

## **Overview: Fundamentals of Real Estate**

This is the reorganized Fundamentals of Real Estate. The book is organized into four major sections.

This is Chapter 7 and covers “Sustainable Growth Management,” and Federal Environmental Regulations affecting real estate.

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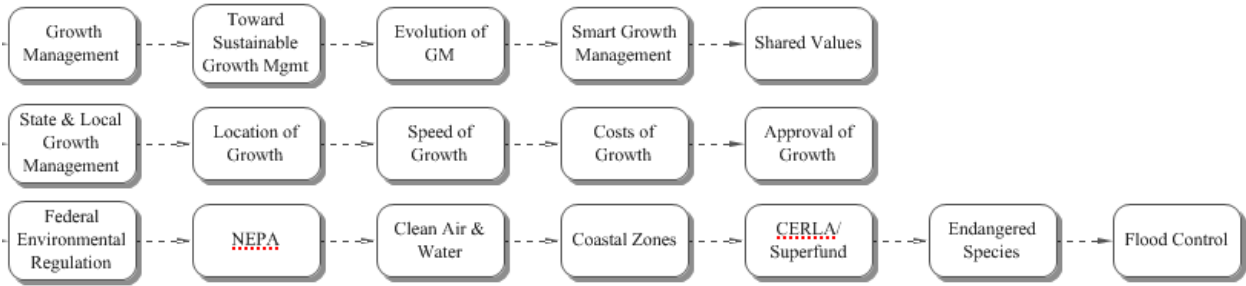
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**Chapter 7 Preview: Growth Management and Environmental Regulation**



**Overview**

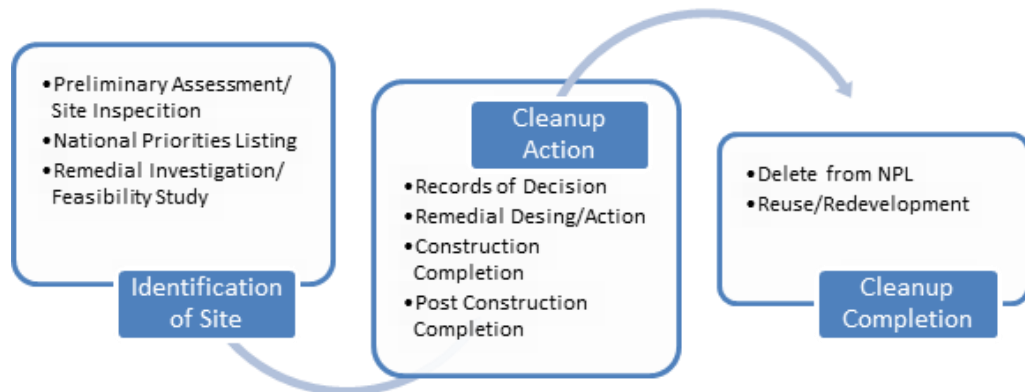
This chapter begins with a discussion of the importance of approaching growth management from a sustainable, market-based perspective. It explores the evolution of growth management including the emergence of the smart growth movement. The background discussion explores the “shared values” among various stakeholders and the importance of engaging the real estate industry in the debates to arrive at more balanced, collaborative approaches to growth management.

The various growth management tools used by state and local jurisdictions are reviewed along with some examples of how they are implemented. These tools address four categories of growth: location, speed, costs and approval processes. The chapter concludes with an overview of federal environmental regulations affecting growth.

**What you will learn in Chapter 7**

- The underlying premises behind growth management.
- The evolution of growth management.
- The “smart growth” principles.
- The notion of shared values among stakeholders including public and private parties.
- State and local growth management tools.
- GM policies affecting the location of growth.
- Policies affecting the speed of growth including concurrency and moratoria.
- GM policies affecting the cost of growth both in economic and non-economic terms.
- Trends in approval policies including ballot box zoning, referenda and regionalism.
- Federal programs affecting growth
- The National Environmental Protection Act
- The Clean Air and Clean Water Act including non-attainment and wetlands.
- Coastal Zone Management.
- Superfund Cleanup of hazardous sites.
- The Endangered Species Act.
- Flood control and flood insurance.

**Superfund Cleanup Process Management**



## Real Estate Regulation

Commentary 7- 1

### Toward Sustainable Growth Management: A Market-Based Approach

Zoning and other land use controls are designed to help control the urban mosaic, indicating what can be built, where it can be built and how intensely it can be built. On the other hand, growth management focuses on controlling the size and massing of the urban form, focusing on where and when growth occurs. Concerns over global warming, environmental degradation and congestion have renewed interest in managing growth. This interest comes on the heels of the “smart growth” movement that has been around for some two decades and for many serves as a reference point for discussions of how growth should be managed. While the smart growth movement has received significant attention and has been embraced by a number of constituencies, it has been met with some resistance from the real estate industry. As will be discussed, this resistance is not based on disagreement on many of the underlying premises, as much as on how market-based solutions should be incorporated and how competing interests should be balanced in managing growth. Given the evolution of the movement, the apparent disconnect among some of the key stakeholders is somewhat understandable. However, the stakes are simply too high to accept the status quo which has polarized some constituencies and resulted in sub-optimal approaches to growth management that have not been fully vetted. To move forward a more collaborative effort is needed to deal with the complex urban problems facing the current generation which will have significant and irreversible impacts on future generations. This approach has been labeled by this author as “Sustainable Growth Management” along with the byline: “A Market-Based Approach.”<sup>1</sup>

### Toward Sustainable Growth Management

- Sustainable.** The term “sustainable” is important since it recognizes the temporal nature of real estate decisions. That is, real estate development represents a capital-intensive commitment of scarce resources. As such, the decision as to how to deploy resources is often irretrievable due to the durability of the underlying asset and the fact that recycling real estate is often cost-prohibitive. For example, in addition to the price of raw land, the true cost of developed sites includes the imputed cost of tearing down an inappropriate solution and replacing it is the loss of the value of the income stream that would be abandoned. The net impact is to raise the “effective cost” of land for development to such a level that new investment is often financially impossible to support. As a consequence, the “temporal” nature of real estate solutions must be carefully factored into decisions. To the extent that such enduring elements of real estate are ignored, one is left with near-term solutions that are not supportable, or sustainable, over the long term.
- Market-Based.** The phrase “Market-Based Approach” is a critical element of the label since it reflects that, over the long term, one cannot dictate to the market. That is, market forces will ultimately prevail despite efforts to skew it to a certain direction. In real estate, exceptions to this rule depend on police power or other mandates can be invoked to prevent the market from prevailing. This is not to argue that the market should be unregulated but that market demand and behavioral responses should be factored into growth management programs. Some might argue that market-based approaches to

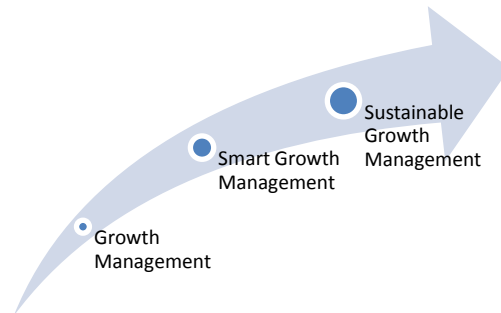


Exhibit 7- 1

<sup>1</sup> James R. DeLisle, “Sustainable Growth Management: A Market-Based Approach,” *Research Quarterly*, International Council of Shopping Centers, 2003.



growth management are inherently flawed others contend that the market actually works. Indeed, within planning circles a number of authors argue that planners and communities must embrace market-oriented principles and concepts. This is necessary to respond to competitive forces and meet the needs of current and future generations of space users. Similarly, some resource economists continue to claim that market-oriented solutions can provide an effective means of managing resources, with an eye toward property rights and individual decision-making. Finally, there is a growing recognition of the fact that cities must begin to think in terms of competitive advantage, to remain attractive and viable in an increasingly global environment. In addition to addressing the spatial side of the equation, the efficacy of market-based growth management programs will depend on the ability of targeted projects to capture capital. Since capital flows are essential to the solvency of both the public and private markets, the reliance on market-based approaches over time is a critical element to the success of any attempt to manage growth.

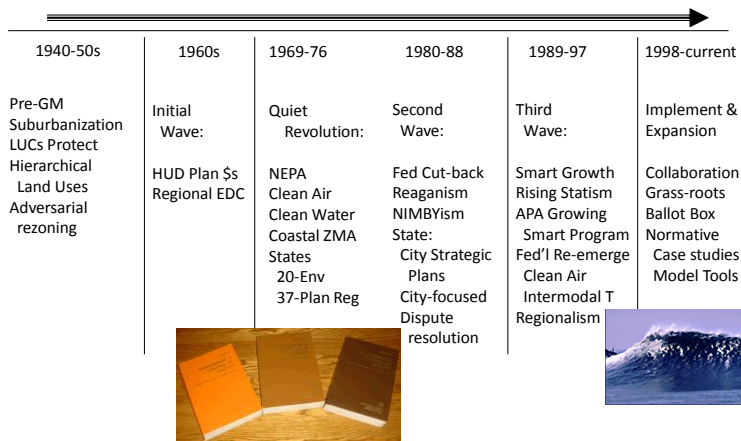
## Growth Management

### Evolution of Growth Management

To help explain growth management and the need to move toward a more sustainable approach, it is useful to explore its evolution and the underlying assumptions and premises upon which it is built. Based on that background, the case for and alternative approach that benefits from broad-based interdisciplinary involvement that includes the business and economic side of the equation can be presented.

The seeds of growth management were planted in the Constitution which addressed the need to balance private land ownership rights against a concern for the public good. However, when the country was formed, little attention was placed to controlling or managing growth. As such, model zoning codes were not designed to manage growth. Rather, the code focused on how to satisfy private property rights for individual parcels while protecting the broader public good from negative externalities associated with conflicting land uses.

### Growth Management – Smart Growth Timeline<sup>2</sup>



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Exhibit 7- 2

Prior to World War II, the majority of growth occurred in the center of cities or in close proximity thereto. In the late 40s, the United States experienced a major surge in ‘suburbanization’ as the market for affordable housing that depended on low land costs responded to the surge in demand from returning veterans. In addition to first-time homeowners seeking lower cost housing, out-migration from center cities was reinforced by the more affluent households willing to trade off higher commuting costs for the suburban lifestyle. Retailers and employers also began to migrate outward, creating a vacuum that left many urban centers behind. Since zoning

<sup>2</sup> James R. DeLisle, The Rising Tide of Growth Management, presented to ICSC Pacific Northwest Idea Exchange August 2004.

codes didn't address growth, cities had no effective way to control where and when unexpected growth occurred. As such, they were on the receiving end with respect to growth, reacting to private zoning appeals and applications for new subdivision plats. When cities tried to control growth by denying zoning appeals, the venue for determining land use patterns migrated to the courts. Since the courts focused on balancing individual private property rights against the public health, safety and welfare rather than on the impacts of growth, there was no proactive way to manage growth. However, some communities did modify master plans to add capacity although there were no best practices or nationally recognized programs to serve as a model.

In the 1960s, the Department of Housing and Urban Development (HUD) provided local jurisdictions with funding for the development of master plans. This stimulus allowed cities to pay more attention to need to manage growth. In the process of developing and updating master plans, planning processes became more formalized. Emphasis also shifted from protecting the status quo to enhancing the quality of life for residents by taking efforts to manage the urban form. Planners also began to take more of a regional view of markets rather than the strictly local approaches that were used in the past. Despite efforts to create more attractive and vibrant cities, the inability to manage growth and protect the environment began to surface. One of the more egregious problems sprang up in Cleveland as the polluted Cuyahoga River caught on fire in 1969. In addition to environmental issues, one of the more visible and vexing issues was urban sprawl and its adverse impact on quality of life.

*Since a surge of suburban growth was not anticipated when model zoning codes were first drafted, cities had no effective way to control where and when unanticipated growth occurred.*

### The Burning Cuyahoga River

The rising tide of public concern culminated in the first Earth Day that was held in April 1970 which focused attention on the problems associated with unbridled growth.<sup>3</sup> This concern resulted in a backlash against growth, with some advocating no-growth programs.<sup>4</sup>

### The First Earth Day: 1970



Exhibit 7- 4

In response to public outcry, Congress passed a number of bills related to the environment, air and water quality, and coastal zone management. The 1969 National Environmental Policy Act (NEPA) signed into law in 1970 was the first of a series of environmental laws passed by the federal government. It was followed in quick succession by the 1970 Clean Air Act (CAA), the 1970 Coastal Zone Management Act (CZMA), the 1972 Clean Water Act (CWA), the 1973 Endangered Species Act (ESA), the 1974 Safe Drinking Water Act (SWDA), the 1976 Toxic Substances Control Act (TSCA),



Exhibit 7- 3

<sup>3</sup> For a discussion of evolution of Earth Day , see: <http://www.earthday.net/node/77>

<sup>4</sup> These approaches had a number of labels including: no growth, slow growth, stop growth and zero growth.

Exhibit 7- 5

and the 1976 Resource Conservation and Recovery Act. As suggested by their titles the laws were focused on particular issues creating a labyrinth of federal regulations affecting land use decisions.

**Federal Environmental Acts in the 1970s**

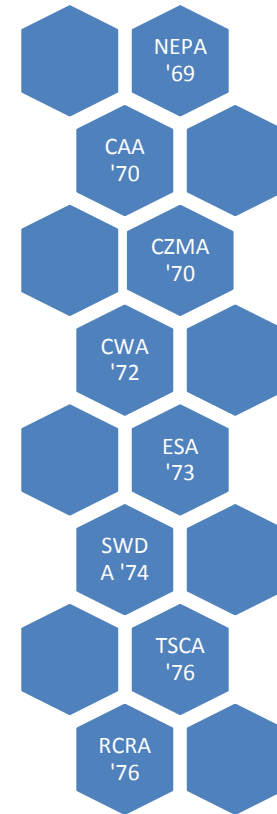
In addition to federal action, some 20 states passed environmental legislation to protect the environment and scarce resources at the state and local level. During this period, 37 states also passed legislation to enhance the planning process, with many adding regional overlays to complement local planning. These efforts were guided in part by an extensive three-volume set entitled “Management & Control of Growth” published by the Urban Land Institute.<sup>5</sup>

**ULI’s Management & Control of Growth Anthology**



**Exhibit 7- 6**

The twenty chapters in this anthology provided an in-depth discussion of growth management. It began with a discussion of the shift in attitudes that had occurred from one of pro-growth focused on economic vitality toward no growth or managed growth focused on environmental protection and maintenance of the status quo. The second volume presented case studies of how some cities approached growth management (i.e., Ramapo NY, Petaluma CA). It also explored some of the legal and constitutional issues associated with managing growth including the mobility and the right to travel that could be impinged by no growth or other exclusionary programs. It explored some of the tools and techniques for managing growth and noted the importance of coordinating zoning with infrastructure expansion and building permit programs. The series also explored impact measurement and fiscal analysis of development, including excerpts from a study on the “costs of sprawl” written by Real Estate Research Corporation (RERC) which was headed by Anthony Downs.<sup>6</sup> Despite caveats attached to the research by Mr. Downs the RERC study continues to be the landmark piece used in arguments regarding the need to control sprawl. The third volume contained more in-depth analysis of various tools as well as a summary of federal, state and local policies. It concluded with a chapter entitled “Perspectives from the Development Sector” followed by a bibliography. The developer’s comments ranged from the “current crisis in real estate” to diplomacy planning and the need for public and private planning partnerships.




