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MARYLAND'S GROWING PAINS: THE NEED FOR STATE REGULATION

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Over the past two decades, much of Maryland's landscape has been rapidly developed into residential uses. This rapid growth has been largely unanticipated and unplanned. This article reviews the current local regulatory process of land use and growth control and reveals the need for changes in the regulatory process with a case study of Montgomery County, Maryland. The author concludes that greater state involvement in the land use regulatory process is necessary in order to manage growth effectively.

I. INTRODUCTION

By 1970, suburbanites in the United States outnumbered both farmers and city dwellers combined, and single family homes became a familiar characteristic of our landscape.[1] In the following two decades there has been astonishing suburban growth, although it has been largely unplanned and unregulated.[2] Municipalities across the country are trying to cope with this surge in land development and have introduced a variety of legislative initiatives intended to curb it.[3]

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1. JACKSON, CRABGRASS FRONTIER 283-84 (1985).
2. This explosion of suburban development in what was formerly countryside is to be contrasted with development in England.

> A map of the English countryside in 1985 shows remarkably little change from a map of the same area a hundred years earlier. The farms, castles, villages, and country estates are much the same, and though the twentieth-century map might include an occasional industrial park or airport, these are relatively slight intrusions on an immemorial landscape. As noted, the English regard age as an asset, not a liability. In the United States, by contrast, the bulldozers are always at work, and a mighty engine of change seems destined to convert every farm into a shopping center, a subdivision, or a highway.

Id. at 287.

3. For a series of recent articles published in the New York Times that discuss growth problems around the country and how communities are responding, see Lueck, *New*

Maryland has experienced similar growth trends.[4] In 1970, only 565,000 acres of Maryland's 6.3 million acres of land were developed.[5] By 1981, however, almost 100,000 additional acres were developed,[6] primarily for residential uses.[7] Much of the land development in the 1970s took place in areas where growth was neither anticipated nor planned.[8] Sixteen percent of this new growth was characterized by low density development on lots of one acre or more.[9] This ten-year growth rate amounts to 16.5%, or slightly more than twice the population growth during the same period.[10] If these growth trends continue through the year 2000, it is projected that an additional 190,000 acres will be consumed by residential development.[11]

Effective measures are required to both control and finance growth. Unplanned and uncontrolled growth leads to congested roads, overcrowded schools, unexpected consumption of water and sewer capacity, increased environmental hazards, and loss of open space and agricultural lands.[12] An adequate public infrastructure, including roads, schools, libraries, parks, water and sewer lines, and police and fire stations is criti-

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Ring of Suburbs Springs Up Around City, N.Y. Times, Apr. 29, 1986, at A1, col.3; Cummings, *Los Angeles, in a Shift, Considers Growth Curb*, N.Y. Times, July 12, 1986, at 5, col. 6; Nordheimer, *Florida, Battling History, Tries to Rein in Growth*, N.Y. Times, July 15, 1986, at A22, col. 4; Kolbert, *Orange County, Once Bucolic, Now Bustles*, N.Y. Times, Aug. 7, 1986, at B1, col. 4; Lueck, *Business Growth on Highways Arouses Fear of Chaos in Jersey*, N.Y. Times, Nov. 10, 1986, at B1, col. 4; May, *Suburbs Resisting Housing for Poor*, N.Y. Times, Nov. 28, 1986, at A1, col. 6; Lindsey, *Alarm Raised on Growth of Phoenix*, N.Y. Times, Mar. 12, 1987, at A18, col. 4.

4. MARYLAND DEPARTMENT OF STATE PLANNING, PUB. NO. 85-20, LAND USE OR ABUSE? 9-12 (1985).
5. *Id.* at 10.
6. *Id.*
7. *Id.* at 11 (Residential Uses accounted for 90% of the increase in urban and suburban land in Maryland during the 1970s).
8. *Id.* at 12.
9. *Id.*
10. *Id.* at 10.
11. *Id.* at 15.
12. The problem was summarized succinctly by a recent state planning report:

> Maryland is losing its forests and agricultural land at a rate faster than population growth, primarily to low-density residential use. The development is not making efficient use of land nor is it occurring in areas designated for growth. Planning is not being implemented.
>
> An excessive amount of other agricultural and forestland is adversely affected by this pattern of development. In addition to the farm and forest land actually developed, nearby farms are affected by increasing traffic and nuisance complaint of non-farm neighbors.
>
> It often costs more to provide public facilities and services with this pattern of development than to centrally plan residential development. New schools and other public facilities are demanded by the growing number of residents in these areas, while existing facilities in older areas are underutilized.

MARYLAND DEPARTMENT OF STATE PLANNING, PUB. NO. 85-20, LAND USE OR ABUSE? (1985).

cal if growth is to be sustained. Consequently, local governments must address the regulation of size, pace and location of development, as well as the provision and financing of the necessary public infrastructure. Adequate public facilities must be expanded substantially to support new development at the time when inadequately financed local jurisdictions are expected to provide a greater share of infrastructure costs.[13]

While land development has increased, demands have been made for the deregulation of local government land use control and for greater reliance on market forces.[14] Several critics of the current regulatory system argue that private enterprise, unregulated by zoning ordinances, is better able to promote fair and efficient allocations of land uses without the cost and other detriments usually associated with administering the current system.[15] The critics also contend that market forces exert enough limitation on development to insure reasonable segregation of incompatible land uses.[16] Critics have proposed the repeal of local land use control in favor of free-market development and marginal state or regional oversight.[17]

These proposals for land use deregulation are not well timed. Market forces alone simply cannot insure orderly, coordinated, and systematic development.[18] Indeed, growth directed largely by market forces already occurs where there are ineffective local regulations and these circumstances have produced many examples of haphazard development, environmental risks, and other adverse consequences for the community. For instance, unregulated development in Florida has created serious long term environmental problems for the water supply system and a

13. During the past decade local governments have experienced decreasing revenues in proportion to their financial responsibilities. *See* Gruson, *End of Federal Revenue Sharing Creating Financial Crises for Many Cities*, N.Y. Times, Jan. 31, 1987, at A7, col. 1. In response to this financial pinch, several states are considering granting to local governments more taxing powers in order to generate revenue. Herbers, *States Act to Give Localities More Power to Collect Taxes*, N.Y. Times, Feb. 9, 1987, at A14, col. 5.

14. Nelson, *Marketable Zoning: A Cure for the Zoning System*, 37 LAND USE L. & ZONING DIG. 3 (1985); Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261 (1984); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

15. Nelson, *supra* note 14, at 4; Delogu, *Rethinking Zoning*, 38 LAND USE L. & ZONING DIG. 3 (1986) [hereinafter *Rethinking*]. Some of the detriments associated with administering the current system include chronic abuses by overreaching local zoning authorities; more restricted housing opportunities; higher housing costs; and an inability of local governments to deal with regional concerns. Kmiec, *Implementing the Recommendations of the President's Commission on Housing — A Proposal for a New Zoning Enabling Act*, 9 ZONING & PLAN. L. REP. 1 (1986).

16. This theory is supported by the experience of the only unzoned major American city, Houston, Texas. Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71, 142-43 (1970).

17. *Rethinking*, *supra* note 15, at 6.

18. *See* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 161.07 (1985) [hereinafter WILLIAMS].

funding dilemma for needed remedial efforts.[19] Vermont found that its water resources were being threatened seriously by uncontrolled development of ski resort areas and that new legislation was necessary to avoid irreparable environmental damage.[20] California is experiencing its greatest population surge in decades which is causing strains on roads, schools, and sewer and water systems in rural areas.[21] Unregulated development also requires the general taxpayer to subsidize the hefty infrastructure costs necessary to support it.[22] Better and more efficient regulation, not less regulation, is needed.

Whatever its faults,[23] government regulation of the land use process is necessary in today's complex society, especially for the resolution of often conflicting demands for more affordable housing, economic development, greater environmental protection, and the preservation of open space and farmland. The current manner of government regulation, however, is questionable. The locally administered system requires more state oversight than it currently receives in order to insure a more fair and efficient operation. State government can better evaluate the impact

19. Nordheimer, *supra* note 3.

20. Butterfield, *Rising Discord in Ski Resorts Spilling into Vermont Politics*, N.Y. Times, Nov. 12, 1985, at A1, col. 1.

21. Lindsey, *Cars, Pavement and People are New Vista of Rural California*, N.Y. Times, Mar. 5, 1987, at A12, col. 1.

22. *See* 1 C. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 13.02-13.04 (4th ed. 1986) [hereinafter RATHKOPF]; Davidson, *Using Infrastructure Controls to Guide Development*, 8 ZONING & PLAN. L. REP. 169, 172-73 (1985).

23. When viewed on a national level, the detriments of the current regulatory system cannot be blamed as much on bad policy as it can on faulty administration and fragmentation. One aspect of this problem is inadequate judicial review in jurisdictions where legislative deference is accorded to site specific local zoning actions. *See* Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986); Quinn v. Town of Dodgeville, 364 N.W.2d 149 (Wisc. 1985); *see also* City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976); WILLIAMS, *supra* note 18, § 5.03 (1974 & Supp. 1986). Only a minority of jurisdictions hold these site specific zoning actions to administrative law standards. *See* Tate v. Miles, 503 A.2d 187 (Del. 1986); Life of the Land v. West Beach Dev. Co., 63 Hawaii 529, 631 P.2d 588 (1981); Cooper v. Board of County Comm'rs, 614 P.2d 947 (Idaho 1980); Kaelin v. City of Louisville, 643 S.W.2d 590 (Ky. 1982); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). Moreover, evolving administrative law concepts, such as the "hard look" doctrine, have not been applied to land use matters. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983); NLRB v. Datapoint Corp., 642 F.2d 123 (5th Cir. 1981); Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584 (D.C. Cir. 1970). Much of the criticism about arbitrary land use decisions would be muted by more uniform review of land use actions under administrative law principles. Inadequate judicial review is not a new criticism, even in Maryland where administrative law standards are applied. Hyson v. Montgomery County, 242 Md. 55, 217 A.2d 578 (1966). A commentator once complained that Maryland courts demonstrated a tendency for more deference to the zoning authorities than applied to more traditional administrative agencies. Sickels, *The Illusion of Judicial Consensus: Zoning Cases in the Maryland Court of Appeals*, 59 AM. POL. SCI. REV. 100 (1965). This complaint subsequently was refuted. Liebmann, *Maryland Zoning — The Court and Its Critics*, 27 MD. L. REV. 39 (1967).

of development on a comprehensive basis, establish important social and economic objectives, and develop guidelines for control over the scope and pace of growth to coincide with the availability of the necessary supporting public infrastructure.[24] Nevertheless, local governments must continue to play an important role in land use regulation because they must allocate many of the resources necessary to support development and they provide the best forum for public participation. Therefore, both state and local government are essential partners in the effective regulation of growth.

Critical to the success of a regulatory scheme is the integration and coordination of all government actions that influence land development into a statewide growth management system. It makes little sense for the state to promote growth and economic development, while localities where this growth is supposed to take place ration building permits or apply other no-growth measures. Statewide growth management regulations are a rational compromise between unregulated market forces and no-growth restrictions imposed by local government.

This article will examine the nature of growth management and why the State of Maryland needs to involve itself to a greater degree in the land use regulatory process. The article also will examine the manner in which growth policies have been formulated in Maryland and how those policies have been applied. These points are illustrated with a case study of the growth management experience in Montgomery County, Maryland.

II. GROWTH MANAGEMENT

Growth management involves a delicately balanced system which seeks to limit, direct, and shape development within the context of a long-range comprehensive plan of land development. The purpose of growth management is to achieve the short term objective of holding growth within reasonable and affordable limits, while carefully providing enough stimulation to sustain long term economic development.[25] The system performs two major functions: the formulation of growth management policies and the implementation of these policies along various

24. *See* DeGrove & Stroud, *State Land Planning and Regulation: Innovative Roles in the 1980s and Beyond*, 39 LAND USE L. & ZONING DIG. 3 (1987).

25. A growth management system that operates too harshly may cause developers to build elsewhere. Developers sometimes threaten local public administrators that they will relocate to neighboring jurisdictions if approvals are not granted. *See, e.g.*, Bowie, *Adventists Plan Move to Columbia*, Balt. Sun, Feb. 8, 1987, at 1B, col. 6 (The Adventists planned a large office project in Montgomery County but were frustrated by the County's demands for road improvements. They threatened relocation to nearby Howard County. The Adventists ultimately remained in Montgomery County because Montgomery County's initial demands were relaxed and the Adventists received approval to develop.). State regulation would reduce county forum shopping.

points in the land development process, including the zoning, subdivision, and permit review stages.

Growth management has yet to develop into a universally applied system. A few states have adopted comprehensive guidelines requiring local governments to control growth.[26] In the absence of comprehensive statewide guidelines, some local governments have tried to adopt their own growth management plans.[27] Others have ignored the problem or have issued policy statements without the necessary implementation mechanisms.[28]

The absence of statewide growth management guidelines can lead to inequities or arbitrary results. For example, local growth controls can be misapplied to reduce housing opportunities and effectively exclude low and moderate income housing.[29] Moreover, local growth restrictions are invariably implemented using widely different standards for measuring the adequacy of public facilities. The self interests of competing levels of government also produce duplicative reviews. All these factors tend to penalize some developers but not others.

