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## **The Future of Smart Growth in Delaware**

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“Though land-use decisions are made by local jurisdictions (municipal and county), the impact of local government land use decisions, land development patterns, and each Delawarean’s decision of where to live affects us all statewide.”<sup>2</sup>

### **I. Background**

Delaware’s population is expected to grow by nearly twenty percent by the year 2040.<sup>3</sup> Given the predicted influx in population in a small state, it is vital to assess the current land use control mechanisms and determine whether new policies can be adopted to help Delaware prepare to manage such growth<sup>4</sup>. For the purposes of the simplicity of this paper, mechanisms used to incentivize or compensate private landowners to forego selling lands for development, as well as mechanisms used to facilitate desirable development, will be referred to as smart growth.

This paper begins with a general overview of planning and zoning, followed by the current state of planning and zoning in Delaware, and will narrow its focus to discuss how Delaware can achieve its smart growth goals while facilitating smart growth in a way consistent with preserving local autonomy through new planning initiatives and strategies that can be executed by local governments.

### **A. Planning and Zoning**

States typically delegate a significant amount of land use authority to local governments through state constitutions and authorizing statutes.<sup>5</sup> Although local governments have primary land use authority<sup>6</sup>, the available tools for land-use planning and control are limited by state

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<sup>2</sup> 2020 Delaware Strategies for State Policies and Spending 2, <https://stateplanning.delaware.gov/strategies/documents/2020-state-strategies.pdf?ver=0806>.

<sup>3</sup> Between 2020 and 2040, Delaware’s population is projected to increase by roughly 86,000 to a total of 1,044,441. 2020 Delaware Strategies for State Policies and Spending 20, <https://stateplanning.delaware.gov/strategies/documents/2020-state-strategies.pdf?ver=0806>.

<sup>4</sup> United Van Lines’ National Movers Study shows that in 2023, Delaware’s inbound population included an range from 55-64 (36.4%) and 65 years or older (40.9%) and of those inbound, 28.1% moved for retirement living purposes. <https://www.unitedvanlines.com/newsroom/movers-study-2021>.

<sup>5</sup> Organization for Economic Co-operation and Development, THE GOVERNANCE OF LAND USE: LAND USE PLANNING SYSTEMS IN THE OECD, <https://www.oecd.org/regional/regional-policy/land-use-United-States.pdf> (last updated 2017).

<sup>6</sup> The Delaware Supreme Court held: “The General Assembly through grants of home rule has ceded primary responsibility for land use control to county and municipal governments. In this delegation of its power over land use, The General Assembly, in effect, has surrendered that incident of its sovereignty to subordinate governmental

delegations of authority.<sup>7</sup> Most states give local governments the authority to enact zoning regulations, and in 15 states, states require the creation and maintenance of a comprehensive plan (discussed in more detail in later sections).<sup>8</sup> Within a municipality, zoning is used to categorize and split diverse land uses into discrete districts. Municipal governments will create different districts for either residential, commercial, or industrial purposes.<sup>9</sup> Zoning regulations are bound to each jurisdiction via the jurisdiction's comprehensive plan. The comprehensive plan is an integral part of the state's land use plan because it acts as a forward-thinking guide and provides for more detailed zoning laws and, in some states, requires the zoning ordinances and maps to be consistent with those found in the plan.

### 1) Planning in Delaware

In Delaware, the Office of State Planning Coordination exists to provide planning assistance to county and local governments.<sup>10</sup> Delaware executes land use decisions at the municipal and county<sup>11</sup> level while the state government provides general guidance and coordination while serving as a planning resource for local governments.<sup>12</sup> The comprehensive plans and municipal development strategies<sup>13</sup> are reviewed by state agencies through the Preliminary Land Use Service (PLUS) and certified by the Governor.<sup>14</sup>

The development of a comprehensive plan is perhaps the most important step for the town or county as it sets forth the overall pattern of land use and all land use regulations are based upon this document. Under Delaware law, all of Delaware's 57 municipalities are required to keep their comprehensive plans and municipal development strategies current under state law, and each plan must be reviewed at least every five years to ensure its provisions are still relevant, and then every ten years, it must be revised, updated, and resubmitted to the Cabinet Committee on State Planning issues.<sup>15</sup> If there are any desired zoning changes to be made in a comprehensive plan prior to the 5 or 10 year review period, in New Castle County or Kent County, the County Council may make amendments in accordance with its plan by having the Department of Land Use hold at least one public hearing and submit its results in a report to the

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entities. Thus, the counties as well as departments of State government, can claim to be agents of the State in the discharge of the sovereign's power to regulate land use." *Hayward v. Gaston*, 542 A.2d 760, 766 (Del.1988).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ty McDuffey et al., LEGAL MATCH: WHAT ARE ZONING REGULATIONS?, <https://www.legalmatch.com/law-library/article/what-are-zoning-regulations.htm> (last updated Dec. 20, 2022).

<sup>10</sup> *Planning Assistance*, OFFICE OF STATE PLANNING COORDINATION, <https://stateplanning.delaware.gov/lup/planning-assistance.shtml>.

<sup>11</sup> New Castle County Zoning Code, 9 Del. C. 1953, § 2601; Kent County Zoning Code, 9 Del. C. 1953, § 4801; Sussex County Zoning Code, 9 Del. C. 1953, § 6901.

<sup>12</sup> Per Delaware Code § 702, it is required for Delaware's municipal governments to develop and regularly update their land use plans, requiring smaller cities with a population less than 2,000 to develop a municipal development strategy, whereas larger cities and towns are required to develop a comprehensive plan.

<sup>13</sup> A municipal development strategy is "a development strategy which sets forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, and the general uses of land within the community and critical community development and infrastructure issues" *Comprehensive Plans*, OFFICE OF STATE PLANNING COORDINATION, <https://redclay.wra.udel.edu/wpplan>.