**Exhibit 7- 7**

<sup>5</sup> \_\_\_\_\_, Management and Control of Growth: Issues, Techniques, Problems and Trends, Urban Land Institute, 1974.  
<sup>6</sup> The study was funded by the Council on Environmental Policy, Office of Policy Development and Research, HUD, Office of Planning and Management, and the EPA and was submitted in 1974.

The decade-long wave of federal intervention in land use and environmental protection culminated in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 which is more commonly referred to as the Superfund Act. CERCLA attached personal liability to ownership of properties that might contain hazardous chemicals.<sup>7</sup> The real estate market responded to this new risk by skewing development and investment away from properties that might be contaminated or were located in designated zones.

**Lower Duwamish Waterway Site**

The Lower Duwamish Waterway site is a 5.5 mile stretch of the Lower Duwamish River which flows into Elliott Bay. The waterway south of downtown Seattle and is lined industrial uses and several neighborhoods. The contaminants in the waterway sediments caused by years of industrial activity and stormwater include polychlorinated biphenyls (PCBs), polyaromatic hydrocarbons (PAHs), mercury and other metals, and phthalates. The Washington State Department of Ecology and EPA are collaborating on efforts clean the waterway and avoid recontamination.



**Exhibit 7- 8**

During the balance of the 1980s, the Federal Government began to retrench on the environmental front, cutting back on regulations, especially those that impinged on private rights or interfered with the self-determination of cities. Under delegated authority, states began to assume a more active role in management of growth, placing emphasis on strategic plans and dispute resolution to provide a more stable and harmonious environment for managing growth. At the same time, there was a rising tide of interest in states' rights and regionalism, as well as rekindled interest in clean air and other critical environmental issues.

In the mid-1980s, the real estate industry went on a major building boom, fueled by dramatic inflows of capital from institutional investors. During this period, the focus was overwhelmingly placed on creating more assets quickly rather than on how to best manage real estate as a "resource." The rampant pace of commercial development that occurred during the mid-80s to satisfy the demand for assets was both unparalleled and dramatically outpaced the growth in demand for space and pushed the development capacity of cities. As such, development flooded over to suburban markets and other areas with lower barriers to entry and lack of growth controls. In many cases, this growth in product outpaced infrastructure and pushed urban boundaries further into the suburbs. As might be expected, the over-exuberance on the development side of the industry was not "sustainable" and led to a dramatic collapse in the commercial real estate arena that began to emerge in the late 80s. As such, the industry was almost completely shut down with emphasis shifting to survival rather than profit maximization. This situation played out for more than five years, which led to the memorable rallying cry issued by Sam Zell of "Stay alive 'til 95" which he coined in 1991.

***The rampant pace of commercial development that occurred during the mid-80s to satisfy the demand for assets dramatically outpaced the growth in demand for space and pushed the development capacity of cities.***

<sup>7</sup> Since it was enacted the Superfund program has identified and analyzed tens of thousands of hazardous waste sites. Actions were taken to people and the environment from contamination at the worst sites and others were involved in cleanup programs. For a complete listing of sites, see: <http://www.epa.gov/superfund/about.htm>



***While the real estate industry shifted into survival mode in the early 1990s, land use planners took the offensive on the growth management front which culminated in the “smart growth” movement.***

While the real estate industry shifted into survival mode in the early 1990s, land use planners took the offensive on the growth management front which culminated in the “smart growth” movement.<sup>8</sup> As with building codes, the growth management movement was standardized by promulgation of the American Planning Associations (APA) Model Code. Efforts to spread the movement across the country were mobilized by the “Growing Smart Legislative Guidebook” which provided a roadmap for state and local planners to get the program implemented.<sup>9</sup> Efforts were also made to adopt regional approaches to close loopholes that stemmed from jurisdictional gaps associated with local controls.

**Alternative Planning Models**

In developing the smart growth movement, the APA explored several distinct planning models that could be used to implement growth management programs. As noted in Exhibit 7-3, these models included: advisory, incentivized, mandatory local



**Exhibit 7- 9**

planning, or mandatory state-regional-local

planning. Rather than relying on a single model, the APA recommended a hybrid approach that blended all four models into a unified approach. Unfortunately, the commercial real estate industry was not represented in these discussions and paid little attention to the smart growth movement and the potential “game changing” that it represented in terms of its impact on private vs. public rights.

When the commercial real estate market finally began recovering in the mid-90s, new development activity faced a groundswell of anti-growth sentiment. This situation resulted in significant tension between managed, or in some cases, no-growth proponents and their pro-growth counterparts. Unfortunately, there was no middle ground, with the smart growth movement powering ahead and pro-growth movement on the defensive. The situation was exacerbated by the absence of a body of empirical research that would have supported a more objective assessment of

***When the commercial real estate market finally began recovering in the mid-90s, new development activity faced a groundswell of anti-growth sentiment.***

<sup>8</sup> For more current information on Smart Growth, see: <http://www.smartgrowth.org/about/default.asp>

<sup>9</sup> American Planning Association's *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change, 2002 Edition* See: <http://www.planning.org/growingsmart/guidebook/print/index.htm>

various approaches of managing growth. Thus, stakeholders of both sides of the debate were forced to rely on their beliefs and normative values. Since the real estate industry had not been at the table during the creation of the smart growth movement and had largely been on the sidelines, it found itself scrambling to catch up on the changes that had occurred in growth management. These efforts were thwarted by the lack of a cohesive front as was the case on the other side of the table. Some of the real estate trade associations launched growth management program initiatives to respond to members' concerns. However, these efforts were largely in a defensive mode and paled in comparison to the smart growth movement which benefited from a united front and almost a decade of efforts to implement the policies and practices.

*Since the real estate industry had not been at the table during the creation of the smart growth movement and had largely been on the sidelines, it found itself scrambling to catch up on the changes that had occurred in growth*

Commentary 7- 2

**Smart Growth & Shared Values**

Over the past decade, many elements of the initial smart growth movement have been integrated into growth management programs across the country. Unfortunately, the initial smart growth program came on the heels of the worst cycle of overbuilding in history which may have led to an over-reaction. This was especially true since the real estate industry was not represented in the discussion as it had been in the ULI's initiative in the 1970s. Thus, it is difficult to determine if the apparent gap between the attitudes of the public and private sector on smart growth are based on philosophical differences that cannot be resolved or if they are an artifact of the evolution of the movement.

**Semantics and the Growth Management Movement**

**Smart vs. Stupid Growth Management**

In a number of respects, the "smart growth" moniker actually made it difficult to find more balanced and sustainable

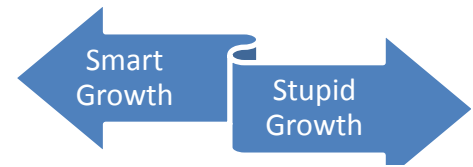


Exhibit 7- 10

approaches to growth management. First, use of the term "smart growth" to label one end of the growth management continuum is in itself inflammatory. That is, it forces the other side to adopt a "stupid growth" position; a no win situation that is like attacking motherhood, apple pie and other icons of American life. Second, the term "smart growth" connotes that it is a knowledge-based position, one that is built on a solid foundation of empirical research. Alternatively, it suggests that the movement is theoretically valid, that it draws on established axioms and postulates that make it logically consistent. Based on results of an extensive survey of the literature, neither of these assumptions appears to hold. That is, despite an overwhelming array of articles on the topic, empirical research that satisfies the rigors of the scientific method is relatively limited.<sup>10</sup> This is especially true for research that is broad enough to be generalized beyond the immediate study and has been integrated into a theoretical body of thought. Third, "smart growth" is a nebulous term that lacks a scientific basis necessary to satisfy the formal rules of definition. As such, it can be pushed and pulled until it satisfies the beliefs or agenda of anyone who utters it. Fourth, it has become marginalized and lacks meaning. As such, advocates throw it out as justification for new growth initiatives and opponents react to it in a defensive manner. Finally, the smart growth phrase suggests a dichotomy, a black vs. white state of nature that has no viable middle ground.

<sup>10</sup> DeLisle, James R. "Growth Management: An Annotated Bibliography," compiled for ICSC, 2006.

**Retail Industry Professionals on Smart Growth**

To explore the private sector’s attitudes toward smart growth, a survey was conducted in conjunction with a speech presented to attendees at International Council of Shopping Centers (ICSC) Pacific Northwest Idea Exchange in 2004.<sup>11</sup> As noted in Exhibit 7-7, the respondents were overwhelmingly supportive of the underlying principles behind the smart growth movement. Similar results were obtained from surveys of other real estate professionals,

Smart Growth Principle	Respondents by Agreement Level				
	Strongly Agree	Agree	Neither	Disagree	Strongly Disagree
Promote Orderly Growth	42%	52%	0%	4%	1%
Ensure Strong/Diverse Economy	67%	25%	6%	0%	1%
Provide Affordable Housing	30%	39%	17%	12%	2%
Protect Infrastructure Investment	27%	52%	15%	3%	3%
Safe & Econ. Transpo System	37%	43%	12%	6%	1%
Sustainable Energy/Natural Resources	33%	45%	9%	7%	6%
Strengthen Agr & Forest Preservation	12%	36%	24%	21%	6%
Consistency of State/Local	33%	42%	16%	4%	4%
Reviatalize Urban Centers	36%	48%	6%	6%	4%
Reduce excess sprawl	31%	18%	18%	22%	11%

**Exhibit 7- 11**

*...the apparent gap between the public and private sectors on smart growth is based in part on semantics rather than solely philosophic differences.*

as well as with graduate students in an interdisciplinary real estate program. In exploring respondents’ attitudes toward smart growth principles, the vast majority either “strongly agreed” or “agreed” on the top 10 principles. This suggests the apparent gap between the public and private sectors on smart growth is based in part on semantics rather than solely philosophical differences. However, respondents did make it clear that they did not think the then-current policies adequately reflected the views of space consumers and space producers. While they felt many policy makers were well-intended, they contended they “just don’t get it” in terms of understanding market fundamentals. They felt that education based on facts rather than normative beliefs was critical to the process and encouraged the development of more collaborative approaches.

The importance of developing collaborative approaches to growth management was recognized in some of the early deliberations at United Nation in 1986 when the phrase “sustainable development” was formally coined.<sup>12</sup> The discussion noted sustainable development was development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

**UN Documents: Toward Sustainable Development**

*A communications gap has kept environmental, population, and development assistance groups apart for too long, preventing us from being aware of our common interest and realizing our combined power. Fortunately, the gap is closing. We now know that what unites us is vastly more important than what divides us.*

*We recognize that poverty, environmental degradation, and population growth are inextricably related and that none of these fundamental problems can be successfully addressed in isolation. We will succeed or fail together.*

*Arriving at a commonly accepted definition of 'sustainable development' remains a challenge for all the actors in the development process.*

**Exhibit 7- 12**

<sup>11</sup> DeLisle, James R. “The Rising Tide of Growth Management,” ICSC Pacific Northwest Idea Exchange, Vancouver WA, 2004.

<sup>12</sup> For more detailed comments, see Our Common Future, Chapter 2: Towards Sustainable Development at <http://www.un-documents.net/ocf-02.htm>

The UN documents pointed out two key concepts that must be recognized in efforts to promote sustainable development. First, is the concept of 'needs', especially those of the world's poor should receive overriding prioritization. Second, limitations imposed by the state of the economy, technology, social organization on the environment's ability to meet present and future needs. The underlying goal was the fundamental belief social equity should be maintained between generations as well as within each generation.

While not directly discussing growth management, the UN discussions noted that the ability to meet “essential needs depends in part on achieving full growth potential, and sustainable development clearly requires economic growth in places where such needs are not being met.”<sup>13</sup> They recognized that there are no strict boundaries on population growth or resource use beyond which lies ecological disaster since market forces may intervene in terms of rising costs and diminishing returns. They concluded discussion of sustainable development by noting:

***The UN noted that the ability to meet “essential needs depends in part on achieving full growth potential, and sustainable development clearly requires economic growth in places where such needs are not being met...”***

In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.

The importance of sustainable real estate practices on the private side of the industry has been a cornerstone of the Wisconsin school of thought. For example, in 1972 Ratcliff noted:

I am inclined to believe that the area of the social sciences concerned with urban economics and urban land will respond to the merging nature of urban problems. After all, social scientific effort would be pointless if it did not serve in solving social problems and in the advance of social well-being... I am sure that you share with me a constant exposure to writings on the urban crisis, ad infinitum, ad nauseum. Since most people now live in cities, the urban crisis is essentially co-extensive with the social crisis...<sup>14</sup>

***I am inclined to believe that the area of the social sciences concerned with urban economics and urban land will respond to the merging nature of urban problems. After all, social scientific effort would be pointless if it did not serve in solving social problems...***

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<sup>13</sup> Ibid, chapter 2, paragraph 6.

<sup>14</sup> Ratcliff, Richard U., Valuation for Real Estate Decisions, Santa Cruz: Democratic Press, 1972: p. 7.



Graaskamp passed this message and his sense of social commitment regarding real estate rather elegantly in a television interview he granted toward the end of his career.<sup>15</sup> In the interview he noted:

Man is the only animal that builds his terrarium about him as he goes and real estate is the business of building that terrarium. So we have a tremendous ethical content, tremendous social purpose. The student is looking for a field in which entrepreneurship and a way of life can be integrated into social purpose. We like to argue that the entrepreneurship of tomorrow is going to be the individual who can inventively implement social policy.

***Man is the only animal that builds his terrarium about him as he goes and real estate is the business of building that terrarium. So we have a tremendous ethical content, tremendous social purpose...***

Graaskamp also referred to risk-management approach that punctuated the importance of developing market-based solutions to growth management and sustainable real estate.<sup>16</sup> He noted:

... the best risk-management device for the producer group, which is usually the lead group in the initiation of a project, is thorough research so the development product fits as closely as possible the needs of the tenant or purchaser, the values of the politically active collective consumer, and the land use ethic of the society.

