

**Smart Growth and Green Building:  
An Effective Partnership to Significantly  
Reduce Greenhouse Gas Emissions**

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Advocates for smart growth<sup>1</sup> have fought to integrate transportation planning and land-use planning for over a decade.<sup>2</sup> Recently, the Oregon legislature took another step towards that goal by enacting Senate Bill 1059, which provides guidelines and a toolkit to help local governments achieve greenhouse gas (GHG) emission reduction targets.<sup>3</sup> The question persists, however, as to whether this strategy is sufficient to achieve sustainable growth in a depressed economy, or whether there is a more balanced approach between state preemption and the current hands-off design of this bill, which leaves the decision exclusively to local governments as to how they will help meet their region's GHG emission reduction target.<sup>4</sup>

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<sup>1</sup> In general, *smart growth* is a term used to describe land use planning that includes features such as compact development, a mix of land uses and a range of housing choices, preservation of green space, protection of environmentally sensitive areas, and a variety of transportation choices such as transit, walking, and bicycling throughout the neighborhood area. *E.g.*, *About Smart Growth*, U.S. ENVTL. PROT. AGENCY (EPA), [http://www.epa.gov/smartgrowth/about\\_sg.htm](http://www.epa.gov/smartgrowth/about_sg.htm) (last updated Oct. 14, 2010); Gerrit-Jan Knapp, *A Requiem for Smart Growth?*, in *PLANNING REFORM IN THE NEW CENTURY* 103, 108 (Daniel R. Mandelker ed., 2005); James Wesley Scott, *Smart Growth as Urban Reform: A Pragmatic 'Recoding' of the New Regionalism*, 44 *URB. STUD.* 15, 17 (2007) ("Smart growth can be understood as a comprehensive strategy of regional sustainability that suggests economic efficiency, environmental protection, a high quality of life and social equity can be achieved through concerted and negotiated land use policies. Among other things, smart growth envisions compact development and redevelopment of existing cores, limited suburban sprawl and transit-oriented land use."); LEED for Neighborhood Development Powerpoint, <http://www.usgbc.org/ShowFile.aspx?DocumentID=6422> ("Smart growth is about thoughtfully considering where and how growth occurs, so that we support and revitalize our existing communities, particularly center cities and older suburbs, with the goal of preserving open space and natural resources. New smart growth developments are compact, transit and pedestrian oriented, with a greater mix of housing types and affordability levels, and are predominantly mixed use.").

<sup>2</sup> *See, e.g.*, Sy Adler, *The Oregon Approach to Integrating Transportation and Land Use Planning*, in *PLANNING THE OREGON WAY* 121, 124 (Carl Abbott et al. eds., 1994) ("Planners sought to enlighten the engineers regarding their profound responsibility for the future course of metropolitan growth, pointing out that transportation was much more than simply a function of land use. Transport investments also created land use patterns. When they made choices about the location and design of facilities, therefore, highway engineers were in fact functioning as urban planners." (citation omitted)). For a general discussion of likely effects of land use policies on transportation behavior, and vice versa, see TERRY MOORE ET AL., *THE TRANSPORTATION / LAND USE CONNECTION* 149–50, 201–02 (2007).

<sup>3</sup> S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, §§ 3(1), 4(1), Or. Laws Spec. Sess. 2010.

<sup>4</sup> *See id.* § 5(1) ("[T]he Land Conservation and Development Commission . . . shall adopt rules identifying a reduction target for greenhouse gas emissions . . . to be met by each region served by a metropolitan planning organization."); *id.* § 7(2) (directing local governments to "[c]onsider whether any immediate action can be taken to reduce greenhouse gas emissions," as well as "how regional transportation plans could be altered to reduce greenhouse gas emissions").

This Article analyzes the aggressive, creative strategies of promoting sustainable growth<sup>5</sup> illustrated in the proposed federal surface transportation bill,<sup>6</sup> Oregon's new law, and California's recent anti-sprawl legislation. This Article also reviews Portland, Oregon's green building policy as well as California's statewide policy,<sup>7</sup> and concludes that strategies that reform the permitting process to provide an incentive for infill green building development are ideally suited to fulfill the mandate of Oregon's S.B. 1059—or any state's respective goal to achieve sustainable growth and consequently reduce GHG emissions. Specifically, this Article advocates adoption of form-based codes<sup>8</sup> for infill development<sup>9</sup> that incorporate green building elements<sup>10</sup> as a method to spur construction within city centers and along transit corridors. Due to the inherent flexibility of green building rating systems, this technique allows a community to tailor infill building projects to adhere to a particular standard form<sup>11</sup> and

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<sup>5</sup> This Article uses the term *sustainable growth* to refer to land use planning “that meet[s] society’s present needs without compromising the ability of future generations to meet their own needs.” *Sustainability*, EPA, <http://www.epa.gov/Sustainability/basicinfo.htm#sustainability> (last updated Feb. 2, 2011). However, this Article’s proposal is most aligned with the concept of “sustainable urbanism” proposed by Douglas Farr: a concept that brings together “three late 20th Century reform movements[—]. . . . [s]mart growth, new urbanism and green building movements[—] . . . and knit[s] them into a design philosophy to allow and create truly sustainable human environments.” DOUGLAS FARR, *SUSTAINABLE URBANISM: URBAN DESIGN WITH NATURE* 28–29 (2008); *see also id.* at 42 (“[S]ustainable urbanism is walkable and transit-served urbanism integrated with high-performance buildings and high-performance infrastructure.” (emphasis omitted)).

<sup>6</sup> The legislation, which has not been introduced in the current Congress, is a product of former U.S. House of Representatives Transportation and Infrastructure Committee Chairman James L. Oberstar (D-Minn.) and his committee’s efforts in 2009 to address reauthorization. *See* COMM. ON TRANSP. AND INFRASTRUCTURE, 111<sup>TH</sup> CONG., *THE SURFACE TRANSPORTATION AUTHORIZATION ACT OF 2009: A BLUEPRINT FOR INVESTMENT AND REFORM*, [hereinafter *BLUEPRINT*] (presented by Chairman James L. Oberstar (D-Minn.), Ranking Member John L. Mica (R-Fla.), Chairman Peter A. DeFazio (D-Or.), and Ranking Member John J. Duncan, Jr. (R-Tenn.)), *available at* [http://t4america.org/docs/061809\\_STAA\\_summary.pdf](http://t4america.org/docs/061809_STAA_summary.pdf).

<sup>7</sup> *See* discussion *infra* Part III.C.

<sup>8</sup> Form-based codes are defined and discussed *infra* Part IV.B.

<sup>9</sup> This Article uses the term *infill development* to narrowly refer to any construction project within an urban growth boundary or otherwise within a half-mile of a transit corridor, and it does not include industrial uses or development on green space not currently part of a metropolitan region’s designated expansion area. The definition itself may be tailored to fit a particular region’s needs. For example, if a region did not have a defined urban growth boundary this definition could artificially create one.

<sup>10</sup> *See infra* Parts III, IV.A.

<sup>11</sup> *See* discussion *infra* Part IV.C; *see also* U.S. GREEN BLDG. COUNCIL, *LEED 2009 FOR NEIGHBORHOOD DEVELOPMENT RATING SYSTEM* xi (2009) [hereinafter *LEED-ND*]

yet still include desirable compact, mixed-use, and connectivity components that have been proven to significantly reduce GHG emissions.<sup>12</sup> Importantly, this Article proposes to modify the traditional building permitting process to allow for approval through a state council if a particular project conforms to the local government's form-based code and includes certain smart-growth characteristics.<sup>13</sup> In this way, the very nonlocal impacts of GHG emissions from low-density car-dependent development<sup>14</sup> can be redressed by the state, while at the same time ensuring the local community's concerns are addressed in the first instance. This balanced approach provides local governments the continued ability to control their community's sense of place and also effectively reduces GHG emissions.

In 1973, it took Tom McCall's famous speech of the "shameless threat to our environment"<sup>15</sup> to enact Oregon's statewide planning goals. By comparison, in 2010 advocates for Senate Bill 1059 spoke of climate change's threat to "Oregon's economy, our quality of life and our natural resources."<sup>16</sup> In both instances, the solution to the recognized problem has its roots in a public participatory process.<sup>17</sup>

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RATING SYSTEM], available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=8881> ("Green developments respect historical resources and the existing community fabric; they preserve open space and encourage access to parks."). LEED-ND was instituted as a pilot program in 2007 with more than 200 projects participating, and formalized in 2009. U.S. Green Bldg. Council, *LEED for Neighborhood Development*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=148>.

<sup>12</sup> For example, criteria might include a location within one half-mile of public transit or proximity to three essential services or businesses. See discussion *infra* Part IV.

<sup>13</sup> Modeled after the process Oregon has instituted for siting certain renewable energy facilities, a state council would approve infill development projects that meet certain criteria and that comply with local form-based codes. See discussion *infra* Parts V.B, V.C.

<sup>14</sup> JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE I* (2006).

<sup>15</sup> Carl Abbott, *The Oregon Planning Style*, in *PLANNING THE OREGON WAY*, *supra* note 2, at 208 (citation omitted).

<sup>16</sup> *Creating Climate-Friendly Communities*, OR. ENVTL. COUNCIL <http://www.oeonline.org/our-work/climate/transportation/great-places-to-live-how-oregon-can-create-climate-friendly-communities> (last visited Apr. 28, 2011). For a voting record in Oregon's house and senate (all Republicans voting nay), see Oregonian, *S.B. 1059: Oregonian Legislative Bill Tracker*, OREGONLIVE.COM, <http://gov.oregonlive.com/bill/2010/S.B.1059/> (last visited Apr. 28, 2011).

<sup>17</sup> Compare Abbott, *supra* note 15, at 210 ("One of the key steps in the passage of Senate Bill 100 was adoption of a statement of legislative intent that state goals and guidelines were to be written by the Land Conservation and Development Commission . . . only after wide public input.") (citation omitted) with S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, §§ 2, 3, 4 Or. Laws Spec. Sess. 2010 (requiring "consultation with . . . metropolitan planning organizations, other state agencies, local governments and stakeholders") and S.B. 1059 § 2(2) (requiring the Oregon Transportation Commission to

This Article does not eliminate that sound foundation and advocates only for a modification to the extent by which local interests may predominate over the interest of all Oregonians in reducing our state's contribution to climate change.

A historical look at how Oregon's local governments have implemented Planning Goal 12 over the last three decades discussed *infra* provides support for a strong state mandate with adequate flexibility to allow local government experimentation to meet this century's complex challenges.<sup>18</sup> Many Oregonians opposed statewide reform of local land use planning in 1973,<sup>19</sup> and there is no doubt that it will not be an easy political feat to institute further restrictions on local governments' control to achieve GHG emission reductions.<sup>20</sup> However, as Carl Abbott wrote of Oregon's planning style,

[Its] character is rooted in a broader Oregon approach to politics and public policy. There is a strong reservoir of support for land use planning in Oregon because both the concept and the processes fit with the underlying political culture and values of the state. There

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"actively solicit public review and comment in the development of the [statewide transportation strategy on reduction of greenhouse gas emissions]"; and S.B. 1059 §§ 3(2), 4(3) (requiring the state DOT and the DLCDC to "actively solicit public review and comment in the development of the guidelines" and "toolkit," respectively). Interestingly, this approach appears to have heeded Carl Abbott's advice that "[a]s Oregonians struggle with the implications of industrial transition and globalization, they will need to shape new definitions of the public good that may well create new planning tasks. It will be the responsibility of citizens and elected officials to continue the Oregon tradition of seeking the common ground." Abbott, *supra* note 15, at 221.

<sup>18</sup> Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (describing benefit of federalism as including ability of states to act as laboratories for experimentation to institute "novel social and economic" policies).

<sup>19</sup> See Gerrit Knaap, *Land Use Politics in Oregon*, in *PLANNING THE OREGON WAY*, *supra* note 2, at 3, 6 (describing the contentions of some Oregonians who felt "land use reform threatened to transfer control over their land to bureaucrats in Salem").

<sup>20</sup> Cf. Michael M. Berger, *State and Local Planning Programs Have Had Quite an Impact; Perhaps It Is Time for a Rest*, in *PLANNING REFORM IN THE NEW CENTURY*, *supra* note 1, at 260, 262–66 (presenting reasons why people do not trust planners and proposing that America "already ha[s] too much planning; we need less, not more."). And despite the snarky tone of Mr. Berger's article, he does raise the important issue that comprehensive plans and zoning ordinances should be reliable guides for what a developer and landowner is allowed to do. *Id.* at 262. However, the blame he places on the well-intentioned majority's endeavor to bring about "good" at the expense of oppressed minorities is misplaced. *See id.* at 269. For example, he questions how anyone can be against environmental protection, *see id.* at 266, or historic preservation, *see id.* at 275, however, is it a wonder how anyone could be against the government paying for perceived infringements on an individual's property rights, either? Mr. Berger should be consoled though, as the economic downturn is presently serving as the equivalent of the planning tool he despises—the moratorium, *see id.* at 268.

are certainly Oregonians who hold the individualistic view that planning impedes the full exercise of private rights or the entrepreneurial view that planning is a tool to be manipulated for private interest. Nevertheless, the majority of Oregon voters have agreed . . . the state is well served by a system that defines planning as a neutral arbiter of the public interest.<sup>21</sup>

Therefore, if Oregonians truly desire to reduce GHG emissions by preventing further unsustainable growth, we are best served by eliminating the tools that have empowered unreasonable local opposition to derail projects<sup>22</sup> that are in the public's best interest.<sup>23</sup> This Article is not calling for the obstruction of a local government's role in shaping the development's form or its ability to mitigate the impact on the local community.<sup>24</sup> Instead, this Article's proposal to modify the permitting process for development that meets certain criteria aims to facilitate sustainable growth that serves both the local *and* the common good.

## I

### WHY IS MODIFICATION TO OREGON'S LAND USE PLANNING SCHEME NEEDED NOW?

It takes three overlays of crises to wake up America. In this case, it has taken public awareness of climate change, peak oil, and the housing market bust to understand it's time for a different system [of land use planning].

Andrés Duany<sup>25</sup>

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<sup>21</sup> Abbott, *supra* note 15, at 205.

<sup>22</sup> Cf. Jim Green, Nat'l Renewable Energy Lab., *Overview: Zoning for Small Wind Turbines* 9 (Jan. 17, 2008), available at [http://www.windpoweringamerica.gov/pdfs/workshops/2008/sw\\_zoning\\_overview.pdf](http://www.windpoweringamerica.gov/pdfs/workshops/2008/sw_zoning_overview.pdf) (describing two instances in different states where landowners seeking to install small scale wind turbines on their respective properties spent an unreasonable amount of time and money working through the public process).

<sup>23</sup> For example, the provisions of Oregon Senate Bill 1059 require the DOT and DLCD to present a joint report to the 2011 legislature, which could propose this Article's changes to the present land use permitting process. See S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, § 9(3) Or. Laws Spec. Sess. 2010 (requiring a progress report on the development of the statewide transportation strategy, the guidelines, and toolkit, as well as recommendations on how to meet the [GHG] emission reduction targets and "[w]hether additional actions or a different framework is necessary to carry out the [GHG] emissions reduction goals").

<sup>24</sup> See discussion *infra* Part IV.B (explaining how form-based codes provide a means of allowing for local government to select areas—called transects—where specific features could qualify the project to be permitted outright while still restraining the set-back, height (based upon the use), and/or signage standards).

<sup>25</sup> Andrés Duany, Co-Founder of the Congress for the New Urbanism, Presentation for the California Governor's Office of Planning and Research, the California Strategic

First and foremost, Oregon needs to once again modify its land use and transportation planning system in order to aggressively position itself to receive federal funding that is currently or soon will be available for “projects that maximize transit’s potential to reduce greenhouse gas emissions.”<sup>26</sup> For example, the federal government’s livability initiative<sup>27</sup> includes \$280 million in funding for “grants targeted to projects that meet livability and sustainability criteria, including greenhouse gas reduction.”<sup>28</sup> Additionally, the U.S. Department of Housing and Urban Development (HUD) requested \$100 million to fund a new Sustainable Communities Planning Grant Program to “help regions integrate land use and transportation investments, environmental planning at the regional scale . . . .”<sup>29</sup>

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Growth Council & the California Department of Conservation, *Beyond Counting Carbon* (Oct. 29, 2009) [hereinafter *Duany Presentation*], [http://www.sgc.ca.gov/meetings/20091013/duany\\_video.html](http://www.sgc.ca.gov/meetings/20091013/duany_video.html).