<sup>14</sup> *Planning Assistance*, OFFICE OF STATE PLANNING COORDINATION, <https://stateplanning.delaware.gov/lup/planning-assistance.shtml>.

<sup>15</sup> 22 Del. C. 1953, § 702.

County Council.<sup>16</sup> This report is not binding and before the County Council can adopt any changes, it must hold a public hearing for comment<sup>17</sup>.

After defining zoning regulations to be “in occurrence with” a comprehensive plan if the regulation furthers the goals of the comprehensive plan by reasonably balancing the goals of a comprehensive plan with the goals of the proposed development, it was determined in *Glassco v. Cnty. Council of Sussex County*, that a zoning decision that does not further the goals of the comprehensive plan is deemed inconsistent<sup>18</sup> with the plan and therefore is not allowed.<sup>19</sup> The Quality of Life Act of 1988 (“The Act”) was created to utilize and strengthen the existing role, processes and powers of county governments in the establishment and implementation of comprehensive planning programs to guide future development.<sup>20</sup> Any growth management plan or policy plan that meets the standards and requirements of The Act shall be an acceptable comprehensive plan and the land use map or map series forming part of the comprehensive plan as required by The Act shall have the force of law, and no development, as defined in The Act, shall be permitted except in conformity with the land use map or map series and with county land development regulations enacted to implement the other elements of the adopted comprehensive plan.<sup>21</sup>

Delaware’s local governments are also implementing master plans which are more detailed plans and involve multiple agencies, local governments, and utility providers, with the purpose of addressing infrastructure, phasing, and timing of growth.<sup>22</sup> The goal of many master plans is to prepare areas for “shovel ready” development that conforms to the comprehensive plan and environmental standards. These plans allow for greater transparency and predictability for the developers and local community alike.<sup>23</sup>

## 2) Zoning in Delaware

In Delaware, zoning regulations are made by the legislative bodies of counties and incorporated towns<sup>24</sup> so that they may regulate and restrict building size and structure, population density, location and use of buildings, as well as structures and land “for trade, industry, residence or other purposes”.<sup>25</sup> In accordance with the applicable jurisdiction’s comprehensive plan, the zoning regulations are designed to “lessen congestion in the streets, promote health and general welfare, and prevent overcrowding of the land . . .”<sup>26</sup> and the regulations will be made “with reasonable consideration . . . as to the character of the district and its peculiar suitability

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<sup>16</sup> 9 Del. C. 1953, § 2611.

<sup>17</sup> 9 Del. C. 1953, § 2611.

<sup>18</sup> *Glassco v. Cnty. Council of Sussex Cnty.*, 1993 WL 50287 (Del. Ch. Feb. 19, 1993).

<sup>19</sup> 9 Del.C. 1953, § 6904.

<sup>20</sup> 66 Del. Laws, c. 207, § 1.

<sup>21</sup> *Id.*

<sup>22</sup> 2020 STRATEGIES FOR STATE POLICIES AND SPENDING, 12,

<https://stateplanning.delaware.gov/strategies/documents/2020-state-strategies.pdf> (last updated July 23, 2020).

<sup>23</sup> *Id.*

<sup>24</sup> 9 Del. C. 1953, § 2601.

<sup>25</sup> 22 Del. C. 1953, § 301.

<sup>26</sup> 22 Del. C. 1953, § 303.

for particular uses . . . and encouraging the most appropriate use for the land throughout the municipality.”<sup>27</sup>

## II. What is Smart Growth?

Smart growth is a land use approach to achieving communities that are socially, economically, and environmentally sustainable. Smart growth practices are able to create these communities through the following general measures: preserving and enhancing valuable natural and cultural resources; expanding the range of transportation, employment, and housing choices in a fiscally responsible manner; balance long-range, regional considerations of sustainability with short-term incremental geographically isolated actions; apply up-to-date local and regional performance measures of successful urban and regional growth; and create pedestrian-oriented, mixed-use development patterns and land reuse while respecting local land-use preferences and priorities.<sup>28</sup> Smart growth is considered a response to sprawl- sprawl fragments areas, detracting from well-functioning centers and neighborhoods while also requiring that households have transportation to access community facilities, shopping, and schools, thereby isolating those who do not have ready access to transportation.<sup>29</sup> Smart growth planning prioritizes investment in existing urban centers and older communities with existing infrastructure rather than the development of open space and farmland into suburban sprawl.<sup>30</sup>

While smart growth and its practices are broadly defined, the remainder of this paper will focus on the following aspects of smart growth:

- (1) Legislative Options and Creative Planning Methods
- (2) Planning for Smart Development
- (3) State Accountability and Metrics

### A. Smart Growth in Delaware

Although there has been success with the state’s efforts to mitigate land conversion and suppress rampant development in rural areas, Delaware is still struggling with overdevelopment among other regulatory land use complications. Delaware currently has two smart growth policies: “(1) State spending should promote sustainable, quality, efficient and compact growth; (2) State policies should foster order and resource protection, not degradation.”<sup>31</sup> Even though Delaware has established these two policies, there is still much work to do in their application.

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<sup>27</sup> *Id.*

<sup>28</sup> *APA Policy Guide on Smart Growth*, AMERICAN PLANNING ASSOCIATION, <https://www.planning.org/policy/guides/adopted/smartgrowth.htm> (last updated 2024).

<sup>29</sup> Rhode Island Division of Planning. 2006. Land Use 2025: Rhode Island State Land Use Policies and Plan Executive Summary. M. Allard Cox (ed.), Rhode Island Sea Grant, Narragansett, R.I. 2 pp.

<sup>30</sup> Andrew Svekla, *Smart Growth*, DELAWARE VALLEY REGIONAL PLANNING COMMISSION, <https://www.dvrpc.org/smartgrowth/>.