Commentary 7- 3

#### **A Note on Sustainable Real Estate**

The term “sustainable” has become common in real estate jargon. The recent attention to sustainability concept has been welcomed by many stakeholders and has been embraced by “thought leaders” in academia and “early adopters” and new leaders in the profession ranks. This acceptance is understandable. Indeed, it would be hard to argue against some of the premises built into a term that is fundamental to American values upon which this country was built. The reality, however, is that this new interest is not really new. Rather, it hearkens back to the essence of the real estate discipline and its origins in agricultural economics. In the early 1900s, real estate was viewed as a scarce resource; one that mankind had temporary control over and served as “stewards of the land.” Over the years, the real estate discipline has moved away from the resource orientation of its founders, shifting from viewing real estate as a scarce resource to viewing real estate as financial asset.

Recognition that real estate is both a resource and an asset is consistent with its dual “space-time, money-time” dimensionality. Thus, the increased interest in the “asset” side of the equation was both understandable and helped advance the discipline on that front. Indeed, a number of graduate real estate programs and real estate centers were launched during the 80s. A number of these academic initiatives were supported by industry sponsorship, much of which came from the Wall Street side of the business. As such, emphasis continued to focus on the financial side of the industry. While not unacceptable per se, the “Main Street” side of the industry which focused on real estate as a resource lost ground. This set the stage for spatial market/capital market divide. As such, in many circles the view of real estate as a scarce resource and concern over how to manage that resource gave way to one of wealth maximization. Going forward, the real estate industry should return to its roots and collaborate with other stakeholders to shift from “smart growth” management to “sustainable growth” management.

<sup>15</sup> Jarchow, Stephen P., editor, Graaskamp on Real Estate, *The Urban Land Institute*, 1991. P68.

<sup>16</sup> Graaskamp, James A. Strategic Planning Approach to Major Real Estate Decisions, unpublished essay reprinted in Stephen P. Jarchow, editor, Graaskamp on Real Estate, Washington, DC: The Urban Land Institute, 1991, 378-83.

## Smart Growth Principles: 2010

While the “smart growth” label has not changed over the years, its core principles have continued to evolve. As noted in Exhibit 7-7, the current iteration of principles puts more emphasis on compact design, walkability, mixed land uses and place-making.<sup>17</sup> The revised principles also recognize different communities may have different needs and encourages engaging community members in collaborative planning processes. Going forward, the approaches to managing growth are likely to continue to evolve. While understandable, the continuous evolution of growth management creates a moving target for the private sector.

- Create Range of Housing Opportunities and Choices
- Create Walkable Neighborhoods
- Encourage Community and Stakeholder Collaboration
- Foster Distinctive, Attractive Communities with a Strong Sense of Place
- Make Development Decisions Predictable, Fair and Cost Effective
- Mix Land Uses
- Preserve Open Space, Farmland, Natural Beauty and Critical Environmental Areas
- Provide a Variety of Transportation Choices
- Strengthen and Direct Development Towards Existing Communities
- Take Advantage of Compact Building Design

Exhibit 7- 13

The lack of stability in growth management principles, policies and practices creates uncertainty which adds to the risks that are borne by developers, owners and investors who provide the capital to support the market. Since real estate competes with other asset classes for capital, to keep the risk/return ratio in balance, these risks must be offset by higher returns. This puts upward pressure on prices and reduces affordability for consumers of space. Alternatively, to compensate for an increase in regulatory

***The lack of stability in growth management principles, policies and practices creates uncertainty which adds to the risks that are borne by developers, owners and investors who provide the capital to support the market.***

uncertainty, developers and investors would have to turn to lower risk projects that have a proven track record and have stood the test of time. This reaction would place limits on development of innovative projects that might be more consistent with smart growth principles but lack a track record that can be used to estimate risk. Examples of such projects include mixed-use, transit-oriented projects, green buildings, lifestyle centers and urban retail. Ironically, these are some of the building blocks upon which many proponents of smart growth hope to build the cities of the future. These considerations punctuate the importance of ensuring growth management policies and practices are sensitive to the realities of the market. This argues for a more collaborative, sustainable approach. At the same time, real estate professionals must pay close attention to changing assumptions and preferences and must get involved in the process to ensure that changes are not made lightly and are subjected to “critical thinking.

<sup>17</sup> For more insights into each of the criteria and the underlying rationale, see: <http://www.smartgrowth.org/about/principles/default.asp>

### Growth Management: A Matter of Perspective

Growth management can be approached from a number of perspectives, each of which has implications on how the issue is addressed. To help understand the diversity of approaches and attitudes toward growth management, it is useful to explore some of streams of research that emanate from these perspectives.

- **Environmental and Ecological Perspectives.** Those who fall into this camp tend to look at growth as a threat to the environment and ecological sustainability. Urban ecologists recognize that urban systems are complex interactions among social, economic, institutional, and environmental variables. In the absence of countervailing forces, they see a potential conflict when human-dominated decisions emerge without considering the impact on local and global earth ecosystems.
- **Social Equity Perspectives.** Stakeholders who fall into this category look at some of the consequences of growth management programs on fairness and the constitutional right to travel. For example, studies suggest low-density housing achieved by large-lot zoning has a negative impact on minorities creating an economic barrier that furthers segregation. Researchers also look at the spatial mismatch that focuses on the central-city residential locations of welfare participants and the expansion of job opportunities in the suburbs which creates long reverse commutes that must be addressed through improved transportation programs. Another area of inquiry that falls under this umbrella focuses on how public policy and related private-sector activities affect how the combination of place and race shape the opportunity structure of metropolitan areas.
- **Health Perspectives.** The impact of sprawl on the health and welfare of individuals and communities has received significant attention. Some researchers explored the relationships between urban sprawl, health, and health-related behaviors. One study reported residents of sprawling counties were likely to walk less, weigh more, and suffer from hypertension more than residents of compact counties. Other studies reinforce this conclusion, arguing that city residents are healthier than their suburban counterparts due to less reliance on automobiles and greater emphasis on walking.
- **Sociological Perspectives.** Sociologists tend to look at the impact of growth management on the social behavior and interactions. For example, one of the premises of smart growth is that placing amenities (i.e., parks, open space), and retail within walking distance of homes and increase pedestrian travel and interaction among neighbors. In a study that explored this hypothesized relationship, some support was gathered but the researchers also noted the importance of attitudes and life-styles in explaining the relationship. Sociologists also look at the impact of smart growth policies on gentrification which is a form of “user succession” in which older, often lower-income residents are displaced by wealthier more educated residents seeking the advantage of urban infill projects. Thus, urban infill and densification has made many sociologists wary of the potential for gentrification to displace disadvantaged residents.
- **Economic Perspectives.** Economists approach growth management from a supply/demand frame of mind. Briefly, policies that constrain supply put upward pressure on prices. Thus, a number of economic studies note that restricting the supply of buildable land puts pressure on housing affordability. Other researchers have explored the economic consequences of various growth management policies and the impact they have on supply, demand and prices. Other researchers explore the effect on economic development programs and note the importance of considering such factors when developing growth management programs. Researchers also look at the cost/benefit equation, exploring metrics that can be used to evaluate various programs. Economists also explore market reactions to positive incentive programs, as well fee-based disincentive programs. The results of these studies differ, but share the common theme that the market tends to react to various interventions in a predictable manner consistent with economic theory.

## State and Local Growth Management

At the state and local level, the growth management toolbox contains a number approaches that can be used to manage growth. Without getting into too much detail, it is useful to explore some of the contemporary approaches that are being deployed by states, regions and local municipalities to manage growth. Growth management programs address several key growth-related areas: location, intensity, speed, costs, and approval processes.

### Growth Management Tools

Location of Growth	<ul style="list-style-type: none"> <li>• Areas of Critical State Concern</li> <li>• Fully Contained Communities</li> <li>• Transferrable Development Rights</li> <li>• Urban Growth Boundaries</li> </ul>
Speed of Growth	<ul style="list-style-type: none"> <li>• Concurrency requirements</li> <li>• Moratoria</li> </ul>
Costs of Growth	<ul style="list-style-type: none"> <li>• Impact Fees</li> <li>• Exactions</li> <li>• Incentives</li> </ul>
Approval Processes	<ul style="list-style-type: none"> <li>• Ballot Box Zoning</li> <li>• Referenda</li> <li>• Regional Transportation</li> </ul>

### Programs Affecting the Location of Growth

#### Areas of Critical State Concern

Under delegation of constitutional authority to protect the public health, safety and welfare, states have been provided the right to designate “Areas of Critical State Concern.” These designated areas are carved out from local jurisdictional oversight and must answer to state requirements which can be much more restrictive than would occur under local control. Under Florida law, state staff professionals in the Division of Community Planning must review all local development projects that fall within the designated areas as well as amendments to comprehensive plans that affect the designated areas. Where appropriate, they may appeal to the Administration Commission any local development orders that they deem are inconsistent with state guidelines. In the State of Washington Areas of Critical Concern are areas along any water frontage, fresh or salt-water; habitat for endangered or threatened species, plant or animal; pristine environment such as old growth or original prairie; recharge aquifer area; wetlands.

Minnesota DNR Critical Area Map<sup>18</sup>

#### Critical Area/MNRRRA Corridor Map

Note: The corridor boundaries of the Mississippi River Critical Area and MNRRRA are the same.

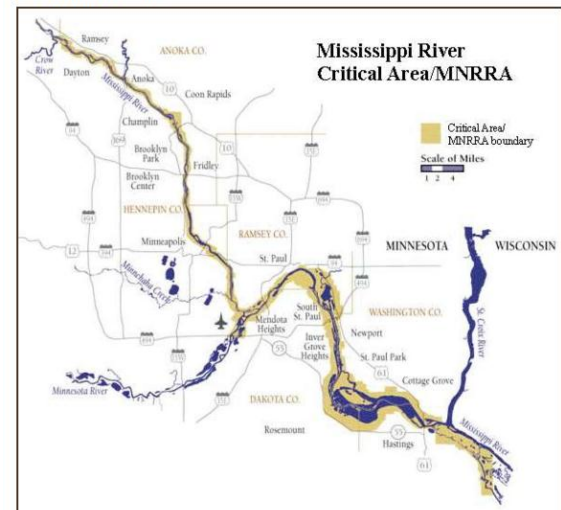


Exhibit 7- 14

<sup>18</sup> For more discussion, see: [http://www.dnr.state.mn.us/waters/watermgmt\\_section/critical\\_area/map.html](http://www.dnr.state.mn.us/waters/watermgmt_section/critical_area/map.html)

Fully Contained Communities

The Growth Management Agreement in the State of Washington enables local jurisdictions to approve Fully Contained Communities (FCC). Exhibit 7-15 indicates the location of the Redmond Town Ridge FCCs located between Redmond and Duvall Washington. FCCs are something of an anomaly relative to other growth management programs in the sense that they allow intense urban development in areas outside of the boundaries of established urban markets. Some argue they are a form of sprawl, but the difference between FCCs and traditional sprawling suburban development is the level of concentration and self-sufficiency they provide. In theory, FCCs avoid negative externalities by creating an agglomeration of land uses that make them self-sufficient. Based on the results of extensive Environmental Impact Statements and public hearings, developers also pay to mitigate or offset the residual externalities that they cannot contain.

Trilogy and Redmond Town Ridge: FCC

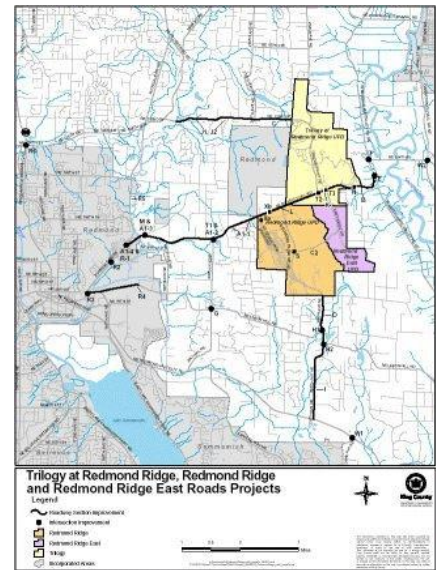


Exhibit 7- 15

Selected Off-Site Road Mitigation Projects

REDMOND RIDGE AND TRILOGY OFF-SITE ROAD MITIGATION PROJECT SUMMARY				
PROJECT DESCRIPTION	PROJECT NUMBER	PROJECT TRIGGER	STATUS	SUBSTANTIAL COMPLETION
<b>COMPLETED PROJECTS</b>				
A1-1: Novelty Hill Road @ 214th Avenue NE and 218th Ave. NE. Turn lanes and sight distance enhancements.	L99R0021	1,200 vph (2-way) on Novelty Hill Rd between 208th NE and RR.	Completed	Fall 2002
A1-2: Novelty Hill Road @ 208th Avenue NE traffic signal and turn lanes.	L99RW038	125 Single Family DU constructed and occupied on UPD sites	Completed	Winter 2000
A1-3: Novelty Hill Road @ Redmond Road Turn lanes and sight distance enhancements.	L99R0022	125 Single Family DU constructed and occupied on UPD sites	Completed	Summer 2002
A1-4: Novelty Hill Road @ Avondale Road Modify signal and channelization.	N/A	125 Single Family DU constructed and occupied on UPD sites	Completed	prior to 1999
B: Novelty Hill Road (Blakely Ridge to West Snoqualmie Valley Road) Shoulder widening.	L00RW019	When 100 peak hour trips from UPDs combined impact roadway	Completed	Summer 2004
C: NE 133rd Street (Blakely Ridge to 218th Avenue NE) Minor widening, shoulder improvements, sight distance and turn lanes.	L00RW015	1,350 vph (eastbound only) on Novelty Hill Rd. east of 208th Ave. NE. North Back Door	Completed	Sumer 2003
D: 238th Avenue NE (Redmond Ridge to Union Hill Road) Widening, shoulder and landscaping improvements.	L00RW026	1,350 vph (eastbound only) on Novelty Hill Rd. east of 208th Ave. NE. South Back Door	Completed	Fall 2001
G: 208th Avenue NE @ Union Hill Road Interim traffic signal	L99RW044	When 100 peak hour trips from UPDs combined impact intersection	Completed	Spring 2001
H2: 238th Avenue NE @ Union Hill Road (South) Realign road, replace culvert, sight distance and shoulder widening.	L00RW026	Prior to Redmond Ridge Drive connecting to 238th Ave. NE. South Back Door	Completed	Winter 2001
I: 238th/236th Avenue NE (SR 202 to Union Hill Road) Widen shoulders.	L00RW026	Peak traffic volumes on 238th Ave NE reach 700 vph (2-way) South Back Door	Completed	Summer 2001
J1: NE 133rd Street (218th Avenue NE to Bear Creek Bridge) Interim shoulder, turn lanes, and sight distance.	L00RW018	When Trilogy connects to NE 132nd St. & 700 peak vph on NE 133rd St. North Back Door	Completed	Spring 2003
K: Novelty Hill Road Frontage @ Trilogy at Redmond Ridge Widening, turn lanes, bike path, sidewalks and signals. (Obligation for Trilogy at Redmond Ridge on	L9900229	Trilogy at Redmond Ridge plat	Completed	Fall 1999
L: Novelty Hill Road Frontage @ Redmond Ridge Widening, turn lanes, bike path, sidewalks and signals. (Obligation for Redmond Ridge only)	L98R0019	Redmond Ridge Masterplat	Completed	Summer 2002

Exhibit 7- 16

The evolution of FCCs in Washington has been taken a circuitous path, moving in and out of favor. For example, in 2005 Snohomish County amended its land use code to allow the development of FCCs.<sup>19</sup> Although no formal applications were filed, developers pursued two large-scale projects: Falcon Ridge which would have developed 3,000 acres just west of Lake Roesiger; and, 2,000 acres in the Seven Lakes area which covered 2,000 acres north of the Tulalip Reservation. In 2008 the county narrowly missed passage of an emergency moratorium to ban FCCs. In 2009 after much public debate, the county removed authorization for FCCs in its Comprehensive Plan and implementing provisions in its development regulations.<sup>20</sup> The decision to ban FCCs were based on extensive hearings in which stakeholders vetted their positions, as well as on language arguing against them contained in the Puget Sound Regional Council’s (PSRC) Vision 2040 statement.

