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LAND USE LAW AND ACTIVE LIVING: OPPORTUNITIES FOR STATES TO ASSUME A LEADERSHIP ROLE IN PROMOTING AND INCENTIVIZING LOCAL OPTIONS

Patricia E. Salkin and Amy Lavine[1]

I. INTRODUCTION

With rates of obesity and related diseases on the rise, particularly in children,[2] the time is ripe to raise discussions about how our built and planned environments can encourage not just youth, but people of all ages, to lead healthier lifestyles. Criticism has long been raised that land use policies in the United States encourage the sprawling development of isolated, single-use areas and foster automobile reliance, thereby removing physical activity from the daily lives of children and adults. For a number of years, smart growth advocates have sought to encourage a modernization of outdated zoning laws that have separated incompatible land uses and that have led to

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[2] *See* Designing to Reduce Childhood Obesity (Active Living Research), Feb. 2005, at 1, http://www.activelivingresearch.org/alr/files/childhoodobesity021105.pdf (noting that the percentage of obese children has tripled in the past forty years). For more information about childhood obesity, *see* Mayo Clinic Staff, Weight Loss: Childhood Obesity, http://www.mayoclinic.com/health/childhood-obesity/DS00698 (last visited Mar. 30, 2008).

sprawl and poorly controlled development.[3] More recently, the "active living" movement has emerged as a subset of smart growth, focusing on the linkages between health and our artificial environment. The American Planning Association has identified a number of planning and zoning trends that interfere with active living communities:

- Conventional development patterns of urban sprawl—wherein housing, employment, schools, and shopping are at great distances from one another—have all but precluded any mode of transportation other than driving for the vast majority of Americans.
- Low-density development is not conducive to walking or bicycling and thus is not favorable to incorporating activity into daily routines.
- Smart growth calls for more mixed-use developments and districts, but often zoning regulations to promote mixed use end up being more complex to administer than conventional single-use subdivisions, strip shopping centers, or big box retail.
- Complex regulations often deter developers from exploring unconventional development types.
- Traffic safety has trumped pedestrian safety in many communities in the last half century, which has made a preponderance of streets and street environments in American cities and towns unsafe and hostile toward anything except the automobile.
- A lack of street connectivity is another problem. Isolated, single-use subdivisions that have no direct street or pedestrian connections to surrounding shopping areas, schools, or other destinations make it very difficult for people to choose to walk even when they are motivated to do so.
- And finally, there are small actions that have large

[3] *See generally* Marya Morris, *Zoning to Promote Health and Physical Activity*, 6 ZONING PRAC. 2 (2004).

> consequences. For example, municipalities may waive the developers' requirement to install sidewalks or, in some cases, not require sidewalks at all. Developers may argue that sidewalks add costs to development, and some neighbors may prefer the rural feel of a neighborhood without sidewalks, but such neighborhoods send a direct message: No one walks here. The health consequences of what may seem like a fairly inconsequential requirement need to be recognized.[4]

A growing number of voices have started to suggest that land use policies at all levels of government can play an important, if not necessary, role in improving public health by fostering the integration of physical activity into everyday life.[5] The land use approaches that states may take to encourage active lifestyles may be thought of as broadly falling into several categories:

- **Land Use Policies.** Local governments draw their power to enact zoning and other land use regulations from state authorizations, and the formulation of statutory language can have extensive impacts on local development policies. Even optional statutory provisions may effect changes at the local level by highlighting positive goals and clarifying the extent of the authority granted to municipalities. In the context of active living, some of the most important statutory land use policies are those contained in comprehensive planning statutes and subdivision regulations. Some states have gone

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[4] *Id.* at 3.

[5] *See, e.g.*, *A Primer on Active Living for Government Officials*, ACTIVE LIVING LEADERSHIP (Leadership for Active Living), Oct. 2005, http://www.leadershipforactiveliving.org/uploads/PDFs/brief_ALL_ActiveLivingPrimer_Oct2005.pdf; Jenny Sewell, *A Walking Path to Enlightenment*, STATE NEWS (The Council of State Governments), Apr. 2005, at 11, http://www.csg.org/pubs/Documents/sn0504.pdf. *See generally* Active Living By Design, Active Living Resources, http://www.activelivingbydesign.org/index.php?id=17 (last visited Mar. 30, 2008) (providing an extensive collection of materials relating to health issues and the built environment).

farther, specifically authorizing flexible zoning techniques and incentives that serve to encourage planning for healthy communities. The common element of all of these policies is to stem sprawling development by giving municipalities the tools to make smart, well-planned land use decisions.

- **Transportation Policies.** Transportation is possibly the most important aspect of the active living movement: the goal is to decrease reliance on automobiles and encourage "active transportation," *i.e.*, walking and bicycling. States can impact local transportation policies in a number of ways: through comprehensive planning elements; through guidance and technical assistance; by offering grants and incentives; and by coordinating state and local transportation projects. Decreasing automobile usage also has the positive effects of decreasing greenhouse gas emissions and mitigating respiratory disease-causing pollutants. In fact, the recent attention on strategies to address climate change has demonstrated the extent to which transportation policies are intertwined with the goal of fostering a sustainable and healthy environment.[6]
- **Urban Redevelopment Policies.** Urban areas and inner-ring suburbs that have higher densities of housing and commercial space are generally more conducive to walking and bicycling than more suburban areas made up of isolated, single-use developments. Studies, in fact, have shown that residents of older neighborhoods often lead more active lifestyles than residents in newer, lower density developments.[7] Unfortunately, urban areas and inner-ring suburbs are often beset with economic

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[6] *See generally* National Governors Association, *State Policies for Shaping Healthy, Active Communities: A Michigan Case Study*, (2005), *available at* http://www.nga.org/portal/site/nga/menuitem.9123e83a1f6786440ddcbeeb501010a0/?vgnextoid=70d761d4e1584010VgnVCM1000001a01010aRCRD; Lora A. Lucero, *The Lawyers Confront Hot Air*, 30 ZONING & PLAN. L. REP. 1 (2007).

[7] *See* Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*, 28 AM. J. PREVENTIVE MED. 96, 97 (2005), *available at* http://www.activelivingleadership.org/uploads/PDFs/article_AJPM_Feb2005.pdf.

problems, deteriorating properties and dwindling populations. State initiated redevelopment strategies, such as infill development and brownfield programs, can help to revitalize these areas, attracting residents who will have more opportunities for active living.

- **Open Space and Recreation Policies.** One corollary of encouraging the repopulation of established city centers is the preservation of open space and agricultural lands. The preservation of these areas has distinct environmental benefits,[8] and the preservation of farmland, together with local farmers' market programs, allows access to local produce. This reduces the need to rely on interstate and international food shipments, and provides communities fresher and potentially healthier crops. Open space and recreational areas also provide outlets for people to engage in physical activity. However, urban redevelopment plans will not forestall the consumption of undeveloped lands on their own, and state policies are necessary to ensure that natural lands are preserved. In this area, legislation pertaining to transfer of development rights programs and conservation easements is especially important.

These issues are thoroughly interrelated and cannot be addressed in isolation. The following discussion focuses on a number of state tools that can be used to foster smart growth and active living policies. However, it should not be forgotten that improving patterns of development and the health of people in our communities are objectives that require input and participation from all levels of government, as well as from the public.

II. STATE COMPREHENSIVE PLAN REQUIREMENTS

Most state statutes require that zoning regulations be developed and implemented in accordance with a

[8] *See* AM. PLAN. ASS'N, POLICY GUIDE ON ENDANGERED SPECIES AND HABITAT PROTECTION (1999), *available at* http://www.planning.org/policyguides/endanger.htm.

comprehensive land use plan (sometimes called a "general plan" or a "master plan"). Typically, a comprehensive plan represents an articulation of a shared vision for the future growth and development of a municipality. It often contains a series of elements designed to address particular issues relevant to future growth. Depending upon the state, some of these elements are required by statute, while others may be designated as optional. Common comprehensive plan elements include: demographic trends; housing stock and future housing needs; public infrastructure and anticipated future infrastructure needs; existing recreational facilities and anticipated needs; transportation infrastructure; economic development goals; open space; and lands dedicated for agricultural use.[9]

The statutory formulation of issues that must or may be addressed in comprehensive plans can have an important impact on whether growth trends will support active, safe, and healthy communities. States should take particular care to include specific language in their statutes encouraging local governments to consider health and physical activity during the comprehensive planning process. While a number of common comprehensive planning elements may be supportive of active living by providing local governments with the tools to plan for smart development, the influence of comprehensive planning elements on improving communities' health will be greater if active living principles are spelled out directly, in the clearest possible language.

A. THE TRANSPORTATION ELEMENT

While states may require comprehensive plans to include a transportation element that considers current and future transportation needs, most focus on access management and infrastructure for automated modes of transportation. Transportation planning requirements for mass transit have also become fairly common,[10] and while extending access to

[9] *See, e.g.*, AM. PLAN. ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 7-69 to 7-177 (Stuart Meck ed., 2002) [hereinafter LEGISLATIVE GUIDEBOOK], *available at* http://www.planning.org/guidebook/index.htm#1.

[10] *See* discussion *infra* Part IV.E.1 (concerning transit-oriented development).

mass transit plays an important part in decreasing automobile reliance, it falls short of encouraging active human mobility. Most state level transportation elements neglect to reflect the fact that bicyclists and pedestrians are as much users of transportation systems as are motorists. While the omission of bicycle and pedestrian interests from enabling legislation does not preclude local governments from addressing these transportation methods, statutes that direct or suggest consideration of these issues are more likely to encourage planning for them.

A number of states have, indeed, specified that the transportation element should include a pedestrian and bicycle component. For example, a Washington statute makes clear that its bicycle and pedestrian planning requirements are intended to "encourage enhanced community access and promote healthy lifestyles."[11] Arizona,[12] Connecticut,[13] Maryland,[14] Nevada[15] and Wisconsin[16] have similar statutes, and

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[11] WASH. REV. CODE § 36.70A.070 (6)(a)(vii) (2008) (requiring, as an element of the comprehensive plan, a "[p]edestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors....").

[12] ARIZ. REV. STAT. ANN. § 11-821(C)(2) (2007) (requiring counties with populations of more than 125,000 to have a circulation element "consisting of the general location and extent of existing and proposed...bicycle routes....").

