IMPLEMENTING PLANNED DEVELOPMENT: THE CASE OF NEW JERSEY

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INTRODUCTION

Over the last thirty years, states have gradually turned to land use regulations in an effort to address the environmental and economic effects of suburban and exurban development. Policymakers, politicians, and voters increasingly understand that land usage is intricately and inextricably tied to improving air quality, limiting traffic congestion, and preserving water resources. More and more, these groups are learning that sprawl and inappropriate development are more than just abstract concepts, and that rapacious construction can destroy the very fabric of both communities and their

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local environment. As such, implementing effective limits on development has become a necessary component of state and local environmental policies.

The "anti-sprawl" movement can be described as an effort to force re-conceptualization of the relationship between environmental and land use policy, so that urban blight and environmental degradation are more appropriately addressed in tandem. A wide array of current state and federal legislation is described as "anti-sprawl"; indeed, there is no generally accepted definition of the term "sprawl."[1] Arguably, the term has been used to describe any development that the user of the term finds aesthetically unpleasing.[2] Generally, however, sprawl refers to low-density developments on the fringes of developed areas where there is no centralized planning or land use regulation.[3] Anti-sprawl policies aim either to halt development in areas susceptible to sprawl or, more conservatively, to enforce urban planning schemes so that development occurs in an orderly and sustainable fashion. Either iteration necessitates the imposition of limitations and constraints on both development rights and the ability of local governments to govern land use.

Constraining local governments' ability to govern land use is an important component of state and regional policies. This is particularly true where statewide and local needs and preferences differ with respect to the use of land. In such cases, in order to achieve the land use goals that meet state or regional needs and protect the communities' environment and character, the state must impose its own goals on local control of land use. There is good reason to suspect that state and local needs will differ. First, it is unlikely that municipalities account for the effect of externalities on neighboring areas resulting from their land use choices. Externalities might include traffic congestion, air pollution and water pollution. Second, policies dictated by the need to raise property tax revenues will oftentimes run counter to the goals of land and natural resource conservation. Because property taxes fund local governments' most costly expense, public education, a locality's commitment to conservation may be compromised by its fiscal needs.

It is important, therefore, to consider the way that statewide land use policies inform or compel local policymaking. The legal, scientific, aesthetic and political choices made by planners are well beyond the scope of this article.

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1. *See* MICHIGAN LAND USE LEADERSHIP COUNCIL, DEFINING SPRAWL AND SMART GROWTH 1, *available at* http://www.michiganlanduse.org/resources/councilresources/Sprawl_SmartGrowth.pdf (last visited Oct. 3, 2005). For another list of proposed definitions, see Planners Web, Sprawl Guide: How Do You Define Sprawl?, *at* http://www.plannersweb.com/sprawl/define.html (last visited Oct. 2, 2005).

2. *See, e.g.*, Robert Bruegmann, Address at Next Cities: Paradoxes of Post-Millennial Urbanism Symposium, Yale School of Architecture (Oct. 7, 2000).

3. *See, e.g.*, ROBERT W. BURCHELL, NAVEED A. SHAD, DAVID LISTOKIN, HILARY PHILIPS, ANTHONY DOWNS, SAMUEL SESKIN JUDY S. DAVIS, TERRY MOORE, DAVID HELTON & MICHELLE GALL., THE COSTS OF SPRAWL—REVISITED 6–7 (1998), *available at* http://www.tcrponline.org/bin/publications.pl; Anthony Downs, *Some Realities About Sprawl and Urban Decline*, 10 HOUSING POL'Y DEBATE 955, 956 (1999).

I will instead attempt to describe legislative and regulatory efforts to enforce the restrictions on land use embodied by statewide and regional planning. How do so-called "anti-sprawl" policies create incentives for the major players in land use—local governments and developers—to plan development or to abide by state and regional plans? Even the most forward-looking, sophisticated planning techniques will be of little use where local and state legislation and regulations fail to execute the resulting plan. New Jersey provides a pertinent example of regulatory failures, and I will chart not only the difficulties that a state encounters, but also how these can be overcome in part, and how the remaining impasse might best be addressed.

The first part of this article provides a framework for understanding enforcement of land use policies and describes the regulatory and legislative options from which jurisdictions have selected land use tools. Part II explains the utility of using New Jersey as a case study for the examination of anti-sprawl enforcement techniques. Part III describes and evaluates past efforts to enforce statewide planning in New Jersey. Part IV examines the current politics of sprawl in New Jersey and the resulting legislative and regulatory efforts to constrain unplanned development and growth. I will conclude by applying the framework established in part I to evaluate proposed development management efforts in New Jersey.

I.
UNDERSTANDING THE TAXONOMY OF LAND USE PLANNING TOOLS

A wide array of tools can be used to regulate and influence the way land is used. The government can choose to regulate directly, through command-and-control mechanisms, or to provide incentives for private entities to engage in a particular kind of development. The best-known example of direct regulation is Oregon's urban growth boundary.[4] Since the mid-1970s, the State of Oregon has required local governments to engage in planning in accordance with statewide standards.[5] Local plans are approved by a state agency—the Land Conservation and Development Commission.[6] In addition to local planning, urban growth boundaries are applied throughout the Portland region (including three counties and twenty-four cities) by Metro, an elected regional body

4. This regulatory system was overhauled in November 2004 with the passage of a referendum that suspends applicability of the boundary to any property owner who can demonstrate that the boundary affects the value of her property. Arguably, such revision to the regulatory system will destroy the effects of the boundary generally. It remains to be seen what effect the referendum will have. Measure 37, *at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_bt.html (last visited Oct. 4, 2005); for discussion of Measure 37's potential impact *see* Sara Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-regulating Land Use*, 23 YALE LAW & POL. REV. 587 (2005); C.J. Gabbe, *Reckless Laws Endanger Land Use*, SEATTLE POST-INTELLIGENCER, May 24, 2005.

5. OR. REV. STAT. §§ 197.005–197.860 (2003).

6. OR. REV. STAT. §§ 197.030–197.070 (2003). *See also* Oregon Dept. of Land Conservation and Development, *at* http://www.lcd.state.or.us (last visited Oct. 3, 2005).

established by referendum in 1979.[7] In this context, the boundary "controls urban expansion onto farm, forest, and resource (industrial, employment, etc.) lands."[8] Urban services, like sewers, are not extended to areas outside of the urban growth boundary.[9] Timed zoning ordinances also fall into the category of command-and-control mechanisms. Timed growth ordinances, pioneered by the small upstate New York town of Ramapo, prohibit development in areas where local infrastructure has not yet been built. The Ramapo government was the first to pass a timed growth ordinance that required development to be sequenced according to a locality's reach of infrastructure.[10]

Instead of or alongside command-and-control mechanisms, state and local governments might choose to create incentives for property owners or developers to develop in particular areas or disincentives to develop in others. Incentives and disincentives can take either financial or regulatory form. First, the government might provide financial incentives for development in the form of subsidies, tax benefits, or infrastructure provision or improvement. Some states and the federal government provide tax credits, for example, to individuals and corporations that clean up brownfields.[11] Such tax credits encourage infill development and inner city redevelopment, and attempt to counter the disincentives created by the cost of clean-up and potential liability to victims of environmental hazards. As another example, in an effort to encourage transit-oriented development, the Charlotte-Mecklenburg region has committed to investing in a rapid transit system, encouraging development around transit nodes.[12]

Government may also choose to implement financial disincentives to development in disapproved areas. For example, in areas not designated for development, Maryland and Georgia refuse to provide infrastructure commonly provided by governments.[13] Oregon's refusal to extend sewer service outside the urban growth boundary is a disincentive to developers because they would have to create sewer access or some equivalent in new developments. Local governments may also demand impact fees for developments that require the provision of infrastructure. Imposition of such fees forces cost internalization by

7. OR. REV. STAT. § 268 (2003). *See also* Metro, *at* http://www.metro-region.org (last visited Oct. 3, 2005).

8. Metro, Urban Growth Boundary Definition and Facts, *at* http://www.metro-region.org/article.cfm?articleID=277 (last modified Sept. 23, 2005).

9. *See id.*

10. The New York Court of Appeals upheld Ramapo's zoning ordinance against a challenge by developers in 1972. Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972). *See also* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH (1999) (describing *Ramapo*'s effect on planning efforts in New York and elsewhere in the United States).

11. *See, e.g.*, I.R.C. § 198 (2000) (permitting expensing of environmental remediation costs).

12. *See* Charlotte Area Transit System, 2025 Integrated Transit/Land Use Plan for Charlotte-Mecklenburg (1998).

13. GA. COMP. R. & REGS. r. 110-12-3-.01–110-12-3-.07 (2004); MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-02–5-7B-03 (2004).

requiring developers to bear some percentage of the true cost of creating homes and businesses in areas not already served by utilities and other public services. The imposition of impact fees also creates disincentives to develop in those areas because they raise regulatory and legal issues that developers may simply choose to avoid.

In addition to financial incentives and disincentives, government can implement regulatory incentives. Developers can be made to go through a number of permitting and regulatory processes in preparation for development. Most developments require building permits, zoning variances, environmental permits, local planning board approval, and a host of other approvals by state and local government in order to proceed. In addition, government might charge developers permit or impact fees. In order to encourage development in particular locations, government might ease these regulatory hurdles for developers. For example, until recently Austin, Texas granted expedited permit reviews and reduced fees for developments inside designated "smart growth" zones.[14] Recent proposals in New Jersey include regulatory incentives, most prominently easing provision of environmental permits for developments located in designated areas.

Regulatory disincentives to development have been employed as well. The government might require additional permit processes in order to approve development in locations considered inappropriate for high-density development. In response to air quality concerns, for example, the Georgia Regional Transportation Authority (GRTA) requires large developments outside of priority funding areas requesting any sort of governmental action to submit proposals and receive approval from a regional governance body.[15] In Vermont, developments that exceed a defined acreage or number of housing units require permit approval.[16] The primary goal driving such regulations may not be to make development more difficult, but rather to ensure that developments meet certain standards and do not excessively impact natural resources and existing developments. Nevertheless, they do have the practical effect of increasing development costs by forcing developers to apply and lobby for governmental approval for projects. Further, such mechanisms make the initial steps of investing in project planning and site acquisition more risky because the project is subject to governmental approval, thus increasing the difficulty of retaining financing and other support.[17]

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14. *See* Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 291 (2000). Austin revised its primary smart growth strategy in the summer of 2003. *See* discussion *infra* Part IV.E.

15. GA. COMP. R. & REGS. r. 110-12-3-.05 (2004).

16. VT. STAT. ANN. tit. 10, §§ 6001–6092 (2004).

17. All of these mechanisms affect a landowner's bundle of property rights by limiting or increasing her ability to use land as she sees fit. They all, however, have different effects. In the most extreme situations, regulatory and financial disincentives may make development impossible, and command-and-control mechanisms are most likely not only to limit the "development stick" in

Last, state or local governments can control development of a parcel of land by purchasing either the land or the development rights to that land. For example, states and localities might participate in open space preservation by purchasing rural and environmentally sensitive lands, then keeping the land in trust by transferring it to not-for-profit conservation organizations, or by funding such not-for-profit organizations.[18] Rather than purchasing the land in fee simple, government and non-profits can also purchase development rights to undeveloped land. The rights are then usually marketable, and can be sold to developers who hope to build higher-density projects in areas suitable for development, termed "receiving zones" or "receiving areas."[19] Government or conservation organizations may alternatively purchase the right of first refusal, whereby they buy from current landowners the right to purchase a parcel of land at a fixed price before the landowner offers it for sale to any other party. Rights of first refusal may be appropriate where the current owner is unlikely to develop the land but may transfer the land to a developer. Open space preservation is less disruptive to established property rights than is regulation because property owners are compensated at the market rate for rights to their land. By removing certain lands from the pool of land available for development, open space preservation forces developers to consider areas that are more appropriate for growth.

Open space preservation programs are severely limited, however, by budgetary limitations. Such programs are expensive to administer and therefore may require immense budgets to achieve state or regional land preservation goals. This problem is particularly acute when the government participates in the market for rural and environmentally sensitive land and drives up the price of that land, in effect hampering its ability to achieve its own preservation goals. In addition, in areas targeted for preservation, individual owners can act as holdouts by refusing to sell land or development rights.

Of course, no state is likely to use any one of these tools in isolation. A piece of legislation often incorporates a number of different tools in an attempt to guide development. Proposals currently under consideration in New Jersey

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the bundle but obliterate it. American jurisprudence considers the possibility that obliteration of that stick renders property rights valueless, and may require compensation for a taking under the Fifth Amendment to the Constitution. Regulatory disincentives can, of course, have this effect as well. This has resulted in a long line of regulatory takings cases before state and federal courts. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (creating, along with cases that followed, a number of ad hoc tests for determining whether a regulation results in a regulatory taking of property). *See also* Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1977); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Palazzolo v. Rhode Island, 533 U.S. 606 (2000). Whatever the test applied by the courts, takings jurisprudence limits the extent to which regulatory and financial disincentives can control development in particular areas.

18. One such organization is the Open Space Institute, a land conservation organization that works "to protect scenic, natural and historic landscapes to ensure public enjoyment, conserve habitats and sustain community character." Open Space Institute, See What We Do (2004), *at* http://www.osiny.org/whatwedo.asp.

19. *See* discussion *infra* Part IV.A.

are illustrative. The menu of possibilities includes regulatory fast-tracking, impact fees, financial incentives and disincentives, infrastructure planning, and command-and-control mechanisms. States like Maryland and Oregon have likewise taken holistic approaches to encouraging smart growth and planned development, incorporating a number of different tools into their smart growth policies. Finally, a landowner may face a number of different land use restrictions promulgated by different levels of government. For example, a developer may be required to apply for a permit from a state agency and to pay impact fees to a local government for the same development project.

In addition to differences among types of land use planning methods, there is an important distinction between state legislation that targets municipalities and legislation that targets developers directly. Simply empowering localities to make land use decisions may not accomplish a state's planning goals because incentives faced by government vary according to the level of government in question. Effective statewide planning may require bringing local incentives in line with state and regional goals. It is unlikely that this is currently the case in most parts of the country, including New Jersey. Because local services are funded primarily by local property tax revenues, local governments have an incentive to develop and compete for revenue-producing projects.[20] These incentives will collide with state and regional efforts to limit development in particular locations.[21] This problem is exacerbated when rural and other undeveloped lands are attractive to consumers, and therefore developers, who value large lots and minimal congestion when looking for a home.

Understanding the full toolbox of land use controls available to regulators better equips us to understand the policy choices made by states placing strict controls on development. New Jersey is an example of one such state. It also provides a case study of the way in which land use controls are implemented when state and local priorities differ. Creating a systematic program of incentives and disincentives to catalyze appropriate developments in an effort to curb urban blight and the shortsighted destruction of environmental amenities is not a simple matter. By exploring the pitfalls they encountered and by describing the best way forward, this article will attempt to generalize from the experiences of New Jersey's executive, legislators, and courts for the benefit of those seeking to understand how a full set of land use controls can be used effectively and refined.

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20. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

21. *See generally* MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997); MYRON ORFIELD & THOMAS LUCE, NEW JERSEY METROPATTERNS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY IN NEW JERSEY (Apr. 2003), *available at* http://www.njregionalequity.org/reports/metropatterns.html.

II.
WHY NEW JERSEY?

One of America's founding fathers described New Jersey, situated between Philadelphia and New York City, as a "keg tapped at both ends."[22] Facing the possibility of endless suburban growth from both the east and west sides of the state, New Jersey's citizens, planners, policymakers, politicians, and lobbyists have engaged in an important discussion of the role of land use legislation for at least thirty years.[23] Residents of the country's most dense state worry about transportation and traffic congestion. In addition, New Jersey's natural resources, such as the sensitive habitats of its pinebarrens and coastland, ignored in the wealth of turnpike and suburbia jokes enjoyed by residents of neighboring states, are important to residents' quality of life, water quality, and New Jersey's tourism industry. Over the last decade, New Jersey voters have passed referenda allocating funds for the preservation of open space by large margins.[24] Polls find that sprawl and growth containment are high priorities for New Jersey voters[25] and most local and state-level candidates in the 2003 elections made statements in support of preserving open space and environmentally sensitive land.[26]

Ongoing conversation about land use policy has yielded the use of innovative tools. Both the *Mount Laurel* decisions, described *infra*, and the State Development and Redevelopment Plan are oft-cited models for effective land use regulation. The State Development and Redevelopment Plan (hereinafter the State Plan), enacted in the mid-1980s, requires local governments to engage in planning and to provide input to the State's development of the State Plan,

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22. There appears to be some disagreement over whether Ben Franklin or James Madison first used this analogy to describe New Jersey's unique location between two early American urban centers. *See* MARTIN BIERBAUM, INSTITUTE FOR PUBLIC ADMINISTRATION, SMART GROWTH: A TALE OF TWO STATES: NEW JERSEY & MARYLAND 7 (2001); THOMAS P. FARNER, NEW JERSEY IN HISTORY: FIGHTING TO BE HEARD (1996); Rick Hampson, *N.J. Knocks Conn. From Top of Income Rankings*, U.S.A. TODAY, Aug. 6, 2001, at 3A.

23. New Jersey's first open space preservation program, the *Mount Laurel* cases, and the first State Plan all date back to the early 1970s. *See* New Jersey Green Acres and Recreation Opportunities Act, 1974 N.J. Laws 102; S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) (holding that municipal land use regulations cannot foreclose the opportunity of housing for low to moderate income populations).

24. A 1998 referendum authorizing the purchase of open space passed by an overwhelming majority. In November 2003, a smaller majority of voters approved a referendum further expanding funds for New Jersey's open space preservation program. *See* discussion *infra* Part IV.A.

25. *See* New Jersey Future, Poll Says Voters Prefer Candidates Who Support Widespread Affordable Housing and Stricter Rules for Development (Oct. 23, 2001), *at* http://www.njfuture.org/index.cfm?ctn=9t45e1o30v9g&emn=5u92y86g2h42&fuseaction=user.item&ThisItem=178 (revealing that more than half of voters prefer a candidate who would impose stricter rules for development).

26. *See Voters Guide*, NEWARK STAR-LEDGER, Oct. 26, 2003, at 25–29. *See also* Lawrence Ragonese, *Anti-Sprawl Strategy Defines Senate Race*, NEWARK STAR-LEDGER, Oct. 28, 2003, at 20.

which, taking into account environmental and economic factors, describes the state's land use goals.

