

**Competing Models for "Smart Growth" in California:
Maryland's Priority Funding Areas and Washington's Growth
Management Act**

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Executive Summary

Over the past several decades, sprawling, low-density development has sprouted up across the United States. In response, many states have adopted “Smart Growth” programs. Two well-developed smart growth programs include Maryland’s Priority Funding Area Program (“PFA Program”) and Washington’s Growth Management Act (“GMA”). This paper argues that California should look to Maryland’s PFA Program as a model smart growth program; in contrast, Washington’s GMA is too comprehensive and excessively “top-down,” or centrally controlled.

Maryland’s PFA program represents a compelling model for California. Although the program has only been in place for a few years, preliminary reports on the program are highly favorable. The Governors of Kentucky and Minnesota have praised the program, while the Connecticut General Assembly currently has a bill pending that would create a similar program in Connecticut. Since the program has been implemented, four highway bypass projects have been cancelled and the percentage of state public school funding spent on renovating older schools jumped from 43 to 84 percent. Most criticism of the PFA Program centers on generic complaints about the goals of managed growth.

The PFA program has been mostly free from burdensome litigation, as its incentive-based approach largely proves it against Constitutional or other legal challenges. In addition, a PFA program would mesh with California’s existing land use scheme, which is highly deferential to local planning decisions. For these reasons, California should look to Maryland’s PFA program as a model smart growth program.

In contrast, Washington’s GMA does not provide a useful model for California. Although the GMA has produced positive results in Washington, two aspects of the GMA make it unsuitable and unnecessary for California. First, the GMA is a comprehensive approach to

growth management, setting up an entire land use scheme and requiring local governments to make general plans and designate growth boundaries. California already requires local governments to create comprehensive plans, making adoption of the GMA in this respect redundant. Second, the GMA serves as an unsuitable guide for California since it focuses on mandates, rather than incentives, as the main driver of compact development. On one hand, the state of Washington mandates and micromanages local governmental land use planning, and on the other hand, provisions in the GMA would result in private landholders losing development rights. If California were to adopt such a program, legal challenges would likely follow — the GMA has been no stranger to Washington courtrooms. In contrast, the Maryland program effects many of the same aims as the GMA, without abridging local control over land use and without directly limiting private development.

I. Introduction

Over the last several decades, low-density sprawling development has dominated growth patterns throughout the United States.¹ In response, state and local governments, as well as many public interest organizations, have advanced “Smart Growth” plans to minimize or curtail the negative effects of sprawl. The Urban Land Institute provides a working definition for the somewhat nebulous goal of “Smart Growth:” “growth that is economically sound, environmentally friendly and supportive of community livability—growth that enhances our quality of life.”²

However, before the advent of “Smart Growth” initiatives, governments have repeatedly attempted to link the timing and scope of development with the provision of public facilities adequate to serve those developments. These efforts include impact fees (or developer exactions),³ concurrency requirements (or “adequate public facilities ordinances”),⁴ and local service area boundaries.⁵ Two interlaced, yet distinct policies stand behind these linkages: on one hand, localities are properly concerned that new residential and office construction not leave homeowners and tenants without vital public services such as electrical power, water, school,

¹ See State of Maryland Brochure, *Smart Growth in Maryland*, July 2001.

² Urban Law Institute, “Frequently Asked Questions about Smart Growth,” http://www.uli.org/Pub/Pages/a_issues/A_SmL4_FAQ.htm (last visited February 8, 2002).

³ “Impact fees were first used in the 1920s in Colorado to finance the purchase of water rights for developments.” John A. Henning, Jr., *Mitigating Price Effects with a Housing Linkage Fee*, 78 Calif. L. Rev. 721, 726 (1990)(citing T. Snyder & M. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure*, Urb. Land Inst. (1986), 74-75).

⁴ See, e.g., *Golden v. Planning Board of Ramapo*, 285 N.E.2d 291 (N.Y.), appeal dismissed, 409 U.S. 1003 (1972)(validating land use scheme delaying the grant of permits of new development on the adequacy of services infrastructure).

⁵ See, e.g., *Arizona’s Growing Smarter Plan*, S.B. 1001 (codified in Ariz. Rev. Stat. Ann. § 9-461.08(B)(4) (West 2000))(“ A plan and regulations determining the location of infrastructure service area boundaries, consistent with the growth areas element of the general plan, beyond which the municipality may limit or prescribe conditions on publicly financed extensions of water, sewer and street improvements that are necessary to service needs generated by new development.”). Of special note here, is that the state legislature empowers, but does not require, localities to create their own infrastructure service area boundaries; in contrast to the non-negotiable demands of PFAs and UGAs.

and adequate roads. On the other hand, imbedded in the linkage is the attempt to internalize the full costs of developing new areas, to ensure that developers at least partly assume responsibility for extending the public infrastructure to serve their customers. These linkages have been met with often intense legal challenges, and debates over the proper division of responsibility between state and local governments, even if the somewhat nebulous goals and mechanics of “smart growth” have met with widespread acclaim from environmental and builders’ advocacy groups alike.⁶ PFAs represent an evolutionary departure from prior linkages, in effect establishing zones of predictable impact fee assessment; and changing the balance of power in the negotiations between local zoning authorities and developers, as they structure impact fee deals.

So far, California has been a quiet participant in this national trend towards linkages, apart from the liberal use of impact fee assessments.⁷ While no one disputes the beauty and richness of California’s land and natural resources, stakeholders might disagree, however, over the best next step to preserve these natural resources and control sprawl’s spread. Accordingly, this paper analyzes two smart growth programs in other states — Maryland’s Priority Funding Area Program (“PFA Program”) and Washington’s older Growth Management Act (“GMA”) — to determine whether California should adopt similar programs. This paper focuses on analyzing the way these programs offer incentives to encourage compact development. Upon examining the legal and policy implications of the these two programs, this paper recommends that California also adopt an incentive-based approach to smart growth using Maryland’s PFA Program as a model.

⁶ See *id.*, as both the Sierra Club and National Association of Home Builders support Smart Growth initiatives.

⁷ California impact fee assessments are almost uniformly upheld, see *e.g. Commercial Builders of Calif. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (upholding a city ordinance requiring nonresidential builders to pay impact fees to offset public costs arising from low-income workers employed by builders).

II. Maryland's Priority Funding Area Program

A. What is the PFA Program?

Over the past 30 years Maryland's population increased from four million to five million, rising by more than 25%.⁸ Low density, single-family housing and sprawling commercial developments accompanied this population growth. The sprawl consumed open space, hastened the decline of established communities, and required public funds for new infrastructure. In recognition that sprawl posed a serious threat to quality of life in Maryland, Governor Parris Glendening promulgated a comprehensive smart growth initiative program in 1997.

The Maryland General Assembly followed Governor Glendening's lead and enacted the Neighborhood Conservation and Smart Growth Initiatives in 1997. These Smart Growth initiatives announced three fundamental goals: (1) to preserve natural resources; (2) to provide support to existing communities; and (3) to save taxpayer dollars spent on infrastructure.⁹ To facilitate attainment of these goals, the Smart Growth initiatives adopted five programs including the Smart Growth Areas Act, or "PFA Program."¹⁰

The Smart Growth Areas Act comprises a central component of the Smart Growth initiatives. This act requires that State spending be directed to areas targeted for economic development and growth, or Priority Funding Areas ("PFAs").¹¹ PFAs include existing communities — municipalities and areas inside the Washington Beltway and the Baltimore Beltway — neighborhood revitalization areas, enterprise zones, heritage areas, and planned

⁸ See *supra* note 1.

⁹ Maryland Department of Planning, *What is Maryland's Smart Growth Program?* <<http://www.op.state.md.us/smartgrowth/smartwhat.htm>> (last visited Oct. 8, 2001).

¹⁰ The other programs include the Rural Legacy Act, the Brownfields Cleanup Program, the Job Creation Tax Credit and the Live Near Your Work Program.