The most effective growth management systems are those that operate at state or regional levels because they include coordinated policies that subordinate parochial interests to larger public interest objectives. Jurisdictions with strong statewide planning direction have developed comprehensive growth management systems because they have recognized a need to provide a more efficient system and, at the same time, provide adequate growth to sustain economic expectations.[30] Statewide regulation also promotes local government objectives. Local governments possess a strong self interest in keeping public infrastructure costs low, increasing revenues, providing for the most efficient use of land, and avoiding litigation for failure to provide fair share housing.

Maryland has not exercised a large degree of statewide control over the land use process. Rather, it has delegated land use control to local

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26. *See* Livingston, *California General Plan Requirement: A New Weapon for Challenging Local Government Land Use and Development Decisions*, 16 URB. LAW. 1 (1984) (discussing California's planning law, CAL. GOV'T CODE § 65300 (West 1983), which requires each county and city to prepare and adopt a comprehensive long-term general plan for land development).
27. Anne Arundel and Montgomery Counties have adopted the most ambitious growth management plans in Maryland. *See infra* note 161 and accompanying text. Other Maryland counties may soon adopt similar plans. *See* Jensen, *Kent Island May Be Ready for Some Growth Controls*, Balt. Sun, Feb. 22, 1987, at 1A, col. 3.
28. Howard County adopted a general plan in 1982 that provides for growth policy objectives. GENERAL PLAN BY HOWARD COUNTY 1982, 4-6 (1982) (adopted May 3 and Aug. 2, 1982). However, enforceable mechanicisms to implement many of these policies have not been adopted.
29. California has required cities and counties to balance housing needs against public service needs before passing growth controls, although this requirement does not apply to growth controls adopted by the initiative process. *See* Building Indus. Ass'n of So. Cal. v. City of Camarillo, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986).
30. *Infrastructure Controls, supra* note 22, at 170-73.

governments through enabling laws. These enabling laws are a nonuniform patchwork quilt conferring different levels of responsibility to the various types of local governments. For example, home rule charter counties enjoy virtually unrestricted authority whereas noncharter counties and municipalities and the District of Columbia area counties are highly restricted.[31] Statewide judicial review provides some oversight, but it operates selectively because of the economic considerations that discourage the appeal of every arbitrary land use decision.[32]

In Maryland, local attempts at growth management have manifested uneven results. Several counties have adopted growth policies only to be frustrated by the policies of their neighbors.[33] The result has been a proliferation of sprawl and congestion. Relief must come at the state or regional level because a growth management system must encompass an area large enough to make it effective. State guidelines and coordination are required so that local efforts are not undermined by external forces. State guidelines are also necessary to deal with those localities that are insensitive to environmental and fair share housing responsibilities. When state and local governments have developed similar policy objectives and coordinate their enforcement, an effective system can be developed. This cooperation is most noticeably demonstrated by the im-

31. *Compare* MD. ANN. CODE art. 25A, § 5(x) (1981 & Supp. 1986) (regulating chartered counties) *with* MD. ANN. CODE art. 66B, §§ 4.01-4.108 (1983 & Supp. 1985) (regulating noncharter counties and municipal corporations) *and* MD. ANN. CODE art. 28, §§ 7-101 - 8-106 (1986) (regulating the Maryland-Washington, D.C. regional district).

32. Professor Norman Williams has suggested that there are four general stages of judicial scrutiny of local zoning decisions and that Maryland has entered the fourth stage in which courts tend to be more active in their review of land use restrictions. 1 WILLIAMS, *supra* note 18, at §§ 2.05, 5.02 - 5.05 (1974 & Supp. 1986). In the first stage in land use control, courts were hostile to attempts to regulate land use on a comprehensive basis. *Id.* § 5.02; *see, e.g.*, Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925). In the second stage, the zoning principle was accepted, but local governments were held to strict accountability for regulating land use in derogation of the common law. WILLIAMS *supra* note 18, § 5.03; *see, e.g.*, Landy v. Zoning Appeal Bd., 173 Md. 460, 196 A. 293 (1938). Land use regulation for purely aesthetic reasons was disfavored. Mayor and City Council of Baltimore v. Mano Swartz, 268 Md. 79, 299 A.2d 828 (1973). The third stage marked general acceptance of land use regulations and accorded great deference to local actions. This stage is now the predominant stage nationwide. WILLIAMS, *supra* note 18, § 5.04; *see, e.g.*, Canada's Tavern v. Town of Glen Echo, 260 Md. 206, 271 A.2d 664 (1970). The fourth stage manifests more active judicial review that is both skeptical of government capabilities and sensitive to the importance of comprehensive planning. WILLIAMS, *supra* note 18, § 5.05; *see, e.g.*, West Montgomery Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n, 309 Md. 183, 522 A.2d 1328 (1987); Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza Venture, 68 Md. App. 650, 515 A.2d 485 (1986); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Board of County Comm'rs v. Gaster, 285 Md. 233, 401 A.2d 666 (1979); Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972).

33. Both Anne Arundel and Montgomery counties have developed growth management systems that are based on comprehensive planning and zoning policies. Unrestricted growth in neighboring counties is one of several factors that has caused both counties to consider more drastic control mechanicisms. *See infra* Part V.

plementation of interjurisdiction water and sewerage systems.[34]

III. POLICY FORMULATION

Growth management involves the formulation of consistent land use, fiscal, and growth policies. These policies, in turn, are applied through the development approval process, that is, zoning, subdivision, and various permit reviews. The formulation of land use, fiscal, and growth policies are of prime importance and must be addressed before evaluating implementation techniques.

A. Land Use Policy

Land use policies are established by the adoption of a comprehensive plan.[35] In Maryland, all noncharter counties and municipalities with planning and zoning powers are required by state law to adopt comprehensive plans[36] as a guide for local development.[37] The comprehensive plans must contain certain minimum elements relating to social and

34. Maryland requires that counties adopt water and sewerage system plans covering a 10-year period. These plans must include certain minimum requirements and must be submitted to the State Department of Health and Mental Hygiene for revision every two years. MD. HEALTH-ENVTL. CODE ANN. §§ 9-503 to -509 (1982 & Supp. 1986). The Department may approve, disapprove, or modify county plans. MD. HEALTH-ENVTL. CODE ANN. § 9-507 (1982 & Supp. 1986). Building permits cannot be issued unless the development conforms with the approved plan. *Id.* § 9-512(B).

35. *See* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

36. The "plan" is defined to include general plans, master plans, comprehensive plans, or community plans. MD. ANN. CODE art. 66B, § 1.00 (1983). Until the adoption of this provision by Ch. 793, Laws of Md. 1971, the "plan" was never defined by law in Maryland and this caused some confusion about the legal status of planning because the "general plan or master plan" was distinguished from the "comprehensive plan" and the former was held to be merely a guide. Board of County Comm'rs v. Edmonds, 240 Md. 680, 215 A.2d 209 (1965). The comprehensive plan itself was treated in Maryland and elsewhere as a comprehensive zoning plan made up of components of various legislative enactments instead of a single planning document. Baylis v. Mayor and City Council of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Bell v. City of Elkhorn, 264 N.W.2d 144 (Wis. 1985). However, strong reliance on master plans has developed in some other jurisdictions and has come to be known as the consistency doctrine. *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); *see also* DiMento, *Taking the Planning Offensive: Implementing the Consistency Doctrine*, 7 ZONING & PLAN. L. REP. 41 (1984) [hereinafter *Planning Offensive*]; DiMento, *The Consistency Doctrine: Continuing Controversy*, 4 ZONING & PLAN. L. REP. 89 (1981); Mandelker and Netter, *A New Role for the Comprehensive Plan*, 33 LAND USE L. & ZONING DIG. 5 (1981). A statutory consistency requirement has been developed in several Maryland counties. *See* Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987); Coffey v. Maryland-National Capital Park & Planning Comm'n, 293 Md. 24, 441 A.2d 1041 (1982). The growth control aspects of the master plan were recognized in *Gaster*, 285 Md. at 246-49, 401 A.2d at 672-74.

37. MD. ANN. CODE art. 66B, §§ 3.05-.08 (1983 & Supp. 1986).

economic matters, transportation, community facilities, land use, housing, environmental matters, and areas of critical state concerns.[38] The plan is prepared and recommended by a planning commission and adopted by the local legislative body.[39] Zoning regulations must be developed in accordance with the plan.[40]

1. Characteristics of the Plan

The comprehensive plan must be an integral part of any workable growth management system and, ideally, it should be divided into reasonable geographic areas so that careful and detailed evaluations of each area can be made.[41] The plan must clearly articulate the planning objectives and also must be internally consistent so that planned growth will relate to available and planned infrastructure.[42] The plan must coordinate local land use policies with relevant state policies and programs so that the local development approval process can be administered realistically and in accordance with planning recommendations.[43] More importantly, the plan must be implemented throughout the development approval process to be an effective element of growth management. This means that evaluations of conformity with the plan should be a component of both the zoning and subdivision stages.

2. Local Adoption of the Plan

Traditionally, local governments have assumed the task of formulating the comprehensive plans. This tradition, however, has eroded and this erosion will likely continue as more states recognize that state government is better equipped to cope with the more troublesome statewide aspects of land use regulation.[44] For example, inner city planning has been undermined by relocation of commercial uses to the suburban fringes.[45] Low and moderate income housing has not been a local government priority because of inherent economic bias against it.[46] This has prompted the judicial branch in several jurisdictions to intervene and

38. *Id.* § 3.05(a).
39. *Id.*
40. *Id.* § 4.03. Charter counties are not subject to a similar requirement. *See* MD. ANN. CODE art. 25A, § 5(X) (1981 & Supp. 1985). Even the enabling legislation for the two District of Columbia area counties, Montgomery and Prince George's counties, neglects to require consistency with the comprehensive plan. MD. ANN. CODE art. 27, §§ 7-110, 8-104(a) (1986). These counties, however, may impose a consistency requirement upon themselves by charter provision or local law, as Prince George's County has done. *See Coffey*, 293 Md. 24, 441 A.2d 1041.
41. 1 WILLIAMS, *supra* note 18, § 1.21 (1974).
42. In California, the local comprehensive plan must be internally consistent and consistent with state policies. Concerned Citizens of Calaveras County v. Calaveras County Bd. of Supervisors, 166 Cal. App. 3d 90, 212 Cal. Rptr. 273 (1985).
43. *Planning Offensive*, *supra* note 36 at 42-45.
44. 5 WILLIAMS, *supra* note 18, §§ 160.01-.14 (1985).
45. Lindsey, *supra* note 3.
46. 1 WILLIAMS, *supra* note 18, § 14.01 (1974); *see* May, *Suburbs Resisting Housing for Poor*, N.Y. Times, Nov. 28, 1986, at 1, col. 1.

eliminate deliberate local government policies against such housing.[47] Local governments do not possess the resources to provide for the needed public infrastructure.[48] It is also necessary to develop alternatives to the current dependence of local planning decisions on the local property tax assessable base.[49]

3. Recent Statewide Planning Initiatives

A local government's authority to adopt planning policies varies depending upon the mandate provided by each state. In some states planning is mandated by statewide procedures, while in others planning is simply a guideline to be formulated at the discretion of local government. Mandatory planning operates as an important growth management tool. Several states have adopted stringent statewide land use policies in effort to limit or direct the pace of development.[50]

The most recent mandatory statewide growth management system was adopted in Florida in 1985 in order to curb the unplanned, haphazard growth resulting from intense land development pressures.[51] The Florida scheme requires the adoption of state, regional, and local plans

47. Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964); Gunderson v. Village of Bingham Farms, 372 Mich. 352, 126 N.W.2d 715 (1964); Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 805 (1975); Asian Americans for Equality v. Koch, 192 Misc. 2d 67, 492 N.Y.S.2d 837 (1984); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); National Land Improvement Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966). The extent of local government liability for exclusionary zoning practices under the federal *Civil Rights Act of 1968*, 42 U.S.C. §§ 3601-3619 (1984) remains unresolved. *See* Hope, Inc. v. County of DuPage, 738 F.2d 797 (7th Cir. 1984). Local governments in Maryland may be liable for exclusionary zoning or other discriminatory housing practices under state or local laws. *See* MD. ANN. CODE art. 49B, § 20 (1986). Broad relief has been granted against local governments which have been found in violation of fair housing laws. *See* United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926, *reh'g denied*, 456 U.S. 1012 (1982).

48. *See* Gruson, *supra* note 13.

49. 5 WILLIAMS, *supra* note 18, § 163.18 (1985). In Maryland, the deficiencies of the local property tax system most likely must be cured by the legislature because one constitutional challenge of local property taxes as applied to public education funding was rejected and the decision offers little comfort for those who would reform the tax system through the courts. *See* Hornbeck v. Board of Education, 295 Md. 597, 458 A.2d 758 (1983).

50. These states include Hawaii, HAWAII REV. STAT. §§ 205-1 to -37 (1976 & Supp. 1984); Maine, ME. REV. STAT. ANN. tit. 12, §§ 681 to 689 (1981 & Supp. 1986); Oregon, ORE. REV. STAT. §§ 197.005 to .015 (1983); and Vermont, VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984). California and Florida have adopted statewide planning requirements for local implementation. *See* CALIF. GOV'T CODE §§ 65000-65100 (West 1983 & Supp. 1987); FLA. STAT. ANN. §§ 186.001 to .901 (West Supp. 1986). These states have all experienced increasing development pressures brought about by booming tourist industries or immigration.