<sup>31</sup> Chapter 11 - Land Use, Comprehensive Plan, [https://cdns5-hosted.civiclive.com/UserFiles/Servers/Server\\_16487754/File/Government/Departments%20and%2000Offices/Code/Comprehensive%20Plan/Chapters%202021/Chapter\\_11\\_Land\\_Use\\_JUNE\\_DRAFT\\_\(1\).pdf](https://cdns5-hosted.civiclive.com/UserFiles/Servers/Server_16487754/File/Government/Departments%20and%2000Offices/Code/Comprehensive%20Plan/Chapters%202021/Chapter_11_Land_Use_JUNE_DRAFT_(1).pdf) (last modified June 2021).

The preceding policies were based on the following eleven goals related to smart growth which are currently listed in Delaware’s 2020 Strategies for State Policy and Spending (here on referred to as “SSPS”), as well as their previous state spending plans:

- “(1): Direct investment and future development to existing communities, urban concentrations, and growth areas;
- (2): Protect farmlands and critical natural resource areas;
- (3): Improve housing quality, variety, and affordability for all income levels;
- (4): Ensure objective measurement of long-term community effects of land-use policies and infrastructure investments;
- (5): Streamline regulatory processes and provide flexible incentives and disincentives to encourage development in desired areas;
- (6): Encourage redevelopment and improve the livability of existing communities and urban areas and guide new employment into underused commercial and industrial sites;
- (7): Provide high-quality employment opportunities for citizens with various skill levels to retain and attract a diverse economic base;
- (8): Protect the state’s water supplies, open spaces, farmlands, and communities by encouraging revitalization of existing water and wastewater systems and the construction of new systems;
- (9): Promote mobility for people and goods through a balanced system of transportation options;
- (10): Improve access to educational opportunities, health care, and human services for all Delawareans; and,
- (11): Coordinate public policy planning and decisions among the state, counties, and municipalities.”<sup>32</sup>

The creation and implementation of Delaware’s SSPS is meant to serve as a reference to the current regulatory mechanisms the State has in place which exist to influence property rights, limit development outside of designated growth areas, direct development within designated growth areas, while also highlighting policies for the State’s infrastructure investment schemes among other priorities identified by the Cabinet Committee on State Planning Issues.<sup>33</sup> The SSPS provides the framework for coordinating the plans and actions of local governments.<sup>34</sup>

Before any project can begin, the planning process must be cohesive and effective. In the past, Delaware’s planning could be considered “reactive” and the cumulative impacts of development were not considered.<sup>35</sup> Now, the latest method of planning in Delaware is more collaborative in nature and called, “proactive planning”<sup>36</sup>, which involves all local governments

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<sup>32</sup> 2020 STRATEGIES FOR STATE POLICIES AND SPENDING, 8, <https://stateplanning.delaware.gov/strategies/documents/2020-state-strategies.pdf> (last updated July 23, 2020).

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 12.

utilizing their comprehensive plans to guide growth and it has also encouraged the development of the aforementioned master plans.

Stemming from these proactive efforts, state agencies have been building on these planning endeavors by encouraging more effective land use planning and coordination within the state government. Specifically, the Delaware Department of transportation (DelDOT) created the Transportation Improvement District (TID) program. Once an area is defined as a TID, a detailed plan is created to support future transportation improvement projects due to expected development and growth. The information in a TID is also available to developers, which saves them time from executing a traffic impact study.<sup>37</sup>

The Downtown Development District (DDD) is another example of a program that “leverages local government plans” and encourages downtown area revitalization.<sup>38</sup> When local governments apply to be a designated DDD, their application also includes a plan for revitalization of the area. The local government provides economic development incentives focused on the area and it is later paired with State DDD rebates.<sup>39</sup> These rebates are administered by the Delaware State Housing Authority and provide “reimbursement of up to 20 percent of the cost of capital construction for qualifying projects. There are now twelve communities with DDD” designations. State funds of “just over \$32 million rebates have leveraged over \$598 million in private investment and of the 167 total projects 118 have already been completed” before 2020. Other initiatives of this nature include the Delaware State Housing Authority’s String Neighborhoods Housing Fund and the Federal Opportunity program which offers federal tax credits to stimulate capital investments in underserved communities.<sup>40</sup>

Delaware has started using the application of the SSPS Maps and resulting data by classifying the results into Investment Levels. The strategy maps represent state and local land use policies which are “intended to guide state agencies as they make investment decisions”.<sup>41</sup> The maps support state and local types of growth and development and the Investment Levels set apart different types of “State policy, service and funding priorities within each area.” For instance, Level 1, 2 and 3 are where State policies support economic growth and development. While Level 4 is where State policy is focused on agriculture and natural environmental protections. “Out of Play” areas are not available for development or redevelopment.

Each Investment Level is supported by agency specific policies and supports different kinds of growth and development. Investment Level 1 includes towns and municipalities which have higher population density and can sustain that kind of population growth. These areas have specially developed plans in order to foster development into the future for the welfare of Delawareans. The State Planning Coordination agency classifies Level 1 as the most “favorable for the location of new public facilities, development, and redevelopment activities”.<sup>42</sup> Level 1 is where much of the DDD program provides their development rebates and economic incentives.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.* at 25.

Level 2 areas are very diverse. Level 2 areas are less developed municipalities or rapidly growing areas that will soon have to be developed to support population growth and a larger population. The strategies implemented in Level 2 areas should include plans for wastewater management, utilities and services, transportation, and support public and private investment opportunities to enhance the communities. The State Planning Coordination agency classifies Level 2 alongside Level 1, as “most favorable for location of new public facilities, development, and redevelopment activities.” This Level also supports DDD designations in small towns that do not have Level 1 areas. Master planning activities also work well in these Level 2 areas to support more stringent initiatives and detailed plans of how to develop into the future more efficiently based on smart growth goals.<sup>43</sup> The creation of these investment areas and agency-specific policies has been a solid start for Delaware in its smart growth journey of healthy development, but there is still more that can be accomplished.