<sup>26</sup> FED. TRANSIT ADMIN., U.S. DEP’T OF TRANSP., *PUBLIC TRANSPORTATION’S ROLE IN RESPONDING TO CLIMATE CHANGE 7* (2010) [hereinafter *PUBLIC TRANSPORTATION’S ROLE*], available at <http://www.fta.dot.gov/documents/PublicTransportationsRoleInRespondingToClimateChange2010.pdf> (describing Federal Transit Authority grants that “grow[] and sustain[] public transportation as a low-emission alternative to automobiles through [that] agency’s \$10 billion a year grant programs”).

<sup>27</sup> See generally Press Release, Dept. of Housing & Urban Development, DOT Secretary Ray LaHood, HUD Secretary Shaun Donovan, and EPA Administrator Lisa Jackson Announce Interagency Partnership between HUD, DOT & EPA (June 16, 2009), available at [http://portal.hud.gov/portal/page/portal/HUD/press/press\\_releases\\_media\\_advisories/2009/HUDNo.09-088\(a\)](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-088(a)) (setting forth six “livability principles” to coordinate policy”). In general, livable communities are defined as having components that improve overall quality of life, such as a place that has safe, convenient access to good schools, housing, public transit, and jobs. See Press Release, U.S. Dept. of Transp., HUD and DOT Partnership: Sustainable Communities (Mar. 18, 2009), available at <http://www.dot.gov/affairs/dot3209.htm>.

<sup>28</sup> *PUBLIC TRANSPORTATION’S ROLE*, *supra* note 26, at 7 & n.23 (referring to proposed “Section 5309 Bus and Bus Facilities Livability Initiative Program Grants” and “Exempt Discretionary Program Grants (Section 5309) for Urban Circulator Systems”).

<sup>29</sup> Center for Transportation and the Environment National Broadcast Program TC-44: DOT-HUD-EPA Interagency Partnerships for Sustainable Communities 6, 16 (Nov. 9, 2009) [hereinafter *Transcript of DOT-EPA-HUD Partnership*], available at <http://www.cte.ncsu.edu/CTE/TechTransfer/Teleconferences/docs/TC44-Transcript.pdf> (statement by Shelley Poticha, Senior Advisor for Sustainable Housing and Communities, U.S. Dep’t of Housing and Urban Development). Additionally, HUD requested \$40 million to “assist[] communities in developing the implementation tools for sustainable communities,” which include “helping communities deliver the [zoning and building codes] . . . that allow this kind of development.” *Id.* at 16. In short, why should Oregon’s local governments not be first in line, ready, willing, and able to receive federal assistance to achieve these laudable goals? The fact that Oregon already mandates integration of transportation and land use planning and is continuing to work towards reducing GHG emissions ensures that federal agencies’ monies will be spent wisely. Cf. JOHN W. FISCHER, CONG. RESEARCH SERV., R40053 SURFACE TRANSPORTATION PROGRAM REAUTHORIZATION ISSUES FOR THE 111<sup>TH</sup>



Moreover, additional funding to support GHG emissions reduction strategies could likely be available for local, regional, and state governments in any future federal climate change bill<sup>30</sup> as well as within the eventual reauthorization of the federal surface transportation bill.<sup>31</sup>

Secondly, several studies support a prediction that the new and growing majority of American households—consisting of single-persons, aging baby boomers, empty nesters, and couples without children—want to live within the community core, whether it is an urban or suburban walkable area.<sup>32</sup> One recent study by the U.S. Environmental Protection Agency (EPA) looked at U.S. census residential building permit data over an eighteen-year period (1990 to 2007) and already found a “dramatic increase in the share of new construction built in central cities and older suburbs.”<sup>33</sup> That study declared that the data reflected a “fundamental shift in the real estate market,”<sup>34</sup> and the *New York Times* has reported that the share of

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CONGRESS 8 (2008) (describing how some legislators desire control over how the federal funds are being used and advocate for the use of “a data set that allows those at the federal level to determine whether federally provided funds are being spent wisely”).

<sup>30</sup> Cf. American Clean Energy and Security Act, H.R. 2454, 111th Cong. §§ 263, 264 (2009).

<sup>31</sup> See discussion *infra* Part II.A. Significantly, when determining a location for new federal facilities, President Obama has mandated that federal agencies consider the extent to which the area is “pedestrian friendly, near existing employment centers, and accessible to public transit . . . .” Exec. Order No. 13,514, § 2(f)(iii), 74 Fed. Reg. 52, 52, 117, 119 (2010).

<sup>32</sup> See REID EWING ET AL., URBAN LAND INSTITUTE, GROWING COOLER: THE EVIDENCE OF URBAN DEVELOPMENT AND CLIMATE CHANGE 23–27 (2008) (describing a “large and growing consumer demand for homes in compact neighborhoods” and citing several supportive studies pertaining to particular demographics); see also RICHARD M. HAUGHEY, URBAN LAND INSTITUTE ET AL., HIGHER-DENSITY DEVELOPMENT: MYTH AND FACT 28–31 (2005) (debunking the myth that households do not prefer higher-density housing and pointing out that the two fastest growing population groups are most likely to prefer such housing); Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 9 (describing how it is “common sense” that the increase in population over sixty-five years of age will result in less auto-dependency and the need for “more compact walkable communities”) (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency). But see RANDALL G. HOLCOMBE & SAMUEL R. STALEY, SMARTER GROWTH: MARKET-BASED STRATEGIES FOR LAND-USE PLANNING IN THE 21<sup>ST</sup> CENTURY 6 (2001) (criticizing smart growth regulation as attempts at defeating market forces because people want low-density, single-family homes to achieve a higher standard of living in suburbs).

<sup>33</sup> JOHN V. THOMAS, DEV., CMTY., & ENVTL. DIV., EPA, RESIDENTIAL CONSTRUCTION TRENDS IN AMERICA’S METROPOLITAN REGIONS 1 (2009).

<sup>34</sup> *Id.* But see Joel Kotkin, *The War Against Suburbia*, THE AMERICAN (Jan. 21, 2010), <http://www.american.com/archive/2010/january/the-war-against-suburbia> (“[T]he Obama administration has been pushing an agenda that seeks to move Americans out of their

residential construction taking place in central cities more than doubled since 2000 in twenty-six of the fifty largest U.S. metropolitan regions.<sup>35</sup> Thus, while it is definitely too early to declare victory,<sup>36</sup> it does appear that the United States may be bucking the trend of urban sprawl<sup>37</sup> that has been the predominant development pattern over the last fifty years.<sup>38</sup> There now exists several case studies that evidence a growing preference for communities where families may walk to school, restaurants, and other daily errands along safe and efficient routes.<sup>39</sup>

Lastly, the benefits of providing Oregon's cities, counties, and regional planning organizations with the guidance, tools, and a process that provides an incentive for sustainable development cannot be understated. Whether the term livable community,<sup>40</sup> climate-friendly community,<sup>41</sup> or green community<sup>42</sup> is used, the benefits of

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preferred suburban locales and into the dense, transit-dependent locales they have eschewed for generations.”).

<sup>35</sup> Gabriel Nelson, ‘*Smart Growth*’ Taking Hold in U.S. Cities, Study Says, N.Y. TIMES (Mar. 24, 2010), <http://www.nytimes.com/gwire/2010/03/24/24greenwire-smart-growth-taking-hold-in-us-cities-study-sa-30109.html>.

<sup>36</sup> For example, this same study admits that “[a]lthough urban core neighborhoods have doubled or tripled their share of residential construction since the early 1990s, they still account for less than half of all new residential units in most regions.” THOMAS, *supra* note 33, at 21.

<sup>37</sup> Sprawl is a pattern of land use “generally identified as the proliferation of low-density, functionally segregated, disparate and overscale developments dependent on the automobile.” Scott, *supra* note 1, at 19 (citing DOLORES HAYDEN, *BUILDING SUBURBIA* (2003)). The causes of sprawl are contentiously debated, and include “[l]ocal land use regulations . . . improved communications technologies . . . [f]ederal subsidies for highways and new suburban infrastructure . . . federal tax benefits and mortgage guarantees favoring new single-family homes.” Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 9–10 (2000) (citations omitted).

<sup>38</sup> See EWING ET AL., *supra* note 32, at 21.

<sup>39</sup> See, e.g., LOCAL GOV’T. COMM’N ET AL., *CREATING GREAT NEIGHBORHOODS: DENSITY IN YOUR COMMUNITY* 9–27 (2003) (outlining several successful developments); Aseem Inam, Jonathan Levine & Richard Werbel, *Production of Alternative Development in American Suburbs: Two Case Studies*, 19 PLAN., PRAC. & RES. 211, 211–12, 214–15 (2004) (describing both the likely reasons for the successful development of Rio Vista West in San Diego, California, as well as the unsuccessful Whisman Station in Mountain View, California).

<sup>40</sup> LOCAL GOV’T COMM’N, *NEIGHBORHOOD-SCALE PLANNING TOOLS TO CREATE ACTIVE, LIVABLE COMMUNITIES* 1 (undated).

<sup>41</sup> OR ENVTL. COUNCIL, *supra* note 16.

<sup>42</sup> Green Communities, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/greenkit/gccheck.htm>.

such development include lower household costs,<sup>43</sup> higher local economic activity,<sup>44</sup> healthier lifestyles of residents,<sup>45</sup> lower government infrastructure costs,<sup>46</sup> and a reduction in air and water

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<sup>43</sup> See Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 8 (“[I]f the U.S. shifted just 10% of new housing starts to a more Smart Growth development pattern over the next 10 years, Americans would save about five billion gallons of gasoline and about \$220 billion dollars [sic] in household and transportation expenses.”) (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency); VICTORIA TRANSP. POLICY INST., *LAND USE IMPACTS ON TRANSPORT 24–25* (2010) (“A typical household reduces its annual mileage 45% by shifting from an automobile-dependent location with poor travel options that requires ownership of two cars, to a transit-oriented neighborhood, which offers quality transit service and requires ownership of just one car. This saves 512 gallons of fuel annually, worth about \$1,920 at \$3.75 per gallon.”); TERRY MOORE ET AL., *supra* note 2, at 87 (“Driving is expensive. The Bureau of Transportation Statistics . . . for example, estimates that in 2005 the average annual cost of owning and operating a car driving 15,000 miles a year was about \$7,800: 52 cents per mile. That is a big number relative to a median, after-tax, household income of less than \$40,000 per year. It suggests that a two-car household spends almost 40 percent of its disposable income on car travel.” (citations omitted)).

<sup>44</sup> See, e.g., Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 4 (“In terms of the economy, small businesses do better in these type of communities because small businesses do not have the budgets to attract people to make a special trip to their storefront, they rely on pedestrian traffic and impulse buyers . . . . Even big businesses do better. Target opened a two-story store in a mixed use, mixed income, walkable neighborhood with strong transit service about 18 months ago and that has become their most profitable location in the country.” (quoting Beth Osborne, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation)).

<sup>45</sup> Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 9 (referring to the increase in health problems that attend obesity and stating “[p]eople in walkable neighborhoods are 7% less likely to be obese” (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency)). See generally DOUGLAS FARR, *supra* note 5, at 19–20 (setting forth several reasons for the U.S. obesity epidemic “in the spatial environment we’ve designed,” including lack of stairs, promoting sedentary behavior with streetscapes that “discourage travel by foot” and spending 87% of our life indoors); REID EWING & RICHARD KREUTZER, *UNDERSTANDING THE RELATIONSHIP BETWEEN PUBLIC HEALTH AND THE BUILT ENVIRONMENT: A REPORT PREPARED FOR THE LEED-ND CORE COMMITTEE* (2006) (describing how the built environment can improve public health).

<sup>46</sup> Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 5 (“Envision Utah . . . found that when they focused development in areas that already exist and their infrastructure investments in areas that already exist, they saved \$4.5 billion dollars in infrastructure costs over a ten year period of time.”) (quoting Beth Osborne, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation). *But see* Knapp, *supra* note 1, at 120–21, 123 (urging proponents of smart growth to “[s]top perpetuating myths that alienate critical constituencies,” stating that “urban infill and redevelopment is not less costly than development of greenfields. . . . Excess infrastructure capacity is rare in urban areas, and redevelopment often requires substantial infrastructure upgrades and retrofits. To preserve the health and vitality of inner cities, infill and redevelopment are worthy and important endeavors, but it is not cheap” (emphasis omitted)).

pollution.<sup>47</sup> Given how hard Oregon has been hit by the recent economic downturn<sup>48</sup> and the environmental degradation that accompanies unsustainable land use and transportation patterns,<sup>49</sup> this state cannot afford to sit back and hope for the best. Redevelopment of blighted areas and cleanup of urban streams and watersheds is not cheap. Every state is better served to convince local governments to avoid such costs by promoting good development at the design phase, both in terms of placement and construction.

### ***A. Climate Change: The Eight-Hundred-Pound Gorilla in the Room***

Former Oregon Governor Ted Kulongoski stated last year that as far as he was concerned, whether climate change is occurring is no longer a debatable issue, as the consensus of the scientific community leaves us only to debate how best to address the problem.<sup>50</sup> In 2010, the Federal Transit Administration (FTA) updated a report on public transportation's role in responding to climate change, stating that "vehicles account for roughly two-thirds of transportation-related emissions, ranking transportation as the second largest source of total U.S. greenhouse gas emissions."<sup>51</sup> The largest source of GHG emissions is the U.S. electric power industry,<sup>52</sup> and U.S. buildings' electricity consumption alone accounts for thirty-three percent of those emissions.<sup>53</sup> Clearly, in order to effectively reduce a

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<sup>47</sup> See discussion *infra* Part IV (regarding fewer carbon emissions from compact development and improvements in water resource protections stemming from smart growth and green buildings); see also *Creating Climate-Friendly Communities*, *supra* note 16; LEVINE, *supra* note 14, at 1.

<sup>48</sup> See generally Robert Young, Presentation: Towards an American Architecture, Washington D.C., Oregon, and Green Cities (Mar. 11, 2010) (discussing Oregon's current economic depression and how the state's boom and bust economy is inevitably tied to its history of resource extraction such as the fur trade and timber industry) (on file with author).

<sup>49</sup> LEED-ND RATING SYSTEM, *supra* note 11 ("Sprawling development patterns fragment habitat, endanger sensitive land and water bodies, destroy precious farmland, and increase the burden on municipal infrastructure.").

<sup>50</sup> Ted Kulongoski, Oregon Governor, Addressing Climate Change: The Right Policy is Also the Smart Policy, Presentation at the University of Oregon School of Law, hosted by the Wayne Morse Center for Law and Politics (Apr. 14, 2010).

<sup>51</sup> PUBLIC TRANSPORTATION'S ROLE, *supra* note 26, at 1.

<sup>52</sup> *Id.*

<sup>53</sup> THOMAS J. WILBANKS ET AL., U.S. CLIMATE CHANGE SCIENCE PROGRAM, EFFECTS OF CLIMATE CHANGE ON ENERGY PRODUCTION AND USE IN THE UNITED STATES 8 (2007), available at <http://www.sc.doe.gov/ober/sap4-5-final-all.pdf>; see also U.S. DEPT. OF ENERGY, BUILDINGS ENERGY DATA BOOK 6.1.1, <http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=6.1.1>; see also Transcript of DOT-EPA-HUD Partnership,

considerable amount of GHG emissions, an integrated land use and transportation plan must include promoting development that both reduces average household VMT *and* capitalizes on the benefit of green building elements in such developments.<sup>54</sup> Furthermore, the Intergovernmental Panel on Climate Change concluded that “greenhouse gas emissions must be reduced by 50% to 85% by 2050 in order to limit global warming to four degrees Fahrenheit, [to] avoid[] many of the worst impacts of climate change.”<sup>55</sup> Thus, the question should not be whether Oregon should take any *one* particular step that has been proven to reduce GHG emissions but how Oregon can combine *all* viable complementary measures to achieve more sustainable growth.<sup>56</sup>

***B. Finally, a Quantifiable Objective  
to Reduce Principal Reliance on Automobiles***

Regardless of one’s position on climate change, land use patterns have indisputably been linked to an individual’s automobile use,<sup>57</sup> with corresponding negative impacts to the environment and other significant associated costs.<sup>58</sup> Therefore, whether one believes that

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*supra* note 29, at 8 (“Buildings and transportation together account for about two-thirds of U.S. greenhouse gas emissions.” (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency)).

<sup>54</sup> *Cf.* PUBLIC TRANSPORTATION’S ROLE, *supra* note 26, at 5 (“Combining investment in public transportation with compact, mixed-use development around transit stations has a synergistic effect that amplifies the greenhouse gas reductions of each strategy.”); Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 9 (“We must get multiple outcomes from single actions . . . .” (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency)).