51. Local Gov't Comprehensive Planning and Land Dev. Act, FLA. STAT. ANN. §§ 163.3161 to .3215 (West Supp. 1986); *see* Nordheimer, *supra* note 3.

and imposes growth control measures on local government.[52] The local plans must include threshold standards defining acceptable levels of service for public facilities. The Florida law also requires the adoption of regulations to apply these standards to all development approval stages, including zoning and subdivision stages.[53] These comprehensive measures require local governments to assess the adequacy of the public infrastructure and develop tools for measuring its effective use.[54] Once the standards are imposed, development cannot be approved if it requires levels of service that exceed the standards.[55]

4. Maryland Experience

In contrast, Maryland does not have a mandatory statewide planning scheme. The Department of State Planning is required to adopt a state development plan,[56] but it has little influence on local comprehensive plans because Maryland has no uniform requirement for local plans to be consistent with state policies. Maryland local governments are given planning and zoning responsibility, and each local government acts independently in its efforts to cope with growth.[57]

Despite the lack of statewide land use policy, Maryland has employed some regional approaches for growth management to deal with specific concerns.[58] Protection of Maryland's Chesapeake Bay was the

52. Local Gov't Comprehensive Planning and Land Dev. Act, FLA. STAT. ANN. § 163.3174 (West Supp. 1986).
53. *Id.* § 163.3194.
54. *Id.* § 163.3177.
55. *Id.* § 163.3194.
56. MD. STATE FIN. & PROC. CODE ANN. § 5-602 (1985).
57. *See* MD. ANN. CODE art. 66B, §§ 3.01-4.08 (1983 & Supp. 1986) (noncharter counties and municipalities); MD. ANN. CODE art. 25A, § 5(X) (1981 & Supp. 1986) (Home Rule charter counties); MD. ANN. CODE art. 28, §§ 7-101 to -111, 8-101 to -104 (1986) (Maryland-Washington Regional District).
58. California and New Jersey also have adopted regional approaches that were based upon environmental concerns. In 1976, California established its coastal commission, an administrative agency that possesses authority to restrict development within the coastal zone and to insist on public access to the coastline. Calif. Pub. Res. Code §§ 30000-30900 (West 1986 & Supp. 1987). The regional body has withstood numerous challenges to its development restrictions. *See* Del Mar v. California Coastal Comm'n, 152 Cal. App. 3d 49, 199 Cal. Rptr. 225 (1984). The regional body also has been successful with its public access protection. Remmengan v. California Coastal Comm'n, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628, *appeal dismissed*, 106 S. Ct. 241, *reh'g denied*, 106 S. Ct. 584 (1985); Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). *But see* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (a five-member court majority held that a permit condition requiring a lateral public access easement was invalid because it lacked a reasonable nexus to the Commission's stated objective to preserve direct access to the ocean and consequently, the easement constituted a taking without just compensation). Notwithstanding the commission's legal successes, the current governor has reduced staff and is reported to seek its elimination. *See* Lawrence, *Coast Commission Battered but Alive on 14th Birthday*, L.A. Times, Oct. 5, 1986, Part 1, at 3, col. 1.

In 1971, New Jersey placed its 1.1 million acre pinelands under a special plan-

subject of a law adopted in 1984 to address the consequences of growth near the bay.[59] The law established a Chesapeake Bay Critical Area Commission[60] with authority to develop standards and criteria for local programs to minimize adverse impact on water quality, promote animal and vegetative conservation, and establish corresponding land use policies.[61] The Chesapeake Bay scheme was designed to allow substantial participation by local government through local program development and administration of land use policies. Nevertheless, the Commission has oversight authority and may intervene in cases where it deems local efforts to be insufficient.

Another regional land use mechanism was established by the *Maryland Wetlands Act of 1970*,[62] which addressed the indiscriminate filling and dredging of wetlands for development. Maryland wetlands include some 341,776 acres of marshland, bogs, or swamps.[63] These areas function as an open environmental system providing natural filters against harmful sediment and debris. The law severely restricted development in wetlands and assigned enforcement responsibility to the Department of Natural Resources. In 1972, a similar restriction on wetlands development in Charles County was upheld as nonconfiscatory and a proper exercise of the police power in *Potomac Sand and Gravel Co. v. Governor of Maryland*.[64] These laws were enacted in response to public concern about the value of wetlands to water quality and seafood production.

Notwithstanding these regional approaches in the formulation of land use policy, the general responsibility for formulating land use policy in Maryland remains with local governments. Until the state legislature reallocates planning responsibilities and provides more comprehensive planning guidelines, local governments alone will be unable to regulate growth effectively.

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ning and land use district, which was designed to limit growth and impose a comprehensive management plan on any development within the district. *Pinelands Protection Act*, N.J. STAT. ANN. § 13:18A-1 to -49 (West 1979 & Supp. 1986). The pinelands district, which covers an environmentally sensitive pine forest area that serves as a habitat for unique plant and animal life and constitutes almost twenty percent of the state, is considered by environmentalists to be a successful land use program. *See* DePalma, *New Jersey is Winning its Battle in the Pinelands*, N.Y. Times, Aug. 20, 1986, at E6, col. 3.

59. The Chesapeake Bay Critical Area Protection Program, MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1986). For a complete discussion of the program, see Liss & Epstein, *The Chesapeake Bay Critical Area Commission Regulations: Process of Enactment and Effect on Private Interests*, 16 U. BALT. L. REV. 54 (1986).

60. MD. NAT. RES. CODE ANN. § 8-1803 (Supp. 1986).

61. *Id.* § 8-1806.

62. *Id.* §§ 9-101 to -502 (1983 & Supp. 1986).

63. MARYLAND DEPARTMENT OF STATE PLANNING AND SMITHSONIAN INSTITUTE CENTER FOR NATURAL AREAS PUB. NO. 231, COMPENDIUM OF NATURAL FEATURES INFORMATION, 6, 11 (1975).

64. 266 Md. 358, 293 A.2d 241 (1971), *cert. denied*, 409 U.S. 1040 (1972).

B. Fiscal Policy

Fiscal policies determine how public infrastructure and the acquisition of public land will be financed. These policies usually are implemented through state or local capital improvement budgets, which contain approved long term programs for land acquisition, planning, design, and construction of various types of public infrastructure, such as roads, schools, parks, libraries, or water and sewer lines. The actual construction of these facilities does not occur until years after initial program approval and may be further delayed because of inadequate financing or other exigencies.

There is a definite relationship between public infrastructure and incipient growth. Residential development invariably follows the construction of water and sewer lines. Conversely, failure to provide this infrastructure or access to it can retard or redirect growth.[65] Growth without the infrastructure necessary to support it can produce a politically hostile climate because of public expectations that infrastructure should be provided in a timely manner without excessive cost to the general taxpayer. Hence, realistic and carefully timed fiscal policies are necessary if growth management is to be effective.

Paradoxically, local fiscal policies almost invariably contain serious impediments to effective growth management. The economic forces exert strong pressures upon local government to encourage the type of growth that will increase the property tax base, the major source of revenue for most local governments.[66] This means that high cost projects enjoy preferential status. These factors do not augur well for the increase of low and moderate income housing, open space and farmland preservation, or environmental protection. Even if local governments successfully expand their taxable base, local revenue sources are often inadequate to provide the infrastructure necessary to sustain growth,[67] and consequently, if effective growth management is to occur, alternatives for the local financing of infrastructure must be found.

Local governments in Maryland have received more state assistance than many of their counterparts in other states because of the statewide local income tax authority.[68] Moreover, the state is responsible for providing some public infrastructure, such as state highways and public schools. Nevertheless, more state involvement is required because the validity of growth management restrictions is dependent upon good faith

65. Indeed, public utility access is an important growth control device in its own right. *See* Stone, *The Prevention of Urban Sprawl Through Utility Extension Control*, 14 URB. LAW. 357 (1982); Davidson, *Using Infrastructure Controls to Guide Development*, 8 ZONING & PLAN. L. REP. 169 (1985).

66. *See* 1 WILLIAMS, *supra* note 18, §§ 14.01, 14.03-.05 (1974 & Supp. 1986).

67. Gruson, *supra* note 13.

68. MD. ANN. CODE art. 81, § 283 (1980 & Supp. 1986). This authority permits Maryland counties to set local income tax rates up to 50% of the state income tax. The state collects the combined taxes, the local portion of which is distributed to the counties.

efforts to accommodate growth within a reasonable time, and local governments by themselves are unable to comply without sacrificing growth management objectives.[69] The state, by promoting economic development, is partially responsible for growth, and therefore, it should not ignore the consequential demand for infrastructure at the local level.

The traditional manner of financing the public infrastructure is undergoing substantial change. The use of capital budgets is limited by revenue sources available to state and local government.[70] When these traditional revenue sources prove inadequate or inappropriate, other financing methods, such as exactions, impact fees, special excise taxes, or special taxing districts, have been imposed. Sometimes these methods are used for policy reasons to shift the cost of needed infrastructure from the general taxpayer to direct users or beneficiaries of the new facilities. There is a growing trend for joint ventures between public and private sectors to provide infrastructure where more traditional public sector measures are not feasible.

Government acquisition of land is another aspect of fiscal policy that effects growth. Over half the land in the United States is federally owned.[71] Much of this land is devoted to passive use such as open space and park land where development is either restricted or prohibited.[72] In Maryland, about ten percent of the land is used for recreation or open space and, therefore, unavailable for development.[73] Acquisition of easements for open space and farmland also promotes growth management objectives because land is preserved for the duration of the easement.[74] The success of the Inner Harbor development in Baltimore City is largely due to the municipal acquisition of land through an urban development district and its eventual resale to private developers under conditions and timing deemed favorable by municipal officials.

C. *Growth Policy*

A growth management policy evolves from land use decisions and fiscal policies and includes determinations of the scope, direction, and timing of authorized land development in a particular geographic area. These objectives are not achieved by traditional planning mechanisms.

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69. The seminal case supporting growth regulation is Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), where the Court of Appeals of New York upheld the regulation but indicated that government can only delay growth for a reasonable time until public facilities become available and must make good faith efforts to provide these facilities.
70. *Federal Revenue Sharing*, *supra* note 13.
71. 15 LAND USE DIG., No. 10, 3 (Urban L. Inst., Oct. 11, 1982).
72. With declining federal spending for parks and open space, state and regional organizations have increased their efforts to acquire land. *See*, Lueck, *Battling Urban Development with Parks*, N.Y. Times, Mar. 18, 1987, at B1, col.3.
73. MARYLAND DEPARTMENT OF STATE PLANNING, PUB. NO. 85-20, LAND USE OR ABUSE? 19 (1985).
74. *See* MD. AGRIC. CODE ANN. §§ 2-501 to -515 (1985 & Supp. 1986).

Although a growth policy may address long term issues contained in the comprehensive plan, its primary goals should be to establish short term objectives that guide public administrators and to provide the necessary tools to monitor growth adequately. Land use decisions should be consistent with sound growth policies, but too often, they merely respond to local political pressures and result in extremes such as unlimited growth or sporadic denials of land development approvals.[75] The potential for arbitrary decisions in this policy vacuum is quite high.

When short term growth policies impose growth limits, such limits must be related to specific policy objectives. These limits may take the form of percentage restrictions on dwelling units or building permits, restrictions on infrastructure access, or development restrictions in areas particularly affected by development pressures.[76] When linked with clear legislative policy and careful land use and fiscal planning, specific limits that do not operate as a long term ban have been found to be a legitimate exercise of the police power.[77]

Growth policies cannot be applied arbitrarily. Courts have analyzed carefully the implementation of policies aimed at limiting growth and often have invalidated arbitrary applications. In *Stony-Brook Development Corp. v. Town of Fremont*,[78] a growth control plan adopted by a New Hampshire town was invalidated as an arbitrary measure because there was no demonstrated relationship to the public health, safety, or welfare. In *Lakeview Apartments of Hunns Lake, Inc. v. Town of Stanford*,[79] a 1977 New York moratorium on multifamily dwellings and com-

75. Land use decisions should manifest clear public purposes and explicit policies are necessary to articulate these purposes. Nevertheless, many land use decisions are made for purely political reasons. Although the courts often have repeated the rubric that land use decisions are not to be based on a plebiscite, Quinn v. County Comm'rs, 20 Md. App. 413, 417, 316 A.2d 535, 537 (1974), in reality public administrators are often very aware of, and responsive to, public sentiment about development.

76. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (upholding ordinance prohibiting issuance of further residential building permits until local education, sewage disposal, and water supply facilities were brought into compliance with specified standards); Tisei v. Town of Ogunquit, 491 A.2d 564 (Me. 1985) (remanding question of whether a moratorium on development and public sewer usage limitations was constitutional); Sturges v. Town of Chilmark, 380 Mass. 246, 402 N.E.2d 1346 (1980) (upholding the creation of an exemption from lot size requirements and a time based restriction on construction of residential dwellings for persons under 30 years old who had resided in area for eight years). *See also* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); P.W. Invs. v. City of Westminster, 655 P.2d 1365 (Colo. 1982); *but see* Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978) (holding exercise of police power invalid because police power delegated to municipality cannot be used as a usual and expedient mechanism for effecting zoning regulations).

77. *See* Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984); City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, *petition for review denied*, 441 So. 2d 632 (Fla. Dist. Ct. App. 1983).

78. 124 N.H. 583, 474 A.2d 561 (1984).