¹¹ Md. Code Ann., State Fin. & Proc., § 5-7B-01 *et seq.* (2000).

growth areas designated by counties.¹² Counties may designate PFAs if the areas meet statutory criteria for intended use, sewer and water availability, and residential density. County-designated PFAs consist of areas that the county wants to be eligible for State-funded projects that meet the criteria. The law gave counties a full year, up to October 1, 1998, to designate PFAs.¹³

The Smart Growth Areas Act works in two ways. First, it largely prohibits the State from funding “growth related”¹⁴ projects outside of PFAs.¹⁵ Thus, State funds cannot be used towards highways, sewer and water construction, or housing and economic development assistance outside a PFA. Second, the Smart Growth Areas Act requires state agencies and departments to use their resources as incentives to direct growth to PFAs.¹⁶ The Smart Growth Areas Act, however, places no limits on local governments’ or developers’ rights to develop outside of the PFA. Thus, the PFA Program emphasizes incentives, not mandates, by inducing private developers to leverage state spending in PFAs, instead of dictating where development can occur.¹⁷

B. The Popular Response

Maryland’s PFA Program has attracted significant attention - both praise and criticism. Many groups and organizations have applauded the PFA Program as innovative and forward-

¹² Md. Code Ann., State Fin. & Proc., § 5-7B-02 (2000). See § 5-7B-03 for the criteria that a county must use in designating a PFA.

¹³ John W. Frece, *Smart Growth: Prioritizing State Investments*, 15-SPG Nat. Resources & Env’t 236, 238 (2001).

¹⁴ *Id.*

¹⁵ Md. Code. Ann. State Fin. & Proc., § 5-7B-05 (2000) (projects outside PFAs may be funded when failure to fund represents a hardship, or there are no reasonable alternatives to the project within a PFA; in addition, the Department of Transportation may fund projects concerning maintenance and access control, or projects connecting PFAs or projects that must be remote from other development).

¹⁶ *Priority Funding for Areas Targeted for Growth*
<<http://www.urban.arch.virginia.edu/~plan/common/courses/plac/gm/pffa1.htm>> (last visited Oct. 8, 2001).

looking. On October 12, 2000, Maryland's Smart Growth and Neighborhood Conservation Initiative received a \$100,000 award as one of 10 winners of the Innovations in American Government program sponsored by the Ford Foundation and John F. Kennedy School of Government at Harvard University.¹⁸ The Maryland program was praised for its creative use of the State's \$19 billion budget as an incentive to encourage more productive growth patterns.¹⁹

Environmental organizations have also lauded Maryland's PFA Program. The Sierra Club has hailed Maryland as the top state in the nation for land preservation.²⁰ In addition, Governors from other states have praised Maryland's PFA Program. For instance, Kentucky Governor Paul Patton noted that Maryland's program is an example for other states to follow.²¹

In addition to praise, Maryland's PFA Program has also received criticism. Critics complain that the program is too modest in scope and will produce uneven results. For example, Maryland attorney Philip Hoon, who represented Chestertown and Kent Island activists, stated that smart growth is not as helpful as he wanted. As long as developers are "paying their own way, smart growth has nothing to say about it."²² Other commentators have suggested that redirecting growth near existing facilities and transportation corridors greatly increases the value of certain landowner's holdings while greatly decreasing the value of others.²³

¹⁷ For instance, Wal-Mart received approval to build a superstore on the Chesapeake Bay outside any PFA, but took on the full costs of building roads and utilities. Tom Bell, *As Maryland Grows*, Maine Sunday Telegram, March 11, 2001, at p. 1A.

¹⁸ Harvard Innovations Award, *Maryland's Land Smart Growth Initiative Wins Prestigious 'Innovations in American Government' Award*, available at <<http://www.mdp.state.md.us/smartgrowth/news/harvard2000.htm>> (last visited Oct. 8, 2001).

¹⁹ *See id.*

²⁰ *Bring Anti-Sprawl Ideas Home; Maryland's Winning Fight Can Help Us*, The Arizona Republic, May 3, 2001, at p. B8.

²¹ *See* Chris Poynter, *Patton Looks to Maryland as 'Smart Growth' Model*, The Courier-Journal, July 31, 2001, at p. 01a.

²² Lori Montgomery, *Maryland Land-Use Weapon Backfires*, The Washington Post, May 14, 2000, at p. C01.

²³ *See* Gary Piro, *Smart Growth Using 'Purchased Development Rights' in San Diego County*, San Diego Business Journal, June 11, 2001, at no. 24, vol. 22, at p. 43.

Another complaint regarding the PFA Program is that too many greenfields are included in PFAs. This concern causes some critics to claim that development within PFAs will be unfocused and diffuse instead of compact.²⁴ Other critics fear that existing built-up areas will not get their fair share of infrastructure funding.²⁵

In contrast, others complain that the PFAs contain too little land. Susan Davies, co-director of government affairs for the Homebuilders Association of Maryland, stated that as fewer acres are available for development, the price of land will soar.²⁶ She also noted that “not everybody wants to live in an urban setting and that’s one of the flaws [the organization] see[s] in smart growth.”²⁷

Furthermore, some critics disparage the aims of smart growth in general and argue that compact development is worse than sprawl. One critic described smart growth as “merely the latest repackaging of liberal disdain for the suburban way of life.”²⁸ Likewise, landowners and developers have complained that the smart growth policies are unwise, undemocratic and will hurt the state in the long run.²⁹

²⁴ See Todd Shields, *Area Breaks Little Ground With Md. Growth Fund Requests*, *Southern Maryland Extra*, The Washington Post, Jan. 24, 1999, at p. M01.

²⁵ See John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 St. John’s L. Rev. 1011, 1014 (1999).

²⁶ See Poynter, *supra* note 21; other critics complain that increased land costs within PFAs will deter developers of low income developments, at the same time that the unsubsidized cost of infrastructure outside of PFAs will similarly increase costs of low income developments, acting as de facto exclusionary zoning. Candida M. Ruesga, *Note & Comment, The Great Wall of Phoenix?*, 32 Ariz. St. L. J. 1063, 1076-1077 (2000) (“If the developers cannot directly pass along the costs of providing all services and infrastructure outside the [infrastructure service area boundary], they will decrease production until the imbalance of supply and demand of housing naturally raises prices.”).

One conservative think tank has estimated that the GMA adds \$884 annually to the price of the average Washington state home. Reason Public Policy Institute, *Smart Growth and Housing Affordability: Evidence from Statewide Planning Laws*. <<http://www.rppi.org/121801.html>>(last visited February 8, 2002).

²⁷ See Poynter, *supra* note 21.

²⁸ See Timothy Beatley and Richard Collins, *Smart Growth and Beyond: Transitioning to A Sustainable Society*, 19 Va. Envtl. L. J. 287, 293 (2000).

²⁹ See Poynter, *supra* note 21.

C. Is the PFA Program Working?

Although it is clear that Maryland's PFA Program has drawn a lot of attention, it is less clear whether the program has actually reduced sprawl. Of course, the program only began in 1997 and it may be still too early to gauge the program's effectiveness accurately.

On a negative note, census figures indicate that the city of Baltimore is the fastest-shrinking city in the nation.³⁰ In addition, Baltimore County faces declining economic fortunes while growth has become rampant in the four outer suburban counties — Anne Arundel, Carroll, Harford and Howard.³¹ Although the PFA Program has not been blamed for causing these problems, the program seems to have not yet stopped sprawl in these areas or the corresponding depopulation of existing communities. Also, up to a third of new growth in some Maryland counties is planned to be outside PFAs.³² Of course, it is beyond the scope of this paper to estimate how much new growth would have occurred if the PFA Program were not in place.

One law review article notes that the program “has not fundamentally re-orientated or shifted demographic and development trends. . . [f]unnelling growth into areas defined as having densities of 3.5 units per acre does not exactly reassure us that we are in a city-building mode.”³³ The article further discussed how preliminary indications suggest that many counties in Maryland have been less than enthusiastic about the program. In fact, it has been reported that as of 1998, some counties designated more than twice as much land as needed for development.³⁴

In spite of these negative reports, Governor Glendening, while admitting that Maryland still has far to go, has noted that the state is already seeing benefits of the smart-growth

³⁰ Alfred W. Barry III and Terri Turner, *Growth Leads to Shrinking Quality of Life; Recent Census Numbers Hold Bleak Implications for Baltimore and Surrounding Counties*, *The Baltimore Sun*, May 13, 2001, at p. 4c.

