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Philip J. Tierney

Office of Zoning and Administrative Hearings for Montgomery County, Maryland

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BOLD PROMISES BUT BABY STEPS: MARYLAND'S GROWTH POLICY TO THE YEAR 2020

Philip J. Tierney†

I. BACKGROUND: THE VISIONS OF 2020

The Chesapeake Bay (the Bay) is the nation's major estuarine system and its 64,000 square mile watershed includes portions of six states.¹ The Bay represents an enormous economic resource with impact along the entire eastern seaboard;² its commercial and recreational amenities are responsible for attracting many of the fifteen million people who reside within its watershed.³ Yet poorly regulated development is destroying huge chunks of farmland, forests, and environmentally sensitive areas which directly affect the Bay,⁴ and these development patterns threaten its environmental health.⁵ Maryland alone is predicted to lose 240,000 acres of farmland and 307,000

† B.S., University of Notre Dame, 1958; J.D., Catholic University of America, 1968. Mr. Tierney is Director of the Office of Zoning and Administrative Hearings for Montgomery County, Maryland, as well as a member of the adjunct faculties at the University of Baltimore School of Law and Washington College of Law of the American University where he teaches courses in land use law. This Article represents the opinions of the author and does not necessarily represent the views of Montgomery County Government, the University of Baltimore, or the American University.

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1. GOVERNOR'S COMMISSION ON GROWTH IN THE CHESAPEAKE BAY REGION PROTECTING THE FUTURE: A VISION FOR MARYLAND, at 7 (Jan. 1991) [hereinafter BAY REPORT].
2. RANDALL T. KERHIN, ET AL., REPORT ON THE CHESAPEAKE BAY EARTH SCIENCE STUDY, MARYLAND GEOLOGICAL SURVEY 3 (Spring 1977) [hereinafter BAY STUDY].
3. BAY STUDY, *supra* note 2, at 3; THE YEAR 2020 PANEL, POPULATION GROWTH AND DEVELOPMENT IN THE CHESAPEAKE BAY WATERSHED TO THE YEAR 2020, at 25 (Dec. 1988) [hereinafter 2020 REPORT]; Invitation to Join, Chesapeake Bay Foundation Fact Sheet, at 1 (Chesapeake Bay Foundation, Annapolis, Md.) (1991) (on file with author).
4. See 2020 REPORT, *supra* note 3, at 29-30; see also BAY REPORT, *supra* note 1, at 7.
5. ECONOMIC GROWTH, RESOURCE PROTECTION, & PLANNING COMMISSION, 1993 REPORT, at 34-35 (Dec. 1, 1993) [hereinafter ANNUAL REPORT].

acres of forests to development by the year 2020.⁶ To save the Bay, growth must be redirected to areas more suitable for development.⁷

For approximately seventy years, most states⁸ relinquished responsibility for planning and land use regulation to local governments.⁹ While some local governments generated innovative land use regulations designed to promote environmental objectives,¹⁰ most localities contributed to environmental degradation through lax regulation of development motivated primarily by economic considerations and parochial attitudes.¹¹ Since the 1950s, these lax regulatory

6. BAY REPORT, *supra* note 1, at 7; BAY STUDY, *supra* note 2, at 3; 2020 REPORT, *supra* note 3, at 18-24; Tom Horton, *The Last Skipjack*, N.Y. TIMES MAG., June 13, 1993, at 32.
7. See, e.g., BAY REPORT, *supra* note 1, at 9-12; BAY STUDY, *supra* note 2, at 3; 2020 REPORT, *supra* note 3, at 35-40.
8. State enabling laws were adopted during the 1920s and local governments were generally delegated full planning and zoning responsibilities. Since the 1970s, a growing number of states have retrieved some of this responsibility in order to address regional and environmental concerns. See Frank J. Popper, *Understanding American Land Use Regulation Since 1970*, J. OF THE AM. PLAN. ASS'N, Spring 1988, at 291; see also 2020 REPORT, *supra* note 3, at 2-4.
9. See Popper, *supra* note 8, at 291. On the whole, local governments have an undistinguished record in exercising this delegated responsibility, especially with respect to environmental and regional concerns. JOHN M. DEGROVE, *NEW FRONTIER FOR LAND POLICY—PLANNING AND GROWTH MANAGEMENT IN THE STATES 2* (1992); Charles M. Haar & Jerold S. Kayden, *Zoning After 70 Years*, N.Y. TIMES, Nov. 24, 1986, at A19.
10. These innovative techniques are discussed in Part IV of this Article. They were all developed by local governments. This is one of the major successes of local land use regulation. Haar & Kayden, *supra* note 9.
11. 2020 REPORT, *supra* note 3, at 2. Tom Horton, an author and leading advocate for sensible and managed growth, recently observed:
 Imagine that we had set out a couple of decades ago to protect the nation's air and water without any national Clean Air Act or Clean Water Act. Imagine that we had, instead, left it up to county commissions, boards of supervisors and town councils across the land. It would have been a polluter's dream: localities by the thousands relaxing and waiving environmental standards to keep or attract industry; rural officials succumbing to the onslaught of corporations with bottomless legal and financial resources; a bewildering hodge-podge of air-and water-quality rules, ranging from downright exclusionary to anything goes.
 It would have been a mess.
 Yet this same parochial approach to environmental protection, long ago deemed disastrous for our air and water, has been zealously enshrined for the protection of land—the third pillar of environmental quality. "Local control" is the mantra here, and with few exceptions, land use is controlled by counties and towns.
 And it *has* been a mess.
 Of course, land is different, the argument often goes. For the most part, land is privately and locally owned, and thus rightly a

patterns have produced unplanned sprawl development¹² with unintended but harmful environmental consequences,¹³ while other more suitable areas have been bypassed.¹⁴ Sprawl development places un-

local issue. But the environmental impacts of poor land use are no more private, or confined to political boundaries, than the ashy plume from a tall smokestack, or the discharge from a sewage plant washing downstream.

Tom Horton, *An Ounce of Prevention*, MID-ATLANTIC COUNTRY, July 1993, at 24.

12. Sprawl development is described in the following manner: "Under the sprawl pattern of development, new growth would follow its present trend of expanding outward in all directions at low densities, seeking always the lowest priced land. Sprawl takes place naturally in the absence of energetic and coordinated public policies to guide new growth" THE MARYLAND NATIONAL CAPITAL PARK & PLANNING COMM'N, . . . ON WEDGES AND CORRIDORS—A GENERAL PLAN FOR THE MARYLAND-WASHINGTON REGIONAL DISTRICT 136 (Jan. 22, 1964) [hereinafter GENERAL PLAN]. James W. Rouse, the developer of Columbia, Maryland, and the New Town located in central Howard County, described sprawl from a developer's viewpoint: "Sprawl is inefficient. It stretches out the distances people must travel to work, to shop, to worship, to play. . . . Sprawl is ugly, oppressive, massively dull. It squanders the resources of nature—forests, streams, hillsides—and produces vast, monotonous armies of housing and graceless, tasteless clutter." James W. Rouse, *Cities that Work for Man—Victory Ahead*, Address at the Lion's International/University of Puerto Rico Symposium on "The City of the Future" 2 (Oct. 18, 1967) (on file with author).

Local governments are motivated to promote sprawl by economic considerations including an increased tax base. High income residents generally occupy the homes built in these low density areas and the housing patterns established by sprawl generally discourage affordable housing. See HOWARD COUNTY 1990 GENERAL PLAN, A SIX POINT PLAN FOR THE FUTURE 59 (July 2, 1990).

13. These consequences include toxic runoff, loss of pervious surfaces, increased sedimentation and soil erosion, and water pollution. BAY REPORT, *supra* note 1, at 7; see also DEGROVE, *supra* note 9, at 18, 34; *Beach Pollution Watch*, WASH. POST, Aug. 4, 1994, at A9 (Maryland ranked fifth in the number of beach closings due to polluted water in 1993).
14. See, e.g., 2020 REPORT, *supra* note 3, at 18-19; Tom Horton, *This Land Is My Land*, MID-ATLANTIC COUNTRY, May 1993, at 22. Horton vividly portrays the problem:

At local levels, where most of the land-use power resides, we zone virtually every acre of our farmland and forest land for residential lots, then wonder why growth occurs willy-nilly, and not in the areas where it makes sense—in the areas where development, and the sewers and roads and schools to serve it, already exist.

The result is sprawl development and strip malls that chew up huge amounts of remaining natural lands, erode our agricultural base, suck the commercial life out of our cities and small towns, and are just downright ugly. To compensate, we regulate piecemeal at the state and federal level—protecting trees, protecting shoreline, protecting farmland, protecting wetlands. Given the mess we have made of planning and zoning for growth, this band-aid approach is a necessary alternative to environmental deterioration.

Id. at 25.

anticipated burdens on local governments in the form of infrastructure overload as roads, schools, and other public facilities are stretched beyond their intended capacities.¹⁵ Sprawl development encourages the migration of high income residents from the cities to suburbia¹⁶ and, as a result, the central cities are experiencing declining population, decreased tax base, and waning political influence.¹⁷ These trends threaten long term social and environmental problems.

The harmful environmental consequences of unmanaged growth prompted state action, particularly in Maryland, which is the most affected by the environmental degradation of the Bay because it is host to the largest portion of Bay waters.¹⁸ Since 1970, Maryland has adopted a number of environmental laws including wetlands protection,¹⁹ state control over water and sewage programs,²⁰ tree preservation,²¹ farmland preservation,²² and a regional critical area program that curtails development within one thousand feet of affected waters and wetlands.²³ While these piecemeal programs achieved limited success in addressing their particular problems, other more comprehensive remedies are necessary to adequately protect the Bay from the consequences of unmanaged growth.²⁴

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15. The belief that sprawl development is an economic benefit for local governments may be based on invalid assumptions. A study of the government of Loudon County, Virginia, concluded that the fiscal impact of sprawl development on local government exceeds the increased public revenue from an expanded tax base. AMERICAN FARMLAND TRUST, DENSITY-RELATED PUBLIC COSTS 5-6 (1986); see also DEGROVE, *supra* note 9, at 9, 14, 34; GENERAL PLAN, *supra* note 12, at 136.
 16. See GENERAL PLAN, *supra* note 12, at 136.
 17. The fragmentation of metropolitan areas has magnified the gap between growth and local government's capacity to respond with a consistent and rational growth policy for the efficient allocation of resources. Michael deCourcy Hinds & Erik Eckholm, *80s Legacy: States and Cities in Need*, N.Y. TIMES, Dec. 30, 1990, § 1, at 1; see Marshall V. Kaplan & Peggy Cuciti, *Reconciling Fragmented Local Government and Infrastructure Services*, LAND USE IN TRANSITION (Urban Land Institute, Washington, D.C.), 1993, at 26-31; David Rusk, *Suburban Renewal*, N.Y. TIMES, Sept. 8, 1993, at A23; Roberto Suro, *Where America Is Growing: The Suburban Cities*, N.Y. TIMES, Feb. 23, 1991, § 1, at 1; Roberto Suro, *Where Have All the Jobs Gone? Follow the Crab Grass*, N.Y. TIMES, Mar. 3, 1991, § 4, at 5; Barbara Vobejda, *Half of Population Lives in Urban Areas*, WASH. POST, Feb. 21, 1991, at A1.
 18. About 1,726 square miles, which is more than half the Bay, lies within Maryland. DIANE P. FRESE, ET AL., MARYLAND MANUAL, A GUIDE TO MARYLAND GOVERNMENT 2 (1991-92).
 19. MD. CODE ANN., NAT. RES. §§ 9-101 to 9-502, 8-1201 to 8-1211 (1990 & Supp. 1994).
 20. MD. CODE ANN., NAT. RES. § 8-1204 (1990 & Supp. 1994).
 21. MD. CODE ANN., NAT. RES. §§ 5-1601 to 5-1613 (Supp. 1994).
 22. MD. CODE ANN., AGRIC. §§ 2-501 to 2-516 (1985 & Supp. 1994).
 23. MD. CODE ANN., NAT. RES. §§ 8-1801 to 8-1816 (1990 & Supp. 1994); COMAR §§ 14.15.01 to 14.15.07.
 24. 2020 REPORT, *supra* note 3, at 13-15; Terry J. Harris, *The Frightening Future*

To this end, Maryland, Pennsylvania, and Virginia formed the Chesapeake Bay Commission to coordinate legislative planning and programs to restore the Bay.²⁵ On December 14, 1987, the Chesapeake Bay Agreement was signed by representatives of the Chesapeake Bay Commission, the District of Columbia, Maryland, Pennsylvania, Virginia, and the United States Environmental Protection Agency.²⁶ This Agreement commissioned a one year study to evaluate anticipated growth issues through the year 2020 and a distinguished panel was assigned the task of developing strategies to alter traditional growth patterns.²⁷

The Year 2020 Panel (the 2020 Panel) concluded that continuation of existing development patterns and unmanaged growth will result in serious damage to the Bay unless bold measures are implemented.²⁸ The 2020 Panel devised six strategic policies which have come to be known as the "Visions of 2020": (1) development is to be concentrated in suitable areas; (2) sensitive areas are to be protected; (3) growth is to be directed to existing population centers in rural areas, and resource areas are to be protected; (4) stewardship of the Bay and the land is to be a universal ethic; (5) conservation of resources is to be a regional priority; and (6) funding mechanisms are to be in place to achieve all other visions.²⁹ The 2020 Panel determined that these policies would be best achieved through a

of the Chesapeake Bay, WASH. POST, Mar. 17, 1991, at D8; Horton also offers some comprehensive proposals:

For any widespread and sustained change in our land-use dilemma, several things have to happen:

Some form of control or oversight must be instituted at a regional or state level. States already have clear legal authority to do this, and eight of them, including New Jersey, have now enacted some form of comprehensive land-use law. We must be willing to put significant portions of our agricultural and forest lands off limits to most development—not just zone them for two-to-five acre residential lots. As long as farmers can still farm, and timber companies can still cut timber, this does not amount to an illegal "taking," as some property-rights activists charge. If such land has already been subdivided and approved for development, compensation might be called for. Developers have to be allowed much freer range to create livable, high-density, mixed-use projects in areas where it makes sense for growth to occur. This may prove more difficult than protecting open space, since it is common for residents of towns to reject any proposals to add density. All too often, sprawl happens because it is the path of least resistance.

Horton, *supra* note 11, at 24.

25. DIANE P. FRESE, ET AL., MARYLAND MANUAL, A GUIDE TO MARYLAND GOVERNMENT 17 (1991-92).

26. *Id.*

27. 2020 REPORT, *supra* note 3, at 15.

28. *Id.* at 1.

29. *Id.* at 4-8.

regulatory system that includes state initiated land use policies and standards that are applied to local governments in a mandatory fashion and result in clearly defined areas designated for growth and protection.³⁰ The 2020 Panel charged Maryland with the responsibility for adopting a statewide comprehensive plan and developing criteria to achieve consistency between the state plan and local actions.³¹

Thus began a three year struggle to define Maryland's role in a planning and regulatory process traditionally operated by local governments. In late 1989, the Governor appointed a thirty-three member commission responsible for evaluating the role of the state in directing growth and development in a manner that will achieve the Visions of 2020.³² The Barnes Commission³³ spent sixteen months conducting evaluations of development strategies and holding public hearings throughout Maryland.³⁴ Its report, published in January 1991, concluded that Maryland's population will increase by one million by the year 2020, that sprawl development is a major contributing factor in the loss of farms and forests and pollution of the Bay, and that the threat of unmanaged growth to the Bay watershed is so substantial that a statewide land use regulatory system is needed to successfully implement the Visions of 2020.³⁵

The major elements of the Barnes Commission recommendations were proposed by the Governor as administration bills during the 1991 session of the Maryland General Assembly.³⁶ These bills (the 2020 Bills) included the Visions of 2020 as the strategic policies of the state,³⁷ and proposed a system of mandatory local planning and zoning to be implemented under a statewide land use classification system³⁸ that divided local jurisdictions into four broad overlay zoning districts: rural and resource areas, sensitive areas, developed areas,

30. *Id.* at 16-18.

31. *Id.* at 49-50.

32. Liz Bowie, *Commission To Study Growth in Chesapeake Bay Region*, THE SUN (Balt.), Oct. 11, 1989, at 3D.

33. The Commission was nicknamed the Barnes Commission after its Chairman, former United States Congressman from Montgomery County, Michael D. Barnes.

34. MARYLAND OFFICE OF PLANNING, 1991 ANNUAL REPORT, PLANNING WORKS 4 (1992) [hereinafter PLANNING WORKS].

35. See BAY REPORT, *supra* note 1, at 7-16.

36. Senate Bill 227, S. 227, 1991 Sess. (Md. 1991), and House Bill 214, H.D. 214, 1991 Sess. (Md. 1991), were introduced as administration bills by the President of the Senate and the Speaker of the House, respectively, on January 21, 1991, and were quickly given the nickname "2020." M. Dion Thompson, *County Commissioners, Farmers Decry Chesapeake Bay Preservation Bill*, THE SUN (Balt.), Feb. 27, 1991, at 2C.

37. S. 227, 1991 Sess. (Md. 1991); H.D. 214, 1991 Sess. (Md. 1991).

38. S. 227, 1991 Sess. §§ 15-203, 15-207, 15-303 (Md. 1991).

and areas suitable for growth.³⁹ Standards for sensitive areas were included in the 2020 Bills,⁴⁰ while standards for the other classifications were proposed for adoption by executive regulation.⁴¹ The 2020 Bills required local governments to adopt plans and programs consistent with the land use classification system and the standards proscribed for each zoning district.⁴² Enforcement was keyed to a state certification process and involved the Office of Planning in the review and approval of local plans and programs.⁴³ A dispute resolution process was included to address conflicts over certification decisions.⁴⁴ An infrastructure fund was proposed to finance desired levels of growth beyond the capacity of particular local governments and fund allocations were to be determined by formula grants,⁴⁵ measured by the wealth of local government,⁴⁶ and incentive grants.⁴⁷

The proposed 2020 Bills introduced a major state presence into a field that was all too frequently characterized by lax regulation and parochialism.⁴⁸ The 2020 Bills would replace a hodgepodge of local regulations with consistent state policies and standards.⁴⁹ These Bills followed the recommendations of the 2020 Panel,⁵⁰ and a growing trend of state regulatory initiatives adopted elsewhere⁵¹ and

39. *Id.* §§ 15-203, 15-204.

40. *Id.* § 15-204.

41. *Id.* § 15-203. The Commission had initially proposed standards for legislative consideration which were deleted from the Governor's bills. *See id.* §§ 15-204 to 15-206.

42. S. 227, 1991 Sess. § 15-206 (Md. 1991); H.D. 214, 1991 Sess. § 13-207 (Md. 1991).

43. S. 227, 1991 Sess. § 15-208 (Md. 1991).

44. *Id.* § 15-404.

45. *Id.* § 15-601(f).

46. *Id.* § 15-601(g).

47. *Id.* § 15-605.