Among planners, New Jersey has been lauded as a model for other states. A 1999 report by the American Planning Association (APA) described the planning programs of six states—New Jersey, along with Washington, Maryland, Oregon, Tennessee, and Rhode Island—as "exemplary models" for planning activity. All six states were said to have taken "exceptional action towards modernizing planning laws to address urban sprawl, open space protection, public transit, and other community planning needs."[27] The report focused on the enumerated goals of the State Planning Act as well as other New Jersey legislation with respect to local planning, environmental protection, farmland, and open space, historic preservation, economic development, transportation, and affordable housing.[28] A year later, the APA awarded Governor Christine Todd Whitman its Distinguished Leader Award for an Elected Official for her commitment to planning issues, evidenced by her support of the State Plan and other legislation passed during her term.[29] Advocates of "smart growth" have described the State Plan as "visionary."[30] Nevertheless, commentators and the APA, both in its report and its announcement of former Governor Whitman's award, have said little about New Jersey's success, or lack thereof, in *executing* the State Plan and effectively managing land development in practice.

In fact, New Jersey has developed more of its non-federal land than any other state in the country.[31] Thus, New Jersey provides an interesting and informative vehicle for a discussion of anti-sprawl policies. Sprawl remains a reigning concern for New Jersey's voters thinking about natural resources, traffic congestion, and quality of life. Thus, the state is more open than some to the possibility of experimenting with land use policies. In fact, the state has recently considered a number of major proposals geared to reducing sprawling development. Lastly, New Jersey's above-average dependence on property tax proceeds to fund local services heightens the propensity of municipalities to encourage development yielding high property taxes but requiring the provision

27. Press Release, American Planning Association, New Jersey One of Six States Lauded in Growing Smart Report (Dec. 13, 1999), *at* http://www.planning.org/newsreleases/1999/ftp12133.htm. *See also* New Jersey State Planning Commission, *APA Lauds New Jersey for Smart Growth Leadership*, 8 STATE PLANNING NOTES 1 (2000).

28. AMERICAN PLANNING ASSOCIATION, GROWING SMART PROJECT, PLANNING COMMUNITIES FOR THE 21ST CENTURY (1999), at 37–46.

29. *Id.*

30. *See, e.g.*, Timothy Beatley & Richard Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 193, 202–03 (2002).

31. Natural Resources Conservation Service, Acreage and Percentage of Non-Federal Land Developed (2000), *available at* http://www.nrcs.usda.gov/technical/land/tables/t5846.html (reporting that New Jersey has developed almost forty percent of its non-federal land, compared to a national average of under seven percent).

of few municipal services.[32] For these reasons, New Jersey is something of a land use law laboratory. The state is constantly dealing with issues related to land use, development, and redevelopment.

III.
IMPLEMENTING NEW JERSEY'S STATE PLAN

It is important to consider how the tools used by government to contain development are implemented on the ground. New Jersey's concern with the effects of land use and development has produced a number of possible approaches to combating sprawl. This section begins to consider the history of state planning in New Jersey and the success of implementation of statewide planning, as a necessary backdrop to the current proposals under consideration.

Recent efforts of the state's Department of Environmental Protection and Office of Smart Growth have been multi-faceted and include a variety of regulatory and legislative provisions. For example, in the spring of 2003, the Department of Environmental Protection sought to use the State Plan to divide the state into three zones for the purposes of environmental permitting: areas to be preserved and protected, areas allowing development where strict regulatory standards are met, and areas where development is encouraged and regulatory standards are eased. Other legislative approaches considered during the McGreevey administration included increasing open space preservation, expanding the New Jersey Municipal Land Use Law,[33] and implementing a Smart Growth Tax Credit.[34] The tax credit would be available to developments that are appropriately located (following the planning choices made by the State Plan) and are also moderately dense, energy-efficient, and within walking distance of transit. In addition, legislation passed in March 2004 allows municipalities to enact Transfer of Development Rights programs.[35] Two major pieces of legislation passed in the summer of 2004 revamp the state's approach to land development in the Highlands, located in northern New Jersey, while providing for regulatory fast-tracking for developments in urban and suburban regions of the state.[36]

These proposals are all considered and understood against the backdrop of the State Plan. This first approach to guiding development choices in New Jersey, statewide planning, is similar to legislation passed in other states.[37] New Jersey's legislation was passed in the mid-1980s. The first plan was adopted in 1992 and created planning areas in which varying levels of development are

32. ORFIELD & LUCE, *supra* note 21, at 2.

33. *See* discussion *infra* Part IV.B.

34. *See* discussion *infra* Part IV.C.

35. *See* discussion *infra* Part IV.A.

36. *See* discussion *infra* Part IV.D.

37. Douglas R. Porter, *Will "Smart Growth" Produce Smart Growth?*, 12 THE ABELL REPORT 1 (Jan. 1999).

considered appropriate. The process of plan adoption involves a unique cross-acceptance methodology, requiring various levels of government to interact and agree on a statewide plan for development. It is important to consider statewide planning because it lays some of the groundwork for the current discussion about sprawl in New Jersey.

The State of New Jersey established a State Planning Commission in 1985 after finding that:[38]

> New Jersey, the nation's most densely populated State, requires sound and integrated Statewide planning and the coordination of Statewide planning with local and regional planning in order to conserve its natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable cost while promoting beneficial economic growth, development and renewal.

The Commission's primary responsibility was to create a State Development and Redevelopment Plan (the State Plan) and to revise and re-adopt that Plan every three years.[39] The legislation requires the Commission to coordinate a range of planning goals including land use, housing, economic development, transportation, historic preservation, and natural resource conservation.[40]

According to the legislation, cross-acceptance, an element of statewide planning original to New Jersey, "means a process of comparison of planning policies among governmental levels with the purpose of attaining compatibility between local, county, and State plans."[41] Thus, the State Plan is designed to incorporate local priorities and decision-making rather than to impose state legislative and agency decisions onto municipalities. The State Planning Commission is required to develop and promote procedures to facilitate cooperation and coordination among State agencies and local governments.[42] Furthermore, "in preparing, maintaining and revising the State Development and Redevelopment Plan, the commission shall solicit and give due consideration to the plans, comments and advice of each county and municipality . . . and other local and regional entities."[43] The State Planning Commission treats cross-acceptance "as part of the planning process, not part of the implementation process."[44] Prior to confirmation of the State Plan, the Commission must distribute the preliminary plan "to each county planning board, municipal planning board and other requesting organizations," and meet with each county

38. N.J. STAT. ANN. § 52:18A-196 (2002).
39. N.J. STAT. ANN. § 52:18A-199 (2002).
40. N.J. STAT. ANN. § 52:18A-200 (2002).
41. N.J. STAT. ANN. § 52:18A-202(b) (2002).
42. N.J. STAT. ANN. § 52:18A-199(c) (2002).
43. N.J. STAT. ANN. § 52:18A-202(a) (2002).
44. NEW JERSEY OFFICE OF STATE PLANNING, WHAT IS CROSS-ACCEPTANCE? 6 (1987) (on file with author).

planning board in order to respond to inquiries and concerns and to receive recommendations.[45] Next, the Commission must negotiate cross-acceptance, a process by which local planning bodies report findings, recommendations, and objections to the commission. Local entities can waive their right to participate in the cross-acceptance process. In addition, they are not required to approve the plan and are permitted instead to file an inconsistent plan with the State Planning Commission.[46]

The State Plan divides the state into five planning areas. Planning Area 1, the Metropolitan Planning Area, includes currently developed land, primarily cities and first-ring suburbs. These areas are targeted for redevelopment and infrastructure enhancements. Future growth is slotted for the Planning Area 2, the Suburban Planning Areas. Planning Area 3 creates a buffer between developed areas and environmentally sensitive areas where development is discouraged. Rural and environmentally sensitive areas are included in Planning Areas 4 and 5, where development is discouraged, especially outside of designated town centers.[47]

In addition to drafting and approving the State Plan, the Commission is responsible for encouraging planning cooperation among state agencies and local governments, adopting a long-term Infrastructure Needs Assessment, and reviewing state-level capital funds appropriations.[48] None of the functions assigned to the Commission, however, allows it to make binding legislative or regulatory decisions with respect to New Jersey's local governments.

The State Plan is not binding on either state agencies or municipalities. According to regulations promulgated under the State Plan legislation, "[n]either the State Development and Redevelopment Plan nor its State Plan Policy Map is regulatory and neither should be referenced or applied in such a manner."[49] Thus, the Plan need not be incorporated or even considered in policy decisions made by state agencies.[50] A later section of the Administrative Code reminds local entities that "the State Planning Act recommends but does not require that municipal, county, and regional plans be consistent with the State Development and Redevelopment Plan."[51] Further, while "state agencies are expected to review and coordinate their plan, programs and regulations to make them consistent with the State Development and Redevelopment Plan,"[52] there is no mechanism to force consistency.

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45. N.J. STAT. ANN. § 52:18A-202(a) (2002).

46. N.J. STAT. ANN. § 52:18A-202(b) (2002).

47. Office of Smart Growth, New Jersey State Development and Redevelopment Plan (2005), *available at* http://nj.gov/dca/osg/plan/stateplan.shtml [hereinafter State Plan].

48. N.J. STAT. ANN. § 52:18A-199 (2002).

49. N.J. ADMIN. CODE tit. 5, § 85-6.1 (2004).

50. Some have argued that to do so is contrary to the legislative intent of the original Act. *See* discussion *infra* Part III.B.

51. N.J. ADMIN. CODE tit. 5, § 85-7.1 (2004).

52. *Id.*

Comprehensive planning documents have different roles in different states. In some states, the state plan works as a sort of constitution with which local zoning laws must comport. State courts in Oregon and Florida, for example, base their presumption of the constitutionality of a local zoning law or zoning change on whether the law comports with a comprehensive plan.[53] Zoning ordinances must enact the more general policy statement expressed by the comprehensive plan. Other states, like New Jersey, reject the strict requirement that local zoning ordinances comport with comprehensive plans.

New Jersey seems to be unclear about what it believes the State Plan is. The Office of Smart Growth's web site describes the State Plan's purpose by citing to the legislation. According to the web site, "[t]he purpose of the State Plan is to: 'Coordinate planning activities and establish Statewide planning objectives in the following areas: land use, housing, economic development, transportation, natural resource conservation, agriculture and farmland retention, recreation, urban and suburban redevelopment, historic preservation, public facilities and services, and intergovernmental coordination.'"[54] Despite this statement of purpose, the legislation clearly is not meant to create a binding plan with which local zoning ordinances must comply.

The State Plan does not replace, or even affect, New Jersey's zoning enabling legislation and does not require direct implementation by local entities. Nevertheless, the legislature seems to have expected that at least some Plan components would be implemented. The statute requires Impact Assessments, intended to estimate the effect of the Plan on job growth, local fiscal health, land capacity, agriculture, pollution, infrastructure provision, and quality of life.[55] The Assessments, drafted in 1992 and 2000, suggest that legislators hoped that the benefits of plan implementation would actually come to pass. Indeed, the introduction to the current State Plan describes the Plan as a "blueprint" and as a "way to grow."[56] In addition, in October 1986, the State Planning Commission issued a Statement of Purpose, listing eight state planning goals, including the following:

> [T]o conserve the state's natural resources, to revitalize the state's urban centers, to protect the quality of the state's environment, to provide needed housing at a reasonable [cost], to provide adequate public services at a reasonable cost, to accomplish these goals while promoting beneficial economic growth, development and renewal, to preserve and enhance the historic, cultural and recreational lands and

53. *See, e.g.*, Snyder v. Bd. of County Comm'rs, 595 So. 2d 65 (Fla. Dist. Ct. App. 1991), *quashed*, 627 So. 2d 464 (Fla. 1993); Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973).

54. State Plan, *supra* note 47 (citing N.J. STAT. ANN. § 52:18A-200(f) (2002)).

55. RUTGERS UNIV. CTR. FOR URBAN POLICY RESEARCH & NEW JERSEY OFFICE OF STATE PLANNING, IMPACT ASSESSMENT OF THE NEW JERSEY INTERIM STATE DEVELOPMENT AND REDEVELOPMENT PLAN (Feb. 28, 1992) (on file with author).

56. State Plan, *supra* note 47.

> structures in the state, [and] to ensure sound and integrated statewide planning coordinated with local and regional planning.[57]

The Commission accepted as one of its mandates "[to] prevent sprawl and promote suitable use of land."[58] Despite the hope that the State Plan would provide effective guidance with respect to land and resource management, the State Plan's status as a nonbinding policy measure hinders the efforts of both the state and citizens to implement it through the regulatory functions of state agencies or the legislative and regulatory power of local governments.

Given New Jersey's focus on the cross-acceptance process, it is possible that the legislature's primary goal in creating the State Planning Commission was not to make a plan, but instead to force a conversation about land use and planning among the various levels of state and local government. New Jersey's cross-acceptance process stands in stark contrast to the top-down planning models in place in Oregon and Florida, where state or regional governmental entities impose plans on local governments.[59] The New Jersey legislation "call[s] for collaboration among the stakeholders in the preparation of the State Development and Redevelopment Plan."[60] On its web site, the Office of Smart Growth claims that cross-acceptance "ensures that the plan belongs to the citizens of New Jersey, whose hopes and visions have shaped it."[61] Collaboration, a process-oriented goal, can be achieved regardless of whether the State Plan is implemented; the process of approving a Plan, which by statute cannot be approved until local governments are given the opportunity to provide feedback to the statewide planning entity, fosters collaboration. On the other hand, if the legislature chose to focus on collaboration because it hoped that an inclusive process might result in a better plan—or simply a plan more likely to be implemented—collaboration is not an end unto itself, but rather a means of implementing the plan.

This section explores four possible routes by which the State Plan might be implemented in order to affect the land use decisions of state agencies, local governments, and developers. The first of these methods is the most top-down in orientation: the use of gubernatorial executive orders.

A. Executive Orders

Given the popularity of growth management among New Jersey voters, it is not surprising that recent governors have espoused support for anti-sprawl

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57. NEW JERSEY STATE PLANNING COMMISSION, STATEMENT OF PURPOSE OF THE NEW JERSEY STATE PLANNING COMMISSION 1 (adopted Oct. 31, 1986, revised Feb. 13, 1987) (on file with author).

58. *Id.* at 2.

59. *See* Charles L. Siemon, *Successful Growth Management Techniques: Observations from the Monkey Cage*, 29 URB. LAW. 233, 235 (Spring 1997).

60. *Id.*

61. State Plan, *supra* note 47.

policies. Nevertheless, given the complexity of the issue, the difficulty of imposing state land use policies without stepping on the toes of municipalities, and a statewide deference to home rule, the state has had little success in passing relevant legislation. One possible solution to this problem is the creation of policy through the governor's issuance of executive orders.

Executive orders in New Jersey have been described as "both a strong and fragile Governor's tool."[62] Executive orders can be highly potent because "[s]o long as the Governor is acting within her authority, she may issue or repeal an executive order without the procedural or other safeguards that other types of law require."[63] On the other hand, executive orders are limited by the constitutional scope of gubernatorial authority and can be overturned at any time by the state legislature or by the current or a future governor.

While the New Jersey Constitution does not specifically discuss executive orders, the power to issue orders derives from the power and responsibility of the governor to implement the law. The constitution vests the executive power in a governor,[64] and requires that the governor "take care that the laws be faithfully executed."[65] It further provides that:

> To this end he shall have power . . . to enforce compliance with any constitutional or legislative mandate, or to restrain violation of any constitutional or legislative power or duty, by any officer, department or agency of the State; but this power shall not be construed to authorize any action or proceeding against the Legislature.[66]

Courts have interpreted this language as empowering the governor to issue orders in furtherance or defense of state law.[67]

The constitution further grants the governor the power to supervise executive departments and agencies and to appoint department executives.[68] "Of necessity, this includes the inherent power to issue directives and orders by way of implementation in order to insure efficient and honest performance by those state employees within his jurisdiction."[69] As required by the New Jersey Constitution, executive or gubernatorial action cannot interfere with the authority of the Legislature to act according to its own constitutional duties and power. On the other hand, where an executive order "applies only to employees within the Executive Branch of government it does not encroach upon the prerogatives of the other branches of government" and "does not require legislative fiat for its

62. Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 989 (1999).

63. *Id.* at 990.

64. N.J. CONST. art. 5, § 1, ¶ 1.

65. N.J. CONST. art. 5, § 1, ¶ 11.

66. *Id.*

67. *See, e.g.*, Kenny v. Byrne, 365 A.2d 211, 215 (N.J. Super. Ct. App. Div. 1976), *aff'd per curiam*, 383 A.2d 428 (N.J. 1978).

68. N.J. CONST. art. 5, § 4, ¶ 2.

69. *Kenny*, 365 A.2d at 215.

validity."[70] In addition, by statute, the governor can "examine and investigate the management by any State officer of the affairs of any department, board, bureau or commission of the State."[71] Thus, the governor exercises control over executive agencies and their officers and may choose to do so in the form of an executive order. Governor Florio's Executive Order No. 114, discussed *infra*, is one example.[72]

Thus, the New Jersey Constitution grants governors the power to issue executive orders with respect to executive functions, including the administration and implementation of the law. Non-executive uses are limited. Executive orders cannot be used by the governor to institute "any action or proceeding against the Legislature."[73] While they can and have been used to make policy, there is no explicit constitutional or statutory authority for this use of executive orders. Nevertheless, "[i]t appears that there is an increasing recognition of executive orders as a legitimate policy-making tool and mechanism to create substantive law."[74] Such "legislative" executive orders are subject to judicial scrutiny. For instance, in one case the New Jersey Supreme Court permitted an executive order that purported to represent state policy, but also held that the order was not binding on county or local governments.[75] Courts will hesitate to strike down executive orders where there is a reasonable declaration of emergency, thus implicating the governor's expanded powers in times of emergency.[76]

The New Jersey courts have only once invalidated an executive order.[77] Michael Herman argues that courts avoid finding executive orders unconstitutional because they recognize the need for governors to act on issues that are "extremely important to the welfare of the state" but unlikely to be addressed by the legislature because they are controversial.[78] While he fails to explain why popularly elected governors might have more incentive to ad-dress controversial issues than legislators, Herman points to a number of -controversial issues that have been addressed by governors through executive orders, including school finance, prison reform, and land management in the Pinelands.[79]

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70. *Kenny*, 365 A.2d at 216.

71. N.J. STAT. ANN. § 52:15-7 (2002).

72. N.J. Exec. Order No. 114 (Jan. 11, 1994), *available at* http://www.state.nj.us/infobank/circular/eof114.htm (last visited Oct. 4, 2005).