<sup>55</sup> PUBLIC TRANSPORTATION’S ROLE, *supra* note 26, at 1; *see also* Transcript of DOT-EPA-HUD Partnership, *supra* note 29, at 8–9 (“One EPA study found that more compact development . . . along with complimentary pricing strategies could reduce CO2 emissions by 24% by 2050.” (statement of John Frece, Smart Growth Program Director, U.S. Environmental Protection Agency)).

<sup>56</sup> *See generally* FARR, *supra* note 5, at 29 (discussing how a myopic approach is self-defeating: “a certified green building isn’t really a positive for the environment when it turns out to be surrounded by a massive paved parking lot; a walkable neighborhood is hard to sustain when its houses are wastefully constructed and energy inefficient”).

<sup>57</sup> VICTORIA TRANSP. POLICY INST., *supra* note 43, at 45 tbl.21; *see also id.* at 3 (“Land use and transportation are two sides of the same coin. Transportation affects land use and land use affects transportation. Decisions that affect one also affect the other. As a result, it is important to coordinate transportation and land use planning decisions so they are complementary rather than contradictory.”).

<sup>58</sup> *See generally* MOORE ET AL., *supra* note 2, at 88–91 (listing the costs of an auto-dependent culture as including not only owning and operating expenses but “time costs

reducing GHG emissions is required to address climate change<sup>59</sup> or necessary to mitigate the specific harms caused by our auto-centric society, the pathway and objective are the same.

Sy Adler observed that from the inception of Oregon's Planning Goal 12, the group 1,000 Friends of Oregon argued that its implementing rules should "require transport plans to set targets for mode shares, and then identify facilities and land use patterns, and demand management policies to achieve them."<sup>60</sup> Indeed, the benefits of incorporating a measurable target into rulemaking are twofold. First, while the end result is a mandate, each community has sufficient flexibility to address its unique concerns or situation in deciding upon the method of achieving that mandate. Oregon's approach to provide "modeling and analysis tools" that will calculate the benefits of a proposed action or program allows local officials to devise their own strategy to achieve their share of the regional target.<sup>61</sup>

The second benefit of a quantifiable target for any legislative mandate is that it provides both transparency and accountability. For example, the threat of reduced funding would engender innovation rather than the status quo because politicians and regional organizations would be called to account for their progress or lack thereof.<sup>62</sup> Furthermore, even if the target numbers for a particular plan

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associated with car travel," "[p]arking," "costs of infrastructure and transportation-related services," "[t]raffic-related deaths and injuries," and pollution costs).

<sup>59</sup> See generally JON CREYTS ET AL., MCKINSEY & CO., REDUCING U.S. GREENHOUSE GAS EMISSIONS: HOW MUCH AT WHAT COST? ix (2007), available at [http://www.mckinsey.com/client-service/sustainability/pdf/US\\_ghg\\_final\\_report.pdf](http://www.mckinsey.com/client-service/sustainability/pdf/US_ghg_final_report.pdf) ("Consensus is growing among scientists, policy makers and business leaders that concerted action will be needed to address rising greenhouse gas (GHG) emissions. The discussion is now turning to practical challenges of where and how emissions reductions can best be achieved, at what costs, and over what periods of time.").

<sup>60</sup> Adler, *supra* note 2, at 135. Specifically, Mr. Adler explained that "[w]hile rulemaking did not converge on that particular target, the idea of a measureable objective resonated . . . . The commissioner urged the participants to define an approach to reducing principal reliance on the auto that could be quantified and incorporated in the rule." *Id.*

<sup>61</sup> S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, § 4(2)(f), Or. Laws Spec. Sess. 2010; see also *id.* § 4(1)–4(2)(a)–(e) (describing all types of information provided to local governments to assist them in "developing and executing actions and programs to reduce [GHG] emissions").

<sup>62</sup> For example, many have proposed provisions for federal legislation that would require measurable emission reductions. See EWING, *supra* note 32, at 135 (proposing that state and local governments be required "to adopt mobile source GHG emission reduction budgets (like the emissions budgets for other pollutants) that demonstrate reasonable progress in limiting emissions").

become a ceiling rather than a floor,<sup>63</sup> at the very least the associated GHG emissions of planning development that lacks connectivity components will no longer appear to be an abstract problem but an enemy that can be chipped away by a few nuanced modifications.

## II

### PROPOSED AND NEWLY INSTITUTED METHODS OF REDUCING GREENHOUSE GAS EMISSIONS: FEDERAL, STATE, AND LOCAL LAWS AFFECTING THE TRANSPORTATION SECTOR

States, rather than the federal government, took the first steps to reduce GHG emissions in the U.S. transportation sector through integration of land use and transportation planning.<sup>64</sup> In the late 1990s, the term *smart growth* became part of the land use lexicon due to action by governors in Colorado and Maryland.<sup>65</sup> Recently, however, smart growth has gained momentum at the federal level: President Obama has required federal agencies to “advance regional and local integrated planning by . . . participating in regional transportation planning and recognizing existing community transportation infrastructure,” and to consider siting new federal facilities in public-transit accessible areas in existing central cities, or in existing or planned town centers in rural communities.<sup>66</sup> Additionally, House representatives have proposed surface transportation legislation that incorporates several of smart growth’s central tenets, which has earned a reputation as “transformational”<sup>67</sup> while also being simultaneously demonized for co-opting federal highway money for bike and walking paths and away from freight needs.<sup>68</sup>

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<sup>63</sup> See *infra* note 178. See generally discussion *infra* Part III.C.

<sup>64</sup> See EWING ET AL., *supra* note 32, at 139 (“More than half of the states—29 at last count—are filling this vacuum by creating their own plans to reduce GHG emissions.”). Notably, states also stepped forward first to regulate land use in absence of any federal policy. See FARR, *supra* note 5, at 29 (discussing the failure of the proposed National Land Use Policy Act in 1970 and state’s consequent enactment of vastly different land use policies).

<sup>65</sup> See FARR, *supra* note 5, at 30 (describing Colorado Governor Roy Romer and Maryland Governor Parris Glendening’s use of the term smart growth).

<sup>66</sup> Exec. Order No. 13,514, § 2(f), 3 C.F.R. 248, 251 (2010).

<sup>67</sup> Press Release, Jim Berard, U.S. House Comm. on Transportation and Infrastructure, House Passes Surface Transportation Extension (Sept. 23, 2009); see also H.R. \_\_\_ Committee Print, 111th Congress, June 22, 2009, at § 331(a)(8), available at <http://atfiles.org/files/pdf/STransJune22bill09.pdf>.

<sup>68</sup> Sean Kilcarr, *Industry Groups Decry Non-Highway Earmarking*, FLEET OWNER, Mar. 1, 2010, <http://fleetowner.com/management/news/industry-groups-non-highway-earmarking-0301/> (describing how American Highway Users Alliance President & CEO Greg Cohen

Clearly, advocacy for smart growth has now made it to the federal stage. Soon, local and state governments will jockey for position, each hoping to initiate sustainable land use and transportation projects with federal monies available through competitive bidding processes.<sup>69</sup> Therefore, this Article sets forth *infra* the features of the House's proposed surface transportation authorization bill (H.R. \_\_\_) as compared to California's Senate Bill 375. This review is intended to inform how Oregon's S.B. 1059 could be made more effective<sup>70</sup> as well as to provide a comparison for other states that are seeking to enact their own smart growth strategies best suited to meet the needs of their regional populations.

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"sees this earmarking proposal as an indication that the Obama administration is growing increasingly biased [against highway projects] in its transportation policies"). H.R. \_\_\_ Committee Print does set forth in its finding that "[i]n order to provide access to sustainable modes of transportation, land use and planning decisions must include considerations about transportation options." H.R. \_\_\_ Committee Print, 111th Congress, June 22, 2009, at § 331(a)(13). Thus, this finding arguably shifts the prior emphasis of eliminating congestion and increasing highway capacity to requiring all state and MPO transportation plans to focus on planning future growth around public transit and active transportation corridors. *Id.*; *see also id.* § 1508(a)(3) (setting forth the policy for "Metropolitan Planning," which is to "encourage and promote the livability and sustainability of all communities, increase coordination among land use, housing, and transportation plans and projects, and increase surface transportation system connectivity and intermodality through metropolitan and statewide transportation planning processes identified in this chapter."). Furthermore, to preempt the argument that transit is not desired, one recent poll shows overwhelming support for improving access to public transportation. *See Future of Transportation National Survey (2010)*, TRANSPORTATION FOR AMERICA, <http://t4america.org/resources/2010survey/> (showing that fifty-nine percent of respondents prefer improving access to public transportation—including trains and buses, to make it easier to walk and bike to reduce traffic congestion—versus thirty-eight percent who advocated for building new roads).

<sup>69</sup> *See Blumenauer Announces \$9 Million to Replace Aging Commuter Buses*, EARL BLUMENAUER (Oct. 4, 2010, 11:31 AM) [http://blumenauer.house.gov/index.php?option=com\\_content&view=article&id=1728:blumenauer-announces-9-million-to-replace-aging-commuter-buses&catid=48:2010-press-releases-new](http://blumenauer.house.gov/index.php?option=com_content&view=article&id=1728:blumenauer-announces-9-million-to-replace-aging-commuter-buses&catid=48:2010-press-releases-new) (describing Oregon's successful bid for funding to upgrade bus transit in Portland's greater metropolitan region); *see generally Livable Communities Task Force*, EARL BLUMENAUER, [http://blumenauer.house.gov/index.php?option=com\\_content&task=view&id=1553&Itemid=167](http://blumenauer.house.gov/index.php?option=com_content&task=view&id=1553&Itemid=167) (last visited Apr. 26, 2011). *But see* Kotkin, *supra* note 34 (stating smart growth "policies have little or no chance of being passed by Congress [because] [t]oo many representatives come from suburban or rural districts to back policies that would penalize a population that uses automobiles for upwards of 98 percent of their transportation and account for 95 percent of all work trips").

<sup>70</sup> *See supra* note 23.



### **A. The Proposed Federal Surface Transportation Authorization Bill**

Federal transportation legislation may be broadly described as consisting of three large divisions: highways, transit, and safety. The textual framework of H.R. \_\_\_ roughly follows these divisions: Title I corresponds to highways; Title III to transit; and Titles II and IV respectively correspond to Highway Safety and Commercial Motor Vehicle Safety. Highways and transit are two separate accounts that are ninety-percent funded by excise taxes on fuel as well as a variety of other sales taxes on related goods, such as tires and trailers.<sup>71</sup> This fund, termed the Highway Trust Fund, allocates roughly five times more to the highway account than to the transit account. The clear change made in H.R. \_\_\_ from past federal transportation legislation is the highway title's new emphasis on intermodalism and inclusion of livability policies—making this title no longer a purely highway section. As one Congressional Research Service (CRS) report notes, some may argue that these policies, in addition to setting new limits on highway lane expansion, represent a clear bias against expanding highway capacity.<sup>72</sup> In fact, four of the eight primary objectives for the bill include “provid[ing] transportation choices for commuters and travelers,” and “promot[ing] environmental sustainability, public health, and the livability of communities.”<sup>73</sup>

Additionally, H.R. \_\_\_ establishes a new Office of Livability under the supervision of the Secretary of Transportation and housed within the Federal Highway Administration: “to provide leadership and support for policies and decision-making at all levels of government that [1] increase modal choice and [2] enhance livability and sustainable modes of transportation.”<sup>74</sup> Sustainable modes of transportation include public transit, walking, and cycling.<sup>75</sup> The

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<sup>71</sup> JOHN W. FISCHER, CONG. RESEARCH SERV., R40780 SURFACE TRANSPORTATION REAUTHORIZATION LEGISLATION IN THE 111<sup>TH</sup> CONGRESS: SUMMARY OF SELECTED MAJOR PROVISIONS 1 (2009) [hereinafter CRS REPORT 40780]. As a point of reference, notice that “adding a penny to the federal fuels tax provides the trust fund with between \$1.6 and \$1.8 billion in new revenues.” *Id.* at 2.

<sup>72</sup> *Id.* at 10. There is certainly disagreement whether highway expansion could also reduce GHG emissions. *See generally* EWING ET AL., *supra* note 32, at 99–105 (explaining the complexity of determining whether “additional highway capacity would lessen congestion” and reduce GHG emissions in that respect or would induce further development along new corridors).

<sup>73</sup> H.R. \_\_\_ Committee Print, 111th Congress, June 22, 2009, at 1, *available at* <http://atfiles.org/files/pdf/STransJune22bill09.pdf>.

<sup>74</sup> *Id.* at § 1203 (adding § 331 to existing Chapter 3, which will be referred to as § 331).

<sup>75</sup> *Id.* § 331(a)(10), (q)(7).

Director of the Office of Livability must [1] “develop quantifiable national mode share targets for sustainable modes of transportation, [2] develop a timeline for achievement of these targets, and [3] support projects, programs and activities within the Department of Transportation [DOT] and nationally in support of these targets.”<sup>76</sup> This office will also be required to provide support to “livable communities and sustainable modes of transportation,” which most likely means supporting city and county communities that adopt active transportation goals “by developing and conducting research, data collection and analyses.”<sup>77</sup> Significantly, the Director of the Office of Livability will serve as point of contact at the federal DOT for executive branch agencies, to coordinate its activities with HUD and the EPA.<sup>78</sup> Thus, it appears that legislators want this office to be a primary contact for communities seeking to gain technical assistance to develop nontraditional, active transportation projects<sup>79</sup> as well as to support that office’s endeavor to “develop statistical and analytical capabilities . . . to ascertain . . . economic, public health, and environmental benefits derived due to the percentage of trips taken annually by sustainable modes of transportation.”<sup>80</sup>

H.R. \_\_ also requires the Office of Intermodalism to develop and create a National Transportation Strategic Plan,<sup>81</sup> which is described as the national equivalent to the state long-range transportation plan required by existing legislation.<sup>82</sup> H.R. \_\_ also alters current state transportation planning requirements by requiring states to take into consideration factors “such as enhancing sustainability and livability, reducing GHG emissions and dependence on foreign oil, and improving public health.”<sup>83</sup> Most important, “the state is required to implement a system of performance management that includes the development of performance measures and targets.”<sup>84</sup> Clearly, any state that has already prepared such a plan and set targets would

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<sup>76</sup> *Id.* § 331(e)(4).

<sup>77</sup> *See id.* § 331(d)(3).

<sup>78</sup> *See HUD-DOT-EPA Interagency Partnership for Sustainable Communities*, EPA, <http://www.epa.gov/dced/partnership/index.html> (last updated Feb. 3, 2011).

<sup>79</sup> H.R. \_\_ Committee Print, 111th Congress, June 22, 2009, at § 331(f).

<sup>80</sup> *Id.* § 331(h)(1)(B).

<sup>81</sup> *See id.* § 5503(d).

<sup>82</sup> CRS REPORT 40780, *supra* note 71, at 23.

<sup>83</sup> *Id.* at 24.

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

necessarily be ahead of most states and ideally suited for the first wave of federal funding.

There is, however, one significant problem with this bold attempt to initiate change in state transportation planning. Specifically, while H.R. \_\_ requires implementation of performance measures and targets as well as reporting requirements in a number of programs, the bill does not require a state or MPO to meet the established performance goals.<sup>85</sup> In fact, while those endorsing the bill stated that it “creates a performance-based framework, designed to achieve results with transparency, accountability, and oversight to ensure that goals are met”<sup>86</sup> this bill includes a few caveats that arguably make such a statement at worst disingenuous and at best only eighty percent tied to performance. For example, in a significant alteration from past federal transportation legislation, H.R. \_\_ requires that transportation plans “address transportation-related [GHG] emissions by including emission reduction targets and strategies.”<sup>87</sup> In the case of a Metropolitan Planning Organization (MPO), it must develop GHG emission reduction targets and strategies that “at a minimum” are based on models and methodologies established by the EPA in order to “address sources of surface transportation-related [GHGs],” including “efforts to increase public transportation ridership” as well as “efforts to increase walking and bicycling.”<sup>88</sup> The bill then ties certification to eligibility for funding by stating that if the MPO fails “to develop, submit, or publish its emission reduction targets and strategies,” then the DOT cannot certify that MPO’s planning process.<sup>89</sup> However, significant caveats are present. For example, DOT *may* withhold *twenty percent of funding* to a MPO that lacks such certification<sup>90</sup> and DOT is allowed to certify their planning process as long as the MPO “has met or *is likely to meet* the performance targets.”<sup>91</sup> Therefore, DOT *may* still allow full funding despite the lack of certification as long as the MPO develops, submits,

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<sup>85</sup> See *id.* at 34 (“The bill would require annual reporting by MPOs of their progress in meeting their performance targets, but it does not seem to contain any sanctions for failure to achieve the stated goals.”).

<sup>86</sup> BLUEPRINT, *supra* note 6, at 5.