48. *See generally*, Horton, *supra* note 11. The element of greed is also a factor sometimes present in the land use regulatory process as illustrated by Maryland's periodic history of political corruption by local zoning officials that prompted the state legislature and the courts to adopt a number of reforms that include among other requirements: open meetings, MD. CODE ANN., STATE GOV'T §§ 10-501 to 10-512 (1993 & Supp. 1994); public ethics and financial disclosure requirements, MD. ANN. CODE art. 40A, §§ 1-101 to 7-104 (1993 & Supp. 1994); and adjudicatory safeguards, *Hyson v. Montgomery County Council*, 242 Md. 55, 217 A.2d 578 (1966); *Ocean Hideaway Condominium Ass'n v. Boardwalk Plaza Ventures*, 68 Md. App. 650, 515 A.2d 485 (1986).

49. Shelly S. Wasserman, *Managing Growth*, MARYLAND B. J., Jan.-Feb. 1992, at 12, 13.

50. The 2020 Panel urged the adoption of state initiated policies and standards, mandatorily imposed on local governments, and which clearly define growth and protected areas. 2020 REPORT, *supra* note 3, at 16-17, 44-48. The 2020 Panel proposals satisfied all three objectives.

51. *Id.*; Wasserman, *supra* note 49, at 13-16.

in Maryland under the Chesapeake Bay Critical Area Program.⁵²

The provisions for statewide standards and stringent state oversight were the most controversial parts of the 2020 Bills and eventually led to their defeat.⁵³ The response to the Bills was swift and clamorous. Property rights advocates, developers, financial organizations, farmers, the Maryland Municipal League, and the Maryland Association of Counties joined forces to form a solid and effective opposition to the 2020 Bills.⁵⁴ The Bills were defeated in committees by lopsided margins;⁵⁵ and the matter was referred to a summer study committee of the General Assembly.⁵⁶

A compromise emerged from the 1991 summer study which secured agreement on the Visions of 2020 as strategic state policy and provided for the policy to be mandatory on local governments, but retreated from state-initiated standards, oversight, and enforcement.⁵⁷ The compromise left local governments with the sole responsibility to define growth and protected areas and develop implementation measures to apply state policy.⁵⁸ The compromise approach was enacted into law during the 1992 session.⁵⁹

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52. This regional program of limited application employs state initiated policies and standards that are mandatory for certain local governments. MD. CODE ANN., NAT. RES. §§ 8-1801 to 8-1816 (1990 & Supp. 1994); see *Bellanca v. Comm'rs of Kent County*, 86 Md. App. 219, 586 A.2d 62, cert. denied, 323 Md. 33, 591 A.2d 249 (1991).
 53. Howard Schneider, *Maryland Assembly Kills Plan To Curb Growth; Environmentalists, Schaefer Rebuffed*, WASH. POST, Mar. 15, 1991, at B1.
 54. PLANNING WORKS, *supra* note 34, at 2; Howard Schneider, *Views on Maryland Growth Control Plan Range from 'Threat' to 'Vision'*, WASH. POST, Feb. 27, 1991, at D3; Roll, *Growth Bill Draws Fire from Builders, Farmers*, MONTGOMERY JOURNAL, Feb. 27, 1991, at A5; M. Dion Thompson, *County Commissioners, Farmers Decry Chesapeake Bay Preservation Bill*, THE SUN (Balt.), Feb. 27, 1991, at 2C.
 55. The Senate Bill failed on a vote of 10-1 in the Senate Economic and Environmental Matters Committee on March 14, 1991. The House of Delegates version failed on a vote of 18-4 in the House Environmental Matters Committee on the same day. C. Fraser Smith, *2020 Proposal To Govern Maryland Growth Put Off, Schaefer Initiative Rebuffed by House, Senate Committees*, THE SUN (Balt.), Mar. 15, 1991, at A1.
 56. The clamorous opposition to the 2020 proposals overshadowed strong support from environmental groups which gave the legislature concern about an outright rejection of the state regulatory concept. Consequently, the legislative leadership pledged a comprehensive study during the summer of 1991 using the 2020 proposals as a starting point. Howard Schneider, *Maryland Assembly Kills Plan To Curb Growth; Environmentalists, Schaefer Rebuffed*, WASH. POST, Mar. 15, 1991, at B1.
 57. James D. Lawler, *Maryland: Growth Control Revisited*, PLANNING (American Planning Ass'n), Jan. 1992, at 5.
 58. *Id.*
 59. House Bill 1195, H.D. 1195, 1992 Sess. (Md. 1992), was enacted by the General Assembly of Maryland in 1992 as Section 2, Chapter 437, of the 1992 Laws

This Article examines the new requirements of Maryland's law, both the strengths and weaknesses, and proposes amendments necessary to fully achieve state policy. The new requirement for mandatory consistency between state policy and local actions and the new authorization for use of flexible techniques to implement the state policy will challenge both state and local governments to develop innovative regulatory measures. Potential impediments to implementation of the state policy need to be overcome through careful regulation and further legislation. The new law offers a modest beginning in developing a process under which more sensible land use patterns may emerge.

II. THE PLANNING ACT REQUIREMENTS

The adoption of the Maryland Economic Growth, Resource Protection, and Planning Act of 1992 (the Planning Act),⁶⁰ resolved the debate on what framework will be used to balance the sometimes competing objectives of economic development, growth management, and environmental protection. Both the 2020 Panel and the Barnes Commission proposed a top-down approach where the state sets the goals, program content, and standards that are implemented at the local level.⁶¹ The Planning Act adopted a bottom-up approach where the program content, standards, and implementation are developed at the local level subject to generalized state policy and state oversight with respect to format and timing. The bottom-up approach represents a concession to the political aspects of the locally based planning process and the difficulties of interfering with that process⁶² and, like many compromise measures, contains both strengths and weaknesses with respect to its potential implementation.

The major strengths of the legislation include a new comprehensive growth policy, mandatory application of the policy on local governments, a state oversight mechanism to monitor compliance, a consistency requirement, and new authorization for use of flexible

of Maryland, 1992 Md. Laws § 2, ch. 437, now codified at MD. ANN. CODE art. 66B (Supp. 1994), and MD. CODE ANN., STATE FIN. & PROC. (Supp. 1994). House Bill 457, H.D. 457, 1992 Sess. (Md. 1992), was enacted by the General Assembly of Maryland in 1992 as Section 2, Chapter 436, of the 1992 Laws of Maryland, 1992 Md. Laws § 2, ch. 436, now codified as MD. ANN. CODE art. 66B § 10.01 (Supp. 1994).

60. H.D. 1195, 1992 Sess. (Md. 1992).

61. S. 227, 1991 Sess. (Md. 1991); H.D. 214, 1991 Sess. (Md. 1991); 2020 REPORT, *supra* note 3, at 16-17. This approach follows the more successful state programs. See DEGROVE, *supra* note 9, at 2-14.

62. Horton, *supra* note 11, at 24.

techniques. These last two implementation measures provide significant potential for successful application of state policy if properly applied and, because of their significance, each measure is discussed separately in Parts III and IV of this Article.

The Planning Act establishes strategic policies which collectively constitute the state growth policy. This growth policy is designed to promote the long-term environmental and economic health of the region.⁶³ The new state growth policy largely incorporates the six components of the Visions of 2020 and requires development to be located in areas where it makes sense—where roads, schools, and other public facilities and services already exist—and to avoid areas where development would cause environmental harm.⁶⁴ Specifically, the new policy requires that local governments concentrate development in suitable areas⁶⁵ and protect sensitive,⁶⁶ rural,⁶⁷ and resource areas.⁶⁸ The legislation also encourages economic development through streamlined regulatory mechanisms,⁶⁹ and calls for the removal of administrative impediments in the development review process for those areas designated as suitable for growth.⁷⁰ A provision for affordable housing was also added as an element of state policy by separate legislation.⁷¹ The state growth policy represents a bold initiative designed to change the way land use is regulated at the local level. The new policy seeks to eliminate sprawl development, the most environmentally destructive form of development.⁷² The success of the policy, however, depends on the effectiveness of the implementation programs in applying the policy as it was intended.

The Planning Act provides a mandatory process under which local governments adopt comprehensive plans⁷³ and modify local regulations to be consistent with state policy.⁷⁴ Local governments are also encouraged to use innovative and flexible techniques to achieve state policy.⁷⁵ The Planning Act explicitly requires local governments to protect sensitive areas.⁷⁶ All local comprehensive plans

63. MD. ANN. CODE art. 66B, § 3.06 (Supp. 1994); MD. CODE ANN., STATE FIN. & PROC. § 5-7A-01 (Supp. 1994).

64. Horton forcefully describes the need for the policy. Horton, *supra* note 11, at 25.

65. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-01(1) (Supp. 1994).

66. *Id.* § 5-7A-01(2).

67. *Id.* § 5-7A-01(3).

68. *Id.* § 5-7A-01(5).

69. *Id.* § 5-7A-01(6).

70. MD. ANN. CODE art. 66B, § 3.05(a)(1)(vi)(1) (Supp. 1994).

71. H.D. 457, 1992 Sess. (Md. 1992).

72. DEGROVE, *supra* note 9, at 9, 14, 34.

73. MD. ANN. CODE art. 66B, § 3.06(b) (Supp. 1994).

74. *Id.* § 4.09.

75. *Id.* § 3.05(a)(1)(vi).

76. *Id.* § 3.06(b), (c).

must include protection for streams and stream buffers, 100-year floodplains, endangered species habitats, steep slopes, and other sensitive areas that local governments may determine to be in need of protection from adverse impacts of development.⁷⁷ Local plans must also include recommendations to streamline the development review process and to use flexible, innovative, and cost saving techniques that foster economic development.⁷⁸

By July 1, 1997, all local governments must adopt comprehensive plans consistent with the state growth policy.⁷⁹ These local plans then serve as the basis for all regulatory actions within each jurisdiction.⁸⁰ Zoning and subdivision regulations must be made consistent with the plans,⁸¹ and therefore consistent with the state growth policy. Comprehensive zoning may be required to apply plan recommendations.⁸² Presumably all comprehensive and piecemeal zoning map amendments, which form a part of the zoning regulations, must be consistent with both local plans and state policy.⁸³

Another important strength contained in the Planning Act is state oversight in the form of a new state agency, the Economic Growth, Resource Protection, and Planning Commission (the Commission), with responsibilities for monitoring, reviewing, and reporting on the performance of local governments.⁸⁴ The Commission

77. *Id.* § 3.06(b).

78. *Id.* § 3.05(a)(1)(vi).

79. MD. ANN. CODE art. 66B, § 3.05(b) (Supp. 1994).

80. *Id.* § 4.09.

81. *Id.*

82. *Id.*

83. Maryland follows the view that both comprehensive and piecemeal zoning are legislative in nature and form an integral part of the local zoning regulations. See *Hyson v. Montgomery County Council*, 242 Md. 55, 63, 217 A.2d 573, 583 (1966); *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 66, 133 A.2d 83, 93 (1957) (Henderson, J., dissenting); see also *Udell v. Haas*, 235 N.E.2d 897, 902 (N.Y. 1968).

84. MD. CODE ANN., STATE FIN. & PROC., §§ 5-702, 5-708 (Supp. 1994). The Commission, which was appointed in March, 1993, is composed of 17 members serving two and four year terms. ANNUAL REPORT, *supra* note 5, at 1. The membership represents regions and interest groups from throughout the state. MD. CODE ANN., STATE FIN. & PROC. § 5-703 (Supp. 1994). Two members are appointed by the House and Senate and 15 members appointed by the Governor from the following categories: two members representing the Maryland Association of Counties, one member representing the Maryland Municipal League, and ten members from seven specific regions of the state. *Id.* § 5-703. The Governor is urged to select membership from business, finance, agriculture, forestry, environmental, civic, planning, and real estate development interests. *Id.* § 5-703(a)(3). The Commission must establish at least four subcommittees the responsibilities and membership of which are mandated by statute. *Id.* § 5-707. The Committee on Interjurisdictional Coordination must promote coordination and cooperation among all jurisdictions consistent with the state

must also formulate proposals for changes in the law as deemed necessary to achieve the state growth policy,⁸⁵ assure that policy goals are attained,⁸⁶ protect sensitive areas,⁸⁷ and assure that funding of state and local infrastructure is consistent with local comprehensive plans.⁸⁸ The Commission is also required to assess the progress of local governments in the implementation of state policy.⁸⁹ The Com-

growth policy and its initial membership must include five members recommended by the Maryland Association of Counties, three members recommended by the Maryland Municipal League, two planners employed by local jurisdictions, two citizens from different regions of the state, and one member selected by the Commission chair. *Id.* The Committee on Planning must promote education and outreach activities and its initial membership must include a Commission member, two members of the local chapters of the American Planning Association, two county officials one of whom is an elected official, two municipal officials one of whom is elected, and four citizen members selected by the Commission chair. *Id.* The Committee on Planning Techniques must develop and promote the use of planning guidelines, models, examples, and other planning tools needed to implement the state growth policy and local plans and its initial membership must include one Commission member selected by the Commission chair, two members selected by the Maryland Association of Counties, two members selected by the Maryland Municipal League, three members selected by the Director, Office of State Planning, as representative of private sector planning community, and two citizen members selected by the Commission chair. *Id.* The Committee on the Environment and Economic Development must promote balanced economic growth, effective protection of the environment, and cooperation among environmental and development interests and its initial membership must include one member of the Commission selected by the Commission chair, six members selected by the Governor equally representing environmental, business, local governments, and one member representing agricultural interests. *Id.* A fifth Committee on Planning and Zoning Review was appointed by the Commission and convened an organizational meeting on June 2, 1994, to examine the effectiveness of existing enabling laws. *Chairman Hutchinson Calls Another School Funding Commission Meeting*, COURTHOUSE NEWS (Md. Ass'n of Counties, Annapolis, Md.), July 15, 1994, at 6.

The specificity of the Planning Act limits discretion in making appointments to the Commission and its Committees. MD. CODE ANN., STATE FIN. & PROC. § 5-707 (Supp. 1994); H.D. 1195, 1992 Sess. § 3 (Md. 1992). The Committee membership is heavily weighted in favor of groups that played a prominent role in opposing the earlier 2020 Panel proposals, particularly the Maryland Association of Counties and the Maryland Municipal League. Anthony D. Redman, *Maryland Growth Management Turnaround*, PLANNING, June, 1992, at 5. Nevertheless, the Committees are engaged in an ambitious work program, ANNUAL REPORT, *supra* note 5, at 6-32, and they enjoy wide latitude to fashion workable and balanced methods for implementing the state's growth policy. MD. CODE ANN., STATE FIN. & PROC. § 5-707(a) (Supp. 1994).

85. *Id.* § 5-708(b)(2)(ii).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* § 5-708(a)(2).

mission has already made significant progress in developing models and guidelines for use by local governments and has adopted a comprehensive monitoring system with measurement criteria that will show whether the state growth policy is being effectively implemented.⁹⁰

The major weaknesses of the Planning Act involve the absence of standards, incentives, direction, enforcement provisions, and a dispute resolution process. The application of state policy depends entirely upon the cooperation of local governments in applying the state growth policy in good faith as part of their local comprehensive plans. Yet, there is little in the way of policy direction, standards, or incentives to guide local governments as to how the policy is to be implemented. For example, the Planning Act does not define significant terms such as "rural" or "growth" areas. Each jurisdiction can set its own growth boundaries without any clear differentiation separating growth areas from other areas. Baltimore County considers "rural" in terms of a fifty acre minimum density.⁹¹ Charles County defines it as three acre density.⁹² Washington County defines it as one acre density.⁹³ This absence of state-wide standards means local governments have little incentive to curb sprawl development which is the major objective of state policy. Rather, the perception that "more high income residents are economically beneficial" will likely perpetuate existing patterns of sprawl development⁹⁴ unless incentives are devised and applied to the implementation process.

The Planning Act does not provide standards as to how sensitive areas are to be defined. With the exception of 100 year floodplains, local governments have wide discretion to define sensitive areas differently. What is considered a steep slope in Montgomery County may not be protected in neighboring Howard County, even though the environmental impact of development is the same.

The Planning Act does not provide incentives for use of newly authorized flexible techniques. These techniques would permit the location of higher densities and different housing styles in communities designated as suitable for growth. These flexible techniques

90. The Commission measures progress based on 11 categories using a mixture of empirical and anecdotal data. ANNUAL REPORT, *supra* note 5, at 6-32. A useful measurement is reflected in a series of Matrix charts, particularly the Matrix on policy and the Matrix on consistency of regulations with policy. *Id.* at 1, 7.

91. *Id.* at 7.

92. *Id.*

93. *Id.*

94. The validity of this perception is questioned earlier in this Article, see *supra* note 15. The link between the perception and sprawl is discussed in DEGROVE, *supra* note 9, at 9, 14, 34.

would provide a key element for the effective implementation of state policy, yet potential community opposition to their use may be formidable and local governments are left without incentives or guidance as to how and when the techniques should be applied.⁹⁵

The Commission's monitoring responsibilities are made difficult by the absence of clear policy direction on how growth and protected areas are to be defined. Indeed, the Commission recently acknowledged the need to define roles and responsibilities in order to properly implement the Visions of 2020.⁹⁶ The Commission cannot monitor compliance effectively when the baseline for any measurement of compliance is undefined or defined differently by each local government who can pay lip service to the state policy by incorporating the language of the Visions into their local plans and regulations and yet fail to clearly define growth and protected areas.

Another weakness in the state oversight is the lack of enforcement provisions. Unlike the 2020 Panel proposals, the Planning Act provides for only modest sanctions in the event of noncompliance.⁹⁷ State funding or support for state and local projects may be withheld if the project is deemed inconsistent with the state growth policy.⁹⁸ However, an exemption permits both the state and local governments to avoid this sanction for extraordinary circumstances and where no reasonable alternative exists.⁹⁹ Another sanction permits the Commission to adopt standards under limited circumstances. Failure to adopt the sensitive area element of a local comprehensive plan by July 1, 1998, will permit the Commission to adopt standards for sensitive areas that are binding on local development until such time as the local plan is brought into compliance.¹⁰⁰ Because local governments are given wide discretion to define sensitive areas and establish standards for them, it is unlikely that these sanctions will ever be levied.

The Commission is without clear authority to approve local plans or programs and, other than for sensitive areas, adopt standards with respect to state policy. This lack of enforcement authority may undermine policy implementation. For example, protection of farmland is a major element of state policy, but implementation of the policy is entirely a matter of local discretion both in terms of defining

95. Developed communities often provide the greatest opposition to new development. NAT. COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess., pt. III, ch. 1, at 206 [hereinafter BUILDING THE AMERICAN CITY]; Horton, *supra* note 11, at 24.

96. ANNUAL REPORT, *supra* note 5, at 10.

97. MD. CODE ANN., STATE FIN. & PROC. §§ 5-709, 5-7A-02 (Supp. 1994).

98. *Id.* § 5-7A-02.

99. *Id.* §§ 5-7A-02(a)(2), (b)(2).