³¹ *See id.*

³² *See id.* A before and after snapshot of growth outside PFA boundaries would be desirable, however, such data were not found; in addition, there are no reliable figures for the percentage of land in Maryland falling within PFAs, either.

³³ *Supra* Beatley, *supra* note 28, at 295.

³⁴ *See id.*

incentives.³⁵ He noted that in 2000 and as of July 25, 2001, the state protected more land from development than was developed.³⁶ In addition, in 2000, the state transportation budget was completely compliant with smart growth objectives.³⁷

Another positive result of the PFA program has been to change the structure of public school funding in Maryland. In 1995, before the PFA program was in place, only 43 percent of state school funds went to existing schools to renovate, rewire or expand them. By fiscal year 2000, 84 percent of state funds were directed to older schools even as the overall size of the state's school construction budget tripled.³⁸

John Frece, special assistant for smart growth, Office of the Governor of Maryland, recently stated that the PFA program has "had an impact in every corner of the state."³⁹ He noted that four highway bypass projects that have been on the books for years and would have generated new development in rural parts of the state have now been taken off the books.⁴⁰ In addition, a fifth bypass project was redesigned to limit sprawl.⁴¹

D. Other State Responses to Maryland's PFA Program

Other states have looked at Maryland's PFA Program. Minnesota Governor Jesse Ventura, while not commenting specifically on the PFA Program, stated that Maryland's anti-sprawl efforts provided a good target for Minnesota. He did not state, however, that he would

³⁵ See Chris Poynter, *Park DuValle Design Draws Accolades; Maryland Governor, Other Officials Tour Area*, The Courier-Journal, July 25, 2001, at p.01b.

³⁶ See *id.*

³⁷ See NGA Center for Best Practices, *Growth and Quality of Life, Tools and Strategies*, <http://www.nga.org/center/divisions/1,1188,C_ISSUE_BRIEF%5ED_2481,00.html> (last visited Oct. 11, 2001).

³⁸ See Frece, *supra* note 13.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ See *id.*

propose similar policies in Minnesota.⁴² Governor Paul Patton of Kentucky said that Maryland could serve as a model for Kentucky, but stopped short of saying that he would adopt Maryland's initiatives wholesale.⁴³

At least one group of scholars from another state has specifically analyzed and commented on Maryland's PFA Program. In Ohio, a group of people prepared a proposal to develop a smart growth legislative agenda for Ohio.⁴⁴ After looking at smart growth initiatives in several states, the report recommended that Ohio "adopt an incentive-based program to guide state capital investment, based on a 1997 law from Maryland, that would target state growth-related expenditures."⁴⁵ For more information on the Ohio report, refer to Appendix, 1.

Furthermore, in Connecticut, a bill that would create a program similar to PFA Program, is currently pending in the General Assembly. This bill, HB 6717, is entitled "An Act Concerning Priority Investment Areas."⁴⁶ This bill provides that the state of Connecticut cannot provide funding for growth related projects unless such projects are located within a priority investment area.⁴⁷ In 1997, a similar bill was introduced to the Connecticut General Assembly but failed in committee. For a more detailed history behind these two Connecticut bills, refer to Appendix, 2.

On balance, the reports on Maryland's PFA Program seem favorable. Most of the criticism seems directed at smart growth plans in general as opposed to the PFA Program. In

⁴² See Doug Peter, *Minnesota Gov. Ventura Says He Still Backs Smart Growth*, Saint Paul Pioneer Press, Dec. 1, 2000.

⁴³ See Poynter, *supra* note 21.

⁴⁴ See Stuart Meck, AICR, Jason Wittenberg, and the American Planning Association, *Ecocity Cleveland: A Smart Growth Agenda for Ohio: Working Paper*, available online at <http://cua6.csuohio.edu/~ecocity/smartgrowth/wp-part1.htm>.

⁴⁵ *Id.* In addition to adopting a program similar to Maryland's PFA Program, the report also recommended that a legislative program in Ohio should also contain high-level organization to coordinate among state departments and promote sound planning at all levels and develop cross-cutting goals documents that will integrate state policy and set direction for development, redevelopment, and resource conservation for Ohio.

⁴⁶ Connecticut Raised H.B. 6717, 2001HB-06717-R00-CBS.HTM, Bill history and text available at <<http://prdbasis.cga.state.ct.us/BAS.../CON/0%2C/BASIS/TSINDSC/LIN1/INDS/0>> (last visited Oct. 25, 2001).

addition, the program acts as a good compromise between those who want to strictly limit sprawling growth and those who want no limits on growth. Although it is still too ‘early to tell if the program effectively meets its goals, progress has been made. The fact that other states have taken interest in Maryland’s PFA program also lends credibility to the program. In the future, it seems likely that the program will further its goals.

III. Washington’s Growth Management Act

A. What is the GMA?

In an effort to control and minimize unregulated sprawling development, and its negative impacts, the state of Washington enacted the Growth Management Act of 1990 (“GMA”). The GMA revolutionized land use law in Washington,⁴⁸ requiring that populous, fast-growing counties and cities to plan development according to its dictates.⁴⁹ Other cities and counties, lured by incentives, can voluntarily elect to plan under the act:⁵⁰ as of 2002, a eleven of Washington’s thirty-nine counties had opted in, joining the eighteen counties required to do so, in combination covering some 80% of the state’s population.⁵¹ Once a city or county begins planning under the GMA, either by force or by choice, it may not opt out of the program.⁵²

For counties planning under the GMA, the GMA requires that the county adopt a county wide planning policy; adopt development regulations for county-designated critical areas,

⁴⁷ See *id.*

⁴⁸ See Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present and Future*, 16. U. Puget Sound L. Rev. 867, 871 (1993).

⁴⁹ See Wash. Rev. Code § 36.70A.040(1). See Wash. Rev. Code § 36.70A.040(1)(1998). A county is subject to the GMA’s planning requirements if it has (1) a population of at least 50,000 and has experienced growth of 10% or more in the decade ending May 16, 1995; (2) a population of at least fifty thousand or more and has experienced a growth rate of more than 17% in the preceding decade; or (3) a population growth rate of more than 20% during the “past ten years.”

⁵⁰ Wash. Rev. Code § 36.70A.040(2) (1998).

⁵¹ Washington State Office of Community Development web site “Counties Planning Under GMA” <http://www.oed.wa.gov/info/lgd/growth/maps/map_1.tpl>(last visited on February 7, 2002).

⁵² See Wash. Rev Code § 36.70A.190(2) (1998).

agricultural lands, forest lands and mineral resource lands; designate “urban growth areas”(“UGAs”); and produce comprehensive local general plans.⁵³

This comprehensive plan is the “coordinated land use policy statement” of the local governing body.⁵⁴ It must contain written text describing objectives, principles, and standards, in addition to maps that illustrate sub-area population densities, development densities, and future land uses.⁵⁵ The comprehensive plans must be guided by the planning goals set forth by the Washington legislature in the GMA and includes -land use, housing, capital facilities, utilities and rural planning components.⁵⁶ Under Washington’s GMA and unlike the Oregon land use regime, the state need not acknowledge or approve local comprehensive plans.⁵⁷ Instead, the plans are presumed valid upon adoption and take immediate effect.⁵⁸ However, the GMA created Growth Management Hearing Boards (“Boards”), quasi-judicial bodies, with the power to determine whether plans comply with GMA requirements when disputes arise.⁵⁹ The board may rule that the plan does not comply with the requirements or goals of GMA, and remand it to the local agency for reconsideration.⁶⁰ In cases of continuing non-compliance, the board may transmit a finding of non-compliance to the governor, who may impose financial penalties upon the offending jurisdiction.⁶¹

An important feature of the GMA concerns the role that the state Department of Community, Trade, and Economic Development (DCTED) plays in providing incentives for

⁵³ Wash. Rev Code §§ 36.70A.040 sets out the general requirements, leaving the specifics to §§36.70A.210, 170, 060, 110(1) and 070, respectively; see Hong H. Huynh, *Administrative Forces in Oregon’s Land Use Planning and Washington’s Growth Management*, 12 J. Envtl. L. & Litig. 115, 131 (1997).