79. 108 A.D.2d 914, 485 N.Y.S.2d 801 (1985).

mercial and industrial establishments, which was extended each year for seven years, was invalidated as an unconstitutional prohibition on development.[80] The court reasoned that, although the moratorium was permissible for a reasonable period of time, pending the enactment of a comprehensive zoning ordinance, seven years represented an excessive period of time for interim legislation.[81] Similarly, in *Innkeepers Motor Lodge v. City of New Smyrna Beach*,[82] a Florida "density cap" on multifamily dwellings that was adopted by initiative without any prior study or evaluation was found to be arbitrary and unreasonable.[83]

When a growth policy is clearly articulated and properly applied through sound forecasting and control methods, extreme government restrictions seldom are required. Nevertheless, growth sometimes reaches levels requiring the imposition of drastic short term measures necessary to protect the public welfare. An absolute moratorium on development has been a device commonly used by state and local governments in such situations. Maryland, for example, experienced a serious growth crisis in 1970 due to inadequate sewers. The Secretary of the Department of Health and Mental Hygiene imposed a seven year moratorium on specified areas in two counties because of the lack of public facilities. This moratorium was upheld by the United States District Court for the District of Maryland in *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*.[84] In a more recent decision, the Court of Special Appeals of Maryland upheld, as a reasonable exercise of police power, a sewer moratorium imposed by the Secretary in 1974.[85] The moratorium, when used to restrict development during a crises or while government seeks solutions to growth problems, has been upheld against constitutional challenges.[86]

IV. IMPLEMENTATION

An established growth policy can be applied to the various stages of the development approval process including zoning, subdivision approval, and building permit review stages. A growth policy is better implemented at some stages than at others, but governments have used each

80. Lakeview Apts. v. Town of Stanford, 108 A.D.2d 914, 485 N.Y.S.2d 801.
81. *Id.*
82. 460 So. 2d 379 (Fla. Dist. Ct. App. 1984).
83. The court also found that the density plan's failure to provide for the granting of variances imposed a unique hardship and thus rendered the ordinance unconstitutional and void. *Id.* at 380.
84. 400 F. Supp. 1369 (D. Md. 1975).
85. 63 Md. App. 472, 492 A.2d 1336 (1985) (moratorium constituted neither a taking of private property without just compensation nor a deprivation of property without due process of law).
86. *See, e.g.*, Schafer v. City of New Orleans, 743 F.2d 1086 (5th Cir. 1984); Arnold Bernhard & Co. v. Planning and Zoning Comm'n, 194 Conn. 152, 479 A.2d 801 (1984); Almquist v. Town of Marshan, 308 Minn. 52, 245 N.W.2d 819 (1976); *see also* Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258, 486 A.2d 330 (1985).

of these stages at one time or another to regulate the scope, direction, and timing of development.

A. Zoning Regulations

Zoning is a regulatory tool based upon the police power of government that enables the realization of land use objectives by regulating the use, density, design, and type of development on a specific parcel of land.[87] Initially, this type of legislation segregated incompatible uses and preserved the amenities of residential neighborhoods.[88] Zoning has evolved to promote a variety of social, economic, environmental, and aesthetic objectives ranging from farmland preservation to the restoration of inner cities. Properly coordinated with planning, zoning provides for systematic growth within a region and constitutes a significant method of growth control.[89]

Two types of zoning have been applied in Maryland — Euclidean and floating. Euclidean zoning, the earliest form, applies uniform use, density, and bulk specifications to specifically defined areas.[90] An example is a residential district where zoning regulation authorizes one dwelling unit on a 6,000 square foot lot. This lot is typically 60 feet wide and 100 feet deep with 25-foot front yard and 10-foot side yard setbacks. Euclidean zoning produced monotonous, single use, residential subdivisons that were aesthetically unappealing because of the lack of design variation among the units.

Floating zones, a more recent innovation, are distinguished from Euclidean zones in that they have no defined boundaries and are applied

87. *See* 1 RATHKOPF, *supra* note 22, § 1.03 (1986).
88. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-90 (1926).
89. *See* Rochette, *Prevention of Urban Sprawl: The Oregon Method*, 3 ZONING & PLAN. L. REP. 25 (1980).
90. Euclidean zoning derives its name from the basic zoning ordinance upheld in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Maryland, Euclidean zoning is applied under the change-mistake rule, which is a judicially created doctrine that supposedly has its roots in Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948). Its essential elements are stated simply: "Where property is rezoned, it must appear that either there was some mistake in the original zoning, or that the character of the neighborhood has changed to such an extent that such action ought to be taken." Kracke v. Weinberg, 197 Md. 339, 347, 79 A.2d 387, 391 (1951). Defining the circumstances which satisfy the rule, however, have caused rezoning applicants considerable dismay. *See* S. ABRAMS, GUIDE TO MARYLAND ZONING DECISIONS 3, 5 (2d ed. 1984). A handful of other states follow a variation of the doctrine. *See* Mayor of Jackson v. Wheatley Place, Inc., 468 So. 2d 81 (Miss. 1985); King's Mill Homeowners Ass'n v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976); Miller v. City of Alburquerque, 89 N.M. 507, 554 P.2d 665 (1976). The doctrine has been criticized widely as being overly restrictive and inflexible. *See* 1 WILLIAMS, *supra* note 18, § 32.01 (1974 & Supp. 1986); MacDonald v. Board of County Comm'rs, 238 Md. 549, 576-601, 210 A.2d 325, 340-54 (1965) (Barnes, J., dissenting). The doctrine has been codified into state law and applied to zoning actions of noncharter counties, Baltimore City, and municipalities with planning and zoning authority. MD. ANN. CODE art. 66B, §§ 2.05(a), 4.05(a) (1983).

in a less rigid manner.[91] Floating zones permit flexibility in the use of land and promote design creativity. They have been used for new towns, planned unit developments, and mixed use projects to provide diversity, self-sufficiency, and aesthetic benefits.[92]

Zoning may be applied in several different ways in order to achieve its objectives. In Maryland, general applications are characterized as comprehensive zoning and piecemeal zoning. Another application is the use of special purpose zoning districts. Comprehensive zoning is a purely legislative action that applies land use regulations to a substantial geographic area.[93] Piecemeal zoning usually involves a single tract of land and is applied in the context of a quasi-judicial proceeding.[94] Special purpose zoning districts may be applied on either a comprehensive or a piecemeal basis. It involves special objectives that justify the use of more flexible regulations than available under traditional zoning methods.[95]

1. Comprehensive Zoning

Comprehensive zoning in Maryland requires careful planning, and it controls and directs future land uses in a substantial geographic area.[96] It is the surest means of achieving meaningful growth management objectives because it can be used to protect a region from urban sprawl

91. The floating zone derives its name from its unanchored characteristic that permits it to float over an entire legislative district and descend at any location that satisfies standards that have been predetermined by the legislature. *See* Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 285 (1957). The floating zone has been compared to a special exception because the special use permit can be applied at any location within a specified zoning district that satisfies predetermined legislative standards. *Compare* Bighenho v. Montgomery County, 248 Md. 386, 237 A.2d 53 (1968) *with* Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981). The analogy stops at this point because the floating zone is applied over a larger area and involves a legislative determination rather than a purely administrative action. The floating zone requires evaluations of wider public interest factors beyond compliance with statutory eligibility standards, although a special use permit evaluation is limited to statutory standards. *See* Montgomery County v. Greater Colesville Citizens Ass'n, 70 Md. App. 374, 521 A.2d 770 (1987); Shultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981). The floating zone is not governed by the change-mistake rule. Aubinoe v. Lewis, 250 Md. 645, 244 A.2d 879 (1968). The floating zone also differs from a Euclidean zone because it applies predetermined legislative standards including a compatibility requirement and other restrictions that safeguard its use such as site plan review and limitations on site development. *See* Bowie v. Board of Comm'rs, 253 Md. 602, 253 A.2d 727 (1969).

92. *E.g.*, 1 WILLIAMS, *supra* note 18, §§ 26.22, 26.23 (1974). Charter counties in Maryland possess wide discretion when formulating local zoning laws and may circumvent the harsh change-mistake rule simply by adopting a variety of floating zones. For example, Montgomery County has adopted 66 land use and density categories or "zones" and 34 are floating zones. MONTGOMERY COUNTY, MD., CODE ch. 59, § C (1984).

93. Mraz v. County Comm'rs, 291 Md. 81, 88-89, 433 A.2d 771, 776 (1981).

94. *See* Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Cardon Invs. v. Town of New Market, 55 Md. App. 573, 466 A.2d 504 (1983), *aff'd on other grounds*, 302 Md. 77, 485 A.2d 678 (1984).

95. *See* Mandelker, *Special Purpose Zoning*, 43 URB. LAND 34 (1984).

96. *Mraz*, 291 Md. 88-89, 433 A.2d at 776.

and to promote the efficient use of the public infrastructure.[97] An added benefit of comprehensive zoning is that it invariably will be upheld because of its legislative character and the reluctance of courts to interfere with legislative determinations.[98]

One important use of comprehensive zoning is the preservation of open space by limiting or directing growth.[99] Such preservation has been recognized as a legitimate exercise of police power and has been accomplished successfully in Maryland with comprehensive zoning.[100] Density restrictions, which consider the adequacy of public facilities, also have been recognized as a legitimate exercise of the police power.[101] Legitimate zoning objectives include staging of growth to assure adequate facilities, density restricting to maintain a country's rural character, and regulating housing styles to preserve existing neighborhoods.[102]

A potential misapplication of comprehensive zoning is the use of large lot restrictions that authorize only a single dwelling unit on a lot of an acre or more in order to limit growth. Such large lot zoning, if used conservatively, can be beneficial for growth management objectives including: density control, growth staging, and preservation of farm land and open space.[103] Notwithstanding such benefits, extensive use of large lot zoning can produce major social and economic detriments.[104] Too much large lot zoning produces an inefficient use of land and adds to the infrastructure costs. By reducing density to the lowest level, only the most expensive forms of development can be sustained. When used as an exclusionary device, it has been considered by some jurisdictions to be an

97. *See* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969); County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967).

98. Comprehensive zoning actions rarely have been invalidated. In Hewitt v. County Comm'rs, 220 Md. 48, 151 A.2d 144 (1959), the proposed zoning was invalidated because it ignored land use recommendations of the comprehensive plan and would have produced inadequate road capacity. In Montgomery County v. Horman, 46 Md. App. 491, 497, 418 A.2d 1249, 1253 (1980), comprehensive zoning was found to extend beyond the boundaries of the master planning area and thereby lost its comprehensive character.

99. Agins v. City of Tiburon, 447 U.S. 255 (1980).

100. County Council v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975).

101. Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969).

102. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967); J.M.C. Constr. Corp. v. Montgomery County, 54 Md. App. 1, 456 A.2d 931 (1983); Bone v. City of Lewiston, 107 Idaho 844, 693 P.2d 1046 (1984).

103. *See* Kelly v. Zoning Hearing Bd., 87 Pa. Commw. 534, 487 A.2d 1043 (1985) (upholding against exclusionary zoning challenge large lot zoning that constituted approximately three percent of township). In Maryland, the exclusionary zoning cases were distinguished on the basis that large lot zoning for unique historic purposes is justified, especially when the area zoned is not located in the path of growth. *Miles*, 246 Md. at 366, 228 A.2d at 459.

104. 3A WILLIAMS, *supra* note 18, § 73.07 (1985); May, *Suburbs Resisting Housing for Poor*, N.Y. Times, Nov. 28, 1986, at 1, col. 1.

improper exercise of the police power.[105]

In 1985, development of lots one acre or larger constituted approximately twenty percent of Maryland's residential growth.[106] This inefficient use of land can be minimized by careful planning and varying the densities and housing styles.

2. Piecemeal Zoning

Piecemeal zoning is applied between periods of comprehensive rezoning. It usually involves a rezoning request initiated by the owner of a small, single tract of land. In Maryland, piecemeal zoning is applied in an administrative context, and this ensures the application of administrative law safeguards.[107] It is more directly responsive to market forces than comprehensive zoning is because it can be initiated quickly and without extensive planning. Piecemeal zoning, however, tends to be applied sporadically and, therefore, may undermine growth management policies if its cumulative impact is not evaluated. Nevertheless, growth management is possible within the piecemeal zoning context if the rezoning is linked to sound planning.