[13] CONN. GEN. STAT. ANN. § 8-23(d) (West Supp. 2007) (requiring municipal conservation and development plans to "provide for a system of principal thoroughfares, parkways, bridges, streets, sidewalks, multipurpose trails and other public ways...and identify areas where it is feasible and prudent to...have compact, transit accessible, pedestrian-oriented mixed use development patterns....").

[14] MD. ANN. CODE art. 66B, § 3.05(a)(4)(iii)(2) (2003) (requiring the comprehensive plan to contain a transportation element that must "[p]rovide for bicycle and pedestrian access and travelways").

[15] NEV. REV. STAT. ANN. § 278.160(1)(q) (LexisNexis 2002) (including an optional transit element that "[s]how[s] a proposed multimodal system of transit lines, including mass transit, streetcar, motor-coach and trolley coach lines, paths for bicycles and pedestrians, satellite parking and related facilities.").

[16] WIS. STAT. § 66.1001(2)(c) (2007) (defining the transportation element as a "compilation of objectives, policies, goals, maps and programs to guide the

recently enacted legislation in South Carolina[17] will add these issues to the transportation element. Other states, like Florida[18] and Oregon,[19] reach the same result by promulgating detailed regulations concerning their comprehensive plan elements. Regardless of its form,[20] language requiring comprehensive plans to address bicycle and pedestrian issues encourages local governments to develop quality sidewalks, bicycle paths and well connected street systems—all things that are missing in many automobile-oriented communities.[21]

In addition to clarifying the need to plan communities that promote physically active methods of transportation (rather than reliance on motor vehicles), transportation elements that place more emphasis on non-automated uses should also encourage the planning of transportation systems that are safe for all types of users. Taking traffic safety into account, by, for example, calming traffic, installing sidewalks and improving crosswalk design, is especially important for children, seniors and disabled persons.[22]

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future development of the various modes of transportation, including... bicycles... [and] walking....").

[17] 2007 S.C. Acts 31, Section 2 (amending S.C. CODE ANN. § 6-29-510) (requiring "a transportation element that considers transportation facilities, including...pedestrian and bicycle projects....")

[18] FLA. ADMIN. CODE ANN. r. 9J-5.019(4)(c)(5) (2007) (listing as a policy, the "[e]stablishment of land use and other strategies to promote the use of bicycles and walking").

[19] OR. ADMIN. R. 660-012-0020(2)(d) (2007) (requiring transportation system plans to include "[a] bicycle and pedestrian plan for a network of bicycle and pedestrian routes throughout the planning area").

[20] The regulatory approach may be preferred over solely statutory direction, as it allows states to provide more specific and detailed requirements. *See* JERRY WEITZ, AM. PLAN. ASS'N , TOWARD A MODEL STATUTORY PLAN ELEMENT: TRANSPORTATION (1997), http://www.planning.org/PEL/commentary/transportation.htm (last visited Apr. 8, 2008).

[21] *See generally* Morris, *supra* note 3.

[22] *See generally* NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, NATIONAL STRATEGIES FOR ADVANCING CHILD PEDESTRIAN SAFETY (Richard A. Schieber & Maria E. Vegega eds., 2001),

Most state comprehensive planning requirements do not specifically address pedestrian and bicyclist safety, but often state guidance does. The Wisconsin Department of Transportation, for example, has developed a number of resources to aid municipalities in planning for transportation, and these materials stress the importance of considering safety issues in relation to non-motor vehicles uses.[23] Pedestrian and bicycle safety issues are becoming more prevalent in planning dialogues as well. A bill currently under consideration in California would require the circulation element of comprehensive plans to "accommodate the safe and convenient travel of users of streets, roads, and highways, defined to include motorists, pedestrians, bicyclists, children, persons with disabilities, seniors, movers of commercial goods, and users of public transportation, in a manner that is suitable to the rural, suburban, or urban context of the general plan."[24]

B. THE "LAND USE" ELEMENT

While transportation planning and the provision of recreational and open spaces are essential to encouraging people to adopt healthy lifestyles, it is also necessary to ensure that the locations of different types of land uses, in relation to one another, maximize the potential for encouraging healthy habits. As a recently enacted South Carolina statute notes, the transportation element "must be developed in coordination with the land use element[.]"[25] To give a simple example, children will not walk to a school or park located far from their

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http://www.cdc.gov/ncipc/pedestrian/newpedbk.pdf (last visited Apr. 8, 2008).

[23] *See* WIS. DEPT. OF TRANSP., YOUR COMPREHENSIVE PLANNING EFFORTS AND THE WISCONSIN DEPARTMENT OF TRANSPORTATION, http://www.dot.wisconsin.gov/localgov/docs/landuse-assistance.pdf (last visited Mar. 30, 2008); WIS. DEPT. OF TRANSP., TRANSPORTATION PLANNING RESOURCE GUIDE: A GUIDE TO PREPARING THE TRANSPORTATION ELEMENT OF A LOCAL COMPREHENSIVE PLAN (2001), http://www.dot.wisconsin.gov/localgov/docs/planningguide.pdf (last visited Mar. 30, 2008).

[24] Assemb. B. 1358, 2007-2008 Sess. (Cal. 2007).

[25] S.C. CODE ANN. § 6-29-510(D)(8) (Supp. 2007).

neighborhood, regardless of how many pedestrian accommodations are made.

Traditional zoning concepts tended to lead to a separation of uses, and this trend was exacerbated during the latter part of the twentieth century as sprawling development became the norm. Today, in many places, the distance required to travel from home to work, or to services and shopping (*e.g.*, to get a haircut or pick up small groceries) is simply too great to make walking or bicycling a practical transportation option.

One method to address this problem is for states to encourage the planning of orderly and compact communities that are accessible to pedestrians and bicyclists. State comprehensive planning statutes often mandate a "land use" element, which generally states the goals and objectives for the development of public and private lands within a municipality.[26] While some statutes are rather vague as to what should be considered as part of the land use element, others provide detailed lists of considerations that must be made as part of this analysis. These states often direct that the land use element should include an inventory of land uses, including, among other things: general zones; historical sights; critical environmental areas; parks; public buildings; business and historical districts; downtowns; and redevelopment areas.[27] Land use plans may also require information related to demographics, such as the extent and direction of expected population growth.[28] Plans that consider such a broad array of land uses are truly *comprehensive*, and through this type of inventorying and mapping, communities are able to better plan for future uses, including those types of developments that will foster healthy communities and active living.

A few states have augmented their land use element requirements to include policies that support active living. Washington's statute, for example, states that "[w]herever possible, the land use element should consider utilizing urban

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[26] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-79 (describing the American Law Institute's Model Land Development Code).

[27] *See id.* at § 7-204 and related commentary, pp. 7-78 to 7-84.

[28] *Id.*

planning approaches that promote physical activity."[29] More recently, states have begun to include within the land use element policies promoting mixed-use developments (which locate residential and commercial areas within close distances of each other) and transit-oriented developments (which seek to encourage growth around alternative transit terminals, thereby decreasing automobile dependence and increasing walking and bicycling). Arizona's comprehensive planning statute, for example, requires counties with more than 200,000 residents to include in their plans, specific programs and policies intended to encourage compact development, multi-modal transportation and mixed-use development.[30] In Nevada, master plans for certain local governments must include a land use element that addresses mixed-use and transit-oriented developments.[31] And Wisconsin's comprehensive planning statute states that the land use element should consider opportunities for redevelopment.[32] Even when these considerations are optional, statutory language suggesting the consideration of such policies may encourage local governments to look to these policies and goals.

C. THE COMMUNITY FACILITIES ELEMENT

Community facilities, as defined in the American Planning Association's Smart Growth Legislative Guidebook,[33] include "the physical manifestations—buildings, land, interests in land (e.g. easements), equipment, and whole systems of activities—of governmental services on behalf of the public."[34] This element is broad, covering such public facilities as sewer and water lines,

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[29] WASH. REV. CODE § 36.70A.070(1) (2008).

[30] ARIZ. REV. STAT. ANN. § 11-821 (2001).

[31] NEV. REV. STAT. ANN. § 278.160(1)(f) (LexisNexis 2005).

[32] WIS. STAT. § 66.1001(2)(h) (2007).

[33] The Legislative Guidebook is "the culmination of APA's seven-year Growing Smart project, an effort to draft the next generation of model planning and zoning legislation for the U.S." Am. Plan. Ass'n, *Growing Smart*, http://www.planning.org/growingsmart (last visited Mar. 30, 2008).

[34] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-111.

police and fire stations, and parks, schools and government buildings. It may also include facilities operated by private or non-profit organizations that offer community amenities, such as botanical gardens, community centers, museums and universities. The Legislative Guidebook suggests that the community facilities element should be considered in conjunction with the land use element in such a manner as to coordinate various public uses with planned patterns of development.[35] The placement of some community facilities, such as water and sewer lines, will have a direct impact on the direction and intensity of future development. Planning for other types of community facilities, such as libraries, playgrounds and schools, will influence neighborhood character and contribute to the quality of life of residents.

The siting of public buildings, especially schools, is particularly important to shaping communities that facilitate active living. Schools are integral to community design and character: whether new schools are located near existing development or on the suburban fringe reflects upon communities' goals in preserving open space and limiting sprawl; and the choice to renovate older schools rather than to build new ones encourages community collaboration and supports neighborhood character.[36] So-called "smart growth schools" tend to be on the small side, and they are located in the neighborhoods that they serve.[37] Close proximity gives students the option of walking or bicycling to school, and school recreational facilities, such as playing fields and playgrounds, can be used by students and others community members when schools are not in session. In addition to requiring school siting to be considered during the comprehensive planning process, states can influence smart growth school siting policies by

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[35] *Id.* at § 7-206(2)(a) at 7-112.

[36] *See* COUNCIL OF EDUC. FACILITY PLANNERS INT'L, SCHOOLS FOR SUCCESSFUL COMMUNITIES: AN ELEMENT OF SMART GROWTH 13-15 (2004), *available at* http://www.epa.gov/dced/pdf/SmartGrowth_schools_Pub.pdf [hereinafter SCHOOLS FOR SUCCESSFUL COMMUNITIES].