⁵⁴ Wash. Rev. Code § 36.70A.030(4) (1998).

⁵⁵ See Wash Rev. Code §§ 37.70A.070 and 36.70A.070(1) (1998).

⁵⁶ Wash Rev. Code § 37.70A.070 (1998); see Huynh, *supra* note 53 at 130.

⁵⁷ *Id.* at 132.

⁵⁸ *Id.*

⁵⁹ See *id.* at 133; Wash. Rev. Code §§ 36.70A.250, 260 (1998)(in an attempt to balance state and local interests, governor-appointed board members must reside in the jurisdictions controlled by each regional board).

⁶⁰ Wash. Rev. Code § 36.70A.300(3) (1998).

⁶¹ See Huynh, *supra* note 53 at 134; Wash. Rev. Code § 36.70A330 (1998).

growth management. The GMA provides that the DCTED “shall establish a program of technical and financial assistance and incentives to counties and cities to encourage and facilitate the adoption and implementation of comprehensive plans and development regulations throughout the state.”⁶² The DCTED accomplishes this through grant programs, and it prioritizes funding needs based on counties’ and cities’ population growth, commercial and industrial development rates, and other factors.⁶³ The DCTED also offers technical assistance and mediation services to resolve disputes between local governments.⁶⁴ The role of the DCETD is so vital because its “exhortation, mediation, technical and financial assistance, and other incentives are expected to be the primary means of inducing local compliance.”⁶⁵ These incentives partly explain why Washington counties and cities voluntarily elect to plan under the GMA even when they are not required to do so.

Comparing Maryland and Washington’s Growth Management Techniques

The element of the GMA most closely resembling the PFA program, in scope and intent, would be the Uniform Growth Areas. The GMA describes UGAs as areas where growth is to be encouraged; growth outside a UGA can only occur if it is not urban in nature.⁶⁶ At the heart of both initiatives lies the sentiment that the state can play a role in preserving the rural character of undeveloped land, in the face of the growth of cities. Both programs permit local governments to set the precise boundaries, based on local concerns. Where the programs diverge, however, is far more significant: Maryland does not bar private parties from developing land outside of PFAs, they only must bear the costs of infrastructure. On the other hand, Washington attempts to prevent non-rural development outside UGAs. A further distinction

⁶² Wash. Rev. Code § 36.70A.190(1) (1998).

⁶³ See *id.* at § 36.70A.190(2) (1998).

⁶⁴ See *id.* at § 36.70A.190(4)-(5) (1998).

⁶⁵ See *Settle*, *supra* note 48 at 928.

goes to the question of state-local relations; both programs rely on incentives to while the programs provide ample incentives to blunt criticism of improper state involvement in local development, the GMA frontloads its incentives, while each community is required to abide by the UGAs that have been imposed. A final critical difference is seen in the enforcement mechanism for UGAs, the Growth Management Hearing Boards, empowered to invalidate local decisions about growth boundaries, rendering the localities subject to financial penalties.

In short, Maryland's program alters the cost structure of private development outside of PFAs; Washington aims to bar urban sprawl entirely. At the same time, the state goal of growth boundaries implicates the state of Washington in a command and control relationship with local decisionmakers, in stark contrast to the Maryland PFA program.⁶⁷

B. The Popular Response

Like Maryland's PFA program, Washington's GMA has received much attention. The American Planning Association heralded the GMA as a national model.⁶⁸ In a report entitled, "Planning Communities for the 21st Century", the American Planning Association singled out six states, including Washington, for having the best and most comprehensive planning laws.⁶⁹ Stuart Meck, one of the report's authors, stated that "[i]n large measure, states like Oregon and Washington are so advanced in comparison to the rest of the country."⁷⁰ Shane Hope, managing director of Washington's growth management division, stated that the law allows for more public

⁶⁶ *See id.*

⁶⁷ It must be noted that the GMA requires state agencies to comply with local comprehensive plans, and the development regulations adopted pursuant to the GMA. Wash. Rev. Code § 36.70A.103 (1998). This provision, in concert with the UGA requirement, serves as a de facto PFA program: arguably, state programs and spending must be limited to non-urban uses outside urban growth zones, just as Maryland state spending outside PFA zones must not be "growth related."

⁶⁸ *See* Kristin Dizon, *State's Smart Growth Planning is Among Top in Nation*, Seattle Post-Intelligencer, Dec. 13, 1999, at B3.

⁶⁹ *See id.* The other states listed include Maryland, Oregon, Rhode Island, Tennessee and New Jersey.

⁷⁰ *Id.*

involvement and “[m]ore citizens are participating in planning their communities than ever before- by leaps and bounds.”⁷¹

Growth management advocates have also stated that the law has changed life in Seattle. They report that older neighborhoods are seeing new investment, natural areas are being protected and in some communities, higher densities- and lower parking requirements- are winning political support.⁷² In addition, the GMA has been popular with the electorate: a statewide property rights initiative, which would have cut into the power of the law, was soundly defeated at the polls in 1995.⁷³

Not all reports on the GMA are favorable, however. Although the GMA advocates a bottom-up approach, some complain that this does not actually happen. Critics assert that the Boards strip local governments of their planning authority.⁷⁴ In addition, local authorities have been infuriated by the Boards’ invalidation of plans passed by many counties.⁷⁵ The Boards are often criticized for construing the GMA standing provision too liberally, misusing the standard of review, interfering in purely legislative matters and the producing contradictory interpretations of procedural rules.⁷⁶

Besides complaints of the GMA centering on the Boards, another criticism of the GMA has revolved around its legislative history. In fact, one author stated that the GMA’s legislative history produced several defects including “politically necessary omissions, internal inconsistencies, and intentionally vague language.”⁷⁷

⁷¹ *Id.*

⁷² See William Fulton, *Ring Around the Region*, Planning (American Planning Association, March 1, 1999), No. 3, Vol. 65, p. 18.

⁷³ See *id.*

⁷⁴ See Huynh, *supra* note 53 at 137.

⁷⁵ See *id.*

⁷⁶ See Derek W. Woolston, *Simply A Matter of Growing Pains? Evaluating the Controversy Surrounding the Growth Management Hearing Boards*, 71 Wash. L. Rev. 1219, 1237 (1996).

⁷⁷ *Id.* at 1235.

Furthermore, for some, the GMA has gone too far in mandating land use planning and regulations that deprive property owners of rights and constrain developers.⁷⁸ For others, the act has not done enough to control growth and cities and towns haven't done enough to add high-density housing to meet growth management goals.⁷⁹

Resentment over the program has been particularly strong in Washington's rural communities.⁸⁰ Many rural communities opted into the program lured by the promise of state funds to assist in planning.⁸¹ However, many of these communities later came to resent the act. Ferry County Commissioner Jim Hall, a vocal foe of the act, stated "[s]ure we got a lot of money, all right. . . [b]ut we also got something called a hearings board."⁸²

C. Is the GMA Working?

For over 10 years, the GMA has been in place in Washington. Thus, more time has elapsed to evaluate the effectiveness of the program in Washington.

One group, the 1000 Friends of Washington, conducted an assessment of the GMA and made a 10 year "report card."⁸³ The report listed three counties- Jefferson, King, and Thurston- that have successfully adopted comprehensive plans.⁸⁴ The report listed other counties- Chelan, Clark, Kitsap, Pierce, and Snohomish- that struggled at first but then were able to adopt plans.⁸⁵ In Snohomish County, for example, lack of significant enforcement initially stymied the county's efforts to comply with the GMA.⁸⁶ In addition, the county was rapidly losing wetlands including

⁷⁸ See Dizon, *supra* note 68.

⁷⁹ See *id.*

⁸⁰ See Fulton, *supra* note 72.

⁸¹ See *id.*

⁸² *Id.*

⁸³ 1000 Friends of Washington, *10-Year Report Card: County Level Assessment of the Growth Management Act 1990-2000* <[http://www.1000 friends .org/counties%20in%202000.htm](http://www.1000friends.org/counties%20in%202000.htm)> (last visited Oct. 20, 2001).