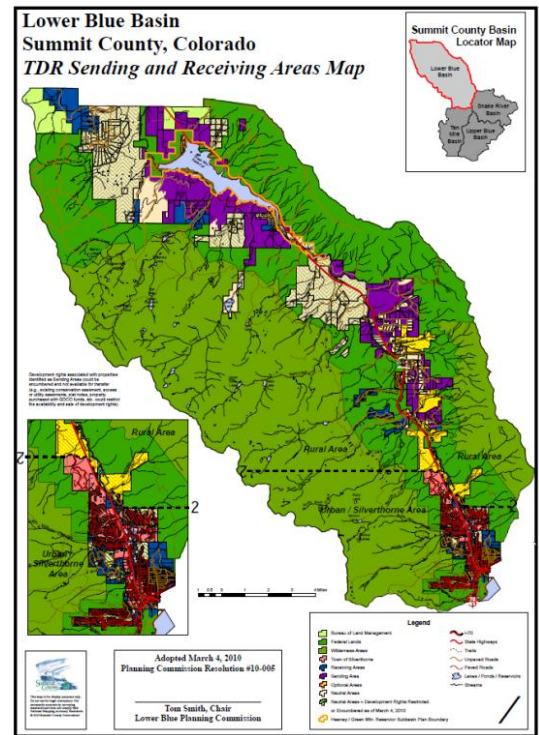
<sup>19</sup> For background report, see: <http://www.co.snohomish.wa.us/Documents/Departments/Council/FCCReportFinal.pdf>  
<sup>20</sup> For details on the changes, see: <http://www.mrsc.org/ords/S61o09-044.pdf>



*Transferrable Development Rights (TDRs)*

Transferrable Development Rights (TDRs) are used to skew growth from some protected areas (i.e., sending areas) to other targeted areas (i.e., receiving areas) that can accommodate more intense development. Often integrated into zoning codes, TDRs offer density bonuses on top of what can be built another example of special districts that create overlays on top of existing zoning. The transfer of density is facilitated by the creation of a market in development rights which the sponsoring governmental bodies create and maintain. In effect, landowners in sending areas are given compensation for the development right transfer they make which places a permanent cap on the allowable development on that site. In general, the sending sites are environmentally sensitive or otherwise locally or regionally significant in terms of their current state of use. On the other hand, the receiving areas are typically located in dense urban areas, sometimes in infill locations which have been earmarked for more intense redevelopment.

**Summit County CO: TDR Send/Receive**



**Exhibit 7- 17**

**Commentary 7- 5**

**King County Wa –Seattle WA TDR Snapshot**

In King County Washington, which has a TDR Program with the City of Seattle, the price of TDRs is set by four factors: 1) the price individual developers are willing to pay for a unit increase in density, 2) the price at which individual rural landowners are willing to sell, 3) the inventory of TDRs available in King County’s Program, and 4) developers’ demand for additional density. Through mid-2010, TDR prices have ranged from \$8,000 to \$30,000 depending on the type (rural/urban) of TDR.<sup>21</sup>

Between 2000 and mid-2010, more than 50 developers used TDRs in 60 or so private market transactions involving some 500 TDRs took place for some \$6.8 million was between private developers and private landowners. The county allocated over 1,000 TDRs to sending landowners, of which 1/3 have been redeemed. Thus, the TDRs have created a secondary market, with some developers holding onto the rights in anticipation of a market recovery that would support their own projects or in hopes of selling them at a profit.

<sup>21</sup> For more details, see: <http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights/market-info.aspx>

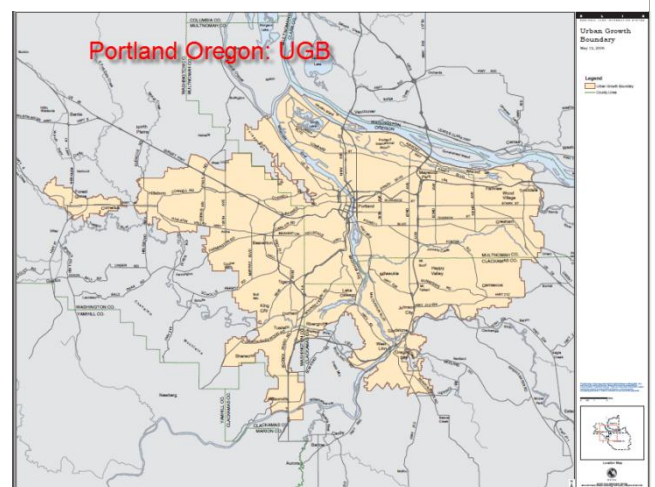
*Urban Growth Boundaries*

A number of states have established Urban Growth Boundaries (UGB) or as Urban Growth Areas (UGA). Regardless of the label, UGBs are basically containment areas that delineate areas for urban growth and areas where urban growth will not be allowed. In Washington, the Growth Management Act (GMA) was passed in 1990 and expanded in 1991 in response to voter outrage over traffic congestion, pollution, loss of open space and sprawl that was occurring due to unbridled growth. In essence, the Act required the larger counties and cities they enfolded to agree on countywide policies and comprehensive plans to guide growth and regulate land uses. In addition the Act required that each county designate an urban growth area within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.<sup>22</sup> Each county is required to identify sufficient land to accommodate its fair share of projected growth over a 25 year period of

time. Counties are encouraged to meet with the cities they enfold to ensure that the aggregate activities will be consistent with the targets and the GMA. To avoid disrupting the market, county plans are required to incorporate reasonable land supply factors to accommodate anticipated growth and permit a range of urban densities and uses. As noted in Exhibit 7-16 UGB is something of a misnomer; rather than enfolded a contiguous area the King County UGB includes several “islands” that wrap around existing small towns.

**King County UGB****Exhibit 7- 18****Portland Metro UGB**

Oregon is another state with a “boundary” program. Rather than county-based, the responsibility for creating Urban Growth Boundaries (UGB) in Oregon has been delegated to local or metropolitan areas.<sup>23</sup> The UGB restricts expansion of the urban area onto agricultural and forest lands. Property inside the UGB is designated for urban services such as roads, water and sewer systems, parks, schools and fire and police protection while land outside is protected against sprawl. The program also encourages infill development and provides guidelines for roads and infrastructure.

**Exhibit 7- 19**

<sup>22</sup> For more resources and discussion, see: <http://www.mrsc.org/subjects/planning/compfaqs.aspx#1>

<sup>23</sup> To read about the Portland Metro plan, go to: <http://www.metro-region.org/index.cfm/go/by.web/id=277#documents>

## *Programs Affecting the Speed of Growth*

### *Adequate Public Facility Ordinances (APFO)*

***Adequate Public Facility Ordinances (APFO) are designed to ensure that local jurisdictions and service areas have adequate infrastructure, services and transportation to accommodate proposed development.***

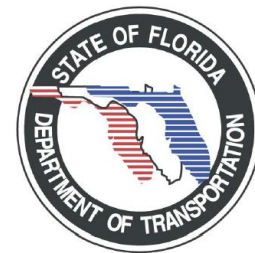
Adequate Public Facility Ordinances (APFO) are designed to ensure that local jurisdictions and service areas have adequate infrastructure, services and transportation to accommodate proposed development. Some states passed APFO-enabling legislation in the late 1960s. The validity of APFOs was challenged in the landmark Ramapo, NY in 1969 when the state supreme court ruled the approach was constitutional.<sup>24</sup> Since that time, a number of states have passed Adequate Public Facility (APFO) legislation to control

growth. While differing dramatically, these programs impose concurrency requirements on local governments. Concurrency-oriented programs address the issue of development timing rather than location or development intensity. In most cases, the determination of adequate services is delegated to the local jurisdiction which establishes minimal “levels of service” (LOS) for various types of services and infrastructure. If the capacity tests are not satisfied, major development activity is restricted through a moratorium or other temporary approach until such time as they are satisfied or their adverse impact is mitigated.

### **Florida’s Transportation Concurrency Programs**

In the State of Florida concurrency mandates that public facilities will be provided in order to achieve and maintain the adopted level of-service standard. Thus, in order to be valid comprehensive plans must to include standards to ensure the adequacy of public facilities. If level-of-service standards are not met, development permits may not be issued.<sup>25</sup> In the Washington, special attention to concurrency requirements is focused on transportation systems. Under the Growth Management Act (GMA) needed transportation improvements or programs must be in place at the time of development. Alternatively, a financial commitment must be made to complete the improvements or strategies within a certain period of time which in Washington is 6 years.<sup>26</sup>

## **Working with Transportation Concurrency Management Systems**



**Exhibit 7- 20**

<sup>24</sup> See: Golden vs. Planning Board of the Town of Ramapo (324 N.Y.S. 2d 178 (N.Y. 1971).

<sup>25</sup> For a detailed discussion, see: <http://www.dca.state.fl.us/fdcp/DCP/complanning/index.cfm>

<sup>26</sup> See: <http://psrc.org/growth/vision2040/implementation/concurrency/>



Jurisdictions with APFO in Maryland: 2005

While APFO requirements are understandable, the lack of standardization adds to the complexity of development as well as uncertainty regarding timing. As noted in Exhibit 7-14, in Maryland most of the urban counties have established APFOs. However, the facilities and services for which concurrency tests must be met are different from county to county as well as from city to city within those counties. For example, some counties require concurrency on roads and schools while others have a much more extensive and hence potentially restrictive list.

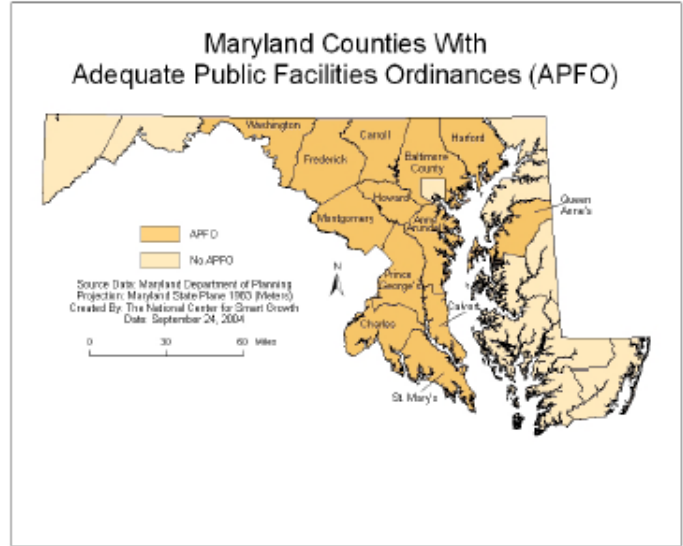


Exhibit 7- 21

APFO Requirements in Maryland

Jurisdiction	Year	Facilities / Services Included
<b>Counties</b>		
Anne Arundel	1978	Schools, roads, water, sewer, water for fire fighting
Baltimore	1979	Schools, roads, water, sewer, storm water, recreation
Calvert	1988	Schools, roads
Carroll	1998	Schools, roads, water, sewer, police, fire/rescue
Charles	1992	Schools, roads, fire suppression in rural areas
Frederick	1991	Schools, roads, water, sewer
Harford	1991	Schools, roads, water, sewer
Howard	1992	Schools and roads
Montgomery	1973	Schools, roads, water, sewer, fire, health services
Prince George's	1981	Schools, roads, water, sewer, police/fire/rescue
Queen Anne's	2001	Schools, roads, water, sewer
St. Mary's	1990	Schools, roads, water, sewer, fire supp., storm drain.
Washington		
<b>Municipalities (&amp; County)</b>		
Aberdeen (Harford)	1999	Schools, roads, water, sewer
Bel Air (Harford)	1998	Schools
Boonesboro (Wash.)	1993	Schools
Brunswick (Frederick)	1998	Schools, roads, water, sewer
Mt. Airy (Fred., Carr.)	1989	Schools, roads, water, sewer, fire/rescue
Keedysville (Wash.)	2005	Schools
Rockville (Montgomery)	2003	Schools, roads, water, sewer, fire/rescue
Smitsburg (Washington)	2005	Schools
Sykesville (Carroll)	1988	Schools, roads, water, sewer, police/fire/rescue, health services, solid waste disposal, storm drainage
Taneytown (Carroll)	1995	Schools, roads, water, sewer, storm drainage
Thurmont (Frederick)	1995	Schools, roads, water, sewer
Williamsport (Wash.)	2005	Schools

In Maryland, municipalities can also impose APFO requirements which again vary from city to city to city. The extreme case is Sykesville which has specified schools, roads, water, sewer, police/fire/rescue, health services, solid waste disposal and storm drainage. In addition to influencing the timing of development differential APFO requirements are likely to be affecting the pattern and/or location of development leading to unintended consequences which may be thwart growth management programs.