[37] Barbara McCann & Constance Beaumont, *Build 'Smart'*, AM. SCH. BD. J. (2003), *available at* http://www.smartgrowthamerica.org/SGA%20School%20Sprawl.pdf .

encouraging collaboration between school officials and planners, removing or relaxing the funding formulas that determine whether renovation is financially possible, directing state funds for capital improvements to older schools, and by reducing or eliminating minimum acreage requirements for schools.[38]

The community facilities element of the comprehensive plan may also cover parks and recreational areas, although these uses are often considered within a separate comprehensive plan element. The parks and recreation component of many states' comprehensive planning legislation consists of a basic requirement that recreational uses be considered during the planning process,[39] but a few states have enacted more specific requirements. In Washington, for example, local governments are directed to conduct an evaluation of current opportunities for recreation and to estimate and plan for their communities' future needs for parks and recreational spaces.[40] In Maine, planners must consider public access to beaches in addition to inventorying existing recreational areas and providing for future public needs.[41] And Massachusetts law requires local governments to formulate "policies and strategies for the management and protection" of open space and recreational areas.[42] Additionally, numerous state funding programs support the creation and maintenance of neighborhood parks, playgrounds, fields, pools, community gardens, recreation centers, zoos, nature preserves and other recreational facilities.[43]

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[38] SCHOOLS FOR SUCCESSFUL COMMUNITIES, *supra* note 36, at 27-29.

[39] *See, e.g.*, DEL. CODE ANN. tit. 9, § 2656(g)(5) (2007); FLA. STAT. ANN. § 163.3177(6)(e) (West 2006); IDAHO CODE ANN. § 67-6508(j) (2006); IND. CODE ANN. § 36-7-4-503(2)(M) (LexisNexis 2004); *and* MINN. STAT. ANN. § 473.859 subd. 3(3) (West 2001).

[40] WASH. REV. CODE § 36.70A.070(8) (2008). *See also* NEV. REV. STAT. ANN. § 278.160(1)(j) (LexisNexis 2002).

[41] ME. REV. STAT. ANN. tit. 30-A, § 4326(1)(F) (1996).

[42] MASS. GEN. LAWS ch. 41, § 81D(6) (West 2004).

[43] For a sampling of these types of initiatives, *see* N.Y. State Office of Parks, Recreation and Historic Preservation, Grant Program Information, http://nysparks.state.ny.us/grants/ (last visited Mar. 30, 2008); Cal. State

Recreational areas and parks in themselves provide opportunities for the public to engage in physical activities, but states can also provide guidance to local governments to better plan for these uses so as to encourage active living. Connecting parks and recreational areas to nearby land uses by trails and greenways, for example, facilitates bicycle and pedestrian use, and design guidelines that make parks safer and more aesthetically pleasing may result in increased use.[44] The Washington State Department of Community, Trade and Economic Development has created an informative guide to planning for parks and recreation that emphasizes these concepts, as well as the need for public involvement in the planning of recreational facilities.[45]

D. ELEMENTS DESIGNED TO PRESERVE OPEN SPACE AND NATURAL AREAS

Comprehensive plans take a variety of approaches to planning for the preservation of open space and natural areas. The land use and community facilities elements may take open space into account, but there are a variety of other methods that states may use to include preservation goals in the comprehensive planning process. The Legislative Guidebook, for example, includes elements for critical and sensitive areas,[46] natural hazards,[47] and agriculture, forest and scenic

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Parks, Grants and Local Services, http://www.parks.ca.gov/?page_id=1008 (last visited Mar. 30, 2008); *and* Tex. Parks and Wildlife Department, TRPA Grant Programs, http://www.tpwd.state.tx.us/business/grants/trpa/ (last visited Mar. 30, 2008).

[44] *See* ACTIVE LIVING BY DESIGN, PARKS, TRAILS AND GREENWAYS, *available at* http://www.activelivingbydesign.org/fileadmin/template/documents/factsheet_ptg_final.doc.

[45] INTERAGENCY COMM. FOR OUTDOOR RECREATION, WASH. STATE DEP'T OF CMTY., TRADE AND ECON. DEV., PLANNING FOR PARKS, RECREATION, AND OPEN SPACE IN YOUR COMMUNITY (2005), http://www.cted.wa.gov/_CTED/documents/ID_1691_Publications.pdf (last visited Apr. 8, 2008).

[46] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-139.

[47] *Id.* at 7-144.

preservation.[48] Whatever form conservationist objectives take in a comprehensive plan, preserving open and natural spaces complements active living policies by serving the functions of promoting environmental stewardship (and thereby mitigating the effects of pollution), directing growth toward already developed areas where active transportation is more feasible, and providing opportunities for such physical activities as hiking, canoeing, and fishing.

III. SUBDIVISION CONTROLS

The common subdivision, which generally includes only one type of land use, has become the conventional mode of development in this country. And because most Americans live, work, or visit land in subdivisions on a regular basis, ensuring that new subdivisions are designed with a focus on active living should be a priority for the states. State regulations control and influence many of the requirements needed to obtain approval of subdivision plats—a prerequisite to subdivision construction. This section explains some of the intersections between subdivision control and planning for active living.

A. SUBDIVISION PLANNING

Most states require subdivisions to comply with underlying zoning,[49] and many states also require consistency with the comprehensive plan.[50] State statues that require consistency between subdivisions and underlying local plans may be particularly important for municipalities that have taken steps to make their comprehensive plans more supportive of active living. As the Supreme Court of California noted in 1979, the "approval of subdivisions which are inconsistent with a locality's

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[48] *Id.* at 7-156.

[49] 8 PATRICK ROHAN, ZONING AND LAND USE CONTROLS, 45-8 (1992).

[50] *See, e.g.*, CAL. GOV'T. CODE § 66473.5 (West 1997); R.I. GEN. LAWS § 45-23-33(3) (1999); OR. REV. STAT. ANN. § 215.050(2) (West 2003); WASH. REV. CODE ANN. § 36.70.680 (West 2003); ME. REV. STAT. ANN. tit. 30-A, § 4404(9) (1996).

general plan 'subverts the integrity...of the local planning process.'"[51]

State subdivision laws typically provide general authority for localities to adopt regulations governing the basic planning and design aspects of subdivisions. These statutes often authorize local governments to provide requirements for street widths and layouts, water systems and other utilities, the provision of open space and recreational areas, minimum lot sizes and setbacks, as well as requirements for curbs, sidewalks and gutters.[52] These authorizations allow municipalities to regulate subdivisions so as to ensure that they harmonize with their surroundings. This authority is essential to integrating a subdivision into a community planned for active living, as municipalities use such measures to ensure that subdivisions provide welcoming environments to bicyclists and pedestrians. For example, while subdivisions often contain many dead-end streets and few connections to neighboring developments, municipalities can use their subdivision regulation authority to require connecting streets and pedestrian infrastructure. Similarly, subdivision regulations allow municipalities to require the installation of sidewalks where appropriate, even if developers and future residents might not desire them.

Although statutory authorizations for subdivisions are typically broad, allowing municipalities to tailor local regulations to their particular needs, states can provide guidance in statutory language and other resources to help local governments devise appropriate subdivision laws. New Hampshire, for example, provides a handbook on subdivision and site plan review that addresses such topics as pedestrian safety, street design, curbing, sidewalks and bicycle paths.[53] More states should provide this type of guidance, encouraging local governments to adopt subdivision regulations that require

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[51] Woodland Hills Residential Ass'n v. City Council, 593 P.2d 200, 210 (Cal. 1979).

[52] ROHAN, *supra* note 49, at 45-11.

[53] SW. REGION PLANNING CTR., SUBDIVISION AND SITE PLAN REVIEW HANDBOOK (2001), http://www.nh.gov/oep/resourcelibrary/referencelibrary/s/siteplanreview/documents/subdivisionandsiteplanreviewhandbook.pdf (last visited Apr. 8, 2008).

sidewalks, traffic calming, connected streets and other pedestrian-friendly facilities. A few states also specifically require certain environmental concerns to be taken into consideration during the subdivision review process.[54] Other states should look to these statutes as models for encouraging subdivision planning for healthy living as well.

B. EXACTIONS AND IMPACT FEES

Exactions and impact fees have long been used by municipalities to obtain community amenities from subdividers. Statutorily authorized exactions may require developers to provide public improvements or to install public facilities in order to obtain subdivision plat approval and, in some states, impact fees may be assessed in lieu of exactions. Although they have faced many constitutional takings challenges, exactions remain permissible under the Supreme Court's *Nollan*[55] and *Dolan*[56] decisions. These cases require exactions to have an "essential nexus" with the negative effects of the proposed development that is also "roughly proportional" in both nature and extent. Within the area of subdivision regulation, exactions and impact fees are used to ensure that developers provide the public improvements and facilities made necessary by the new residents and users drawn to their subdivisions.

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[54] *See, e.g.*, ME. REV. STAT. ANN. tit. 30-A § 4404 (1996) (pollution, erosion, and aesthetic, cultural and natural values); CONN. GEN. STAT. ANN. § 8-25 (West 2001) (erosion and energy conservation).

[55] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). In *Nollan*, the Supreme Court held that requiring beachfront homeowners to grant a public easement across their shoreline in order to receive a building permit was unconstitutional. According to the Court's reasoning, the state's interest in preserving the public's view of the seashore had no relationship to the exaction, which sought to grant the public the right to use the seashore.

[56] Dolan v. City of Tigard, 512 U.S. 374 (1994). *Dolan* presented a more difficult case than *Nollan*: a storeowner applied for a permit to enlarge her store and, in response, the city required her to dedicate land for a bike path. According to the city, the bike path would help to alleviate the increased traffic expected to be caused by the store. The Supreme Court found that even if a nexus existed between the effects of the proposed development and the exaction, it was not roughly proportional.

Exaction statutes have traditionally placed an emphasis on infrastructure, granting municipalities the authority to condition subdivision plat approval on the provision and improvement of public streets, sidewalks and utilities. A number of states also authorize municipalities to exact other public amenities, such as land for parks and recreational facilities, trails and bicycle paths, and local transit facilities.[57] These types of requirements have generally been upheld, with the courts finding that parks and recreational trails as well as new streets and sewer lines are made necessary by new development.[58] The same reasoning could be applied to exactions made for the provision of pedestrian and bicycle infrastructure.

Exactions and impact fees are important tools for municipalities, and states must be sure to grant specific and clear authorizations.[59] In the past, developers have successfully challenged exactions as being unauthorized exercises of power when the public benefit demanded was not specifically

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[57] ROHAN, *supra* note 49, at 45-16.