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

80% of the wetlands located within the Snohomish River estuary. However, now over 80% of the Country's total growth is occurring within UGAs.⁸⁷ The report also listed four counties- Island, Mason, Spokane, and Walla Walla- that had not developed comprehensive plans by 2000.⁸⁸

In another report, the group noted that “[i]t is difficult to conduct an accurate assessment of the state’s achievements under growth management because the state has not established key benchmarks. The state does not collect pertinent data. . . in order to measure performance in attaining GMA’s goals.”⁸⁹ However, in yet another report, the group indicated that over 100 Washington cities and counties have complied with GMA’s comprehensive guidelines and over 85% have complied with the critical lands and resource lands requirement.⁹⁰

Some negative reports, though, claim that the GMA does not work because it is hard to comply with and the hearing boards strip power from the local government. Even Governor Gary Locke admitted that the Boards must give greater deference to local planners and recognized that the Boards need more specific standards in judging local plans.⁹¹ Contrary reports, however, indicate that the Boards have been an extremely effective method. Out of 326 cases filed, the Boards have only found 63 plans and regulations to not meet the GMA guidelines.⁹²

Moreover, one report stated that King County, Washington is accomplishing a prime goal of the GMA: protecting rural areas by channeling new urban growth into urban centers,

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ Tracy Burrow, 1000 Friends of Washington, *Is the GMA Really Managing Growth?*, available at <www.djc.com/special/environment2000/gma.html> (last visited Oct. 20, 2001).

⁹⁰ See 1000 Friends of Washington, *About Washington’s Growth Management Act*, <<http://www.1000friends.org/introgma.htm>> (last visited Oct. 26, 2001).

⁹¹ See Huynh, *supra* note 53 at 137.

⁹² See *supra* note 90. ⁹³ See Aaron Corvin, *More Finding Jobs, Homes in Tacoma*, Washington Area, The News Tribune, Oct. 19, 2001.

especially Seattle.⁹³ But the county's overwhelming job growth and high housing prices have resulted in more traffic and longer commutes across the region.⁹⁴ In addition, the 2000 census showed that South Sound suburbs were among the fastest growing in Washington in 2000.⁹⁵ Also, Washington workers have an average commute of 25 minutes, longer than in all but nine states and Washington D.C., according to census data.⁹⁶

On balance, Washington's GMA seems like a progressive step towards smart growth. Although it is difficult to tell how Washington would have grown in the past ten years without the GMA, Washington seems to be doing well in the area of land management. The GMA has provided a comprehensive and detailed scheme to growth management in Washington.

IV. Will These Programs Work in California?

To this point, the paper has attempted to assess the benefits and drawbacks of the Maryland and Washington programs. Next, this paper turns to the analysis of the application of these programs to California from both a policy and a legal perspective.

A. Policy Perspective of Implementing the Programs in California

In asking whether Maryland's or Washington's regimes might be relevant to California, a first response would be a comparison of the size, population, and budgets of the three states. The following table compares the populations of California, Washington, and Maryland, revealing that of the three states, Maryland is experiencing the mildest growth in absolute numbers, as well as in its projected growth rate.

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

Projections of total populations of states from 1995 to 2025 (in thousands)

	<i>1995</i>	<i>2000</i>	<i>2025</i> <i>(est.)</i>	<i>Projected Growth</i> <i>Rate(1995-2025)</i>
California	31,589	32,521	49,285	56%
Maryland	5,042	5,275	6,274	24%
Washington	5,431	5,858	7,808	44%

Source: United States Census Bureau and PLRI analysis.⁹⁷

In addition, the next table demonstrates the imperative for Maryland’s smart growth experiment: its population density is roughly 2.5 times California’s, suggesting that Maryland is at greater peril of irreversible loss of its remaining open space

State Land Area and Population Density (2000)

	<i>Land Area</i> <i>(in square miles)</i>	<i>Population Density</i> <i>(per square mile)</i>
California	155,973	202.5
Maryland	9,775	515.9
Washington	66,581	81.6

Source: Encyclopedia Americana Online Journal⁹⁸

However, this table demonstrates that the law of large numbers will be coming to play in California, as the state must struggle to absorb a staggering six million new housing units across the next two decades: the terms and conditions for their deployment will result in a permanent change in the look and feel of the California landscape.

⁹⁷ Table based on data obtained at < <http://www.census.gov/population/projections/state/stpjpop.txt> > (last visited March 20, 2002).

⁹⁸ *Wall Street Journal Almanac 1999: Living in America* <http://ea.grolier.com/ea-online/wsja/text/ch08/tables/lv010.htm><http://orl.grolier.com/wsja/text/ch08/tables/lv054.htm>>(last

Housing Units in California, Maryland and Washington (2000-2025)

	<i>Housing Units, 2000</i>	<i>Average Household Size</i>	<i>Projected New Housing Units by 2025</i>
California	12,214,549	2.6	6,500,000
Maryland	2,145,283	2.4	425,000
Washington	2,451,075	2.2	880,000

Source: United States Census Bureau and PLRI analysis.⁹⁹

The following table compares state budgetary information, suggesting that the state of California could wield heavy incentives in a priority funding area program, even more so than Maryland.

State Revenues, Expenditures and per capita Spending

	<i>State Revenues</i>	<i>Expenditures</i>	<i>Spending per capita</i>
California	\$131.3 B	\$117.6 B	\$3,617
Maryland	\$20 B	\$16.2 B	\$3,071
Washington	\$26.8 B	\$22.2 B	\$3,791

Source: Encyclopedia Americana Online¹⁰⁰

B. Legal Implications of Adopting Smart Growth Programs

Besides policy implications, the legal implications of adopting smart growth programs in California must be assessed.

1. California’s General Land Use and Planning Framework

California should adopt a smart growth program that fits easily into its existing land use scheme. This would minimize disruption and complication of California’s existing law. To

⁹⁹ Table based on data obtained at < <http://www.census.gov/population/projections/state/stpjpop.txt>>; <http://quickfacts.census.gov/qfd/states/06000.html>; <<http://quickfacts.census.gov/qfd/states/24000.html>>; <http://quickfacts.census.gov/qfd/states/53000.html> (last visited April 11, 2002).

determine which types of programs would fit into existing law, an initial overview of California's legal land use framework proves useful.

The legal basis for land use and planning regulations, including growth control, is the police power of the city to protect the public health, safety and welfare of the its residents.¹⁰¹ A land use restriction falls within the city's police power if it is reasonably related to the public welfare.¹⁰² The California Constitution specifically confers power on cities to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws."¹⁰³ In exercising police power the city must meet due process principles¹⁰⁴ and refrain from acting where the state has completely preempted the field.¹⁰⁵

California Government Code section 65100 requires each city and county to have a planning agency with power to carry out the legislative purposes of that section.¹⁰⁶ California Government Code section 65300 provides that "each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning."¹⁰⁷ The general plan constitutes a city's basic planning document.¹⁰⁸ In 1990, the California Supreme Court observed that the

¹⁰¹ See Daniel J. Curtin, Jr. and Cecily T. Talbert, *Curtin's California Land Use and Planning Law*, Solan Press Books, 2001, at 1 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

¹⁰² See *id.* (citing *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582 (1976)).

¹⁰³ Cal. Const. Art. XI, § 7.

¹⁰⁴ See Curtin *supra* note 101 (citing *G & D Holland Construction Co. v. City of Marysville*, 12 Cal.App.3d 989 (1970)).

¹⁰⁵ See Curtin *supra* note 101 (citing *Morehart v. county of Santa Barbara*, 7 Cal. 4th 725 (1994)).

¹⁰⁶ See Cal Govt Code § 65100. This section further states that if a city does not have an adequate planning agency then the legislative body shall carry out all the functions of the planning agency.

¹⁰⁷ Cal Govt Code § 65300. This section further provides that chartered cities shall adopt general plans which contain the mandatory elements specified in section 65302.