100. *Id.* § 5-709.

protected areas and adopting restrictive measures to insure preservation. Under the current framework, local neglect of state policy can go unchallenged. The Commission needs authority to act when local governments fail to implement state policy. Plan approval and rule making authority would rectify situations where local governments fall short of adequate implementation.¹⁰¹

Another necessary enforcement provision involves the right of the state to intervene in cases where state policy issues are at stake. Intervention is important because of the critical nature of state policy and the serious consequences of nonenforcement. These enforcement provisions can be effective without ever being invoked. For example, designation of appropriate densities to adequately preserve farmland may be a difficult task for local governments in the face of local opposition. However, the mere possibility of the adoption of standards by the Commission or state intervention may prompt local governments to take serious steps to implement state policy. These enforcement provisions would provide the Commission with authority similar to that of the Chesapeake Bay Critical Area Commission.¹⁰²

The Planning Act fails to provide a dispute resolution process for conflicts that will invariably arise. For example, there is no process for determining consistency between the state growth policy and local plans or regulations, although both the state and local governments are required to adopt procedures for review of certain affected projects.¹⁰³ Presumably, decisions to withhold state funds or other support will be based on initial state and local government determinations of inconsistency. However, the Planning Act does not provide criteria for making this determination or specify a forum where disputes involving state and local governments, developers, and other groups with legitimate concerns can be resolved.

Dispute resolution at the administrative level would reduce litigation and promote consistent application of state policy. Moreover, an administrative process to resolve disputes seems a better alternative than case by case adjudication by the courts. An administrative dispute resolution process should include the authority to establish procedural rules governing access and scope of review as well as substantive rules governing standards and criteria. The Commission is the appropriate forum to hear and decide these disputes because it will be developing an expertise pertaining to the state growth policy.

101. Necessary elements of a successful state growth management program include standards, criteria, and rules. See DEGROVE, *supra* note 9, at 4, 162-63; 2020 REPORT, *supra* note 3, at 16.

102. See MD. CODE ANN., NAT. RES. §§ 8-1806, 8-1809 (1990 & Supp. 1994).

103. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-02(c) (Supp. 1994).

The Planning Act establishes a new context for local planning and land use regulation and represents a modest first step in providing for more state involvement in this process. However, the goals of state law far exceed the capacity of the administrative framework designed to achieve them and, in this respect, the legislation is incomplete. Greater policy direction, standards, incentives, enforcement provisions, and a dispute resolution process are needed to make implementation effective.¹⁰⁴ The separate application of state policy by each local government without some measure of cohesiveness and a single dispute resolution process will undermine the integrity of the policy and permit it to become a proverbial Tower of Babel.¹⁰⁵ The Commission needs to be provided with the same authority currently exercised by the Chesapeake Bay Critical Area Commission.¹⁰⁶

Notwithstanding the incomplete nature of the legislation, its bottom-up approach can be successful if a careful balance is struck so that state policy is applied with enough flexibility to accommodate local initiatives and regional differences, but with sufficient cohesiveness to retain its integrity and not to be sacrificed to either local fragmentation or neglect. The challenge for the Commission will be to encourage local governments to actually adopt plans and regulations that are truly consistent with the state growth policy¹⁰⁷ and use the flexible techniques now authorized to implement that policy.¹⁰⁸

III. THE CONSISTENCY REQUIREMENT

The state growth policy is made mandatory on local governments through the consistency requirement which is simply stated but difficult to apply.¹⁰⁹ Regulatory actions must be consistent with goals

104. These elements are present in successful state programs and are recommended by experts in the field as essential. See DEGROVE, *supra* note 9, at 10, 109.

105. See *id.*; Genesis 11:5-9.

106. See MD. CODE ANN., NAT. RES. §§ 8-1801, 8-1816 (1990 & Supp. 1994); North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1175, *cert. denied*, 336 Md. 224, 647 A.2d 444 (1994) (intervention authority); Bellanca v. County Comm'rs of Kent County, 86 Md. App. 219, 586 A.2d 62, *cert. denied*, 323 Md. 33, 591 A.2d 249 (1991) (state plan approval).

107. MD. ANN. CODE art. 66B, §§ 3.05(b), 3.06(b), 4.09 (Supp. 1994).

108. MD. ANN. CODE art. 66B, §§ 10.01, 11.01, 12.01 (Supp. 1994).

109. The Commission summarized the problem nicely:

Attention to consistency arises from the fact that while no plan in Maryland has ever advocated sprawl, this has been the result where there is no strong connection between land use planning and land use regulation. Well-drafted goals and policies have no meaning if they are not supported by equally well-drafted zoning ordinances and subdivision regulations. A working definition of consistency is difficult to achieve, however. A literal translation of plan to regulation might produce a situation where planners perform a function that is legis-

and policies contained in the comprehensive plan. The problem lies in the varied nature of comprehensive planning. Some plans contain site specific recommendations, while others contain general recommendations with little concrete application to particular regulatory actions. Moreover, planning and regulation serve different functions, and the replication of the plan in regulation simply creates duplication in process. A delicate balance is needed between the two functions in order to maintain the integrity of one without replacement of the other.

The planning process provides a sound basis for regulatory action. Planning decisions are reached after careful study and public debate on a range of issues affecting comprehensive areas.¹¹⁰ These planning decisions, which possess a degree of rationality generally absent from ad hoc regulatory decisions,¹¹¹ are incorporated into a comprehensive plan, master plan, or general plan.¹¹² Under the consistency requirement, these plans serve as the basis for subsequent regulatory decisions.¹¹³ The consistency requirement promotes the goals of comprehensive planning and links planning and development regulations so these regulations, and decisions made pursuant to them, are evaluated against a planning baseline.¹¹⁴

The consistency requirement is not new and was explained in *Fasano v. Board of Commissioners*,¹¹⁵ a famous Oregon case which held that zoning decisions must be consistent with land use and density elements of the comprehensive plan.¹¹⁶ Since Oregon has used the consistency requirement longer than any other jurisdiction, its case law provides some useful insights into how consistency is applied. A consistency determination involves all elements of a comprehensive plan.¹¹⁷ For example, a zoning request that was not consistent with the plan's staging element was found to lack consistency.¹¹⁸ In another

lative in nature, or a situation where both documents are so similar it is not necessary to have both.

ANNUAL REPORT, *supra* note 5, at 15. The Subcommittee on Planning Techniques is drafting an "operational" definition of consistency. *Id.*

110. See generally *Mraz v. Comm'rs of Cecil County*, 291 Md. 81, 433 A.2d 771 (1981).

111. See *DEGROVE*, *supra* note 9, at 15, 21.

112. The terms "comprehensive plan," "master plan," and "general plan" are interchangeable. MD. ANN. CODE art. 66B, § 1.00(f)(2) (Supp. 1994).

113. MD. ANN. CODE art. 66B, § 4.09 (Supp. 1994).

114. 1 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 12.04[2] (4th ed. 1994) [hereinafter RATHKOPF]; see *DEGROVE*, *supra* note 9, at 15, 21.

115. 507 P.2d 23 (Or. 1973).

116. *Id.* at 29-30.

117. *Id.* at 28.

118. *Philipi v. City of Sublimity*, 662 P.2d 325, 329 (Or. 1983).

case, a zoning request for greater intensity of use than contemplated by the plan was found to be inconsistent with the plan.¹¹⁹

The consistency requirement as applied to zoning regulations will present a major surprise for many because of the long-standing Maryland common-law rule that master plans are only guides and cannot form the basis for zoning decisions.¹²⁰ This common-law rule, of course, only applies in the absence of statute¹²¹ and the courts have recognized that local efforts to link planning and zoning actions by statute are appropriate and elevate the status of comprehensive plans to a regulatory device.¹²²

Consistency was applied in Maryland in several cases. In *County Commissioners v. Gaster*,¹²³ consistency between the master plan and subdivision approval was required by statute.¹²⁴ A denial of a sub-

119. *Gillis v. City of Springfield*, 611 P.2d 355, 356-57 (Or. Ct. App. 1980).

120. See STANLEY D. ABRAMS, GUIDE TO MARYLAND ZONING DECISIONS § 5.2 (3d ed. 1992). The common-law rule is not unique to Maryland and developed at a time when local governments struggled with the implementation of their newly delegated land use authority. See generally Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). The term "comprehensive plan" has been a part of zoning enabling laws since the 1920s. *Id.* at 1154. The plan was intended to provide a link between planning and zoning actions and the enabling laws provided that zoning be "in accord with the comprehensive plan." *Id.* When zoning was first applied at the local level, however, many jurisdictions neglected to adopt comprehensive plans as the term is now understood and this omission caused problems for reviewing courts when the zoning was challenged. *Id.*

At one time, the term "comprehensive plan" was undefined which allowed judges to define the plan as something other than a physical document. Hence, some courts defined the "comprehensive plan" as the cumulative product of comprehensive zoning regulations, administrative practice, and local custom. See *Nottingham Village, Inc. v. Baltimore County*, 266 Md. 339, 292 A.2d 680 (1972); *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 133 A.2d 83 (1957); *Udall v. Haas*, 235 N.E.2d 897 (N.Y. 1968). On this basis the comprehensive plan was defined as something different than a master plan. The result of these decisions rendered master plans mere guides that were not to play a significant role in the regulatory process. *Kanfer v. Montgomery County Council*, 35 Md. App. 715, 373 A.2d 5 (1977). Since comprehensive plans are now defined by law to include master plans and general plans, MD. ANN. CODE art. 66B, § 1.00 (Supp. 1994), it is unlikely that the common-law rule will hinder the implementation of the consistency requirement of the Planning Act.

121. *Boyd's Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 702-04, 526 A.2d 598, 608-09 (1987); *Floyd v. Council of Prince George's County*, 55 Md. App. 246, 258-59, 461 A.2d 76, 83 (1983).

122. *Boyd's Civic Ass'n*, 309 Md. at 702-04, 526 A.2d at 608-09; *Floyd*, 55 Md. App. at 258-59, 461 A.2d at 83.

123. 285 Md. 233, 401 A.2d 666 (1979).

124. *Id.* at 242, 401 A.2d at 670.

division approval based on a finding of inconsistency with the plan was upheld despite conformity with the applicable zoning.¹²⁵ The master plan contained a staging element that limited density to adequate roads and the development was denied on that basis.¹²⁶ The *Gaster* decision was followed in *Coffey v. Maryland-National Capital Park & Planning Commission*.¹²⁷ Several local governments have linked planning and zoning by a statutory consistency requirement¹²⁸ and the validity of this approach was acknowledged in *Boyd's Civic Association v. Montgomery County Council*.¹²⁹

The Commission identified several factors for use in evaluating consistency with the state growth policy: (1) creating opportunities for concentrated development in suitable plan-designated areas; (2) achieving regulatory streamlining to encourage development and economic growth in plan-designated areas; (3) implementing protection for agricultural land and other rural resource areas; and (4) requiring that sensitive areas be adequately delineated in the plan or mapped by an applicant.¹³⁰ The Commission's actual evaluations, however, appear nonsubstantive in nature and may permit consistency determinations where local jurisdictions simply articulate the state policy without meaningful regulations to implement it. For example, rural zoning categories in several counties are listed by the Commission as apparently consistent with state policy when they reflect density levels that encourage the continuation of sprawl development and do not preserve agricultural land.¹³¹

Consistency is critical to the success of the state policy and disputes will invariably arise as to its implementation. For example, any authorization for development within an area in need of protection is likely to prompt a challenge based on consistency. Local regulatory decisions may raise questions of consistency with state policy and policies adopted by neighboring jurisdictions.¹³² Municipal

125. *Id.*

126. *Id.* at 240-41, 401 A.2d at 669-70.

127. 293 Md. 24, 25-26, 441 A.2d 1041, 1041-42 (1982).

128. For example, Montgomery and Prince George's Counties established several zoning districts that require consistency with the master plan. See MONTGOMERY COUNTY ZONING ORDINANCE §§ 59-C-6.214, 59-C-8.24, 59-C-12.2, 59-C-18.3 (Jan. 1993); *Floyd v. Council of Prince George's County*, 55 Md. App. 246, 461 A.2d 76 (1983).

129. 309 Md. 683, 526 A.2d 675 (1986).

130. ANNUAL REPORT, *supra* note 5, at 16.

131. *Id.* at 7.

132. Developments with regional impact need to be evaluated on a comprehensive basis. The potential environmental impact of the Washington Redskins professional football stadium proposed to be located near the juncture of three counties has prompted local governments and environmental groups to complain about the lack of a regional dispute resolution forum. Dan Beyers, *Two*

annexation of land within a county's protected areas can also raise questions of consistency with both local plans and state policy.¹³³ There is a need to provide a mechanism to resolve these potential disputes.¹³⁴ The absence of a dispute resolution process means that local governments will make the initial determination themselves and, if disputes arise, the courts will decide whether local plans, regulations, or decisions are consistent with the state growth policy or with each other. It remains to be seen how the consistency requirement will be applied, but the current law encourages both lawyer ingenuity and litigation.¹³⁵

Leading Environmental Groups Formally Oppose Laurel Stadium Plan, WASH. POST, July 14, 1994, at B3. After a record 27 days of public hearings reflecting significant controversy, local land use approval of the proposed development will be made under Anne Arundel County's special exception process. Dan Beyers, *Stadium Middleman Keeping His Balance*, WASH. POST, Aug. 16, 1994, at B6.

133. For example, Poolesville, a Montgomery County municipality which possesses its own planning and zoning powers, is considering annexation of a large tract currently designated as part of the county's agricultural preserve for use as a large school and religious complex sponsored by the Saudi Arabian government. The project which was described by county officials as a mega city is considered inconsistent with county planning objectives. Louis Aquilar, *Potter Joins Opposition to Saudi Project in Poolesville*, WASH. POST, Sept. 1, 1994, at Md. 1. In recognition of the annexation problem, the Commission recommended that it undertake a study of annexation laws and policies with the objective to better define long-term growth boundaries. ANNUAL REPORT, *supra* note 5, at 4.
134. The Planning Act requires procedures to be adopted for determining consistency with respect to state funding and support sanctions, but these procedures will necessarily be narrow in scope applying only to certain projects and will not address local plans or land use regulations. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-02(c) (Supp. 1994). The Planning Act also requires state agencies to coordinate their actions and policies so they are consistent with the state growth policy and local plans. *Id.* § 5-7A-02. The Planning Act requires state government projects and funding to conform with the planning initiatives. *Id.* State actions, for the first time, must be consistent with not only the state growth policy but also with local plans which apply that policy. *Id.* State procedures were adopted to review capital projects for consistency. ANNUAL REPORT, *supra* note 5, at 30. This aspect of the Planning Act is significant because growth policies adopted by other states have been undermined by the failure to include state agencies and their projects in the policy implementation. *See* DEGROVE, *supra* note 9, at 26-27.
135. Judicial resolution of consistency disputes raises questions about standing. A developer denied permission to build may challenge a consistency determination. A local government denied state funding may also challenge a consistency determination. However, environmental or civic groups may not enjoy equal rights to question local consistency determinations because of common-law standing restrictions. *See* *Medical Waste Assocs. v. Maryland Waste Coalition*, 327 Md. 596, 612-14, 612 A.2d 241, 245-50 (1992). Neighboring jurisdictions also need access to a forum to argue their disagreements with local plans, as

The task of evaluating local plans or regulations for their consistency with the state policy and with each other may overwhelm an overworked judicial system in view of the wide variation among local comprehensive plans, regulations, and decisions that will be produced under the current framework. A judicial determination of noncompliance with the consistency requirement may cause invalidation of a whole planning and zoning scheme. Given the importance of consistency in the implementation of the state policy, invalidation may be a necessary remedy in certain circumstances.¹³⁶ However, the sanction raises questions about interim regulations which will govern in the absence of invalidated regulations. Will the Commission be permitted to adopt interim regulations as it is authorized to do in the case of sensitive area matters?¹³⁷ Will the courts require other interim relief; and, if so, what relief? These questions underscore the incomplete nature of the legislation and provide another justification for a dispute resolution mechanism.

The manner in which the consistency requirement is applied will determine the credibility of the current legislative approach.¹³⁸ If local comprehensive plans are truly consistent with the state policy and this consistency is enforced through adoption of land use regulations and development approvals, then major strides in the implementation of state policy will be achieved. If, however, local governments are allowed to conduct business as usual, then state policy will lose credibility and the environment will continue to suffer the consequences.

IV. FLEXIBLE TECHNIQUES

The Planning Act encourages use of innovative and flexible techniques by local governments for implementation of the state growth policy.¹³⁹ Local governments are authorized to employ a variety of flexible techniques for managing growth under several

illustrated by a recent conflict about potential development in Howard County and objections by neighboring Montgomery and Prince George's Counties. Dan Beyers, *Howard's Development Aspirations Fracture Tri-County Cordiality*, WASH. POST, March 30, 1993, at B1. If appeals can only be made by those regulated and not the beneficiaries of the regulation, the state policy will be frustrated. Fairness supports wide access to a comprehensive dispute resolution forum on the question of consistency.

136. Invalidation may be applied as a remedy where local action departs from established norms. *City of Miami v. Save Bricknell Ave., Inc.*, 426 So. 2d 1100, 1102 (Fla. App. 1983).

137. See MD. CODE ANN., STATE FIN. & PROC. § 5-709 (Supp. 1994).

138. Effective state oversight requires empowerment to resolve the inevitable conflicts that will arise over interpretation of state policy. DEGROVE, *supra* note 9, at 162-63.

139. See MD. ANN. CODE art. 66B, § 3.05(a)(1)(vi) (Supp. 1994).

provisions of state law¹⁴⁰ and these techniques have been applied with some success by local governments in Maryland and elsewhere.¹⁴¹

The core of the state growth policy can be distilled into four regulatory objectives: (1) growth concentrated in suitable areas under streamlined procedures;¹⁴² (2) provision for affordable housing;¹⁴³ (3) resource conservation¹⁴⁴ and protection of sensitive areas;¹⁴⁵ and (4) funding mechanisms that achieve the other strategic policies.¹⁴⁶ This Part of this Article analyzes how flexible techniques may be used either individually or in combination for the implementation of these four objectives. Of course, individual techniques may be applied to several objectives and this analysis does not suggest that the techniques can only be applied as discussed.

A. Growth Concentrated in Suitable Areas Under Streamlined Procedures

The principal regulatory technique for directing growth to desired locations is zoning because it determines land use, density, and location. Zoning can be either a streamlined device or an obstacle to growth.¹⁴⁷

1. Types of Zoning Available in Maryland

Traditional Euclidean zoning is the most prevalent form of zoning,¹⁴⁸ and it constitutes the biggest obstacle for implementation of state policy. Euclidean zoning is designed as a rigid, self-executing regulation, that requires minimum government oversight once implemented.¹⁴⁹ Design standards are applied in an inflexible manner,¹⁵⁰ except for a cumbersome and sometimes strict variance process that

140. *Id.* §§ 10.01, 11.01, 12.01 (1988 & Supp. 1994).

141. See Carol M. Dickey, *History of Staging in Montgomery County*, 1993 J. OF MD. PLANNING, at 1-6; DEGROVE, *supra* note 9, at 90; RATHKOPF, *supra* note 114, §§ 9.01-9.02, 9.04.

142. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-01(1) (Supp. 1994); MD. ANN. CODE art. 66B, § 3.05(a)(1)(vi) (Supp. 1994).

143. MD. ANN. CODE art. 66B, §§ 10.01, 12.01 (Supp. 1994).

144. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-01(5) (Supp. 1994).