<sup>87</sup> H.R. \_\_ Committee Print, *supra* note 73, at §§ 1508(h)(3) (requiring MPOs to include emission reduction targets); *id.* at § 1509(c)(1)(E) (requiring state transportation plans to include emission reduction targets).

<sup>88</sup> *Id.* § 1508(h)(6)(B)(ii); see also CRS Report 40780, *supra* note 71, at 34.

<sup>89</sup> H.R. \_\_ Committee Print, *supra* note 73, at § 1508(h)(6)(D).

<sup>90</sup> *Id.* § 1508(i/q)(3)(A).

<sup>91</sup> *Id.* § 1508(i/q)(2)(D).

and publishes its emission reduction targets and strategies.<sup>92</sup> In conclusion, while this bill purports “to move federal surface transportation policies and programs into closer alignment with the concepts of ‘sustainable transportation’ and ‘livable communities,’”<sup>93</sup> at present the threat to withhold funds to states without such policies is a hollow one; therefore, politics will likely determine actual funding levels.

***B. Oregon’s Statewide Transportation Strategy to Reduce Greenhouse Gas Emissions—Oregon Senate Bill 1059***

Oregon Senate Bill 1059 directs the Oregon Transportation Commission (OTC) to collaborate with MPOs, other state agencies, local governments and stakeholders to “adopt a statewide transportation strategy on [GHG] emissions to aid in achieving”<sup>94</sup> the state’s goal of a 10% reduction from 1990 GHG emission levels by 2020, and a 75% reduction from 1990 levels by 2050.<sup>95</sup> This bill requires the Oregon Department of Transportation (ODOT) and the Department of Land Development and Conservation (DLCD) to develop guidelines and a toolkit for MPOs to aid these local governments reduce GHG emissions by “developing and evaluating alternative land use and transportation scenarios.”<sup>96</sup> This bill also directs DLCD, in consultation with the OTC and ODOT, to adopt rules identifying reduction targets for each MPO except the Portland regional organization.<sup>97</sup> However, similar to H.R. \_\_\_, S.B. 1059 does not mandate that these MPOs achieve the set reduction targets but instead asks the local governments within each MPO to “[c]onsider whether any immediate action can be taken to reduce [GHG] emissions” as well as to “[c]onsider how regional transportation plans could be altered to reduce [GHG] emissions.”<sup>98</sup> Thus, in essence, achievement of the state’s GHG emissions reduction target depends

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<sup>92</sup> See *id.* § 1508 (i)(1)(B).

<sup>93</sup> CRS Report 40780, *supra* note 71, at 22.

<sup>94</sup> S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, § 2(1) Or. Laws Spec. Sess. 2010.

<sup>95</sup> OR. REV. STAT. § 468A.205 (2009).

<sup>96</sup> S.B. 1059 § 3(1).

<sup>97</sup> The metropolitan planning organization that serves the Portland region is currently working on similar goals and related tasks pursuant to the House Bill 2001, Jobs and Transportation Act; therefore, that MPO has been excluded from complying with Senate Bill 1059’s requirements. See DAN BATES ET AL., OFFICE OF GOV’T RELATIONS, CITY OF PORTLAND 2010 SPECIAL SESSION LEGISLATIVE REPORT 14 (2010), available at <http://www.portlandonline.com/govtrelations/index.cfm?a=297720&c=35411>.

<sup>98</sup> S.B. 1059 § 7(2).

upon local governments' voluntary implementation of programs developed by stakeholders.

In sum, Oregon Senator Alan Bates, a Democrat from Ashland, most accurately described this bill when he stated: “[I]t’s basically a study and a good look at what our future might or might not be. . . .”<sup>99</sup> The bill’s primary mandate is directed at ODOT and the DLCD, and it requires those agencies to provide local governments with information about the numerous GHG emissions reduction strategies. The substantial benefit of this order is that in educating the general public about how just one individual can help or hinder their community’s access to federal and state funding, this will likely aid any chosen program’s successful implementation. For example, the FTA has found “[i]f just one driver per household switched to taking public transportation for a daily commute of 10 miles each way, this would save 4,627 pounds of carbon dioxide per household per year—equivalent to an 8.1% reduction in the annual carbon footprint of a typical American household.”<sup>100</sup> Thus, the hope is not only that the public will see how their individual actions can make a difference, but also that such studies will engender support for new rules because the public will see how these strategies will save them money *and* help them to lead healthier lifestyles.<sup>101</sup>

### ***C. California’s Anti-Sprawl Legislation—California Senate Bill 375***

California Senate Bill 375 (SB 375)<sup>102</sup> seeks to reduce the state’s single-largest source of greenhouse gas emissions<sup>103</sup> by tying eligibility for the annual allocation of approximately \$20 billion in state transportation funding to a local government’s land use

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<sup>99</sup> Sarah Ross, *Senate Approves Bill to Reduce Vehicle Emissions*, OREGON CAPITAL NEWS (Feb. 23, 2010), <http://oregoncapitalnews.com/blog/tag/sb-1059/> (statement of Sen. Alan Bates, D-Ashland).

<sup>100</sup> PUBLIC TRANSPORTATION’S ROLE, *supra* note 26, at 2.

<sup>101</sup> See, e.g., Simmons et al., *Healthy Neighborhoods*, in SUSTAINABLE URBANISM, *supra* note 5, at 148–49 (2008) (“With effective street-scale urban redesigns, health care cost savings due to greater physical activity would average \$92,295 (ranging between \$42,192 and \$163,494) annually for 1,000 people in a small geographic area of a few blocks. The indirect cost savings are not estimated but are probably much higher.”).

<sup>102</sup> CAL. GOV’T CODE § 65080 (West 2011); SB 375, 2008–2009 Leg., 2008 Sess. (Cal. 2009).

<sup>103</sup> Cars and light trucks make up approximately thirty-six percent of all GHG emissions in California. CAL. AIR RES. BD., CLIMATE CHANGE PROPOSED SCOPING PLAN 13 (2008) [hereinafter SCOPING PLAN], <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

planning.<sup>104</sup> Thus, if a project is consistent with land use patterns that have been shown to reduce the average household vehicle miles traveled (VMT), then that project's approval will receive streamlined environmental permit processing and potentially make available state transportation funds for that city or county to spend on transit infrastructure, expansion, or maintenance.<sup>105</sup> At its core, SB 375 can be viewed as providing an irresistible incentive for local governments to align planning for transportation and housing consistent with California's AB 32<sup>106</sup> climate policy goal of promoting future development around city centers and key major transit corridors.<sup>107</sup>

However, while SB 375 was lauded in the press as "the most important land use bill in California since the enactment of the [California Coastal Act],"<sup>108</sup> it is quite evident from its ambiguous wording that it was a hard-fought compromise between affordable housing advocates, government advocacy organizations, environmentalists, and building industry representatives.<sup>109</sup> Thus, the success of that bill will likely depend upon the political will of the California Air Resources Control Board (CARB) in setting the emission reduction targets<sup>110</sup> as well as how many developers pursue consistency with their region's transportation plan to qualify for exemptions from certain environmental processing requirements.<sup>111</sup>

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<sup>104</sup> Margot Roosevelt, *Legislation Takes Aim at Urban Sprawl*, L.A. TIMES, Aug. 21, 2008, <http://articles.latimes.com/2008/aug/21/local/me-sprawl21>.

<sup>105</sup> See *Senate Bill 375—Resources for Target Setting*, CAL. AIR RES. BD. (Mar. 9, 2009) [hereinafter *Fact Sheet*], <http://www.arb.ca.gov/cc/sb375/resources/keyprovisions.sb375.pdf>.

<sup>106</sup> See Cal. Env'tl. Prot. Agency, Air Res. Bd., *Assembly Bill 32: Global Warming Solutions Act*, CA.GOV, <http://www.arb.ca.gov/cc/ab32/ab32.htm> (describing California's landmark legislation that set a goal of limiting the state's greenhouse gas emissions by 2020 to 1990 levels).

<sup>107</sup> *Id.*

<sup>108</sup> Frank D. Russo, *Biggest Land Use Bill in California in 32 Years Goes to the Governor—SB 375 Would Curb Sprawl and Reduce Global Warming Pollution*, CALIFORNIA PROGRESS REPORT (Aug. 31, 2008), <http://www.californiaprogressreport.com/site/node/1847> (last visited Apr. 26, 2011).

<sup>109</sup> See *id.*

<sup>110</sup> See also MARK STIVERS, S. TRANSP. & HOUS. COMM., 2008 LEG. SESS., SB 375 BILL ANALYSIS 13 (Cal. Aug. 29, 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_cfa\\_20080903\\_100317\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20080903_100317_sen_comm.html) ("This bill is built on faith that ARB will be able to set aggressive and appropriate targets.").

<sup>111</sup> Assembly Comm. on Local Gov't, 2008 Leg. Sess., SB 375 Bill Analysis 13 (Cal. Aug. 19, 2008) ("Residential and mixed-use projects that are consistent with an SCS or APS that CARB accepts as meeting its greenhouse gas target will not have to be analyzed under CEQA for growth-inducing impacts or impacts on global warming or on the regional transportation network."), available at [ftp://leginfo.public.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_cfa\\_20080818\\_153416\\_asm\\_comm.html](ftp://leginfo.public.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20080818_153416_asm_comm.html); see also Letter

First among its mandates, SB 375 required CARB to set emission reduction targets for 2020 and 2035 by the end of September 2010 for each of the eighteen MPOs throughout California.<sup>112</sup> The bill then required MPOs to develop a strategy—termed a sustainable communities strategy (SCS)—that achieves a GHG emissions reduction target.<sup>113</sup> Significantly, an MPO may meet its target by incorporating virtually any combination of future improved land use and housing patterns,<sup>114</sup> including proposing to reduce passenger vehicle emissions by increasing net density per acre, increasing mixed-use developments, or integrating new transportation networks.<sup>115</sup> In submitting its strategic plan, however, an MPO is required to provide a “quantification of the [GHG] emission reductions the strategy would achieve and a description of the technical methodology used to obtain that result,”<sup>116</sup> and CARB is given the ultimate authority to approve or reject that proposal.<sup>117</sup>

Another important aspect of SB 375 is the incentive it provides for builders who design projects that are consistent with an MPO’s

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from Bill Higgins, Legislative Representative, Cal., to Cal. City Officials, Technical Overview of SB 375 (v. 1.3) 12 (Jan. 23, 2009) [hereinafter Tech. Overview], *available at* <http://www.cacities.org/sb375summary> (describing CEQA exemptions and expedited processing).

<sup>112</sup> See CAL. GOV’T CODE § 65080(b)(2)(A) (West 2011); *Fact Sheet*, *supra* note 105 (“This law will direct the CARB to set GHG reduction targets for regions of the state and work with California’s 18 MPOs. . . .”). *But see* CAL. ASS’N OF COUNCILS OF GOV’TS, CALCOG GUIDE TO REGIONAL PLANNING AS REVISED BY SB 375, at 4 (2009) <http://www.calcog.org/events/documents/calcogguide.pdf> (“It is generally accepted that there are 17 MPOs in California. However, if you include the Tahoe Regional Planning Agency [a bi-state agency], there are 18.”). The main responsibility of an MPO is to create that region’s long-range transportation plan, which identifies existing and future transportation needs and potential costs based on projected land use development patterns. *Id.* at 2; *see also* 23 C.F.R. 450.104 (2011) (“[MPO is] the policy board of an organization created and designated to carry out the metropolitan transportation planning process.”).

<sup>113</sup> CAL. GOV’T CODE § 65080(b)(2)(B).

<sup>114</sup> See *id.* §§ 65080(b)(2)(B), (b)(2)(F), (b)(4)(C).

<sup>115</sup> See SCOPING PLAN, *supra* note 103, at 48–50 (describing land use patterns that reduce GHG emissions).

<sup>116</sup> CAL. GOV’T CODE § 65080(b)(2)(I). Notice however that this bill provides that an MPO may submit an alternative planning strategy (or APS) that would set forth other “development patterns, infrastructure, or additional transportation measures or policies” needed to achieve the target, if that MPO’s proposed sustainable communities strategy as proposed cannot meet the emissions reduction target. See *id.* § 65080(b)(2)(H).

<sup>117</sup> Compare *id.* § 65080(b)(2)(I)(ii) with Tech. Overview, *supra* note 111, at 7 (describing CARB’s authority as “very limited” because it has the power only to “accept or reject the MPO’s determination that the plan would, if implemented, achieve the regional GhG emission reduction target. . .[and] may not issue conditional approvals or otherwise interfere in any way with local decision-making.”).

sustainable communities strategy. Specifically, SB 375 circumvents certain California Environmental Quality Act (CEQA) procedural requirements for two types of projects<sup>118</sup>—a project that qualifies as a transit priority project or a project that is deemed by the local jurisdiction after public hearing to be a sustainable communities project.<sup>119</sup> A development qualifies as a transit priority project if it (1) complies with an approved “sustainable communities strategy” or an alternative planning strategy, (2) is 50% residential, (3) provides at least a net density of 20 dwelling units per acre and floor-area ratio of .75, and (4) is located “within one-half mile of a major transit stop . . . or high-quality transit corridor.”<sup>120</sup> A project that meets these requirements and has imposed feasible mitigation measures by a prior environmental impact report then is subject only to a limited CEQA review, termed a sustainable communities environmental assessment.<sup>121</sup>

In contrast, SB 375 completely exempts from CEQA review those projects that fall under the second category, which are declared by the legislative body of the local jurisdiction to be a sustainable communities project.<sup>122</sup> A sustainable communities project must meet all the requirements of a transit priority project listed above, and in addition: (1) it must not be located on a site of more than eight acres or that is considered wetlands or wildlife habitat, (2) the building must meet minimum energy and water efficiency standards, and (3) the project must meet certain affordable housing and open space requirements and consist of less than two hundred residential units.<sup>123</sup> Additionally, the CEQA documents prepared for either of these two types of projects are not required to include or “discuss (1) growth inducing impacts; or (2) any project specific or cumulative impacts

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<sup>118</sup> See STIVERS, SB 375 BILL ANALYSIS, *supra* note 110, at 10.

<sup>119</sup> *Id.* at 10–13.

<sup>120</sup> Cal. Pub. Res. Code § 21155(b) (West 2011).

<sup>121</sup> *Id.* Also notice that if a transit priority project’s limited sustainable communities environmental assessment is challenged in court, it will be reviewed under the “substantial evidence” test, a more deferential standard that is more likely to be upheld in court. *Id.* at § 21155.2(b)(7).

<sup>122</sup> *Id.* at § 21155.1

<sup>123</sup> *Id.* “Provides that no additional review is required pursuant to CEQA for a transit priority project if the legislative body of a local jurisdiction finds, after conducting a public hearing, that the project meets specified criteria and is declared to be a sustainable community’s project.” SB 375 Steinberg: Transportation Planning: Travel Demand Models: Sustainable Communities Strategy: Environmental Review, <http://www.abag.ca.gov/abag/events/agendas/e091808a-Item%2010.4.pdf>.



from cars and light-duty truck trips generated by the project on global warming or the regional transportation network.”<sup>124</sup>

One criticism of SB 375 is that its success lies entirely in the hands of those who have no desire to create an aggressive SCS.<sup>125</sup> Furthermore, CARB already had the discretion to allocate state transportation funding as it saw fit;<sup>126</sup> therefore, this bill does not change the status quo as it still does not explicitly require consistency with an SCS before funds are distributed.<sup>127</sup> In contrast, supporters of the bill argue that even though SB 375 does not *require* a local government to modify its zoning or general plans to be consistent with an SCS,<sup>128</sup> this modification seems to be the only route for a city or county to take once an SCS has been incorporated into its applicable Regional Transportation Plan.<sup>129</sup> For example, a city’s approval of a project inconsistent with that city’s general plan may be subject to legal challenge on that basis regardless of its consistency with its region’s SCS. Therefore, while SB 375 may be only an incentive to induce change, its practical effect may be sufficient to force California to grow in a more sustainable manner. Certainly, the

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<sup>124</sup> CAL. PUB. RES. CODE § 21159.28 (West 2011).

<sup>125</sup> See Tech. Overview, *supra* note 111, at 9 (“MPOs are not likely to support measures that limit the discretion of cities and counties, particularly in those MPOs where every city and county in the region has a seat on the MPO board.”).

<sup>126</sup> *Id.* (“SB 375 makes explicit the authority that already exists in the law.”).

<sup>127</sup> *But see* STIVERS, *supra* note 110, at 16 (“While the language of SB 375 has changed to no longer explicitly state that transportation funding will be withheld from MPOs that fail to adopt an SCS/APS, the effect still seems to be the same.”).