*Moratoria*

***In some cases moratoria are enacted as a “time-out,” allowing jurisdictions some time to step back and develop longer-term solutions to growth-related issues.***

In an effort to “slow” or manage the speed of growth, some other states have authorized the use of moratoria. Briefly, moratoria place growth caps on issuance of building permits or subdivision plat approvals. They can be focused on particular types of properties including commercial, industrial or residential or can be implemented across all property types. These caps are typically temporary measures and place a governor or restrictor on the pace of development. Moratoria may place lids on the square footage of certain types of space that can be built or on the number of residential units that are built. Building permit moratoria can involve a complete shutdown of permit activity, or can involve a

slowdown in the pace of permits. They are common in states that have enacted APFOs as a way to allow local jurisdictions time to expand infrastructure capacity to meet concurrency tests. In some cases moratoria are enacted as a “time-out,” allowing jurisdictions some time to step back and develop longer-term solutions to growth-related issues. In general, the courts will uphold moratoria as an accepted means of allowing a jurisdiction time to perform its legislative task in an orderly manner. This is especially true when existing plans have been stressed by rapid growth or there has been an unexpected shortfall in capacity to accommodate growth. However, they can be invalidated where they have been used in bad faith to delay permitting in an effort to forestall new development, especially of large-scale projects.<sup>27</sup>

***Programs Affecting the Cost of Growth***

*Impact Fees*

Impact fees have emerged as a popular way for local jurisdictions to fund the costs of growth. Impact fee programs began in Florida and California in the late 1970s and have spread across the country. Briefly, impact fees are charges that are imposed to cover the costs of providing services to new development. In theory impact fees are a “pay as you go” system which puts the burden of new growth on those who create the need for new infrastructure and services. In reality, they can create something of a windfall for local governments and current residents who were grandfathered in under previous business models and were not charged for the cost of existing infrastructure. At the same time, they are somewhat regressive, especially when applied to affordable housing or services for businesses that are operating on the margin and have a need for new space.

***In theory impact fees are a “pay as you go” system which puts the burden of new growth on those who create the need for new infrastructure and services. In reality, they can create something of a windfall for local budgets and subsidize current residents who were grandfathered in under previous business models.***

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<sup>27</sup> Geisler v. City Council of the City of Cedar Falls, 2008 WL 1975420 (Iowa, 7/102/009).

**Impact Fee Use in Florida**

IMPACT FEE TYPE	USE
Road & Transportation	96.9%
Fire	81.3%
Water	81.3%
Sewer	81.3%
Parks	71.9%
Schools	71.9%
Law Enforcement & Jails	53.1%
Library	43.8%
Public Bldg	34.4%
EMS	34.4%
Solid Waste	12.5%
Other	3.1%

**Exhibit 7- 22**

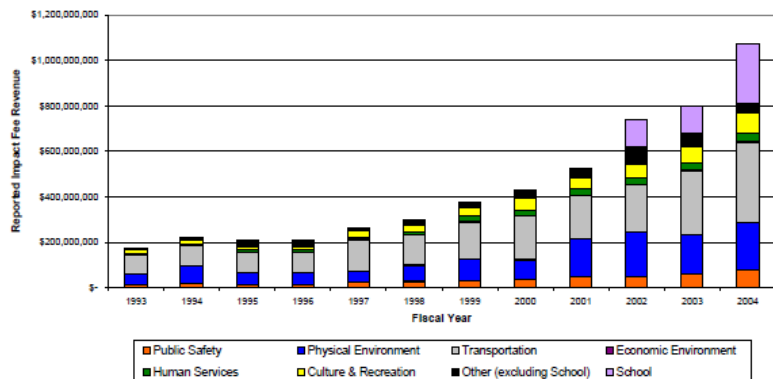
Since their introduction, impact fee programs have exhibited several tendencies. First, they are contagious as evidenced by their rapid spread across states that have adopted them. Indeed, as of mid-2010 some 60% of cities over 25,000 population and 40% of counties in the US have adopted impact fee programs. Second, they are sticky. That is, once impact fees have been set up they tend to increase rising above the initial floor. Third, they can exhibit mission drift, shifting from their original intent to fund new infrastructure and services to serve as source of revenue stream for communities. This is especially true in fast growing communities where fees can become a major revenue generator.

In Florida, impact fees were met with resistance from developers and wound up in the courts. After a number of challenges the Florida Supreme Court concluded they were a valid exercise of city and county home rule authority.<sup>28</sup> However, the Court imposed some limits on the level of fees specifying they cannot exceed a pro rata share of the cost of expanding facilities. In addition, they determined that impact fees cannot be imposed or structured to benefit or provide a “windfall” to existing residents and established a rationale nexus test that mandated the expenditures must be required to serve new development. Finally, local governments must prove that those paying the fees will receive a commensurate benefit from the expenditure of those fees. Since impact fees are set at the local level, fee structures vary widely across jurisdictions. Determining the appropriate level of impact fees is complicated and depends on a number of factors including local cost structure, capacity levels and marginal needs. In addition, local jurisdictions may specify the proportion of incremental costs that are to be recovered through impact fees, allowing some flexibility in sharing costs of growth between current and new residents and land uses.

**Impact Fee Revenue Trends in Florida**

The same basic criteria established through the Florida courts system apply to impact fee programs nationwide. In general, with appropriate enabling legislation they are within the purview of delegated authority. However, to withstand judicial scrutiny impact fees must satisfy two major tests. First, they must meet the "rational nexus" test. This test requires that there is a reasonable connection between the need for additional infrastructure and services and the new development to which impact fees are charged. The test also

**Reported Impact Fee Revenues by Fee Category**  
Fiscal Years 1993 - 2004



**Exhibit 7- 23**

<sup>28</sup> For a detailed discussion of impact fees in Florida, see: <http://www.floridalcir.gov/taskforce.cfm>

requires that the payer will benefit from the investment rather than merely subsidizing a local budget or creating windfalls for other owners who will disproportionately benefit without incurring commensurate costs. Second, the fee calculation of the fee must be based on a proportionate "fair share" formula that puts the payer on a quid pro quo basis with others and thus satisfies the equal treatment doctrine.

#### *Incentive Programs*

In addition to establishing regulations to guide land use and manage growth, a number of states and local jurisdictions have created incentive programs to induce and reward desired development. These programs take a number of forms ranging from monetary approaches that involve local, state or federal funding to density-bonus programs that involve no direct public expenditures. Some local jurisdictions also waive fees and provide expedited permit processing to encourage development activity that is consistent with comprehensive plans and/or desired in terms of other public policy considerations.

***In addition to establishing regulations to guide land use and manage growth, a number of states and local jurisdictions have created incentive programs to induce and reward desired development.***

Once of the simplest monetary incentives is property tax abatement. Such programs are not automatic and require enabling state legislation. Tax abatement programs cannot violate the rights of property owners to equal treatment doctrine that emanates from the "ad valorem" nature of property taxes. In addition, tax abatement programs do not have to provide a complete waiver, but may accept a "payment in lieu of taxes" that lowers the tax burden from the ad valorem values. Tax abatement programs differ from tax exemptions in the sense that are not permanent, but involve temporary forbearance. For example, the City of Tacoma Washington created a "tax incentive for multifamily housing" program to encourage development of multifamily housing in its 17 Mixed-Use Centers.<sup>29</sup> To stimulate development in these targeted areas the program exempts property taxes for 8 to 12 years for that create 4 or more additional housing units. The standard exemption is 8 years, but the 12 year exemption can be obtained by targeting 20% of the units to renters making less than 80% of Area Median Income (AMI) or homebuyers making no more than 115% of AMI.

Colorado has created a number of local incentives options for local jurisdictions.<sup>30</sup> These include delegation of power to offer:

- **Personal Property Tax Credits.** Cities, counties, and special districts may negotiate a personal property tax rebate of up to 50 percent for 10 years.
- **Waiver of Permit Fees.** In addition to expediting the building permit process, cities may choose to waive all or part of various permit fees.
- **Local Tax Abatement.** Cities may consider waiving or rebating local sales/use taxes for construction materials, personal property, and manufacturing equipment.
- **Low Interest Loans.** Cities may offer low interest loans or interest rate reductions on a loan for tenant finish costs, equipment, and working capital.

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<sup>29</sup> For more details, see: <http://www.cityoftacoma.org/Page.aspx?nid=456>

<sup>30</sup> For more details, see: <http://www.metrodenver.org/site-selection/incentives/local.html>

In addition to local programs, the State of Colorado also has established some state-level tax credit programs. These programs include:

- **Contaminated Land Redevelopment Income Tax Credit.** An income tax credit for expenses associated with the redevelopment of contaminated land is available for qualified projects.

**Colorado Enterprise Zones**

- **Enterprise Zones.** The Colorado Enterprise Zone (EZ) program provides tax credits for private enterprise to expand and for new businesses to locate in economically distressed areas of Colorado. EZs are as designated by the Colorado Economic Development Commission (EDC). Businesses located in a zone may qualify for ten different Tax Credits and Incentives to encourage job creation and investment in Colorado. On the real estate side these include a vacant Building Rehabilitation Tax Credit that covers 25% of rehabilitation expenditures

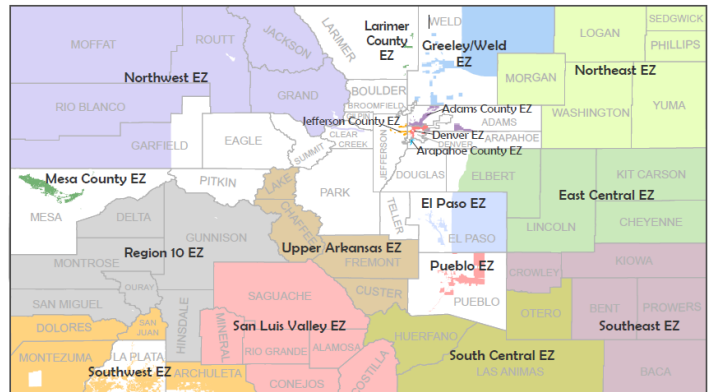


Exhibit 7- 24

Some states provide funding support for projects that improve the quality of life for local residents while helping manage growth and improve the overall quality of for residents of the local community and the state at large. For example, in 2006 Florida created a Transportation Regional Incentive Program (TRIP). The objective of the program was to help improve regionally significant transportation facilities in designated "regional transportation areas." The program makes funds are available to local governments and to the private sector to help pay for critically needed projects that benefit regional travel and commerce.

**Florida TRIP Program**



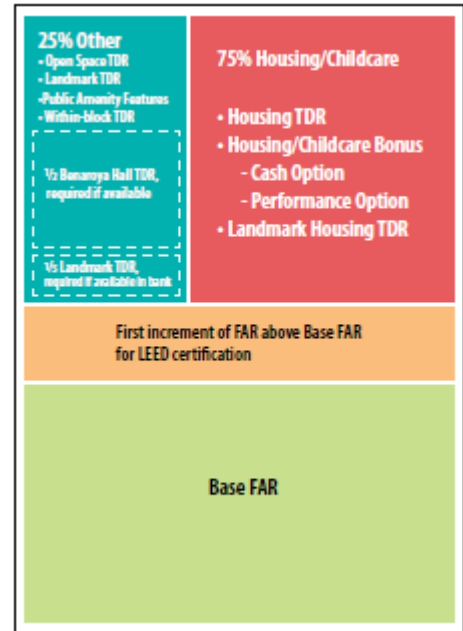
Exhibit 7- 25

The Florida Department of Transportation (FDOT) provides a 50/50 match of federal and local funds selected public transportation facility projects.<sup>31</sup> Matching funding includes in-kind matches such as right of way donations, private funds and federal funds attributable to urbanized areas over 200,000 in population. To qualify for funds, eligible partners must form a regional transportation area, create an interlocal agreement, and develop a transportation plan that identifies and prioritizes regionally-significant facilities.

<sup>31</sup> For more details, see: <http://www.dot.state.fl.us/planning/trip/>

**Density Bonus Program in Seattle**

In addition to economic incentives, a number of states allow cities and counties to create density bonus programs. These programs may be established to promote more compact development in targeted areas, or to encourage the development of community-oriented amenities or assets. For example, Seattle has created an incentive zone program to provide code flexibility by trading of increased density and development rights in return for public benefits in the form of affordable housing and other amenities valued by the community.<sup>32</sup> In designated downtown zones, to receive the first bonus increment of FAR above the base, developers must agree to build a LEED Silver certified project. Once that hurdle has been met, they can acquire rights to develop additional space up to the maximum established by the code. The maximum size bonus can be captured by purchasing TDRs up to 25% of the added bonus, with 75% being earned through affordable housing/child care options, and the remaining 25 percent through other menu options.



**Exhibit 7- 26**

King County Washington, which enfoldes Seattle, also offers residential density bonuses to developers of residential lands in urban areas and rural activity centers, in exchange for public benefits. These public benefits include affordable housing, open space protection, historic preservation and energy conservation. Additional density bonuses are available by combining any of the listed public benefits. Similar programs are offered in a number of other states.

***Programs Affecting the Approval Processes for Growth***

***Ballot Box Zoning***

Ballot Box Zoning is the practice of submitting land use decisions ranging from individual projects to amendments to comprehensive plans to voters for approval. The use of ballot box zoning originated in California where over 1,000 measures dealing with growth and development have appeared on local ballots over the past 30 years.<sup>33</sup> The approach spread to other states, especially those experiencing rapid population growth such as Arizona and Colorado were asked to vote on ballot initiatives aimed at slowing the population growth rates in those states. Ballot box measures take a number of forms including those that require all local jurisdictions to designate specific areas for future growth and submit those areas for voter approval. Once approved, the areas cannot be expanded without getting voter approvals.<sup>34</sup> Ballot box initiatives have



<sup>32</sup> \_\_\_\_, Incentive Zoning in Seattle: Enhancing Livability and Housing Affordability, White Paper, Seattle Planning Commission, February 2007.

<sup>33</sup> Fulton, William, Nguyen, Mai, Williamson, Chris, Shigley, Paul, Kancler, Erik, Diethofer, Jaime and Sourial, Jill, Growth Management Ballot Measures in California, June 2002.

<sup>34</sup> Downs, Anthony, Dealing Effectively With Fast Growth, November 2000, Policy Brief, 67.