145. *Id.* § 5-7A-01(2).

146. *Id.* § 5-7A-01(7).

147. Zoning has historically manifested both results. Edward H. Ziegler, Jr., *Shaping Megalopolis: The Transformation of Euclidean Zoning by Special Zoning Districts and Site Specific Development Review Techniques*, 1993 ZONING AND PLANNING LAW HANDBOOK, at 65-79; BUILDING THE AMERICAN CITY, *supra* note 95, at 203-08.

148. Euclidean zoning derives its name from the basic zoning ordinance upheld in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

149. BUILDING THE AMERICAN CITY, *supra* note 95, at 203-04.

150. *Id.*

may provide a waiver in cases of hardship or practical difficulty.¹⁵¹ In practice, Euclidean zoning is not conducive to either concentration of growth or streamlined regulation. It has been historically applied with a "wait and see" attitude to zone large areas for low densities that are suitable for higher density development, allowing local officials to negotiate higher densities as development proposals materialize.¹⁵² Paradoxically, it has also been applied in a lax manner to zone areas for residential use that should be protected because of their rural or sensitive nature, but become ripe for development before local government can act to adopt protective measures.¹⁵³ Once applied, revisions are difficult, expensive, and time consuming.¹⁵⁴

151. *North v. St. Mary's County*, 99 Md. App. 502, 511, 638 A.2d 1175, 1179 (1994). The late Judge Rita C. Davidson provided a thorough explanation of the variance process as applied in Maryland in *Anderson v. Board of Appeals*, 22 Md. App. 28, 39, 322 A.2d 220, 226-27 (1974).

152. Kaplan, *supra* note 17, at 26-31; *BUILDING THE AMERICAN CITY*, *supra* note 95, at 206.

153. 2020 REPORT, *supra* note 3, at 18-19; BAY REPORT, *supra* note 1, at 7; Horton, *supra* note 11, at 25; ANNUAL REPORT, *supra* note 5, at 15.

154. Euclidean rezoning is very difficult to change. In Maryland, Euclidean zoning amendments are subject to the change-mistake rule which requires a strict standard of proof. See ABRAMS, *supra* note 120, § 1.3. Maryland's change-mistake rule is a judicially created doctrine that supposedly has its roots in *Northwest Merchant Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 A.2d 743 (1948). The essential elements are simply stated: "Where a property is rezoned, it must appear that either there was some mistake in the original (or subsequent comprehensive) zoning, or 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).

The purpose of the change-mistake rule is to provide a baseline measurement to evaluate the continuing validity of a presumption accorded the last comprehensive zoning. Comprehensive zoning is by definition the product of a well thought out, carefully planned zoning action that considers a number of policies, premises, assumptions, and trends, and it is normally accorded a presumption of validity as a safeguard against later attempts to rezone individual parcels in a haphazard manner that threatens the underlying public policies of the comprehensive zoning. *Mraz v. Board of County Comm'rs*, 291 Md. 81, 88-89, 433 A.2d 771, 776 (1981); see *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 66, 254 A.2d 700, 705 (1969). If the presumption is overcome, then individual rezoning is deemed permissible. *Howard County v. Dorsey*, 292 Md. 351, 355, 438 A.2d 1339, 1342 (1982).

The change-mistake rule applies to piecemeal Euclidean rezoning, see *Mayor of Baltimore v. NAACP*, 221 Md. 329, 334, 157 A.2d 433, 436 (1960), and does not apply to comprehensive zoning, *McBee v. Baltimore County*, 221 Md. 312, 317, 157 A.2d 258, 260 (1960), or to floating zones, *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 61, 133 A.2d 83, 91 (1957). Defining the circumstances that satisfy the rule can cause considerable delay and expense because of the complex factual and legal issues concerning what constitutes change, mistake, or the neighborhood. See generally ABRAMS, *supra* note 120, ch. 1. The rule has been widely criticized as overly restrictive

Euclidean zoning is responsible for most of the sprawl development against which the Visions of 2020 are directed.¹⁵⁵

The floating zone, by contrast, provides an important tool for application of flexible techniques because its provisions can be tailored to site specific land uses, as well as performance and design objectives.¹⁵⁶ It forms the host for a variety of flexible zoning districts.¹⁵⁷ Moreover, it can be applied more quickly and easier than Euclidean zoning and therefore responds better to market forces and provides for more streamlined regulation.¹⁵⁸ For these very reasons,

and inflexible. See I NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* § 32.01 (1988).

The rigid nature of the Euclidean zoning means that the use of flexible zoning techniques are largely confined to floating zones or comprehensive zoning. Yet, floating zones are disfavored in some jurisdictions because of hostility from the community about their sudden application. Comprehensive zoning does not permit a site specific analysis that is inherent in the use of flexible zoning. Because of these limitations, a broader baseline should be applied for more flexible use of Euclidean zoning. The change-mistake rule need not be abandoned. It has served the state well. What is proposed, however, is that the enabling law be amended to permit rezoning to be granted on the basis of other factors in addition to change-mistake. See *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 28-29 (Or. 1979), *overruled on other grounds by* 607 P.2d 725 (Or. 1980).

155. BAY REPORT, *supra* note 1, at 7; ANNUAL REPORT, *supra* note 5, at 15.
156. 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 predetermined standards. See *generally* *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 8 (1957). The "floating zone" is now authorized for use by all jurisdictions in Maryland with planning and zoning authority. MD. ANN. CODE art. 66B, § 10.01(a)(8) (Supp. 1994). The annotation for this section provides a useful working definition of the term floating zone. The authorization of floating zones for all jurisdictions with planning and zoning authority is important because it corrects an inconsistency among the various jurisdictions and promotes the use of site specific flexible zoning techniques. Nevertheless, further clarification is necessary. Noncharter counties and municipalities are governed by the enabling authority found in Article 66B, MD. ANN. CODE art. 66B, § 4.05(a) (1988 & Supp. 1994), that requires findings of fact relating to change and mistake that are inappropriate for floating zones. See *Aubinoe v. Lewis*, 250 Md. 645, 653, 244 A.2d 879, 883-84 (1968).
157. Flexibility in application, as compared to the rigidity of the Euclidean zones, is a major advantage for the floating zone. Ziegler, *supra* note 147. The floating zone has been compared to a special exception that can be applied at any location within a specified zoning district that satisfies predetermined legislative standards. Compare *Bigenho v. Montgomery County Council*, 248 Md. 386, 390-91, 237 A.2d 53, 56 (1968) with *Schultz v. Pritts*, 291 Md. 1, 11, 432 A.2d 1319, 1325 (1981). The analogy stops at this point because the floating zone is applied over a wider area and involves legislative discretion rather than a purely administrative action. *Rockville Crushed Stone, Inc. v. Montgomery County*, 78 Md. App. 176, 183, 552 A.2d 960, 963 (1989).
158. The change-mistake rule does not apply to floating zones, *Aubinoe v. Lewis*, 250 Md. 645, 652, 244 A.2d 879, 883 (1968), so the zoning can be applied quickly if the location meets the eligibility requirements.

however, the floating zone is viewed with suspicion by community groups and political pressure often discourages its use.¹⁵⁹ The rigid nature of the Euclidean zone presents few surprises for the community, but the floating zone can be applied suddenly and without warning.¹⁶⁰ The flexibility of the floating zone is achieved at the expense of predictability. It is necessary, therefore, to use floating zones with adequate safeguards to insure both compatibility and predictability.¹⁶¹

A hybrid or special purpose zoning device combines the certainty of Euclidean zoning with the flexibility of the floating zone. This hybrid zoning device was approved in Maryland in *Montgomery County v. Woodward & Lothrop*,¹⁶² and provides for both standard and optional methods of development within a base Euclidean zone.¹⁶³ The optional method usually includes incentives, such as higher densities and preferred uses, to encourage its application,¹⁶⁴ but also requires more government oversight through a site plan review process to ensure compatibility and necessary amenities.¹⁶⁵ This hybrid zoning involves a delegation of authority to an administrative agency that approves site plans under pre-set legislative standards.¹⁶⁶ The zoning authority has less control under this hybrid than it does under the floating zone,¹⁶⁷ but the hybrid offers the community more predictability.¹⁶⁸

159. See *supra* note 11. The community opposition to more density is characterized as NIMBYism or "not in my back yard." Wasserman, *supra* note 49, at 13. The purpose of zoning at the community level is to protect established neighborhoods from the intrusion of incompatible uses. Much local zoning is intended more to prevent change than to guide it. BUILDING THE AMERICAN CITY, *supra* note 95, at 204.

160. The floating zoning cannot be applied without satisfying procedural notice requirements. However, it can be applied without the delays and expense associated with the Euclidean zone. See *supra* note 154.

161. See *infra* Part IV.A.2.

162. 280 Md. 686, 725, 376 A.2d 483, 504 (1977).

163. See, e.g., MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-6.215 (1994).

164. *Id.*

165. Ziegler, *supra* note 147.

166. *Id.* MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-D-2.0 (1994).

167. The zoning authority exercises legislative discretion when considering the application of a floating zone, but the discretion is diminished when an administrative agency is delegated the decision making role under pre-set standards. Compare *Rockville Crushed Stone, Inc. v. Montgomery County*, 78 Md. App. 176, 193-94, 552 A.2d 960, 968 (1989) with *Schultz v. Pritts*, 291 Md. 1, 21, 432 A.2d 1319, 1330 (1981).

168. The Euclidean base zone will normally be applied by comprehensive zoning. See *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977).

Another hybrid device is the overlay zoning district, which, as its name implies, involves the application of a second layer of zoning to achieve a specific purpose without replacing the base zone.¹⁶⁹ This hybrid zoning was approved in Maryland in *Swarthmore Co. v. Kaestner*,¹⁷⁰ and may be more restrictive than the base zoning for environmental protection purposes in areas where base zoning is already applied, but does not contain adequate safeguards to protect the environment.¹⁷¹ The overlay zone can also be used to achieve flexibility in the authorization of development that could not occur under the base zoning. For example, Montgomery County adopted an overlay zoning district to maintain the scale and character of the Wheaton Central Business District, and yet permit a range of retail, cultural, entertainment, and recreational uses not permitted under the base zoning.¹⁷²

Both the floating zone and the hybrids can serve as hosts for the various flexible techniques now authorized for local governments. These zoning tools are used to concentrate growth in suitable locations under a streamlined regulatory process.

2. Use of Flexible Techniques

Flexible zoning techniques can accommodate immediate development or growth staged over time and provide for a varied mix of housing types and densities, more efficient use of land, environmentally sensitive development, more open space, and a range of community amenities.¹⁷³ Several flexible zoning techniques, including the following, can be used in combination to promote these objectives: the cluster method of development,¹⁷⁴ mixed use development,¹⁷⁵

169. RATHKOPF, *supra* note 114, § 1.04[2][L].

170. 258 Md. 517, 266 A.2d 341 (1970).

171. RATHKOPF, *supra* note 114, § 7.03[3]; *Ziegler*, *supra* note 147.

172. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-18 (1994).

173. *See* *Estate of Friedman v. Pierce County*, 768 P.2d 462, 469 (Wash. 1989); *Orinda Homeowners Comm. v. Board of Supervisors*, 90 Cal. Rptr. 88, 90 (1970).

174. Cluster development authorizes variations in the manner of development in order to preserve open spaces and environmentally sensitive areas. *See* *Estate of Friedman v. Pierce County*, 768 P.2d 462 (Wash. 1989). Cluster development is often permitted as an alternative form of development at the subdivision stage or as a flexible zoning device. The annotation to subsection 10.01(a)(5) of Article 66B, MD. ANN. CODE art. 66B, § 10.01(a)(5) (Supp. 1994), provides a useful working definition of this term.

175. Mixed use development allows for a combination of uses within the same zoning district. *See* *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 694-95, 376 A.2d 483, 488 (1977). Because zoning was originally justified on the basis that separation of uses accomplished important public purposes, *see* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391

planned unit development (PUD),¹⁷⁶ performance zoning,¹⁷⁷ and incentive zoning.¹⁷⁸

The discretion associated with flexible zoning demands government oversight throughout the development process because the greater

(1926), care must be taken to ensure that this zoning device maintains necessary elements of compatibility in its application so that the mixed uses are not vulnerable to a charge of arbitrary classifications. See *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925). This device is always dependent on a site specific plan because the specific mix of uses must be authorized by the zoning authority or under delegated standards to an administrative agency. If the mix of uses is approved at the zoning stage, it is usually applied as piecemeal rezoning to allow for a site specific evaluation. See MD. ANN. CODE art. 66B, § 10.01(a)(4) (Supp. 1994) (annotation providing working definition of "mixed use development").

176. The PUD is another site specific zoning device that can include both cluster and mixed use development. See *Estate of Friedman v. Pierce County*, 768 P.2d 462, 469 (Wash. 1989). It is often established as a floating zone, the location of which is evaluated under pre-set legislative standards and a site specific development plan approved at the time of zoning. Although PUDs have been widely used in Maryland, review by the courts has been limited. See *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Comm'n*, 87 Md. App. 602, 590 A.2d 1080 (1991), cert. denied 324 Md. 324, 597 A.2d 421 (1991); *Rockville Crushed Stone, Inc. v. Montgomery County*, 78 Md. App. 176, 552 A.2d 960 (1989); *Montgomery County v. Greater Colesville Citizens Ass'n*, 70 Md. App. 374, 521 A.2d 770 (1987); see also *Floyd v. County Council*, 55 Md. App. 246, 461 A.2d 76 (1983); *Howard Research & Dev. Corp. v. Howard County*, 46 Md. App. 498, 418 A.2d 1253 (1980). See MD. ANN. CODE art. 66B, § 10.01(a)(6) (Supp. 1994) (annotation providing working definition of "planned unit development").
177. Performance zoning relies more on performance standards than the more traditional design standards. The zoning can be used to measure external impacts for environmental protection and other purposes. See RATHKOPF, *supra* note 114, § 1.04[2][m]. For example, Columbia's New Town Zoning District requires development to provide certain levels of green space and density but within these limitations, the developer retains flexibility over design and bulk issues. HOWARD COUNTY, MD., ZONING REGULATIONS § 122A (1985); see MD. ANN. CODE art. 66B, § 10.01(a)(10) (Supp. 1994) (annotation providing working definition of "performance zoning").
178. Incentive zoning provides inducements, usually in the form of higher densities, in exchange for public facilities or amenities ranging from public space to affordable housing. RATHKOPF, *supra* note 114, § 1.04[2][i]. Incentive zoning is a sophisticated level of regulation that includes several levels of government oversight to insure that the incentives are properly implemented in a manner that achieves the objectives of the zoning. See generally Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991). A site specific plan is reviewed and approved either at the zoning stage, the subdivision or permit stage, or both. The zoning can be designed on two levels to include the incentive and a base zone that allows development as of right without the incentive. *Id.*; see MD. ANN. CODE art. 66B, § 10.01(a)(9) (Supp. 1994) (annotation providing working definition of "incentive zoning").

flexibility and discretion of the process means greater potential for abuse.¹⁷⁹ Government oversight must ensure procedural fairness and prevent abuse of discretion.¹⁸⁰ Safeguards include pre-set design¹⁸¹ or performance standards,¹⁸² development plan¹⁸³ or site plan reviews,¹⁸⁴ master plan conformity,¹⁸⁵ amendment procedures,¹⁸⁶ provisions for

179. Kayden, *supra* note 178, at 6-7; RATHKOPF, *supra* note 114, § 41.06.

180. See generally 3 RATHKOPF, *supra* note 114, § 41.06.

181. Pre-set standards can include minimum and maximum levels of development. An approved development may exceed threshold standards in order to justify the zoning at a particular location. For example, a proposal may include 45% open space even though the minimum standard is only 30%. The additional open space may be necessary to achieve desired clustering or environmental objectives. These pre-set standards are necessary to ensure that development does not violate traditional prohibitions against conditional zoning. See *Montgomery County v. Greater Colesville Citizens Ass'n, Inc.*, 70 Md. App. 374, 385, 521 A.2d 770, 776 (1987); *cf.* *Rodriguez v. Prince George's County*, 79 Md. App. 537, 551-52, 558 A.2d 742, 749 (1989).

182. RATHKOPF, *supra* note 114, § 1.04[2][m]. For example, minimum noise levels may be required for industrial uses. See *MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-12* (1993).

183. A development plan is approved at the time of zoning and, in the absence of pre-set standards, provides the key limitation under the flexible zoning technique because it contains authorization for specific land uses, densities, and bulk specifications such as setbacks and building heights. 2 ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* § 11.12 (3d ed., 1986 & Supp. 1992); *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 69 Cal. Rptr. 251 (1968). The plan includes the zoning specifications as applied to the site. *Id.* All parcels included under a development plan are subject to it despite a subsequent conveyance. The conveyed parcel is not severed from the development plan unless the plan is specifically amended. *Estate of Friedman*, 768 P.2d at 469.

184. Site plan review provides for post-zoning oversight to ensure conformity with pre-set standards or a development plan. *Millbrae Ass'n*, 69 Cal. Rptr. at 264-65. Site plan review is limited in scope under delegated administrative authority. *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 109, 543 A.2d 863, 869 (1988). It is not intended as a substitute for zoning. *Id.* at 106, 543 A.2d at 868. Consequently, a planning board lacks authority to approve a site plan that purports to change land uses, density, development standards, or staging of development. *Hansel v. City of Keene*, 634 A.2d 1351, 1353 (N.H. 1993).

185. Master plan conformity plays a growing role in the use of flexible zoning. See *supra* Part III. The master plan is used to set limits on density, provide development guidelines for certain locations, specify land uses or environmental requirements, provide for staging of development until public facilities are adequate, and specify the need for public facilities or amenities such as local parks or open space. See generally *supra* Part III.

186. Amendment procedures provide opportunity for changes to be considered. Not every change to an approved flexible zoning project requires a hearing. See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976) (discussing due process requirements); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1191 (1st Cir. 1983); *Chevy Chase Village v. Montgomery County Bd. of Appeals*, 249 Md. 334, 345-46, 339 A.2d 740, 745 (1968). There is a need to structure the amendment process so that it achieves both streamlined objectives and fairness

perpetual maintenance of common areas,¹⁸⁷ and development agreements for public facilities or amenities.¹⁸⁸ Each of these measures plays an important role in ensuring that flexible zoning is properly applied and implemented in an integrated and consistent manner. Safeguards are also necessary to assuage community hostility to flexible zoning.

Design flexibility is a prominent characteristic of this type of zoning.¹⁸⁹ Instead of rigid standards characteristic of traditional Euclidean zoning,¹⁹⁰ flexible zoning permits unique forms of development tailored to site specific situations.¹⁹¹ The site specific evaluation promotes better development because land uses, design, and location can be evaluated under a discretionary process that allows flexibility for the developer in exchange for more detailed regulation.¹⁹²

An example of the flexible zoning process can be found in the Town of Columbia, Maryland, that was developed under techniques

to the participants.

An obvious demarcation in the formality of the process would involve changes that affect approved density, land use, or bulk specifications such as building height. These elements are a basic part of zoning regulation and changes of this nature should involve a process similar to the original zoning approval. See *Millbrae Ass'n*, 69 Cal. Rptr. at 264-66.