## B. Smart Growth Potential in Delaware

There are several areas where smart growth could be incorporated into Delaware’s pre-existing legislative frameworks, as well as planning and zoning methodologies which could be further explored and created to better serve the state. This next section will explore the following three areas and how they have been incorporated in other states and how they could be tailored to serve Delaware:

- (1) Legislation Options and Creative Planning Methods;
- (2) Planning for Smart Development; and
- (3) State Accountability and Metrics

### 1. Legislative Review, Enforcement, and Creative Planning Methods

Through state governments supporting local governments via legislative review and enforcement strategies, the development of smart growth-related planning policies can aid in fostering growth in these areas.

States that have experienced exponential growth over a short period of time have implemented legislative measures in an attempt to regulate and promote smart growth in heavily populated areas. Tennessee was experiencing rapid growth in the late 1990s which was causing conflicts in land development at the local level. According to the 2000 Census, Tennessee was the 14th fastest growing state in the nation and also had the 4th fastest rate of land development based on data from the 1997 National Resources Inventory.<sup>44</sup> As a solution, the Tennessee General Assembly created a framework for the development of local growth policy in 1998 by enacting Public Chapter 1101, the Growth Policy Act, which is known as “PC 1101.”<sup>45</sup>

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<sup>43</sup> *Id.* at 29.

<sup>44</sup> *Id.*

<sup>45</sup> *Tennessee Growth Policy*, Tennessee Advisory Commission on Intergovernmental Relations, <https://www.tn.gov/tacir/growth-policy.html>.



PC 1101 required local officials within each of the 92 non-metropolitan counties to work together to shape growth policy through the development of 20-year growth plans, which act as each jurisdiction's comprehensive plan. PC 1101 included five statements of legislative intent: (1) to eliminate annexation or incorporation out of fear; (2) to establish incentives to annex or incorporate where appropriate; (3) to more closely match the timing of development to the provision of public services; (4) to stabilize each county's education funding base and establish an incentive for each county legislative body to be more interested in education matters; and, (5) to minimize urban sprawl.<sup>46</sup> The General Assembly assigned responsibility for monitoring the implementation of PC 1101 to the Tennessee Advisory Commission on Intergovernmental Relations (TACIR).<sup>47</sup>

Once a growth plan has been adopted, it cannot be amended for three years, and once the amendment period ends, the final step in the growth plan approval process is approval by the state Local Government Planning Advisory Committee (LGPAC).<sup>48</sup> The plan should identify three distinct areas: (1) "urban growth boundaries" (UGB), regions which contain the corporate limits of a municipality and the adjoining territory where growth is expected; (2) "planned growth areas" (PGA), compact sections outside incorporated municipalities where growth is expected, and where new incorporations may occur; and (3) "rural areas" (RA) which consists of any territory, not already within one of the other categories, which is meant to be preserved for agriculture, recreation, forest, wildlife, and uses other than high-density commercial or residential development.<sup>49</sup>

Since Delaware currently has comprehensive plans for each county and municipality which are reviewed every five and ten years, Delaware would need to create its own policy which would allow for a new long-format plan involving all three counties and their municipalities, and the counties would create a comprehensive/growth plan for the state and what could be possible over a 20-year timespan. Each county would need to identify the three aforementioned areas- UGBs, PGAs, and RAs (which are not all currently identifiable in Delaware's local plans) and follow a similar legislative framework to what is listed in PC 1101. This could be a powerful tool for Delaware to focus on more ambitious long and short-term smart growth goals and aim to create and foster the best forms of growth for each area while in itself creating a stronger community amongst the counties.

During a time when Vermont was undergoing significant land development pressure, Act 250 was created to significantly impact the way their land is developed. The Act is an environmental review and permit process that regulates land use through regulating development projects and reviewing them for the potential impacts on natural resources, cities and towns by looking at ten criteria. An important thing to note about Act 250 is that its purpose is to provide a voice to Vermont citizens for them to be able to participate in development projects and provide

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> The University of Tennessee Institute of Public Service, *A Guide for Community Leaders, Growth Policy, Annexation, and Incorporation*, 3, [https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2017-december/2017December\\_Tab%205GrowthPolicyGuidebook.pdf](https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2017-december/2017December_Tab%205GrowthPolicyGuidebook.pdf) (last updated Dec. 2017).

<sup>49</sup> *Id.*



public review.<sup>50</sup> This is an essential element of Act 250 and one that Delaware should investigate implementing as well. The theme of local government autonomy is present in a program like this because it gives a voice to the people of the community so that they have more input in how their land is developed.

Within the Executive Branch of the Vermont government lies the Natural Resources Board (NRB) which is an independent entity that serves to administer Act 250 to regulate certain types of development and subdivision in Vermont. The NRB also issues rules and policies related to Act 250 and provides training and legal assistance to District Commissions and staff.<sup>51</sup> The NRB consists of a full-time Chair, four citizen volunteer members, and up to five alternates.<sup>52</sup> If Delaware were to implement a similar board, it would serve as an unbiased entity to provide training, assistance, and accountability, for areas implementing growth policies or new regulations to curb overdevelopment in high-impact areas.