73. N.J. CONST. art. 5, § 1, ¶ 11.

74. Herman, *supra* note 62, at 1013.

75. Tormee Constr., Inc. v. Mercer County Improvement Auth., 669 A.2d 1369, 1372 (N.J. 1995).

76. Herman, *supra* note 62, at 1006–12. The governor's emergency powers are conferred by New Jersey's Disaster Control Act. N.J. STAT. ANN. app. A, ch. 9, art. 6 (2002).

77. Herman, *supra* note 62, at 1018. *See* De Rose v. Byrne, 343 A.2d 136 (N.J. Super. Ct. Ch. Div. 1975), *vacated on other grounds*, 353 A.2d 100 (N.J. Super. Ct. App. Div. 1976).

78. Herman, *supra* note 62, at 1019–20.

79. *Id.* at 1021 (arguing that "the courts still appear to have concerns about the Legislature's willingness to address tough issues").

Where New Jersey law, through the State Planning Act and, more importantly, the Zoning Enabling Act, empowers local governments to zone and to govern land use, an executive order cannot be used to defy or to create state law in violation of existing legislation. Therefore, executive orders cannot affect the ability of municipalities to zone or encourage development in contravention of state legislation, specifically the Zoning Enabling Act. Executive orders can inform and direct the actions of state agencies, but are limited in their capacity to affect the legislative and regulatory authority of local governments with regard to land use planning, so long as state legislation enables local governments to exercise authority in this area.

In 1994, two years after the completion of the first State Plan, former Governor James Florio issued Executive Order No. 114 to encourage state agencies to incorporate the State Plan into their regulatory framework. That order required state agencies to incorporate "policies which comport with the State Plan" into the execution of their regulatory functions.[80] Two years later, former Governor Christine Todd Whitman wrote a letter to over sixty state agencies requesting that they report annually on the extent to which their "functional plans, programs, investments, grants-in-aid, regulations, proposed legislative initiatives and public information activities advance the State Plan's goals."[81] The letter described the State Plan as a "comprehensive road map" and an "integral tool" for achieving goals related to conservation, urban revitalization, and provision of affordable housing.[82] Whitman claimed that implementation of the Plan "saves money, reduces pollution and improves our economic climate and our overall quality of life" without pointing to proof that implementation of the State Plan had actually taken place.[83]

In the first year, over fifty state entities responded to Whitman's request. According to "smart growth" advocates, agency reports failed to describe efforts to seriously implement the State Plan. Instead, reports described existing work while attempting to use language from the State Planning Act to validate programs implemented with little or no consideration of their effect on state planning.[84] Environmental advocates argue that executive actions taken by former Governors Florio and Whitman were half-hearted attempts to stem development in locations not preferred by the State Plan. Whether or not this is true, given the legal constraints on executive orders, it is clear that executive action is insufficient to ensure implementation of the State Plan. Any more forceful attempt to do so would almost certainly violate existing law in the form

80. N.J. Exec. Order No. 114, *supra* note 72.

81. New Jersey State Planning Commission & New Jersey Office of State Planning, *Governor Advances State Plan Implementation*, 4 STATE PLANNING NOTES 1 (1996), *available at* http://www.state.nj.us/dca/osg/docs/planningnotes100196.pdf (last visited Oct. 4, 2005).

82. *Id.*

83. *Id.*

84. Barbara L. Lawrence & Dorrie Margolin, *State Plan Update: 1999* (1998), *available at* http://www.njfuture.org/index.cfm?fuseaction=user.item&thisitem=389 (last visited Oct. 4, 2005).

of the zoning enabling legislation or the State Plan itself. Nevertheless, to the extent they can ensure that state agencies make regulatory decisions in conformity with the State Plan, executive orders can be effective in the limited sphere in which they do not violate existing law.

B. The Courts

On a number of occasions, New Jersey courts have addressed the role of the State Plan in informing and mandating local and statewide land use policies. Municipalities and state agencies have used the State Plan as a defense in cases brought by developers to challenge land use planning decisions that discourage development. In addition, advocacy organizations and citizen groups have turned to the courts in an attempt to force agencies and municipalities to implement the State Plan. Courts have been hesitant to force implementation in the face of clear legislative intent not to create a document that would be binding on either agencies or local governments. In those rare cases where legislation or agency regulations have explicitly incorporated the Plan, however, state courts have allowed—but rarely required—application of the Plan.[85] In some ways, the caution of the courts reflects a concern for their proper institutional role. Under this view, judicial rulings are as troubling as gubernatorial executive orders as a means of catalyzing sound systemic land use policies.

1. Giving Effect to the State Plan Through Regulation

Advocacy litigation has exposed both the power of the New Jersey courts and their reticence to use this power to promote appropriate land development regulations in line with explicit statewide planning goals. In 1997, New Jersey Future, an advocacy organization,[86] sued the Council on Affordable Housing (COAH), the New Jersey agency that oversees the state's compliance with inclusionary zoning and affordable housing mandates, as required by the *Mount Laurel* line of cases.[87] *Mount Laurel* held that the New Jersey Constitution requires municipalities to provide their fair share of affordable housing with

85. The two examples discussed here involve the New Jersey Fair Housing Act and the New Jersey Coastal Area Facility Review Act (CAFRA). The Fair Housing Act requires that the administering agency, the Council on Affordable Housing, consider the State Plan when approving development of affordable housing. CAFRA similarly requires that the New Jersey Department of Environmental Protection coordinate CAFRA regulations with the State Plan. *See infra* Part III.B.1.

86. New Jersey Future describes itself as "the state's largest smart-growth advocacy group. Our nonprofit organization is leading the fight for better-managed growth under the State Plan, and for sustainable development: a strong economy, a healthy natural environment and a just society for ourselves and future generations." New Jersey Future, *at* http://www.njfuture.org (last visited Oct. 4, 2005). *See also* Chris Hedges, *Public Lives: For an Environmentalist, Victory Toasts Are Rare*, N.Y. TIMES, Mar. 30, 2004, at B2.

87. S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983) ("Mount Laurel II"); S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) ("Mount Laurel I").

respect to regional need.[88] COAH was established pursuant to the New Jersey Fair Housing Act and "has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations."[89] Among other things, COAH grants local governments "substantive certification" of their plans to develop affordable housing, known as "fair share" plans. Certification effectively shields local governments from lawsuits brought by builders under a private right of action provided for in the *Mount Laurel* cases.[90] These lawsuits, known as builder's remedy suits, can force municipalities to approve developments that provide for the development of some affordable housing.[91]

New Jersey's Fair Housing Act (FHA) requires COAH to consider the State Plan when granting substantive certification.[92] Regulations also create specific criteria for evaluating proposed site-specific remedies for failure to meet minimum affordable housing requirements. These criteria are based on what planning area the site sits in.[93] Thus, unlike other state entities, COAH is required to consider the State Plan when taking administrative and regulatory action.[94] In 1997, COAH granted substantive certification to a plan by Hillsborough Township to develop a 3000-unit age-restricted housing development that included 450 affordable units on a site comprised primarily of rural and environmentally sensitive land in Planning Areas 4 and 5.[95] Development of rural and environmentally sensitive land is intended to be extremely limited under the State Plan, and FHA regulations discourage development of affordable housing on such land. Consequently, New Jersey Future sued.[96] Political

88. *Id.* at 724.

89. N.J. ADMIN. CODE tit. 5, § 91-1.2 (2004).

90. N.J. ADMIN. CODE tit. 5, § 91-3.6 (2004). For discussion of recent changes to COAH regulations, *see infra* Part IV.B.

91. *See infra* Part IV.B. *See also* N.J. ADMIN. CODE tit. 5, § 91-3.6 (2004).

92. N.J. STAT. ANN. § 52:27D-307 (2004) (requiring that COAH "give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State Development and Redevelopment Plan . . . and public comment"). *See also* N.J. ADMIN. CODE tit. 5, §§ 93-13.1–93-13.4 (1998) (governing COAH's ability to provide site-specific relief based on a site's designation by the State Development and Redevelopment Plan).

93. N.J. ADMIN. CODE tit. 5, §§ 93-13.1–93-13.4 (2004). For a discussion of the five planning areas, *see supra* Part III.

94. The State Plan and the Fair Housing Act, both passed in 1986, are products of the *Mount Laurel* decisions. In addition, the *Mount Laurel* decisions themselves emphasized the importance of regional and statewide planning in the provision of affordable housing. Thus, it is not surprising that the Fair Housing Act would require consideration of the State Plan when other state legislation and agencies fail to do so. John M. Payne, *General Welfare and Regional Planning: How the Law of Unintended Consequences and the Mount Laurel Doctrine Gave New Jersey a Modern State Plan*, 73 ST. JOHN'S L. REV. 1103, 1116 (1999).

95. Alicia Grey, *Housing Project for Elderly Dealt Blow*, NEWARK STAR-LEDGER, Oct. 2, 1997, at 26.

96. This case was settled out of court and is unreported. The lawsuit is described on New Jersey Future's web site at http://www.njfuture.org/index.cfm?fuseaction=user.item&ThisItem=390&ContentCat=3&ContentSubCat1=27&ContentSubCat2=34 (last visited Oct. 4, 2005) and in

pressure forced COAH to revoke the certification and to refuse to certify any plans not in compliance with the State Plan.[97]

Nevertheless, the case, *New Jersey Future v. Hillsborough Township*, does not provide a basis for extensive implementation of the State Plan. Because the case was settled, it does not set judicial precedent for future COAH actions that implicate the State Plan. Even if it had, such precedent would apply only to affordable housing developments certified by the State. Non-residential and market-rate residential development does not implicate COAH's authority to approve or disapprove a development. In addition, not all affordable housing is subject to COAH's approval. In order to defend against builder's remedy lawsuits, municipalities ask COAH to certify that they have developed a minimum level of affordable housing as required by the FHA and the *Mount Laurel* cases. COAH approval is sought only when a municipality is attempting to develop sufficient affordable housing to meet its mandate under the FHA. Thus, incorporation of State Plan standards into COAH's regulations affects a small minority of residential developments. Furthermore, introducing an additional hurdle to the development of affordable housing is hardly a practical or equitable way to implement the State Plan. Unless the legislature requires similar use of the State Plan by other state agencies or in the implementation of other legislation, the effect of *Hillsborough Township* is limited.

Courts have upheld application of the State Plan in administrative regulations just one other time. In 1999, the New Jersey Department of Environmental Protection revised its regulations to protect coastal areas.[98] A 1973 state statute, the Coastal Area Facility Review Act (CAFRA), requires DEP to regulate development in coastal areas. While the statute was motivated primarily by environmental concerns, it has been interpreted to require regulation of coastal land use in accordance with a broader set of considerations.[99] In 1983, the New Jersey Supreme Court found that "[a]lthough CAFRA is principally an environmental protection statute, the powers delegated to DEP extend well beyond protection of the natural environment. Succinctly stated, the delegated powers require DEP to regulate land use within the coastal zone for the *general welfare*."[100] Ten years later, the legislature revised CAFRA.[101] One important

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an article by Professor John Payne, who represented New Jersey Future in the lawsuit. *See also* Payne, *supra* note 94, at 1116.

97. *See* James Ahearn, *Lawsuit: Mount Laurel Versus Land Preservation*, THE RECORD (Hackensack, N.J.), July 17, 1996; Susan K. Livio, *Proposal to Build 3,000 Homes in Hillsborough Not Quite Dead*, NEWARK STAR-LEDGER, Jan. 14, 2001, at 47; Susan K. Livio, *Hillsborough Considers Limits on Development*, NEWARK STAR-LEDGER, Sept. 14, 2000, at 33.

98. N.J. ADMIN. CODE tit. 7, § 7E-5A.1 (2004). *See also* N.J. ADMIN. CODE tit. 7, § 7E-6.3 (2004) (analyzing the likely geographic extent of induced development and its relationship to the State Development and Redevelopment Plan, assessing likely induced point and non-point air and water quality impacts, and evaluating the induced development in terms of all applicable Coastal Zone Management rules). *See also* BIERBAUM, *supra* note 22.

99. *In re* Egg Harbor Associates (Bayshore Centre), 464 A.2d 1115, 1118 (N.J. 1983).

100. *Id.* (emphasis added).

amendment required DEP to adopt new regulations "closely coordinated with the provisions of the State Development and Redevelopment Plan."[102] Representatives of environmental and development interests promptly challenged the regulations promulgated pursuant to the amended statute, and these suits were consolidated.[103]

Appellants, representing builders, realtors, and environmental advocacy organizations, challenged the regulations on a number of different procedural and substantive grounds. One of the prominent issues involved the role of the State Plan. The 1993 legislation not only required that CAFRA regulations be closely coordinated with the State Plan, but also authorized the State Planning Commission to adopt CAFRA's regulations as the State Plan for coastal areas.[104] After examining the State Plan's division of coastal areas into planning areas, DEP "determined that the boundaries drawn by the State Planning Commission were established and drawn to serve many of the same purposes" as the CAFRA statute.[105] As such, it allowed incorporation of the Plan's boundaries into the new CAFRA regulations. Despite varying interests, all appellants alleged that "DEP's use of the centers and planning areas in the State Plan and creation of its own coastal centers was arbitrary, capricious, and unreasonable." The builders argued "that DEP's regulations were not closely coordinated enough," while the environmental groups argued that "DEP's regulations were too closely coordinated."[106] In addition, a number of appellants argued that DEP's reliance on the State Plan violated administrative procedural requirements.[107]

The court upheld DEP's reliance on the State Plan for guidance on development in coastal areas. Citing *In re Egg Harbor*'s holding that CAFRA required DEP to consider not only environmental consequences but also the general welfare, the Appellate Division found that it was proper for DEP to look to the State Plan in order to regulate coastal areas in the interest of furthering the general welfare.[108]

The 1993 legislation required close coordination, but not total incorporation.

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101. N.J. STAT. ANN. § 13:19 (2002).

102. N.J. STAT. ANN. § 13:19-17(b) (2002).

103. Appellants included the New Jersey Builders Association, New Jersey Association of Realtors, Association of New Jersey Environmental Commissions, New Jersey Conservation Foundation, New Jersey Environmental Federation, American Littoral Society, Pinelands Preservation Alliance, and the New Jersey chapter of the Sierra Club. The New Jersey State League of Municipalities was an amicus curiae. *In re* Coastal Permit Program Rules, 807 A.2d 198 (Sup. Ct. N.J. App. Div. 2002).

104. *In re* Coastal Permit Program Rules, 807 A.2d at 209.

105. *In re* Coastal Permit Program Rules, 807 A.2d at 216 (citing 30 N.J. Reg. 4168, *accord* 31 N.J. Reg. 2044).

106. *In re* Coastal Permit Program Rules, 807 A.2d at 237.

107. *In re* Coastal Permit Program Rules, 807 A.2d at 207.

108. *Id.* at 236 (citing *In re* Egg Harbor Associates (Bayshore Centre), 464 A.2d 1115, 1118 (N.J. 1983) (finding that "the delegated powers [under CAFRA] require DEP to regulate land use within the coastal zone for the general welfare")).

Because the regulations varied from the State Plan in certain respects, DEP's use of the State Plan was not improper.[109] Further, because DEP intended to review the State Plan's coastal policies to ensure that they met the statutory demands of CAFRA, DEP's adoption of the State Plan was not arbitrary or capricious.[110] The court held that municipalities and agencies can refer to the State Plan's guidelines and policy recommendations in their own laws and regulations, and thereby give regulatory effect to the State Plan, even if the State Plan itself has no inherent regulatory effect.[111] State and municipal legislatures and agencies have the option of incorporating and giving regulatory effect to the State Plan as long as doing so does not violate other statutes. Moreover, where an agency is responsible for acting in the general welfare it may make use of the State Plan but only, again, as long as doing so does not violate other statutory mandates, since the State Plan embodies policy guidelines with respect to the general welfare. This holding may provide support for current efforts to further implementation of the State Plan by revising water quality regulations to discourage development in drinking water source areas.[112]

2. The General Welfare Test

While an agency or municipality may look to the State Plan as an expression of general welfare, it will never be compelled to do so by a court. Therefore, a mandate to consider general welfare is not equivalent to a mandate to consider the State Plan. Where a statute or regulation requires that an agency or municipality act on behalf of the general welfare, the governmental entity need not rely on the State Plan as either evidence or the final arbiter of what sort of land use planning will further the general welfare.

A recent case reinforced this point with respect to municipal land use law and local zoning decisions. In August 2001, Jackson Township rezoned six thousand acres of land. The area sits in Planning Area 2, the Suburban Planning Area, intended for accommodating future growth.[113] The Township rezoned the area with the express purpose of limiting growth, despite the State Plan's designation. The August 2001 rezoning changed the designation from R-1, or minimum one-acre lots, to R-3 and R-5, minimum three and five-acre lots.[114] The New Jersey Shore Builders Association, a lobbying group, sued Jackson Township shortly after passage of the rezoning. In June 2003, Judge Eugene

109. Points of distinction included failure to incorporate population, growth, and affordable housing as factors in planning; policies with respect to barrier islands; and the process for establishing coastal centers. *In re* Coastal Permit Program Rules, 807 A.2d at 238.

110. *Id.* at 240.

111. *Id.* at 239 (finding that incorporation of the State Plan in executive agency regulations did not violate legislative intent with respect to the State Plan).

112. *See* discussion *infra* Part IV.D.

113. State Plan, *supra* note 47.

114. Joyce Blay, *Jackson Scores Win in Builders' Lawsuit; Judge Says Town Has Right to Zone Land and Restrict New Homes*, TRI-TOWN NEWS (Howell, N.J.), June 19, 2003, at 1.

Serpentelli ruled that the State Plan did not constrain the town's zoning choices. Following this ruling, the Shore Builders Association dropped the case. According to an attorney representing the Association, "[w]e lost the part [addressing] the state plan and because that was our primary goal, we decided to drop the whole thing.... The decision relegates the state plan to that of a position paper. It has no teeth."[115] Town officials told local papers that the Shore Builders Association's decision to drop the lawsuit confirmed that the town had the right to rezone the area in question to limit growth.[116]

The Shore Builders Association brought the lawsuit primarily to make a point. It sued Jackson Township in an effort to highlight the inconsistency of invoking the State Plan only when convenient to legitimize anti-growth policies, and—out of frustration with the courts' invocations of the State Plan—to validate rezonings to more restrictive categories that local governments had adopted in Planning Areas 3, 4, and 5. The attorney who brought the case on behalf of the Shore Builders Association argues that the judge's ruling "demonstrates the weakness of those other cases [citing the State Plan]. The State Plan should not be cited ever. Courts shouldn't cite it as part of the justification for downzoning."[117] The Jackson Township case demonstrates the difficulty with using the State Plan for guidance but not mandating its use. Agencies and localities can choose to implement the Plan selectively with little or no regard for its overall development goals.