¹⁰⁸ See Curtin *supra* note 101 at 7.

general plan was the “constitution for all future developments.”¹⁰⁹ The Court also noted that any decision of the city affecting land use and development must be consistent with the plan.¹¹⁰ And, any subordinate land use action, such as a zoning ordinance, tentative map, or development agreement, that is not consistent with a city’s current and legally adequate general plan is “invalid at the time it is passed.”¹¹¹

California Government Code section 65302 mandates that a general plan contain seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety.¹¹² In addition to the seven mandatory elements, the general plan may include any other elements that the city council believes relate to the physical development of the city.¹¹³

California appellate courts have repeatedly emphasized the prerequisite of a valid plan. If a plan contains defects, and the defects are related to a proposed land action, the city could not find that the land action is consistent with the general plan.¹¹⁴ Any amendments to a general plan must follow the procedure set forth in Government Code section 65350 et seq..¹¹⁵ A general plan will can be amended by resolution.¹¹⁶

Besides general plans, cities can also adopt specific plans “for the systematic implementation of the general plan for particular areas.”¹¹⁷ In addition, cities have control over zoning regulations. In fact, the California “Legislature has provided maximum control over zoning matters to cities while ensuring uniformity of, and public access to zoning and planning

¹⁰⁹ *Id.* at 8 (citing *Citizens of Goleta Valley v. Board of Supervisors*, 52 Ca.; 3d 553 (1990)).

¹¹⁰ *See id.* at 22.

¹¹¹ *Id.* at 8 (citing *Leshar Communications, Inc. v City of Walnut Creek*, 52 Cal.3d 531, 544 (1990)).

¹¹² *See id.* at 10.

¹¹³ *See id.* at 16.

¹¹⁴ *See id.* at 17.

¹¹⁵ *See id.* at 24-25.

¹¹⁶ And, if a city has a planning commission, at least one public hearing must be conducted by the planning commission and the one public hearing after appropriate notice is given. *See Curtin at 24-45.*

¹¹⁷ *Id.* at 31 (citing Cal. Govt Code § 65450).

hearings.”¹¹⁸ Cities also have the power to regulate and control the design and improvement of subdivisions within its boundaries under the MAP act.¹¹⁹

Under California’s land use scheme, considerable power remains in local governments. Except for mandating the general plan procedures with its required elements and consistency, the Legislature has largely not preempted the decision-making power of the local legislative bodies as to the specific contours of the general plan or actions taken under it.¹²⁰

2. Legal Implications of Smart Growth Programs in General

In addition to attempting to adopt a smart growth program that will fit into its existing land use scheme, California should also look for program that will spawn few legal disputes. Thus far, “there has been no flood of litigation challenging new growth management.”¹²¹ One reason for the dearth of legal challenges to the smart growth movement is that most challenges have been expensive and resulted in endorsement of regulatory schemes.¹²² However, some predict future battles over sprawl will result in legal disputes with potentially high stakes. In fact, in Loudon County, Virginia, the newly elected pro-smart growth county supervisors set up a \$1 million legal defense fund in anticipation of future litigation from developers.¹²³

Smart growth measures can be attacked in court on the basis of Fifth Amendment “takings” challenges, consistency challenges, and vague or overly broad. The following subsections set out general challenges to land use planning; thereafter these theories will be applied to the Maryland and Washington land use schemes.

¹¹⁸ *Id.* at 33(citing *Beck Dev. Co. v. Southern Pac. Transp. Co.*, 44 Cal.App.4th 1160 (1996)).

¹¹⁹ *See id.* at 61 (citing Govt Code § 66411).

¹²⁰ *See id.* at 9.

¹²¹ James A. Kushner, *Smart Growth: Urban Growth Management and Land Use Regulation Law in America*, 32 *Urban Lawyer* 211, 228 (2000).

¹²² *See id.*

¹²³ *See* William C. Smith, *The Brawl Over Sprawl*, 86-DEC A.B.A. J. 48, 51 (2000).

i. Takings Challenges

The Takings Clause of the Fifth Amendment of the United States Constitution prohibits state and local “. . . [g]overnments from forcing some people to bear public burdens which in all fairness and justice, should borne by the public as a whole.”¹²⁴ It is well-settled law that government’s physical invasions of property as well as government’s deprivation of “all economic use” of the property necessitates compensation to the landowner. But, the Supreme Court case of *Pennsylvania Coal Co. v. Mahon* created a new doctrine of “regulatory takings,” or governmental interference with private property significant enough to require government compensation.¹²⁵

Unfortunately, the Court has never issued clear guidelines for separating valid exercises of police power in the public interest and regulatory takings triggering government compensation,¹²⁶ approaching these cases with a highly contextualized, fact-based analysis. One commentator distills this analysis into a four-part scrutiny, which asks whether: 1) the ordinance advances some public interest; (2) it falls short of destroying any classic property rights (such as right to exclude others); (3) it leaves much of the commercial value of the property untouched; and (4) the ordinance confers some benefit upon the regulated landowner.¹²⁷

Smart growth plans readily meet three-quarters of the test: they advance legitimate public interests, do not destroy classical property rights, and confer the benefit of improved general living conditions upon landowners through controlling rampant and unregulated growth. The third factor, however, is more problematic: to what extent can a local ordinance diminish

¹²⁴ U.S. Const. Amend V; *Armstrong v. United States*, 364 U.S. 40, 49 (1960)..

¹²⁵ 260 U.S. 393, 413 (1922)(“One factor for consideration in determining such limits is the extent of the diminution [of the property’s value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.”).

¹²⁶ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting the Court has failed to promulgate a dispositive test for regulatory takings).

the value of a property. Several California land use cases provide useful in this analysis. The Supreme Court held in *Agins v. City of Tiburon* that the application of a general zoning law to a particular property becomes a taking if the ordinance either (1) does not substantially advance legitimate legal state interests or (2) denies an owner economically viable use of his land, upholding an ordinance sharply limiting the density of development on a vacant lot¹²⁸ The California Court of Appeal provides further guidance in understanding the “economically viable” clause, observing that local government regulations may be upheld, even where a landowner alleges a substantial diminution in the value of the property, in upholding a “managed growth” ordinance capping annual residential building permits even though the ordinance “substantially” reduced value of litigant’s property.¹²⁹

One additional point about takings cases bears quick mention. Generally, land use statutes cannot be examined by courts until the regulatory regime is applied to a particular litigant’s piece of property: the fact based inquiry requires a particular parcel and land-use scheme.¹³⁰ This leaves the legality uncertain until the land use regime is applied to specific properties, exposing a comprehensive, state-initiated land use policy subject to widespread permutations of lawsuits at the local level.

ii. Consistency Challenges

Besides making a takings claim, a landowner or developer can challenge land use regulations under a consistency theory. Since 1971, California has had a consistency

¹²⁷ Laurance H. Tribe, *American Constitutional Law* (2nd ed.), The Foundation Press, Inc., 1988 at 597 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹²⁸ 447 U.S. 255, 261 (1980).

¹²⁹ *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016, 1030 (1991), *cert. den’d*, 112 S. Ct. 3027 (1992).

requirement for general plans. A consistency requirement mandates that all land use approvals be consistent with a city's general plan. Any inconsistent proposals may be challenged in court.¹³¹

iii. Challenge to the Police Power

Land use regulations, as all other regulation based on local government's police powers to protect the public welfare, may be challenged as being outside the scope of legitimate exercise of the police power. In California, the leading case upholding a comprehensive and restrictive planned growth regime is *Construction Industry Ass'n v. City of Petaluma*.¹³² The Ninth Circuit found Petaluma's slow growth program to be a legitimate exercise of its police powers asserted for the public welfare.¹³³ The court expressly validated the public purpose of the goals of managed growth, including the preservation of the city's small-town character, open space, low density and population, and growth at an orderly and deliberate pace.¹³⁴ Significantly, the Ninth Circuit chose an expansive definition of the public welfare, in upholding Petaluma's land use regime, even in the face of arguments that the slow growth plan would result in limiting the amounts of new housing for residents and would-be residents of Petaluma.¹³⁵

¹³⁰ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 (1985)(The Court deferring judgment until the action became final, nothing that "[the effect of the zoning ordinance] cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.").