Some states ensure that jurisdictions are working towards accomplishing their desired growth goals by incorporating a standard set of smart growth planning goals into state law. Maryland has incorporated their “planning visions” (planning goals) into state law.<sup>53</sup> The following “visions” must be incorporated into every comprehensive plan created throughout the state:

- (1) Quality of life and sustainability: a high quality of life is achieved through universal stewardship of the land, water, and air resulting in sustainable communities and protection of the environment;
- (2) Public participation: citizens are active partners in the planning and implementation of community initiatives and are sensitive to their responsibilities in achieving community goals;
- (3) Growth areas: growth is concentrated in existing population and business centers, growth areas adjacent to these centers, or strategically selected new centers;
- (4) Community design: compact, mixed-use, walkable design consistent with existing community character and located near available or planned transit options is encouraged to ensure efficient use of land and transportation resources and preservation and enhancement of natural systems, open spaces, recreational areas, and historical, cultural, and archaeological resources;
- (5) Infrastructure: growth areas have the water resources and infrastructure to accommodate population and business expansion in an orderly, efficient, and environmentally sustainable manner;

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<sup>50</sup> *Understanding Act 250 and Its Significance for Vermont’s Environment & Communities*, VNRC POLICY POSITION: ACT 250, <https://vnrc.org/vnrc-policy-position-act-250/> (last updated June 2024).

<sup>51</sup> *Act 250 Program*, State of Vermont: Natural Resources Board, <http://nrb.vermont.gov/act250-program#:~:text=The%20law%20provides%20a%20public,landscape%2C%20economy%20and%20community%20needs> (last updated 2024).

<sup>52</sup> *Act 250 Staff, District Commissions, and Natural Resources Board*, STATE OF VERMONT: NATURAL RESOURCES BOARD, <http://nrb.vermont.gov/contact-us> (last updated 2024).

<sup>53</sup> *Planning Legislation*, Maryland Department of Planning, <https://planning.maryland.gov/pages/OurWork/plan-legislation.aspx>.

- (6) Transportation: a well-maintained, multimodal transportation system facilitates the safe, convenient, affordable, and efficient movement of people, goods, and services within and between population and business centers;
- (7) Housing: a range of housing densities, types, and sizes provides residential options for citizens of all ages and incomes;
- (8) Economic development: economic development and natural resource-based businesses that promote employment opportunities for all income levels within the capacity of the State's natural resources, public services, and public facilities are encouraged;
- (9) Environmental protection: land and water resources, including the Chesapeake and coastal bays, are carefully managed to restore and maintain healthy air and water, natural systems, and living resources;
- (10) Resource conservation: waterways, forests, agricultural areas, open space, natural systems, and scenic areas are conserved;
- (11) Stewardship: government, business entities, and residents are responsible for the creation of sustainable communities by collaborating to balance efficient growth with resource protection; and
- (12) Implementation: strategies, policies, programs, and funding for growth and development, resource conservation, infrastructure, and transportation are integrated across the local, regional, State, and interstate levels to achieve these visions".<sup>54</sup>

Currently, Delaware's list of goals (aforementioned from the SSPS) is not required to be listed in each comprehensive plan; by contrast the list acts as a guiding-point for each jurisdiction to create its own goals to match its community's needs. By incorporating the same or similar goals into Delaware's land use code for its comprehensive plan requirements, it would still allow for local autonomy while keeping all jurisdictions on the same playing field in regards to accountability and expectations. This could also help jurisdictions that might be struggling to find focus in their comprehensive plan and lend direction to where their efforts for smart growth should be focused. This has already been implemented in the city of Lewes' city code regarding its comprehensive plan requirements: "Where practicable and not in conflict with City codes, adherence to the following: (1) The principles of smart growth, as listed in the EPA's "Essential Smart Growth Fixes for Urban and Suburban Zoning Codes" (EPA, November 2009). (2) Techniques to make use of green infrastructure for management of stormwater, as outlined in Chapter 9 of the EPA's "Essential Smart Growth Fixes for Urban and Suburban Zoning Codes" (EPA, November 2009)."<sup>55</sup>

In an attempt to "grow smarter", Pennsylvania has adopted multiple municipal land-use planning (MMLP).<sup>56</sup> MMLP allows for municipalities to provide for all reasonable land uses on a regional, not municipal basis; cooperatively provide and extend services and facilities in a more logical efficient manner; and cooperatively better protect natural resources, prime

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<sup>54</sup> Md. Land Use Code Ann. § 1-201.

<sup>55</sup> DEL. CODE ANN. § 197-3 (D) (Ecode360 through 11/13/2023).

<sup>56</sup> PLANNING BEYOND BOUNDARIES: MULTI-MUNICIPAL PLANNING STRATEGIES, 2, [https://planningpa.org/presentations/05/pbb\\_part1.pdf](https://planningpa.org/presentations/05/pbb_part1.pdf).

farmland, scenic areas, and community character.<sup>57</sup> A multi-municipal plan has the opportunity to accomplish more than what a single municipal plan can, such as providing a shared review of developments of regional impact, tax and TDR sharing across municipal boundaries, and receiving priority consideration in state funding or permit decisions.<sup>58</sup> This could be a potential tool for Delaware so that jurisdictions would be able to plan for an entire area in which daily human, economic, and potential adverse environmental activity is having an impact, without having to worry about municipal boundaries.<sup>59</sup>

Connecticut is working to accomplish responsible growth through the implementation of transit-oriented development (TOD).<sup>60</sup> House Bill 5278, currently pending in Connecticut, involves requiring the Office of Policy and Management to consider transit-oriented development when making certain recommendations for priority funding areas. The idea behind this proposed bill is to start focusing on incentive-based zoning. Incentive-based zoning is a form of land use regulation that allows property owners to receive certain benefits or exemptions from zoning restrictions in exchange for meeting certain public goals or objectives.<sup>61</sup> The need for restructuring zoning policies in the state comes from the lack of ability to construct multi-family housing in much of the state due to zoning restrictions. HB5278 would offer grants that have been used to bolster economically depressed areas to towns that want to establish transit-oriented development, allowing the money to cover costs for city planning for this development.<sup>62</sup>

Advocates say this would be beneficial for housing stock as well as the environment by implementing this type of development concept to encourage density near public transportation hubs so that communities can be built in areas where it is easy to access businesses, residences, and transportation by foot.<sup>63</sup>

Delaware could benefit from similar legislation to bolster the redevelopment of vacant areas while also encouraging infill development and restoring vibrancy and community to seemingly forgotten areas.