<sup>128</sup> CAL. GOV’T CODE § 65080(b)(2)(K) (West 2011) (“Nothing in a sustainable communities strategy shall be interpreted as superceding the exercise of the land use authority of cities and counties within the region . . . . Nothing in this section shall require a city’s or county’s land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy.”).

<sup>129</sup> Compare Bill Fulton, *SB 375 Is Now Law—But What Will It Do?*, CAL. PLAN. & DEV. REP. (Oct. 1, 2008, 8:32 AM), <http://www.cp-dr.com/node/2140> (“The bottom line is that the law won’t be sweeping unless the state and the regional planning agencies take it seriously . . . . SB 375 talks tough about tying state and federal transportation dollars to land use decisions, but the bill does not alter the current regional planning structure, which delegates decision-making authority to local officials sitting as MPO board members.”) with ASSEMB. COMM. ON LOCAL GOV’T, 2008 LEG., SB 375 BILL ANALYSIS 17 (Aug. 19, 2008), [http://info.sen.ca.gov/pub/07-08/bill/sen/sb\\_0351-0400/sb\\_375\\_cfa\\_20080818\\_153416\\_asm\\_comm.html](http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20080818_153416_asm_comm.html) (“[W]hile fulfilling the provisions of SB 375 is technically voluntary in many cases, it appears that the reality may be different. How can an MPO create a CARB-acceptable SCS/APS without involving local general plans and other land use policies?”).

good faith of CARB, each MPO, and city and county is absolutely essential if this bill is to effectively curb urban sprawl in California.<sup>130</sup>

### III

#### PROPOSED AND NEWLY INSTITUTED METHODS OF REDUCING GREENHOUSE GAS EMISSIONS: FEDERAL, STATE, AND LOCAL LAWS AFFECTING THE BUILDING INDUSTRY

Green building is often characterized as being “our first, best opportunity to reduce energy use and CO<sub>2</sub> emissions”<sup>131</sup> because buildings account for seventy-three percent of U.S. electricity consumption<sup>132</sup> and thirty-eight percent of associated carbon dioxide emissions.<sup>133</sup> In fact, improving energy efficiency in buildings was the number one cluster of initiatives that McKinsey & Company advised should be instituted immediately because it “would generate positive economic returns over their lifecycle” and potentially offset the costs of other more expensive measures required to reduce GHG emissions.<sup>134</sup> Thus, similar to new policies affecting the transportation sector, federal, state, and local governments have also set their sights on GHG reduction strategies through manipulating building standards in the form of increasingly restrictive energy efficiency mandates,<sup>135</sup> building energy efficiency tax credits,<sup>136</sup> and most recently, in

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<sup>130</sup> See SB 375 BILL ANALYSIS, *supra* note 129, at 14 (“This bill is also built on faith that cities and counties will voluntarily implement the SCS or at least respond to regional political pressure to do so.”).

<sup>131</sup> Leslie Guevarra, *California Adopts Green Building Code for All New Construction*, GREEN BIZ (July 17, 2008), <http://www.greenbiz.com/news/2008/07/17/california-adopts-green-building-code-all-new-construction> (quoting Rick Fedrizzi, President, CEO, and Founding Chair of USGBC).

<sup>132</sup> *Buildings Energy Data Book: 1.1 Buildings Sector Energy Consumption*, U.S. DEP'T OF ENERGY (last updated Sept. 2008), <http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=1.1.9>.

<sup>133</sup> See *Buildings Energy Data Book: 1.4 Environmental Data*, U.S. DEPT. OF ENERGY (last updated December 2008), <http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=6.1.1>.

<sup>134</sup> JOHN CREYTS ET AL., *supra* note 59, at xii–xiv.

<sup>135</sup> See generally, *Rules, Regulations, & Policies for Energy Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (DSIRE), <http://www.dsireusa.org/summarytables/rpee.cfm> (last visited Apr. 26, 2011) (table of state programs and incentives).

<sup>136</sup> E.g., S. F., Cal., Ordinance 180-08, chapter 13C (Sept. 4, 2008) [hereinafter SFGB Code], available at [http://www.sfenvironment.org/downloads/library/sf\\_green\\_building\\_ordinance\\_2008.pdf](http://www.sfenvironment.org/downloads/library/sf_green_building_ordinance_2008.pdf); see discussion *infra* Part III.C. See generally *Financial Incentives for Energy Efficiency*, DSIRE, <http://www.dsireusa.org/summarytables/finee.cfm> (last visited Apr. 26, 2011).

voluntary and required green building codes.<sup>137</sup> For example, the U.S. General Services Administration first adopted Leadership in Energy and Environmental Design (LEED)<sup>138</sup> standards for all government-owned and developed buildings in 2003,<sup>139</sup> and now many state governments have similar requirements for government buildings.<sup>140</sup>

In general, instituting green building standards or mandating LEED certification<sup>141</sup> effectively addresses what is termed the triple bottom line.<sup>142</sup> For example, green buildings are twenty-five to thirty-five

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<sup>137</sup> *LEED Initiatives by State*, U.S. GREEN BUILDING COUNCIL (USGBC), <http://www.usgbc.org/ShowFile.aspx?DocumentID=5030> (last updated Mar. 2, 2010) (listing all LEED initiatives adopted by public entities, “including 202 localities (138 cities, 36 counties, and 28 towns), 34 state governments (including the Commonwealth of Puerto Rico), 14 federal agencies or departments, 17 public school jurisdictions, and 41 institutions of higher education across the United States.”). Additionally, there exist numerous state and local programs that provide financial incentives for certain green building elements, such as on-site renewable energy generation. See *Financial Incentives for Renewable Energy*, DSIRE, <http://www.dsireusa.org/summarytables/finre.cfm> (last visited Apr. 26, 2011) (providing a comprehensive list of state and local tax incentives, as well as loan programs, designed to help defray upfront cost of installation).

<sup>138</sup> LEED is a volunteer leadership standard, a rating system for the design, construction, and operation of high-performance green buildings. *LEED Rating System*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited Apr. 26, 2011). It is administered by the U.S. Green Building Council and serves as a nationally accepted third-party certification program. *Id.* A building must achieve certain prerequisites in each of five categories (sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality) and depending upon additional credits achieved in those categories it will be awarded Silver, Gold, or Platinum-level certification. *Id.* The primary opposition to requiring new construction be LEED-rated is the cost of such certification. However, third-party verification does come with a price, and federal funding is available in some circumstances to offset certification costs associated with LEED. See FED. TRANSIT ADMIN., TRANSIT GREEN BUILDING ACTION PLAN 25 (2009), available at [http://www.fta.dot.gov/documents/Transit\\_Green\\_Building\\_Action\\_Plan.pdf](http://www.fta.dot.gov/documents/Transit_Green_Building_Action_Plan.pdf) (stating that FTA has supported “pioneering initiatives” such as voluntary adoption of green building design standards for the construction and renovation of transit facilities “by recognizing the costs of green building design and certification as eligible project costs”).

<sup>139</sup> See Letter from Terrell Dorn, Director, Physical Infrastructure & Mark Gaffigan, Director, Natural Resources and Environment to Barbara Boxer, Representative, et al. (Status of GSA’s Implementation of Selected Green Building Provisions of the Energy Independence and Security Act of 2007), 3, (Oct. 31, 2008), available at <http://www.gao.gov/new.items/d09111r.pdf>.

<sup>140</sup> See, e.g., Ariz. Exec. Order 2005-05, 11 Ariz. Admin. Reg. 2161 (Feb. 11, 2005) (requiring state-owned and state-supported buildings be LEED certified).

<sup>141</sup> Significantly, any equivalent green building rating system may be utilized, e.g., Green Globes or Green Points. This Article often refers to the LEED rating system only because of its wide application across the United States. See *LEED Projects & Case Studies Directory*, USGBC, <http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx> (last visited Apr. 26, 2011).

<sup>142</sup> See W.M. Adams, *The Future of Sustainability: Re-Thinking Environment and Development in the Twenty-first Century*, 2 (2006), available at <http://cmsdata.iucn.org>

percent more energy efficient than conventionally constructed buildings.<sup>143</sup> Green buildings achieve such reductions in energy usage by utilizing efficient fixtures and appliances (e.g., low flow toilets, showerheads, and Energy Star-rated lighting), sound building envelope (e.g., sealed windows, insulation), high-performance ventilation systems (e.g., ceiling fans and high-quality HVAC), climate-appropriate landscaping (e.g., native plants, xeriscaping, use of cisterns, or planting for shading purposes), and most important, the incorporation of renewable energy technologies (e.g., solar thermal heating, solar photovoltaic units, geothermal heat-source pumps, or small-scale wind turbines).<sup>144</sup>

The financial benefits of green buildings include significant savings in long-term operating costs.<sup>145</sup> An average building will recoup the approximate 0.7% to 7% increase in cost for *greening* a building<sup>146</sup> through decreases in electricity and water bills over time periods that are dependent upon climate and other local factors.<sup>147</sup> And while additional reliable comparative studies are needed to properly identify maximum potential energy savings for specific

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/downloads/iucn\_future\_of\_sustainability.pdf (describing how sustainability is achieved by balancing economic, social, and environmental goals).

<sup>143</sup> GREGORY H. KATS, GREEN BUILDING COSTS AND FINANCIAL BENEFITS 4 (2003), available at <http://usgbccolorado.org/downloads/articles/Kats-Green-Buildings-Cost.pdf>.

<sup>144</sup> JONATHAN ROSE COMPANIES & WALLACE ROBERTS & TODD, SMART GROWTH GUIDELINES FOR SUSTAINABLE GROWTH AND DEVELOPMENT 18–21 (2009), [http://www.epa.gov/dced/pdf/sg\\_guidelines.pdf](http://www.epa.gov/dced/pdf/sg_guidelines.pdf). Significantly, “LEED buildings have purchased or generated 2.45 BkWh total renewable electricity to date.” Rob Watson, GREEN BUILDING MARKET AND IMPACT REPORT 17 (2009), <http://www.greenbiz.com/sites/default/files/GreenBuildingImpactReport2009.pdf>.

<sup>145</sup> For example, significant long-term cost savings due to simple efficiency measures. See U.S. Green Building Council, Building Momentum: National Trends and Prospects for High-Performance Green Buildings 6 (2003), available at [http://www.usgbc.org/Docs/Resources/043003\\_hpgb\\_whitepaper.pdf](http://www.usgbc.org/Docs/Resources/043003_hpgb_whitepaper.pdf) (“According to a report released by EPA in 2002, ENERGY STAR-labeled office buildings cost an average of \$0.86 per square foot per year to operate—40 percent less than the average office building.”).

<sup>146</sup> Cascadia Green Building Council & USGBC, Costs and Benefits of Green Building Fact Sheet, [http://media.whatcounts.com/onenw\\_cgbc/August\\_2005/COSTS.B.BENEFITS.pdf](http://media.whatcounts.com/onenw_cgbc/August_2005/COSTS.B.BENEFITS.pdf). But see DAVIS LANGDON, COST OF GREEN REVISITED: REEXAMINING THE FEASIBILITY AND COST IMPACT OF SUSTAINABLE DESIGN IN THE LIGHT OF INCREASED MARKET ADOPTION 3 (2007) (“[T]here is no significant difference in average costs for green buildings as compared to non-green buildings.”).

<sup>147</sup> CONNECTICUT CAPITOL REGION COUNCIL OF GOVERNMENTS, SMART GROWTH: GUIDELINES FOR SUSTAINABLE DESIGN & DEVELOPMENT 16–17 (2009).

projects<sup>148</sup> because the cost of energy and water will likely both increase, these savings represent a powerful incentive to build green even without any further incentives.<sup>149</sup>

Significantly, there are two new sustainable development strategies that have entered the mainstream: a new addition to the LEED certification program, LEED-Neighborhood Development (LEED-ND);<sup>150</sup> and an initiative by the Cascadia Region Green Building Council, referred to as the Living Building Challenge.<sup>151</sup> In comparison to LEED's other rating systems,<sup>152</sup> LEED-ND has three environmental categories, which place particular "emphasis on the site selection, design, and construction elements that bring buildings and infrastructure together into a neighborhood and relate the neighborhood to its landscape as well as its local and regional context."<sup>153</sup> LEED-ND integrates smart growth components into the LEED rating system<sup>154</sup> to eliminate the myopic "building-centric focus," which was perceived as a fundamental shortcoming of its other systems.<sup>155</sup> Similarly, the Living Building Challenge is a standard that takes into account both the building's design and its location both within the community and with respect to transportation infrastructure. This standard though, only certifies projects if net-zero

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<sup>148</sup> See CATHY TURNER & MARK FRANKEL, NEW BUILDINGS INSTITUTE, ENERGY PERFORMANCE OF LEED FOR NEW CONSTRUCTION BUILDINGS 31–32 (2008) (setting forth several recommendations regarding gathering more data to help "calibrate" the system).

<sup>149</sup> See DAVIS LANGDON, THE COST & BENEFIT OF ACHIEVING GREEN BUILDINGS 5–6 (2007).

<sup>150</sup> LEED-ND RATING SYSTEM, *supra* note 11.

<sup>151</sup> Living Building Challenge 2.0 was introduced in April 2010, and includes several significant changes from past versions. INT'L LIVING BLDG. INST., LIVING BUILDING CHALLENGE 2.0: A VISIONARY PATH TO A RESTORATIVE FUTURE 11–12 (2010) (listing the substantive differences).

<sup>152</sup> See *LEED Rating Systems*, *supra* note 138 (listing all LEED Rating systems: New Construction, Existing Buildings Operation & Maintenance, Commercial Interiors, Core & Shell, Schools, Healthcare, Retail, Homes).

<sup>153</sup> LEED-ND RATING SYSTEM, *supra* note 11, at xii.

<sup>154</sup> See generally Susie Glass, *LEED for Neighborhood Development: A New Edge in the Marketplace*, ENVTL. NEWS AND VIEWS, (Jan. 24, 2011), available at <http://envmagazine.org/?p=2939> ("[A] rating system that incorporates the principles of smart growth, New Urbanism, and green building into a national standard for green neighborhood design."). Like the other LEED rating systems, this is a "voluntary leadership standard," which they state "is not meant . . . to replace[] zoning codes or comprehensive plans," but instead hope that localities will utilize it as a comparison to their zoning and building codes to identify barriers to such sustainable growth. LEED-ND RATING SYSTEM, *supra* note 11, at xv.

<sup>155</sup> See FARR, *supra* note 5, at 36.

water and energy is achieved—after a year of operation—as well as eighteen other requirements depending upon the type of project.<sup>156</sup>

### *A. Federal Green Building Goals and Guiding Principles*

On October 5, 2009, President Obama ordered federal agencies to implement several policy goals,<sup>157</sup> essentially requiring agencies to comply with green building standards such as water efficiency and management improvements,<sup>158</sup> minimization of construction waste,<sup>159</sup> siting considerations,<sup>160</sup> and energy efficiency.<sup>161</sup> This executive order specifically directed agencies to “ensur[e] that all new construction, major renovation, or repair and alteration of federal buildings” complies with guiding principles established in 2006.<sup>162</sup> Significantly, that order requires agencies to also set GHG emissions reduction targets and consider when setting such targets the reduction in energy consumption of buildings<sup>163</sup> as well as the increase in use of renewable energy on federal property.<sup>164</sup>

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<sup>156</sup> For example, if a project with multiple buildings is planned, then it would be categorized within the “Neighborhood” typology and would be required to meet twenty total “imperatives.” INT’L LIVING BLDG. INST., *supra* note 151, at 13 (summary matrix of performance-based requirements). For an incredibly informative, comprehensive analysis of the various regulatory barriers to achieving certification as a Living Building, see CASCADIA REGION GREEN BUILDING COUNCIL, CODE, REGULATORY AND SYSTEMATIC BARRIERS AFFECTING LIVING BUILDING PROJECTS (2009).

<sup>157</sup> Exec. Order No. 13,514, § 2, 3 C.F.R. 248, 249 (2010) (outlining energy, water, and waste reduction targets).

<sup>158</sup> *Id.* at 250 (including “reducing [building] potable water consumption” by twenty-six percent by 2020 (as compared to fiscal year 2007), utilizing water reuse and stormwater management strategies).

<sup>159</sup> *Id.* (including conservation and recycling measures and a fifty percent reduction in construction debris whether by recycling or reuse of materials).

<sup>160</sup> *Id.* at 251 (“[E]nsuring that planning for new Federal facilities or new leases includes consideration of sites that are . . . accessible to public transit . . .”).

<sup>161</sup> *Id.* (including everything from traditional management techniques, product efficiency, to integrated design methods such as “highly reflective and vegetated roofs”). Perhaps, the most aggressive goal set by this order is the requirement that by 2020 federal agencies ensure new buildings are “designed to achieve zero-net-energy by 2030.” *Id.* at § 2(g)(i).