¹³¹ See discussion of consistency requirements, *supra* note 111.

¹³² 522 F.2d 897 (9th Cir. 1975), *cert. den'd* 424 U.S. 934 (1976).

¹³³ *Id.*

¹³⁴ 522 F.2d at 909.

¹³⁵ "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 522 F.2d at 906, *citing Berman v. Parker*, 348 U.S. 26, 33, 99 L. Ed. 27, 75 S. Ct. 98 (1954).

iv. Other Legal Challenges

Other legal challenges besides the ones mentioned above can be made against any land use or growth management program. These include substantive due process challenges, exclusionary zoning challenges based on the Equal Protection clause, and others. However, incentive-based growth management programs, as opposed to mandate-based programs, are most likely to survive legal challenges. One law review article noted that “smart growth strategies that rely upon targeted public expenditures that encourage growth in areas that possess community facilities, and do not proscribe development by growth control regulations, will make it difficult for property owners to object.”¹³⁶ Furthermore, it has been suggested that growth control regulations in California will be more effective and subject to fewer legal challenges if they are linked directly to the general plan rather than adopted independently.¹³⁷ The same author also suggested that voter initiatives may not be the best tool for growth management since they tend to be inadequate, simplistic approaches to complex, multi-faceted problems.¹³⁸

3. Legal Implications of Designating PFAs

Computer searches revealed no cases in Maryland adjudging the lawfulness of PFAs.¹³⁹ This is not surprising considering the program’s emphasis on incentives rather than mandates and the youth of the program. On its face, the PFA Program seems to be immune from taking challenges under federal and California law since landowners would have a difficult time arguing that the program effects a taking under the holding in *Agins* or *Long Beach Equities*.

¹³⁶ Beatley, *supra* note 28.

¹³⁷ See Curtin, *supra* note 101.

¹³⁸ See *id.*

¹³⁹ One recent case, *John Bollech et al. v. Charles County, Maryland, et al.*, 166 F.Supp. 2d 443 (D. Md. 2001), alluded to the PFA program but did not engage in a discussion of its merits (suggesting that a county may cancel pre-existing plans for water and sewer service to developer’s parcel in compliance with the county PFA, with no recourse for developer).

Under these cases, landowners would have to show that the program denies them of all economically viable use of their land or does not have a legitimate public purpose. Of course, landowners are free to develop their land but merely cannot take advantage of state infrastructure spending outside the priority funding areas. In addition, the PFA Program has legitimate public goals, such as those validated by the *Petaluma* court in California.¹⁴⁰

Moreover, in Oregon and Washington, state courts have upheld urban growth boundary legislation.¹⁴¹ Under this type of legislation, growth is prohibited outside of a designated urban growth boundary. Presumably, if these more stringent land use controls have been upheld, the less restrictive PFA Program would similarly be upheld if it ever did face a challenge.

Under the PFA Program, or any other similar, incentive-based, smart growth program, the probability of successful legal challenges to the program validity or application seems low. In addition, the program does not seem likely to act as a catalyst to other legal disputes. The PFA Program does not encourage takings since it does not proscribe land for public uses. Furthermore, the incentive-based policy behind the PFA Program makes it difficult for people to raise legal objections to the program. Thus, it seems likely that Maryland's PFA Program, or another similar program, would survive any legal challenges.

4. Legal Implications of the GMA

Unlike Maryland's PFA Program, Washington courts have seen many legal disputes concerning the GMA's application. Facial constitutional challenges to central GMA requirements have "been quite summarily rejected."¹⁴² Cases have been arisen, though,

¹⁴⁰ See *Petaluma*, *supra* note 132.

¹⁴¹ See Kushner, *supra* note 121.

¹⁴² Richard Settle, *Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court*, 23 Seattle Univ. L. R. 5, 32 (1999) (citing *Postema v. Snonomish County*, 83 Wash. App. 574 (1996)); other

concerning specific aspects of the GMA. For example, cases have arisen out of the Board's attempts to apply vague and contradictory statutory provisions within the GMA.¹⁴³ Also, the Washington Supreme Court has ruled that the state cannot make counties comply retroactively with the GMA.¹⁴⁴ One law review article noted that the GMA is being challenged "by the same issues that affect land use regulations generally: 'more or less regulatory control, the effects of regulatory control on the economy, the environment, and the quality of life; whether control should be exercised at the state or local level; and the effect of control on intergovernmental harmony.'"¹⁴⁵ Another article notes that the "risk to UGBs may come from challenges claiming categorical takings, or complete extinguishment of commercial value of the property; in order to avoid such claims, municipalities may need to approve exceptions for specific property owners" lest the denial of permit lead to a loss of all economically viable use of the property.¹⁴⁶ In arid portions of California, it is possible that the withdrawal of planned water service extensions could result in very substantial diminution in property value.

commentators see a continuing possibility of regulatory takings challenges in the decisions of local governments to deny permits outside UGAs. See Ruesga, *supra*, note 26, at 1082 (Growth boundaries restrictions "may go 'too far' in restricting viable use of land, implying that UGAs must be administered so as to avoid a substantial diminution in the value of parcels outside the UGA); citing Daniel R. Mandelker et al., *Planning and Control of Land Development* 693 (4th ed. 1995) ("Development permission denials outside the growth boundary clearly raises takings problems.").

¹⁴³ See *Clark County Natural Resources Council v. Clark County*, 92-2-0001, WWGPHB 5 (Nov. 1992) (cited in Derek W. Woolston, *Simply a Matter of Growing Pains? Evaluating the Controversy Surrounding the Growth Management Hearing Boards*, 71 Wash. L. Rev. 1219, 1235 (1996)).

¹⁴⁴ See *Skagit Surveyors and Engineers et al. v. Friends of Skagit County et al.*, 135 Wn. 2d 542 (1998).

¹⁴⁵ See Woolston, *supra* note 76 at 1230-31 (quoting Robert W. Burchell, *Issues, Actors, and Analyses in Statewide Comprehensive Planning*, in *State & Regional Comprehensive Planning: Implementing New Methods for Growth Management* 18, 19 (Peter A. Buschbaum & Larry J. Smith eds., 1993)).

¹⁴⁶ See Ruesga *supra*, note 26, at 1082 ("Service area boundaries (SABS) are not likely to run afoul of the Takings Clause. The boundaries imposed by SABS do not constitute insurmountable barriers to economically viable use of property. SABS simply make certain land less desirable for development via the added expense of providing infrastructure and services").

V. Analysis

A. Should California adopt a program similar to Maryland's PFA Program?

In Maryland, the PFA Program has received generally favorable reviews: most criticism focuses on the aims of smart growth in general as opposed to the PFA program. One specific criticism of the PFA program is that too much land is included in the PFAs. This problem is likely to occur in California as well. However, the PFA program has elicited favorable reports, especially in preventing large highway bypass projects and perhaps similar results could also be reached in California. Likewise, although the PFA has not eliminated sprawl in Maryland, it has helped.

The differences inherent in California and Maryland do not seem too large to prohibit adoption of the program. Although California is much larger than Maryland, this likely will not pose too many problems since California could simply outline PFAs that have larger land sizes than those in Maryland. As noted above, state spending per capita is roughly similar in Maryland and California; California should be able to benefit from Maryland's targeted approach to state infrastructure spending. Moreover, the budget-neutral nature of PFA programs is a strong plus in the current, straitened budgetary climate: no new infrastructure spending is required.

One benefit of adopting the PFA Program in California is that the program's structure renders it nearly impervious to legal challenge, reducing the risk of being overturned, and minimizing litigation costs imposed on local governments.¹⁴⁷ Maryland has not yet faced legal

¹⁴⁷ PFAs render irrelevant the U.S. Supreme Court's impact fee jurisprudence in *Nollan* and *Dolan*, which together require that impact fees bear a "rational nexus" to the public purpose behind the fees and a rough proportionality between the fees and the costs of development borne by local governments; with PFAs, developers at their choice will pay exactly and only the costs of infrastructure development for their parcels. *Nollan v. California Coastal Commission*, 483 U.S. 825, 838-39 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

challenges to its PFA program.¹⁴⁸ This is not surprising considering program's incentive-based policies. In addition, the PFA legislation defines clear and unambiguous criteria for determining how the state can dole out funding incentives. The program simply prohibits state funding for growth related projects located outside PFAs. If California were to adopt a similar program, few legal challenges seem likely, beyond the possible suits of developers whose plans to build are adversely affected by withdrawal of state infrastructure spending.¹⁴⁹

Another benefit of adopting the PFA program in California would be that it meshes well with existing California land use law. California already requires local general plans to include elements such as transportation. The legislature could simply require cities and counties to amend their general plans to include PFA areas.