## 2. Planning for Smart Development

Protecting rural areas and mitigating land development, namely farm and agricultural lands, is a common focus of state smart growth policies and initiatives. It is imperative to establish protections and cultivate positive growth in these areas because these areas may have

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<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.* at 5-6.

<sup>59</sup> *Id.* at 9.

<sup>60</sup> *Transit-Oriented Development & Responsible Growth*, CT.GOV (2024), [https://portal.ct.gov/decd/content/community-development/01\\_project\\_type/transit-oriented-development-and-responsible-growth](https://portal.ct.gov/decd/content/community-development/01_project_type/transit-oriented-development-and-responsible-growth).

<sup>61</sup> *Incentive Zoning*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/incentive\\_zoning](https://www.law.cornell.edu/wex/incentive_zoning) (last updated 2023).

<sup>62</sup> Ginny Monk, *Housing: CT Bill Would Offer Distressed Municipality Funds to Towns That Build Near Public Transit*, CT MIRROR, <https://ctmirror.org/2024/02/28/ct-distressed-municipality-housing-funding/> (last updated Feb. 28, 2024).

<sup>63</sup> *Id.*

less diverse economies and traditional landscapes, therefore it is crucial for the communities to focus on common growth goals.<sup>64</sup>

Maryland has implemented an important tool to promote and regulate smart growth across the state, which is creating “priority funding areas” (PFAs). Maryland established PFAs via the 1997 Priority Funding Areas Act which directs State funding for growth related infrastructure to PFAs, providing geographic focus from state investment in growth.<sup>65</sup> PFAs exist in communities and places where local governments want state funds for future growth.<sup>66</sup> PFAs also create incentives for development in particular areas, usually where infrastructure already exists while removing incentives for growth pressure in undeveloped areas.<sup>67</sup>

In Maryland, there have been pros and cons to integrating PFAs into planning legislation. The benefits include an increase in communication between state agencies and local governments, while also seeing more urban growth and greater investment in water and sewer infrastructures within PFAs than outside of them.<sup>68</sup> Some negative aspects include that the criteria used to establish PFAs vary from county to county in Maryland, and the Maryland Department of Planning does not have authority to redraw PFAs that may be too large.<sup>69</sup> It has been seen that counties that have established a more flexible approach to establishing PFAs have been more successful.<sup>70</sup> PFAs are similar to Delaware’s already established DDD program, but the PFAs can be applied to a wide array of areas, whereas Delaware’s DDDs focus on leveraging state resources in a limited number of pre-designated areas, mostly designated downtown areas and neighborhoods.

Maryland has another relevant legislation which is the Sustainable Communities Tax Increment Financing (TIF) Designation and Financing Law in 2013. This law authorizes municipalities and counties to finance the cost of infrastructure improvements in a Sustainable Community<sup>71</sup> in the same manner as an MDOT designated TOD.<sup>72</sup> Local governments work with the state to build on assets and create opportunities where public and private investments can

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<sup>64</sup> PUTTING SMART GROWTH TO WORK IN RURAL COMMUNITIES, 1, [https://www.epa.gov/sites/default/files/2014-01/documents/10-180\\_smart\\_growth\\_rural\\_com.pdf](https://www.epa.gov/sites/default/files/2014-01/documents/10-180_smart_growth_rural_com.pdf) (last updated 2010).

<sup>65</sup> *Planning Legislation*, MARYLAND DEPARTMENT OF PLANNING (2024), <https://planning.maryland.gov/pages/OurWork/plan-legislation.aspx#:~:text=1997%20Planning%20Legislation&text=The%201997%20Priority%20Funding%20Areas.State%20funding%20for%20future%20growth>.

<sup>66</sup> *Id.*

<sup>67</sup> PUTTING SMART GROWTH TO WORK IN RURAL COMMUNITIES, 14, [https://www.epa.gov/sites/default/files/2014-01/documents/10-180\\_smart\\_growth\\_rural\\_com.pdf](https://www.epa.gov/sites/default/files/2014-01/documents/10-180_smart_growth_rural_com.pdf) (last updated 2010).

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Maryland defined “sustainable community” as: “regions across the state where governments, business and communities coordinate investments to achieve sustainable growth, good jobs and thriving neighborhoods, and these communities tend to be historically or culturally significant with a local or national historic district designation”. *Sustainable Communities*, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT: MARYLAND MORTGAGE PROGRAM (2024), <https://mmp.maryland.gov/Pages/Sustainable-Communities.aspx>.

<sup>72</sup> *Planning Legislation*, MARYLAND DEPARTMENT OF PLANNING (2024), <https://planning.maryland.gov/pages/OurWork/plan-legislation.aspx#:~:text=1997%20Planning%20Legislation&text=The%201997%20Priority%20Funding%20Areas.State%20funding%20for%20future%20growth>.

achieve a healthy local economy, a mix of land uses, and growth and development practices that protect the environment and conserve air, water and energy resources, encourage walkability and recreational opportunities and where available, create access to transit.<sup>73</sup>

Another form of repurposing or developing under-utilized areas is infill development. Infill development encourages the redevelopment of existing commercial areas which results in protecting rural areas from development. Successful infill development can increase residential densities to support improved transportation and provide a wider variety of neighborhood amenities.<sup>74</sup> There are several forms of infill development including residential development, commercial development, mixed use development, transit-oriented development, brownfield redevelopment, and greyfield redevelopment.<sup>75</sup>