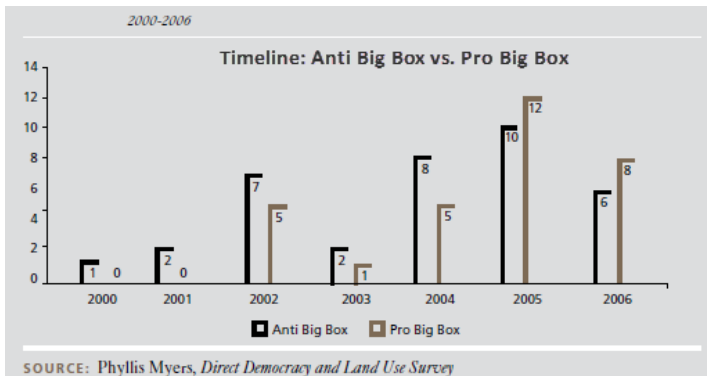
sprung up across the country, as noted by an amendment proposed by the Florida Hometown Democracy group raised in 2008 that was approved as amendment by the state supreme court. Briefly, the amendment required that local governments proposing changes to their comprehensive plans must receive voter approval at the ballot box before the amendments take effect.<sup>35</sup> While the amendment failed to get the required votes, advocates are likely to resurrect it over the next several years.

*Permit Referenda*

In some states major projects must be presented to registered voters to receive approval regardless of whether they satisfy current zoning, building codes or other forms of land use controls. The most visible manifestation of these voter interventions is the spate of anti-big box referenda that have targeted Wal-Mart. This anti-big box movement was vulcanized with a highly visible fight in Inglewood California. The battle quickly spread across the country reaching Maine and other eastern states. Interestingly, the efforts to block big box stores have not always been upheld by voters. For example, in 2005 Acme Township voters rejected a temporary moratorium on big-box store construction in their community.<sup>36</sup> After the moratorium was narrowly overturned, Meijer who planned a 232,000 square foot retail store successfully challenged the township’s requirements for a special use permit. However, the action did not stop after the Traverse City required a special land use permit that required a brick façade, restricted store hours and vetoed the proposed location for a convenience store and gas station. After some of the restrictions were removed, a district court judge upheld the special-use permit requirements.<sup>37</sup>

***In some states major projects must be presented to registered voters to receive approval regardless of whether they satisfy current zoning, building codes or other forms of land use controls.***

**Anti- Big Box vs. Pro Big Box Initiatives**



**Exhibit 7- 27**

development. As noted in Exhibit 7-20, studies suggest these efforts have turned the corner in some jurisdictions with pro-big box initiatives outpacing anti big box measures in the early-mid decade.<sup>38</sup>

In some states major projects must be presented to registered voters to receive approval regardless of whether they satisfy current zoning, building codes or other forms of land use controls. The he anti-big box and anti-development initiatives have created an interesting backlash from developers. Indeed, rather than being on the defensive some developers have taken the offensive filing developer-initiated referenda and encouraging citizen-driven measures challenging anit- big box

<sup>35</sup> Goldberg, Brian, *New Reactions to Old Growth: Land Use Law Reform in Florida*, Columbia Journal of Environmental Law, 2009, Vol. 34:1

<sup>36</sup> For a copy of the article by John Latella, see: <http://www.mlui.org/growthmanagement/fullarticle.asp?fileid=16911>

<sup>37</sup> See: <http://archives.record-eagle.com/2007/jan/19meijer.htm>

*Regional Approvals*

A number of states have established regional planning agencies that have some powers over local and county plans. For example, in Washington the Puget Sound Regional Council (PSRC) was created to develop broader, more regional approaches to land use and urban issues.<sup>39</sup> The mission of PSRC is to play a leadership role in helping create a thriving region through planning and implementing solutions for transportation, land use and economic development at a regional level. PSRC has approached its mandate by spearheading the development of a long-term vision, and then helping coordinate efforts to achieve that vision and adjust it as changes occur over time. Drawing on its extensive funding base from the federal government, PSRC has developed an extensive database and forecasting models to help understand population and growth trends, as well as capacity requirements to serve that growth. By working along with state and local leaders and keeping the GMA strategy in mind, PSRC hopes to make the vision a reality by coordinating decisions made by other jurisdictions.

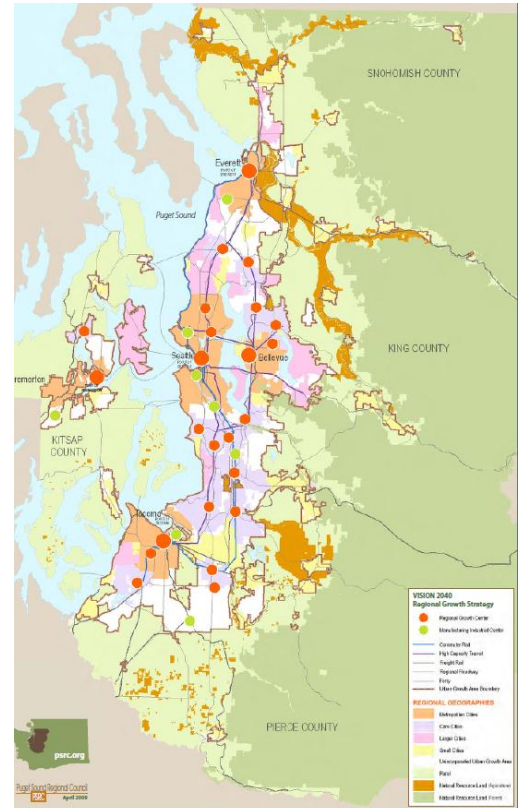


Exhibit 7- 28

**Transportation Planning in GMA**

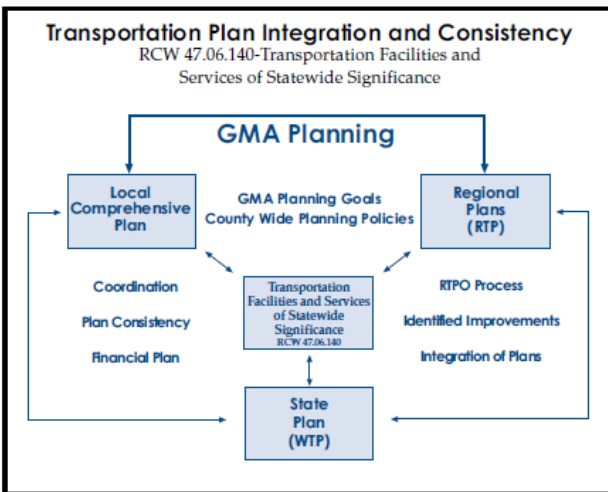


Exhibit 7- 29

The State of Washington’s Growth Management Act as fourteen distinct goals for managing growth at the state and local levels. While delegating many decisions to local jurisdictions, the GMA recognizes the importance of public infrastructure and making sure services are adequate to support the state-wide strategy. Of particular note was the linkage between transportation and growth management. One of the manifestations of this was the designation of certain transportation facilities and services as being of statewide significance. As such, local transportation plans must be integrated into, and consistent with regional and state plans. These plans are also

required to be inclusive and recognize differences in residents’ who depend on the transportation system either directly or indirectly.

<sup>38</sup> Myers, Phyliss, Direct Democracy and Land Use: Eminent Domain and Big Box Development at the Local Ballot Box, Initiative and Referendum Institute University of Southern California, Los Angeles, 2007.

<sup>39</sup> See more resources and more details, see: <http://psrc.org/about>

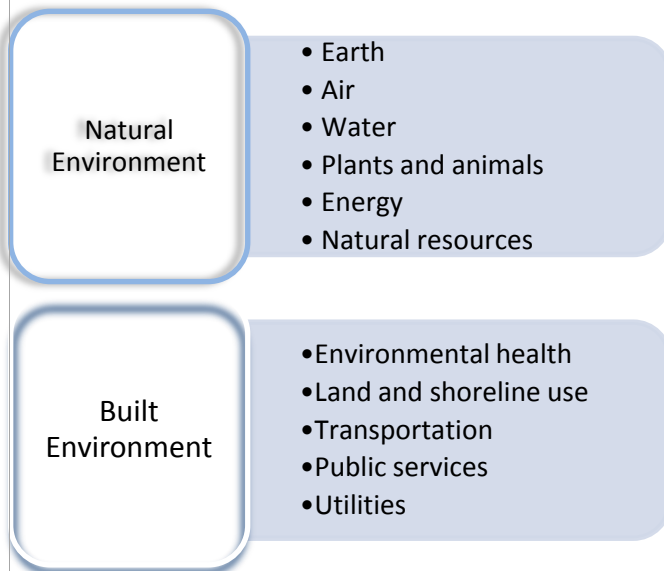


**State Environmental Protection Acts**

In addition to traditional growth management programs, a number of states have created environmental protection acts to retain control of projects that have an overriding concern to the state. For example, in 1971 Washington passed the State Environmental Policy Act (SEPA). Briefly, SEPA provides a framework for considering environmental consequences of proposed development or land use activity before taking action. SEPA empowers local agencies to attach conditional requirements to approvals or to deny them when they have significant adverse impacts on the environment.<sup>40</sup> SEPA review is mandated for all project and non-project actions that do not fall under explicit exceptions. Project actions involve all governmental agency decisions regarding individual non-exempt projects, while non-project actions involve decisions on policies, plans, or programs. Examples of these non-project actions include modification of a comprehensive plan, adoption of new development regulations, or creation of a six-year road plan.

***SEPA empowers local agencies to attach conditional requirements to approvals or to deny them when they have significant adverse impacts on the environment.***

**Scope of SEPA “Environment”**



There are several types of exemptions for actions that do not require SEPA review. First, there are categorical exemptions which deal with smaller project not likely to have a significant environmental impact. Second, there are threshold exemptions where the projects do not standards that are set by the local jurisdiction relative to its own size and scale of operation. Finally, there are emergency exemptions when actions must be undertaken immediately or within a time too quickly to allow full compliance to avoid an imminent 1) threat to public health or safety, 2) danger to public or private property, or 3) threat of serious environmental degradation.

In most cases, SEPA determinations are made at the county or local level, although larger projects may be reviewed at the state level. Once an event

**Exhibit 7- 30**

triggering a land-use action occurs, the lead agency must make a Determination of Non-significance (DNS) or a Determination of Significance (DS). In the former case, the action can be taken without being subjected to SEPA review and compliance requirements. However, if a DS is made the action will depend on the outcome of an Environmental Impact Statement (EIS). An EIS is an extensive, time-consuming and costly report that is charged with presenting an impartial discussion of significant environmental impacts of an action. EIS reports also explore reasonable alternatives to an action and/or mitigation measures that would avoid or reduce adverse impacts to tolerable levels. Once the EIS has been issued, SEPA conducts a number of public hearings to determine what, if any modification or mitigation actions are warranted.

<sup>40</sup> For a more detailed discussion of SEPA, see: <http://www.ecy.wa.gov/programs/sea/sepa/faq.htm>

## Federal Environmental Regulation of Land Use and Growth

### *National Environmental Protection Act (NEPA)*

The National Environmental Policy Act (NEPA) was one of the first federal laws that addressed environmental protection.<sup>41</sup> The key strategy behind NEPA's was to ensure that all branches of government give proper consideration to the environment before engaging in any major federal action that significantly affects the environment. NEPA compliance is required for construction of a range of public facilities including airports, buildings, military complexes, highways and national parkland purchases. Before such projects are built, Environmental Assessments (EA) or Environmental Impact Statements (EIS) must be prepared to assess the probable impacts from alternative courses of action proposed by all Federal agencies. The EIS may arrive at several conclusions ranging from no objections which allow the project as proposed to unsatisfactory which warrants a rejection of the project.

#### EIS Outcomes

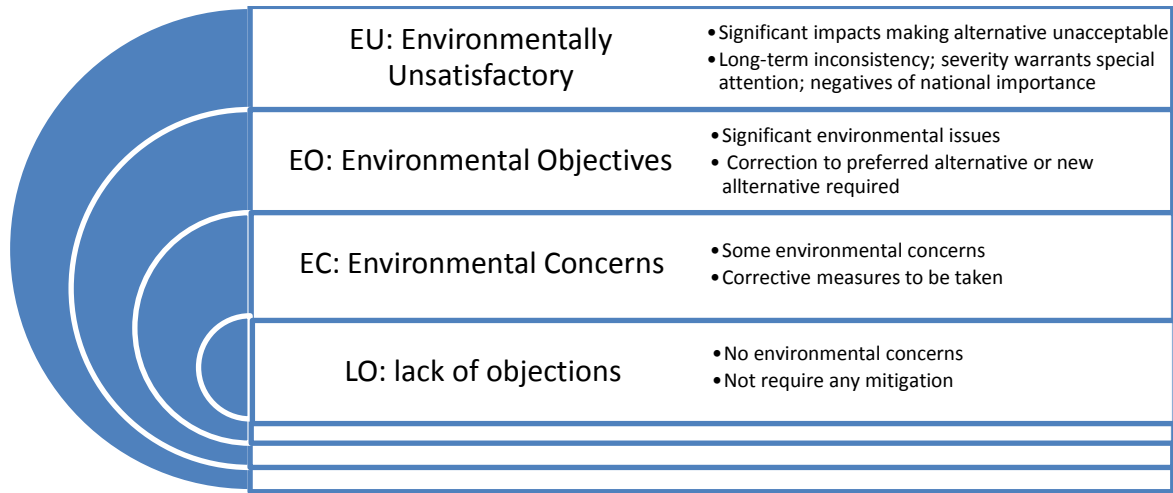


Exhibit 7- 31

### *Clean Air Act (CAA)*

The CAA is the law that defines the Environmental Protection Agency's responsibilities for protecting and improving the nation's air quality. The CAA also addresses protection of the stratospheric ozone layer. The first Clean Air Act was passed in 1963 as a result of concern over air pollution and has been amended a number of times including major changes in the 1990 Clean Air Act Amendments. The CAA established two types of air quality standards: primary standards and secondary standards. Primary standards set limits to protect public health, including the health of environmentally "sensitive" populations (e.g., asthmatics, children, and the elderly). Secondary standards set limits to protect the public welfare against visibility impairment and damage to animals, crops, vegetation, and buildings. Under the Clean Air Act, the EPA has established a number of programs related to air quality, climate change, health and ecosystem protection, ozone layer protection and radiation exposure.<sup>42</sup>

<sup>41</sup> For a discussion of NEPA requirements, see: <http://www.epa.gov/lawsregs/laws/nepa.html>