On balance, Maryland's incentive-based PFA program sets a good example for California to follow. Such a program will limit state hidden subsidies for sprawling development, fit well into California's existing land use scheme, and spawn few legal disputes.

B. Should California adopt a program similar to Washington's GMA?

Washington's GMA has provoked more political controversy and led to a mixed set of reviews. Although the GMA is considered a landmark legislative act in Washington and has likely produced more efficient growth, California does not need to adopt similar land management legislation. Aspects of the GMA make it unnecessary and unsuitable for California.

¹⁴⁸ Any legal challenges would be limited to transition questions such as where the line should be drawn, permissible effects on previously approved projects now falling outside PFAs. *Bollech* suggests that such claims are likely to be bootless. *Bollech*, *supra* note 139, at 451.

¹⁴⁹ California courts have been traditionally highly deferential to local land use planning decisions, one notable exception is the case of *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 514 (1980) (holding that a growth control ordinance downzoning a specific parcel as substantially and reasonably related to the welfare of the region affected and but arbitrary and capricious).

First, the GMA is a comprehensive land use planning tool that gives power to cities and counties to adopt plans without state approval. California's existing land use scheme already provides methods for cities and counties to adopt general plans. It would be unnecessary for California to implement an entirely new land use scheme. In addition, implementation of a new, comprehensive scheme would require substantial redesign and disruption to California's existing scheme. Perhaps more troubling still to California cities and counties, would be the GMAs elaborate appellate process, whereby local general plans are subject to substantive state oversight.

Furthermore, legislation such as GMA may be unsuitable for California since it focuses on mandates, rather than incentives, as the primary impetus for channeling development into previously developed areas. The Washington program's mandates affect local governments and private developers. On one hand, the GMA model requires that local government surrender a measure of local sovereignty over land use decisions.¹⁵⁰ Even the state payments in the form of technical assistance and grants fail to adequately compensate local governments for this surrender of sovereignty: reports of Washington's GMA in news articles and law reviews suggest that local governments believe that they have struck a bad deal.¹⁵¹ In short, a GMA-styled plan would bring a dramatically different balance of power between state and local government in making local land use decisions. California cities and counties would be forced to cede several critical elements of land use planning to the state: the ability to fund new infrastructure by looking to exact impact fees from developers, as well as the ability to rely on state infrastructure spending to subsidize local government projects.

¹⁵⁰ In contrast, Maryland's program could result in local governments having to go it alone to build out infrastructure in non-PFAs, consistent with the cost-shifting imbedded in the PFA program.

¹⁵¹ In contrast, Maryland sweetened its deal with local government: Maryland's state agencies must defer to the local comprehensive plan in implementing state projects and programs.

The other targets of the GMA mandates are private land developers, who find themselves constrained from building beyond the Uniform Growth Areas. More legal challenges can be brought against programs creating mandates rather than incentives. In fact, Washington's GMA, in contrast with Maryland's PFA Program, has been the subject of many legal disputes. These disputes are simply a natural outgrowth of the program's far-reaching and comprehensive approach to land use planning. If California adopted a program similar to Washington's GMA, California courts will likely see some of the same challenges brought in Washington courts.

California already has a maze of land use and zoning regulations. Thus, it needs to focus on adopting narrowly tailored, incentive based programs rather than comprehensive land use legislation. Since Washington's GMA creates a comprehensive land use scheme not focused on incentives, it does not provide a useful guide for California.

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VI. Conclusion

This paper conducted an analysis of Maryland's PFA Program and Washington's GMA to determine whether California should adopt either program. Both programs use funding incentives to encourage compact development. Both programs, at bottom, require local governments to draw sprawl-limiting boundaries. Beyond these superficial similarities, however, the programs diverge dramatically and tellingly. Washington's program requires local governments to designate areas of restricted development, consequently, it restricts some landowners from developing their property. Both points conflict with California's traditions of local control of land use planning decisions. In contrast. Maryland's program steers development to zones of concentrated state investment rather than prohibiting development full stop. Consequently, Maryland's program is unlikely to raise a firestorm of legal actions against state and local government, unlike Washington's highly litigated GMA. Finally, Washington's

GMA legislation is duplicative of California's land use planning regime, and would require substantial changes to local general plans.

Appendix

1. Ohio Report: After looking at smart growth initiatives in several states, the Ohio report recommended that Ohio “adopt an incentive-based program to guide state capital investment, based on a 1997 law from Maryland, that would target state growth-related expenditures.”¹⁵² The report acknowledged that Ohio legislative reforms efforts must address modest state growth, prioritize economic development, and farmland preservation as a bellwether issue. In addition, the report was based on the premise that the Ohio Smart growth agenda must: (1) not dramatically expand existing state agencies, (2) provide for integration aiming state program with respect to their effects on development, redevelopment and conservation, create or support a continuing constituency for cooperative planning efforts; and (3) be primarily incentive-based, rather than regulatory.¹⁵³
2. Connecticut General Assembly Bills: In Connecticut, the Planning and Development Committee introduced a bill in 1999 in the General Assembly entitled “An Act Concerning Priority Funding Areas.”¹⁵⁴ This bill, HB 6799, would have developed a program in Connecticut similar to Maryland's PFA Program had it not failed in Committee on March 31, 1999. After this bill was introduced, Bill Ethier, Executive Director for the Home Builders Association of Connecticut noted that people already living in designated growth areas may

¹⁵² See Meck, *supra* note 44. In addition to adopting a program similar to Maryland's PFA Program, the report also recommended that a legislative program in Ohio should also contain high-level organization to coordinate among state departments and promote sound planning at all levels and develop cross-cutting goals documents that will integrate state policy and set direction for development, redevelopment, and resource conservation for Ohio.

¹⁵³ See *id.*

¹⁵⁴ Connecticut Raised Bill No. 6678, 1999HB-06678-R00-CBS.HTM, available at <<http://prdbasis.cga.state.ct.us/ps99/Tob/h/1999HB-06678-R00-HB.htm>> (Oct. 21, 2001).

resist the increase on population density promoted by this type of mandate.¹⁵⁵ He stated, “Connecticut does not exist in a vacuum. People will choose to live elsewhere if they are discouraged from buying a home in the neighborhood of their choice.”¹⁵⁶

Although HB 6799 failed in committee, recently, the Planning and Development Committee introduced a similar bill in the Connecticut General Assembly. This bill, HB 6717, is entitled “An Act Concerning Priority Investment Areas.”¹⁵⁷ Under this bill, the state cannot provide funding for growth related projects unless such projects are located within a priority investment area.¹⁵⁸ The priority investment areas are to be designated by municipalities in accordance with the statute’s provisions.¹⁵⁹ Bill Ethier, in a public hearing held in committee on February 14, 2001, noted that again the Home Builder’s Association of Connecticut opposes this bill.¹⁶⁰

¹⁵⁵ See Kim Locke, *Current Smart Growth Initiatives: Connecticut State Focus*, Marin Environmental Newsletter, June 1999.

¹⁵⁶ *Id.*

¹⁵⁷ Connecticut Raised H.B. 6717, 2001HB-06717-R00-CBS.HTM. Bill history and text available at <<http://prdbasis.cga.state.ct.us/BAS.../CON/0%2C/BASIS/TSINDSC/LIN1/INDS/0>> (last visited Oct. 25, 2001)

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* Connecticut Committee Hearing, Feb 14, 2001, available at <<http://prdbasis.cga.state.ct.us/BAS.../CON0%2C/BASIS/TSINDSC/LIN1/INDS/0>> (last visited Oct. 25, 2001).