While the Jackson Township case casts doubt on the consistency with which local governments apply the State Plan, the Lebanon Township case demonstrates that the state may face legal difficulty in attempting to implement the Plan if it interferes with local decision-making. Following a rezoning to restrict growth, a developer and several property owners sued Lebanon Township. The State Plan designated the township for low growth and the State argued that the Plan created an interest in seeing the Plan implemented. In fact, in his State of the State Address, Governor McGreevey promised Lebanon Township the backing of the State's Attorney General in fighting the lawsuit.[118] The State of New Jersey then sought to enter the litigation as *amicus curiae*, arguing that it had an interest in the implementation of the State Plan and in protection of water supplies and, therefore, had a stake in the lawsuit. The court disagreed and refused the State's request, reasoning that it was not providing neutral assistance to the court and that the local zoning issue addressed by the

115. *Id.* (quoting Michael Gross, Attorney, Giordano, Halleran & Ciesla).

116. Lois A. Kaplan, *Builders Drop Jackson Lawsuit*, OCEAN COUNTY OBSERVER (Tom's River, N.J.), June 18, 2003, at A3.

117. Telephone Interview with Michael Gross, Attorney, Giordano, Halleran & Ciesla, (Nov. 10, 2003).

118. Governor James McGreevey, 2003 State of the State Address (Jan. 14, 2003), *available at* http://www.nj.gov/sos2003/speech_text.html. *See also* Press Release, State of New Jersey, Governor's Newsroom, McGreevey Addresses Mayors (Jan. 22, 2003), *available at* http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=1018.

case simply did not concern the State.[119] This finding that the state did not have a legitimate interest in local policymaking that might implicate state policy, as manifested in the State Plan, is certainly a set-back in efforts to implement local use of the State Plan.

Nevertheless, some observers argue that even in arenas where state agencies have not incorporated the State Plan into their regulatory procedures, courts can and should require consideration of the State Plan as an expression of general welfare. John Payne, a leading affordable housing litigator, argues that the *Mount Laurel* cases recognize the importance of statewide and regional planning with respect to all land use decisions, not simply with respect to affordable housing. *Mount Laurel II*, which sets out remedies for the injustices found in *Mount Laurel I*, insists that local land use power be used to further fairness, decency, and the general welfare, as required by the New Jersey State Constitution.[120] Payne argues that "[a]pplication of the 'general welfare' criterion is not a special requirement of affordable housing cases alone."[121] Thus, under *Mount Laurel*, all land use decisions must further the general welfare in order to comply with the state constitution. By emphasizing the importance of regional concerns, the *Mount Laurel* court acknowledged that local interests may not further regional welfare, and thus required that local governments act in furtherance of regional welfare by providing a level of affordable housing consistent with regional requirements. According to Payne, *Mount Laurel* "reversed the presumption of constitutionality precisely because parochial local interests, rather than the broader regional interests affected by exclusionary zoning, were the only ones engaged in the law-making process."[122] Therefore, "when a sound state or regional plan exists, [there ought to be] a presumption that it embodies the constitutionally required attempt to serve the general welfare."[123] Following his argument, courts should assume that where a sound state plan conflicts with local plans, the state plan meets the general welfare standard, and that it sets a benchmark for the constitutionality of local plans.

Payne notes that New Jersey courts are slowly adopting this approach. He cites two cases in which state courts agreed with municipalities that the existence of a State Plan validated land use decisions challenged by landowners. Payne's analysis serves as an appropriate aspiration for those interested in statewide planning. Unfortunately, as a reflection of current policy, it is overly optimistic.

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119. Steve Chambers, *Jersey Loses a Round in Battle Against Sprawl*, NEWARK STAR-LEDGER, July 16, 2003, at 28; Steve Chambers, *State Steps Into Land Use Case to Help Town Fight Developer*, NEWARK STAR-LEDGER, June 5, 2003, at 25. *See also* Smart Growth Online, *at* http://www.smartgrowth.org (last visited Sept. 30, 2005).

120. S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983).

121. John M. Payne, *General Welfare and Regional Planning: How the Law of Unintended Consequences and the Mount Laurel Doctrine Gave New Jersey a Modern State Plan*, 73 ST. JOHN'S L. REV. 1103, 1117–18 (1999) (arguing that "New Jersey has now begun to find a way to make its 'non-regulatory' [State Plan] useful in actually guiding growth and change in the state").

122. *Id.* at 1119.

123. *Id.*

One of the two cases he cites, *Kirby v. Township of Bedminster*, is an unreported trial court decision which was later upheld by the Appellate Division.[124] The Appellate Division repeatedly cited the trial judge's opinion and adopted much of his reasoning. Neither court, however, adopted the general welfare criterion. The trial judge mentioned the State Plan when making a secondary policy argument regarding the appropriateness of the zoning changes challenged by the plaintiff.[125] Again, the State Plan is mentioned only in passing. The opinion turned on the great deference that is allowed to local land use legislation. The court accepted that "a zoning ordinance is insulated from attack by a presumption of validity."[126] It is exactly this presumption in favor of a local zoning law's constitutionality that Payne hopes to dethrone and replace with his general welfare criterion. In the second case cited by Payne, *Sod Farm Associates v. Springfield Township Planning Board*, the court also only cited the State Plan in a secondary argument. The primary concern in the trial court's reasoning was not whether the land use decision comported with the State Plan, but whether it contradicted either the locality's own Master Plan or New Jersey's zoning enabling legislation. As in *Kirby*, the court used the State Plan only as one of a number of rationales buttressing the finding that a local land use measure was proper.[127] As such, both cases are consistent with the reigning precedent in New Jersey courts.[128] Payne concedes that these two cases "hardly add up to a 'general welfare' movement in state and regional planning law."[129] The *Jackson Township* and *Lebanon Township* rulings ought to reinforce this concession. Nevertheless, Payne offers an interesting normative question: ought the State Plan be used to restrict the ability of localities to zone?

Absent the addition of enforcement language to the State Planning Act or to the Municipal Land Use Law, it is unlikely that New Jersey courts will ever look

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124. Kirby v. Bedminster Twp., 775 A.2d 209 (N.J. Super. Ct. App. Div. 2000).

125. *Kirby*, 775 A.2d at 215.

126. *Id.* at 216 (quoting Riggs v. Twp. of Long Beach, 538 A.2d 808 (N.J. 1988)).

127. Sod Farm Assocs. v. Springfield Twp. Planning Bd., 688 A.2d 1125, 1133 (N.J. Super. Ct. Law Div. 1995). The trial court cited four reasons including the municipality's history as a rural township, the municipality's own master plan, its expenditures on farmland preservation, and lastly, its designation in the State Plan as rural.

128. *See, e.g.*, Riggs v. Twp. of Long Beach, 538 A.2d 808, 812 (N.J. 1988) ("A zoning ordinance is insulated from attack by a presumption of validity, which may be overcome by a showing that the ordinance is 'clearly arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'") (quoting Bow & Arrow Manor v. Town of West Orange, 307 A.2d 563 (N.J. 1973)). A long line of cases both precedes and follows. *See, e.g.*, Manalapan Realty, L.P. v. Twp. Comm. of the Twp. of Manalapan, 658 A.2d 1230 (N.J. 1995); Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 364 A.2d 1016 (N.J. 1976); Harvard Enter., Inc. v. Bd. of Adjustment of the Twp. of Madison, County of Middlesex, 266 A.2d 588 (N.J. 1970); Cappture Realty Corp. v. Bd. of Adjustment of the Borough of Elmwood Park, 313 A.2d 624 (N.J. Super. Ct. Law Div. 1973);. *See also* KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 3:14 (4th ed. 1996).

129. John M. Payne, *General Welfare and Regional Planning: How the Law of Unintended Consequences and the* Mount Laurel *Doctrine Gave New Jersey a Modern State Plan*, 73 ST. JOHN'S L. REV. 1103, 1121 (1999).

to the general welfare as embodied in the State Plan when reviewing local land use decisions. Unfortunately, the trend has been that municipalities and environmental groups ask the courts to use the State Plan to validate slow-growth (or no-growth) zoning choices, but then fail to demand implementation of the State Plan with respect to growth in urbanized areas.

C. *Advocacy*

A third effort to implement the State Plan encourages citizens and voters to use the political process and public hearings to lobby agencies to adopt regulations that accord with the Plan. This approach avoids the limitations in promoting sweeping changes imposed by the weaknesses of both the courts and executive orders. No one can argue that public advocacy is an inappropriate forum for considering wide-ranging reforms, and various actors have attempted to promote the development of systematic land use policy within the public sphere. On its web site, New Jersey Future describes its attempt "to support the State Plan and its implementation by encouraging regional planning efforts" and to target those state agencies whose work and public expenditures impact development patterns.[130] Other local and state organizations, including the Sierra Club and the Highlands Coalition, regularly address the State Planning Commission and other agencies at public hearings.[131] This type of campaign is particularly difficult because it requires encouraging and challenging proposed regulations and administrative actions on a piecemeal basis. It is not a campaign to pass one piece of legislation or to bring one lawsuit but, instead, an attempt to consistently address regulations on a wide range of issues by a large number of government entities on the state and local levels.

D. *Local Enforcement*

The State Plan's cross-acceptance process mandates the participation of local and county governments in the formulation of the State Plan. Planning is structured to "build consensus among the three levels of government through discussion and negotiation surrounding the various plans."[132] As such, one might expect local governments to implement the Plan they helped to write. Again, this implementation technique ought to be viewed skeptically given the varying incentives faced by local, regional, and state governments.[133] As with all power-sharing arrangements, the relations between the local and state authorities mandated by the cross-acceptance program have not been without friction and even open conflict.

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130. New Jersey Future, http://www.njfuture.org/index.cfm?ctn=9t45e1o30v9g&emn=5u92y86g2h42&fuseaction=user.item&ThisItem=116 (last visited Oct. 4, 2005).

131. *See, e.g.*, New Jersey State Planning Commission, Meeting Minutes (July 16, 2003), *available at* www.nj.gov/dca/osg/docs/spcminutes071603.txt.

132. BIERBAUM, *supra* note 22.

133. These coordination problems are discussed extensively in Part IV.B *infra*.

E. *Imagining the Future of Implementation of the State Plan*

During the cross-acceptance process, the Office of State Planning is required to conduct an Impact Assessment, to be distributed to the Governor, State Legislature, local governing bodies, and the public.[134] The Impact Assessment estimates and compares the effects of proposed State Plans and the effects of allowing development to proceed, absent implementation of a State Plan. It is intended to provide state and local actors with information necessary to approve the Interim State Plan. The Assessments do not, however, measure the impact of the State Plan's implementation following the cross-acceptance process. Both the 1992 and 2000 Impact Assessments describe a rosy scenario in which implementation of the State Plan positively affects the locational choices of businesses, decreases the need for expenditures on public infrastructure, and does not impede economic development.[135] The assessments fail to note difficulties in enforcement of the proposed Plans resulting from the refusal of state agencies and local governments to consider the State Plan in making decisions related to growth.

It is unlikely that the State Plan, in its current form, will amount to anything more than a set of guidelines that is consistently ignored. Speaking to smart growth advocates at an annual conference, Joseph Kocy, Director of the Department of Planning and Zoning in Harford County, Maryland, emphasized the need for carrots, sticks, and incentives for local government. He cited five such tools in Maryland's shed: "cash, technical assistance for master plans and zoning, cash, permitting assistance, and cash."[136] The State Plan, on the other hand, has been described quite accurately as "not regulatory but a set of guidelines, many of which have been ignored."[137] While the State Planning Act established lofty goals—conservation of natural resources, revitalization of urban centers, effective provision of housing and public services, and promotion of economic growth—it is unlikely that implementation has successfully changed development patterns in New Jersey. It is unsurprising, then, that current efforts to curb sprawl in New Jersey focus on enforcement and have sparked heated debate about which locations are appropriate for development. Effective state planning legislation ought not only define which locations are suitable for development but also create effective carrots and sticks in order to

134. N.J. ADMIN. CODE tit. 5, § 85-4.7 (2003).

135. RUTGERS UNIV. CTR. FOR URBAN POLICY RESEARCH & NEW JERSEY OFFICE OF STATE PLANNING, IMPACT ASSESSMENT OF THE NEW JERSEY INTERIM STATE DEVELOPMENT AND REDEVELOPMENT PLAN, REPORT II: RESEARCH FINDINGS (Feb. 28, 1992) (on file with author); RUTGERS UNIV. CTR. FOR URBAN POLICY RESEARCH, THE COSTS AND BENEFITS OF ALTERNATIVE GROWTH PATTERNS: THE IMPACT ASSESSMENT OF THE NEW JERSEY STATE PLAN (2000).

136. Joseph Kocy, Perspectives on State Planning, Presentation at Rutgers University's Eagleton Institute of Politics (Oct. 25, 2002) *at* http://www.njfuture.org/index.cfm?fuseaction=user.item&thisitem=452.

137. Laura Mansnerus, *McGreevey Aides Say Sprawl Plans Are Heart of State Address*, N.Y. TIMES, Jan. 14, 2003, at B5.

ensure that developers and local governments abide by those locational decisions.

IV.
THE INTRODUCTION OF POSSIBLE LEGISLATIVE AND REGULATORY SOLUTIONS

In his 2003 State of the State Address, former Governor James McGreevey pointed to the failures of the State Plan to achieve significant improvements in statewide development patterns. Arguing that "there is no single greater threat to our way of life in New Jersey than the unrestrained, uncontrolled development that has jeopardized our water supplies, made our schools more crowded, our roads congested, and our open space disappear," McGreevey put what he called "runaway development" on his primary agenda.[138] In support of restrained growth, McGreevey proposed discontinuing state funding for development of infrastructure in protected areas, fast-tracking environmental permitting for development in urban and developed areas, assessing impact fees, and preservation of farmland and open space. In essence, McGreevey promised enforcement of policy goals that have existed in New Jersey since at least 1985. McGreevey, elected governor in November 2001, spurred a new statewide conversation on land use policy with his 2003 State of the State Address and continued to engage controversial land use issues until his resignation in November 2004.

In considering the McGreevey administration's legislative proposals during this time period, this article is not concerned with locational questions of where development ought and ought not to be encouraged. Instead, the sole concern here is with implementation measures. Once planners establish that some locations ought to be prioritized for development while others ought to be protected from development, what sorts of tools can be used in order to execute those planning decisions?[139]

During the Whitman administration, the primary tool used to control development was open space preservation through the purchase of land by the state government. The state government did very little to provide incentives and disincentives to either developers or municipalities.[140] Further, as we have seen, New Jersey's planning efforts to date are supported by little to no regulatory authority. Thus, McGreevey's promise to enforce planning efforts significantly

138. Governor James McGreevey, 2003 State of the State Address (Jan. 14, 2003), *available at* http://www.nj.gov/sos2003/speech_text.html.

139. By the term "planners" I refer primarily to governmental actors, but accept that planners' concerns may include a range of policy considerations, including but not limited to urban revitalization, environmental preservation, economic development, maximization of tax revenue, quality of life, and regional cooperation.

140. Telephone Interview with Thomas Borden, Attorney, Rutgers Environmental Law Clinic (Oct. 20, 2003); Telephone Interview with Rick Brown, Office of Planning, Policy, & Science, New Jersey Department of Environmental Protection (Oct. 29, 2003). *See generally Stopping Sprawl: At Last, a Plan With Teeth*, NORTHJERSEY.COM, Jan. 26, 2003.

changed the potential and future role of state planning in New Jersey. Reporting in January 2003 on a shift in thinking about the State Plan and growth in New Jersey, *The New York Times* stated that in the area of planning and development, "self-policing is out."[141] *The New York Times* noted that McGreevey's legislative agenda was "a strong endorsement of the state plan, probably the strongest from a governor since Thomas H. Kean and the Legislature set out in the 1980's to remap the state designating areas for development and preservation."[142] A few months later, DEP Commissioner Bradley Campbell told a forum in New Brunswick, "[w]e're putting teeth in [the State Plan] through regulation."[143] Governor McGreevey's administration repeatedly used the teeth metaphor to describe its land use planning policies.

In the months following January 2003, the McGreevey administration suggested a number of regulatory and legislative approaches to the implementation of statewide planning goals. Following the address, the Office of Smart Growth considered no fewer than seven legislative proposals intended to encourage planned growth.[144] The first proposal presented to the state legislature passed following intense compromise and the election of a Democratic legislature.[145] Many of the legislative proposals were never put forth in the form of proposed bills. In the summer of 2004, immediately prior to McGreevey's announcement that he would resign the governorship, however, there was a burst of legislative activity in the land use arena. Concurrently, state agencies considered regulatory changes to parallel the administration's legislative goals. This section of the article describes four policies, implicated by both regulatory and legislative initiatives, and evaluates them in the context of the theoretical grounding established in part I, New Jersey's experience with planning described in part II, and the experiences of other states and municipalities with implementation of analogous programs. The first group of

141. Andrew Jacobs, *McGreevey, Focusing on Environment, Enlists in 'War on Sprawl,'* N.Y. TIMES, Jan. 2, 2003, at B5.

142. Mansnerus, *supra* note 137. This may have been something of a misstatement considering that McGreevey's original regulatory proposals relied not on the State Plan but on an effort to redefine locational planning decisions known as the BIG (or Blueprint for Intelligent Growth) map. Nevertheless, the article's commentary on McGreevey's support of planning efforts and their enforcement is accurate. Regardless, in October 2003, the BIG map was officially folded into the State Plan.

143. Steve Chambers, *Old Proposal to Curb Sprawl Develops New Support—Controversy Over Big Map Leads Many to Reconsider State Plan*, NEWARK STAR-LEDGER, May 29, 2003, at A11.

144. This article does not examine each one of these proposals. Not all of the proposals recently under consideration by New Jersey's Office of Smart Growth involve incentives of the sort examined by this article. For example, one bill would create a forum for land use disputes between municipalities. Another, no longer under serious consideration, would impose a one-year moratorium on all development in the state in order to allow towns to engage in serious planning. The McGreevey administration never heavily pushed another proposal, to enable towns to engage in timed growth planning, because it is unlikely that the development community could ever be convinced to support such an effort.