[58] In *Patenaude v. Town of Meredith*, 392 A.2d 582, 586 (N.H. 1978), for example, the plaintiff argued that an open space condition imposed by the town constituted a taking of his land without compensation. The court's response was simple: "when an owner intends to develop his land in a manner that will result in a significant number of people forming a community on that land, adequate recreational space is a necessity.... Thus the limitation in use is necessitated by the subdivision itself and need not be compensated." *See also* Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 610 (Cal. 1971) (stating that "[t]he elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. Manifestly governmental entities have the responsibility to provide park and recreation land to accommodate this human expansion despite the inexorable decrease of open space available to fulfill such need."); Cimarron Corp. v. Bd. of County Comm'rs, 563 P.2d 946 (Colo. 1977); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970); Krughoff v. City of Naperville, 354 N.E.2d 489 (Ill. App. Ct. 1976); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (S.C. 1990); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); *and In re* Denio, 608 A.2d 1166 (Vt. 1992).

[59] *See* AM. PLANNING ASS'N, POLICY GUIDE ON IMPACT FEES, *available at* http://www.planning.org/policyguides/impactfees.html (last visited Mar. 30, 2008).

mentioned in the enabling statute.[60] Clear authorizing language also supports the position that exactions and impact fees for public amenities other than infrastructure are necessitated by the growth caused by development.

IV. FLEXIBLE LAND USE PLANNING TECHNIQUES

Although comprehensive planning and subdivision regulations help municipalities to address some of the conditions that cause sprawl and support sedentary lifestyles, a number of flexible zoning and land use planning techniques are available which allow municipalities to direct development in a manner that furthers healthy living. While many of these tools can be implemented at the local level without specific state authorization, statutory language is important for a number of reasons: it clarifies the extent of planning and zoning authority held by local governments; it encourages local governments to consider alternative forms of land use regulation; and it may provide a starting point from which municipalities can develop other innovative solutions to their particular problems.

A. CLUSTER DEVELOPMENTS AND CONSERVATION SUBDIVISIONS

Cluster development ordinances may give municipalities the ability to allow developers to exceed density restrictions if the developer preserves areas of open space by so doing. In effect, development is "clustered" on a small portion of the property, leaving the rest undeveloped or as manicured open space. Cluster development is preferable to conventional subdivision development in number of respects, but most notably because of its ability to preserve large areas of open space. In addition to the environmental benefits of open space preservation, residents

[60] *See, e.g.*, Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (finding that the municipality had no authority to require sidewalks, curbs and gutters in the absence of specific enabling legislation); Eyde Constr. Co. v. Charter Twp. of Meridian, 386 N.W.2d 687 (Mich. Ct. App. 1986) (holding that the township lacked authority to require the provision of recreational facilities); City of Montgomery v. Crossroads Land Co., 355 So.2d 363 (Ala. 1978); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App.1983); Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273 (Tex.Civ.App.1980).

who live in cluster developments have access to the passive recreational opportunities provided by that open space such as hiking, biking and jogging.

States can encourage the use of clustering in a number of ways: by specifically authorizing localities to adopt cluster development ordinances; by adopting statutory language supporting the use of cluster developments;[61] by providing technical guidance; and through incentives.[62] Indeed, states have taken different approaches to clustering. Some states simply authorize local governments to enact cluster zoning ordinances without addressing more detailed issues.[63] In other states, authorizing legislation may specify the maximum lot size in a cluster development,[64] the minimum total area of the development property,[65] or the minimum area of the property

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[61] Montana's subdivision statute, for example, indicates that its purpose is to "promote cluster development approaches[.]" MONT. CODE ANN. § 76-3-102(7) (2005). *See also* ME. REV. STAT. ANN. tit. 30-A § 4326(3-A)(A)(2) (2007) (requiring local governments in rural areas to adopt appropriate land use policies and including clustering as an example of such).

[62] Regulations adopted under the Montana clustering statute, for example, may include expedited procedures and other incentives. MONT. CODE ANN. § 76-3-509(3)(a)-(b) (2005). Stuart Meck, editor of the Legislative Guidebook, has noted that provisions requiring floodplains, wetlands and other sensitive environmental areas to be included in preserved open space, in conjunction with provisions relating to calculating the net buildable area, may serve as an incentive by resulting in a greater number of buildable units than would be available according to the underlying zoning. Stuart Meck, *Cluster Development: Modern Application of an Old Town Form*, 8 ZONING PRACTICE 2 (2007).

[63] *See, e.g.*, N.H. REV. STAT. ANN. 674:21(I)(f) (2007); S.C. CODE ANN. § 6-29-720(C)(1) (2004); *and* WASH. REV. CODE ANN. § 36.70A.177(2)(b) (West 2003).

[64] *See, e.g.*, COLO. REV. STAT. ANN. 30-28-403 (West 2007) (requiring lots to be less than thirty-five acres in size); MONT. CODE ANN. § 76-3-509(2)(a) (2005) (requiring municipalities to enact maximum lot sizes).

[65] Massachusetts delegates the authority to enact minimum property size to municipalities. MASS. GEN. LAWS ANN. ch. 40A, § 9 (West 2004). In Montana, cluster developments do not have minimum total area requirements, but they must contain at least five lots. MONT. CODE ANN. § 76-3-103(2) (2005).

required to be left as open space.[66] Massachusetts specifies that land left as open space must be either dedicated to the municipality or to a non-profit organization for the purpose of conserving the property.[67] Similarly, open space in cluster developments in Montana must be subject to an irrevocable conservation easement.[68] Some states, however, such as New York, while allowing for cluster subdivisions, do not authorize increased density as an incentive in exchange for the clustered design.[69]

Although cluster development has been used as a planning tool since the early twentieth century,[70] rural and suburban residential cluster developments have become increasingly popular in recent years, and they have garnered the name "conservation subdivision." The term is intended to emphasize the open space conservation aspect of clustering, and model conservation subdivision ordinances provide guidelines for compact residential developments that provide large areas of open and natural space. Wisconsin has enacted conservation subdivision authorizing legislation,[71]and Pennsylvania's smart growth program, Growing Greener, has created a conservation subdivision handbook.[72] In Georgia, the Department of Community Affairs offers guidance on the creation of conservation subdivision ordinances, including model language,

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[66] *See, e.g.*, COLO. REV. STAT. ANN. 30-28-403 (West 2007) (requiring at least two thirds of the entire property to be preserved); CONN. GEN. STAT. ANN. § 8-18 (West 2001) (requiring one third of the property to be preserved as open space, but allowing municipalities to enact more stringent requirements).

[67] MASS. GEN. LAWS ANN. ch. 40A, § 9 (West 2004).

[68] MONT. CODE ANN. § 76-3-509(2)(c) (2005).

[69] N.Y. GEN. CITY LAW § 37(3)(b) (McKinney's 2003).

[70] Meck, *supra* note 62, at 2.

[71] WIS. STAT. § 66.1027.

[72] NATURAL LANDS TRUST, GROWING GREENER: CONSERVATION BY DESIGN (2001), http://www.natlands.org/uploads/document_33200515638.pdf (last visited Apr. 8, 2008).

implementation guides and case studies.[73] Massachusetts' Smart Growth Toolkit also provides local governments with helpful information and a model ordinance for residential subdivision.[74]

B. PLANNED UNIT DEVELOPMENTS AND TRADITIONAL NEIGHBORHOOD DEVELOPMENTS

Planned Unit Development (PUD) ordinances originated in the 1950s and 60s as a method to introduce more flexibility into the procedures applicable to large developments, which had been stifled by traditional zoning and subdivision regulations. The PUD approach grew from the clustering concept, but extended it beyond clustering in terms of density to allow developers to deviate from use restrictions as well.[75] Under the PUD approach, developers may mix uses on particular lots when doing do so would not otherwise be permitted, so long as the uses are allowed under the zoning designations of some of the lots in the development. In addition to the flexibility offered to developers, PUDs give community planners a certain degree of flexibility in requiring developers to provide specific community amenities during the PUD negotiation process.[76] These amenities might include, among other things, the preservation

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[73] Georgia Department of Community Affairs, Toolkit of Best Practices, Conservation Subdivision, http://www.dca.state.ga.us/toolkit/ToolDetail.asp?GetTool=31 (last visited Mar. 30, 2008).

[74] Massachusetts uses the term "open space residential development" rather than "conservation subdivision," but the concepts are similar. *See* Mass. Executive Office of Energy and Envtl. Affairs, Open Space Residential Design (OSRD), http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-osrd.html (last visited Mar. 30, 2008); MASS. EXECUTIVE OFFICE OF ENERGY AND ENVTL. AFFAIRS, OPEN SPACE RESIDENTIAL DEVELOPMENT MODEL BYLAW, http://www.mass.gov/envir/smart_growth_toolkit/bylaws/OSRD-Bylaw.pdf (last visited Mar. 30, 2008).

[75] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 8-74 to 8-75. It should be noted that, although the clustering and PUD concepts are similar, clustering places a larger emphasis on the preservation of open space than does PUD legislation, which tends to focus on flexibility in planning in exchange for the provision of community amenities.

[76] *Id.*

of open space, the creation of pedestrian and bicyclist infrastructure or the construction of recreational facilities.

As with cluster zoning statutes, the states have taken various approaches to PUD legislation, with many having enacted no specific PUD authorization at all. A number of states have made specific statutory declarations concerning the benefits of PUDs.[77] Vermont's statute specifically notes that one of the purposes of PUDs may be to "encourage compact, pedestrian-oriented development."[78] In addition to standards relating to permitted uses, densities, lot sizes and the like, a few states have authorized local governments to enact requirements regarding open space,[79] and design and construction standards.[80] Importantly, some statutes require PUDs to be consistent with comprehensive plans.[81] This ensures that the flexibility offered by the PUD planning process does not undermine progressive

[77] *See, e.g.*, FLA. STAT. ANN. § 163.3202(3) (West 2006) (noting that "[t]his section shall be construed to encourage the use of innovative land development regulations which include...planned unit development...."); NEB. REV. STAT. ANN. § 19-4401(1) (LexisNexis 1999); NEV. REV. STAT. ANN. § 278A.020 (LexisNexis 2002) (stating that "[t]he legislature finds that the provisions of this chapter are necessary...in an era of increasing urbanization and of growing demand for housing of all types and design; to provide for necessary commercial and industrial facilities conveniently located to that housing; [and] to encourage a more efficient use of land...."); N.J. STAT. ANN. § 40:55D-2(k) (West 1991) (expressing the intent to "encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site"); *and* N.Y. GEN. CITY LAW § 81-f (McKinney's 2000) ("Planned unit development district regulations are intended to provide for residential, commercial, industrial or other land uses, or a mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved....").

[78] VT. STAT. ANN. tit. 24 § 4417(a)(1) (2007).