An integral type of infill development present in Delaware are greyfields. A greyfield is a property that is old, abandoned, or underutilized previously used for retail or commercial shopping.<sup>76</sup> In Chester County, Pennsylvania, greyfield redevelopment has become a prominent staple in their land use regulatory scheme. To do so, Chester County has taken the following steps to accomplish their goal of revitalizing greyfield space into usable, walkable, and commuter-friendly areas: (1) inventory the supply and demand of the current retail in the area (retail performance, tenants in the area, physical space), (2) perform a market analysis, (3) develop a vision with property owners, (4) establish partnerships (public or private).<sup>77</sup> There are several programs and tools available in Chester County for this process including: local economic revitalization tax assistance, local government incentives (TIF, bonds), Redfields to Greenfields initiative, among others specific to Pennsylvania.<sup>78</sup>

For Delaware, New Castle County's comprehensive plan has identified key areas for infill development, focusing on greyfields throughout the county, with supporting ideas around incentivization and revitalization to promote smart growth in the affected areas.<sup>79</sup> To aid Delaware in this process of promoting infill development, flexible development standards and development of programs that comply with state law and county ordinances are key to these types of programs. Additionally, other financial incentives in these kinds of programs include grants for infrastructure development, such as waivers or reduced fees and even streamlined licenses, permits and inspection procedures for developments that qualify.

Rural communities must also be considered when discussing smart growth and how to best support the rural landscape. Smart growth in these communities requires preserving the landscapes valued by its community-members. To implement this, there are several strategies

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<sup>73</sup> *Sustainable Communities*, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT: MARYLAND MORTGAGE PROGRAM (2024), <https://mmp.maryland.gov/Pages/Sustainable-Communities.aspx>.

<sup>74</sup> *Infill Development*, MRSC (2024), <https://mrsc.org/explore-topics/planning/zoning/infill-development>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Transforming Greyfields Into Dynamic Destinations*, COMMERCIAL LANDSCAPE SERIES, 17, <https://www.chescoplanning.org/municorner/ComLand/PDF/DocGreyfields.pdf> (last updated Apr. 2017).

<sup>78</sup> *Id.*

<sup>79</sup> *Transit Oriented Development*, NEW CASTLE COUNTY COMPREHENSIVE PLAN 2050, 277, <https://ssl02.nccde.org/gisfiles/Images/NCC2050/Comp%20Plan%20Final%20Draft/Complete%20Plan%20Final%20Draft%20%2006272022.pdf> (last updated July 26, 2022).

and tools to consider for Delaware including: supporting the implementation of ecosystem service markets, boosting agritourism and ecotourism, agricultural zoning and rural home clustering.<sup>80</sup>

Ecosystem services exist in rural landscapes and include sequestering carbon, filtering and storing a clean water supply, and mitigating natural hazards (floods and fires).<sup>81</sup> In an ecosystem service market, the landowner is able to sell an ecosystem service credit to a bank, who in turn sells them to a buyer that has exceeded limits in carbon emissions, water pollutants, or biodiversity loss based on a cap-and-trade service. This process allows landowners to take advantage of the ecological value that their land provides to the public.<sup>82</sup> If this were to be applicable in Delaware, it would allow farmers to have other incentives in maintaining their crop cycles and farm use by creating a more profitable business model.

Agritourism and ecotourism activities include farm tours and overnight stays in farm bed-and-breakfast operations.<sup>83</sup> These tours and overnight stays could include opportunities for guests and patrons to participate in farm activities- feeding the animals, harvesting crops. Ecotourism activities are more focused on people who are seeking to engage in nature-related tourism on conservation lands while reducing the ecological footprint of their visit.<sup>84</sup> Opportunities for ecotourism include having landowners earn profits from offering traditional recreational activities on their land, such as hunting and fishing.<sup>85</sup> Sussex County's current comprehensive plan was created in 2018 and has goals of creating voluntary agribusiness areas.<sup>86</sup> Implementing these areas would establish districts to foster support for important agriculture industries to develop in support of Sussex County's large agricultural economy without unnecessary delay.<sup>87</sup> Sussex County's comprehensive plan will be up for review in four years and it will be worth considering an added stipulation for expanding the definition of "agribusiness" to include agritourism and ecotourism planning strategies. By doing so, it could potentially benefit not only the farmers, but local economies as well by increasing local storefront and restaurant profits from the increase in patronage.

Agricultural zoning is another pivotal aspect of land use planning, and it allows for primary industry uses but anything involving residential or commercial development is strictly prohibited.<sup>88</sup> States and/or local governments can develop conservation zoning regulations to ensure that productive farms are protected- Pennsylvania has established locally based rural land zoning and Oregon has instituted the Exclusive Farm use zoning delegation (described in more detail below).

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<sup>80</sup> PUTTING SMART GROWTH TO WORK IN RURAL COMMUNITIES, 9, [https://www.epa.gov/sites/default/files/2014-01/documents/10-180\\_smart\\_growth\\_rural\\_com.pdf](https://www.epa.gov/sites/default/files/2014-01/documents/10-180_smart_growth_rural_com.pdf) (last updated 2010).

<sup>81</sup> *Id.* at 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> SUSSEX COUNTY 2018 COMPREHENSIVE PLAN, 4-18, <https://sussexcountyde.gov/sites/default/files/PDFs/2018CompPlan-Final.pdf> (last updated Mar. 2019).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 15.



Rural home clustering allows a developer to build the same number of units on smaller lots while preserving a percentage of the developable land for agriculture or to be left as natural land- one method of this is known as a “conservation subdivision”.<sup>89</sup> These subdivisions allow for environmental and fiscal advantages such as reducing infrastructure costs and reducing community service costs (police and fire protection), while limiting loss and fragmentation of wildlife habitat.<sup>90</sup> This type of development can be encouraged by a comprehensive plan, but will struggle manifesting smart growth outcomes because of the zoning regulatory requirements it will face. Delaware could benefit from this type of development planning by still allowing for healthy community development while preserving a percentage of land for natural resources and agricultural services.