145. *See infra* Part IV.A.

policies includes the purchase of open space and development rights. The second group creates disincentives to development in inappropriate locations. The last two are regulatory and financial incentives to spur development in appropriate locations.[146]

A. *Open Space Conservation and Transferable Development Rights*

New Jersey began spending state dollars to preserve rural areas in the 1970s.[147] In the late 1990s, New Jersey increased its investment in open space preservation. In fact, this was the predominant smart growth policy during Christine Todd Whitman's gubernatorial administration.[148] In 1998, voters amended the state constitution by referendum. This amendment guarantees a commitment of ninety-eight million dollars annually through 2008 to be used "for the acquisition and development of lands for recreation and conservation purposes, for the preservation of farmland for agricultural or horticultural use and production, and for historic preservation."[149] The referendum's primary goal was the purchase of one million acres of open space—including farmland and undeveloped lands—intended to prevent development of that land. Five years later, in November 2003, voters approved a referendum to authorize increased funding for open space, farmland, and historic preservation programs. New Jersey's program allows funds to be used to purchase open space in rural, forested, and urban areas.

Following passage of the 1998 referendum, the state legislature passed the Garden State Preservation Trust Act.[150] The Act implements the constitutional amendment by establishing the Garden State Preservation Trust, an entity responsible for providing funding to the Department of Environmental Protection, the State Agriculture Development Committee, and the New Jersey Historic Trust for acquisition of open space, farmland, and historic properties.[151] The Trust may also make grants to local governments for the purpose of land acquisition[152] and has the power to issue bonds and notes.[153] The Act

146. There are few command-and-control options currently under mainstream consideration in New Jersey. One example is the recent prohibition of development within three hundred feet of high quality waterways. 36 N.J. Reg. 670(a). While such tools (described *supra* part I) can be highly effective, they are often less politically palatable because they disrupt existing property rights. They are also more likely to implicate a jurisdiction's obligations to compensate a property owner for the value of her land, lost to regulation, under a long line of regulatory takings cases decided under the Due Process Clause of the Fifth Amendment. *See* cases cited *supra* note 17.

147. New Jersey Green Acres and Recreation Opportunities Bond Act of 1974, 1974 N.J. Laws 102.

148. *See generally* Laurence Arnold, *Whitman May Fit In at EPA*, ASSOCIATED PRESS, Dec. 20, 2000; Dunston McNichol, *Whitman Gets Mixed Reviews on Green Record*, NEWARK STAR-LEDGER, Dec. 20, 2000, at 31.

149. N.J. CONST. art. VIII, § 2, ¶ 7 (Dec. 3, 1998).

150. N.J. STAT. ANN. §§ 13:8C-1–13:8C-42 (2002).

151. N.J. STAT. ANN. § 13:8C-5 (2002).

152. N.J. STAT. ANN. § 13:8C-27 (2002) (allowing the Trust to fund twenty-five percent of

recognizes the possibility that localities will suffer decreased property tax revenues due to the state's purchase of open space. In an effort to quell possible local objections based on declining tax revenues, the Act provides for payment from the state to the locality of an annually declining percentage of the property tax that would have been otherwise due, for thirteen years following acquisition by the state.[154]

The Garden State Preservation Trust Act authorizes expenditures primarily for the purposes of "acquisition and development of lands"[155] and, to a more limited extent, for the purchase of development easements on farmland.[156] The Act expands the Transferable Development Rights programs currently used in the Pinelands and Burlington County to allow use by municipalities throughout the state.[157]

Despite the statutory requirement that the Garden State Preservation Trust prepare and submit a master plan, known as the Open Space Master Plan,[158] the implementation of New Jersey's open space preservation program fails to follow the State Plan or a logical coherent model of land purchase, according to some critics. For example, an explicit goal of the program is to aid in the revitalization of urban areas by providing public investment in parks and garden spaces.[159] Following the passage of the referendum, the state purchased 300,000 acres of land.[160] Of the land purchased to date, almost 90,000 acres is farmland while just over 200,000 acres is forest.[161] The McGreevey administration promised to refocus efforts on urban green spaces. Critics, however, condemned the lack of a master plan and the failure to adhere to the State Plan in executing land preservation goals.[162]

Advocates and the media have pointed to the state's inability to sustain the productivity of the Garden State Preservation Trust's work. As the Trust has purchased land and, therefore, increased demand, the price of undeveloped land

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the cost of acquisition of lands for "recreation and conservation").

153. N.J. STAT. ANN. § 13:8C-7 (2002).

154. N.J. STAT. ANN. § 13:8C-29 (2002) (providing for payment of an annually declining percentage of the tax assessed and paid by the former property owner in the year prior to sale to the government).

155. N.J. STAT. ANN. § 13:8C-26 (2002).

156. N.J. STAT. ANN. §§ 13:8C-39, 13:8C-40 (2002).

157. Telephone Interview with Maura McManimon, Policy Advisor, New Jersey Office of Smart Growth (Nov. 11, 2003).

158. N.J. STAT. ANN. § 13:8C-25.1 (2002).

159. GARDEN STATE PRESERVATION TRUST, ANNUAL REPORT 55 (2001); GARDEN STATE PRESERVATION TRUST, BENEFITS OF LAND PRESERVATION: CONSIDERATIONS FOR THE PRESERVATION OF OPEN SPACE AND FARMLAND IN NEW JERSEY 2–3 (2003).

160. Steve Chambers, *Million-Acre Promise Stalls—Squabbling Makes Open Space Goal Seem Out of Reach*, NEWARK STAR-LEDGER, Aug. 3, 2003, at 1.

161. The constitutional amendment was sold to voters as a program to save one million acres of land.

162. *See, e.g.*, New Jersey Conservation Foundation, Garden State Greenways: Making the Connection (2002), *at* http://www.njconservation.org/html/greenways.html.

has increased. Further, because of the much higher price of green space in urban areas, the Trust has neglected these areas and its stated goal of providing urban park space. Lastly, open space preservation does little to contain sprawling development outside of the land that is preserved. When the extent of preserved land is limited by funding constraints, this becomes an even more significant problem. One possible solution would be to implement a transfer of development rights program.[163] For example, in 2000, in recognition of the high costs associated with purchasing fees simple for the purposes of open space preservation, Maryland amended its Rural Legacy Program, originally authorized to purchase easements and fee estates, to allow transfer of development rights.[164]

Open space preservation is not inherently a smart growth policy. It is a free-market, site-specific, no-growth policy. While it may cause development to occur in areas that are better suited for development, it does not force development to occur in such areas. Further, it does not dictate what development, where it does occur, ought to look like. It is an indirect and very limited program. The stated goals of the Garden State Preservation Trust recognize this fact. According to its web site, "[w]hile the Garden State Preservation Trust concerns itself primarily with land and historic preservation, it recognizes that promoting growth in places that can sustain it and discouraging growth in places that cannot is a necessary complement to our land preservation efforts."[165] Nevertheless, in explaining the benefits of land preservation, the Trust's publications decry the costs associated with development, without differentiating between development of open spaces and development and redevelopment of already urbanized areas.

In addition to recognizing that open space preservation must occur in tandem with efforts to focus development in appropriate areas, government must also recognize that open space preservation can be accomplished using a variety of tools. While New Jersey has to date focused the bulk of its efforts on the purchase of fees simple, other approaches include the purchase and sale of transferable development rights,[166] used in some areas of New Jersey since 1989, and the purchase of rights of first refusal.[167] Authorizing the use of

163. Press Release, State of New Jersey, Governor's Newsroom, McGreevey: We're Giving Mayors the Necessary Tools to Fight Sprawl and Overdevelopment (Mar. 13, 2003) (on file with author).

164. MD. CODE ANN., NATURAL RES. § 5-9A-01 (2000). *See also* Ed Bolen, Kara Brown, David Kiernan & Kate Konschnik, *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 145, 174 n.226 (2002).

165. Garden State Preservation Trust, Land Use Patterns and Loss of Open Space (on file with author).

166. *See* Lauren A. Beetle, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs Within the Garden State*, 34 RUTGERS L.J. 513 (2003).

167. *See generally* Lawrence D. Spears & Karen Paige Hunt, *Protecting Rural Lands: A Market-Based, Efficient and Culturally Appropriate Strategy Using Rights of First Refusal and the*

transferable development rights in New Jersey's Municipal Land Use Law was one piece of a legislative package proposed by the McGreevey administration in 2003,[168] but not unveiled until the lame duck legislative session following the November 2003 elections.[169]

In the fall of 2003, legislative efforts stalled.[170] Rather than introduce bills that might prove controversial in the state legislature or among powerful lobbying interests, the administration declined to introduce bills drafted by the Office of Smart Growth during the 2003 calendar year. Eventually, a bill proposing amendments to New Jersey's Municipal Land Use Law[171] made its way out of Senate and Assembly committees in January 2004.[172] The bill provided for authorization of transfer of development rights programs by municipal governments.[173] Transferable development rights (TDR) programs allow owners of land that the state hopes to preserve to sell their development rights to developments in receiving areas, where the state hopes to channel growth. In March 2004, the McGreevey administration celebrated its first legislative victory with respect to its land use agenda. The legislature passed the State Transfer of Development Rights Act by high margins,[174] but only after Democrats took over both houses in the November 2003 elections and the McGreevey administration made a number of concessions. For example, the builders' lobby dropped objections after the administration agreed to add a section requiring municipalities to conduct economic assessments prior to receiving authorization to implement a TDR program.

Notably, the administration originally envisioned that the bill would require the local plan to be in accord with the State Plan in order for a municipality to be authorized to use TDRs within their boundaries.[175] Accordance with the State Plan was required so that the agency authorizing and regulating the program could easily confirm that the local TDR program applied principles in line with state goals, and so that municipal governments could receive assistance from state agencies in providing infrastructure in locations where developers use

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Nonprofit Sector, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 235 (2002).

168. McManimon, *supra* note 157.

169. S. 2832, 210th Leg. (N.J. 2003).

170. *See* Steve Chambers, *Growth Factors—Hating Sprawl is Easy. Controlling it is a Heavy Lift*, NEWARK STAR-LEDGER, Oct. 26, 2003, at 1 ("In an hourlong [sic] interview at the Statehouse two weeks ago, McGreevey conceded that legislative efforts have stalled.").

171. N.J. STAT. ANN. § 40:55D-1 (2002).

172. S. 2832, 210th Leg. (N.J. 2003). *See also* Bill Bowman, *State, Environmentalists Find Hope In Fighting Sprawl*, COURIER-NEWS (Bridgewater, N.J.), Jan. 3, 2004, at A4; Perspective, *Make It Up to Mother Nature*, NEWARK STAR-LEDGER, Jan. 11, 2004, at 2.

173. Another bill, providing for assessment of education-related impact fees, was never introduced in the legislature. *See* Dyer, *infra* note 203.

174. State Transfer of Development Rights Act, Assemb. 2480, 211th Leg. (N.J. 2004). On March 15, 2004 the Assembly passed the bill sixty-five to ten (with four abstentions), and a week later the Senate passed an identical version (S1287) thirty-seven to two.

175. McManimon, *supra* note 157.

TDRs, called receiving areas. Under the law as passed, however, municipalities must meet a number of requirements in order to qualify for use of TDRs. Prior to receiving authorization from the Office of Smart Growth to pursue a TDR program, a municipality must adopt a plan describing its intended use of TDRs, adopt a strategy for providing infrastructure and capital improvements to the receiving zone, prepare a market analysis, and receive endorsement by the State Planning Commission.[176]

Transferable development rights programs slow growth in rural areas while also increasing development and density in locations specifically targeted for growth. Thus, unlike the outright purchase of land or conservation easements, TDR programs create incentives to develop in areas targeted for growth because development can be more dense and more profitable. Further, development rights are not simply purchased by the government, but are also sold onwards to developers, creating the possibility of offsetting the cost of purchasing TDRs. Given a market for TDRs, the program is less expensive than purchasing conservation easements or fee simples.

The law also provides for intermunicipal use of TDRs. Nevertheless, the bill's writers imagined that TDRs will be used primarily within towns facing development pressures where there is a significant amount of farmland that the town hopes to preserve.[177] There may be forty to fifty towns, of the 566 municipalities in New Jersey, that fall into this category.[178] As a local newspaper editorial recognized, "[t]he reality is that many communities are not large enough or have already been developed enough where the transfer possibilities would be minimal at best."[179]

The bill does not provide for purchase and sale of TDRs by the state or by state agencies, but development transfer banks may apply for funding from the Garden State Preservation Trust. Still, the Trust cannot directly purchase TDRs and, according to drafters of the legislation, it is not intended to facilitate governmental purchase of development rights.[180] The law focuses on enabling local governments to preserve open space and to increase density in designated areas by selling development rights to builders. Thus, it is unlikely that the largest statewide expenditures on open space preservation will take advantage of TDRs.

Proponents of smart growth should question the use of TDRs where it is limited to the local, rather than intermunicipal or regional, level.[181] Increasing the availability of local land use tools without first aligning local and regional

176. N.J. STAT. ANN. § 40:55D-140 (2002).

177. McManimon, *supra* note 157.

178. *Id.*

179. Editorial, COURIER-NEWS (Bridgewater, N.J.), Jan. 8, 2004, at A5.

180. McManimon, *supra* note 157.

181. The Highlands Water Protection and Planning Act provides for use of TDRs on a regional basis. *See* discussion *infra* Part IV.D.

growth goals will not have a substantial impact on existing land use patterns. Policymakers too often assume that the problem is the types of tools that are available to control land use, and not the incentives that drive use of those tools. This basic oversight informs my evaluation of the next contemporary option for policymakers hoping to affect land development.

B. Increasing Authority for Localities to Reject Development

Despite concerns about the discrepancy between state and local land use goals, much of the state's intended strategy requires or assumes that individual towns are capable of better protecting resources through use of their own municipal resources.[182] In his 2003 State of the State Address, Governor McGreevey promised that:

> [T]owns across the State will be given the legal firepower from our administration to fight developers when they need it. Too often the law doesn't allow communities to protect their own taxpayers. So I will propose empowering towns with the legal and zoning tools to control and manage their future development . . . . No tool is more important to a mayor than the ability to say "no."[183]

The first proposed regulations intended to increase the ability of localities to reject development were released in the summer of 2003. In August 2003, the Council on Affordable Housing (COAH), the state agency responsible for implementing obligations under New Jersey's *Mount Laurel* doctrine, proposed new regulations explicitly intended to increase the ability of local governments to limit sprawl. Since its inception in 1985, COAH has promulgated "fair share" numbers, allocating responsibility for allowing construction of affordable housing for each municipality in the state.[184] In the past, these numbers have provided a mechanism for developers to sue municipalities that have failed to meet their fair share allocation of affordable housing.[185] When developing in towns that had failed to meet their fair share requirements, developers could sue for the right to build at higher densities if they agreed to build one affordable unit for every four market rate units.[186]

In the summer of 2003, rather than establish fair share numbers, COAH proposed revised regulations intended to alter its procedures in accordance with

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182. Brown, *supra* note 140.

183. Governor James McGreevey, 2003 State of the State Address (Jan. 14, 2003), *available at* http://www.nj.gov/sos2003/speech_text.html.

184. The Council on Affordable Housing is the agency charged with implementing New Jersey's Fair Housing Act, which became effective in July 1985. N.J. STAT. ANN. § 52:27D-301 (2002).

185. DANIEL R. MANDELKER & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 386 (5th ed. 2001).

186. Steve Chambers, *Anti-Sprawl Movement Spurs Vote on Reforms in Affordable Housing*, NEWARK STAR-LEDGER, Aug. 24, 2003, at 1.

the administration's attempts to slow growth.[187] The agency adopted the revised regulations on November 22, 2004 and the regulations took effect on December 20, 2004. In lieu of assigning fair share numbers, COAH adopted "growth share methodology."[188] According to that methodology, localities determine their own rate of growth and affordable housing responsibilities are based on that self-determined growth rate. Should a town successfully halt growth by erecting zoning and permitting barriers, it would not be responsible for producing or allowing the production of any affordable residences, and developers would lose an important means of disputing potentially exclusionary regulations. On the other hand, any growth that does occur must include one affordable unit for every ten residential units or for every thirty jobs generated by commercial development.[189] This shift in procedure is explicitly intended to "minimize the impact on environmentally sensitive and rural areas."[190] The agency specifically intended the new rules to limit the susceptibility of municipalities to builder's remedy lawsuits, as noted in the Economic Impact Analysis that accompanied the proposed regulations.[191]

Housing advocates and developers objected strenuously to the proposed regulations. Affordable housing advocates claimed that the rules would result in the development of fewer affordable units.[192] A coalition of affordable housing developers and environmental organizations (including the New Jersey Audubon Society, New Jersey Conservation Foundation, New Jersey Environmental Foundation, New Jersey Environmental Lobby, New Jersey Future, and the New Jersey chapter of the Sierra Club) argued in its written comments that the proposed rules constituted "an abdication of COAH's statutory obligation to implement the Fair Housing Act and the *Mount Laurel* doctrine."[193] Developers

187. Substantive Rules for the New Jersey Council on Affordable Housing for Period Beginning (Effective Date of Rules), 35 N.J. Reg. 4636(a) (proposed Oct. 6, 2003), 36 N.J. Reg. 3691(a) (proposed Aug. 16, 2004, adopted Nov. 22, 2004), codified at N.J. ADMIN. CODE tit. 5, §§ 94-1.1–94-9.2 (2004); Procedural Rules for the New Jersey Council on Affordable Housing for Period Beginning (Effective Date of Rules), 35 N.J. Reg. 4700(a) (proposed Oct. 6, 2003), 36 N.J. Reg. 3851(a), codified at N.J. ADMIN. CODE tit. 5, §§ 95-1.1–95-15.2 (2004).

188. *Id. See also* Chambers, *supra* note 186.

189. Substantive Rules for the New Jersey Council on Affordable Housing for Period Beginning (Effective Date of Rules), 35 N.J. Reg 4636(a) (proposed Oct. 6, 2003), 36 N.J. Reg. 3691(a) (proposed Aug. 16, 2004), codified at N.J. ADMIN. CODE tit. 5, §§ 94-1.1–94-9.2 (2004).

190. *Id.* at Social Impact Analysis.

191. *Id.* at Economic Impact Analysis.