[79] *See, e.g.*, COLO. REV. STAT. 24-67-105(6)(b) (2007); IDAHO CODE ANN. § 67-6515 (2006); NEB. REV. STAT. ANN. § 19-4401(1) (LexisNexis 1999); NEV. REV. STAT. ANN. § 278A.120 (LexisNexis 2002); *and* VT. STAT. ANN. § 4417 (2007).

[80] *See, e.g.*, COLO. REV. STAT. § 24-67-105(7) (2007); MICH. COMP. LAWS § 125.3503.

[81] *See, e.g.*, COLO. REV. STAT. § 24-67-104 (1)(f) (2007); NEB. REV. STAT. § 19-4401 (1) (LexisNexis 2007); N.Y. GEN. CITY LAW § 81-f (Gould 2007); VT. STAT. ANN. tit. 24, § 4417 (2007).

land use plans that incorporate smart growth and active living principles.

The PUD concept has been adopted as a smart growth tool under the moniker of "traditional neighborhood development." The concept of traditional neighborhood design is to encourage development that incorporates mixed uses, pedestrian infrastructure and design elements (such as small setbacks and architectural details) so as to mimic traditional neighborhoods (as opposed to the now ubiquitous residential subdivision, office park or strip mall). Traditional neighborhood development statutes have been enacted in Pennsylvania[82] and Wisconsin,[83] and Massachusetts has developed a traditional neighborhood design model ordinance as part of its smart growth program.[84] Virginia has also picked up on the trend, calling for comprehensive plans to incorporate principles of traditional neighborhood developments which may include, but need not be limited to (i) pedestrian-friendly road design, (ii) interconnection of new local streets with existing local streets and roads, (iii) connectivity of road and pedestrian networks, (iv) preservation of natural areas, (v) satisfaction of requirements for stormwater management, (vi) mixed-use neighborhoods, including mixed housing types, (vii) reduction of front and side yard setbacks, and (viii) reduction of subdivision street widths and turning radii at subdivision street intersections.[85]

PUDs, and especially traditional neighborhood developments, better support active living communities than traditional land use regulations, primarily because of their emphasis on mixing uses, which makes it easier for people to incorporate active transportation into their daily routines. As

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[82] 53 PA. CONS. STAT. § 10702-A (2007).

[83] WIS. STAT. § 66.1027 (2006) (requiring cities with more than 12,500 residents to enact traditional neighborhood development ordinances).

[84] *See* Mass. Executive Office of Energy and Envtl. Affairs, Smart Growth / Smart Energy Toolkit Model Bylaws, http://www.mass.gov/envir/smart_growth_toolkit/pages/SG-bylaws.html (last visited Mar. 30, 2008).

[85] VA. CODE. ANN. § 15.2-2223.1 (2007).

with clustering, the basic methods available to states to encourage the use of PUD zoning are specifically authorizing municipalities to enact PUD ordinances, stating that PUDs are a favored manner of development in the statutes, and providing guidance and incentives.

States should take note of the American Planning Association's Legislative Guidebook, which includes a model state PUD statute. The model statute emphasizes that PUDs should be intended to encourage the preservation of open space, provide for the efficient use of public facilities, and to promote attractive and functional development. The model statute would require PUDs to be designed consistently with any comprehensive plans, and it also includes a provision authorizing local governments to make PUD planning mandatory in certain zoning districts. Additionally, the model statute authorizes the adoption of site planning standards that emphasize pedestrian, bicycle and other forms of transportation, mixed use and compact communities, interconnecting streets and design standards intended to promote traditional neighborhood developments.[86]

C. INCENTIVE ZONING

Through incentive zoning, developers may obtain waivers from particular zoning provisions (usually density, height or use restrictions) in exchange for providing certain community amenities identified in the local incentive zoning ordinance.[87] The benefits sought by municipalities often include open space preservation and the construction of affordable housing, but may include the creation of bicycle and pedestrian amenities such as trails, parks and public spaces.[88] While incentive zoning ordinances have many of the same goals as PUDs and cluster developments, the specific amenities and incentives tend to be more clearly defined in these ordinances. In a state such as New York, which does not authorize impact fees and does not allow density bonuses for cluster developments, incentive zoning laws

[86] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 8-77 to 8-90.

[87] *See generally* ROHAN, *supra* note 49, at 8-2 to 8-16.

[88] *See id.* at 8-17 to 8-55.

can be an effective technique to secure needed or desired community amenities during the development process. In addition to granting incentives for developers to provide amenities supportive of active lifestyles, such as open space and trails, incentive zoning often helps to make the built environment more conducive to healthy living by increasing density and thereby making active transportation more feasible.

Several states have enacted authorizing legislation for incentive zoning, and, although these statutes do not generally specify exactly what benefits may be required of developers, some of the statutes do seek to promote a particular goal. The California law, for example, requires that affordable housing be used as the basis for awarding zoning incentives.[89] In other states, including Rhode Island[90] and Maryland,[91] local governments are simply authorized to use zoning bonus programs. New York's statute is more specific: it requires incentive programs to be consistent with the comprehensive plan and it also requires local governments to determine whether increased development can be feasibly accommodated by existing infrastructure.[92] In order to more clearly encourage local governments to adopt incentive systems, states should include in incentive zoning authorizations examples of the types of community amenities that may be eligible for zoning bonuses.

D. DEVELOPMENT AGREEMENTS

Approximately a dozen states[93] provide statutory authorization for development agreements, which are contracts

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[89] CAL. GOV'T CODE § 65915 (Deering 2007).

[90] R.I. GEN. LAWS § 45-24-33 (b)(1) (2007).

[91] MD. ANN. CODE art. 66B, § 10.01 (2007).

[92] N.Y. GEN. CITY LAW § 81-d (Gould 2007).

[93] States that have authorized the use of development agreements include Arizona (ARIZ. REV. STAT. ANN. § 9-500.05 (2007)), California (CAL. GOV'T CODE § 65864 (Deering 2008)); Colorado (COLO. REV. STAT. §§ 24-68-101-106 (2007)); Florida (FLA. STAT. ANN. § 163.3220 (LexisNexis 2007)), Hawaii (HAW. REV. STAT.ANN. § 46-123 (LexisNexis 2007)), Idaho (IDAHO CODE ANN. § 67-6511A (2007)), Louisiana (LA. REV. STAT. ANN. § 33:4780.22 (2007)), Maryland (MD. ANN. CODE art. 66B, § 13.01 (2008)), Nevada (NEV. REV. STAT. ANN. §

negotiated between developers and local governments in which a developer promises to provide certain amenities in exchange for assurances that the land use regulations applicable to the proposed development will remain fixed for a period of time.[94] For municipalities, development agreements provide an attractive alternative to exactions and PUDs, which limit the types of amenities that may be conditioned as part of a development. Under the development agreement model, local governments negotiate with developers on a case-by-case basis in order to determine the amenities most needed by the community, whether they be infrastructure improvements, the creation of affordable housing, or the preservation of open space. In this respect, development agreements are often more flexible than exactions and incentive zoning systems. Accordingly, they may be efficient tools for negotiating the benefits most necessary for promoting active living, such as sidewalks, paths, street lighting and architectural standards.

E. OVERLAY ZONING

Overlay zoning singles out unique geographic areas so that the underlying zoning restrictions may be modified to better deal with these areas' exceptional features. In short, overlay zones, which generally supplement (rather than replace) existing zoning designations, allow local governments to tailor planning for distinct areas, whether the special attributes are related to ecological or topographical features, historical or cultural properties, or to business and commercial interests. An overlay zone may be coextensive with the underlying zone, or it may only take up only a portion of it, and it may either expand or relax the underlying zoning regulations. Much like PUDs, the

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278.0201 (LexisNexis 2007)), New Jersey (N.J. STAT. ANN. § 40:55D-45.2 (West 2008)), Oregon (OR. REV. STAT. § 94.504 (2005)), South Carolina (S.C. CODE ANN. § 6-31-10 (2006)), Virginia (VA. CODE ANN. § 15.2-2303.1 (2007)), and Washington (WASH. REV. CODE ANN. § 36.70B.170 (LexisNexis 2007)).

[94] For a comprehensive discussion of development agreements, *see generally* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities after* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001).

purpose of overlay zoning is to increase flexibility in the land use planning process.[95]

Although specific state authorization is not generally considered to be necessary for municipalities to use overlay zoning, statutory enabling legislation may provide guidance in the creation of overlay zones. Kentucky, for example, provides that overlay districts may be created in order to preserve or conserve areas of historical, architectural, natural or cultural significance.[96] Perhaps more importantly, however, states may support land use planning based on smart growth and active living principles by offering guidance as to the creation of overlay zones. In recent years, several distinctive types of overlay zones have been developed by innovative municipalities, and state support for these measures, and dissemination of their success, may play a large role in influencing other communities to adopt similar legislation.

1. Transit-Oriented Development Overlay Districts

Transit-oriented development overlay districts are perhaps the most notable of this group. Transit-oriented development ("TOD") seeks to encourage the growth of mixed use, high density and pedestrian-friendly development near mass transit stations, with the goal of reducing motor vehicle reliance and curbing sprawl.[97] The primary goal of transit-oriented design is to decrease automobile use, and this is accomplished by encouraging the construction of mixed types of housing and commercial space near transit stations. Since many transit stops are located in already developed areas, TOD also has the effect of curbing sprawl by directing development to already urbanized areas. Although its name might suggest otherwise, transit-oriented development is also incredibly supportive of

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[95] *See* Spokane County, Wash., Zoning Code: Planned Unit Development Overlay Zone, Chap. 14.704.100, http://www.spokanecounty.org/BP/Documents/ZoneCode/704PUD.pdf.

[96] KY. REV. STAT. ANN. § 82.660 (LexisNexis 2008).