Massachusetts has Executive Order 193 which is the original source of authority for the Massachusetts Department of Agricultural Resources (MDAR) to assert farmland mitigation and apply it for review under the Massachusetts Environmental Policy Act (MEPA).<sup>91</sup> EO 193 directs state agencies to mitigate against the conversion of state-owned agricultural land and sets forth policies intended to prevent unnecessary conversion of agricultural land.<sup>92</sup> The first relevant mitigation policy mandates that “State funds and federal grants administered by the state shall not be used to encourage the conversion of agricultural land to other uses when feasible alternatives are available.” EO 193 defines “agricultural land” as “land classified Prime, Unique, or of State and Local Importance by the USDA Soil Conservation Service, as well as land characterized by active agricultural use [emphasis added].”<sup>93</sup> While EO 193 does not define “active agricultural use,” this language is nonetheless significant because it allows MDAR to seek mitigation not only for the conversion of state-owned land, as EO 193 explicitly directs, but also provides authority for mitigating the conversion of private agricultural lands where there is state involvement in the project through permitting or funding.<sup>94</sup>

Delaware could benefit from establishing a similar EO and also the state’s own environmental policy act to further limit farmland conversion. Delaware could apply the same principles that prevent unnecessary conversion of state-owned agricultural land and require an investigation into reasonable alternatives. Delaware’s EO could also provide similar authority on private lands if there is any state involvement through either permitting or funding, therefore creating another potential block to big developers.

### 3. State Accountability and Metrics

To be successful in developing and implementing smart growth policies, the actions and results of those actions must be recorded and measured so that improvements can be made. Several states have implemented metrics to monitor these changes.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 15-16.

<sup>91</sup> Policy Options for Strengthening Farmland Mitigation in Massachusetts and Other New England States, 3, <https://landforgood.org/wp-content/uploads/LAPP-Policy-Options-For-Strengthening-Farmland-Mitigation-in-Massachusetts-and-other-New-England-states.pdf> (last updated 2016).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



In 2009, Maryland introduced Smart Growth Goals, Measures, and Indicators and Implementation of Planning Visions bill which requires local planning commissions or boards to submit annual reports to local legislative bodies that include specified smart growth measures and indicators and information on a local land use goal as part of the report.<sup>95</sup> The annual report must state which ordinances or regulations were adopted or changed to implement the States' planning visions. Examples of the measure and indicators that must be reported on include: (1) the amount and share of growth that is being located inside and outside the PFA; (2) the net density of growth that is being located inside and outside the PFA; (3) the development capacity analysis (updated every 3 years or when there is a significant zoning or land use change), and (4) the number of acres preserved using local agricultural land preservation funding.<sup>96</sup> This bill also established a statewide land use goal of increasing the current percentage of growth within the PFA and decreasing the percentage of growth outside the PFA- as required by the state's bill.<sup>97</sup>

In 1985, Florida's land use system was implemented by the Growth Management Act (GMA) which gave the state oversight in land use planning.<sup>98</sup> The GMA called for a state-wide comprehensive plan which addressed 267 goals and was intended to guide all other planning efforts, including those at the local and regional level.<sup>99</sup> In 2011 the GMA was largely repealed and most of the planning authority shifted back to local governments, but there are several successes worth noting. Under the GMA, local governments were required to address smart growth factors such as conservation, adequate infrastructure, and affordable housing in their comprehensive plans.<sup>100</sup> Florida's state land use agency, the Department of Community Affairs (DCA) along with Florida's Department of Transportation and Environmental Protection agencies all reviewed and commented upon any plan amendments.<sup>101</sup> The DCA also had authority to influence local plans and any plan amendments, while also outlining objections, recommendations, and comments that most local governments followed because if they did not, they could be subject to an administrative hearing.<sup>102</sup> Florida also maintained stringent consistency<sup>103</sup> requirements, requiring vertical, horizontal, and internal plan consistency.<sup>104</sup> Although Florida's top-down approach to planning may have failed over time, it still serves as an aggressive example of how states can implement accountability measures to ensure that growth goals are being articulated, measured, and reviewed, and how involved relevant state agencies can and should be in these processes.

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<sup>95</sup> *Planning Legislation*, Maryland Department of Planning, <https://planning.maryland.gov/pages/OurWork/plan-legislation.aspx>.

<sup>96</sup> *Smart Growth Goals, Measures, and Indicators and Implementation of Planning Visions*, 2009 Planning Legislation <https://planning.maryland.gov/Documents/OurWork/sgg/SGG2.pdf> (2009).

<sup>97</sup> *Id.*

<sup>98</sup> Edward J. Sullivan & Jessica Yeh, *State Strategies in Managing Sprawl*, 45 URB. LAW. 349-405, 361 (2013).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 362.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> “[P]lans are vertically consistent if they reflect the goals, objectives, and policies laid out in regional policy plans and articulated in the State comprehensive Plan. Plans are horizontally consistent if they reflect land policies and future land use designations of neighboring jurisdictions. Internal consistency rests upon a close connection between a local comprehensive plan and the . . . regulations that are to implement that plan.” *Id.* at 363.

<sup>104</sup> *Id.*

If Delaware counties and municipalities were to incorporate growth metrics or more aggressive accountability measures into their comprehensive plans, it could encourage more realistic goal setting and allow room for broader discussions into what is possible within each jurisdiction while focusing on applicable smart growth goals.

### III. Conclusion

Delaware has an exciting opportunity to maximize its growth potential to meet future population demands by utilizing some of the aforementioned land use tools examined in this paper. By implementing these strategies, Delaware will be better positioned to curb rapid overdevelopment and sprawl. Delaware already has a strong foundation in its smart growth goals, but by expanding their application, it will create more opportunities for healthier and more sustainable growth throughout the state while preserving local land use autonomy.