192. Michael H. Schill, Housing, Markets and Law, Inaugural Lecture of the Wilf Family Professor of Property Law at New York University School of Law (Sept. 29, 2003). *See also* Steve Chambers, *Affordable Housing Rules Stir Criticism—Overhaul Designed to Rein in N.J. Sprawl*, NEWARK STAR-LEDGER, Aug. 26, 2003, at 1.

193. Coalition for Affordable Housing and the Environment, Comments on Proposed Council on Affordable Housing Rules Published in Oct. 6, 2003 N.J. Register 2 (Dec. 4, 2003) (on file with author). In March 2004, the Coalition for Affordable Housing and the Environment sued COAH, alleging that the agency failed to turn over data and methodology used to develop the proposed substantive regulations. *See* Complaint in Lieu of Prerogative Writ, Coalition for Affordable Housing and the Environment v. New Jersey Council on Affordable Housing (on file with author).

agreed. Comments filed by the New Jersey Builders Association[194] complained that:

> the proposed new rules are technically unsound and represent bad planning and unwise social policy . . . . [T]hey also pervasively violate fundamental constitutional standards as enunciated by the New Jersey courts and provisions of the Fair Housing Act. Indeed, the violations are so pervasive that a complete catalog would greatly exceed the length of the proposed rules themselves.

Developers further claimed that the regulations would result in increased *Mount Laurel* litigation.[195]

It is necessary to consider the efficacy of the smart growth strategy embodied in the new regulations. The regulations implicitly assume that locally determined growth strategies can produce regional or statewide smart growth. The idea that local ability to halt development will result in more efficient land use planning is so entrenched that, according to advocates, the regulations remove restrictions on local siting of affordable housing. For example, the regulations remove the requirement that local governments consider the environmental impacts of approving affordable housing developments in environmentally sensitive sites as well as the requirement that COAH comply with the State Plan.[196]

This assumption underlies several legislative efforts to allow towns to reject developments because they will have negative effects on traffic congestion. Former Governor McGreevey argued that such power is necessary in his 2003 State of the State Address: "Here's how senseless development is in the State: New Jersey is the most congested State in the Nation. But under our laws, a local town cannot even consider the impact of additional traffic when it reviews new development."[197] Indeed, a 1984 case held that a local planning board could not deny an application for site plan approval "based solely upon the anticipated detrimental impact of the proposed use on traffic congestion and safety."[198] In March 2003, the governor announced a legislative package that

194. New Jersey Builders Association describes itself as "the voice of the building industry in New Jersey." *See* New Jersey Builders Association, About the NJBA, *at* http://www.njba.org/njbaInfo/aboutNJBA.asp (last visited Sept. 30, 2005).

195. Telephone Interview with Joanne Harkins, Director of Land Use and Planning, New Jersey Builders Association (Oct. 24, 2003). *See generally* Chambers, *supra* note 192; Patrick J. O'Keefe, Executive Vice President, New Jersey Builders Association, COAH Says "No" to Affordable Housing (Sept. 2, 2003) *at* http://www.njba.org/landuse/COAHsaysno.asp (alleging that proposed regulations "allow the fox to guard the chicken coop").

196. Coalition for Affordable Housing and the Environment, Comments on Proposed Council on Affordable Housing Rules Published in Oct. 6, 2003 N. J. Register (Dec. 4, 2003) (on file with author). *See also* discussion *supra* Part III.B.1.

197. Governor James McGreevey, 2003 State of the State Address (Jan. 14, 2003), *available at* http://www.nj.gov/sos2003/speech_text.html.

198. Dunkin' Donuts of New Jersey, Inc. v. Twp. of North Brunswick Planning Bd., 475 A.2d 71, 72–73 (N.J. Super. Ct. App. Div. 1984).

allowed towns to consider traffic and parking when evaluating development applications.[199] Currently, the Municipal Land Use Law enables localities to charge impact fees to address off-site impacts but does not allow localities to reject developments on the basis of those impacts. While a local government can require an applicant to make off-site street improvements in order to secure site plan approval, it cannot deny approval based solely on traffic considerations. Proposed revisions to the Municipal Land Use Law would allow municipalities to consider off-site traffic impacts when reviewing a site plan.

Additional proposed tools include the use of education impact fees by local governments. The Office of Smart Growth planned to release a draft of a bill to increase the ability of local governments to charge impact fees alongside the Transferable Development Rights bill discussed above.[200] The bill provided for charging developers a flat fee per school-age child estimated to be living in a new development.[201] In order to be eligible for the program, municipalities would have had to be in compliance with the State Plan before charging the fees.[202] The bill was targeted to towns that reject single-family residential development because they fear increased costs of public education.

The McGreevey administration never introduced the bill in the state legislature.[203] The proposal was received skeptically by both builders and local governments. Developers rejected the notion that they ought to be responsible for the total financial impact of housing development.[204] In addition, "the state League of Municipalities balked at a proposal that would tie the fees to a requirement that towns follow the State Plan."[205] The proposal attempted to account for the reality that towns hoping to increase property tax revenues while limiting public education expenditures must opt for elderly-only housing and big box retail rather than housing. The proposed solution, however, did not take into consideration the possibility that developers, no longer forced by towns to develop big box retail or senior housing, would nevertheless opt to do so in order to avoid paying the impact fees. In addition, developers would be less likely

199. Press Release, State of New Jersey, Governor's Newsroom, McGreevey: We're Giving Mayors the Necessary Tools to Fight Sprawl and Overdevelopment (Mar. 13, 2003) (on file with author).

200. McManimon, *supra* note 157.

201. *Id.*

202. *Id.*

203. *See* Steve Chambers & Tom Hester, *Special-Interest Feuding Slowly Sinking a Bill to Combat Sprawl*, NEWARK STAR-LEDGER, Jan. 8, 2004, at 20 (alleging that "it became clear in recent weeks that the [bill]—which would allow municipalities to assess developers for every new housing unit—would never happen"); John Dyer, *State Agenda Loses Drive: Lawmakers Trim Their To-Do List*, THE RECORD (Hackensack, N.J.), Jan. 4, 2004, at A1.

204. Editorial, *McGreevey on the Record*, THE RECORD (Hackensack, N.J.), Jan. 11, 2004, at O1 (quoting Governor McGreevey as arguing that "[d]evelopers are not going to readily acquiesce to impact fees, namely the fact that they can build 500 houses and not have any sense of responsibility for the cost of schools").

205. Tom Hester & Steve Chambers, *Land Use Bills Are Revived—Sprawl Bills Drawn Up for Lame-Duck Session*, NEWARK STAR-LEDGER, Nov. 11, 2003, at 9.

to build affordable housing. While impact fees may be passed through to consumers of housing, the pass through would be impossible if rents were limited by statute or by market forces. Regardless, by forcing developers to cover that cost, the Office of Smart Growth hoped to encourage more residential development. Fearing that the race to attract property-tax-producing developments would overwhelm towns' desires to limit sprawl, the Office of Smart Growth wrote into the bill a requirement that towns plan in accordance with the State Plan, in order to be able to use the education impact fees. To be more flexible would be to "collect[] money to buy more roads and schools in areas you're trying to protect," thus, "subsidizing sprawl."[206]

The assumption that smart growth goals can be achieved by increasing the ability of local governments to reject development, implicit in both the proposed legislative package and the COAH regulations, warrants skepticism and serious inquiry. Local governments pay for a different package of services and rely on different pools of funding and, therefore, face different incentives than do state and regional government. Therefore, their conception of smart growth, or an appropriate level of development for a given geographic location, will most likely differ from that of a state or regional government. Acknowledgment of this discrepancy in land use goals of state and local government drives the move by courts to require that New Jersey towns engage in inclusionary zoning.[207] It is this phenomenon that underlies Payne's argument that a general welfare standard, based on regional and statewide needs, ought to be more forcefully imposed on all local land use decisions.[208] The desire of localities to limit the costs expended on infrastructure and public education while increasing property tax revenues makes it unlikely that statewide interests in the development of affordable housing and limitations on dispersed growth will be achieved. Rural and exurban areas, on the other hand, might be pressured to develop land that the state might hope to preserve because of the high dependency of New Jersey towns on property taxes to fund services. Directing growth to appropriate locations while limiting growth in rural and environmentally sensitive regions requires legislation and regulation by the State of New Jersey in order to address the wide array of interests held by local governments.

Regulations increasing local authority to govern land use without first aligning the interests of local governments with those of the state will likely have perverse effects. For example, the ability to consider off-site impacts may give towns in Planning Areas 1 and 2, towns that are already urbanized and quite possibly already suffering from severe traffic congestion, greater ability to reject or prevent development. These are areas, however, where the State Plan wants

206. John Dyer, *Elections Over, Lawmakers Dare to Tackle Thorny Issues*, THE RECORD (Hackensack, N.J.), Nov. 19, 2003, at AO1 (quoting Jeff Tittel, New Jersey Director of the Sierra Club).

207. S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 732 (N.J. 1975), *rev'd*, 456 A.2d 390 (N.J. 1983).

208. *See* Payne, *supra* note 94.

to direct growth. In fact, one constituency that strongly objected to Governor McGreevey's initial, more radical, regulatory land use proposals when they were released in the spring of 2003 was the residents of towns in urban areas. Urban residents objected to the fact that their towns, which they considered built to capacity, would have been prioritized for further development.[209] Already plagued with severe traffic congestion problems, residents of these regions object to the reality that in order to accommodate population while also preserving natural resources, developed areas will have to be developed more densely. Allowing towns to address problems of off-site impacts by refusing to accommodate development, rather than by facilitating it with the necessary infrastructure, is a questionable approach to reining in sprawl. Absent other constraints, that development would then be directed to greenfields in communities "chasing ratables."[210] In practice, these regulations may pit municipalities against one another rather than encouraging regional and statewide cooperation.

C. *Smart Growth Tax Credit*[211]

Building hurdles to development in environmentally sensitive and rural locations will not counteract the forces that hinder development in areas considered appropriate for development, specifically urban and suburban areas. Making it more difficult to develop in environmentally sensitive areas will not be sufficient to direct growth if similarly significant hurdles to develop exist in urbanized areas. In order to effectively direct development to appropriate locations, financial or regulatory incentives may be necessary. In May 2003, State Senator John H. Adler introduced S. 2502, the Smart Growth Tax Credit.[212] The bill proposes a financial incentive—a tax credit against either personal or corporate income—to developers who build developments that satisfy a number of different criteria. First, developments must be located in areas designated for development by the State Plan. These include Planning Areas 1 (metropolitan areas), 2 (suburban areas) or 5b (barrier islands); centers

209. *See* James Ahearn, *Latest Twist in Saga to Combat Sprawl*, THE RECORD (Hackensack, N.J.), Oct. 29, 2003, at B5 ("[C]ities and older suburbs [slated for development in McGreevey's original proposal] protested that it was all they could do to preserve the last scraps of open space in their communities, and here the state was fixing to undercut the effort.").

210. The colloquial term "chasing ratables" is used to describe a local government's efforts to woo land uses that create high property tax revenues in order to meet fiscal needs. *See* S. Burlington NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 731 (N.J. 1975) ("[A] developing municipality may properly zone for and seek industrial [or commercial] ratables to create a better economic balance for the community *vis a vis* educational and governmental costs engendered by residential development.") (citing Gruber v. Mayor and Twp. Comm. of Raritan Twp., 186 A.2d 489, 493 (N.J. 1962)).

211. From January through May of 2003, through New York University School of Law's Environmental Law Clinic, I worked as an intern at the Natural Resources Defense Council, completing assignments related to the Smart Growth Tax Credit.

212. On May 15, 2003, the bill was referred to the Senate Environmental Committee.

(essentially downtown areas in both suburban and rural towns); or towns designated as "substantially conforming to the State Plan."[213] Developments must be proximate to and well-served by transit. Developments are eligible only if there are six or more residential units per acre, a number based on location efficiency standards.[214] The amount of the credit varies depending on accessibility to transit and density of the development.[215] In addition, "green building" standards are built into the tax credit. The development must be energy efficient; homes, equipment, and appliances must comply with energy usage standards. Building materials must adhere to standards with respect to recycled content and limited use of wood.[216] Extra credit is given for developments on revitalized brownfields and developments that include a mix of residential and non-residential uses.[217]

The Smart Growth Tax Credit attempts to account for the fact that unconventional developments are more difficult to finance and more expensive to build than conventional large-lot suburban subdivisions.[218] As such, financial incentives may be necessary to encourage developers to engage in the type of development that both conserves natural resources and helps to revitalize urban centers. The Smart Growth Tax Credit encourages development in urban areas by rewarding development in brownfields, requiring that eligible developments not require extension of sewer lines, and requiring proximity to transit. This last criterion not only encourages development in areas already served by transit, but also encourages developers to invest in and to encourage local and state investment in public transportation infrastructure.

While the bulk of the tax credit is tied to the actual cost of development, the bonus credits are not. For example, the bonus for increased density over six units per acre is based not on the cost of building denser housing but instead on

213. S. 2502, 210th Leg. (N.J. 2003).

214. Location efficiency standards are determined by the Institute for Location Efficiency, a not-for-profit organization advocating location-efficient mortgages. Location efficiency is based on a residence's proximity to transit and commercial areas. The underwriting of location-efficient mortgages takes into consideration the fact that a household budget does not include the costs and expenses associated with automobile ownership. Thus, location-efficient mortgages increase the buying power of residents of neighborhoods that are proximate to commercial and retail districts and served by transit. While the Smart Growth Tax Credit does not include provisions for location-efficient mortgages, it relies on research done by the Institute for Location Efficiency in order to determine the minimum density required for a development to be considered "smart."

215. S. 2502 §§ 3(a)(7)–3(a)(8), 8(a)(7)–8(a)(8), 210th Leg. (N.J. 2003).

216. S. 2502 §§ 6(c)(2)–6(c)(3), 210th Leg. (N.J. 2003).

217. S. 2502 §§ 3(a)(3)–3(a)(4), 210th Leg. (N.J. 2003).

218. Seth A. Brown, *Why Building Smart is Hard*, 1 THE NEXT AMERICAN CITY 1 (Fall 2001) (describing the difficulties of financing mixed-use and other atypical developments due to the structure of securitization markets and the lack of market comparables available to financial institutions); Sally Hicks, *Former Enemies Unite to Corral Sprawl in Austin*, NEWS AND OBSERVER (Raleigh, N.C.), July 23, 1997, at A9 (quoting a developer building a 1400 acre "neo-traditional" subdivision outside of Austin, Texas as saying, "[t]he banks are saying, 'Sure, we'll go do it, but we want you to put up this asset and that asset . . . You give me typical suburban development I can just go go go go go").

the estimated increased energy efficiency. As such, these bonuses may not encourage, for example, development on a former brownfield if the difference in cost associated with brownfields development is not covered by the credit. In other words, unless the credit erases the cost distinction between developing, as another example, a traditional building and one that is in conformance with energy efficiency standards, it will fail to encourage profit-conscious developers to build in accordance with the legislation's standards. It is difficult to know how much of a financial incentive is sufficient to force particular modes of development. Development costs are difficult to predict and non-traditional developments are even more difficult to finance than traditional developments.[219] A governmental subsidy for an inner city redevelopment project might fail to make up for the higher cost of financing faced by a developer attempting to develop high-density housing on a cleaned-up brownfield.

The goal of the Smart Growth Tax Credit is to provide a long-term solution by demonstrating to developers that non-traditional developments can be profitable investments. To prove this point, the program provides a carrot for developers to attempt smart growth development.[220] Smart Growth Tax Credit proponents hope that the program will demonstrate to developers that such developments can be profitable and ought to be developed with or without a tax incentive. While a tax credit might encourage some development, there is reason to be skeptical that the credit will encourage future developments that are not reliant on tax breaks, unless using green building materials and developing dense mixed-use projects yields a profit based on the market, rather than on a subsidy. Encouraging the creation of model developments can be helpful, however, in creating a market for smart growth. If there is demand for housing and commercial space in the developments supported by the Smart Growth Tax Credit, this might encourage further development. Anecdotal evidence from mixed use and green developments in other areas of the country certainly points to this possibility.[221]

Another consideration is the potential political unpopularity of developer subsidies. As Austin's experience makes clear, at a time when state budgets are strapped for cash, tax credits may be unfeasible.[222] Providing incentives directly to developers will often be viewed as favored treatment for individual developers or as kickbacks for campaign donations.[223] In addition, in a

219. *See* Brown, *supra* note 218.

220. The Statement accompanying the bill claims that the tax credit could "help the State's building and development professionals overcome market barriers and develop the capacity to create superior buildings and neighborhoods at minimal additional cost." S. 2502, 210th Leg. (N.J. 2003).

221. *See* Timothy B. Wheeler, *Developer Builds Case to Put End to Sprawl*, THE BALTIMORE SUN, Nov. 17, 2004, at 1B.

222. *See infra* Part IV.E.

223. *See generally* Steve Chambers, *Mayor Says 2,450 Units Were OK'd Because Builder is Cozy With DEP*, NEWARK STAR-LEDGER, Sept. 19, 2003 at 26.

forum where developers have a reputation for being "the bad guy," funding developers not to build sprawling developments is considered sacrilege by environmentalists, planners, and strained local governments. Many smart growth advocates may object that it is wrong to pay developers for doing what they ought to do. In light of these criticisms, regulatory incentives may prove more feasible and more effective. Events that occurred in the summer of 2004 indicated that the state government had learned that these incentives must be well-tailored.

D. The Highlands Act and Smart Growth Act

The summer of 2004 saw a burst of activity in the world of New Jersey land use law. In June, advocates of restraints on development and growth celebrated the passage of the Highlands Water Protection and Planning Act (the Highlands Act), legislation aimed at conserving water and managing development and economic growth.[224] The Act cost McGreevey a great deal in political capital. In order to encourage its passage by the state legislature, he threatened to impose a functional equivalent to the proposed bill by executive order.[225] Furthermore, garnering support for the Highlands Act required McGreevey to support another piece of land use legislation. The Smart Growth Areas Act, passed just six days after its introduction, followed shortly after the Highlands Act.[226] The Smart Growth Areas Act expedited environmental review and permitting for developments proposed in areas considered appropriate for development, Planning Areas 1 and 2, designated centers, and areas designated in need of redevelopment.[227] In addition, it created a Director of Smart Growth in New Jersey's Department of Community Affairs and gave that position substantial authority over permitting determinations.[228]

Both statutes curb local control of development in favor of greater regional and state authority over land use and conservation. The Highlands Act provides a menu of carrots and sticks to localities to implement and enforce master planning that provides for conservation of land in order to protect sources of drinking water. In addition to providing local government with incentives to meet regional goals and needs with respect to land use policy, the Act creates a Council, comprised of representatives of various areas of the state, with

224. Highlands Water Protection and Planning Act, 2004 N.J. Sess. Law Serv. 120 (West) (codified at scattered sections of N.J. STAT. ANN. § 13:20 (West 2004)) [hereinafter Highlands Act].