187. Creation of common areas used for open space, green area, or recreational purposes is one of the beneficial aspects of the clustering technique. However, there is a need to protect the land held in trust for these purposes to assure that it is perpetually maintained. Once zoning is approved, it is the responsibility of the owner as trustee for the land to be held in common to provide for the necessary mechanisms for maintenance and conveyance to the ultimate user organization, whether a homeowners association, park and recreation association, or condominium association. The zoning and site plan stages are used to review the adequacy of these mechanisms. See, e.g., MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-D-1.3 (1994).
188. A development agreement can be an integral part of the flexible zoning process to provide necessary infrastructure or other amenities and, in exchange, the developer is provided with some certainty that the regulations will not be changed while the project is built out. John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49, 49-50 (1993). In effect the development agreement provides for protection against harsh effect of the vested rights doctrine and promotes financing of infrastructure for large projects. *Id.*; see generally Patricia G. Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119 (1993).
189. See *Estate of Friedman*, 768 P.2d at 469.
190. *Id.*
191. *Id.*
192. The flexibility inherent in the zoning does not violate principles of uniformity. Ziegler, *supra* note 147; see *Prince George's County v. M & B Construction Corp.*, 267 Md. 338, 363, 297 A.2d 683, 695 (1972); *Orinda Homeowners Comm.*, 90 Cal. Rptr. at 90.

that the Barnes Commission used as a model for how planned development can promote the Visions of 2020.¹⁹³ Columbia is developed under a New Town Zoning District,¹⁹⁴ a floating zone containing authorization for mixed uses, public amenities, and a range of densities.¹⁹⁵ The zoning also provides flexibility to accommodate staged, long term development that may be subject to changes in market conditions. After a general concept plan is approved at the zoning stage,¹⁹⁶ more detailed site plans are approved by a planning board that functions as an administrative agency exercising delegated responsibilities for site specific development under both design and performance standards specified by the zoning district.¹⁹⁷

Columbia is near completion with a population of 75,000 people living within an area of about 15,000 acres.¹⁹⁸ The creation of visionary developer James W. Rouse, Columbia reflects the best of the flexible techniques as it incorporates mixed uses and cluster forms of development within an average gross density of two and one half dwelling units per acre and preserves about one-third of the total area, over 5,000 acres, for open space, recreational amenities, and sensitive area protection.¹⁹⁹ Growth has avoided wetlands and other sensitive areas, significant public facilities were provided by the developer, and approvals were achieved with a minimum of delay and expense given the size of the project.²⁰⁰ The Columbia model has been applied throughout Maryland in a number of smaller scale projects that provide a similar combination of public benefits and streamlined regulation.²⁰¹

The use of these flexible techniques is discretionary for local governments,²⁰² but they are clearly superior to traditional zoning in directing growth to suitable areas. Their use can assist in streamlining

193. BAY REPORT, *supra* note 1, at 9.

194. HOWARD COUNTY, MD., ZONING REGULATIONS § 122 (1985); MORTON HOPPENFELD, *THE COLUMBIA PROCESS: THE POTENTIAL FOR NEW TOWNS* (1971).

195. HOWARD COUNTY, MD., ZONING REGULATIONS § 122A.8 (1985).

196. *Id.* § 122B.

197. *Id.* § 122C.

198. THE ROUSE CO., COLUMBIA, MARYLAND—HISTORY 2 (June 1993) [hereinafter HISTORY]; HOPPENFELD, *supra* note 194, at 16.

199. THE ROUSE CO., 1991 ANNUAL REPORT 17 (1991); HOPPENFELD, *supra* note 194, at 16; HISTORY, *supra* note 198, at 2.

200. See generally HOPPENFELD, *supra* note 194.

201. For example, Montgomery Village is a planned new town of mixed uses and densities and contains substantial open space with a population of 35,000 people living in 12,000 homes within an area of 2,500 acres. This project, which is located in central Montgomery County, was developed under a zoning scheme very similar to Howard County's New Town Zoning District and carefully linked planning and zoning approvals. WILLIAM N. HURLEY, JR., MONTGOMERY VILLAGE—A NEW TOWN—TWENTY YEARS LATER 23-24 (1987).

202. MD. ANN. CODE art. 66B, § 10.01 (1988 & Supp. 1994).

development review. For example, the flexible techniques can be combined with existing development review procedures so that site plan, subdivision, or permit reviews can occur simultaneously to reduce delay. The Commission should be authorized to establish policy guidance and incentives so that these techniques are not misapplied or ignored. Revisions to state law are needed to expand the basis for use of Euclidean zoning in a site specific context for greater flexibility, as well as to promote use of floating zones as a desirable alternative. Without greater incentives to use these flexible techniques, sprawl development and cumbersome regulatory practices will likely continue.

B. Affordable Housing

Maryland has made the provision of affordable housing a part of state policy.²⁰³ Many jurisdictions have initiated efforts to encourage the development of more affordable housing and use a variety of techniques to promote the goal.²⁰⁴ Some use regulatory approaches that require affordable housing as a component of larger development projects.²⁰⁵ Others simply encourage affordable housing through incentive zoning,²⁰⁶ authorization for accessory housing on existing lots,²⁰⁷ or relaxation of zoning design standards.²⁰⁸

One inclusionary zoning technique used to promote affordable housing is known as the moderately priced dwelling unit (MPDU)

203. MD. ANN. CODE art. 66B, §§ 10.01(a)(3), 12.01 (Supp. 1994). California and Oregon have adopted state policies promoting affordable housing. See DANIEL R. MANDELKER, *Land Use Law* §§ 7.30-7.31 (3d ed. 1993); see also NATIONAL HOUSING TASK FORCE, *A DECENT PLACE TO LIVE* 50-51 (Mar., 1988) (discussing means of reducing regulatory constraints on the production of affordable housing) [hereinafter ROUSE REPORT, after its Chairman, James W. Rouse]; see DEGROVE, *supra* note 9, at 21.

204. ANNUAL REPORT, *supra* note 5, at 17-20.

205. The regulatory approval requires some minimum level of affordable housing. ANNUAL REPORT, *supra* note 5, at 18.

206. Incentive zoning uses a voluntary approach that offers higher densities in exchange for an affordable housing component. ANNUAL REPORT, *supra* note 5, at 18.

207. Accessory housing employs existing single family structures or lots to expand the housing stock primarily through accessory apartments or separate "granny" flats which are authorized by right or under a special exception process. ANNUAL REPORT, *supra* note 5, at 19.

208. Relaxation of design standards permits housing to be constructed at lower cost. This technique includes relaxation of minimum area, lot, and yard requirements. ANNUAL REPORT, *supra* note 5, at 19-20. Some jurisdictions hold design standards invalid if not rationally related to legitimate zoning objectives. See, e.g., *Builders Serv. Corp. v. Planning & Zoning Comm'n*, 545 A.2d 530, 550 (Conn. 1988).

program, which is specifically authorized in Maryland.²⁰⁹ The MPDU program is designed to promote housing opportunities for persons and families who would otherwise be excluded from the housing market.²¹⁰ This program is being used more frequently as a result of pressures brought on by court decisions and state laws that prompt local government to increase the availability of affordable housing.²¹¹ MPDUs promote affordable housing as a set aside program in which below market housing is provided by developers in exchange for density bonuses.²¹² The program is administered with limitations imposed on the use, cost, and resale of the housing.²¹³

Several Maryland jurisdictions, on their own initiative, have included affordable housing as an element of their comprehensive plan.²¹⁴ Montgomery County was the first county in Maryland to actually adopt a program for mandatory set asides for all housing projects of fifty units or more in which the approved density is two dwelling units per acre or greater.²¹⁵ The Montgomery County program was adopted in 1973.²¹⁶ In the same year a similar program in neighboring Fairfax County, Virginia, was invalidated by the Virginia courts.²¹⁷ Montgomery County adopted the program under its general home rule police powers,²¹⁸ rather than its zoning powers, due to the absence of specific zoning enabling authority, a fatal defect for the Fairfax County scheme.²¹⁹ The Montgomery County program has never been challenged and, with the adoption of specific state enabling authority,²²⁰ is unlikely to be attacked on the basis of lack of authority.

209. MD. ANN. CODE art. 66B, § 10.01(a)(3) (Supp. 1994).

210. ROUSE REPORT, *supra* note 203, at 50-51.

211. *See Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (Mt. Laurel II); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (Mt. Laurel I); RATHKOPF, *supra* note 114, § 17.05[2][d].

212. *See* ROUSE REPORT, *supra* note 203, at 49-50.

213. *See* MANDELKER, *supra* note 202, §§ 7.26-7.28.

214. ANNUAL REPORT, *supra* note 5, at 17; *see, e.g., HOWARD COUNTY, MD., 1990 GENERAL PLAN*, *supra* note 12, 103-09, MONTGOMERY COUNTY DEP'T OF HOUSING & COMMUNITY DEVELOPMENT, HOUSING POLICY FOR MONTGOMERY COUNTY IN THE 1980s (1981).

215. MONTGOMERY COUNTY, MD., CODE ch. 25A, §§ 1-12 (1984).

216. Chap. 17, LAWS OF MONTGOMERY COUNTY, MD., ch. 17 (1974); INVENTORY OF AFFORDABLE HOUSING IN MONTGOMERY COUNTY 11 (1994) [hereinafter INVENTORY].

217. *Board of Supervisors of Fairfax County v. DeGroff Enters.*, 198 S.E.2d 600, 602 (Va. 1973).

218. MD. ANN. CODE art. 25A, § 5(s) (1994); MONTGOMERY COUNTY, MD., CHARTER, adopted Nov. 5, 1968; INVENTORY, *supra* note 216, at 11.

219. *Board of Supervisors of Fairfax*, 198 S.E.2d at 602.

220. MD. ANN. CODE art. 66B, § 10.01 (1988 & Supp. 1994).

The Montgomery County program started producing MPDUs by 1976.²²¹ The program requires that each eligible housing project include between twelve and one half percent and fifteen percent of its total density as MPDUs.²²² The builder may obtain a density bonus of up to twenty two percent over and above the authorized zoning density depending on site specific factors evaluated by the Planning Board²²³—the administrative agency responsible for monitoring compliance with the program and approving waivers under certain circumstances.²²⁴

A county or nonprofit housing agency is given first priority to purchase up to forty percent of the MPDUs in each project.²²⁵ The remaining MPDUs are sold to eligible buyers meeting income standards established by county regulation.²²⁶ Eligible buyers are required to live in the units and resale is subject to restrictions.²²⁷ If the resident sells the unit within the first ten years, the seller may only receive the original purchase price and a cost of living index increase.²²⁸ If the resident sells the unit at a fair market price after the ten year period, the sale is subject to a recapture provision of fifty percent of any excess profits.²²⁹

The location of affordable housing can be controversial.²³⁰ Conflicts may arise between the developer, the local housing agency, and neighbors. In one case, a developer of an upscale residential project sought to locate the MPDUs off site, claiming that affordable housing residents would be better off at an alternative location because the upscale neighborhood lacked convenient access to public transportation and employment centers, and that the residents could not afford expensive membership fees for community pool and recreational facilities.²³¹ Nonetheless, the county required the MPDUs to be located on the site.²³²

221. Interview with Eric Larsen, MPDU Coordinator, Montgomery County Department of Housing and Community Development (DHCD) (Aug. 24, 1993); DHCD STATUS REPORT MONTGOMERY COUNTY, MD., DEP'T OF HOUSING & COMMUNITY DEV., SUMMARY, REPORT & STATISTICAL PROFILE OF THE MPDU PROGRAM, 1989-91, (1993) (on file with author).

222. MONTGOMERY COUNTY, MD., CODE ch. 25A, § 5 (1984).

223. *Id.*; Larsen interview, *supra* note 221.

224. MONTGOMERY COUNTY, MD., CODE ch 25A, § 5 (1984).

225. *Id.* § 7; Larsen interview, *supra* note 221.

226. MONTGOMERY COUNTY, MD., CODE ch. 25A, § 4.

227. *Id.* § 9.

228. *Id.*

229. *Id.*

230. Kevin Sullivan, *Some in Potomac Shudder at "Affordable" Housing*, WASH. POST, May 17, 1993, at B1.

231. *Id.*

232. *Id.*

The Montgomery County program compares favorably with New Jersey's famous court imposed *Mt. Laurel* housing program.²³³ The Montgomery County program has produced 8,442 MPDUs over seventeen years,²³⁴ while the entire state of New Jersey has produced 13,723 *Mt. Laurel* units during a similar period.²³⁵ The Montgomery County program has achieved national recognition and serves as a model for other Maryland jurisdictions.²³⁶

The need for affordable housing is well established,²³⁷ and the recent amendments in state law will, no doubt, promote more of it than would otherwise be available. Unfortunately, the policy for affordable housing is discretionary for local governments, which are not required to include affordable housing as an element of local comprehensive plans.²³⁸ This flaw should be corrected by requiring affordable housing as a mandatory element of local plans, which must then be implemented under the consistency requirement. If applied as intended, this will minimize the gap between planning objectives and regulatory practices. There is also a need to assign to the Commission the responsibility for determining minimum levels of participation.²³⁹ Local governments should be required to authorize sufficient densities in designated growth areas to support affordable housing programs²⁴⁰ and use the set aside authority to provide affordable housing as components of developments of a certain size.

C. Resource Conservation and Protection of Sensitive Areas

Protection of sensitive areas is a special concern of the Planning Act, which delineates four areas for consideration: streams and their buffers, habitats of threatened and endangered species, steep slopes, and 100 year floodplains.²⁴¹ These four areas are particularly susceptible to damage by the cumulative impact of development.²⁴² The range of protection currently afforded these areas varies from non-

233. See generally *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), cert. denied 423 U.S. 808 (1975) (*Mt. Laurel I*); INVENTORY, *supra* note 216, at 11-15.

234. Larsen interview, *supra* note 221.

235. Robert Hanley, *Open Housing Is Mired in Lawsuits Again*, N.Y. TIMES, Jan. 2, 1990, at B1.

236. Larsen interview, *supra* note 221; see ROUSE REPORT, *supra* note 203, at 27; William K. Stevens, *Scattered Low-Cost Housing Offers Renewed Hope to Poor and Minorities*, N.Y. TIMES, Sept. 15, 1988, at B6.

237. ROUSE REPORT, *supra* note 203, at 5-8.

238. See MD. ANN. CODE art. 66B, § 12.01(a) (Supp. 1994).

239. ANNUAL REPORT, *supra* note 5, at 34-35, 50-51.

240. *Id.*; see DEGROVE, *supra* note 9, at 20-21.

241. MD. ANN. CODE art. 66B, § 3.06(b) (Supp. 1994).

242. ANNUAL REPORT, *supra* note 5, at 16-17.

existent to very stringent.²⁴³ The Commission has identified the need to implement this state policy through regulation, the responsibility for which squarely rests on local governments.²⁴⁴

Farms and forests are the most threatened resources,²⁴⁵ yet the Planning Act provides little in the way of protective measures. Protection of these resources is primarily the responsibility of local government and can only be achieved through restrictive zoning regulations that prohibit harmful uses.²⁴⁶ Restrictive zoning means density low enough to discourage sprawl development and yet provide some reasonable use of the land.²⁴⁷ Agricultural zoning has been regularly upheld,²⁴⁸ and densities as low as one dwelling unit for 160 acres have been determined appropriate under certain circumstances.²⁴⁹

This type of zoning, however, represents a severe curtailment of property owners' expectations of potential development rights. While some legal experts believe that the police power supports these limitations without the need for compensation,²⁵⁰ the loss of investment backed expectations and the political consequences of these lost expectations may compromise or lessen the scope of regulation at the expense of the land to be conserved. Indeed, only five Maryland counties have adopted protective agricultural zoning.²⁵¹ A more practical approach employs a combination of restrictive zoning and the use of transferable development rights (TDRs).

TDRs are devices used to conserve or protect areas such as agricultural lands, forests, historic districts or landmarks, and environmentally sensitive areas.²⁵² The authority for this flexible device was adopted in 1986²⁵³ and has been used in Maryland²⁵⁴ and else-

243. For example, Worchester County has not developed goals, policies, or regulations on any of the four categories, while most urban counties have stringent regulations. ANNUAL REPORT, *supra* note 5, at 13-14 (Supp. 1993).

244. *See id.* at 17.

245. *Id.* at 34-35.

246. Coughlin, *Formulating and Evaluating Agricultural Zoning Programs*, APA JOURNAL 183, 183-92 (Spring 1991).

247. *See generally* MANDELKER, *supra* note 203, ch. 12; DEGROVE, *supra* note 9, at 21-22.

248. *Id.*

249. *See* County of Ada v. Henry, 668 P.2d 994 (Idaho 1983).

250. *See* MANDELKER, *supra* note 203, § 12.

251. The five counties requiring a minimum density of at least one dwelling unit per 20 acres are Anne Arundel, Baltimore, Caroline, Carroll, and Montgomery. ANNUAL REPORT, *supra* note 5, at 7.

252. MANDELKER, *supra* note 203, § 12.13.

253. *See* MD. ANN. CODE art. 66B, § 11.01 (1988).

254. ANNUAL REPORT, *supra* note 5, at 24 (Supp. 1993).

where.²⁵⁵ Montgomery County inaugurated a successful TDR program in 1981 in order to preserve agriculture and rural open space.²⁵⁶ The program links comprehensive planning and zoning with market demand for housing to provide for a viable transfer device that results in agricultural easements in exchange for more concentrated densities in designated growth areas.²⁵⁷

Montgomery County adopted the program following a planning study that determined that rural zoning by itself was not effectively conserving agriculture and that large amounts of agricultural land were being converted to sprawl development.²⁵⁸ The planning study concluded that there was a need to take stringent measures and recommended a massive downzoning of agricultural land to be accompanied by a TDR program to offset lost development expectations.²⁵⁹

About 91,591 acres of agricultural land and rural open space, which represents twenty-eight percent of the County's 323,862 acres, were downzoned in 1981 from a five-acre authorized density to a twenty-five-acre density with a minimum lot size of 40,000 square feet.²⁶⁰ The zoning category used for this purpose is the Rural Density Transfer (RDT) zone,²⁶¹ which permits one dwelling unit per twenty-five acres and creates five TDRs for each twenty-five acres.²⁶² For a 100 acre farm, the property owner is provided with the choice of developing it with four residential units, retaining it in agricultural or open space use and selling twenty TDRs, or a combination of the two methods. For example, the owner could develop one dwelling unit which automatically extinguishes one TDR, and sell the remaining nineteen TDRs.

Selection of receiving areas poses both legal and political problems.²⁶³ A receiving area is located in a designated growth area and

255. Mandelker, *supra* note 203, § 12.13; see, e.g., Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991); Barancik v. County of Marin, 872 F.2d 834 (9th Cir. 1988), *cert. denied*, 493 U.S. 894 (1989).

256. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, THE TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM FOR THE PRESERVATION OF AGRICULTURE AND RURAL OPEN SPACE, STATUS REPORT (July 1992) [hereinafter TDR STATUS REPORT].

257. *Id.* at 1-5.

258. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, FUNCTIONAL MASTER PLAN FOR THE PRESERVATION OF AGRICULTURAL & RURAL OPEN SPACE IN MONTGOMERY COUNTY, MD., 12-25 (1980).

259. *Id.* at 27-31.

260. NORMAN L. CHRISTELLER, REPORT OF THE WORKING GROUP TO EVALUATE THE AGRICULTURAL AND RURAL OPEN SPACE PRESERVATION PROGRAMS 13-14 (Feb. 2, 1988) [hereinafter TDR WORKING GROUP REPORT]; TDR STATUS REPORT, *supra* note 256, at 1-14.

261. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-9.6 (1994).

262. *Id.* §§ 59-C-9.41, 59-C-9.6.

263. See TDR WORKING GROUP REPORT, *supra* note 260, at 15-21.

will host density increases above the level authorized by conventional zoning.²⁶⁴ Density increases may generate opposition from the nearby community. An attack by neighbors produced a temporary invalidation of the Montgomery County program²⁶⁵ and prompted curative measures to readopt the program with adequate zoning districts.²⁶⁶ The program currently employs a variety of receiving area zoning districts,²⁶⁷ which are normally applied by comprehensive zoning at locations specified as suitable for higher densities by master plans.²⁶⁸

Once the receiving areas are applied to the zoning map, the program is implemented through the subdivision process.²⁶⁹ When a developer acquires TDRs for use on land zoned for higher TDR density, a subdivision plan must be approved with the TDR sale and an easement recordation verified.²⁷⁰ A county agency responsible for subdivision approval provides oversight and monitors the implementation of the system.²⁷¹ All sales and easement recordation data are retained in computer-based storage, which is used to verify the TDR implementation process.²⁷² To date, the system has worked successfully, without incidents of fraud or attempts to reuse TDRs.²⁷³

Montgomery County's program has been implemented in an incremental fashion with more receiving areas being designated as comprehensive planning and zoning actions identifying suitable areas for growth.²⁷⁴ When the program was first established there were no receiving areas designated,²⁷⁵ and a TDR fund was created to purchase TDRs in hardship situations.²⁷⁶ Notwithstanding the absence of receiving areas, the program survived a legal challenge.²⁷⁷

The Montgomery County program is gradually achieving equilibrium between supply and demand. Not all land classified in the RDT zone is appropriate to be under a TDR easement because some of it is public parkland or open space, some is already under either

264. *Id.*

265. See *West Montgomery Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 309 Md. 183, 186, 522 A.2d 1328, 1329 (1987).

266. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-1.33 (1994).

267. See *id.*

268. TDR WORKING GROUP REPORT, *supra* note 260, at 13-14.

269. *Id.* at 15-21.

270. *Id.*

271. *Id.*

272. Interview with Denis Canavan, Senior Planner and TDR Coordinator, Maryland-National Capital Park and Planning Commission (Aug. 24, 1993).

273. *Id.*

274. *Id.*

275. See TDR Working Group Report, *supra* note 260, at 1.

276. *Id.*

277. *Defour v. Montgomery County Council*, Law Nos. 56964, 56969, 56983, Circuit Court for Montgomery County (1983) (J. McAullife).

state or county agricultural easement, and some is already developed for residential purposes.²⁷⁸ About 26,182 acres fall within these categories and will not use TDRs.²⁷⁹ The remaining 65,409 acres represent potential TDR sending areas for 12,297 TDRs.²⁸⁰ By July, 1992, the designated receiving areas increased to a level capable of hosting 11,650 TDRs.²⁸¹ As the supply and demand have, more or less, settled into equilibrium, the unit price of the TDRs has reached about \$10,000.²⁸² The TDR fund was never used and was eliminated by administrative action.²⁸³

The TDR program will be completed when the remaining TDRs are sold and easements recorded.²⁸⁴ So far, easements have been recorded for 3,185 TDRs, resulting in a minimum of 15,925 acres being preserved for agriculture and rural open space.²⁸⁵ There are 2,174 additional TDRs sold and awaiting approval under the subdivision process, which will result in an additional 10,870 acres under easement.²⁸⁶ This total of 26,795 acres under a TDR easement represents about forty-one percent of the potential supply under the program.²⁸⁷

Resource conservation and protection of sensitive areas are prime objectives of the Visions of 2020 because of their direct relationship to the health of the Chesapeake Bay.²⁸⁸ Without protective zoning and other regulatory measures, the objectives will not be achieved. Once local governments determine the areas to be protected as part of a local plan, there must be corresponding regulation of these areas. If this effort does not occur, then the state must consider imposition of regulation as recommended by the 2020 proposals²⁸⁹ because these areas are far too important to risk to future development.

D. Funding Mechanisms

The Visions of 2020 anticipated that funding mechanisms would be in place to support growth in suitable areas.²⁹⁰ In effect, the

278. TDR WORKING GROUP REPORT, *supra* note 260, at 16.

279. See TDR Status Report, *supra* note 256.

280. *Id.*

281. *Id.*

282. Canavan Interview, *supra* note 272.

283. *Id.*

284. *Id.*

285. TDR STATUS REPORT, *supra* note 256, at 8.

286. *Id.*

287. *Id.*

288. BAY REPORT, *supra* note 1. The American Farmland Trust recently concluded that four Maryland counties are at risk of losing substantial areas of farmland to development. Deb Riechmann, *Four Maryland Counties Losing Ground*, MONTGOMERY J., July 19, 1993, at A3.

289. Maryland Growth and Chesapeake Bay Protection Act of 1991; S. 227, 1991 Sess. (Md. 1991); H.D. 214, 1991 Sess. (Md. 1991).

290. 2020 REPORT, *supra* note 3.

Visions contemplate a concurrency standard²⁹¹ that requires that adequate public facilities be in place for areas where development is to be approved.²⁹² Concurrency means that growth can only be considered suitable if roads, schools, parks, and other necessary public facilities are adequate to support the growth.²⁹³ If funding mechanisms are not in place to provide these facilities concurrent with anticipated growth, then the designated area is not suitable for growth until the necessary facilities are available.²⁹⁴ The Planning Act, however, modified the policy pertaining to funding mechanisms and substituted a vague objective that funding mechanisms need only be addressed.²⁹⁵ This modification is a significant retreat from the Visions of 2020.

The practice of deferring growth and related development approvals until public facilities are deemed adequate has received judicial support in Maryland based on all types of public facilities.²⁹⁶ The adequacy of public facilities is usually measured in terms of levels of service (LOS)²⁹⁷ under standards contained in an adequate public facilities ordinance (APFO) or related growth policy documents.²⁹⁸ The purpose of the APFO is to ensure that development does not occur unless the capacity of public facilities is adequate to absorb the proposed growth.²⁹⁹

The APFO is a regulatory device used to control the timing and pace of development, the use and density of which has already been authorized by zoning.³⁰⁰ Applied before development authorizations are issued, the APFO permits local government to evaluate the impact of development on existing and planned public facilities and delay development approvals if the facilities are found to be inadequate to accommodate the proposed growth under a LOS threshold deemed appropriate for a particular locality.³⁰¹

291. See generally DEGROVE, *supra* note 9, at 7, 16-20 (discussing the concept of concurrency).

292. *Id.*

293. *Id.*

294. *Id.*

295. MD. CODE ANN., STATE FIN. & PROC. § 5-708(7) (Supp. 1994).

296. Shapiro v. Montgomery County, 269 Md. 380, 388, 306 A.2d 253, 257 (1973) (schools); Montgomery County Council v. Pleasants, 266 Md. 462, 466-67, 295 A.2d 216, 217 (1972) (sewers); Price v. Cohen, 213 Md. 457, 464, 132 A.2d 125, 129 (1957) (roads).

297. MONTGOMERY COUNTY, MD., ANNUAL GROWTH POLICY, July, 1993; William E. Baumgaertner & John W. Guckert, *APFO: A Successful Growth Management Tool*, 1993 J. OF MD. PLANNING 10; DEGROVE, *supra* note 9, at 17-20.

298. See *supra* note 296.

299. See *supra* note 296.

300. See *supra* note 296.

301. See *supra* note 296.

The APFO is now authorized for discretionary use by local governments.³⁰² State law neglects, however, to provide any policy direction on the use of the APFO. The more effective APFOs address a range of public facilities and evaluate the cumulative impact of growth.³⁰³ Some APFOs, however, have limited application and do not evaluate public facilities that are the responsibility of other levels of government,³⁰⁴ or focus only on the immediate area,³⁰⁵ or examine only present conditions without considering future growth.³⁰⁶ These shortcomings cause an underestimate of future growth that will be unsupported by adequate facilities over time.³⁰⁷

If an APFO review finds inadequacy, then funding mechanisms must be identified which are reasonably probable of fruition in the foreseeable future³⁰⁸ and will provide adequate facilities to support the development.³⁰⁹ If state or local governments are unable to provide funding, alternative sources must be identified if the development is to be approved.³¹⁰ The APFO usually contains provisions for mitigation to allow development to proceed so long as private sector funding provides the necessary facilities.³¹¹

Flexible zoning is another technique that affects funding for public facilities. Incentive zoning provides public amenities or facilities that reduce the need for public funding sources.³¹² Mixed use zoning provides a balance between employment and housing which encourages pedestrian traffic and shorter vehicle trips, thus easing the impact of growth on transportation facilities and public funding sources.³¹³ Several other techniques include development agreements³¹⁴ and various types of private sector contributions through impact fees³¹⁵ or

302. MD. ANN. CODE art. 66B, § 10.01 (Supp. 1994). The Commission reports that 12 counties and 10 municipalities have enacted APFOs. ANNUAL REPORT, *supra* note 5, Supplement, Matrix 2.8A, 2.8B, at 31-36.

303. Baumgaertner, *supra* note 297.

304. See *supra* note 302; Philip J. Tierney, *Maryland's Growing Pains: The Need for State Regulation*, 16 U. BALT. L. REV. 201, 238 (1987).

305. Tierney, *supra* note 304, at 238-40.

306. *Id.*

307. *Id.*

308. *Montgomery County v. Greater Colesville Citizens Ass'n*, 70 Md. App. 374, 387-88, 521 A.2d 770, 777 (1987).

309. MONTGOMERY COUNTY ANNUAL GROWTH POLICY 13-16 (July, 1993).

310. *Greater Colesville*, 70 Md. App. at 387-88, 521 A.2d at 777.

311. Baumgaertner, *supra* note 297; see *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

312. Kayden, *supra* note 178.

313. BAY REPORT, *supra* note 1, at 7.

314. Delaney, *supra* note 188.

315. *DeGrove*, *supra* note 9, at 24. Maryland courts require explicit authority for impact fees, and home rule authority has been held insufficient as a basis for these fees. *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (1990).

development taxes.³¹⁶ A new funding mechanism was authorized in 1992 and provides for off-site improvements under certain circumstances.³¹⁷ The authorization for off-site improvements allows exactions for needed facilities and wisely includes a nexus requirement,³¹⁸ which codifies both Maryland³¹⁹ and federal³²⁰ legal requirements for the imposition of exactions.

Funding mechanisms are critical to concentrating growth in suitable areas. Use of the concurrency standard provides an important incentive to direct growth to areas with excess infrastructure but in need of revitalization.³²¹ Yet, the Planning Act provides a weakened policy objective that needs to be strengthened in order to make the state growth policy consistent with the Visions of 2020. The Commission should also be assigned rule-making authority for the use of growth management regulations.

V. POTENTIAL IMPEDIMENTS TO STATE POLICY

Achievement of the state growth policy will be difficult enough without having to deal with several potential impediments to the effective implementation of the policy. These impediments include the takings challenge, shifts in the presumption of regulatory validity, the inability to employ site-specific use conditions when discretionary zoning is approved, and the application of a strict vested rights doctrine.

A. Takings Challenge

The takings challenge is based on the Fifth Amendment of the United States Constitution and its Just Compensation Clause.³²² The challenge is concerned with land use regulations imposing onerous burdens on certain property owners that should more fairly be

316. DEGROVE, *supra* note 9, at 24. A development impact tax was upheld as a properly authorized excise tax. *Waters Landing Ltd. Ptnshp. v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994).

317. MD. ANN. CODE art. 66B, § 10.01(a)(2) (Supp. 1994).

318. *Id.*

319. *Howard County v. J.J.M., Inc.*, 301 Md. 256, 282, 482 A.2d 908, 921 (1984).

320. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-37 (1987); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

321. Kaplan, *supra* note 17.

322. The Fifth Amendment to the United States Constitution, which is incorporated against the states by the Fourteenth Amendment, *Chicago B & O R.R. v. Chicago*, 166 U.S. 226, 239 (1897), provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

assumed by the public.³²³ How the takings challenge is applied involves an examination of the character of the regulation³²⁴ and the impact on the affected property.³²⁵ In 1922, when the United States Supreme Court, in *Pennsylvania Coal Co. v. Mahon*,³²⁶ held that a noninvasive police power regulation went "too far" and became a "taking" of private property by the government, the seeds of the regulatory takings doctrine were planted and its first fruits would be produced years later to the consternation of local government officials.³²⁷

Because the Supreme Court ignored the regulatory takings doctrine for over fifty years,³²⁸ state courts initially determined the limits of land use regulations under a substantive due process analysis and violations involved the traditional remedy of invalidation of the regulation.³²⁹ As the states were formulating their due process jurisprudence, a more narrow view of property emerged that subordinated private property rights in favor of the general welfare.³³⁰ The New Deal, the decline of the *Lochner*³³¹ era view of property rights,³³² and the development of administrative law provided the basis for the emergence of more deference to legislative action, particularly with

323. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); MANDELKER, *supra* note 203, § 2.01; Norman N. Williams, Jr., *A Narrow Escape?*, 16 ZONING & PLANNING LAW REPORT 113, 115-17 (1993).

324. MANDELKER, *supra* note 203, § 2.01.

325. *Armstrong*, 364 U.S. at 49 (1960); MANDELKER, *supra* note 203, § 2.01; Williams, *supra* note 323, at 115-17.

326. 260 U.S. 393 (1922).

327. See Williams, *supra* note 323, at 123-26; Charles R. Wise, *The Changing Doctrine of Regulatory Takings and the Executive Branch*, 44 ADMIN. L. REV. 403, 409-13 (1992).

328. Forty-six years elapsed between the two regulatory takings cases. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

329. MANDELKER, *supra* note 203, § 2.25; Williams, *supra* note 323, at 115-17.

330. The progressive income tax, welfare programs, and rent control are several examples. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 3-7, 213-46, 263-64 (1992). Subordination of property rights to larger public interest concerns is not simply a product of progressive legal thinkers but enjoys a wider following. For example, Pope John Paul, II, provided the following view about subordination of private property rights:

Christian tradition has never upheld [private property . . . rights] as absolute and untouchable. On the contrary, it has always understood this right within the broader context of the right common to all to use the goods of the whole of creation: *the right to private property is subordinated to the right to common use*, to the fact that goods are meant for everyone.

THE ENCICLYCAL LETTER OF POPE JOHN PAUL II, *LABOREM EXERCENS* ch. 14, at 35, Sept. 14, 1981 (emphasis in original).

331. *Lochner v. New York*, 198 U.S. 45 (1905).

332. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

respect to land use regulation.³³³ With changing notions of property and the decline of *Lochner* influence, conservative thinkers returned to the Holmes dictum in *Pennsylvania Coal* for support and, beginning in the 1970s, the takings challenge began to emerge in a new package with links for the first time to the Just Compensation Clause instead of the Due Process Clause.³³⁴

The Supreme Court first considered this new takings challenge in 1978 in *Penn Central Transportation Co. v. City of New York*.³³⁵ The Court declined to formulate any fixed rules, however.³³⁶ The Court's then liberal majority expressed a preference for a case by case evaluation. The Court applied a balancing test with three elements: the character of the government action, the extent to which the regulations affect investment-backed expectations, and the economic impact of the regulations.³³⁷ Subsequently, however, the Court's increasingly conservative membership succeeded in establishing fixed rules about property rights³³⁸ and began to identify categories that limited the scope of legislative actions and the deference to be accorded them.³³⁹

A more conservative Supreme Court in three recent decisions, *Nollan v. California Coastal Commission*,³⁴⁰ *Lucas v. South Carolina Coastal Council*,³⁴¹ and *Dolan v. City of Tigard*,³⁴² began a shift away from the view that property is a creation of law and its regulation is entitled to judicial deference. *Nollan* abandoned traditional deference as applied in other types of constitutional challenges³⁴³

333. HORWITZ, *supra* note 330, at 213-46; Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

334. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), was, of course, a due process case and did not involve the Just Compensation Clause despite the dictum of Justice Holmes. Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVIR. LAW RPTR. 10369 (Sept. 1987); Williams, *supra* note 323, at 117-26; Wise, *supra* note 327, at 409-13. The just compensation theory of regulatory takings was initially rejected by two leading state courts. See *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 990 (1976); *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

335. 438 U.S. 104 (1978).

336. *Id.* at 124.

337. *Id.*

338. Williams, *supra* note 323, at 117-26.

339. *Id.*; Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 455-73 (1988).

340. 483 U.S. 825 (1987).

341. 112 S. Ct. 2886 (1992).

342. 114 S. Ct. 2309 (1994).

343. *Nollan*, 483 U.S. at 834 n.3.

and shifted the presumption of validity normally accorded land use regulations at least when an invasive regulation is involved.³⁴⁴ *Lucas* further eroded traditional deference with the application of a common-law nuisance baseline to regulations that destroy value.³⁴⁵ *Lucas* rejected the liberal contention that regulations necessary for public health or safety purposes, which sometimes exact uneven burdens on property owners, are still entitled to deference because the legislature is the best forum to resolve distributive issues.³⁴⁶ Instead, *Lucas* reasserted longstanding conservative suspicions of the legislature³⁴⁷ and limited the impact of *Keystone Bituminous Coal Association v. De Benedictis*,³⁴⁸ which provided the basis for the state court's affirmation of the South Carolina beach protection regulation.³⁴⁹ The *Keystone* majority had earlier suggested that regulations with health and safety objectives were virtually immune from a takings challenge under a nuisance exception.³⁵⁰ *Keystone* was modified on this point,³⁵¹ but was not directly overruled.

Dolan continued the recent trend to undercut traditional presumptions of validity and deference to the legislature by imposing new requirements for local governments to establish both a reasonable nexus and rough proportionality between exactions and the impact of development.³⁵² Exactions, the requirement for contribution of property or money to alleviate the impact of development in exchange for development approval, are customary devices used by local governments to obtain property or funds for roads, schools, parks, and other public facilities, the need for which is caused at least in part by the new development.³⁵³ When the government seeks to acquire a property right—such as the right to exclude—the burden is now on the government to establish adequate nexus and proportionality using an individualized analysis and subject to heightened judicial scru-

344. Some believe that *Nollan's* heightened scrutiny is limited to situations involving a permanent physical occupation. See Frank Michelman, *Takings*, 1987, 88 COL. L. REV. 1600, 1612-14 (1988).

345. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

346. *Id.* The decision also threatens the basis for all environmental regulations that limit property to natural uses. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

347. HORWITZ, *supra* note 330, at 213-46.

348. 480 U.S. 470 (1987).

349. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1991), *rev'd*, 112 S. Ct. 2886 (1992).

350. See *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987).

351. See *Lucas*, 112 S. Ct. at 2886.

352. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

353. See *id.* at 2317-19.

tiny.³⁵⁴ Since the local government in *Dolan* was attempting to implement state policy under a comprehensive plan and regulation, the Supreme Court's decision is a disappointing loss for plan-based regulation because the majority neglected to analyze the total economic impact of the government's action on the property owner. As Justice Stevens pointed out in his dissent, the Court chose to ignore both the benefits received by the property owner from the government's approval and the impact of the government's actions on the value of the whole parcel,³⁵⁵ and instead imposed a *Lochner* era type review to support a finding of an unconstitutional condition.³⁵⁶

Despite the conservative trend in recent decisions, there has not been a substantial redefinition of property when a takings analysis is required.³⁵⁷ Before *Dolan*, a discrete property interest could not be conceptually severed³⁵⁸ from the whole parcel and considered individually for a takings analysis without reference to the effect of the regulation on the entire parcel. *Dolan* modified this view at least as it applies to discrete property interest sought by the government for public use by way of dedication.³⁵⁹ Nevertheless, *Dolan* does not threaten protective zoning for farmlands, floodplains, or other environmental purposes even if the value of the property is substantially diminished by the regulation. In this respect, the whole parcel analysis is still viable.³⁶⁰ Indeed, if the whole parcel approach is abandoned,

354. See *id.* The heightened judicial scrutiny is applied in an adjudicative setting and may not apply when the challenged regulatory action is legislative in character.

355. *Id.* at 2324-25 (Stevens, J., dissenting). In its takings analysis, the conservative majority ignored the factor of increased property values resulting from government approvals and other actions such as infrastructure improvements. See *id.* at 2319-22; see also *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965). Surely, the increased property values represent a legitimate factor in any taking analysis to determine the true economic impact of government action on a particular property. See Edward Thompson, Jr., *The Government Giveth*, II ENVIRON. FORUM, No. 2 at 22 (Mar./Apr. 1994).

356. Dwight H. Merriam & R. Jeffrey Lyman, *Dealing with Dolan, Practically and Jurisprudentially*, 17 ZONING & PLANNING L. REP. 57, 62-63 (Sept., 1994).

357. The majority in *Dolan* was narrowly applied and exempted protective zoning from the decision. See *Dolan*, 114 S. Ct. at 2309. Nevertheless, the *Lucas* majority did signal that a clarification of the affected property interest and the notion of a partial taking remain on the conservative agenda. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7, 2895 n.8 (1992). Support for both points are found in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), and *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

358. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COL. L. REV. 1667, 1674-78 (1988).

359. In this respect, the decision involves an invasive regulation as in *Nollan* and may be limited to that situation. See Michelman, *supra* note 344.

360. Williams, *supra* note 323, at 123-27. See Richard M. Frank, *Inverse Condem-*

every residential front yard setback restriction will be vulnerable to attack even though the entire lot enjoys a reasonable use³⁶¹ and property owners could manipulate conveyances under existing regulations to create takings while enjoying reasonable and profitable uses on their remaining interests.

States may be reluctant to replace their long-established tests for evaluating takings challenges. There are difficulties inherent in the application of these Supreme Court decisions.³⁶² The Supreme Court of Washington has twice tried to formulate an application of the United States Supreme Court's rules to land use regulations and produced confusion for both regulators and developers.³⁶³ Maryland has long followed an analysis centering on denial of all reasonable use.³⁶⁴ The Maryland courts have yet to apply the fixed rules and prefer the case by case approach with deference to the legislature on issues of public purposes of the regulation and a focus on the economic impact of the regulation.³⁶⁵

The takings challenge is now well established and provides boundaries beyond which government regulation should not go. Recent Supreme Court decisions will require local governments to exercise careful planning and administration when providing discretionary approvals in exchange for public amenities. The government may be required to demonstrate that the public amenities bear a reasonable relationship and a rough proportionality to the subject matter of the approval.

The application of the state growth policy can certainly coexist with the takings challenge if local governments are careful in crafting

nation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions, 43 WASH. U. J. URB. & CONTEMP. L. 85, 102-04 (1993). In *Dolan*, the majority ignored the balance of the property interests. Presumably, the Washington State court will evaluate the entire property interest when determining whether the rough proportionality test can be satisfied.

361. See *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987); *Gorieb v. Fox*, 274 U.S. 603 (1927).
362. The decisions leave many questions to be resolved that include distinguishing between takings and substantive due process violations, identifying invasive and noninvasive regulations, defining the property interests to be evaluated, and dealing with the notion of partial takings.
363. Compare *Allingham v. City of Seattle*, 749 P.2d 160 (Wash. 1988) with *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash.), cert. denied, 498 U.S. 911 (1990).
364. For recent discussions of Maryland's takings jurisprudence, see *Lone v. Montgomery County*, 85 Md. App. 477, 584 A.2d 142 (1991); *Offen v. County Council*, 96 Md. App. 526, 625 A.2d 424 (1993), rev'd on other grounds, *County Council v. Offen*, 334 Md. 499, 639 A.2d 1070 (1994).
365. Maryland courts have applied a whole parcel analysis when evaluating the economic impact of a regulation. See *North v. St. Mary's County*, 99 Md. App. 502, 638 A.2d 1175 (1994).

their regulations and state law is revised to provide better policy direction. The takings challenge underscores the need for the use by local governments of the flexible techniques and streamlined approaches now authorized under state law. These new approaches will enable local governments to adopt regulations for site-specific conditions and provide for a variety of uses that will benefit both the property owner and the public.

B. Shift in Presumption of Validity

Since at least 1926 and *Euclid v. Ambler Realty Co.*,³⁶⁶ a presumption of validity has applied to land use regulations which are only invalidated if clearly arbitrary and unreasonable and with no substantial relationship to the public health, safety, morals, or general welfare.³⁶⁷ The courts have continued to apply the presumption of validity to ordinary land use disputes.³⁶⁸ Generally, the presumption is evaluated under an ends-means test.³⁶⁹

The presumption of validity is under attack by property rights advocates³⁷⁰ and this attack corresponds to a shift in the presumption

366. 272 U.S. 365 (1926).

367. The regulation is upheld if the basis for it is "fairly debatable." *Euclid*, 272 U.S. at 395. The fairly debatable standard was formulated by the Supreme Court in a facial challenge to a legislative action. *Id.* Whether this same standard should also be applied to administrative or adjudicatory actions is an interesting question after *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), although Maryland courts have applied the fairly debatable standard to adjudicatory decisions. See *Enviro-Gro Technologies v. Bockelmann*, 88 Md. App. 323, 594 A.2d 1190, cert. denied, 325 Md. 94, 599 A.2d 447 (1991). Maryland courts, however, have not always been deferential to the legislature when reviewing land use regulation. See *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 A. 547 (1916) (separation of semi-detached houses in residential areas is not a valid basis for police power regulation).

368. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Mears v. Town of Oxford*, 52 Md. App. 407, 449 A.2d 1165 (1982) (attacker must show absence of public benefit).

369. The end purpose of the regulation must relate to legitimate government objectives and the means employed must be reasonable and not oppressive. See *Levinson v. Montgomery County*, 95 Md. App. 307, 620 A.2d 961, cert. denied, 331 Md. 197, 627 A.2d 539 (1993). The ends-means test has a long history in Maryland. See *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 A. 547 (1916) (segregation of multifamily from single family housing based on aesthetics, an unreasonable means); *Tighe v. Osborne*, 149 Md. 349, 131 A. 801 (1925) (public welfare justification too broad to be proper end for regulation that restricts property rights); *Tighe v. Osborne*, 150 Md. 452, 133 A. 465 (1926) (health and safety justification supports regulation against due process attack).

370. President Reagan's Commission on Housing concluded in 1982 that the presumption should be replaced with a requirement that governments show that land use regulations are necessary to achieve a "vital and pressing governmental interest." BERNARD SIEGAN, REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING, LAND USE LAW 7 (Nov. 1982); see *Williams, supra* note 323, at 122-23.

in several areas where constitutional and important public policy issues are at stake.³⁷¹ The presumption shifts when land use regulations involve exclusionary zoning,³⁷² unconstitutional intrusions,³⁷³ discriminatory classifications,³⁷⁴ and malfunctions of the zoning process.³⁷⁵

The erosion of the presumption poses a clear threat to the use of flexible techniques necessary to implement the state growth policy. For example, incentive zoning or TDRs provide for added density in exchange for public amenities.³⁷⁶ Property rights advocates may contend that the higher densities are being withheld for later sale, when they should have been applied to the land in the first place instead of imposing burdens on a select class of property owners who happen to own property with enough development potential to support the zoning scheme.³⁷⁷ This argument concludes that the government, by use of these zoning schemes, expropriates market value for resale.³⁷⁸

The presumption of validity is critical to local government's defense of land use regulatory programs. The flexible techniques now authorized by state law involve redistributive measures which have historically enjoyed deference and would likely survive ends-means analysis.³⁷⁹ The flexible techniques are not likely to be found to

371. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

372. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (Mt. Laurel I); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (Mt. Laurel II).

373. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *see Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (invasive regulatory takings); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (suppression of religious activity); *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (unreasonable limitations on protected modes of expression) (Blackmun, J., concurring).

374. *See, e.g., Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372, *cert. denied*, 114 S. Ct. 600 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *State v. Baker*, 405 A.2d 368 (N.J. 1979); *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980); *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994).

375. Malfunction of the zoning process is illustrated by cases where the public interest is subordinated for private benefit contrary to the comprehensive plan. In this situation, courts do not accord the presumption to the government's action. MANDELKER, *supra* note 203.

376. Kayden, *supra* note 178, at 3-8; TDR STATUS REPORT, *supra* note 256, at 2-5.

377. *See* Kayden, *supra* note 178, at 3-8.

378. *Id.*

379. *See Levinson v. Montgomery County*, 95 Md. App. 307, 620 A.2d 961 (1993). The majority in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), did not

constitute a takings because property owners retain valuable property rights.³⁸⁰ The problem will occur under a substantive due process challenge where local government misapplies the flexible techniques in a shocking, arbitrary, or capricious manner.³⁸¹ Clear policy direction will minimize the risks of any shift in the presumption.

C. Conditional Zoning

One of the major features of the flexible techniques is the ability to tailor development to take advantage of unique characteristics of a particular site³⁸² and rely on site-specific use conditions.³⁸³ For example, PUDs often include mixed uses which vary in the type and intensity of use,³⁸⁴ and are not intended to be uniform.³⁸⁵ These flexible zoning techniques allow for limitations on uses, density, building locations, and other physical features of development and permit local governments to respond quickly to changing market forces.³⁸⁶ The town of Columbia, Maryland illustrates this approach with its substantial park land and transportation facilities all dependent on conditions imposed in exchange for zoning approval.³⁸⁷

In a general sense, these techniques employ use conditions which may run afoul of a Maryland common-law doctrine that prohibits conditional zoning.³⁸⁸ Although conditional zoning was authorized by

abandon the presumption in cases involving general and noninvasive application of legislative policy, even when the application involves substantial diminution of property values.

380. See *Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied*, 434 U.S. 1067 (1978).

381. To be successful under a substantive due process claim, both a property interest and abusive government action must be shown. Compare *Gardner v. City of Baltimore*, 969 F.2d 63 (4th Cir. 1992), and *G.M. Eng'rs & Assocs., Inc. v. West Bloomfield Township*, 922 F.2d 328 (6th Cir. 1990) with *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) and *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987).

382. 2 RATHKOPF, *supra* note 114, § 29A.02[I].

383. *Id.*

384. 5 RATHKOPF, *supra* note 114, § 63.01.

385. *Id.* § 63.02.

386. *Id.*

387. HOWARD COUNTY ZONING REGULATIONS § 122 (1985).

388. The conditional zoning doctrine finds its roots in *Wakefield v. Kraft*, 202 Md. 136, 96 A.2d 27 (1953). The Court of Appeals continued to explain its dissatisfaction with conditional zoning in a series of decisions that involved the ad hoc conditions imposed by local governments at the time of zoning approval. See *Montgomery County v. National Capital Realty Corp.*, 267 Md. 364, 297 A.2d 675 (1972); *Marathon Builders, Inc. v. Polinger*, 263 Md. 410, 283 A.2d 617 (1971); *Carole Highlands Citizens Ass'n v. Board of County Comm'rs*, 222 Md. 44, 158 A.2d 663 (1960); *Pressman v. Mayor of Baltimore*, 222 Md. 330, 160 A.2d 379 (1960); *Rose v. Paape*, 221 Md. 369, 157 A.2d 618 (1960); *Baylis v. City of Baltimore*, 219 Md. 164, 148 A.2d 429 (1959).

the state legislature in 1975,³⁸⁹ the Court of Special Appeals of Maryland has narrowly construed that authorization and applied the conditional zoning doctrine in a manner that is not based on sound policy or law.³⁹⁰

Conditions imposed through the flexible zoning process could avoid any vulnerability under the conditional zoning doctrine if the conditions are made part of a traditional zoning scheme under a more cumbersome approach. For example, a developer selects a site and makes plans for site specific development that are then made part of a zoning text amendment that authorizes the conditional form of development following a legislative process including planning analysis, notice, and public hearings. A new zoning district is then adopted which authorizes the site-specific development. The district is then applied to the site by either comprehensive or piecemeal rezoning which involves another round of planning reviews, notice, and hearings. Flexible zoning expedites this process by permitting the conditions to be imposed at the time of site-specific zoning approval under a very generalized zoning authorization that is available to any number of developers to use for different circumstances.³⁹¹

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389. The General Assembly authorized conditional zoning in a manner that (1) permits restrictions to protect the character and design of the area, (2) permits post-zoning review of design, and (3) provides for enforcement and procedural rights.

The local legislative body of a county or municipal corporation, upon the zoning or rezoning of any land or lands . . . , [1] *may impose* such additional restrictions, *conditions* or limitations *as may be deemed appropriate to preserve, improve, or protect the general character and design of the lands and improvements being zoned or rezoned, or of the surrounding or adjacent lands and improvements*, and [2] *may, upon the zoning or rezoning of any land or lands, retain or reserve the power and authority to approve or disapprove the design of buildings, construction, landscaping, or other improvements, alterations, and changes made or to be made on the subject land or lands* to assure conformity with the intent and purpose of this article and the jurisdiction's zoning ordinance. The powers provided in this subsection shall be applicable only if the local legislative body adopts an ordinance [3] which shall include enforcement procedures and requirements for *adequate notice of public hearings and conditions sought to be imposed*.

MD. ANN. CODE art. 66B, § 4.01(b) (1988 & Supp. 1994) (emphasis added). The authorization provided safeguards to prevent the imposition of ad hoc conditions found so offensive in the early Maryland conditional zoning decisions. Under the statutory authorization, conditions can only be applied with adequate notice.

390. See *Board of County Comm'rs v. H. Manny Holtz, Inc.*, 65 Md. App. 574, 501 A.2d 489 (1985).
391. See *Collard v. Incorporated Village of Flower Hill*, 421 N.E.2d 818 (N.Y. 1981).

The conditional zoning doctrine and its hostility to site-specific use conditions pose a threat to the use of flexible zoning in Maryland.³⁹² There are safeguards to insure that local governments exercise conditional use powers in a responsible manner. The conditional zoning authorization requires notice and a hearing. The new Planning Act³⁹³ and related legislation³⁹⁴ provide a firm basis for local regulatory actions grounded in consistency with state policy and a comprehensive plan.³⁹⁵ These laws diminish any policy justification for the conditional zoning doctrine to limit the newly authorized flexible zoning techniques.

Conditional use zoning as authorized by law does not involve the imposition of ad hoc conditions, which initially prompted judicial hostility to its application,³⁹⁶ and is distinguishable from spot zoning, contract zoning, and zoning violative of uniformity. For example, spot zoning is simply a descriptive term involving site-specific zoning

392. The conditional zoning doctrine is based on concerns that site specific zoning with conditions may provide discriminatory benefits in favor of individual property owners at the expense of the larger community and involve the zoning authority in bargaining away public rights. The leading decision on conditional zoning in Maryland is *Baylis v. City of Baltimore*, 219 Md. 164, 148 A.2d 429 (1959), where the owner challenged a restrictive zoning condition that was subsequently held invalid by the court on the basis of lack of authority, departure from the comprehensive plan, improper restriction of the police power by contract, and violation of uniformity. As authority for its rejection of conditional zoning, the court relied on a decision by the Supreme Court of Suffolk County, New York, in *Church v. Town of Islip*, 160 N.Y.S.2d 45 (1956), *rev'd*, 190 N.Y.S.2d 297 (1959), which had invalidated a rezoning on similar grounds. The reliance on *Church* was misplaced as the New York Court of Appeals subsequently reversed the lower court ruling and upheld conditional zoning as a valid form of flexible zoning inherently authorized by the standard enabling act, not violative of uniformity or notions of spot zoning, and not a form of contract zoning. *Church v. Town of Islip*, 168 N.E.2d 680 (N.Y. 1960). The approval of conditional zoning in New York was further explained in *Collard v. Incorporated Village of Flower Hill*, 421 N.E.2d 818 (N.Y. 1981), and represents a growing trend of decisions supporting conditional zoning as a flexible zoning tool necessary for the general welfare. See 2 RATHKOPF, *supra* note 114, §§ 29A.02[3], 29A.03[1][c]. The New York Court of Appeals in *Collard* provided a persuasive rationale for the use of conditional zoning:

Conditional rezoning is a means of achieving some degree of flexibility in land use control by minimizing the potentially deleterious effect of a zoning change on neighboring properties; reasonably conceived conditions harmonize the land owner's need for rezoning with the public interest and certainly fall within the spirit of the enabling legislation.

Collard, 421 N.E.2d at 822.

393. H.D. 1195, 1992 Sess. (Md. 1992).

394. H.D. 457, 1992 Sess. (Md. 1992).

395. MD. ANN. CODE art. 66B, §§ 3.05(b), 3.06(b), 4.09 (1988 & Supp. 1994).

396. 2 RATHKOPF, *supra* note 114, § 29A.01[c].

different from the surrounding area,³⁹⁷ and is only invalid in Maryland when it is applied solely for the benefit of the property owner without any relationship to the comprehensive plan or the general welfare.³⁹⁸ Contract zoning, which involves a bargain between the land owner and the zoning authority, is often confused with conditional use zoning that does not involve prospective commitments.³⁹⁹ Unlike contract zoning, conditional zoning does not bargain away the police powers and the zoning can be changed in the future without regard to the condition.⁴⁰⁰ While uniformity is required under the enabling law,⁴⁰¹ courts have not applied it in a strict manner and have permitted mixed uses, cluster development, and variations in density or bulk that are the very characteristics of the newly authorized flexible techniques most vulnerable to the conditional zoning doctrine.⁴⁰²

Conditional use zoning, applied with appropriate safeguards, is a modern technique that is consistent with sound planning and zoning objectives.⁴⁰³ The General Assembly authorized its use in 1975 and presumably overcame the limitations of common-law doctrine. However, the Court of Special Appeals of Maryland applied a narrow interpretation to the legislation in *Board of County Commissioner v. H. Manny Holtz, Inc.*⁴⁰⁴ In *Holtz*, the Board of County Commissioner, which acts as the zoning authority for Washington County, approved a commercial zoning classification with conditions prohibiting a convenience store and several other uses normally permitted under the commercial zoning district.⁴⁰⁵ The use conditions were imposed on an ad hoc basis without prior notice, in apparent violation of notice requirements.⁴⁰⁶ The trial court upheld the rezoning but found the conditions in violation of the uniformity provision and removed them from the rezoning.⁴⁰⁷

397. See *Tennison v. Shomette*, 38 Md. App. 1, 379 A.2d 187 (1977); *City of Baltimore v. Byrd*, 191 Md. 632, 62 A.2d 588 (1948).