<sup>162</sup> *Id.*; FEDERAL LEADERSHIP IN HIGH PERFORMANCE AND SUSTAINABLE BUILDINGS MEMORANDUM OF UNDERSTANDING, [http://www.energystar.gov/ia/business/Guiding\\_Principles.pdf](http://www.energystar.gov/ia/business/Guiding_Principles.pdf).

<sup>163</sup> 3 C.F.R. 249 (mandating consideration of “reducing energy intensity in agency buildings” when establishing and reporting agency-wide GHG emission reduction targets); *id.* at 259 (defining “energy intensity” as “energy consumption per square foot of building space, including industrial or laboratory facilities”).

<sup>164</sup> *Id.* at 249 (including onsite renewable energy generation and use of renewable energy in general).

***B. Oregon's Energy Efficient Building Tax Incentive  
and Portland's Green Building Policy and Feebate Program***

Oregon provides a tax credit for sustainable commercial and residential construction and renovations.<sup>165</sup> For example, a new commercial building will receive a tax credit based on square footage if it achieves LEED-silver (at least one credit for commissioning and two credits in energy efficiency category) certification, or an equivalent-level certification from another rating program approved by the Oregon Department of Energy.<sup>166</sup> Notably, if a building achieves a higher level of certification, then it will be eligible for proportionately larger tax credits.<sup>167</sup> Similarly, a “High-Performance Home” facility is eligible for a tax credit of up to \$12,000 if Energy Star Homes Northwest program technicians verify that it meets certain heat loss and HVAC requirements, and that the homeowner installs a qualifying renewable energy system and an additional other performance measure.<sup>168</sup> The amount of the tax credit is primarily dependent upon the type of renewable energy system installed.<sup>169</sup>

Similarly, the City of Portland's innovative Feebate program began to phase in in March 2010, applying to new commercial buildings greater than 20,000 square feet and multi-residential construction

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<sup>165</sup> See generally Or. Dep't of Energy, *BETC—Sustainable Buildings*, OREGON.GOV <http://egov.oregon.gov/ENERGY/CONS/BUS/tax/sustain.shtml> (last visited Apr. 26, 2011) (commercial buildings); Or. Dep't of Energy, *BETC-Renewable Energy Projects*, <http://www.oregon.gov/ENERGY/CONS/BUS/tax/BETC-Renewables.shtml> (last visited Apr. 26, 2011) (residential construction).

<sup>166</sup> OREGON DEP'T OF ENERGY, BUSINESS ENERGY TAX CREDITS: TECHNICAL REQUIREMENTS 6–7 (2008) [hereinafter *BETC TECH REQUIREMENTS*]. There is an additional reporting requirement for projects that are seeking LEED-New Construction or Core & Shell certification. *Id.* at 6.

<sup>167</sup> *BETC TECH REQUIREMENTS*, *supra* note 166, at 6–7. In sum, the amount of the tax credit is tied to the rating system used, the level of certification, and the square footage—to effectively offset the cost of required certification. See *id.* at 7; see also Oregon Department of Energy, *supra* note 165 (“The sustainable building tax credit incentive helps offset the cost of applying for the LEED rating and the extra design and commissioning costs.”).

<sup>168</sup> See *BETC TECH REQUIREMENTS*, *supra* note 166, at 9 ¶ 6 (explaining that renewable energy systems may accord a homebuilder up to \$9000 while the other shell requirements will achieve \$3000 max).

<sup>169</sup> See OREGON DEP'T OF ENERGY, OREGON HIGH PERFORMANCE HOME–4 (2008) (setting forth general criteria, specific requirements, and qualifying renewable energy systems and measures). See generally *Technical Standards*, NW. ENERGY STAR HOMES, <http://www.northwestenergystar.com/partner-resources/technicalstandards/index.html> (last visited Apr. 26, 2011).

greater than 5,000 square feet after January 1, 2011.<sup>170</sup> This program will impose a fee, or provide a waiver or a cash reward, on the basis of gross square footage and the respective level of green building certification the project achieves.<sup>171</sup> For example, if a multifamily residential project does not obtain any level of green building certification, then such buildings will be subject to a fee of \$.51–\$1.03 per square foot.<sup>172</sup> However, if that project achieves LEED Gold certification (at least four points in the energy and atmosphere category and three in water efficiency category), then such fees are waived.<sup>173</sup> Most important, however, is that if the project achieves LEED Platinum certification plus certain category requirements, or it meets the Living Building Challenge, then it will receive a reward<sup>174</sup> that may be combined with any other federal and state tax incentives as applicable.<sup>175</sup>

### *C. California's Green Building Standards and San Francisco's Green Building Code*

In July 2008, California led the nation by adopting the first statewide green building standards that force developers to reduce energy use by fifteen percent from current standards in all new

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<sup>170</sup> City of Portland Office of Sustainable Dev., City of Portland Proposed High-Performance Green Building Policy Fact Sheet, <http://www.portlandonline.com/bps/index.cfm?c=45879&a=220882> (last visited Apr. 26, 2011) [hereinafter Proposed High-Performance Green Building Policy Fact Sheet]; see also City of Portland Office of Sustainable Dev., City of Portland Proposed High-Performance Green Building Policy Questions & Answers, <http://www.portlandonline.com/bps/index.cfm?c=45879&a=220984> (last visited Apr. 26, 2011) [hereinafter Questions & Answers]. For the effect on existing commercial buildings beginning in 2011, see Questions & Answers, *supra*, at 5.

<sup>171</sup> Proposed High Performance Green Building Policy Fact Sheet, *supra* note 170, at 2.

<sup>172</sup> City of Portland Office of Sustainable Dev., Presentation to General Public, Portland's Proposed Green Building Policy 11 (Jan. 6, 2009) [hereinafter Portland's Proposed Green Building Policy Presentation], (Powerpoint available at <http://www.portlandonline.com/bps/index.cfm?c=45879&a=226565>).

<sup>173</sup> *Id.* Notice that if a building project is less than 50,000 square feet that project may achieve Earth Advantage certification in lieu of LEED certification. *Id.*; see also Questions & Answers, *supra* note 170, at 6.

<sup>174</sup> Portland's Proposed Green Building Policy Presentation, *supra* note 172, at 11 (reaching \$1.03–\$2.06/sf or \$2.58–\$5.15/sf, respectively). Another unique feature of this program is that provides an award for a residential project that qualifies as an affordable housing project even if it meets only the waiver requirements of Gold (plus) level certification. Questions & Answers, *supra* note 170, at 6.

<sup>175</sup> Questions & Answers, *supra* note 170, at 4.



construction.<sup>176</sup> Not to be outdone, former San Francisco Mayor Gavin Newsom enacted Ordinance No. 180-08<sup>177</sup> three months later, a more stringent building code affecting a much larger number of projects.<sup>178</sup> Certainly, both measures are steps to achieve the state's climate initiatives.<sup>179</sup> However, as many people have pointed out, the state's building standards should be viewed only as "a solid floor from which to build up," as there is room for improvement in terms of recycling, use of renewable energy, and raw building material requirements.<sup>180</sup> Furthermore, while the state's code was referred to as "groundbreaking,"<sup>181</sup> the specific green building measures applicable to non-state-owned residential construction are minimal<sup>182</sup> and most of those measures are merely voluntary, not required.<sup>183</sup>

In contrast, San Francisco's green building code is mandatory and utilizes the ratings systems of LEED<sup>184</sup> for commercial construction and major renovations,<sup>185</sup> and GreenPoints<sup>186</sup>—or an equivalent rating system to be used if approved by the Director of Building Inspection<sup>187</sup>—for new residential construction.<sup>188</sup> And while the

<sup>176</sup> CAL. CODE REGS. tit. 24, pt. 11 § 101.3 (effective Aug. 1, 2009) (describing scope of green building standards).

<sup>177</sup> SFGB CODE, *supra* note 136.

<sup>178</sup> Wyatt Buchanan, *Newsom Signs Strict Green Building Codes Into Law*, S.F. GATE (Aug. 5, 2008), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/04/BADQ1250K9.DTL&tsp=1>. San Francisco's code is applicable to all new residential construction taller than seventy-five feet, as well as all new commercial buildings greater than 5000 square feet and major alterations in those buildings greater than 25,000 square feet, with some rules effective January 1, 2009, and others phased in by 2012. *See* SFGB CODE, *supra* note 136.

<sup>179</sup> *See* Cal. Env'tl. Prot. Agency, Air Res. Bd., *supra* note 106.

<sup>180</sup> *See, e.g.*, Margot Roosevelt, *California Raises Standards for Green Buildings*, L.A. TIMES, July 18, 2008, <http://www.climateark.org/shared/reader/welcome.aspx?linkid=103237> (quoting Nick Zigelbaum, Energy Analyst, NRDC). One example is construction debris management at fifty percent reduction in state code, versus seventy-five percent in SFGB Code. *Compare* CAL. CODE REGS. tit. 24, pt. 11 § 708.3 *with* SFGB CODE § 1304C.2.1.5 *and* § 1304C.2.2.4.

<sup>181</sup> Roosevelt, *supra* note 180.

<sup>182</sup> *See* CAL. CODE REGS. tit. 24, pt. 11 § 401, Matrix Adoption Table Chapter 5—Energy Efficiency 21 (2009), (laying out requirements for state-owned buildings under column BSC, as well as requirements for residential construction in column HCD-1), *available at* [http://www.documents.dgs.ca.gov/bsc/2009/part11\\_2008\\_calgreen\\_code.pdf](http://www.documents.dgs.ca.gov/bsc/2009/part11_2008_calgreen_code.pdf).

<sup>183</sup> *Id.* at §§ 101.10, Chapter 11 Application Matrices and Worksheets.

<sup>184</sup> USGBC, <http://www.usgbc.org> (last visited Apr. 26, 2011).

<sup>185</sup> SFGB Code §§ 1304C.2.2, 1304C.3.

<sup>186</sup> BUILD IT GREEN, <http://www.builditgreen.org> (last visited Apr. 26, 2011).

<sup>187</sup> *See id.* at § 1304.0 ("Wherever reference is made to the LEED or GreenPoint Rated Systems, a comparable equivalent rating system may be used if approved by the Director

administration costs of LEED certification is not insignificant, San Francisco has potentially offset that additional cost in some cases by expediting all permit review for buildings that seek Gold-level certification, thus, eliminating costs associated with the typically time-consuming permitting process.<sup>189</sup> Furthermore, San Francisco's building code more effectively promotes on-site renewable development.<sup>190</sup> For example, by 2012, in San Francisco, a midsize or larger commercial building is required to "submit documentation to verify renewable on-site energy [production] or purchase green energy credits."<sup>191</sup> In contrast, the state code merely prescribes "[u]se [of] on-site renewable energy sources such as solar, wind, geothermal, low-impact hydro, biomass and bio-gas for at least 1 percent" of the buildings energy demand or 1 kW, whichever is greater, but this requirement only applies to state-owned buildings.<sup>192</sup> Also, San Francisco has provided additional economic incentives above and beyond the state rebate program and federal income tax credit to help defray upfront construction costs of installing solar photovoltaic (PV) energy systems.<sup>193</sup> For example, a midsize or larger commercial for-profit building may receive from the city \$1.50 per watt of generation capacity, up to a cap of \$10,000, for installation of a solar PV energy system.<sup>194</sup> Thus, by aligning economic incentives as a form of bait attached to certain LEED points, San Francisco has effectively left the flexibility in the rating system but encouraged developers to take a

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[of Building Inspection]."). This provides verification without requiring compliance with a single system. *See, e.g.*, LEED Certification Information, NATURAL RES. DEF. COUNCIL <http://www.nrdc.org/buildinggreen/leed.asp> (last visited Apr. 26, 2011) ("LEED certification, which includes a rigorous third-party commissioning process, offers compelling proof to you, your clients, your peers and the public at large that you've achieved your environmental goals and your building is performing as designed.").

<sup>188</sup> SFGB Code § 1304C.1. However, note that after January 2010, high-rise residential buildings may achieve LEED "silver" certification *or* achieve seventy-five GreenPoints. *Id.* at § 1304C.1.3.1.

<sup>189</sup> S.F. Planning Dept., Director's Bulletin No. 2006-02, at \*2 (Sept. 28, 2006), <http://sfdbi.org/Modules/ShowDocument.aspx?documentid=170>.

<sup>190</sup> *Compare* CAL. CODE REGS. tit. 24, pt. 11 § 511.1 *with* SFGB Code §§ 1304C.2.1.7, 1304C.2.2.6, 1304C.0.2.

<sup>191</sup> SFGB Code §§ 1304C.2.1.7, 2.2.6.

<sup>192</sup> *See* CAL. CODE REGS. tit. 24, pt. 11 § 401, Matrix Adoption Table Chapter 5—Energy Efficiency (2009), 21 (showing § 511.1 only applicable to state owned buildings).

<sup>193</sup> *Solar Rebates, Tax Credits & Other Incentives*, SF ENVIRONMENT, <http://sfenvironment.org/downloads/library/solarincentives.pdf> (last visited Apr. 26, 2011).

<sup>194</sup> *Id.*

particular route best suited to meet San Francisco's objective to promote such installations.<sup>195</sup>

There are, however, three potential issues for a city in California to consider before following San Francisco's lead. The first is overcoming the general fear that strict building codes will chill development within city limits.<sup>196</sup> The San Francisco Office of Economic Analysis has estimated that the new codes will cost the city between \$30 million and \$700 million a year in economic output through 2027.<sup>197</sup> And while former Mayor Newsom has claimed that report is "inaccurate,"<sup>198</sup> and continues to assert that a greener city will attract businesses,<sup>199</sup> the fact remains that both sides are simply making predictions.<sup>200</sup> The second potential hurdle for a Californian city that desires to enact more stringent building standards is possible preemption.<sup>201</sup> Specifically, the state code indicates that it is the intent "that local government entities retain their discretion to exceed the standards established by [the state] code."<sup>202</sup> However, Governor

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<sup>195</sup> *GoSolarSF—Solar Energy Incentive Program*, S.F. PUB. UTILS. COMM'N, [http://www.sfwater.org/mto\\_main.cfm/MC\\_ID/12/MSC\\_ID/139/MTO\\_ID/361](http://www.sfwater.org/mto_main.cfm/MC_ID/12/MSC_ID/139/MTO_ID/361) (last visited Apr. 26, 2011).

<sup>196</sup> See, e.g., David C. Longinotti, *San Francisco's Green Building Ordinance: All That Glitters...*, THE REGISTRY, August/September 2008, available at [http://www.hansonbridgett.com/docs/press\\_room/hb\\_in\\_the\\_news/Registry\\_Sept08.pdf](http://www.hansonbridgett.com/docs/press_room/hb_in_the_news/Registry_Sept08.pdf).

<sup>197</sup> Practising Law Institute, *Green Building Codes—What Do They Mean for Construction in SF?* 571–72 (Nov. 10, 2008) 558 PLI/ REAL ESTATE 557 (addressing estimates of job losses, higher rents, and/or businesses choosing to locate elsewhere).

<sup>198</sup> Wyatt Buchanan, *Newsom Signs Strict Building Codes into Law*, SFGATE.COM, Aug. 5, 2008, [http://articles.sfgate.com/2008-08-05/bay-area/17122532\\_1\\_building-codes-green-building-new-codes](http://articles.sfgate.com/2008-08-05/bay-area/17122532_1_building-codes-green-building-new-codes).

<sup>199</sup> See THE MAYOR'S TASK FORCE ON GREEN BLDG., REPORT AND RECOMMENDATIONS (2007), <http://www.sfenvironment.org/downloads/library/gbtfrre-leasev1.3.pdf>.

<sup>200</sup> But see DAVID ROLAND-HOLST, ENERGY EFFICIENCY, INNOVATION AND JOB CREATION IN CALIFORNIA 6 (2008), [http://www.next10.org/pdf/report\\_eijc/UCB\\_Energy\\_Innovation\\_and\\_Job\\_Creation\\_10-20-08.pdf](http://www.next10.org/pdf/report_eijc/UCB_Energy_Innovation_and_Job_Creation_10-20-08.pdf) ("California's legacy of energy policies and resulting economic growth provides evidence that innovation and energy efficiency can make essential contributions to economic growth and stability. Had the state not embarked on its ambitious path to reduce emissions over three decades ago, the California economy would be in a significantly more vulnerable position today."). Note the ample explanation of methodologies and core findings in this report. *Id.* at 5.