<sup>42</sup> For detailed discussion, see: <http://www.epa.gov/air/caa/>

**Clean Air Act Programs**

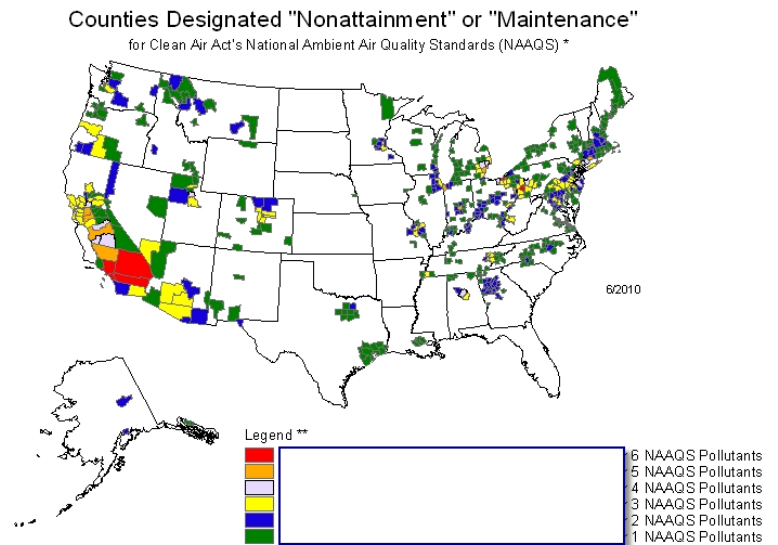
The Acid Rain Program	<ul style="list-style-type: none"> <li>• Acid rain is damaging to lakes, streams, forests &amp; plants</li> <li>• Control by cleaning smokestacks, using alternative energy</li> </ul>
Climate Change	<ul style="list-style-type: none"> <li>• Major challenge affecting people and the environment</li> <li>• Control via energy efficiency, restrictions and innovations</li> </ul>
Air Pollutants	<ul style="list-style-type: none"> <li>• Identifies six common pollutants that must be controlled</li> <li>• Includes ozone, particulates, CO2, NO2, Sulfur Dioxide, &amp; lead</li> </ul>
Health and Ecosystem Protection	<ul style="list-style-type: none"> <li>• In addition to specific air pollutants</li> <li>• Includes acid rain, AIRNow, Great Waters, Ultraviolet &amp; Visibility</li> </ul>
Ozone Layer Protection	<ul style="list-style-type: none"> <li>• Protection of the ozone layer from various contaminants</li> <li>• Includes depleting substances, potentials and global warming</li> </ul>
Radiation	<ul style="list-style-type: none"> <li>• Emphasis on health effects of radiation exposure</li> <li>• Controls include timing, exposure and shielding</li> </ul>

**Exhibit 7- 32**

The CAA mandated that states submit State Implementation Plans (SIP) which would outline how they would bring nonattainment areas into compliance with National Ambient Air Quality Standards (NAAQS).<sup>43</sup> The expectation was that SIPs would force urban areas do take actions with respect to transportation systems and residential and commercial land use patterns to comply with federal air standards. If a state failed to submit a SIP, the EPA was empowered to step in and create a Federal Implementation Plan (FIP). While many states were able to meet requirements on some pollutants, attainment of carbon monoxide and ozone has been more problematic.

**Counties Designated for Nonattainment**

To increase pressure on states and local markets to force compliance with NAAQS, the EPA was given the power to withhold federal highway funds and to place a ban on the construction of major sources of new pollution. Despite efforts to comply, some states still were unable to meet standards and were granted extensions in 1990 revisions to the CAA. The EPA also shifted emphasis toward reliance on technological innovations to attain compliance rather than relying on controls over land patterns.



**Exhibit 7- 33**

<sup>43</sup> Nonattainment areas are accessible at: <http://www.epa.gov/air/oaqps/greenbk/multipol.html>

## Clean Water Act (CWA)

The CWA presents the legal framework for regulating water quality. It addresses the discharge of pollutants into the waters of the United States as well as setting water quality standards for surface waters.<sup>44</sup> The initial legislation regarding regulation of water was passed in 1948 as the Federal Water Pollution Control Act. The Act was significantly changed and its scope expanded in 1972 and amended in 1977 under the "Clean Water Act" moniker. The 1977

amendments addressed a number of concerns including: the basic structure for regulating pollutant discharges into US waters; the authority to implement pollution control programs (e.g., wastewater standards); maintained existing water quality standards controlling contaminants in surface waters; made it illegal to discharge pollutants from a point source into navigable waters without a permit; funded construction of sewage treatment plants under a grants program; and, addressed the need to address problems posed by nonpoint source pollution.

Under the CWA, the National Pollutant Discharge Elimination System (NPDES) controls water pollution by regulating point sources that discharge pollutants into waters of the United States. Point sources are defined as discrete conveyance systems including pipes and man-made ditches. Under the Act, commercial, municipal and other non-residential development must obtain permits if they discharge water directly into surface waters.

### Clean Water Act: Wetlands Section 404

Section 404 of the CAA addresses regulation of wetlands which are characterized as land on which water saturation is the dominant factor affecting the nature of its soil and the plants and animal residing thereon or therein. Under the CAA, wetlands means "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."<sup>45</sup> There are two basic types of wetlands. Coastal wetlands are estuaries wherein sea water mixes with fresh water. Inland wetlands are common in floodplains along rivers and streams, in depressions along lakes and ponds, and in other low-

## CWA Facilities Review by State

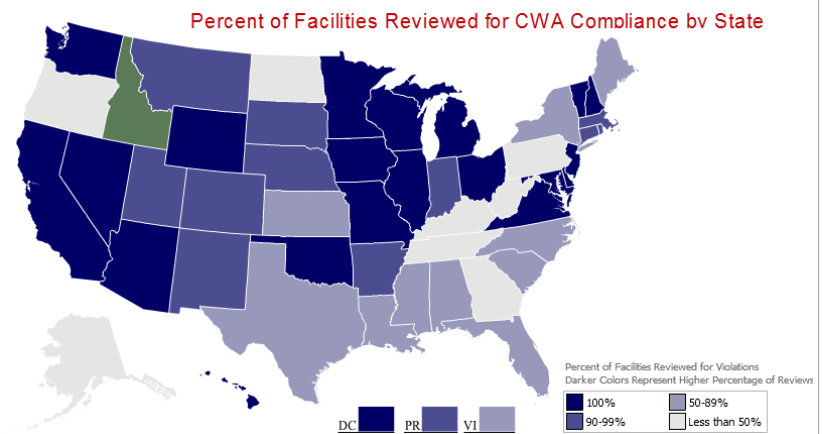


Exhibit 7- 34

## Coastal Wetland



Atlantic Coastal Marsh

Exhibit 7- 35

<sup>44</sup> See: <http://www.epa.gov/lawsregs/laws/cwa.html>

<sup>45</sup> From EPA Regulations at 40 CFR 230.3(t); see: <http://water.epa.gov/lawsregs/guidance/wetlands/definitions.cfm>

lying areas with a high water table or are exposed to heavy precipitation. In addition to “permanent” wetlands, the EPA also recognizes the importance of “seasonal” wetlands which may only appear at certain times of year but provide critical habitat for wildlife adapted to such conditions.

**Seasonal Wetlands**



**Seasonal Wetland in Spring**

Regardless of the type of wetland and their permanent or temporary nature, the EPA has established a number of programs for wetland conservation, restoration, and monitoring. Working with the U.S. Army Corps of Engineers (Corps), the EPA has created formal standards for reviewing permits for discharges, grading or filling that may adversely affect wetlands. These standards are applied to all forms of development including residential and commercial projects, along with highways, roads, and levees. Wetlands cannot be disturbed or marginalized without permits from the Corps that ensures such actions meet strict environmental standards. Applications for permits that affect wetlands are subject to public comments to ensure community values and needs are considered in any waivers or permit approvals. In addition to the Corps, the EPA partners with EPA works with a variety the U.S. Fish and Wildlife Service, the U.S. Department of Agriculture, and the National Marine Fisheries Service to protect and enhance wetlands.

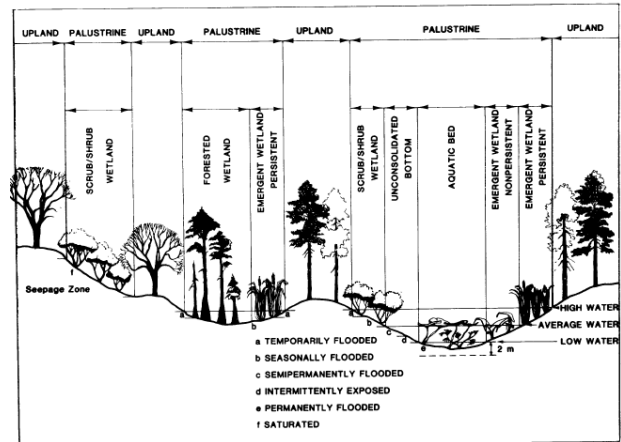
**Exhibit 7- 36**

Since wetlands are fairly common, development conflicts with wetland protection laws are fairly common. In making a determination to grant a permit, the Corps considers a number of factors. One of the key elements is the public interest determination which explores whether a projects positive contribution to the physical environment outweighs the loss of wetlands. While positive impact on the community may be considered, arguments based on the creation of jobs without other considerations are unlikely to warrant a permit. On the other hand, the Corps has to consider the

***Before the Corp will grant a Section 404 permit, it must be convinced that there were no reasonable non-wetland alternatives...***

are any viable alternatives that are not cost prohibitive that would avoid the need for a permit. A developer

**Wetland Zones<sup>46</sup>**



**Exhibit 7- 37**

value of historic preservation in making such decisions. Before the Corp will grant a Section 404 permit, it must be convinced that there were no reasonable non-wetland alternatives at the time the site was acquired. In exploring reasonable or practical alternatives, the Corps has the option of looking at the project as a whole, or focus on the wetlands area as separate and distinct. In evaluating alternatives, the Corp will also look at whether there

<sup>46</sup> \_\_\_\_, Classification of Wetlands and Deepwater Habitats of the United States, Department of Interior, 1979.



will also have to explore other sites that could accommodate the proposed use and demonstrate that they are not viable alternatives. Under the CWA, the Corps can deny permits for projects that have a significantly adverse environmental impact without having to weight arguments that balance environmental or ecological losses against other considerations.

***Coastal Zone Management Act (CZMA)***

The CZMA was passed in 1972 to encourage states and tribes to preserve, protect, develop, and where possible, restore or enhance valuable natural coastal resources. It was modified in 1990 to include non-point pollution which it recognized as a major contributor to degradation of coastal areas. The overall program objectives of CZMA are to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone." The Act covers most bodies of water including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, and coral reefs. It also extends to fish and wildlife using those habitats. The term "coast" is broadly defined to include land bordering the Atlantic, Pacific, and Arctic Oceans, as well as the Gulf of Mexico, Long Island Sound, and the Great Lakes. The law is unique in the sense that it is voluntary. That is, rather than working through regulations, the program provides financial assistance is to develop and implement Comprehensive Coastal Management Programs. Despite its voluntary nature, most eligible entities participate in the program.

**State Requirements for CZMA**

Identify Land Uses	<ul style="list-style-type: none"> <li>• Coastal areas where there is a failure to maintain standards</li> <li>• Areas threatened by reasonably foreseeable rise in pollution</li> </ul>
Identify Critical Coastal Areas	<ul style="list-style-type: none"> <li>• ID areas adjacent to coastal waters</li> <li>• ID areas in which new land uses or expansion need managing</li> </ul>
Management Measures	<ul style="list-style-type: none"> <li>• Implement and revise management measures</li> <li>• Focus on achieving &amp; maintain water quality standards</li> </ul>
Technical Assistance	<ul style="list-style-type: none"> <li>• Assist local government and the public</li> <li>• Assist development of ordinances &amp; regulations</li> <li>• Technical guidance &amp; modeling to predict and assess efficacy</li> </ul>
Public Participation	<ul style="list-style-type: none"> <li>• Create opportunities across spectrum of program</li> <li>• Include opportunities to comment, educate, etc.</li> </ul>
Administrative Coordination	<ul style="list-style-type: none"> <li>• Improve coordination among state &amp; local agencies</li> <li>• Employ joint review, memo of agreement or other tools</li> </ul>
State Coastal Zone Boundary Modification	<ul style="list-style-type: none"> <li>• Provide mechanism for modifying boundaries</li> </ul>

**Exhibit 7- 38**

The CZMA is jointly administered at the federal level by the EPA and the National Oceanic and Atmospheric Agency (NOAA) through its Office of Ocean and Coastal Resource Management (OCRM).<sup>47</sup> According to OCRM, it attempts to manage the nation's coastal resources while striking a balance between

<sup>47</sup> For a discussion of NOAA’s mission, see: <http://coastalmanagement.noaa.gov/about/czma.html#section6217>

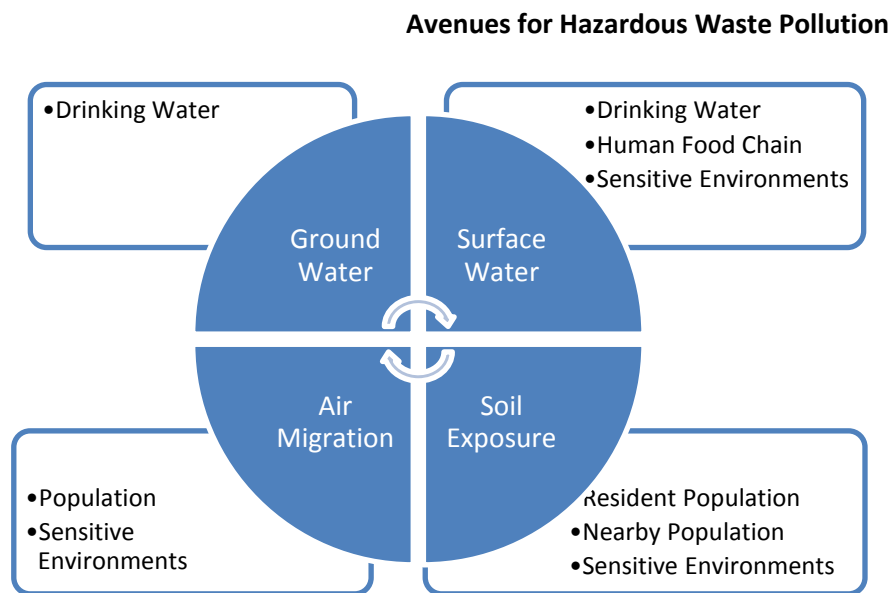
economic development and environmental conservation. The CZMA encompasses two programs. The first is the National Coastal Zone Management Program which seeks to balance competing land and water issues in 34 separate coastal zones. The second is the National Estuarine Research Reserve System approaches estuarine reserves as field laboratories in which it tries to better understand how estuaries function and how humans impact them.

In addition to coastal areas, the CZMA covers inland coastal zones that are linked to coastal areas and thus warrant management and oversight. Recent revisions include guidance on nonpoint source pollution that originates from outside of coastal areas. This guidance is fairly comprehensive including detailed information on individual methods, measures and practices regarding controls. It also addresses operational and maintenance procedures associated with each technique. The guidance measures also identify the categories and subcategories of activities, locations and pollutants for which the various measures are best suited and how they can be customized to address unique situations. Finally, the guidance addresses measures to test the efficacy of programs including quantitative assessment, and on-going monitoring systems.