[97] *See generally* Marya Morris, *Smart Communities: Zoning for Transit-Oriented Development* (Campaign for Sensible Growth), Nov. 2002, at 1, http://www.growingsensibly.org/cmapdfs/i@wv2n4.pdf (last visited Apr. 8, 2008).

pedestrian and bicycle use; it has aimed to make transit stations accessible and inviting to these users by creating transit-oriented developments that are compact, mixed use, and thoughtfully designed. TOD has been noted by the active living community not only for this quality, but also for the belief that people who use mass transportation are likely to incorporate more walking into their daily transportation routines than those who primarily use cars. Moreover, since transit-oriented development seeks to reduce automobile use and to slow sprawling development, it also helps to lower the vehicle emissions that exacerbate respiratory problems. Open space preservation and its ancillary benefits may also be a goal of TOD.[98]

California has been a pioneer in this area, having enacted its Transit Village Development Planning Act in 1994.[99] The Act was used as the basis for the model TOD legislation included in the Growing Smart Legislative Guidebook,[100] and making transit-oriented developments appealing to pedestrians and bicyclists is a focus of both the California Act and the model legislation. While California's Act may be the most comprehensive in the country, other states have begun to address transit-oriented development as well. In North Carolina, cities are authorized to create TOD districts within a quarter mile radius of any mass transit stop,[101] and Pennsylvania has authorized public transportation agencies to work cooperatively with local governments to create "transit revitalization investment districts,"[102] which are intended to

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[98] *See generally* DENA BELZER & GERALD AUTLER, BROOKINGS INST. CTR. ON URBAN METRO. POLICY, TRANSIT ORIENTED DEVELOPMENT: MOVING FROM RHETORIC TO REALITY (June 2002), http://www.brookings.edu/~/media/Files/rc/reports/2002/06cities_dena%20belzer%20and%20gerald%20autler/belzertod.pdf (last visited Apr. 8, 2008). *See also* Transit Oriented Development, Design for a Better Future, http://www.transitorienteddevelopment.org (last visited Mar. 18, 2008).

[99] *See* CAL. GOV'T CODE §§ 65460-65460.11 (Deering 2007).

[100] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-184.

[101] N.C. GEN. STAT. § 160A-536 (2007).

[102] 73 PA. CONS. STAT. ANN. § 850.102 (West 2007).

encourage transit oriented design. Connecticut has recently enacted legislation stating that one of its growth management principles is to promote the "concentration of development around transportation nodes and along major transportation corridors to support the viability of transportation options and land reuse[.]"[103] The new Connecticut legislation also requires regional planning agencies to identify areas where "compact, transit accessible, pedestrian-oriented mixed use development" is feasible.[104] Nevada has a similar requirement for regional planning bodies.[105]

It bears mentioning that government assistance and incentives are especially important in encouraging local and regional governments to develop comprehensive transportation plans and TOD policies that support active living and smart growth. While the following discussion explores a sampling of the incentives and other programs that states have used in this area, there are a vast number of transportation programs not described here, including many administered by the federal government and private organizations.

Perhaps most simply, states can encourage their municipalities to adopt smart transportation policies that encourage walking and bicycling by providing information about transit-oriented design and other innovative transportation strategies. Massachusetts' Smart Growth Toolbox includes a model TOD overlay ordinance and case studies demonstrating successful implementation of transit-oriented development principles.[106] The model ordinance includes such smart growth and active living provisions as limiting the number of parking spaces that may be built, minimizing building setbacks, and

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[103] 2007 Conn. Pub. Acts 07-239, § 3(e)(1)(F)(iii).

[104] *Id.* at § 6.

[105] NEV. REV. STAT. ANN. § 278.0274 (LexisNexis 2007).

[106] *See* MASS. EXECUTIVE OFFICE OF ENERGY AND ENVTL. AFFAIRS, TRANSIT-ORIENTED DEVELOPMENT OVERLAY DISTRICT: MODEL BYLAW, http://www.mass.gov/envir/smart_growth_toolkit/bylaws/TOD-Bylaw.pdf (last visited Mar. 18, 2008). *See also* Mass. Executive Office of Energy and Envtl. Affairs, *Transit-Oriented Development (TOD) Case Studies*, http://mass.gov/envir/smart_growth_toolkit/pages/SG-CS-tod.html (last visited Mar. 18, 2008).

requiring sidewalks and outdoor lighting. It also provides design standards relating to street trees, benches, public art and other pedestrian amenities.[107] Georgia[108] and the District of Columbia[109] also provide comprehensive materials intended to educate government bodies, developers and the public about the benefits of transit-oriented development. Oregon's Transportation and Growth Management Program does more than produce publications and guidance: it offers real-time and in person outreach and assistance in developing local comprehensive plans and zoning ordinances that "result[ ] in a balanced, multi-modal system that enhances opportunities for people to walk, bike, and use transit."[110]

Funding and other financial incentives, of course, are especially useful in encouraging the creation of TOD districts and persuading local governments to integrate smart growth principles into their transportation policies. For example, TOD has been supported in New Jersey by the Department of Transportation's Transit Village Initiative, which gives priority funding and technical assistance to qualifying municipalities.[111] Similar frameworks exist in other states. The federal

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[107] *See* Mass. Executive Office of Energy and Envtl. Affairs, Smart Growth / Smart Energy Toolkit: Transit-Oriented Development, http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-tod.html (last visited Mar. 18, 2008). As of July, 2007, more than one hundred transit-oriented development projects had been initiated in Massachusetts. *Turning Toward the Future*, HARTFORD COURANT, July 15, 2007, at C4.

[108] *See* Ga. Quality Growth P'ship, Toolkit of Best Practices TOD Small Area Plans, http://www.dca.state.ga.us/toolkit/tooldetail.asp?Gettool=14 (last visited Mar. 18, 2008).

[109] D.C. Office of Planning, Trans-Formation: Recreating Transit-Oriented Neighborhood Centers in Washington D.C. (2002), http://planning.dc.gov/planning/cwp/view,a,1282,q,569523,planningNav,|32341|.asp (last visited Apr. 8, 2008).

[110] Or. Transp. & Growth Mgmt. Smart Dev. Code Assistance, http://www.oregon.gov/LCD/TGM/codeassistance.shtml (last visited Apr. 8, 2008).

[111] *See* State of N. J. Dep't of Transp., Transit Village Initiative: Overview, http://www.state.nj.us/transportation/community/village/index.shtml (last visited Mar. 18, 2008)

government provides funds to states as part of the Safe Routes to Schools Program; the states are to distribute this money for infrastructure improvements and other projects (e.g. education and enforcement) that enable and encourage children to walk or bicycle to school.[112] Broader walking and bicycling grant programs exist in North Carolina[113] and Oregon,[114] where funding is available for the creation of bicycle and pedestrian plans and improvements, and grant programs in Washington,[115] Nevada[116] and Illinois[117] focus on improving pedestrian and bicycle safety. Oregon also provides grants through its Transportation and Growth Management (TGM) Program for

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[112] Fed. Highway Admin., Safe Routes to School Program, Overview, http://safety.fhwa.dot.gov/saferoutes/overview.htm (last visited March 18, 2008).

[113] *See* N.C. Dep't of Transp., Bicycle and Pedestrian Planning Grant Initiative, http://www.itre.ncsu.edu/PTG/BikePed/NCDOT/overview.html (last visited Mar. 18, 2008).

[114] *See* Or. Transp. and Growth Mgmt., Grants and Incentives, http://www.oregon.gov/LCD/TGM/grants.shtml (last visited Mar. 18, 2008). Oregon distributed nearly $5 million dollars in 2007 in grants to local governments for bicycle and pedestrian improvements. The Transportation and Growth Management Grant Program also awards grants for bicycle and pedestrian related projects, and the Transportation Enhancements Program dispenses funds for such projects as "pedestrian and bicycle facilities, pedestrian and bicycle safety education, acquisition of scenic or historic sites, scenic or historic highway programs, landscaping, historic preservation, rehabilitation of historic transportation facilities (e.g., railroad stations), rail-trails, archaeological planning and research, and transportation museums." *Id.*

[115] *See* Wash. State Dep't of Transp., *Pedestrian and Bicycle Safety Program*, http://www.wsdot.wa.gov/bike/Ped_Bike_Program.htm (last visited Mar. 18, 2008).

[116] *See* Nev. Dep't of Pub. Safety, Office of Traffic Safety, Nevada Bicycle and Pedestrian Safety Education Program, http://ots.state.nv.us/Nevada_Bicycle_Pedestrian_Safety_Program.html (last visited Mar. 18, 2008).

[117] *See* Ill. Dep't of Transp., Div. of Traffic Safety, Pedestrian and Bicycle Safety Program Grant: Project Specifications, http://www.dot.il.gov/trafficsafety/grants/Pedestrian%20and%20Bicycle%20Safety%20Program%20Grant.pdf (last visited Mar. 18, 2008).

integrated land use and transportation planning.[118] It emphasizes that these "projects typically integrate land use and transportation planning so that land use patterns and transportation investments support each other. TGM supports *planning* but not *construction* projects."[119] All of these programs (and there are many more) have the positive effects of encouraging the creation of environments that foster active transportation and the use of mass transit.

2. Pedestrian Overlay Districts

Pedestrian-oriented overlay districts are intended to facilitate growth consistent with pedestrian and other non-motorized forms of transportation. The American Planning Association has developed a model pedestrian overlay ordinance that emphasizes the goal of creating "a healthful built environment in which individuals have opportunities to incorporate physical activity, such as walking, into their daily routine . . . ."[120] Significant aspects of the ordinance include the prohibition of setbacks, the requirement that paths be available to connect cul-de-sacs and facilitate access through large city blocks, and parking provisions (for both cars and bicycles). Design standards also help to ensure that the pedestrian overlay district will be attractive and inviting to walkers: awnings are required on all commercial and public buildings so as to provide shelter from the elements; doors must be placed so as not to interfere with foot traffic when opened; and a minimum percentage of ground level wall areas are to be "devoted to interest-creating features, such as building entrances, murals, display windows, or windows affording views into retail, office or lobby spaces."

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[118] *See* Or. Transp. and Growth Mgmt. Program, TGM Grants, http://www.oregon.gov/LCD/TGM/grants32306.shtml (last visited Mar. 18, 2008).

[119] *Id.*

[120] STUART MECK ET AL., RESEARCH DEP'T OF THE AM. PLANNING ASS'N, INTERIM PAS REPORT: MODEL SMART LAND REDEVELOPMENT REGULATIONS § 4.8.1 – 101(b) (2006), *available at* http://www.planning.org/smartgrowthcodes/phase1.htm#1.

Currently, pedestrian-oriented overlay ordinances have been enacted in a number of municipalities, including Charlotte (NC)[121] Minneapolis (MN),[122] Seattle (WA) and Portland (OR).[123] While they have not been included in many state statutes, Oregon has authorized local governments to created pedestrian districts by administrative rule.[124] Pedestrian-oriented development shares many attributes with traditional neighborhood and transit-oriented developments, and while local governments should take note of the types of regulations that support pedestrian activity and incorporate them into existing ordinances, states could help in this effort by making informational materials and guidelines available.