The local zoning authority in Maryland has discretion to determine whether the piecemeal rezoning request bears a sufficient relationship to the public interest as to justify the exercise of the police power.[108] The zoning authority evaluates the public interest by examining several factors that are directly related to growth management, such as density and infrastructure adequacy. For example, piecemeal zoning requests based solely on density considerations have been rejected when such zoning would result in incompatability in neighborhoods.[109] An adverse impact on existing public infrastructure also has justified a denial of piecemeal rezoning.[110] In *Shapiro v. Montgomery County*,[111] the court found that a relatively small projected increase in student population, to be generated by the proposed rezoning, was a sufficient ground for denial of the zoning because area schools would be overcrowded.[112] In *Price v. Cohen*,[113] adverse traffic impact provided an adequate basis for rejecting the proposed

105. *See* 3 WILLIAMS, *supra* note 18, §§ 66.01-.02 (1985).
106. MARYLAND DEPARTMENT OF STATE PLANNING, PUB. NO. 85-20, LAND USE OR ABUSE? 11-12 (1985).
107. 2 RATHKOPF, *supra* note 22, § 27.07. Maryland is aligned with the minority. *See* Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966).
108. *See* Messenger v. Board of County Comm'rs, 259 Md. 693, 271 A.2d 166 (1970); Montgomery County v. Laughlin, 255 Md. 724, 259 A.2d 293 (1969).
109. Fitzgerald v. Montgomery County, 37 Md. App. 148, 376 A.2d 1125 (1979) (zoning to regulate density is a legitimate exercise of the police power), *cert. denied*, 439 U.S. 854 (1978). *But see* Kanfer v. Montgomery County Council, 35 Md. App. 715, 373 A.2d 5 (1977) (density per se would not be a valid reason for denial of zoning application).
110. Shapiro v. Montgomery County, 269 Md. 380, 306 A.2d 253 (1973).
111. *Id.*
112. *Id.* at 388, 306 A.2d at 257.
113. 213 Md. 457, 132 A.2d 125 (1957).

rezoning.[114] Inadequate sewer service was deemed sufficient to deny piecemeal rezoning in *Montgomery County v. Pleasants.*[115]

There are limitations on growth regulation in the piecemeal zoning context. When a rezoning request was based on the Euclidean zoning mistake theory, that is, a mistake shown in the previous comprehensive zoning that now justifies corrective action, consideration of public interest factors such as congested roads or overcrowded schools was deemed irrelevant.[116] In order to deny rezoning on public interest grounds, the evidence must show an insufficient public infrastructure that has a present impact.[117] Likewise, where a developer can show that reasonably imminent improvements will correct infrastructure inadequacy, it would be difficult to deny zoning on public interest grounds.[118]

3. Special Purpose Zoning Districts

Special purpose zoning districts are designed to achieve special or unique objectives, and they can be used to limit, shape, and direct growth. New York City, for example, has developed special purpose zoning districts to preserve its unique theatre district and historic buildings while the restricted density is permitted elsewhere.[119] Los Angeles has developed special zoning districts that prohibit certain uses, promote social and economic objectives, and employ specific planning areas and urban design controls.[120] Environmental protection districts have been established in rural areas of Long Island to preserve aquifer and other

114. Price v. Cohen, 213 Md. 457, 464, 132 A.2d 125, 127-28 (1957).

115. 266 Md. 462, 466, 295 A.2d 216, 218 (1972).

116. Overton v. Board of County Comm'rs, 225 Md. 212, 170 A.2d 172 (1961); *but see* Anne Arundel County v. A-PAC, Ltd., 67 Md. App. 122, 506 A.2d 671 (1986).

117. *See* Tauber v. County Bd. of Appeals, 257 Md. 202, 262 A.2d 513 (1970) (potential traffic hazard found to be an insufficient basis to deny land use approval).

118. The adequacy of public facilities consistently has been evaluated as an important public interest consideration at the zoning stage. *See* Montgomery County v. Greater Colesville Citizens Ass'n, 70 Md. App. 374, 521 A.2d 770 (1987) (roads); Shapiro v. Montgomery County, 269 Md. 280, 306 A.2d 253 (1973) (public schools); Montgomery County v. Pleasants, 266 Md. 462, 295 A.2d 216 (1972) (water and sewer facilities). When existing public facilities are shown to be inadequate, the successful zoning applicant must show that remedial improvements, which are neither uncertain nor remote in time, will be provided. *See Greater Colesville*, 70 Md. App. 374, 521 A.2d 770; Trainer v. Lipchin, 269 Md. 667, 309 A.2d 471 (1973); Gerczak v. Todd, 233 Md. 25, 194 A.2d 799 (1963). The timeliness of the remedial public improvements is measured by whether they are "reasonably probable of fruition in the foreseeable future," a test first discussed in the context of the "change-mistake" doctrine. *See* Chapman v. Montgomery County Council, 259 Md. 641, 649, 271 A.2d 156, 159 (1970); *Trainer*, 269 Md. 667, 309 A.2d 471; Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 112, 202 A.2d 612, 615 (1964); Rhode v. County Bd., 234 Md. 259, 199 A.2d 216 (1984).

119. For a critical analysis of this example of special purpose zoning, see Goldberger, *New Times Sq. Zoning: Skycrapers With Signs*, N.Y. Times, Jan. 30, 1987, at B1, col. 5.

120. Hamilton, *What Can We Learn from Los Angeles?*, 52 JOURNAL OF THE AMERICAN PLANNING ASS'N, No. 4, 500, 506 (1986).

irreplaceable groundwater supplies.[121] This type of zoning can be employed to manage growth. Examples include performance zoning, sector plan zoning, farmland and open space preservation, and transferable development rights (TDRs).[122]

Performance or incentive zoning can be linked with floating zones and they require the zoning authority's review and approval of a uniquely designed development plan that meets general performance criteria concerning density, use, and environmental considerations. The specific details of the design are determined at the site plan stage, where the developer often negotiates with public administrators.[123] Performance based floating zones incorporate unique features not found in traditional zoning mechanisms: development plan approval at the zoning stage based upon general design and performance specifications; relaxation or elimination of traditional building bulk regulations such as height and lot setbacks; substantial conformity with master plan; and postzoning site plan approval, incorporating details about design features of the proposed development.[124] Performance based zoning has prompted the development of new towns like Columbia, Maryland,[125] as well as a number of smaller planned unit developments and mixed use projects that integrate commercial and office uses with residential uses. This type of zoning usually is applied on a piecemeal basis because each development plan must be evaluated separately. Conditions can be applied to this type of zoning to restrict development to stages that will occur over a long period of time in order to insure coordination with the availability of public infrastructure.[126]

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121. Gutis, *Land Use Battle Disturbs Serenity of Southampton*, N.Y. Times, Mar. 16, 1987, at B1, col. 3; 1 RATHKOPF, *supra* note 22, § 7A.05[2][a] (1986 & Supp. 1987).
122. Transferable development rights are zoning rights granted at one location to compensate for the denial of those rights at another. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 113-15 (1978).
123. Site plan regulations must be sufficiently precise to provide adequate standards for enforcement. A Colorado regulation was held to be improperly applied to require an off-site road improvement without standards to evaluate adequacy of the road system. Beaver Meadows v. Larimer County Bd. of County Comm'rs, 709 P.2d 928 (Colo. 1985).
124. *See* Connor, *Performance Zoning: Successor to Euclidean Zoning*? 33 LAND USE L. & ZONING DIG. 7 (1981); Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987).
125. Howard County's New Town District is explained in Howard Research & Dev. Corp. v. Howard County, 46 Md. App. 498, 418 A.2d 1253, *cert. denied*, 289 Md. 736 (1981).
126. 5 WILLIAMS, *supra* note 18, § 163.75. This type of special purpose zoning also illustrates another distinction between Euclidean and floating zones in Maryland and their use by different government entities. The placing of conditions on a use permitted by Euclidean zoning would be subject to invalidation. *See* Board of County Comm'rs v. H. Manny Holtz, Inc., 65 Md. App. 574, 501 A.2d 489 (1985). Noncharter counties and municipalities are unlikely to adopt floating zones because the enabling legislation limits rezoning to the Euclidean change-mistake rule. MD. ANN. CODE, art. 66B, § 4.05(a) (1983 & Supp. 1986). In *Holtz*, the court strictly applied the uniformity provision found in MD. ANN. CODE art. 66B, § 4.02 (1983 & Supp. 1986), in order to invalidate the conditions imposed on use. This effectively

Sector plan zoning is directed at small regions or neighborhoods in need of special protection.[127] Land use policies are developed under a master plan or sector plan for a small neighborhood and these policies subsequently are implemented by comprehensive zoning within that neighborhood or district. These special districts are established for the protection of existing neighborhoods or for the promotion of unique development objectives, such as transit station areas.[128] Montgomery County followed this approach to preserve residential areas and to promote appropriate transit station development in Friendship Heights, a small 62-acre neighborhood located adjacent to the District of Columbia.[129] The sector plan zoning was upheld against a challenge based in part on a claim that the area involved was too small to be a suitable basis for comprehensive zoning.[130]

Farmland and open space preservation is usually accomplished by creating very low density enclaves[131] where development is severely limited. This is done in order to discourage residential subdivisions and encourage the preservation of economically viable farms or open spaces for aesthetic or environmental purposes.[132] The drastic economic consequences of the low density zoning on the development potential of the preserved land is sometimes offset by public acquisition of open space easements or the creation of a TDR program.[133]

TDR programs permit the shifting of density from one location to another in order to preserve some aspect of the property from which the density is transferred and to provide the land owner with compensation for the restriction on development.[134] It is used increasingly to shape and direct growth. An early use of a TDR program by New York City to redirect growth in order to preserve two small private parks was inval-

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restricted the flexibility of noncharter counties and municipalities. However, counties not governed by article 66B may apply these more flexible methods. *See* Wheaton Moose Lodge No. 1775 v. Montgomery County, 41 Md. App. 401, 397 A.2d 250 (1979).

127. Mandelker, *supra* note 95.

128. *Id.* at 35.

129. SECTOR PLAN: FRIENDSHIP HEIGHTS CENTRAL BUSINESS DISTRICT, MONTGOMERY COUNTY, MARYLAND (June, 1974).

130. Montgomery County v. Woodward & Lothrop, 280 Md. 686, 376 A.2d 483 (1977); *see* Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978).

131. Comment, *Zoning for Agricultural Preservation*, 36 LAND USE L. & ZONING DIG. 3 (1984); 3A WILLIAMS, *supra* note 18, § 73.08.

132. Freilich and Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW. 27 (1981).

133. Delaney, Kominers & Gordon, *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URB. LAW. 593, 596-97 (1983). A TDR program may be enough to save conservation area zoning from a claim of unconstitutional taking of property without just compensation. *See* Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (1986), *cert. denied*, 107 S. Ct. 577 (1987).

134. *Id.* at 595-96.

idated in *Fred F. French Investing Co. v. City of New York.*[135] The court found that the TDR program did not provide adequate compensation for the property because of its speculative nature. However, a later TDR program designed for historic preservation was upheld in *Penn Central Transportation Co. v. City of New York.*[136]

A TDR program was adopted by Montgomery County, Maryland to preserve open space and farmland.[137] The TDR scheme coordinated master plan recommendations with comprehensive zoning. Over 88,000 acres were classified in the Rural Density Transfer Zone, a requisite for the sale of TDRs that limits density to one dwelling unit for every 25 acres. The TDRs were sold for use elsewhere in the county at locations that were underzoned, but were recommended in area master plans for higher densities as suitable receiving areas for TDRs.[138] The Montgomery County program developed into an active market: over 1,145 TDRs were approved for sale, which preserved some 5,725 acres as farmland.[139] Although the program withstood several constitutional attacks,[140] its implementation mechanism was invalidated recently by the Court of Appeals of Maryland on the grounds of lack of uniformity; the designation of TDR receiving areas and the resultant density increases occurred outside the zoning process and without sufficient legislative standards. The program was revived using the court's suggested mechanism of indentifiable receiving districts which were created and applied by comprehensive zoning.[141]

As the recent case of *West Montgomery Citizens Association v. Maryland-National Capital Park and Planning Commission*[142] illustrates, the use of flexible zoning measures is dependent upon their uniform application within the zoning scheme. Maryland's uniformity requirement provides that local zoning regulations must be uniform for each class or kind of development within each zoning district, although variations between districts are permitted.[143] In other words, the elements of a zoning classification, such as density, use or bulk regulation, must be applied uni-

135. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).
136. 438 U.S. 104 (1978).
137. MONTGOMERY COUNTY, MD., CODE ch. 59, § A-6.1 (1984). For a discussion of Montgomery County's TDR program, *see* Tustian, *Preserving Farming Through Transferrable Development Rights — A Case Study of Montgomery County, Maryland*, 4 AM. LAND F. 63 (1983).
138. MONTGOMERY COUNTY, MD., CODE ch. 59, § A-6.1 (1984).
139. Interview with Melessa Banach, Sr. Planner, Maryland-National Capital Park and Planning Commission, (Mar. 20, 1986).
140. West Montgomery Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n, 309 Md. 183, 522 A.2d 1328 (1987); Du Four v. Montgomery County, Law Nos. 56968, 56969, 56970 (Cir. Ct. Mont. Co., Md. 1983). The General Assembly expressly authorized local governments to establish TDR programs. *See* 1986 Md. Laws 605.
141. Montgomery County, Md., Ordinance 11-4 (June 2, 1987). *West Montgomery*, 309 Md. 183, 522 A.2d 1328.
142. *Id.*
143. MD. ANN. CODE art. 66B, § 4.02 (1983 & Supp. 1986); MD. ANN. CODE art. 28,

formly throughout the zoning district and deviations from this uniformity requirement will be invalidated.[144]

Some courts have viewed the uniformity requirement as prohibiting discrimination among developers, while permitting variation among units of development.[145] Maryland courts have applied the uniformity requirement to permit several innovative measures to survive, despite claims of nonuniformity. For example, the cluster form of development, which permits residential development to be grouped in clusters that form a greater density than usually permitted in order to establish open space areas and make more efficient use of land and topography, was upheld.[146] Also, an optional method of development in a central business district, which encouraged public amenities in exchange for greater density, was upheld.[147] A density control scheme, which permitted variations similar to the cluster method, was also upheld.[148]

B. Subdivision

In the subdivision control stage, an administrative body such as a planning board or commission ensures that individual lots, which are intended to be developed for permitted uses, may be used safely for such purposes and that the use of specific parcels as zoned will not affect adversely the public welfare.[149] Subdivision approval requires the application of regulations to the proposed development design in order to determine what physical improvements are required to render the property suitable for use as zoned and to allow the developer to sell, lease, or transfer the lots.[150] Subdivision regulations are, in effect, the standards for subdivison approval. Once a subdivision design is approved, it is then recorded as a plat in the land records office of the locality.[151] Subdivision regulations vary, but most require adequate and well designed internal

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§ 8-102 (1986). Curiously, a similar requirement does not apply to home rule charter counties. *See* MD. ANN. CODE art. 25A, § 5(X) (1981 & Supp. 1986).