225. David Kocieniewski, *Agreement is Reached in Trenton to Limit Highlands Development*, N.Y. TIMES, June 8, 2004, at B2. *See* discussion of use of executive orders *supra* Part III.A.

226. Smart Growth Areas Act, 2004 N.J. Sess. Law Serv. 89 (West) (to be codified at N.J. STAT. ANN. §§ 52:27D-10.2–52:27D-10.6 (2004)) [hereinafter Smart Growth Areas Act].

227. *See id.* at § 1 (defining smart growth areas); *id.* at § 5 (describing the process for expedited review of permits).

228. *See id.* at § 9.

enforcement authority.

The Highlands Act is a comprehensive law to protect 800,000 acres of land in northern New Jersey that includes "an essential source of drinking water for one-half of the State's population."[229] It requires local governments to account for regional and statewide interests by instating oversight over local land use decisions. The legislation's parallel purpose, in addition to conservation, is to manage development and economic growth.

The Legislature further finds and declares that the New Jersey Highlands provides a desirable quality of life and place where people live and work; that it is important to ensure the economic viability of communities throughout the New Jersey Highlands; and that residential, commercial, and industrial development, redevelopment, and economic growth in certain appropriate areas of the New Jersey Highlands are also in the best interests of all the citizens of the State, providing innumerable social, cultural, and economic benefits and opportunities.[230]

In the case of the Highlands, the public value of the land conservation is clear. As the legislature noted, the region provides one-half of the state's drinking water. At the same time, the interests of the entities with authority to manage development in the region do not correspond with those of the population of regions that might benefit from land conservation in the area. Finding that land conservation in the Highlands is "an issue of State level importance that cannot be left to the uncoordinated land use decisions of 88 municipalities, seven counties, and a myriad of private landowners," the legislature combined authorization of additional land use tools with increased regional and state-level authority over land use decisions in the Highlands Act.[231] The tools authorized by the Act include impact fees, TDRs, and the purchase of both fees simple and conservation easements. The Act creates a "Preservation Area" within the Highlands where conservation is prioritized.[232] In that area, all future non-residential developments, along with any residential development "that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more" must receive approval by a council comprised of representatives of both the Highlands region and the rest of the state.[233]

The Act balances the need for land conservation in the preservation area with the inevitability of economic growth and development. For example, the TDR program established by the legislation provides for the transfer of

229. Highlands Act § 2 (discussing legislative findings and declarations relative to the Highlands Water Protection and Planning Act).

230. *Id.*

231. *Id.*

232. *See id.* at §§ 2, 7 (describing the "Preservation Area").

233. *See id.* at § 3 (defining "Major Highlands development"); *id.* at § 5 (specifying appointment and qualifications of council members).

development rights from the preservation area to the planning area, made up of all areas that are in the Highlands but not in the preservation area. Four percent of the planning area is designated a receiving region for the purposes of the TDR program. In addition to encouraging greater densities in particular regions of the Highlands by establishing a TDR program, the legislation authorizes the council to "establish, where appropriate, capacity-based development densities, including, but not limited to, appropriate higher densities to support transit villages or in centers designated by the [State Plan]."[234] Localities in the planning area that adopt land use plans and regulations approved by the council and create receiving zones for development rights where residential density is at least five units per acre are entitled to financial assistance and other incentives, including authorization to impose impact fees.[235] This approach differs markedly from the March 2004 Transferable Development Rights Law, see *supra* pages 152–152, as it contemplates regional, rather than local, use of transferable development rights.

The Highlands Planning and Preservation Council is also empowered to designate parts of the preservation area "within which development shall not occur in order to protect water resources and environmentally sensitive lands while recognizing the need to provide just compensation to the owners of those lands when appropriate, whether through acquisition, transfer of development rights programs, or other means or strategies."[236] Essentially, the council is given land use powers by the state that would otherwise be allocated to localities.

In fact, should a municipality fail to enact or enforce

> an approved revised master plan, development regulations or other regulations, as the case may be, including any condition thereto imposed by the council . . . the council shall adopt and enforce such rules and regulations as may be necessary to implement the minimum standards contained in the regional master plan as applicable to any municipality or county within the preservation area.[237]

Under such circumstances, the council is empowered with all land use authority under the Municipal Land Use Law.[238] Approval or denial of certain developments, where "ultimate disturbance of two acres or more of land or a cumulative increase in impervious surface by one acre or more," is subject to review by the Highlands council.[239] Furthermore, any individual can request that the council review an application for development in the preservation area.[240] In

234. *Id.* at § 6(s).
235. *See id.* at § 13(k)-(l).
236. *Id.* at § 6(n).
237. *Id.* at § 14(d).
238. *Id.*
239. *Id.* at § 17(c).
240. *Id.* at § 17(d).

essence, standing to contest the appropriateness of a development is conferred on the public because all individuals have an interest. This avoids a "tragedy of the commons" problem, wherein everyone who can exploit an unsustainable resource can (and will) do so, since the comparative advantage of the exploiter can, without court intervention, only be taken away by additional exploitation and depletion of the resource by other parties.[241]

As there are regional benefits of conservation of land resources in the preservation area, the costs ought to be allocated regionally. If the costs of a regional or statewide benefit are localized, there will be little incentive for the locality to assume them. Like the state's open space preservation legislation, the Highlands Act attempts to mitigate the local costs of land conservation by spreading such costs regionally.[242] It achieves this end by covering the loss of local tax revenues with payments made to towns in the preservation area relative to some percentage of their expected property tax revenue loss.[243]

Despite provisions for such fiscal mitigation, advocates of local control over development object to the Act on the ground that it strips localities of home rule. Generally, however, local governments' authority to regulate land use is entirely derivative of the state's police powers. While such an objection likely does not provide a basis for towns to challenge the statute in the courts, there may be other grounds. For example, in January of 2005, freeholder boards of two counties commissioned an environmental consultant to examine "whether good science was used" in determining the borders of the Highlands region and the preservation area.[244]

The Smart Growth Areas Act is also criticized for conflicting with the political philosophy of home rule because of its extensive regulation of local planning.[245] Permit applications for developments in Planning Areas 1 and 2 (the "Smart Growth Area") receive expedited review by the Departments of Environmental Protection, Transportation, and Community Affairs.[246] If an agency fails to act on an application for forty-five days, the application is deemed approved.[247] Furthermore, the Act creates a "Smart Growth Ombudsman," a person who has broad authority over the approval of permits for developments in the Smart Growth Area as well as any state agency regulations

241. *See, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–48 (1968).

242. *See* Highlands Act § 19 (to be codified at N.J. STAT. ANN. §§ 54:1–54:85 (West 2004)) (providing for the creation of the Highlands Municipal Property Tax Stabilization Board).

243. *Id.*

244. Joe Tyrell, *Some Towns Wary of Joining Counties' Highlands Lawsuit—Hunterdon and Warren Freeholders Offer Chance to Challenge New Law*, NEWARK STAR-LEDGER, Jan. 20, 2005, at B6.

245. *Id.*

246. Smart Growth Areas Act, § 10, 2004 N.J. Sess. Law Serv. 89 (West) (to be codified at N.J. STAT. ANN. § 13:1D-146 (2004)).

247. *Id.* at § 7(c)(1)(b) (to be codified at N.J. STAT. ANN. § 27:1E-2 (2004)).

that affect that Area.[248] Lambasted by the environmental lobbies, the Smart Growth Areas Act is unlikely ever to be implemented as passed in June 2004. On December 13, 2004, a bipartisan coalition introduced a bill that would repeal the Act.[249] State Senator Leonard Lance, a sponsor of the repeal legislation, publicly called the Smart Growth Areas Act "flawed, legally, constitutionally, democratically and substantively."[250] Others, including Acting Governor Codey, advocated amending the Act.[251] In July 2005, however, barely a year after the Act's passage, Acting Governor Codey issued an Executive Order that suspended implementation of the Smart Growth Area Act indefinitely.[252] In doing so, Codey echoed concerns expressed by environmental advocates that the Act violated various federal regulatory schemes protecting wetlands, endangered species, drinking water, and coastal lands.[253] The Executive Order delays implementation of the Act "[u]ntil such time as the federal government and the [New Jersey] DEP reach agreement concerning the impact, if any, of [the New Jersey] DEP's proposed rules implementing [the Smart Growth Areas Act] upon the ability of DEP to administer the federal programs described above."[254]

In order for the State Plan, insofar as it is a planning document, to have any effect, there must be some means to ensure that land use decisions made by landowners and local governments reflect the planning goals laid out by state and regional authorities. Local land use decisions are unlikely to match regional and statewide goals unless mechanisms are in place to remove control from local entities or to match the regional costs and benefits of development to local costs and benefits. The Smart Growth Areas Act attempts to match local and private incentives to regional incentives by lowering regulatory costs of developing land in areas designated for development in the State Plan.

Lowering regulatory costs can have a significant impact on the costs of development and developed land.[255] However, there is little popular support for the policy position that a decrease in regulation can promote conservation. The use of deregulation as a tool to promote an environmental agenda is controversial and often manipulated by industry forces with little interest in conservation. In the arena of land use, however, economic growth dictates that land development

248. *See id.* at §§ 2–3. Actions and regulations undertaken by the Highlands Council are exempted.

249. S. 2157, 211th Leg., 1st Sess. (N.J. 2004); Assem. 3650, 211th Leg., 1st Sess. (N.J. 2004).

250. Lauren O. Kidd, *Fast-Track Law Critics Say Repeal It, or Fix It; Bipartisan Group of 18 Lawmakers Opposes 'Smart Growth' Measure*, ASBURY PARK PRESS, Dec. 14, 2004.

251. *Id.*

252. N.J. Exec. Order No. 45 (Jul. 12, 2005).

253. *Id.*

254. *Id.*

255. *See e.g.*, JERRY J. SALAMA, THE NEW YORK UNIVERSITY SCHOOL OF LAW CENTER FOR REAL ESTATE AND URBAN POLICY, REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY 47–50 (1999) (discussing incentives for getting developers and owners to clean up brownfields).

must occur somewhere in order to accommodate an increasing population. Yet all costs are relative. While the Smart Growth Areas Act may go too far in promoting deregulation of land, it ought to be considered alongside brownfields remediation legislation, which attempts to mitigate the costs of developing environmentally contaminated land in urban areas.[256] The Act is based on the assumption that the costs of developing in urban areas often exceed the costs of developing land that the state prioritizes for conservation. Thus, the financial interests of property owners and the regional interest in conserving undeveloped lands diverge. Effective land use legislation must better align these interests.

Legislation seeking such an alignment might increase the costs of developing land in areas like the Highlands, where both the state and the region value conservation. In addition, legislation ought to decrease the cost of developing land in urban areas. One method of doing so without expending funds or allotting tax credits is to make it *relatively* easier and *relatively* cheaper to develop in already-urbanized areas. Because it empowers a statewide authority with an array of tools to enforce statewide land use priorities, the Highlands Act promises to be an effective protector of regional interests. The Smart Growth Areas Act ought to be recognized by environmentalists as a different approach to the same goal. So long as minimum environmental standards are met, the state should promote development in areas where it is appropriate. All told, the approach to incentives embodied in the Highlands Act and the Smart Growth Areas Act demonstrates that some of the lessons of the past have been learned, but that the New Jersey government still needs to consider how to create more attractive inducements for appropriate development, rather than merely discouraging that which is deemed inappropriate. New Jersey can look to examples of this type of incentive structure outside the state.

E. Regulatory Hurdles and Regulatory Fast-Tracking

The city of Austin, Texas provides some insight about how effectively financial and regulatory incentives can lure residential and commercial activities to urban areas. Perhaps more importantly, an examination of Austin's experience points to the role of politics, economic stability, and local perception of a program's effects in successful land use management. In 1994, the Austin City Council appointed a Citizens Planning Committee to formulate recommendations regarding the city's development and planning processes.[257] The group included developers, environmental advocates, transportation experts, and neighborhood representatives.[258] Its goals included fostering participation by neighborhoods in the planning process and rewriting the city's code to

256. *Id.*

257. *See* AUSTIN, TEX., CODE CHARTER, art. X, §§ 1–4 (2004); Hicks, *supra* note 218.

258. Sharon Jayson, *City's Land Development Code to Get Renovation*, AUSTIN AMERICAN-STATESMAN, Dec. 6, 1994, at C7.

encourage and expedite development.[259] The Council also hoped to revitalize Austin's urban core to make it competitive with the suburban area surrounding the city.[260] As a University of Texas Professor of community and regional planning said, "[t]he command-and-control approach hasn't worked here . . . so we're trying a new approach."[261]

In April 1996, the Citizens Planning Committee delivered its proposal for "re-engineering the city's development and planning process to inject more predictability, accountability and local responsibility."[262] While the report addressed conservation and efficient use of natural resources, it also described methods for encouraging development by simplifying regulation and permitting.[263] The proposals did not vilify developers and growth but instead were based on the idea that development could occur in ways attractive to businesspeople, environmentalists, and community activists alike.

Environmental advocates hailed the short-lived smart growth program that resulted.[264] Interestingly, however, the package of incentives that, for a few years, served as Austin's smart growth artillery, arose out of a focus on urban revitalization, economic competitive advantage and, only secondarily, conservation of natural resources.[265] Austin feared losing population, its tax base and economic advantage to its suburbs; smart growth developed as a mechanism for treating those ills, rather than as a tool for resource conservation.[266] The Citizens Planning Committee understood that in order to accomplish its goals, Austin had to provide an alternative to suburban living by offering dense pedestrian neighborhoods in urban areas. In order to encourage downtown and infill development, the city chose to streamline building codes and permitting processes on all levels.[267]

From February 1998 through June 2003, Austin implemented the Smart Growth Initiative. Under the program, developments in the Desired Development Zone (DDZ) received both financial and regulatory incentives.

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259. *Id.*

260. *Id.*

261. Hicks, *supra* note 218.

262. CITIZENS PLANNING COMMITTEE, FROM CHAOS TO COMMON GROUND: A BLUEPRINT FOR AUSTIN (1996) (on file with author).

263. Jayson, *supra* note 258.

264. *See, e.g., A Mixed Use Ordinance to Foster Smart Growth*, 81 PUB. MGMT. 9, A6 (Oct. 1, 1999).

265. Telephone Interview with George Adams, Planning, Environmental and Conservation Services, City of Austin, Texas (Oct. 28, 2003). *See generally* Editorial, *Suburban Sprawl Depletes Vitality of Austin's Core*, AUSTIN AMERICAN-STATESMAN, Jun. 4, 1995, at A11; Vanita Reddy, *Plan Helps Austin Curb Sprawl*, SAN ANTONIO EXPRESS-NEWS, Apr. 14, 1999, at D4.

266. *See, e.g.*, Chuck Lindell, *Dense Makes Sense to Reformers of Land Code; Citizens Committee Studies Ways to Lure Developers Out of Suburbia and Back to Austin's Center*, AUSTIN AMERICAN-STATESMAN, Oct. 22, 1995, at C9.

267. Chuck Lindell, *Red Tape Binds Developers, Chokes Austin, Council is Told*, AUSTIN AMERICAN-STATESMAN, Nov. 30, 1995, at D3. *See also* Editorial, *Easing the Permit Maze*, AUSTIN AMERICAN-STATESMAN, Jan. 9, 1996, at A12.

The DDZ encompassed the eastern two-thirds of Austin, including downtown Austin and depressed East Austin.[268] Projects located within the DDZ received funding based on "1) the location of development [within the DDZ]; 2) proximity to mass transit; 3) pedestrian-friendly urban design characteristics; 4) compliance with nearby neighborhood plans; 5) increases in tax base, and other policy priorities."[269] The Smart Growth Matrix designated point allocations for a variety of criteria in these categories, including density, green building construction, pedestrian and bicycle access, mixed commercial and residential uses, and, for residential projects, affordability.[270] Based on total point score, developers could receive fee waivers, infrastructure improvements, and other incentives, the total value of which could not exceed the value of property tax revenues expected from the project over five years.[271] During the course of six years, fifteen projects received support under the Matrix; of these, eleven included a residential component.[272]

Perhaps the most significant aspect of Austin's program was the failure to implement effective regulatory fast-tracking techniques. The bureaucratic structure in Austin housed the incentive program and the development review process in different agencies. Thus, while one agency might speed up its regulatory process, this would provide little benefit to a developer who still had to wait months or years for approval from another municipal office.[273] This aspect of Austin's program ought to be particularly instructive for New Jersey.

A staff member at the New Jersey Department of Environmental Protection (DEP) describes the current regulatory process as "one size fits all."[274] Regardless of where a project is situated and how its location impacts the environment, it must endure the same regulatory process. In his 2003 State of the State Address, former Governor McGreevey promised developers, "[i]f you want to build and grow consistent with smart growth, then we will help you get regulatory approvals quickly and make sure the infrastructure is there to support

268. City of Austin, Smart Growth Initiative, The City of Austin Smart Growth Map, *at* http://www.ci.austin.tx.us/smartgrowth/map.htm (last visited Oct. 4, 2005). While the Smart Growth Matrix program ended in June 2003, these designations remain applicable to current "smart growth" programming in Austin.

269. City of Austin, Smart Growth Initiative, Smart Growth Incentives in Austin, *at* http://www.ci.austin.tx.us/smartgrowth/incentives.htm (last visited Oct. 4, 2005).

270. City of Austin, Transportation, Planning and Design Department, Smart Growth Criteria Matrix, Version 9, *at* http://www.ci.austin.tx.us/smartgrowth/smartmatrix.htm (last visited Oct. 4, 2005). *See also* CITY OF AUSTIN TRANSPORTATION, PLANNING, AND DESIGN DEPARTMENT, SMART GROWTH INITIATIVE MATRIX APPLICATION PACKET 9–19 (Jan. 1999, revised Feb. 2001), *available at* http://www.ci.austin.tx.us/smartgrowth/smartmatrix.htm.

271. City of Austin, Smart Growth Initiative, Smart Growth Matrix, *at* http://www.ci.austin.tx.us/smartgrowth/matrix.htm (last visited Oct. 4, 2005).