3. Redevelopment Districts

Redevelopment plans and incentives are a vital aspect of smart growth; by redirecting development activity to areas already served by infrastructure and away from the suburban fringes that still contain open space, redevelopment policies foster compact and transit accessible development.[125] And by attracting new residential, commercial and office development to distressed communities, redevelopment programs encourage the growth of mixed use developments that make active transportation a viable option the community. Moreover, redevelopment programs often make funding available for infrastructure improvements and the creation and maintenance of public amenities such as parks, playgrounds and public

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[121] *See* CHARLOTTE, N.C. ZONING CODE, PART 8: PEDESTRIAN OVERLAY DISTRICT, http://ww.charmeck.org/Planning/Rezoning/TOD-TS-PED/ZoningOrd_PED.pdf (last visited Mar. 30, 2008).

[122] *See* Kevin Diaz, *New Zoning Code Puts Minneapolis in New Era*, STAR TRIBUNE (Minneapolis, MN), Nov. 13, 1999, at 1A.

[123] MECK, *supra* note 120, at § 4.8.1 – 108 Comment.

[124] 45-8 Or. Bull. 303 4(c) (August 1, 2006).

[125] *See* AM. PLANNING ASS'N, POLICY GUIDE ON PUBLIC REDEVELOPMENT 1-2, 10-11 (2004), *available at* http://www.planning.org/policyguides/redevelopment.htm [hereinafter POLICY GUIDE ON PUBLIC REDEVELOPMENT].

buildings.[126] These improvements help to make distressed communities more inviting to people traveling by foot or bicycle.

Redevelopment districts function like other overlay zones, often modifying underlying zoning ordinances to allow for mixed use development and increased density. However, redevelopment zones are also heavily dependent on associated grant and funding programs. The Legislative Guidebook includes a generic redevelopment statute authorizing the creation of redevelopment districts, and it is illustrative of the considerations that should go into the designation of redevelopment zones and the formulation of incentives that they are to offer.[127] The redevelopment statute instructs local governments to conduct detailed studies before the designation of an area as a redevelopment zone. Based on these studies, the planning or redevelopment agency is to design a redevelopment plan tailored to the area that addresses, among other things, the goals of the revitalization, applicable land use regulations, property maintenance and housing codes, options for the financing of public improvements, programs to address environmental contamination, and programs to market and promote the redevelopment area to new businesses.[128]

As this list demonstrates, the revitalization programs that operate in redevelopment areas involve numerous issues beyond the scope of traditional land use planning. Because of this, redevelopment programs are often overseen by redevelopment agencies that may or may not be coordinated with local government planning bodies.[129] The American Planning

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[126] *Id.* at 1. (stating that "[p]ublic agencies typically offer a combination of incentives and undertake redevelopment programs pursuant to a statutory system for creating, financing, and operating redevelopment areas.").

[127] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-190 to 7-194.

[128] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-191. As may be noticed from this list, environmental contamination may be a problem in redevelopment zones. Many states also have aid programs to clean up these "brownfield" areas. For more information about state brownfields programs, *see* United States Environmental Protection Agency, State and Tribal Response Programs, http://www.epa.gov/swerosps/bf/state_tribal.htm. The webpage has links for each state, as well as information on federal aid to states.

[129] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 7-191, note 290.

Association's Policy Guide on Public Redevelopment recognizes this divide between land use planning and redevelopment and offers suggestions to help integrate land use planning with redevelopment efforts. Among these policy suggestions, the American Planning Association recommends that redevelopment plans be required to conform with comprehensive planning efforts, and it also encourages the organization of local government agencies such that redevelopment programs are overseen by the same agency tasked with long-range land use planning.[130]

In addition to the challenges involved in ensuring that land use planning is coordinated with other revitalization programs, issues of social equity often arise in the context of redevelopment. Planners and legislators must be attentive to the possibility that revitalization may result in the displacement of lower-income residents as redevelopment areas become more appealing.[131] Although redevelopment policies can produce real health benefits for residents by encouraging smart growth and making the funding available to improve bicycle and pedestrian infrastructure, parks and other community amenities, it must be remembered that active living is not an ideal for which social equity should be dispensed with; rather, environments conducive to active living should be available to all people.[132] Revitalization efforts, then, must be inclusionary. Requiring new construction in such districts to include sufficient affordable housing units, planning for a wide variety of transportation options and prioritizing funding for repairs and

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[130] *See* POLICY GUIDE ON PUBLIC REDEVELOPMENT, *supra* note 125.

[131] *See id.* at 6; *see also* Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37 (2006) (noting that "[r]edevelopment policy and practice in the U.S. has relied upon the massive relocation of poor people and the destruction of poor people's neighborhoods with only token recognition of the costs and burdens imposed on the displaced"). *Id.* at 38.

[132] *See* POLICY GUIDE ON PUBLIC REDEVELOPMENT, *supra* note 125. *See generally* INT'L CITY/COUNTY MGMT. ASS'N, ACTIVE LIVING AND SOCIAL EQUITY: CREATING HEALTHY COMMUNITIES FOR ALL RESIDENTS, http://www.activelivingleadership.org/uploads/PDFs/rpt_ICMA_Jan2005.pdf (last visited Apr. 8, 2008).

maintenance can help in this respect.[133] Still, achieving social equity is a complex task, and planners must continuously reevaluate the effects of their actions on lower-income and minority populations. The populations of redevelopment districts, after all, are as much, if not more, in need of environments that foster active living as are the residents of other communities.[134]

F. TRANSFER OF DEVELOPMENT RIGHTS

Transfer of Development Rights (TDR) programs provide another flexible zoning technique employed to preserve open space and natural areas and to concurrently promote development in urban areas. The transferability of development rights promotes active and healthy living in two basic ways: by directing new growth to urban and already developed areas where walking and bicycling are more viable forms of transportation than in undeveloped areas; and by providing a mechanism whereby rural areas and open space can be permanently preserved, thus providing recreational opportunities. TDR programs function by designating areas where land is to remain undeveloped as "sending districts."[135] These areas are usually designated as sending districts in order to protect environmental resources, conserve open or agricultural space, or to preserve historical areas.[136] Areas where increased density is desired, on the other hand, are designated as "receiving districts," and they may use

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[133] *See generally* INT'L CITY/COUNTY MGMT. ASS'N, ACTIVE LIVING AND SOCIAL EQUITY: CREATING HEALTHY COMMUNITIES FOR ALL RESIDENTS (2005), http://www.activelivingleadership.org/uploads/PDFs/rpt_ICMA_Jan2005.pdf (last visited Apr. 8, 2008).

[134] *Id.*

[135] *See, e.g.*, Mass. Executive Office of Energy and Envtl. Affairs, *Transfer of Development Rights*, http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-tdr.html (last visited March 19, 2008).

[136] *See* AM. PLANNING ASS'N, MODEL TRANSFER OF DEVELOPMENT RIGHTS (TDR) ORDINANCE, [hereinafter MODEL TDR ORDINANCE], http://www.planning.org/smartgrowthcodes/pdf/section46.pdf (last visited Mar.19, 2008).

development rights transferred from sending districts in order to increase the density or intensity of uses permitted by the underlying zoning regulations.[137] An owner of undeveloped land in a sending district, then, is able to sell his or her development rights to urban property owners seeking to increase the density of their developments. When the development right is successfully transferred, a permanent easement or restriction is placed on the property in the sending district, thereby prohibiting future development. The result is that the rural landowner is, theoretically, able to receive the fair market value of the right to develop his or her land while the land itself is preserved. Development rights banks are often used in conjunction with TDR programs. Using this tool, a local government can collect development rights that have been transferred from sending districts and control their sale in the future. In this way, TDR can be strategically used by municipalities to direct development to certain areas.[138]

Successful TDR programs are difficult to build and maintain, however. Valuing development rights in such a way as to be able to market them is not a simple task, and many communities do not want the increased density that designation as a receiving district entails.[139] Moreover, receiving districts must not have such high permitted densities under the base zoning so as to make transferable development rights unmarketable; but they also must not have such restrictive underlying zoning so as to make the TDR program susceptible to takings challenges.[140] Beyond these market concerns, TDR programs may also be challenged as unconstitutional takings of land without just

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[137] The concept of TDR was introduced in 1961 by Gerald Lloyd, who analogized TDR to clustering, which can also be thought of as involving a "sending portion" of a piece of property and "receiving portion." Kieth Aoki, Kim Briscoe & Ben Hovland, *Trading Spaces: Measure 37, MacPherson v. Department of Administrative Services, and Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 297-98 (2005).

[138] MODEL TDR ORDINANCE, *supra* note 136.

[139] Robert Lane, *Transfer of Development Rights for Balanced Developments*, LAND LINES (Mar. 1998), *available at* http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=424.

[140] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-56.

compensation,[141] as illegal spot zoning[142] or on grounds of substantive due process.[143]

Despite this legal and economic balancing act, TDR programs have been enacted in about half of the states,[144] likely because of their great potential to accomplish multiple goals simultaneously: they preserve undeveloped land; promote infill and compact development; and restrain sprawl and associated vehicle use. Although a few TDR programs have been started without enabling legislation,[145] it is recommended that states adopt authorizing language due to the complexity of this type of program and the possibility that programs could be attacked as being unauthorized.[146] Moreover, a number of states have enacted only cursory provisions, and these states could benefit from more robust authorizations that provide standards for the creation of sending and receiving districts and the valuation of development rights.

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[141] *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). *See also* Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 690-96 (2003).

[142] *See, e.g.*, Fur-Lex Realty v. Lindsay, 367 N.Y.S.2d 388 (N.Y. Sup. Ct. 1975).

[143] *See, e.g.*, City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. App. 1983); Gardner v. N. J. Pinelands Comm'n, 593 A.2d 251 (N.J. 1991).

[144] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-50 to 9-55 (describing the TDR legislation in Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Kentucky, Maryland, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Tennessee and Washington). Other jurisdictions to have enacted TDR legislation include Colorado (COLO. REV. STAT. § 30-28-401 (2007)), Delaware (DEL. CODE ANN. tit. 22, § 310 (2007)), Hawaii (HAW. REV. STAT.ANN § 46-161 *(*LexisNexis 2007)), Kansas (KAN. STAT. ANN. § 12-755 (2006)), Louisiana (LA. REV. STAT. ANN 33:4722 (2007)), Maine (ME. REV. STAT. ANN. tit. 30-A, § 4328 (2007)), Massachusetts (MASS. GEN. LAWS ANN. ch. 40A, § 9 (2008)), Minnesota (MINN. STAT. §394.25 (2007)), New Mexico (N.M. STAT. ANN. § 5-8-43 (LexisNexis 2007)), Virginia (VA. CODE ANN. § 15.2-2316.2 (2007)), West Virginia (W. VA. CODE § 7-1-3mm (2007)), and Puerto Rico (P.R. LAWS ANN. tit. 23 § 226a (2006)).