398. *Cassel v. City of Baltimore*, 195 Md. 348, 73 A.2d 486 (1950).

399. *Collard v. Incorporated Village of Flower Hill*, 421 N.E.2d 818 (N.Y. 1981); RATHKOPF, *supra* note 114, § 29A.03[1][b].

400. *Cassel v. City of Baltimore*, 195 Md. 348, 73 A.2d 486 (1950).

401. MD. ANN. CODE art. 66B, § 4.02(a) (1988).

402. *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Prince George's County v. M & B Constr. Corp.*, 267 Md. 338, 297 A.2d 683 (1972); *Malmar Assocs. v. Board of County Comm'rs*, 260 Md. 292, 272 A.2d 6 (1971); *Ellicott v. Baltimore*, 180 Md. 176, 23 A.2d 649 (1942); *Wesley Inv. Co. v. County of Alameda*, 198 Cal. Rptr. 872 (Cal. App. 1984).

403. RATHKOPF, *supra* note 114, § 29A.02[3].

404. 65 Md. App. 574, 501 A.2d 489 (1985).

405. *Id.* at 576-77, 501 A.2d at 490.

406. *Id.* at 577, 501 A.2d at 490.

407. *Id.* at 579, 501 A.2d at 491.

The court of special appeals affirmed by holding that the conditional zoning authority contained in state law only applies to physical restrictions and not use.⁴⁰⁸ The court found that the authorization language is limited to design issues only and the permitted uses of the zoning district must be evaluated under the uniformity provisions.⁴⁰⁹ The court found that the uniformity requirement prohibits haphazard application of use conditions which could establish an endless variety of mini-use districts and undermine the very nature of zoning.⁴¹⁰ Acknowledging the desirability of conditional zoning as a flexible zoning tool, the court observed that conditional use zoning might be applied by charter counties or under a floating zone scheme.⁴¹¹ *Holtz* could have been decided on narrower grounds because of the apparent failure of the zoning authority to comply with the notice requirements of the conditional zoning authorization.⁴¹² Instead, the court proceeded to formulate a substantive prohibition against conditional use zoning and created a potential impediment for flexible techniques at a time when they are needed to cope with the problems of unregulated growth.

The *Holtz* doctrine is unsound because it failed to distinguish between two purposes of the authorization language. For example, the first purpose of the authorization provides the zoning authority with wide discretion to impose *any* condition deemed appropriate to preserve, improve, or protect the *character* and *design* of the area.⁴¹³ This language does not distinguish between conditions on use or design and seems to authorize both. Certain conditions on use are appropriate to preserve, improve, and protect the character of an area. The second purpose of the law reserves the opportunity for post-zoning *design* review.⁴¹⁴ The two purposes are clearly designed for two different functions and to be applied at different times. Nevertheless, the *Holtz* court seemed to read the two purposes as a single authorization for conditions on design. The court's reliance on uniformity takes an overly strict view of a provision that has not been applied in this manner because variations in use have been

408. *Id.* at 582, 501 A.2d at 492.

409. *Id.* at 585-87, 501 A.2d 494-95; *see also* MD. ANN. CODE art. 66B, § 4.02(a) (1988 & Supp. 1994).

410. 65 Md. App. at 584-85, 501 A.2d at 494. Flexible techniques, of course, allow different forms of development for different locations and could be vulnerable to the charge that each different form of development constitutes a mini-use district. Mini-use districts do not undermine the integrity of zoning if consistent with the comprehensive plan.

411. *Id.* at 586, 501 A.2d at 495.

412. *See* MD. ANN. CODE art. 66B, § 4.01(b) (1988 & Supp. 1994) (element [3]) (*see supra* note 389 for text of statute).

413. *Id.* (element [1]).

414. *Id.* (element [2]).

consistently upheld as valid zoning.⁴¹⁵ Moreover, the uniformity clause does not contain any basis to distinguish between conditions on use or physical characteristics.⁴¹⁶

Holtz was followed in *People's Counsel for Baltimore County v. Mockard*,⁴¹⁷ where the zoning authority granted rezoning restricted to a specific use. Baltimore County is a charter county and adopted a form of site plan zoning presumably exempt from the *Holtz* doctrine. The applicant did not request the site plan zoning and the Board of Appeals applied conditions on use which the court found to be invalid.⁴¹⁸ *Holtz* was followed again in *Rodriguez v. Prince George's County*,⁴¹⁹ where the zoning authority applied a PUD-type floating zone that was based on a development plan that contained restrictions on uses and other development characteristics. The court again invalidated the zoning because of the condition on use.⁴²⁰ The *Holtz* doctrine has yet to be addressed by the Court of Appeals of Maryland.⁴²¹

The need to clarify the authority for conditional use zoning is important and legislative action is necessary. State law should be amended to explicitly authorize the imposition of conditional use zoning so that the flexible techniques designed to implement the state growth policy can be applied without threat of invalidation under an outdated common-law doctrine.

D. Vested Rights

The vested rights doctrine limits retroactive application of new land use regulations on property.⁴²² The purpose of the doctrine is to provide eligible property owners with some entitlement under regulations existing at a time when they took steps to develop their property.⁴²³

Zoning does not confer any vested rights.⁴²⁴ Property owners are at risk when they fail to develop property under current zoning

415. See *supra* note 402.

416. Compare MD. ANN. CODE art. 66B, § 4.01(b) with § 4.02 (1988 & Supp. 1994).

417. 73 Md. App. 340, 533 A.2d 1344 (1987).

418. *Id.*

419. 79 Md. App. 537, 558 A.2d 742 (1989).

420. *Id.* at 551-52, 558 A.2d at 749.

421. The court of appeals, however, subsequently acknowledged that conditional zoning as authorized by statute is on the ascendency. See *Attman/Glazer P.B. Co. v. Mayor of Annapolis*, 314 Md. 675, 686 n.8, 552 A.2d 1277, 1283 n.8 (1989).

422. *Dainese v. Cooke*, 91 U.S. 580 (1875), appears to be the first decision of the United States Supreme Court to recognize vested rights.

423. *Delaney*, *supra* note 188, at 51-52; 4 РАТНКОФФ, *supra* note 114, § 50.01.

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

because it may be changed to more restrictive zoning and the owner is bound by the new regulation.⁴²⁵ Vested rights only accrue when the property owner exhibits some intention to develop the property and expends some effort to that end.⁴²⁶ Depending on state policy, vested rights will accrue sometime between the time the property owner applies for a building permit⁴²⁷ and actually begins construction.⁴²⁸

Establishing the time of vesting involves several policy considerations. Late vesting rules apply when construction is actually initiated.⁴²⁹ Late vesting rules are based on concerns that nonconforming uses will be created that are generally considered contrary to public policy,⁴³⁰ and the granting of vested rights too early in the development process may undermine the public policy basis for the new regulations.⁴³¹ Under late vesting rules, developers are considered no more burdened by new regulations than changed economic conditions and they can make necessary adjustments.⁴³² Late vesting rules indicate a preference for public policy over individual property owner considerations.

Early vesting rules accommodate situations where developers expend money and effort on preliminary work and these rules protect the investment by applying the existing regulations at an early stage

425. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 553 P.2d 546 (Cal. 1976), *cert. denied*, 429 U.S. 1083 (1977).

426. Delaney, *supra* note 188, at 51-52.

427. *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980); *Hull v. Hunt*, 331 P.2d 856 (Wash. 1958) (vest at time of application). An intermediate rule permits vested rights if substantial change occurs in the developer's position without notice of pending change in regulations. See *Cos Corp. v. City of Evanston*, 190 N.E.2d 364 (Ill. 1963); *Village of Palatine v. LaSalle Nat'l Bank*, 445 N.E.2d 1277 (Ill. App. 1983).

428. In Maryland vested rights are strictly limited to circumstances where construction is started pursuant to a validly issued building permit. See *O'Donnell v. Bassler*, 289 Md. 501, 425 A.2d 1003 (1981); *Prince George's County v. Sunrise Dev. Ltd. Partnership*, 330 Md. 297, 623 A.2d. 1296 (1993); *County Council v. District Land Corp.*, 274 Md. 691, 337 A.2d 712 (1975). Some jurisdictions do not permit vested rights until the final discretionary approval. *Aries Dev. Co. v. California Coastal Zone Conservation Comm'n*, 122 Cal. Rptr. 315 (1975); *Youngblood v. Board of Super. of San Diego County*, 586 P.2d 586 (Cal. 1978); *County of Kauai v. Pacific Std. Life Ins. Co.*, 653 P.2d 766 (Haw. 1982), *appeal dismissed sub nom.*, *Pacific Std. Life Ins. Co. v. Committee to Save Nukolii*, 60 U.S. 1077 (1983).

429. Delaney, *supra* note 188, at 51-52.

430. *County Council v. E.L. Gardner, Inc.*, 293 Md. 259, 443 A.2d 114 (1982); *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980).

431. 4 RATHKOPF, *supra* note 114, § 50.03[3]; *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980).

432. *County Council v. E.L. Gardner, Inc.*, 293 Md. 259, 443 A.2d 114 (1982); *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980).

in the development process, such as the point of building permit application.⁴³³ Early vesting rules also recognize that political pressures may develop during the early stages of a project that cause the government to change regulations for the purpose of unfairly blocking the project.⁴³⁴

Maryland follows a strict late vesting rule that requires substantial beginnings in construction to be made under a validly issued permit which is readily seen by the public.⁴³⁵ The visibility requirement was recently reaffirmed in *Prince George's County v. Sunrise Development Limited Partnership*.⁴³⁶ This strict rule causes a problem for the use of flexible zoning especially in cases where development projects are staged over time as with a large PUD. Developers often provide substantial public facilities before more profitable stages of construction commence. For example, a developer may provide roads, sewers, and recreational amenities based on the expectation that certain levels of density will be approved under the existing regulations as the project builds out to completion.⁴³⁷ If regulations are subsequently changed to a lower density and vested rights in the old regulations are not applied, the developer loses the expected density which supported the amenities or facilities already built.⁴³⁸ Strict vesting rules may create a disincentive for the use of flexible techniques designed to promote the state growth policy.

433. 4 RATHKOPF, *supra* note 114, § 50.03[[]].

434. An example of the problems that political pressure may create for a developer is illustrated by the egregious fact pattern in *Prince George's County v. Blumberg*, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981), where the developer started to build out a properly authorized project only to experience questionable permit revocations by local government brought on by political opposition to the project.

435. *Offen v. County Council*, 96 Md. App. 526, 625 A.2d 424 (1993), *rev'd on other grounds*, 334 Md. 499, 639 A.2d 1070 (1994).

436. 330 Md. 297, 623 A.2d 1296 (1993).

437. Another risk for developers involves financing the project and lenders' concerns about certainty. Vested rights assume a valid permit but later invalidation can terminate vested rights. *Parkview Assocs. v. City of New York*, 519 N.E.2d 1372 (N.Y. 1988), *cert. denied*, 488 U.S. 801 (1988); *see* *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir 1979), *cert. denied*, 445 U.S. 928 (1980); *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 93 Md. App. 59, 611 A.2d 993 (1992), *rev'd*, 336 Md. 569, 650 A.2d 226 (1994). Even with a valid permit in Maryland, vested rights are not created without construction. *Francis v. MacGill*, 196 Md. 77, 75 A.2d 91 (1950).

438. An example of this situation is illustrated in *Hamilton Bank v. Williamson County Regional Planning Commission*, 729 F.2d 402 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985), where the developer provided infrastructure but was denied expected density approvals and subsequently lost the project through bankruptcy.

In egregious situations where the regulations are changed under circumstances where a developer relied on government actions or tried to implement old regulations only to be deliberately thwarted by government delaying tactics, relief may be provided by some form of estoppel or due process remedy.⁴³⁹ This type of relief, however, is uncertain and involves expensive litigation.⁴⁴⁰

A better approach involves the use of development agreements that establish the rights of the developer under existing regulations in exchange for the public amenities and facilities to be provided under the agreement.⁴⁴¹ These agreements, however, may be vulnerable to attack under the conditional zoning doctrine and based on the lack of authority by the local government. Development agreements have been authorized in Arizona, California, Colorado, Florida, Hawaii, and Nevada.⁴⁴² Maryland should join this growing list of states and authorize development agreements.⁴⁴³ The authorization will encourage use of flexible techniques and enhance local governments' ability to enter into public-private sector agreements to provide needed public facilities and other amenities that will promote the state growth policy.

VI. CONCLUSIONS

The Chesapeake Bay is a major economic and recreational resource for the region. Yet its environmental health is threatened by poor land use regulation. Unmanaged growth is consuming huge

439. Estoppel is applied as a remedy. See *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 518 A.2d 123 (1986) (reliance on building permit issued with reasonable interpretation will estop county from using different interpretation later); *County of Charleston v. National Advertising Co.*, 357 S.E.2d 9 (S.C. 1987) (permit issued within general scope of authority and relied upon to the developer's detriment will raise estoppel defense if permit later revoked); 4 RATHKOPF, *supra* note 114, § 50.04[1]. Maryland has not yet adopted zoning estoppel. See *County Council v. Offen*, 334 Md. 499, 639 A.2d 1070 (1994). Due process also provides relief for abusive government conduct. *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989).

440. See *Offen v. County Council*, 96 Md. App. 526, 625 A.2d 424 (1993), *rev'd on other grounds*, 334 Md. 499, 639 A.2d 1070 (1994).

441. Delaney, *supra* note 188; 2 RATHKOPF, *supra* note 114, § 29A.03[1][g]. For a thorough discussion of development agreements, see Patricia G. Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119 (1993).

442. 2 RATHKOPF, *supra* note 114, § 29A.03[1][g] n.49.

443. An authorization for development agreements is preferable to legislative modification of the Maryland Vested Rights Doctrine which is based on long standing public policy considerations. Developers sought such a modification in 1994, but the effort was unsuccessful. Paul D. Samuel, *Vested Development Rights Become Issue in Legislation*, DAILY RECORD, March 21, 1994, at 9.

chunks of farmland, forests, and environmentally sensitive areas. Lax regulatory patterns also place unanticipated burdens on local governments to provide adequate roads, schools, and other public facilities or services while other more suitable areas are bypassed. Growth must be redirected to areas more suitable for development and the current pattern of sprawl development, which represents a major factor in pollution of the Bay, must be eliminated.

The new Planning Act contains important measures that address these problems: a bold new land use policy to concentrate growth only in areas where it makes sense and to protect areas where it does not, mandatory application of the policy to local governments, and a mechanism for state oversight through a new Planning Commission which will evaluate the consistency between state policy and local actions. This policy of sensible and managed growth means substantial changes must be made in the way land use is regulated and local governments must clearly define designated growth and protected areas and adopt regulations necessary to insure that state policy will be applied to these areas. The new state policy seeks to eliminate sprawl development, the most environmentally destructive form of development, and its success depends on effective implementation programs.

The goals of state policy far exceed the capacity of the administrative framework designed to achieve them and, in this respect, the legislation is incomplete. Full implementation of state policy cannot be achieved without adequate standards, incentives, enforcement provisions, and a dispute resolution process. These measures are needed to insure that state policy is applied as it is intended. The Planning Commission's initial oversight activities are limited to development of guidelines, initiation of cooperative efforts between state and local governments, and critical evaluation of compliance with state policy. The Commission lacks both rule-making power and enforcement authority necessary to change existing patterns of sprawl development that will likely continue unless local governments are provided incentives and guidance as to how to redirect growth.

The requirement for consistency between state policy and local actions is critical to the effectiveness of the Planning Act. The growth policy is made mandatory on local governments through the consistency requirement and it will determine the credibility of the current legislative approach. However, the legislation neglects to insure that local plans and regulations are truly consistent with state policy and not fragmented or ineffective. Without more Commission empowerment and a dispute resolution process to address conflicts in the consistency determination, achieving consistency between state policy and local actions will be a formidable, if not impossible, task.

New, flexible techniques are made available for local governments to assist in the implementation of the state growth policy.

State policy requires growth to be concentrated in suitable areas under streamlined procedures. One flexible technique that promotes this objective is innovative zoning which is designed to provide varied uses and densities, more efficient use of land, environmentally sensitive development, a range of community amenities, and a streamlined process. However, the application of innovative zoning techniques by local governments is discretionary and the Commission needs empowerment to develop incentives for their use. Legislation revisions are also necessary to broaden the basis for application of Euclidean zoning and eliminate a requirement for a finding of change or mistake by non-charter counties and municipalities when applying floating zones.

Affordable housing is another objective of state law and its need is well established. While affordable housing was included as part of the state growth policy, the legislation neglects to make it a mandatory element of local comprehensive plans and lacks incentives for local governments to adopt affordable housing programs. Legislative revisions are needed to include affordable housing as a mandatory element of local comprehensive plans and empower the Commission to establish minimum levels of participation.

State policy requires resource conservation and protection of sensitive areas that can only be achieved through protective zoning with density levels low enough to discourage sprawl development and yet provide a reasonable use of the land. Few local governments have adopted protective zoning measures and the Planning Act neglects to provide either standards or incentives for its wider use. Protective zoning represents one of the most controversial aspects of any resource conservation program, but it is absolutely necessary if the state growth policy is to be achieved. The use of TDRs provides a measure of relief for property owners burdened by protective zoning. The Commission must be empowered to develop standards and incentives to promote this aspect of state policy.

The original Visions of 2020 contemplated a policy that funding mechanisms be in place to support growth. The Planning Act represents a substantial retreat from this policy that needs to be restored so that growth only takes place where it is suitable; that is, where public facilities and services are adequate. Local governments need standards and incentives to adopt growth management regulations that provide the basis for funding mechanisms involving participation of the private as well as public sectors.

Potential impediments to the achievement of state policy, such as represented by the takings challenge and the shifting presumption of validity, can best be addressed by providing local governments with clear policy direction and incentives to use new flexible techniques. Conditional zoning and vested rights doctrines operate as detriments to the effective use of the new flexible techniques, and

further legislation is necessary to authorize both conditional uses and development agreements.

The Planning Act represents a modest beginning in the unfinished process of significantly increasing the state's role in land use planning and regulation. Current deficiencies in the law need to be promptly corrected before damage caused by unmanaged growth takes too great a toll on the environment and an opportunity to correct destructive land use practices is irretrievably lost. The bold promises encapsulated in the state growth policy require equally bold implementation measures if local governments are to change the way they regulate land use and require more sensible development patterns.