144. Most of the invalidations have occurred in the context of conditional zoning cases where development favored by local government has been approved with the imposition of *ad hoc* conditions that restrict the uniform application of one or more of the elements of the zoning classification. *See* Carole Highlands Citizens Ass'n v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960); Rose v. Paape, 221 Md. 369, 157 A.2d 618 (1960); Baylis v. Mayor & City Council of Baltimore, 219 Md. 164, 148 A.2d 429 (1959).

145. Wesley Inv. Co. v. County of Alameda, 151 Cal. App. 3d 672, 198 Cal. Rptr. 872 (1984); Orinda Homeowners Comm'n v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

146. Prince George's County v. M & B Constr. Corp., 267 Md. 338, 356-63, 297 A.2d 683, 692-95 (1972).

147. Montgomery County v. Woodward & Lothrop, 280 Md. 686, 716-23, 376 A.2d 483, 501-04, *cert. denied*, 434 U.S. 1067 (1977).

148. Malmar Assoc. v. Board of County Comm'rs, 260 Md. 292, 272 A.2d 6 (1971).

149. 4 RATHKOPF, *supra* note 22, § 64.02.

150. *Id.*

151. *Id.* §§ 64.04, 66.02.

streets,[152] protection of the natural environment and natural resources,[153] installation of adequate water and sewer facilities,[154] design layout,[155] and conformity with established zoning and development standards.[156]

The subdivision approval stage is important to growth management because it is at this stage that the timing of development may be controlled and the authority to control development may be placed in an administrative agency. An administrative agency, such as a planning board, will evaluate the impact of development on public facilities.[157] Several methods have been employed at the subdivision stage to advance growth management objectives, and the most significant include: adequate public facilities review, cluster development, master plan conformity, exactions, and impact fees. Some subdivision regulations contain a "use it or lose it" provision that discourages stockpiling of building permits that could inundate public infrastructure if development occurs at one time.[158]

1. Adequate Public Facilities Ordinances

In order to regulate the pace of development, the planning board must be given discretion by specific legislative authority to evaluate the adequacy of public facilities.[159] This type of evaluation is most effective at subdivision or later stages because the impact of development can be measured more realistically than at the zoning stage.[160] This is accomplished by an adequate public facilities ordinance (APFO). Establishing policy declarations in the comprehensive plan is not enough because the policy must be enforceable through an APFO where the planning board is given clear authority to defer development approvals until public facilities are deemed adequate.

An APFO will be effective only if it is broad enough to cover most forms of development, its cumulative impact addresses all public infrastructure likely to be affected by growth and, most importantly, contains clear legislative standards to insure adequate administration.[161] Other-

152. *Id.* § 65.02[3].
153. *Id.* § 65.02[2].
154. *Id.* § 65.02[5].
155. *Id.* § 64.03[1].
156. *Id.* § 65.02[1].
157. 3A WILLIAMS, *supra* note 18, § 73.04.
158. *See* Colwell v. Howard County, 31 Md. App. 8, 354 A.2d 210 (1976).
159. For discussion of inadequate legislation standards, see 5 WILLIAMS, *supra* note 18, § 156.05.
160. 5 WILLIAMS, *supra* note 32, § 156.04.
161. Anne Arundel County has adopted an APFO with specific legislative standards. ANNE ARUNDEL COUNTY, MD., CODE § 13-133 (1978). Comprehensive revision to its growth management system, which includes APFO revisions, comprehensive planning and zoning proposals, and impact fees to fund infrastructure are currently under consideration. Daily Record, Aug. 13, 1986, at 1, col. 3; Balt. Sun, Oct. 15, 1986, at 3D, col. 6. The growth management system also links comprehensive zon-

wise, the public administrators, who must apply the APFO in difficult cases involving one of the largest and most powerful industries in the country, may be reluctant to apply the APFO strictly or may apply it loosely or inconsistently, thereby frustrating its objectives.

The APFO has not been upheld directly by Maryland appellate courts. It received an unenthusiastic evaluation in *Maryland-National Capital Park and Planning Commission v. Rosenberg*,[162] where a Prince George's County APFO was found to have been applied arbitrarily with respect to school capacity. Nevertheless, the APFO and its link to development approval has been approved and upheld indirectly in Maryland[163] and elsewhere.[164]

2. Cluster Development

The subdivision approval process also may include alternative forms of development such as the use of the cluster method. This method is a popular form of development because of its basic space efficiency, lower construction costs, and open space amenities.[165] The cluster method permits smaller lot sizes than may be permitted elsewhere under the applicable zoning ordinances. The remaining land not used for dwelling lots is consolidated as common open space for conservation and the recreational use of all the residents.[166] The total density on the plat remains substantially the same as under conventional methods, but the dwellings are "clustered" on smaller lots. The open space or recreation areas are held in common ownership by the residents of the subdivision, who usually are required to form a homeowners' association to maintain the common areas.[167] A planning board usually is given responsibility for the approval of cluster proposals under standards requiring that aggregate density not be increased.[168] The cluster method has been upheld in Maryland.[169]

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ing and planning. *See* Williams v. William T. Burnett Co., 296 Md. 214, 462 A.2d 66 (1983).

162. 269 Md. 520, 307 A.2d 704 (1973).
163. Kassab v. Burkhardt, 34 Md. App. 699, 368 A.2d 1064 (1977); *see also* Tartan Dev. Corp. v. Montgomery County Planning Bd., Law Nos. 63708, 63718, slip op. at 3 (Cir. Ct. Mont. Co., Md. filed Nov. 28, 1983).
164. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).
165. *See* May, *In Suburbs, Market Widens for Clustered Dwellings*, N.Y. Times, Nov. 4, 1986, at B1, col. 2.
166. 4 RATHKOPF, *supra* note 22, § 65.04(b). The cluster method normally operates on a voluntary basis. However, Southampton, Long Island, has adopted a mandatory cluster development regulation that requires reservation of 25% of subdivided land for open space. Gutis, *Land Use Battle Disturbs Serenity of Southampton*, N.Y. Times, Mar. 16, 1987, B1, col. 3.
167. *Id.*
168. *Id.*
169. Prince George's County v. M & B Constr. Corp., 267 Md. 338, 356-363, 297 A.2d 683, 692-695 (1972) (upholding cluster method with variations among housing

3. Master Plan Conformity

The subdivision approval stage also provides an opportunity to manage growth by the implementation of master plan recommendations. Local or area master plans are designed to address long term comprehensive planning issues and are adopted and updated periodically.[170] There is a growing trend to require conformity with the master plan at the subdivision stage in order to control the timing of development.[171] When a master plan contains density or staging elements, which are otherwise unenforceable, the requirement for conformity at the subdivision approval stage effectively implements these growth control policies.

The relationship between master plan recommendations and subdivision approval has been recognized in Maryland. The denial of a subdivision's approval for nonconformity survived a constitutional challenge in *Krieger v. Planning Commission of Howard County*.[172] More recently, the statutory relationship between master plans and subdivisions was upheld in *Board of County Commissioners v. Gaster*[173] and *Coffey v. Maryland-National Capital Park and Planning Commission*.[174]

4. Exactions

Subdivision approval also may require exactions, a developer's partial contribution in land or money for the public infrastructure necessary to support the subdivision.[175] Exactions usually take the form of dedications of on-site or adjacent land for schools, parks, or roads.[176] In some instances, however, a developer also may be required to dedicate off-site land or contribute to the construction of off-site infrastructure.[177] The dynamics of the subdivision process sometimes result in developers agreeing to provide voluntarily many levels of public improvements that

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types, lot, and building dimensions); *See also* Malmar Assocs. v. Board of County Comm'rs, 260 Md. 292, 272 A.2d 6 (1971) (upholding density control regulations that permitted increased bedrooms for multifamily buildings as a special exception).

170. 1 WILLIAMS, *supra* note 18, §§ 1.21, 22.01 (1974).

171. 4 RATHKOPF, *supra* note 22, at § 65.02[1][b]; *Planning Offensive*, *supra* note 36, at 41-43.

172. 224 Md. 320, 324-26, 167 A.2d 885, 886-88 (1961).

173. 285 Md. 233, 401 A.2d 666 (1979).

174. 293 Md. 24, 441 A.2d 1041 (1982).

175. For a discussion of exactions as a condition of subdivision approval, see 4 RATHKOPF, *supra* note 22, § 65.03.

176. *Id.*

177. An off site dedication or improvement may involve building a road near the property in question to alleviate traffic congestion that might otherwise preclude development approval. *See* Montgomery County v. Greater Colesville Citizens Ass'n, 70 Md. App. 374, 521 A.2d 770 (1987). *See*, Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977). For a discussion of the expanding use of exactions, see Schmidt, *Cities Place New Fees on Developers*, N.Y. Times, Oct. 31, 1985, at A18, col. 3. *See also* Annotation, *Validity and Construction of Statute or Ordinance Requiring Land Developers to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof.* 43 A.L.R.3d 862 (1972).

otherwise might not be required by the subdivision rules.[178]

New forms of exactions are evolving. An example is assistance for low and moderate income housing. Several jurisdictions have adopted regulations that require inclusion of low or moderate income housing as part of a larger development.[179] Such regulations generally provide for a density bonus in exchange for the required housing component. There is an increasing trend to incorporate "fair share" housing elements in land use regulations as part of local government's responsibility for the promotion of the general welfare.[180]

Developers throughout the United States have challenged exactions applied at the subdivision stage.[181] As a result of this litigation, several tests have been developed for evaluating the validity of exactions. In Illinois, for example, the exaction must be "specifically and uniquely attributable" to the particular subdivision under review.[182] In California, a more liberal "public need" test is applied, and an exaction that is reasonably related to public need rather than specifically benefitting the subdivi-

178. There are limits on the exactions that a government can require of a developer, and a fine line exists between the proper land use regulation of private property and taking it without just compensation. *See* Stevens v. City of Salisbury, 240 Md. 556, 565, 214 A.2d 775, 779 (1965). Often the validity of the regulation depends on the degree of intrusion on property rights. *Compare* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) *with* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987). Improper regulation is characterized by the absence of a clear public purpose or a significant diminution of property values and investment backed expectations. *Nollan*, 107 S. Ct. 3141. When subdivision regulations are used in a confiscating manner, they will be held invalid. Maryland-National Capital Park & Planning Comm'n v. Chadwick, 286 Md. 1, 405 A.2d 241 (1979).

If the regulation is found to be a taking, a new remedy now exists that provides compensation for a temporary regulatory taking from the date of enactment until invalidation. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987). This new remedy will have a direct impact in Maryland because the court of appeals previously applied invalidation as the sole remedy for a regulatory taking. *Chadwick*, 286 Md. 1, 405 A.2d 241. The remedy, however, may have little practical application as developers choose to negotiate rather than litigate with land use regulators. However, developers who voluntarily make contracts to provide public amenities will be held to their promises. *See* Bozung, *Inclusionary Housing: Experience Under a Model Program*, 6 ZONING & PLAN. L. REP. 89, 93-94 (1983). *See* Mayor of Rockville v. Brookeville Turnpike Constr. Co., 246 Md. 117, 228 A.2d 263 (1967).

179. *See* Bozung, *supra* note 178 (describing the inclusionary housing program established in Orange County, California).

180. *See* In Re Egg Harbor Assocs., 94 N.J. 358, 464 A.2d 1115 (1983); Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low and Moderate Income Housing by Local Government*, 5 URB. L. & POLICY 169 (1982). Boston and San Francisco have developed innovative linkage concepts that require developers of downtown commercial buildings to contribute to a housing element in exchange for development approvals. The Boston approach was upheld in Bonan v. City of Boston, 398 Mass. 315, 496 N.E.2d 640 (1986). The San Francisco approach was upheld in Terminal Plaza Corp. v. City of San Francisco, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986).

181. *See* 4 RATHKOPF, *supra* note 22, § 65.03.

182. *See, e.g.*, Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961).

sion has been upheld.[183] Several jurisdictions, including Maryland, have adopted a middle position characterized as the "reasonable nexus" test.[184] This test was applied, in a recent case, *Howard County v. JJM, Inc.*,[185] where the Court of Appeals of Maryland held that the government's exaction of private property as a requirement for subdivision approval must bear a reasonable nexus to the proposed development.[186] In Maryland, where the exaction is intended to serve general public needs extending beyond the proposed development, the government cannot use subdivision approval as leverage to acquire the needed land.[187] Such land must be acquired through eminent domain.[188]

5. Impact Fees

In growth areas where necessary public infrastructure cannot be financed by traditional government sources and the exaction method is inadequate, impact fees have been used as an alternative method of financing infrastructure. These fees are based on a legislatively predetermined formula and must be paid by the developer at the subdivision stage or at the permit review stage. Impact fees are an expansion of the exaction concept and provide more flexibility for both the government and the developer because the fees can be applied to all forms of development.[189] Impact fees shift the reasonable infrastructure cost incurred to the developer or new residents of the proposed development.

The use of impact fees to finance the infrastructure required by new

183. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 637-45, 94 Cal. Rptr. 630, 634-39, 484 P.2d 606, 610-15, *appeal dismissed*, 404 U.S. 878 (1971). The future of the California exaction test, however, is in grave doubt because of the new heightened scrutiny test established in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987). The Court invalidated an exaction applied under California law because it did not manifest a reasonable nexus to the public purpose claimed to be served.

184. Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832, 833-35 (Mo. 1977). *See generally* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs of New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Johnston, *Constitutionality of Subdivision Control Exaction: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

185. 301 Md. 256, 264-82, 482 A.2d 908, 911-21 (1984).