[145] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-50.

[146] *See, e.g.*, W. Montgomery County Citizens Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 522 A.2d 1328 (Md. 1987).

The Smart Growth Legislative Guidebook includes several suggestions for successful TDR programs: statutes and ordinances should state a clear and valid public purpose (such as environmental or historic preservation) for employing TDR programs in order to avoid findings of invalidity; consistency between the comprehensive plan and the designations of sending and receiving areas should be required; and notice that the development rights from a sending parcel have been transferred should be clearly made and recorded.[147] Other issues that may be dealt with in enabling legislation include the types of land that may be designated as sending districts, whether receiving areas must be determined to have adequate infrastructure to accommodate increased development, and whether development rights can be transferred across municipal boundaries. States may also wish to expressly authorize the creation of TDR banks, mechanisms that allow local governments to buy and keep development rights for either conservation or future sale.[148]

G. CONSERVATION EASEMENTS

Conservation easements provide an especially effective approach to preserving open space and important environmental areas due to the fact that, like other easements, they are permanent and run with the land to future owners. Essentially, when a property owner grants a conservation easement to a local government or qualified nonprofit (which is required in most states), the property owner has transferred his or her right to further develop the land. Since conservation easements are contained in written agreements, they may place different burdens on different parcels; although the typical conservation easement requires the present and future owners to leave the property in a minimally developed state, there are also scenic easements, historic easements, and innumerable others that have been modified to meet the needs of the

[147] *See* LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-36 to 9-57.

[148] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-57 and related commentary.

property owner or to achieve specific goals, such as the conservation of a particular local habitat.[149]

While it is possible that some municipalities may purchase conservation easements funded either through local purchase of development rights programs or through other existing open space funds, oftentimes the landowner voluntarily donates the conservation easement in exchange for a tax deduction. This is generally done for tax purposes: donating a conservation easement reduces the assessed value of land and therefore also the amount of property taxes; and conservation easements qualify for federal income and estate tax credits. Several states also offer income tax credits for the granting of a conservation easement. The effect of these tax benefits is often to offset the pressure on rural land owners, including many farmers, to develop their land for more valuable uses.[150] The conservation easement, then, can be a win-win solution for rural residents and their municipalities: with lighter tax burdens, the residents and farmers can afford to continue living on their land without subdividing it or selling it for future development, and the municipality is benefited by the permanent addition of open space to the community.

Because conservation easements, like other easements, are governed by common law rules, state enabling legislation is generally not considered to be necessary to their formation.[151] However, conservation easements differ significantly from most common law easements, and because of this it is often not constructive to apply common law rules to them.[152] Responding

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[149] *Id.* at pp. 9-66 to 9-67; *see also* THE NATURE CONSERVANCY, FINAL REPORT: CONSERVATION EASEMENT WORKING GROUP 2-3 (2004), http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/files/easements_report.pdf [hereinafter THE NATURE CONSERVANCY].

[150] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-64. *See also* Theodore A. Feitshans, *PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools*, 7 DRAKE J. AGRIC. L. 305 (2002).

[151] LEGISLATIVE GUIDEBOOK, *supra* note 9, at 9-66.

[152] *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 425 (2005). One example of the inability of the common law to deal with conservation easements

to this problem, all of the states and the District of Columbia have enacted some form of conservation easement enabling legislation.[153] These statutes generally remove the common law barriers to the creation and enforcement of perpetual conservation easements. It should also be noted that the National Conference of Commissioners on Uniform State Laws has produced a Uniform Conservation Easement Act that has been enacted in twenty-four states.[154] Now may be an appropriate time for other states to consider adopting the act. The uniform law may be particularly important as conservation easements are beginning to be the subject of more frequent property transactions and transfers.[155]

V. CONCLUSION

Trying to formulate a list of actions that states may take to foster smart growth and active living is not simple, as the individuality of communities and their problems demands particularized solutions. Moreover, there is no panacea that will solve the problems of urban sprawl, auto-dependency and the general trend of sedentary populations in the United States. Yet, states occupy an important position: they can offer local

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is illustrated by the problematic classification of conservation easements as in gross (this designation is made because the easement holder does not have any interest in land appurtenant to the burdened tract). This classification acts to prevent the easement from running with the land at common law. *Id.* The common law is also rather unfavorable to negative easements (*i.e.* those which require the owner to refrain from certain uses of the land), a category that includes many conservation easements. *See* Unif. Law Comm'rs, *Summary: Uniform Conservation Easement Act,* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucea.asp (last visited Mar. 19, 2008).

[153] McLaughlin, *supra* note 152, at 426, note 13.

[154] Unif. Law Comm'rs, A Few Facts About The Uniform Conservation Easement Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Mar. 18, 2008). See UNIFORM CONSERVATION EASEMENT ACT (2007) http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.pdf for the text of the Act.

[155] *See* THE NATURE CONSERVANCY, *supra* note 149, at 3.

governments the authorization to use an array of land use tools to implement growth strategies; and they can guide local governments in the use of these tools through state policies, legislative declarations and various types of non-compulsory assistance. Additionally, states can offer incentives to encourage municipalities to engage in particularly desired planning activities.

SUGGESTIONS FOR STATES

- State planning policies should expressly state that it is a goal of planning to improve health, particularly by encouraging people to be more physically active.
- Comprehensive planning statutes should require the consideration of opportunities for physical activity during the planning process. This consideration should be made in relation to the transportation, land use, community facilities and conservation-based elements.
- Subdivision statutes should require subdivisions to be consistent with the comprehensive plan, and municipalities should be authorized to require exactions and impact fees as necessary for the construction and maintenance of pedestrian and bicycle infrastructure and open space.
- States should enact enabling legislation for various flexible zoning techniques, including planned unit developments, clustering, development agreements, overlay zoning and transfer of development rights. State legislation is important, even if unnecessary, as express permission may influence some local governments to experiment with flexible zoning when they otherwise would not. State authorization can also help to regulate and guide the use of these tools.
- States should offer incentives to local governments to engage in planning for smart growth and active living. These incentives should focus on increasing population densities in appropriate areas, expanding transportation options and reducing automobile reliance, preserving open space and increasing opportunities for recreation, and revitalizing underused urban areas.
- States should offer technical guidance and assistance in

implementing smart growth and active living policies. This may be accomplished by regulation, through noncompulsory materials such as model ordinances and educational information, or through in-person technical assistance.

- States should require, in conjunction with these efforts, that local governments consider the need for affordable housing and transportation options. In any program based on smart growth and active living principles, the states should emphasize the need to consider issues of equity and fairness for all residents.

Although local governments possess the authority to engage in creative planning and land use control techniques to accomplish healthy living goals, states must provide strong leadership and significant incentives to promote and to guide the development and implementation of appropriate regulatory programs at the local level.

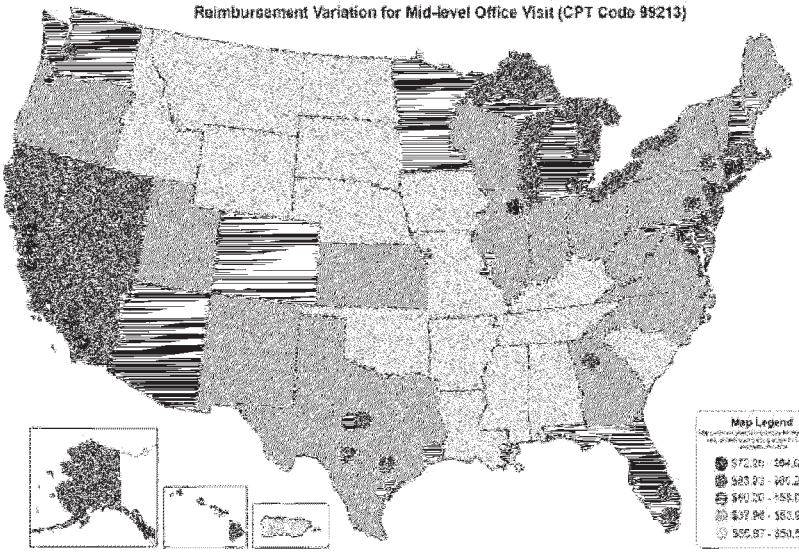
Geographic Inequity in Medicare Reimbursement

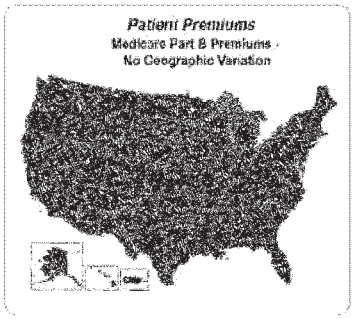
Effect of Geographic Practice Cost Indices (GPCIs) on Physician Reimbursement and Patient Access

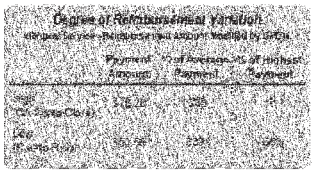
Melissa H. Weresh, Professor of Law, Drake University Law School

Physician Reimbursement

Reimbursement Variation for Mid-level Office Visit (CPT Code 99213)







Effect of Geographic Variation on Patient Access to Physician Care

Comparison of Geographic Adjustment Factor (GAF) with Physician / Population Ratio

2007 GAF, Ratios exclude physicians located in the Possessions*

High Reimbursement Localities

Locality	2007 GAF Rank	GAF	Physician per Population Ratio	Population per Physician
NY - Manhattan	4	1.164	4	204
MA - Boston	5	1.152	2	260
DC - MD / VA Suburbs	10	1.152	1	152

Low Reimbursement Localities

Locality	2007 GAF Rank	GAF	Physician per Population Ratio	Population per Physician
Idaho	87	922	50	618
Mississippi	86	919	42	607
Oklahoma	88	913	51	635

Source: U.S. Census Bureau, Population Division, Annual Population Estimates and Estimated Components of Change for the United States and States, April 1, 2000 to July 1, 2005; Physician Characteristics and Distribution in the U.S., Dept. of Physician Practice and Communications Information, Division of Survey and Data Resources, American Medical Association, 2006 and prior editions.