***The overall program objectives of CZMA are to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone.***

### ***The CERLA or Superfund Acts***

The 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERLA) authorized the federal government to clean up uncontrolled or abandoned hazardous-waste sites that could endanger public health or cause significant environmental damage.<sup>48</sup> The Act focused on abandoned hazardous waste sites but also addressed accidents, spills, and



**Exhibit 7- 39**

other emergency releases of pollutants and contaminants into the environment. It established liability of persons or companies responsible for releases of hazardous waste. It also set up a trust fund capitalized by a tax on the chemical and petroleum industries for cleanup when no responsible party can be identified.

The 1986 Superfund Amendments and Reauthorization Act (SARA) amended CERCLA) based on EPA's initial experience administering the complex program during its first six years and made several important

<sup>48</sup> See: <http://www.epa.gov/lawsregs/laws/cercla.html>

changes and additions to the program. SARA made a number of important changes to CERCLA. First, it placed higher priority on permanent remedies for cleaning up hazardous waste sites. Second, it created new enforcement and settlement tools, as well as encouraged the development and application of new technologies. Third, it broadened the focus of the Superfund Act to make it more complementary with other initiatives, mandating that enforcement and cleanup actions consider the standards and requirements in other State and Federal environmental laws and regulations. Fourth, it increased State involvement and encouraged increased citizen participation in deciding how sites should be cleaned up. Fifth, it placed greater emphasis on the human health problems created by hazardous waste sites. Finally, it dramatically increased the trust fund.

The EPA establishes a National Priorities List (NPL) for uncontrolled hazardous waste sites. Priority levels are determined by a Hazard Ranking System (HRS). The system is designed to use relatively accessible data to provide a preliminary assessment of risk. The HRS is based on three categories of information: the probability a site has or will release hazardous substances into the environment; the toxicity and quantity of the waste; and the human or sensitive environments that may be affected. The analysis looks at a variety of avenues through which the pollution may occur including ground water, surface water, soil exposure and air migration.

***The HRS is based on three categories of information: the probability a site has or will release hazardous substances into the environment; the toxicity and quantity of the waste; and the human or sensitive environments that may be affected.***

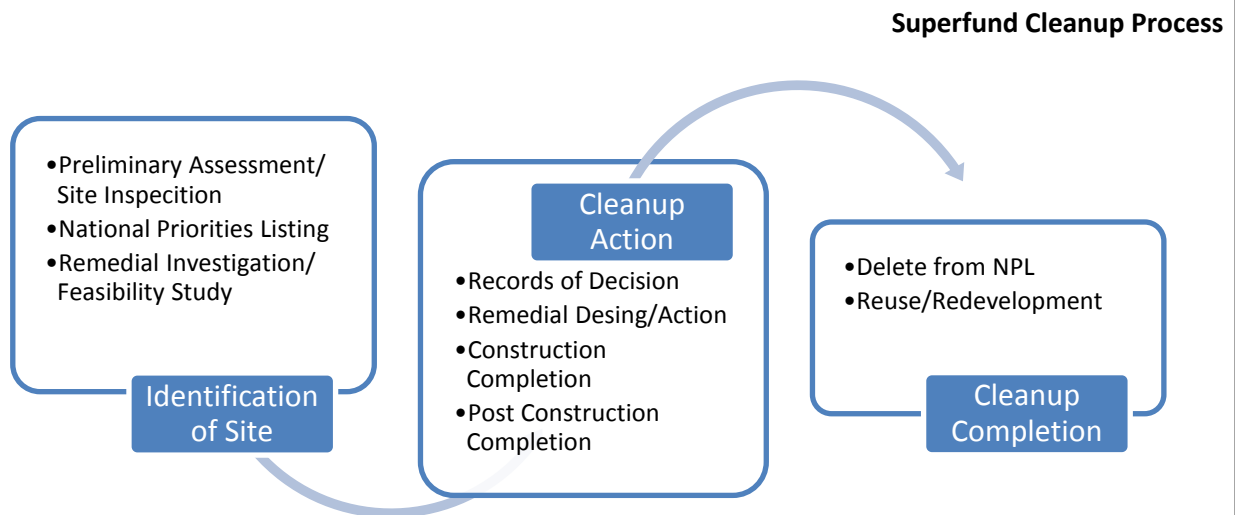


Exhibit 7- 40



Once a site has been targeted for remediation, a formal cleanup process is undertaken.<sup>49</sup> The cleanup program draws on the preliminary analysis and remedial investigation and feasibility studies conducted in conjunction with the National Priority List. Once the formal analysis has been completed, the results are documented and the remedial program is developed. The next phase includes the completion of specified construction or actions and is followed by post-completion activities that ensure the long-term protection of human health and the environment from further risk emanating from the site. These actions include Long-Term Response Actions, Operation and Maintenance, Institutional Controls and Five-Year Reviews. Once these are completed, the site is removed from the list and the site can be reused or redeveloped.

### ***Endangered Species Act***

The Endangered Species Act (ESA) of 1973 provides for the conservation and protection of threatened and endangered plants and animals and the habitats in which they are discovered.<sup>50</sup> The ESA requires federal agencies ensure that any action it authorizes, funds, or carries out, does not "adversely impact" any listed species, or "destroy or adversely modify" any critical habitat for that species. The ESA is administered by several federal agencies including the Fish and Wildlife Service (FWS) and the National and NOAA's National Marine Fisheries Service (NOAA Fisheries Service), in the Department of Commerce, share responsibility for administration of the ESA. These responsibilities include listing and delisting species, designating critical habitat, and formulating recovery plans. As of 2010 there were almost 2,000 species listed under ESA as endangered or threatened. Of those, some 70% are in part or entirely domiciled in the U.S. and its waters. Once on the list, they and the habitats are protected.

#### **Critical Habitat: Chinook Salmon**

The ESA requires the government to designate "critical habitat" for any species it lists under the ESA. In this context, critical habitat is defined specific areas within the geographical area occupied by the species at the time of listing in cases where they contain features essential to conservation that require special management considerations or protections. Critical habitat areas also include specified areas outside the geographical area occupied by the species that are determined to be essential for conservation. Once critical habitat areas are designated, federal regulations can effectively stop development, barring modification of threatened species habitats.



**Exhibit 7- 41**

<sup>49</sup> See: <http://www.epa.gov/superfund/cleanup/index.htm>

<sup>50</sup> For a discussion of the ESA, see: <http://www.epa.gov/espp/>

**National Flood Insurance Program (NFIP)**

Congress established the National Flood Insurance Program (NFIP) with the passage of the National Flood Insurance Act of 1968. The Act was modified several times to increase participation and encourage mitigation of flood losses. In 1973, the Flood Disaster Protection Act was passed in response to Tropical Storm Agnes which caused extensive damage on the east coast at a time when few homeowners were insured. The Act restricted federal funding in floodplains of communities not participating in the “voluntary” program. It also restricted federal agencies and federally insured lenders from providing mortgages for properties in designated floodplains that did not have insurance creating an essentially a “mandatory program.” In 1994 Congress amended the Act to strengthen its provisions, manage costs and increase coverage. In June 2010, it was extended through September on an interim basis.

The NFIP is overseen by the Federal Emergency Management Agency (FEMA). Briefly, FEMA’s mission is to lead the country to prepare for, prevent, respond to, and recover from disaster, both natural and man-made. As such, FEMA is responsible for coordinating Federal responses to floods as well as to earthquakes, hurricanes, and other natural disasters. FEMA is also charged with providing disaster assistance to states, communities and individuals on an as-needed basis.

The NFIP remains technically a voluntary program in which some 20,000 communities participate. Community participation requires adoption and enforcement of floodplain management ordinances to reduce losses from future flood damage. Despite its voluntary nature, mandatory insurance requirements are set for properties in high risk zones located in participating communities.

**High Risk Floodplain Zones with Mandatory Insurance<sup>51</sup>**

**High Risk Areas**

In communities that participate in the NFIP, mandatory flood insurance purchase requirements apply to all of these zones:

ZONE	DESCRIPTION
A	Areas with a 1% annual chance of flooding and a 26% chance of flooding over the life of a 30-year mortgage. Because detailed analyses are not performed for such areas; no depths or base flood elevations are shown within these zones.
AE	The base floodplain where base flood elevations are provided. AE Zones are now used on new format FIRMs instead of A1-A30 Zones.
A1-30	These are known as numbered A Zones (e.g., A7 or A14). This is the base floodplain where the FIRM shows a BFE (old format).
AH	Areas with a 1% annual chance of shallow flooding, usually in the form of a pond, with an average depth ranging from 1 to 3 feet. These areas have a 26% chance of flooding over the life of a 30-year mortgage. Base flood elevations derived from detailed analyses are shown at selected intervals within these zones.
AO	River or stream flood hazard areas, and areas with a 1% or greater chance of shallow flooding each year, usually in the form of sheet flow, with an average depth ranging from 1 to 3 feet. These areas have a 26% chance of flooding over the life of a 30-year mortgage. Average flood depths derived from detailed analyses are shown within these zones.
AR	Areas with a temporarily increased flood risk due to the building or restoration of a flood control system (such as a levee or a dam). Mandatory flood insurance purchase requirements will apply, but rates will not exceed the rates for unnumbered A zones if the structure is built or restored in compliance with Zone AR floodplain management regulations.
A99	Areas with a 1% annual chance of flooding that will be protected by a Federal flood control system where construction has reached specified legal requirements. No depths or base flood elevations are shown within these zones.

**Exhibit 7- 42**

<sup>51</sup>

For properties located in areas zoned for moderate to low risk of flooding in participating communities, flood insurance is optional.

**Moderate to Low Risk Areas**

**Moderate to Low Risk Areas**

In communities that participate in the NFIP, flood insurance is available to all property owners and renters in these zones:

ZONE	DESCRIPTION
B and X (shaded)	Area of moderate flood hazard, usually the area between the limits of the 100-year and 500-year floods. B Zones are also used to designate base floodplains of lesser hazards, such as areas protected by levees from 100-year flood, or shallow flooding areas with average depths of less than one foot or drainage areas less than 1 square mile.
C and X (unshaded)	Area of minimal flood hazard, usually depicted on FIRMs as above the 500-year flood level. Zone C may have ponding and local drainage problems that don't warrant a detailed study or designation as base floodplain. Zone X is the area determined to be outside the 500-year flood and protected by levee from 100-year flood.

Exhibit 7- 43

The NFIP has three major components: flood insurance, floodplain management, and flood hazard mapping.

- Flood Insurance. In exchange for their communities actions to mitigate losses, resident homeowners, renters, and business owners are eligible for flood insurance.
- Floodplain Management. Floodplain management is the operation of a community program of corrective and preventative measures for reducing flood damage. These measures take a variety of forms and generally include requirements for zoning, subdivision or building, and special-purpose floodplain ordinances.
- Floodplain Mapping. The NFIP identifies and maps the Nation’s floodplains to create broad-based awareness of the flood hazards and provide data necessary for floodplain management and actuarial calculation of insurance rates for new construction.

Under the floodplain management requirement, communities must adopt floodplain management ordinances that meets or exceeds minimum NFIP criteria that the community has been provided by FEMA. In general, communities must regulate all development located in the Special Flood Hazard Areas (SFHA) it delineates in its mandatory Flood Insurance Study (FIS). In this context, development refers to

*“any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.”<sup>52</sup>*

Since Special Flood Hazard Areas are periodically updated, risks should be assessed on a periodic basis to avoid uncovered losses due to floods or market value losses due to restrictions on new development.

<sup>52</sup> \_\_\_\_, National Flood Insurance Program Description, FEMA, August 2002.

Summary Chapter 7: Growth Management and Environmental Regulation

<ul style="list-style-type: none"> <li>• <b>Growth Management.</b> Over the past 50 years, efforts have been made to manage growth to create healthy, safe, vibrant communities and avoid the negative consequences of sprawl.</li> <li>• <b>Real Estate Cycles.</b> The commercial real estate industry has experienced several periods of overbuilding that have triggered anti-growth movements. The industry was not represented in those deliberations and needs to take a more proactive approach.</li> <li>• <b>Sustainable Growth Management.</b> The term sustainability has been fairly narrowly defined and a “new concept” for real estate. In essence, it harkens back to the roots of the discipline where real estate was seen as a scarce resource rather than an asset that can be merely bought and sold without concern for underlying fundamentals.</li> <li>• <b>Smart Growth.</b> The principles of smart growth are shared by many on the private and public side of the industry; new efforts to translate shared values into collaborative solutions are long overdue.</li> <li>• <b>State, Regional &amp; Local GM.</b> A number of tools exist for managing growth at the state, regional and local levels. These fall into four categories: those affecting location, speed and costs of growth, along with those affecting approvals for growth initiatives, both pro and con.</li> <li>• <b>State Environmental Policies.</b> Some states have taken a lead in protecting their environments and enhancing quality of life for residents.</li> <li>• <b>Federal Environmental Regulations.</b> A number of federal environmental programs have significant impacts on growth. These programs address environmental quality (e.g., NEPA, Clean Air and Water), and locational preferences and options (e.g., coastal zones, flood hazards). Some programs are proactive avoiding future problems while others are reactive, clearing up past problems (e.g., Superfund).</li> </ul>	<p><b>Concepts</b></p> <ul style="list-style-type: none"> <li>• Growth Management</li> <li>• Smart Growth</li> <li>• Market-based solutions</li> <li>• Shared Values</li> <li>• Adequate Public Facilities</li> <li>• Moratoria</li> <li>• Density Bonuses</li> <li>• Incentive Programs</li> <li>• Enterprise Zones</li> <li>• Fully Contained Communities</li> <li>• Regionalism</li> <li>• Ballot Box Zoning</li> <li>• Referenda and Initiatives</li> <li>• Anti-big Box</li> <li>• Impact Fees</li> <li>• Environmental Impact Statements</li> <li>• Clean Air Act</li> <li>• Clean Water Act</li> <li>• Section 404 wetlands permits</li> <li>• Coastal Zone Management Act</li> <li>• Superfund Cleanup</li> <li>• Endangered Species Act</li> <li>• Flood Insurance Program</li> </ul>
	<p><b>Washington’s State Environmental Policy Act (SEPA)</b></p> <p>The diagram illustrates the components of Washington's State Environmental Policy Act (SEPA). It is divided into two main categories: Natural Environment and Built Environment. The Natural Environment category includes Earth, Air, Water, Plants and animals, Energy, and Natural resources. The Built Environment category includes Environmental health, Land and shoreline use, Transportation, Public services, and Utilities.</p>



## Next Chapter