272. City of Austin, Smart Growth Initiative, Smart Growth Matrix Results, *at* http://www.ci.austin.tx.us/smartgrowth/matrixresults.htm (last modified June 27, 2003).

273. Adams, *supra* note 265.

274. Brown, *supra* note 140.

you."[275] This is, in fact, what the Smart Growth Areas Act promised to accomplish. In essence, the Act provided for the fast-tracking of environmental permitting applications filed for developments in Planning Areas 1 and 2.[276] Yet even with quicker permit processing by the DEP, absent other legislative or regulatory changes, a developer would remain subject to the permitting processes of other state and local agencies. As a result, it is easier to build hurdles to development in undesirable locations than to remove them in desirable locations.

New Jersey must learn from Austin, or any holistic smart growth plan will be short-lived, just as Austin's was. According to a local newspaper, the Austin City Council "that once embraced Smart Growth so warmly in its infancy, essentially ushered it out of existence with a quick, unanimous vote, preceded by little substantive discussion."[277] On June 12, 2003, the City Council passed a resolution establishing an Economic Development Policy and Program, supplanting the Smart Growth Initiative. That resolution provided for larger incentive packages based on purely economic criteria, rather than locational and environmental criteria.[278] As Austin's dot-com economy soured in the late 1990s, Austin began to associate smart growth with large corporate subsidies and the disappearance of local businesses. In addition, the coalition that originally supported the Smart Growth matrix began to fall apart. Environmental groups rejected the notion that the City ought to provide incentives for growth in identified locations and instead adopted a "no-growth" philosophy, while urban neighborhoods feared increased density.[279]

In the summer of 2003, New Jersey's governor hailed smart growth as a solution to its quality-of-life problems while Austin discontinued its program. It is important to recognize the ways in which Austin's experience with sprawl and growth differs from that of New Jersey. Like New Jersey, Austin worried about traffic congestion, uncontrolled growth and conservation of natural resources. Unlike New Jersey, Austin also recognized the importance of urban revitalization. Redevelopment of downtown and East Austin appealed to Austin's residents, but revitalization of Newark, New Brunswick and Camden simply does not register with the majority of New Jersey voters. Thus, in Austin, development became a neutral force that was potentially good for the urban core when it occurred in environmentally friendly ways. Development was not the four-letter word it has become in New Jersey. For example, in February 1996, the Citizens' Planning Committee, with the University of Texas,

275. Governor James McGreevey, 2003 State of the State Address (Jan. 14, 2003), *available at* http://www.nj.gov/sos2003/speech_text.html.

276. *See supra* Part IV.D; *see also* Borden, *supra* note 140.

277. Jonathan Osborne & Stephen Scheibal, *Like Go-Go 1990s, Smart Growth's Time Had Passed*, AUSTIN AMERICAN-STATESMAN, Jun. 22, 2003, at B7.

278. City of Austin, Recommendation for Council Action, RCA Serial # 2247, Exhibit A (June 12, 2003) (on file with author).

279. Adams, *supra* note 265.

sponsored a forum in which developers, neighborhood advocates, and environmentalists came together to design neighborhoods that were attractive to all participants.[280] The exercise was meant to demonstrate to participants that their goals were not as divergent as some might think.

It is difficult to change consumers' preferences about where to live. As one student of Austin's efforts noted,

> Areas outside of the Desired Development Zone tend to be the most attractive to homeowners and businesses because of the natural and scenic environment of property, and buyers who can afford to purchase and maintain property outside of the DDZ are not deterred by the high costs of utility and infrastructure connections.[281]

Developers faced difficulties financing mixed-use and residential developments in downtown Austin.[282] Because the price of land in downtown Austin is high, rental housing developed under the Smart Growth Matrix was often unaffordable.[283] While concerns about affordability in urban centers may be less pressing in New Jersey, the ability to affect where people choose to live is equally difficult. A representative of a builders' professional organization expressed this problem in an overly simplistic manner to the *New York Times*: "[i]f smart growth would accommodate growth in places where people want to live, that would be smart . . . You can put it all in Newark, but frankly not a lot of people are going to move there unless something is done about other problems, like the schools."[284]

Corporations, therefore, may be more natural targets for a city's efforts to draw development downtown. As the economic bubble of the late 1990s burst, the public began to see Austin's smart growth enticements as corporate subsidies. The timing of the program's implementation coincided with changes in Austin's downtown. Many people attributed the loss of downtown neighborhood bars and affordable outlets to the policy of "corporate welfare" embodied by the Smart Growth Matrix.[285] When a deal with Intel Corporation to use funds from the Smart Growth Matrix to develop a major headquarters in Austin fell through, popularity of the Smart Growth Matrix fell as well.[286] The City Council resolution replacing the Smart Growth Matrix focuses primarily on

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280. Chuck Lindell, *Frequent Foes Work Together to Design Ideal Subdivision*, AUSTIN AMERICAN-STATESMAN, Feb. 25, 1996, at B1.

281. Stephanie Yu, *The Smart Growth Revolution: Loudoun County, Virgina and Lessons to Learn*, 7 ENVTL. LAW. 379, 386 (2001) (citing Christian Davenport, *Pioneers of Smart Growth*, AUSTIN AMERICAN-STATESMAN, Aug. 16, 1999, at A1).

282. Adams, *supra* note 265. *See also* Brown, *supra* note 218.

283. *Id.*

284. Jacobs, *supra* note 141, at B5 (quoting Nancy Wittenberg, Environmental Affairs Director, New Jersey Builders Association).

285. Adams, *supra* note 265.

286. Osborne & Scheibal, *supra* note 277; Stephen Scheibal, *Smart Growth a Thing of the Past*, AUSTIN AMERICAN-STATESMAN, June 5, 2003.

the goal of economic development rather than smart growth.[287] When jobs are scarce and local tax proceeds are low, the goals of smart growth—conservation of natural resources, historic preservation, and development of affordable housing—lose appeal.

A mix of incentives, both regulatory and financial, may be necessary to effectively implement smart growth policies. In a world of multiple regulatory agencies and authorities, regulatory incentives are difficult to provide to developers in large part because they are difficult to control. Nevertheless, financial incentives, particularly in a difficult economic climate, can only address a fraction of the structural problems that prevent developers from engaging in smart growth. According to a planner with the City of Austin, "incentives will only get you so far . . . at some point you need to firm up regulations."[288]

Given Austin's desire to guide growth and encourage urban revitalization, the city ought to have been more receptive than New Jersey to the types of regulatory and financial incentives provided by the Smart Growth Matrix. Austin's experience with the Smart Growth Matrix provides a few important lessons for other states and cities (notably, New Jersey) considering similar efforts. First, incentives to developers do not help to change consumers' locational preferences. Second, while it may be easier to change corporate locational preferences using subsidies, such efforts may be politically unpopular. Smart growth campaigns, because they have wide-ranging implications for individuals and corporations alike, are likely to be blamed for impeding economic growth in a downturn. Third, no one form of incentive will be capable of forcing smart growth. A mix of regulatory and financial incentives is necessary to make the market embrace dense development in appropriate locations and conservation of natural resources.

One state that has attempted to incorporate a mix of regulatory and financial incentives into its planning policies is Maryland.[289] Maryland, like Oregon and New Jersey, receives accolades from planners and lawyers interested in smart growth. Unlike New Jersey's State Plan, "Maryland's [State Economic Growth, Resource Protection, and Planning] Policy has substantive, or more precisely, coercive effect."[290] In less than a decade, it has emerged as a leader in creating incentives to plan growth. Five different programs constitute

287. City of Austin, Recommendation for Council Action, Agenda Item 15 (June 15, 2003), *available at* http://www.ci.austin.tx.us/agenda/2003/downloads/061203015.pdf.

288. Adams, *supra* note 265.

289. For comprehensive descriptions of Maryland's array of smart growth policies, see Maryland Office of Smart Growth, *at* http://www.smartgrowth.state.md.us (last visited Oct. 3, 2005). *See also* James R. Cohen, *Maryland's "Smart Growth": Using Incentives to Combat Sprawl*, *in* URBAN SPRAWL: CASES, CONSEQUENCES & POLICY RESPONSES (2002); Bolen, Brown, Kiernan & Konschnik, *supra* note 164, at 170.

290. Bolen, Brown, Kiernan & Konschnik, *supra* note 164, at 172 (comparing Maryland's smart growth policy to that of states, like New Jersey, with growth policy statements).

Maryland's approach to smart growth. Two of these programs can provide some background with respect to incentive packages for smart growth.[291] The 1997 Smart Growth Areas Act limits state funding for infrastructure to designated areas.[292] The law therefore imposes financial disincentives on developers who build in non-preferred locations. Under the second program, the Live Near Your Work Program, the state offers to match contributions by local governments and employers to home purchases by employees in the neighborhoods where they work.[293]

The Live Near Your Work program is "small, but successful."[294] Like the Smart Growth Areas Act, it aims to make housing markets in preferred locations more attractive to both developers and consumers. The program works by helping individuals and families pay closing costs, which can be substantial impediments to home ownership among low-to-moderate income households and high-income households with little savings. The Smart Growth Areas Act, on the other hand, aims to change development decisions by making development in priority funding areas less expensive than development in other areas. Thus, developers have a financial incentive to build in priority funding areas. In addition, consumer demand for housing in priority funding areas ought to increase as prices decrease.

The Smart Growth Areas Act cannot stop sprawl in areas where either local governments or developers themselves choose to assume infrastructure costs. Neither developers nor local governments are forced to concentrate development in priority funding areas. Wal-Mart continued to construct big box retail stores outside of priority funding areas in suburban and rural areas following passage of the smart growth legislation.[295] Some have estimated that over the next twenty years, seventy-five percent of new development in the Baltimore region will take place *outside* of priority funding growth areas.[296] In fact, few counties in Maryland other than Baltimore County have succeeded in redirecting growth to priority funding areas.[297] A study by the Baltimore Regional Partnership in 2001 found that outside of Baltimore County, every suburban jurisdiction in the

291. The other three are the 1997 Rural Legacy Act, Financial Incentives for Qualified Brownfield Sites, and the Job Creation Tax Credit. MD. CODE ANN., NAT. RES. §§ 5-9A-01–5-9A-09 (2000); MD. CODE ANN., TAX–PROP. § 9-229 (2002) (providing property tax credit for revitalized brownfields); MD. CODE ANN., Art. 83A §§ 5-1101–5-1103 (2002) (providing a tax credit for businesses that create jobs in designated areas). *See also* MD. CODE ANN., Art. 83A § 5-1408 (2002) (providing financial support for brownfields remediation).

292. MD. CODE ANN., STATE FIN & PROC. § 5-7B-02 (2002).

293. The program was initated in 1997, discontinued in 2003, and resurrected in May 2005. *See* H.D. 449, 2005 Leg., 419th Sess. (Md. 2005) (enacted).

294. Parris N. Glendening, *Maryland's Smart Growth Initiative: The Next Steps*, 29 FORDHAM URB. L.J. 1493, 1504 (2002).

295. Lori Montgomery, *Maryland Land Use Weapon Backfires*, WASH. POST, Apr. 24, 2000, at B1 (cited in Cohen, *supra* note 289).

296. Editorial, *Sprawl: Region—Growth and Development*, BALT. SUN, Dec. 6, 2002, at A26.

297. BALTIMORE REGIONAL PARTNERSHIP, PLANNING FOR SPRAWL: A LOOK AT PROJECTED RESIDENTIAL GROWTH IN THE BALTIMORE REGION (2001).

region expected to build at least 5000 homes on over 10,000 acres of previously undeveloped land outside of its priority funding growth area over the next two decades.[298] The percentage of new development expected to take place in locations outside of priority funding areas ranged from nine percent, in Baltimore County, to almost sixty percent, in Carroll County.[299]

Despite the mix of incentives provided by smart growth legislation, Maryland maintains very little control over local zoning choices. Structural issues continue to create incentives for rural and suburban counties to chase property tax revenues by allowing large commercial development and residential subdivisions.[300] It is far from clear that Maryland effectively combats these problems, which result in developers and localities choosing to develop environmentally fragile lands, rather than reinvest in cities and older suburbs.

CONCLUSION

As it faces more intense development pressures than most regions in the country, New Jersey remains at the forefront of land use policy. However, the state must perform a difficult calculus in determining how best to direct development in an equitable and efficient manner. Its past experience with the State Plan demonstrates both the need for plan adoption and, more importantly, the incredible difficulty of plan *execution*. The State Plan has proven difficult to implement through exercise of pure executive or judicial authority. Public dissatisfaction with the state's land use policy made McGreevey's focus on sprawl an easy issue with which to shroud himself politically. Few enjoy a daily traffic jam on the way to work or believe that schools ought to be overcrowded, and deriding McMansions on three-acre plots is ingrained in the sensibility of many, even those who live in them.

In January 2003, McGreevey's approach to sprawl was well-received. As with all intractable public policy problems, however, the problems were easier to articulate than were the answers. A slew of legislative proposals came forth upon McGreevey's insistence that he would be the New Jersey governor who solved "sprawl." These proposals provide an instructive lens through which to consider whether oft-cited solutions can address the systemic problems that create inefficient and inequitable use of land. Too often, proposed solutions, like the Council on Affordable Housing's embrace of a watered-down version of "growth share," empower local governments without considering whether such empowerment is in the best interests of the state or region. The Highlands Act is

298. *See id.* at 1.

299. *See id.* at 2.

300. A December 2002 story in The Baltimore Sun describes Carroll County's struggle with residential development. *See Sprawl: Suburb—Growth and Development*, BALT. SUN, Dec. 2, 2002, at A12 (describing "a Faustian deal with developers, who ensnared the county in an addictive spiral of allowing more new homes to raise tax revenues to keep up with the rising demands of all the new residents.").

an example of legislation that increases the availability of regulatory tools while attempting to ensure that regional needs and interests are prioritized. Whether the Act succeeds in protecting New Jersey drinking water or even survives potential protracted litigation remains to be seen. It is clear, however, that the authority to regulate development derives from a *state's* police power—the need to protect the general welfare. Local land use regulation must, as the *Mount Laurel* court demanded, serve that general welfare. Where localities fail in that duty, their control over land use is hardly sacrosanct. Instead, states ought to legislate to ensure that the incentives faced by regional entities are matched by those faced by local governments. Where every locality is empowered to make development more difficult, but no local government creates the opportunity for developers to meet the market's growing demands, regional needs will not be met. Moreover, environmental goals are undermined by ineffective regulation.

In September 2003, while governmental agencies debated the implementation of regulatory fast-tracking, *Builder* magazine profiled a New Jersey developer, Matzel and Mumford, and described that company's efforts to adjust to New Jersey's regulatory environment.[301] Recognizing the "chilly climate" for development in New Jersey's suburbs, the company increasingly turned to redevelopment in cities and older suburbs as its primary mode of development. As recently as 1998, all of Matzel and Mumford's work was new single-family development on former greenfields. In 2003, the company predicted that in 2004, over half of its development would, in fact, be redevelopment.[302]

Foreclosing development in unsuitable areas is not sufficient to reduce sprawl. Development forces will result in growth occurring somewhere. It is incumbent upon the state to direct that growth to more suitable areas. As the *Builder* magazine profile indicates, New Jersey has had some success attracting developers to cities and older suburbs. Transit hubs in northern New Jersey have attracted investment in both residential and commercial developments. A study by the University Transportation Research Center at the City College of New York found that investments in transportation infrastructure "have spurred residential relocation and enabled economic growth."[303] In addition to finding improved economic indicators in areas targeted for infrastructure improvements, the study found that property values and residential and commercial locational preferences changed in response to investment in transit and highway infrastructure. In areas newly serviced by direct transit access to Manhattan, residential real estate values increased twenty percent.[304] Improved

301. David Holzel, *Transformation: Confronting New Jersey's Chilly Regulatory Climate, Matzel and Mumford Refocused its Business Strategy on Urban Redevelopment. But Can the Former Single-Family Builder Make it Work in a Hostile Market?*, 26 BUILDER 22, (Sept. 15, 2003).

302. *Id.*

303. ROBERT E. PAASWELL, NEW JERSEY'S LINKS TO THE 21ST CENTURY: MAXIMIZING THE IMPACTS OF INFRASTRUCTURE INVESTMENT (FINAL REPORT) (Dec. 2002).

304. *Id.* (cited in John Holusha, *Commuter Hub May Help Energize the Economy*, N.Y.

infrastructure in urban areas can make those areas more attractive to developers.

Similarly, in South Orange, LCOR, Inc., a for-profit developer "actively seeking to take advantage of improvements in mass transit,"[305] focuses on transit-oriented mixed-use development. A senior vice president at LCOR told the *New York Times*, "[w]e were suburban developers . . . We took cornfields and potato fields and built on them. But we are driven by barriers to entry, and barriers to entry in the suburbs are driving us back to the cities."[306]

Barriers to entry are relative. Where there exist significant barriers to entry in the suburbs and equally or more significant barriers in cities, development will not be redirected to cities. If, on the other hand, erection of barriers to entry is paired with incentives to develop in preferred development locations, government may succeed in redirecting development away from environmentally sensitive areas. Anecdotal evidence suggests that this pairing is both possible and highly effective. Maryland's Live Near Your Work program and the Maryland Smart Growth Areas Act are examples. Unfortunately, despite eased access to developing in preferred locations, barriers to entry outside of priority funding areas are as yet insufficient to prevent development there. Local land use controls, specifically zoning, fail to control development in rural and exurban areas.

Given New Jersey's experience, it is important to distinguish between policies that give localities more power to reject development and those that actually increase the state's power to make choices about the location of new development and redevelopment. Increasing local control over growth simply exacerbates the abuses of land use control that have resulted in New Jersey's current land use patterns. Unless the state provides effective incentives for local governments to act in the statewide or regional interest, it is both naïve and dangerous to insist that local control over land use planning can result in smarter growth. Continued insistence on home rule and refusal to revise the state's property tax policies will only worsen an already bad situation. In order to effectively address problems associated with low-density development spanning environmentally fragile areas, states must initiate a two-pronged attack, limiting development rights in some areas while enhancing them in others. Investing in urban infrastructure and making asset-building investments in cities requires political will on the state level, particularly in a state where less than ten percent of the population lives in urban centers. Nevertheless, building urban infrastructure and limiting exurban and rural development will be impossible to achieve without better aligning local, regional, and state land use goals.

TIMES, Aug. 13, 2003, at C6).

305. John Holusha, *New Vitality Around Old Railroad Stations*, N.Y. TIMES, Mar. 16, 2003, § 11, at 1.

306. *Id.*