<sup>201</sup> See Nick Zigelbaum, Natural Res. Def. Council, *California Adopts America's First State-Wide Green Building Code*, CAL. PROGRESS REPORT (July 18, 2008), <http://www.californiaprogressreport.com/site/node/2157>. Also, note potential impact of preemption in California, see Edmund G. Brown, Jr., ATTORNEY GEN. STATE OF CAL. DEP'T OF JUSTICE, STATE AND LOCAL GOVERNMENT GREEN BUILDING ORDINANCES IN CALIFORNIA (2010), [http://ag.ca.gov/globalwarming/pdf/green\\_building.pdf](http://ag.ca.gov/globalwarming/pdf/green_building.pdf).

<sup>202</sup> CAL. CODE REGS. tit. 24, pt. 11 § 101.7 (2009).

Schwarzenegger vetoed a state senate bill<sup>203</sup> that would have clarified the scope of that statement in the fall of 2009.<sup>204</sup> The issue centers upon the code's preface, which states that "[a] city . . . may establish more restrictive building standards *reasonably necessary* because of *local climatic, geological or topographical conditions*."<sup>205</sup> This bill language consequently leaves open to challenge whether a particular higher standard is "reasonably necessary" due to physical conditions rather than simply deemed necessary to achieve an individual city's desired policy objectives.<sup>206</sup>

Lastly, the success of San Francisco's and Portland's integration of LEED certification into its municipal code is an open question. There are at least two legal issues surrounding mandating certification by a third party, including control over that third party's requirements and its process timeline.<sup>207</sup> Additionally, one commentator has argued that "[w]hen governments choose one standard, they hinder the development of other standards that may prove more appropriate."<sup>208</sup> To clarify, this last criticism is not simply that multiple equivalent rating systems must be allowed to achieve certification, which San Francisco and Portland have amply addressed.<sup>209</sup> But in contrast, critics argue that a government should avoid a myopic one-size-fits-all approach and instead tailor its code to reflect that city's climatic zone and proximity to available building materials,<sup>210</sup> seeking to balance competing city policy goals.<sup>211</sup> In fact, San Francisco's

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<sup>203</sup> A.B. 2939, 2008–2009 Leg. Sess. (Cal. 2009), available at [http://info.sen.ca.gov/pub/07-08/bill/asm/ab\\_2901-2950/ab\\_2939\\_cfa\\_20080616\\_155905\\_sen\\_comm.html](http://info.sen.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2939_cfa_20080616_155905_sen_comm.html).

<sup>204</sup> Cal. League of Conservation Voters, 2008 Scorecard: Year in Review, <http://www.ecovote.org/page/2008-scorecard-year-review> (describing as one of his vetoes a bill that "would have clarified that existing law allows cities and counties to adopt green building standards that exceed those adopted by the state.").

<sup>205</sup> CAL. CODE REGS. tit. 24, pt. 11 at iii (emphasis added).

<sup>206</sup> See *id.* at § 101.7.1 (mandating that a city provide "express findings for each amendment, addition or deletion based upon climatic, topographical or geological conditions" and seek approval of Energy Commission for such variations).

<sup>207</sup> See, e.g., Shari Shapiro, *Part 3 of Regulating Green Series—To LEED or Not To LEED*, GREEN BUILDING LAW BLOG (Feb. 20, 2009), <http://www.greenbuildinglawblog.com/2009/02/articles/regulating-green/part-3-of-regulating-green-seriesto-leed-or-not-to-leed/>. One example of an open question is whether mandating certification requires LEED's appeal processes to comply with state administrative law appeals procedures.

<sup>208</sup> Todd Myers, *Green Building Standards: Why Mandating a Good Idea Can Be Bad Policy*, CEI ON POINT, May 12, 2005, at 2, available at <http://cei.org/pdf/4521.pdf>.

<sup>209</sup> SFGB Code § 1304.0, 1304C.0.1, 1304C.0.5.1.1, 1304C.05.1.2.

<sup>210</sup> See Myers, *supra* note 208, at 4.

<sup>211</sup> For example, a city should ensure a balance is achieved in order to supply affordable housing and green buildings, as these two are not mutually exclusive. HOUS. ASSISTANCE

tailoring of the LEED and GreenPoints certification to achieve its other policy goal of historic preservation<sup>212</sup> is testament to the ability to balance such priorities. Moreover, it does not preclude further refinement of more nuanced variations to achieve other goals in the future. In sum, while a city in California does face some uncertainty in enacting its own green building standards, reliance upon the state's building code to encourage greener construction is misplaced. The state code is riddled with reserved sections that promise to someday mandate real change; however, at present, it is truly left to a city or county to ensure its growth is more than just a dull shade of green.

#### IV

#### MAKING THE CASE FOR ADOPTING FORM-BASED CODES FOR INFILL DEVELOPMENT THAT PRESCRIBE GREEN BUILDING ELEMENTS AND SMART GROWTH COMPONENTS

Individuals who live in compact, mixed-use development that is within a quarter mile of public transit<sup>213</sup> are responsible for ten to thirty-one percent lower CO<sub>2</sub> emissions than the average metropolitan area household, or as much as seventy-eight percent fewer depending on the particular neighborhoods land use characteristics.<sup>214</sup> In fact, areas of compact development see a twenty to forty percent reduction in driving as “compared to average U.S. development patterns.”<sup>215</sup> If these percentage reductions are combined with, for example, the

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COUNCIL, AFFORDABLE GREEN BUILDING IN RURAL COMMUNITIES 13–14 (2007), <http://www.ruralhome.org/storage/documents/greenbuildingreport.pdf> (outlining challenges and cost-benefit analysis).

<sup>212</sup> The San Francisco Board of Supervisors amended the draft green building standards to include several provisions that encourage “[p]reservation, rehabilitation, and reuse of existing structures.” Amended Ord. No. 180-08 at 7, <http://www.sfbos.org/ftp/uploaded/files/bdsupvrs/ordinances08/o0180-08.pdf>. Specifically, that Board inserted section 1304C.0.5, which raises the sustainability requirements of buildings constructed on a site within five years of any demolition of a building on that site. *See id.* at 16. Essentially, that section requires additional LEED points be achieved, providing an incentive for increasing the density of projects while at the same time discouraging demolition of historic resources. SFGB CODE § 1304C.0.5.1.1–1.2. *But see* Paul D’Arelli, *Redevelopers Beware—SF’s Green Building Ordinance is LEED on Acid*, GREENBUILDINGSNYC (Oct. 23, 2008), <http://www.greenbuildingsnyc.com/2008/10/23/sfordinanceisleedonacid/> (noting how a re-developer demolishing an historic resource working within LEED rating system constraints “could pursue the extra required points from credits that have no direct relation to the goals [sought to be achieved by requiring those extra points]”).

<sup>213</sup> *See* LEED for Neighborhood Development, *supra* note 11 (explaining benefit and credit obtained for this smart growth component).

<sup>214</sup> PUBLIC TRANSPORTATION’S ROLE, *supra* note 26, at 5.

<sup>215</sup> *Id.* (citing EWING ET AL., *supra* note 32).

corresponding GHG emissions reduction due to the median decrease of nearly fifty percent in energy use for LEED-Gold certified office buildings,<sup>216</sup> then a region could achieve *significant* GHG reductions. Additionally, and perhaps most important, the above described green-infill development<sup>217</sup> effectively addresses the problems that Oregon's land use planning goals did not, which is to ensure both the desirability of development near the urban core<sup>218</sup> and protection of natural resources within urban growth boundaries.<sup>219</sup>

***A. Ecological Design Protects and Increases  
the Desirability of the Urban Environment***

The belief that the city is an entity apart from nature and even antithetical to it has dominated the way in which the city is perceived and continues to affect how it is built. . . . The city must be recognized as part of nature and designed accordingly.

Anne Whiston Spirn<sup>220</sup>

As an Oregon transportation planner once pointed out, "increasing residential densities is no guarantee of shifts of automobile trips to other modes. Without significant pricing and public policy intervention, Americans have shown an amazing adaptive capacity to

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<sup>216</sup> See TURNER & FRANKEL, *supra* note 148, at 14–15 fig.9 (showing median measured energy use intensity of Gold and Platinum-level buildings equaling fifty-one versus commercial building energy consumption survey average at ninety-one).

<sup>217</sup> This Article utilizes the term *green-infill development* to refer to what would be created by a form-based code for infill development that prescribes construction that incorporates green building elements and adheres to the principles of smart growth discussed *supra* note 215.

<sup>218</sup> See FARR, *supra* note 5, at 29 ("[Urban Growth Boundaries (UGBs)] succeeded in controlling the scope of land development, thus preserving the state's scenic treasures, but it did little to ensure the quality of development within the UGB, leading to well-located bad development . . .").

<sup>219</sup> See Michael C. Houck, *Respecting Nature's Design in Metropolitan Portland, Oregon*, in THE HUMANE METROPOLIS: PEOPLE AND NATURE IN THE 21<sup>ST</sup>-CENTURY CITY 75, 79 (Rutherford H. Platt ed., 2006) ("The challenge is not whether to hold a tight urban growth boundary to protect these lands, but how to simultaneously maintain quality of life *inside* the UGB. Unfortunately, the manner in which local jurisdictions have applied the state planning goals has led to an inequitable distribution of parkland, loss of natural resources, degraded water quality, and disappearance of fish and wildlife habitat throughout the region." (citing Oregon's STATE OF THE ENVIRONMENT REPORT 108 (2000))). Significantly, Mr. Houck did credit Metro, the City of Portland, and Wilsonville for protecting natural resource values in their areas. *Id.* at 81.

<sup>220</sup> *Id.* at 75 (quoting ANNE WHISTON SPIRN, THE GRANITE GARDEN 5 (1985)).

remain in their automobiles.”<sup>221</sup> While this observation has merit, requiring infill development adhere to green building standards—as opposed to utilizing other pricing interventions<sup>222</sup>—affects the actual appearance of the project rather than merely providing compensation to the community for its effects. For example, ecological design capitalizes on recent technological advances that can increase density in a manner that results in significantly less aesthetic impact than other buildings of similar size.<sup>223</sup> Specifically, architects employing these principles seek to blend buildings into the surroundings, avoiding boxy shapes and instead incorporating natural flora, and sometimes shifting building orientation to create open pedestrian-level spaces.<sup>224</sup>

In addition to planning that building’s location based on smart-growth siting considerations, utilizing these principles to guide building design also ensures the safe, efficient connectivity of various

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<sup>221</sup> Adler, *supra* note 2, at 140 (citation omitted). Interestingly, it took until the summer of 2008—when gas prices reached four times what they had been ten years previous—before “Americans drove 1.8 percent fewer miles.” See Clifford Krauss, *Driving Less, Americans Finally React to Sting of Gas Prices, a Study Says*, N.Y. TIMES, June 19, 2008, <http://www.nytimes.com/2008/06/19/business/19gas.html>.

<sup>222</sup> See EWING ET AL., *supra* note 32, at 137 (listing the full gamut of potential measures).

<sup>223</sup> See generally CHARLES J. KIBERT, SUSTAINABLE CONSTRUCTION: GREEN BUILDING DESIGN AND DELIVERY 108–31 (2005); Ecological Design Certificate Program, UNIV. OF OR. ARCHITECTURE AND ALLIED ARTS PROGRAM, <http://aaa.uoregon.edu/interdisciplinary/ecodesign/> (last visited Apr. 26, 2011). Ecological design is defined as “any form of design that minimizes environmentally destructive impacts by integrating itself with living processes.” SIM VAN DER RYN & STUART COWAN, ECOLOGICAL DESIGN x (1996). This book provides an excellent illustration of how ecological design “provides a new way of *thinking about* design,” see *id.*, explaining that “*design* [is] the intentional shaping of matter, energy, and process to meet a perceived need or desire. Design is a hinge that inevitably connects culture and nature through exchanges of materials, flows of energy, and choices of land use.” *Id.* at 8. Significantly, the authors of this book believe that “the environmental crisis is a design crisis,” *id.* at 9, and find that only by a return to designing in conformance with ecological principles can we negate the environmental degradation resulting from “*dumb design*.” See *id.* at 7–10.

<sup>224</sup> See Timothy Beatley, *Green Urbanism in European Cities*, in HUMANE METROPOLIS, *supra* note 219, at 297, 298–99 (explaining how appropriate ecological design is for urban environments and how it most “successfully balances connection to the past . . . with a unique modern design . . . [D]emonstrat[ing] that city building can occur in ways that create interesting and organically evolved places and that also acknowledge and respect history and context, and overcome monotony”). See generally BILL G. REED ET AL., THE INTEGRATED DESIGN GUIDE TO GREEN BUILDING 3 (2009) (“Built of native stone and local alpine wood, using indigenous practices and traditions handed down through generations, these towns feel organic—as if they grew out of the landscape, blurring the line between the built and natural environment, presenting a unified place.”).

essential services that create an urban environment that ever-increasing population groups find desirable.<sup>225</sup> For example, studies have indicated that redesigning our urban and suburban landscapes so that a mix of land uses are clustered within one-quarter mile of residential and transit centers promotes physical activity<sup>226</sup> and leads to healthier populations and less demand on medical services.<sup>227</sup> Specifically, smart growth precepts dictate that communities plan for areas where businesses such as a dry cleaner or grocery store co-exist with restaurants and parks, and where child care facilities and schools are planned within walking distances of residential areas.<sup>228</sup> Thus, increasing density in the urban environment by constructing green buildings that accommodate such a mixture of uses will create a more aesthetically pleasing and active metropolitan community.

Green-infill development also protects the quality of the urban environment. For example, such development protects water quality in metropolitan regions in two complementary ways. First, green building design and structural controls offset the problems associated with sustainable growth's increased density—namely the higher site-level imperviousness.<sup>229</sup> Specifically, green buildings utilize revolutionary storm water systems, such as cisterns and ecoroofs, which reuse storm water rather than merely managing its volume and

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<sup>225</sup> See JONATHAN D. MILLER, URBAN LAND INST. & PRICEWATERHOUSECOOPERS LLP, EMERGING TRENDS IN REAL ESTATE 48 (2010) (“Urban and infill areas should benefit from demographics changes and economic shifts working against many suburbs. The ‘move back in’ by echo boomers and empty nester baby boomers continues, and office tenants migrate toward suburban nodes with more urban amenities.”).

<sup>226</sup> See Victor Dover & Jason King, *Neighborhood Definition*, in SUSTAINABLE URBANISM, *supra* note 5, at 127–28 (“Most people will walk a distance of approximately one-quarter mile (1,320 feet) before turning back or opting to drive or ride a bike rather than walk.”).

<sup>227</sup> See Simmons et al., *supra* note 101, at 148–49.

<sup>228</sup> See generally Eliot Allen & Doug Farr, *Neighborhood Completeness*, in SUSTAINABLE URBANISM, *supra* note 5, at 132–33 (illustrating a new model for evaluating neighborhood design and its impact on people's willingness to walk to destinations).

<sup>229</sup> See generally Jim Patchett & Tom Price, *Stormwater Systems*, in SUSTAINABLE URBANISM, *supra* note 5, at 176–78 (listing integrated building and site design techniques “[t]hat are directed at restoration of hydrological stability and enhanced water quality in urban, suburban, and rural environments”); Colin M. Cathcart, *Building the Right Shade of Green*, in THE HUMANE METROPOLIS, *supra* note 219, at 278, 282 (“Sustainable buildings encourage physical health through their design and promote energy efficiency, water conservation, renewable energy use, material recycling, and indoor environmental quality....”).



velocity.<sup>230</sup> This increase in green space and flora has been shown to reduce the overall heat island effect in cities.<sup>231</sup> Secondly, because high-density development consumes less land, it more effectively protects overall regional water quality.<sup>232</sup>

***B. Form-Based Codes for Green-Infill Development  
Satisfy Community Concerns as well as Developers' Desire  
for More Predictable Results***

Traditional Euclidean-type zoning codes focus on the use of a particular building, requiring that certain types of uses—such as industrial, commercial, or residential—be grouped together. In contrast, form-based codes focus on design components rather than the intended use of a building, or as one commentator described: “Form-based codes focus on . . . how [building appearance] affects public spaces,” meaning its primary emphasis is pedestrian-oriented characteristics and the building’s context within the neighborhood block.<sup>233</sup> The unique attribute of form-based codes is that they are prescriptive, meaning they mandate a desired physical environment<sup>234</sup> that generally permits acceptable ranges in building height, roof type,

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<sup>230</sup> See Patchett & Price, *supra* note 229, at 175 (“In contrast to traditional stormwater engineering practices, which are designed to direct water away from where it falls, sustainable approaches to site and regional water resource management strive to treat water as a resource, not a waste product.”).

<sup>231</sup> See, e.g., EWING ET AL., *supra* note 32, at 111; KARA KOCKELMAN ET AL., GHG EMISSIONS CONTROL OPTIONS: OPPORTUNITIES FOR CONSERVATION 50–51 (2010) (citing a study that “found that a [two degree centigrade] reduction in urban temperature could be realized if 50% of roofs were green roofs versus 0% green roofs”), available at <http://www.itsa.org/itsa/files/pdf/sr298kockelman.pdf>.