186. Howard County v. JJM, Inc., 301 Md. 256, 282, 482 A.2d 908, 921 (1984).

187. *Id.* at 270, 482 A.2d at 915-16, (quoting *Johnston, supra* note 184, at 877-84).

188. One distinction between exactions and eminent domain is who pays for the public acquisition of private property. When an exaction is applied properly, the developer or subsequent homeowner bears the cost of public acquisition because, under the reasonable nexus test, they will enjoy the benefits of the public improvements provided by the exaction in a manner different from the public at large. Where public acquisition must occur through eminent domain, the general taxpayer bears the cost because the benefit of the acquisition is for the public at large and not uniquely attributable to the subdivision. *See* Maryland-National Capital Park & Planning Comm'n v. Washington Business Park Ass'n, 294 Md. 302, 449 A.2d 414 (1982); *see also* Montgomery County v. Schultze, 302 Md. 481, 489 A.2d 16 (1985);

189. For a discussion of impact fees in the context of subdivision, see 4 RATHKOPF, *supra* note 22, § 65.03.

growth has been adopted by several jurisdictions, notably Florida[190] and California.[191] Florida's treatment of impact fees is particularly relevant because Florida follows the same "reasonable nexus" test for subdivision exactions applied in Maryland.[192]

The leading Florida decision, *Contractors & Builders Association v. City of Dunedin*,[193] approved of using impact fees to finance capital improvements if three conditions were present: the new development requires infrastructure expansion, the fees assessed are no more than necessary to accommodate the new growth, and the fees are earmarked specially for the purpose for which they are assessed.[194] Impact fees supporting a countywide park system[195] and supporting road improvements[196] have been upheld under the *Dunedin* test, because they were related to needs attributable to the growth generated by the subdivision, and because the fees were earmarked to benefit subdivision residents.[197] On the other hand, an impact fee system earmarked to include "other specified Town purposes . . ." was found unconstitutional because there was no guarantee that funds collected actually would be used to promote the development and acquisition of open space and parkland.[198]

A California impact fee adopted to pay the cost of additional public facilities was invalidated initially because there were no reasonable safeguards to insure that impact fees would be used for their stated purposes.[199] Although the invalidation was vacated by the Supreme Court of California because the city revised the impact fee scheme, the court of appeals decision illustrates the pitfalls in drafting impact fee legislation. The city had not established geographic benefit areas and had neither earmarked funds for specific purposes nor shown any direct benefit be-

190. Impact fees have been adopted exclusively by local governments in Florida and the first test occurred in Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (dictum), *cert. denied*, 444 U.S. 867 (1979).

191. Impact fees also have been adopted exclusively by local governments in California and their use was upheld in J.W. Jones Cos. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984). Whether the liberal impact fee standard applied in California can survive depends upon the range of application given Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

192. Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. App. 1976).

193. 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979) (rejecting the particular water and sewer impact fee in question).

194. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320-21 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979).

195. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612-14 (Fla. Dist. Ct. App.), *petition for review denied*, 440 So. 2d 352 (Fla. 1983).

196. Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 141-42 (Fla. Dist. Ct. App. 1983).

197. *Id.* at 144-45; *Hollywood*, 431 So. 2d at 611-12.

198. Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574, 576 (Fla. Dist. Ct. App. 1983).

199. Building Indus. Ass'n v. City of Oxnard, 150 Cal. App. 3d 535, 198 Cal. Rptr. 63 (1984), *vacated*, 40 Cal. 3d 1, 706 P.2d 285, 218 Cal. Rptr. 672 (1985) (a new amended ordinance is being considered).

tween the new development and new public facilities.[200] Therefore, the initial impact fee scheme was held to be an invalid general regulatory tax that operated in a discriminating manner on new development property.[201] An impact fee for the cost of public facilities was upheld, however, where it designated a specific benefit area, within which the benefits of the new infrastructures would be apparent readily.[202] Other safeguards included earmarking the funds collected and using them only for the specific purpose of the assessment.[203]

C. *Permit Reviews*

The final stage in the development approval process is the permit review stage. A variety of permits are required by federal, state, and local governments depending on the type and location of development.[204] The permit review stage is another point where local government can control growth through the rationing of building permits or applying an adequate public facility test.[205]

Several recent decisions illustrate how growth regulations have been employed successfully at this stage. In Massachusetts, for example, a town limited certain residential building permits to an annual ten percent level for a ten-year period to protect subsoils. The limitation was upheld in *Sturges v. Town of Chilmark*[206] partly on the grounds that the town made a *prima facie* showing that concern for subsoils was a rational basis for the limitation.[207] A California building permit restriction that required a showing of adequate public facilities was upheld in *Associated Home Builders of Greater Eastbay v. City of Livermore*.[208] A Maine public sewer usage limitation ordinance that restricted the number of sewer connections available each year to a lottery, enacted because of extraordinary town growth, was upheld in *Tisei v. Town of Ogunquit*.[209]

In Maryland, state agencies must examine a number of local envi-

200. *Id.* at 535, 198 Cal. Rptr. at 65-66.
201. *Id.* at 535, 198 Cal. Rptr. at 66.
202. J.W. Jones Cos. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).
203. *Id.* at 754-58, 203 Cal. Rptr. at 587-89.
204. The permit review stage is recognized in Maryland as an important element of the land use regulatory process and has been enforced strictly. *See* Joy v. Anne Arundel County, 52 Md. App. 653, 451 A.2d 1237 (1982). Federal regulation generally is applied through the United States Army Corps of Engineers, which has jurisdiction to approve development in wetland areas. *See* United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985).
205. 3A WILLIAMS, *supra* note 18, §§ 73.30 -73.32 (1985 & Supp. 1986). Impact fees have been applied at this stage because it is the final stage in the development process and represents a logical point for collection. *See* Laguna Village, Inc. v. County of Orange, 166 Cal. App. 3d 125, 212 Cal. Rptr. 267, 270 (1985).
206. 380 Mass. at 258-60, 402 N.E.2d at 1354-55.
207. Sturges v. Town of Chilmark, 380 Mass. 246, 258-60, 402 N.E.2d 1346, 1354-55 (1980).
208. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
209. 491 A.2d 564 (Me. 1985).

ronmental issues to determine whether development can proceed safely. These approvals include, among others, grading and sediment control plans,[210] sewage disposal plans,[211] stormwater management plans,[212] and conformity with water and sewage requirements.[213] Local building permits cannot be issued without each of these state agency approvals.[214] This dual level of regulation illustrates the need for an integrated state and local growth management system because failure to coordinate can lead to the frustration of both state and local land use policies.

Such frustration was evidenced recently when inconsistent state and local land use policies conflicted. The State Aviation Administration is authorized to designate noise zones and promulgate regulations governing land use within the noise zone.[215] The state prohibits residential development in areas where high noise levels exist due to nearby airport operations.[216] A board of airport zoning appeals is authorized to consider variances from strict application of these regulations.[217]

Anne Arundel County, on the other hand, authorized a residential use in a state designated noise zone where the residential uses were restricted. The state, therefore, prohibited a land use in the same area where the county permitted it. The state's authority to regulate this land use was challenged in *Greenberg v. State*,[218] and the regulations were found to be a reasonable exercise of the police power that advanced legitimate government goals.[219] Consequently, the developer's request for a variance from the airport zoning appeals board was denied.[220] The regulations were deemed nonconfiscatory because the land owner was not denied all beneficial uses of the property.[221] As the *Greenberg* decision illustrates, the state can restrict development within areas where local zoning regulations authorize it. In such a situation it is clear that state regulations control, and any use authorized by local zoning is subject to state limitations.[222]

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210. MD. NAT. RES. CODE ANN. § 8-1103 (1983 & Supp. 1986).
211. *Id.* § 8-1204.
212. *Id.* § 8-9A-03.
213. MD. HEALTH-ENVTL. CODE ANN. § 9-512 (1982 & Supp. 1986).
214. *Id.* § 9-512(b).
215. *Id.* § 5-804 (1977 Vol.). Regulations prohibiting residential development within certain noise zones are found in MD. REGS. CODE tit. 11 § 11.03.03.03 (1977).
216. MD. TRANSP. CODE ANN. § 5-821 (1977 & Supp. 1986).
217. *Id.* § 5-822.
218. 66 Md. App. 24, 502 A.2d 522 (1986).
219. Greenberg v. State, 66 Md. App. 24, 32-37, 502 A.2d 522, 526-28 (1986).
220. *Id.* at 26-27, 502 A.2d at 523.
221. *Id.* at 32-37, 502 A.2d at 526-28.
222. The relationship between state and local government is governed by doctrines of preemption, conflict, and concurrent jurisdiction. In areas where the state has preempted the field, local regulations in the same field are invalid. Rockville Grosvenor, Inc. v. Montgomery County, 289 Md. 74, 422 A.2d 353 (1980). In areas where the state and local governments have concurrent jurisdiction, but the state has adopted regulations that conflict with the local regulations, the state regulations control. East v. Gilchrist, 296 Md. 368, 463 A.2d 285 (1983); Northampton Corp.

Although *Greenberg* upheld the state land use prohibition in Maryland, the other side of the challenge has prevailed in at least one other state. The Supreme Court of Minnesota found a municipal airport zoning restriction to be confiscatory because it was designed to benefit only the government enterprise and the municipal airport operation.[223] It also did not promote the general welfare because the property owner suffered a substantial decline in market value.[224] Nevertheless, the *Greenberg* decision is an example of the conflicts between state and local governments that will exist as long as the local and state regulatory systems remain uncoordinated. An effective partnership between the two levels of government is needed. The following case study of one of Maryland's counties illustrates the need for state and local government coordination.

V. MONTGOMERY COUNTY — A CASE STUDY

Montgomery County, Maryland, which lies immediately northwest of Washington, D.C., contains approximately 500 square miles[225] and has a population of about 600,000.[226] It has been a home rule charter county since 1948.[227] Unlike most other charter counties, its planning and zoning powers are circumscribed by special state legislation first adopted in 1927 that applies only to Montgomery County and her eastern neighbor, Prince George's County.[228] This special legislation provides elaborate procedures for the adoption and approval of general plans,[229] master plans,[230] and local zoning ordinances.[231] Like the state law that applies to noncharter counties and municipalities,[232] the legisla-

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v. Prince George's County, 273 Md. 93, 327 A.2d 774 (1974); Prince George's County v. Maryland-National Capital Park and Planning Comm'n, 269 Md. 202, 306 A.2d 223, *cert. denied*, 414 U.S. 1068 (1973); *see also* Mayor of Forest Heights v. Frank, 291 Md. 331, 435 A.2d 425 (1981) (discussing the relationship of a municipal ordinance to a "public local law" and a "public general law"). In areas where state and local governments have concurrent jurisdiction and the local regulations do not conflict with state regulations, the local regulations are valid and enforceable even if they are more strict. City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 376 (1969) (upholding Baltimore City minimum wage although it was higher than the state minimum wage). These municipal law principles apply to local zoning regulations. *See* AD+ Soil, Inc. v. County Comm'rs, 307 Md. 307, 513 A.2d 893 (1986).

223. McShane v. City of Fairbault, 292 N.W.2d 253 (Minn. 1980). The *Greenberg* court distinguished *McShane* because the plaintiffs there were under the flight paths, the height of structures was limited, and the sole purpose of the ordinance was to benefit the municipal airport. The situation in *Greenberg* differed from that in *McShane*, because the state was seeking to limit noise pollution.

224. *Id.*

225. ARCHIVES DIVISION, HALL OF RECORDS COMMISSION, DEPARTMENT OF GENERAL SERVICES, MARYLAND MANUAL 553 (1985-1986).

226. *Id.*

227. The Montgomery County, Maryland Charter was adopted on Nov. 2, 1948.

228. *Id.*

229. *Id.* § 7-108(a).

230. *Id.* § 7-108(b).

231. *Id.* § 8-101(b).

232. MD. ANN. CODE art. 66B, § 4.02 (1983 & Supp. 1986).

tion contains a uniformity requirement[233] but does not similarly contain a planning consistency requirement.[234] All planning and zoning actions in Montgomery County are subject to the requirements of this state law.

A. Policy Development

For over fifteen years, Montgomery County has strived to develop an effective growth management system. The county first established a general growth policy when a general plan for the development of both Montgomery and Prince George's Counties was amended in 1969.[235] Since then, the county has developed some innovative growth control measures, but their cumulative application has proven to be inadequate as a comprehensive growth management system.[236] Nevertheless, some important elements of a growth management system were adopted and their use has ameliorated growth problems that could have been much more serious.

The Montgomery County planning process was significantly modified during the 1970s to provide a closer relationship between planning and zoning and to obtain greater design flexibility in development. The county was divided into a number of separate planning areas, which became the subject of individual planning initiatives.[237] Over time, the county developed long range local master plans for specified geographic areas and each local master plan constituted an amendment to the general plan. Land use and density recommendations were intended to limit growth to levels deemed supportable by existing and planned facilities. As the process evolved, master plans were adopted which included staging elements[238] and, in some areas, higher densities were reserved for planned development zones or TDR programs.[239] Where staging elements were included, planned growth would be restricted to areas where infrastructure was adequate or would soon be adequate.[240] These plans were implemented by comprehensive zoning soon after their adoption.

In 1974, the planning board published the *First Annual Growth Pol-*

233. MD. ANN. CODE art. 28, § 8-102 (1986).

234. The Regional District Act does not contain a provision comparable to MD. ANN. CODE art. 66B § 4.03 (1983), which requires zoning regulations to be "in accordance with the plan."

235. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. . . . *On Wedges and Corridors, Updated General Plan*, 9 (Dec., 1969).

236. REPORT TO THE MONTGOMERY COUNTY COUNCIL OF THE CONSENSUS COMMITTEE ON GROWTH MANAGEMENT, 34-35 (Dec. 31, 1985) [hereinafter REPORT].

237. The county has been divided into 27 separate planning areas pursuant to the requirements of MD. ANN. CODE art. 28, § 7-108(b) (1986).

238. *See* COMPREHENSIVE AMENDMENT TO THE MASTER PLAN FOR GERMANTOWN, 61-76 (Jan. 1974); MASTER PLAN FOR THE POTOMAC SUBREGION, 143-44 (May 1980); MASTER PLAN FOR EASTERN MONTGOMERY COUNTY PLANNING AREA, 35-42 (Nov. 1981); GAITHERSBURG VICINITY MASTER PLAN, 53-72 (Jan. 1985).

239. *See* GAITHERSBURG VICINITY MASTER PLAN, 109-10 (Jan. 1985).

240. *See, e.g.*, GAITHERSBURG VICINITY MASTER PLAN, 106-09 (Jan. 1985).

icy: Framework for Action.[241] This document was intended to be a comprehensive review of growth issues. It was revised periodically by the planning staff and then transmitted to the County Council, the legislative body. This policy statement was not adopted by the legislature and, therefore, it lacked the authoritative character of official policy.[242] This deficiency was corrected in 1986 when a local law was enacted to require the adoption by the County Council of an official growth policy on an annual basis.[243] The new growth policy process is designed to review such matters as the remaining growth capacity of zoned land, approved development awaiting construction, levels of service of major public facilities, forecasts of probable trends, and growth capacity ceilings for appropriate areas.[244] Procedures for an interim growth policy to be used prior to the Council's first annual growth policy were provided.[245] The County also provided that building permits not used within six months would be invalid.[246]

In 1970, the county initiated a six year capital improvement programming budget process (CIP) that permitted the coordination of fiscal and land use policies.[247] State capital projects were, of course, exempt from this process. This integrated system was intended to produce a coordinated review of needed facilities for the county. The CIP was approved by the County Council, but implemented by the County Executive, who was excluded by a local charter provision from the land use process.[248] Failure by the County Executive to expend funds for authorized CIP facilities exemplified the lack of coordination between branches and among levels of government that frustrated the effectiveness of any growth policy.[249] Recently, state law has been changed to override the local charter provision and include the County Executive in the land use process.[250]

Another development of the 1970s was the adoption of an inclusionary zoning policy designed to increase the supply of low and moderate income housing in the County. Under county law, 12.5% of the total residential density for those residential projects with 50 or more dwelling

241. MONTGOMERY COUNTY PLANNING BOARD (1974).
242. REPORT, *supra* note 236, at 41-42.
243. MONTGOMERY COUNTY, MD., CODE § 33A-13(g) (1986).
244. *Id.* § 33A-13(c)(2). The fiscal year 1988 annual growth policy was approved on June 30, 1987. Montgomery County, Md., Res. 11-364 (1987).
245. *Id.* § 33A-14.
246. *Id.* § 8-25(b).
247. MONTGOMERY COUNTY CHARTER § 302 (adopted in 1968 and implemented in 1970).
248. Since 1968, the Montgomery County Charter § 110 reserved to the County Council exclusive responsibility for planning and zoning.
249. REPORT, *supra* note 236, at 42.
250. State law now provides the County Executive with authority to appoint some planning commission members, MD. ANN. CODE art. 28, § 2-101 (1986), authority to veto master plans, *id.* § 7-108(d)(1), and authority to veto changes to zoning ordinance, *id.* § 8-102.1.

units must be reserved for moderately priced dwelling units.[251] In exchange for the required moderate income housing, the developer is provided a density bonus.[252] This program not only addressed Montgomery County's housing requirements, but offered other benefits as well. It provided for the efficient use of land and infrastructure while diminishing the tendency to segregate low and moderate income housing.

B. Policy Implementation

The implementation of planning policies centered on the zoning and subdivision stages. Zoning was drastically altered during this period. The 1955 Montgomery County zoning ordinance, as well as most other traditional zoning regulations, divided the industrial, commercial, and residential districts into about twenty different use and density categories that are typically Euclidean in character and contain rigid design standards for height, bulk, and density.[253] The county zoning ordinance, as amended during the 1970s, now contains over sixty different use and density categories, approximately half of which are floating zones.[254] Many of the floating zones require master plan conformity and development plan approval instead of rigid design specifications. The use of development plan approvals has produced a number of innovative projects in the County's transit station cores, business areas, new towns, and planned development areas. Many were developed in stages where the county monitored the sequence of development to conform with the adequacy of public facilities.

One of the most important innovations was the subdivision regulations, which linked development approvals to determinations of adequate public facilities.[255] In 1973, the County adopted an Adequate Public Facilities Ordinance (APFO) to be applied at the subdivision stage and designed it to regulate the pace of growth.[256] This ordinance authorized the planning board to approve or disapprove subdivision requests depending on the adequacy of affected public facilities such as schools, roads, and water and sewer systems.[257] Formal evaluations were required using the standards contained in the APFO.[258] Any development found to have an adverse impact on public facilities could be disapproved as premature, or the developer could be required to take remedial steps to alleviate the inadequacy.[259]

The application of the APFO had mixed results. First, it created

251. MONTGOMERY COUNTY, MD., CODE § 25A-4(a) (1984).
252. *Id.* § 25A-5.
253. *Id.* §§ 107-5 to -17 (1955).
254. *Id.* § 59-C (1984).
255. *Id.* § 50-35(k).
256. *Id.*; *see also* REPORT, *supra* note 236, at 11.
257. MONTGOMERY COUNTY, MD., CODE § 50-35(k) (1984).
258. *Id.* § 35(k)(2).
259. *See* Tartan Dev. Corp. v. Montgomery County Planning Bd., Law Nos. 63708, 63718, slip op. at 3 (Cir. Ct. Mont. Co., Md. filed Nov. 28, 1983).

pressure on both public administrators and developers to correct the identified inadequacies of public facilities if economic development was to be sustained at desired levels.[260] As a result, the County built roads and schools for which the state was responsible but neglected to provide. At the same time, developers were less reluctant to accept exactions.[261] One innovative measure adopted to raise revenue was the use of road clubs, a public and private sector venture where developers in a region with roads identified as being inadequate combined to build necessary improvements.[262]

Second, the APFO was perceived by public administrators as a near absolute safeguard against premature development. This proved, however, to be a misconception because of several loopholes in its application. The APFO only contained a general standard that facilities be "adequate," but did not further elaborate on what circumstances would constitute "adequacy" or how "adequacy" should be measured.[263] This rather broad responsibility was left to the planning board[264] which adopted administrative guidelines that contained particulars for measuring the adequacy of some facilities, but neglected to provide much detail about the measurement of others.[265] Universal application of the APFO and cumulative measurement of development impact were never achieved because smaller development projects were exempted, evaluation of school capacity was largely ignored and other development escaped review altogether. Nevertheless, the cumulative impact of all development had to be absorbed into the infrastructure capacity and as a result, the implementation of the APFO was judged as inadequate.[266]

C. Local Relief — An Incomplete Painkiller

By the mid 1980s, the tremendous growth experienced throughout the region caused Montgomery County officials to reexamine the growth management system.[267] Development occurred at a record pace between 1983 and 1985, and produced congested roads and overcrowded schools in several areas of the county.[268] The cumulative effect of this growth revealed the need to develop even more stringent growth controls and

260. *See* REPORT, *supra* note 236, at 11-13, 26-28.
261. *Id.* at 13.
262. *Id.* at 28.
263. MONTGOMERY COUNTY, MD., CODE § 50-35(k) (1984).
264. *Id.*
265. MONTGOMERY COUNTY PLANNING BOARD, Guidelines for the Administration of the Adequate Public Facilities Ordinance, (1982); REPORT, *supra* note 236, at 76-80.
266. REPORT, *supra* note 236, at 34-35.
267. Montgomery County, Maryland Council Resolution 10-1554, Oct. 8, 1985, established the Consensus Committee on Growth Management to examine a range of issues prompted by rapid growth. The County Executive appointed the Blue Ribbon Task Force on the Planning Process to examine organizational issues. REPORT, *supra* note 236, at 65.
268. REPORT, *supra* note 236, at 12.

provide for more integrated government regulation.[269]

In 1985, two citizen advisory panels seriously criticized the effectiveness of the County's land use process for many of the reasons already discussed. One panel, the County Executive's Blue Ribbon Task Force on the Planning Process, recommended organizational changes to enhance the County Executive's role in the planning and zoning process.[270] Another panel, the County Council's Consensus Committee on Growth Management, recommended changes to infrastructure financing and tightening of development controls.[271] Following these reports several legislative proposals were adopted. The County Executive's role was expanded significantly in planning and zoning matters to include appointment of several planning board members and veto authorization over zoning ordinance amendments and master plans.[272] The County Council enacted local laws to require approval of an annual growth policy[273] and imposed impact fees at the building permit stage for road construction projects in rapidly growing areas of the County.[274]

There are several reasons why the County's growth management system did not keep growth within acceptable limits. First, the APFO was used as a major growth control device but proved to be inadequate for this purpose. It was based on a vague standard, had limited application, and was inconsistently applied. Even if the deficiencies of the APFO are corrected, fundamental problems concerning public infrastructure still exist that cannot be remedied by the County alone.

Second, several external factors also contributed to the inadequacy of the County's growth management system. Public facilities experienced sudden and unexpected increases in use. Traffic levels increased dramatically on major roads passing through the County from neighboring Howard, Carroll, and Frederick counties. This spillover effect led to congestion for the entire county road network. Schools had unanticipated student enrollments that led to overcrowding in several areas of the County that was not alleviated by increased state school construction.[275]

Finally, federal spending policies were curtailed sharply and economic conditions reduced the level of revenues normally available to the county from both federal and state sources. These factors caused deferral of many planned capital improvement programs. As a result, the assumptions that planned facilities would be built by the time development took place, which supported many of the County's land use decisions, proved invalid.

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269. *Id.* at 34-44.
270. BLUE RIBBON COMMITTEE ON THE PLANNING PROCESS, FINAL REPORT OF THE MONTGOMERY COUNTY, MD., (Oct. 18, 1985).
271. REPORT, *supra* note 236, at 34.
272. MD. CODE ANN. art. 28, §§ 2-101 (appointment power), 7-108(d)(1) (veto power), 8-102.1 (approval power) (1986).
273. MONTGOMERY COUNTY, MD., CODE 53 §§ 33A -13(a) to -13(g) (1986).
274. *Id.* §§ 49A-1 to -14.
275. REPORT, *supra* note 236, at 12-13.

The Montgomery County experience shows that a local growth management system, however well intended, can be frustrated by a number of factors outside of its control. The County, despite over fifteen years of effort, has been able to develop only a moderately effective growth management system by itself. If Montgomery County, with its considerable resources, cannot effectively control its growth, it is unlikely that any county could succeed. The solution to local growth problems lies in a combined state and local effort that operates under a statewide growth management system.

VI. CONCLUSION

Development pressures are expected to continue and these pressures invariably will require the application of state growth management regulations. Efforts to deregulate land use are not likely to succeed because the proponents do not offer reasonable alternatives to protect communities from the undesirable consequences of uncontrolled growth. Growth management systems are necessary to deal effectively with current development trends that are expected to continue through the next century. Many states already have adopted these regulations and many more will be compelled by circumstances to adopt them.

The need for statewide growth management oversight also presents an opportunity to review the entire field of land use regulation. Maryland land use regulations have not been examined for some time.[276] The dynamic changes in recent years indicate a need to simplify and consolidate the various laws in this field. It is time for the appointment of another state land use commission to be charged with examining the current state of the law. This commission should be staffed with planners, developers, land use lawyers, fair share housing advocates, civic association officials, and public officials. Some proposals that the commission might consider include stronger emphasis on the role of state planning, more consistency between planning and zoning, greater uniformity in the authority delegated to local governments, modification of the change-mistake rule, expanded conditional zoning authority, clarification of the administrative nature of piecemeal rezoning, integrated and low cost review of land use decisions by a state land use court, clarification of the substantial evidence standard of judicial review for land use

276. In December, 1969, the Maryland Planning and Zoning Law Study Commission issued its final report which recommended among other things the clarification of the change-mistake rule, the strengthening of the planning process, and the authorization of conditional zoning. This report included a model code that proposed the simplification of land use regulations and an increased role for state government. In 1970, article 66B was amended to include several of the Commission's recommendations. 1970 Md. Laws Chap. 672. The General Assembly, however, neglected to heed the Commission's recommendation to modify the change-mistake rule and its amendment made it more rigid. *See* MD. ANN. CODE art. 66B, § 4.05(a) (1983 & Supp. 1986).

actions, public infrastructure financing, and statewide growth management regulations.

Land use is a unique field of law. It involves a critical resource that should be regulated carefully but fairly so that the public welfare is best served by orderly, systematic, and harmonious growth. This can only be accomplished effectively if the state takes a more active role in the process. Efforts to control growth on the county and municipal levels have proved inadequate, even in counties like Montgomery County that have the requisite resources and resolve. Before Maryland's picturesque rural landscape is irreparably transformed into a continuum of large lot, single family houses, the Maryland General Assembly should establish a comprehensive statewide program of growth management.