<sup>232</sup> See Lynn Richards, *Water and the Density Debate*, in SUSTAINABLE URBANISM, *supra* note 5, at 108–10 (explaining an EPA study that debunks the myth that low-density development protects water resources because “[h]igher-density developments consume less land while accommodating the same number of houses as lower-density developments. Consuming less land means less impervious cover is created”).

<sup>233</sup> See Christina Anderson, *Regulating Plan and Form-Based Code*, in FARR *supra* note 5, at 88; see also AMERICAN PLANNING ASSOC., SMART CODES: MODEL LAND-DEVELOPMENT REGULATIONS 225 (Marya Morris ed., 2009) (“Form-based codes emphasize the appearance and quality of the built environment.”); Bill Spikowski, Spikowski Planning Assocs., Presentation at Raleigh Department of City Planning Conference, *Designing a 21<sup>st</sup> Century City: Creating Urban Form: Conventional and Form-Based Codes*, (Nov. 6, 2007), available at <http://www.formbasedcodes.org/creating-urban-form-conventional-and-form-based-codes> [hereinafter Spikowski Presentation] (stating that form-based codes think of streets, blocks, and buildings as “pieces of the urban design puzzle that should be matched together, and the kind of street that’s built should be closely related to the kind of urban environment you are creating”).

<sup>234</sup> AMERICAN PLANNING ASSOC., *supra* note 233, at 226.

and specify ground floor façade elements, entrance location, setback, and parking siting.<sup>235</sup> As opposed to traditional codes that state what is not wanted or allowed, this proactive approach more effectively ensures that new construction or major renovations are in character with other development and in accord with the preference of the community.<sup>236</sup>

Individuals who have experience working with form-based codes state that they more effectively assuage the community's fear of the potential negative impacts of new development.<sup>237</sup> The California Local Government Commission even stated that "these codes are much more democratic instruments, because they are more readily understood by residents who are not otherwise involved in land use or development professions."<sup>238</sup> Indeed, form-based codes are typically simpler, easier to understand, and often contain more pictures than traditional zoning codes.<sup>239</sup> These features make residents happier because the code more accurately predicts the visual aspect of new projects.

Furthermore, the community's early involvement in the planning process to develop the code also serves to reduce skepticism towards new development. For example, the first step in the process of

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<sup>235</sup> See Anderson, *supra* note 233, at 88. Additionally, some form-based codes include landscape standards (type, quantity, placement), or architectural standards such as acceptable exterior colors, styles, or building materials. See AMERICAN PLANNING ASSOC., *supra* note 233, at 226.

<sup>236</sup> *C.f.* Anderson, *supra* note 233, at 88 (explaining how conventional zoning has resulted in "generic buildings that are out of character with . . . preferences of the community").

<sup>237</sup> For example, one proponent remarked that one of the benefits of form-based codes is its ability to engage the community by diffusing the skepticism about potential development. See Spikowski Presentation, *supra* note 233 ("The fact is people look around and with their own eyes, they see an awful lot of new [development] is terrible . . . we know its true, it is an inescapable fact . . . However, form-based codes have the ability to engage the citizenry who is skeptical about development in creating better codes so that the local government can say to people: if development gets approved it going to be in the form that we've talked about the last two years through the comprehensive planning process. They actually can say that with conviction and mean it and deliver on it, there is an ability to turn a lot of that skepticism into positive change.").

<sup>238</sup> HOUSING CHOICE & AFFORDABILITY, [http://library.slocog.org/PDFs/2050/pages/Ch2-HousingChoice&Affordability\(25-28\).pdf](http://library.slocog.org/PDFs/2050/pages/Ch2-HousingChoice&Affordability(25-28).pdf) (last visited Apr. 26, 2011).

<sup>239</sup> Compare PORTLAND ZONING & PLANNING CODE § 33.130 (2010), available at <http://www.portlandonline.com/auditor/index.cfm?c=28197&a=53297>, with BENICIA, CAL. MUN. CODE § 17.26.010 (2010) (stating land use regulations and development standards are regulated by that city's DOWNTOWN MIXED USE MASTER PLAN, CH. 4: FORM-BASED CODE (2007), available at [http://www.ci.benicia.ca.us/index.asp?Type=B\\_BASIC&SEC=%7BD87C20DD-AE9B-41D5-84A7-D29CAD93E9F3%7D](http://www.ci.benicia.ca.us/index.asp?Type=B_BASIC&SEC=%7BD87C20DD-AE9B-41D5-84A7-D29CAD93E9F3%7D) (follow link to "Chapter 4)).

adopting a form-based code involves what is termed a *charrette*—“a collaborative planning process that brings together residents and design professionals in an intensive multi-day process that typically includes focus group meetings, workshops, presentations, and public engagement exercises to develop a feasible plan for future revitalization and development.”<sup>240</sup> From that public participatory process, practitioners create a regulating plan that illustrates the detailed development standards applicable to each street, district, or transect—whichever area the locality desires the form-based code should be applied.<sup>241</sup> Graphic depictions show building form standards and public space standards, all of which are a product of the “public visioning and charrette process.”<sup>242</sup> Significantly, this proposal would require that a community’s form-based code include some combination of green building elements appropriate for the climatic zone.<sup>243</sup> In devising the regulatory plan, the community must address where certain green building components—such as on-site renewable energy systems, ecoroofs, or storm water systems—should be integrated,<sup>244</sup> versus where more flexibility exists or a target rating

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<sup>240</sup> Cal. Local Gov’t Comm’n, Form-Based Codes: Implementing Smart Growth 4 (undated), available at [http://www.lgc.org/freepub/docs/community\\_design/fact\\_sheets/form\\_based\\_codes.pdf](http://www.lgc.org/freepub/docs/community_design/fact_sheets/form_based_codes.pdf).

<sup>241</sup> See *id.* For an example of a form-based code that applies to infill development in Sarasota County, Florida, see SARASOTA COUNTY, FLA. CODE § 6.11.5 (2007), available at <http://www.scgov.net/PlanningandDevelopment/PlanningServices/documents/SarasotaCodeExhibitsAugust28.pdf>.

<sup>242</sup> See Cal. Local Gov’t Comm’n, *supra* note 240, at 4. Significantly, these are not design guidelines and must not be so restrictive as to become design guidelines. See Mary E. Madden & Bill Spikowski, *Place-Making with Form-Based Codes*, URB. LAND 174, 175 (Sept. 2006) (“Form-based codes are sometimes confused with design guidelines, which try to control how buildings look. . . . Well-written form-based codes are more objective and easier to implement than design guidelines and they avoid most of the types of quarrels that erupt over architectural style.”); see also Eight Advantages to Form-Based Codes, CITY OF EUKIAH, [http://www.cityofukiah.com/pdf/planning/Eight\\_Advantages\\_to\\_Form\\_Based\\_Codes.pdf](http://www.cityofukiah.com/pdf/planning/Eight_Advantages_to_Form_Based_Codes.pdf) (last visited Apr. 26, 2011) (“[Form-Based codes] obviate the need for design guidelines, which are difficult to apply consistently, offer too much room for subjective interpretation, and can be difficult to enforce. They also require less oversight by discretionary review bodies, fostering a less politicized planning process that could deliver huge savings in time and money and reduce the risk of takings challenges.”).

<sup>243</sup> As shown by Portland and San Francisco, a city can tailor a green building rating system’s requirements to address specific local concerns. See discussion *supra* Part III.B and Part III.C, respectively. This Article suggests each local government tailor the green building rating systems accordingly, and also ensure the locality has capitalized on promoting all elements that are the most cost effective for their region, e.g., by adding solar photovoltaic arrays to buildings in Arizona.

<sup>244</sup> While this Article does not propose that any locality should require certain green building features, a community should analyze in advance what areas are best suited for

will achieve compliance. The community should address these issues in the charette process and allow for additional flexibility to accommodate new green building features as they develop.

In sum, an effectively administered charette—one that provides active citizen collaboration with designers and land use practitioners—generates a high level of predictability in the approval process, which is appreciated by both residents *and* developers.<sup>245</sup> Thus, a well-written form-based code is more likely to avoid legal challenges as individual projects are proposed. Again, this makes residents happier because they know new buildings will improve the area, and it saves the developers time and money—allowing the architects to focus on creatively designing resource-efficient buildings in a manner they know is desirable to the community.<sup>246</sup> It is not often you can please everyone; therefore, local officials should find this aspect of form-based codes especially appealing.

## V

### MAKING THE CASE FOR CHANGING THE PROCESS TO ENCOURAGE DEVELOPMENT THAT CONFORMS TO SMART GROWTH AND GREEN BUILDING PRINCIPLES

[We are] wrapped around the axle of stupid process.

[We have got to come up with] better ways to extract value [from what we already do] and get away from mindless process. We've got to be able to have a rationale conversation about resources, appropriate spending . . . . If people are convinced that they are getting better value [from available transportation choices], then we can talk about equitable and thoughtful ways to finance a future that you all deserve. . . . I truly believe that this [issue of providing transportation options] will bring [this country] together politically:

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such structural systems. For example, it would be the epitome of poor planning to allow tall buildings without solar arrays in the only district appropriate for such generation—whether due to shading or transmission issues, only to discover this limitation later when the designer of a smaller, flatter building points out that it can not achieve the total required credits because the area is shaded by those previously-constructed buildings.

<sup>245</sup> See Madden & Spikowski, *supra* note 242, at 177 (“This ‘upfront’ agreement on the desired future, often reached through a public participation charette or some other visioning method, allows for the creation of precise and objective codes that can remove much of the politics and uncertainty from the approval process.”).

<sup>246</sup> *Id.* at 178.

red state, blue state . . . because they really all want livable communities, for their families to be safe, healthy, and economically secure.

Oregon Congressman Earl Blumenauer<sup>247</sup>

Many scholars disagree regarding the success of Oregon's land use planning process<sup>248</sup> in curbing urban sprawl. On one side of the debate, one commentator lauded Oregon's novel approach to comprehensive land use planning as "extremely successful at containing urban sprawl."<sup>249</sup> In contrast, another commentator stated that Oregon's statewide planning goals were "being systematically undermined by land use decisions made at the local level" and cited as evidence that by 1981 "counties [had] approved between 85 and 96 percent of all applications for land divisions and new dwellings in exclusive farm use zones. . . . Further, development [had] occurred at densities less than planned inside the [urban growth boundaries] and at densities greater than planned outside [those boundaries]."<sup>250</sup> Specifically, the latter commentator blamed local politics, explaining that "in spite of state-prescribed procedures and goals" the pressure on municipal governments from developers, business interests, and

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<sup>247</sup> Keynote Address at University of Oregon Green Business Initiative Student Association Symposium, *Green Behind the Scenes*, Apr. 2, 2010, [hereinafter Blumenauer Presentation].

<sup>248</sup> To briefly summarize, in 1973, the Oregon legislature enacted Senate Bill 100, which required local governments to devise and submit their comprehensive land use plans to the Land Conservation and Development Commission (LCDC), who would then formally "acknowledge" such plans if they complied with statewide planning goals. Edward J. Sullivan, *The Legal Evolution of the Oregon Planning System*, in *PLANNING THE OREGON WAY*, *supra* note 2, at 49, 53 ("Acknowledgement is the formal recognition by LCDC that local plans and regulations, read together, meet the [state-wide] goals."); see OR. REV. STAT. § 197.015(1) (2009) ("'Acknowledgement' means a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals or certifies that Metro land use planning goals and objectives, Metro regional framework plan, amendments to Metro planning goals and objectives or amendments to the Metro regional framework plan comply with the goals."). If LCDC did not find a particular plan consistent, then the local land use authority was preempted and the state could withhold grants and aid to that local entity. See Knaap, *supra* note 19, at 3–4. Furthermore, once a local plan is acknowledged by LCDC, other land use decisions, including zoning and regulations, are required to conform to that plan. Sullivan, *supra* note 246, at 51; *Fasano v. Washington Co.*, 264 Or. 574, 507 P.2d 23 (1977); *Baker v. City of Milwaukie*, 271 Or. 500, 533 P.2d 772 (1975) (finding comprehensive plan was controlling and not that city's zoning ordinance).

<sup>249</sup> Houck, *supra* note 219, at 79.

<sup>250</sup> Knaap, *supra* note 2, at 16 (citations omitted).

homeowners resulted in low-density development at the urban fringe of extensive urban boundary limits.<sup>251</sup>

While Representative Blumenauer's call to reform process quoted above was not referring to Oregon's land use planning process,<sup>252</sup> given the uncertainty of the current land use process' ability to constrain unsustainable growth, reformation is needed to ensure local political pressure does not hold Oregon back from reaching its GHG emissions reduction goals.<sup>253</sup> Additionally, unlike the proposed federal transportation bill and California's SB 375 discussed *supra*, Oregon's bill should be amended to place some accountability on local governments and regional organizations to prove progress is being made towards Oregon's GHG emissions reduction goals.

Two under-emphasized principles of smart growth are that development decisions be "predictable, fair, and cost effective," and that such decisions be made through "community and stakeholder collaboration."<sup>254</sup> This proposal makes predictability, fairness, and cost-effectiveness central features of Oregon's land use planning and building permitting approval process. First, instituting form-based codes for green-infill development saves developers and governments money by eliminating obscure zoning code language, making the regulatory plan easier to understand and generating more predictable results. Second, this proposal makes the current building permitting approval process both fair and more predictable by providing an alternative process discussed *infra* that is not subject to local political pressure. Thus, this proposal seeks to reduce the likelihood of community opposition and a protracted permitting process, and consequently, to avoid the costs traditionally expended by developers on marketing their projects. Instead, upfront community collaboration ensures that future projects are designed to meet that community's

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<sup>251</sup> *Id.* at 12.

<sup>252</sup> The example Representative Blumenauer made was to the Superfund, the federal government's fund for cleanup of hazardous waste sites that currently has no funding but extensive funds being directed as *studying* the problem. Blumenauer Presentation, *supra* note 247. Significantly, Representative Blumenauer qualified his remarks regarding "process," assuring the audience that he is not advocating for any shortcut on environmental due diligence. *Id.* ("We have to extract more value from what we do, making it practical, [and I do] not mean that we are going to in any sense undercut our environment values."). This Article also fervently submits that the proposal discussed herein does not advocate shortcutting proper analysis of environmental impacts.

<sup>253</sup> See generally OR. REV. STAT. § 468A.205 (2009).

<sup>254</sup> U.S. EPA, About Smart Growth, [http://www.epa.gov/smartgrowth/about\\_sg.htm](http://www.epa.gov/smartgrowth/about_sg.htm) (last updated Oct. 14, 2010); Knaap, *supra* note 2, at 108.

expectations<sup>255</sup> and the developer's savings then more than offset the cost of instituting the required green building elements. In this manner, a local government gets to choose *how* it is going to grow without effectively precluding all development by setting economically infeasible building standards. Unfortunately, this balanced approach means fighting both our human tendency to resist change<sup>256</sup> and our desire to “build ambiguity into plan policies to provide ‘flexibility’ in a future case.”<sup>257</sup> However, as Representative Blumenauer urged, we need to find creative methods in these uncertain financial times to make our communities better without increasing spending. Our present incomprehensible zoning codes and the aforementioned unwillingness to limit ambiguity needlessly drives up the cost of development—letting money go towards litigation or marketing when, for example, it could have been used instead to install a boulevard that would increase the revenues of local businesses.

#### *A. The Scale of Climate Change Demands New Process*

Andrés Duany—a cofounder of the New Urbanists<sup>258</sup>—recently advocated for the abandonment of Euclidian-style zoning for form-based codes and a full-scale change in the public review process.<sup>259</sup> He began by recounting to a room full of California planners and local government leaders a discussion he had with an Australian planner, who had suggested to him that Americans' planning process

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<sup>255</sup> In other words, when a community comes together and formulates not just principles but a code that encapsulates their vision for the future (inevitable) growth of their community, they will be less resistant when someone steps forward to build in conformance with those set guidelines. See discussion *supra* Part IV.B.

<sup>256</sup> See Knapp, *supra* note 2, at 120–21 (“The most formidable obstacle to smart growth is inertia. Change is hard . . . . This complex of developers, homebuilders, financial institutions, automobile manufacturers, and the highway construction industry all have vested interests in the status quo.”).

<sup>257</sup> Cf. Edward J. Sullivan, *Answered Prayers: The Dilemma of Binding Plans*, in PLANNING REFORM IN THE NEW CENTURY, *supra* note 1, at 147 (discussing the “tendency of human nature to build ambiguity into plan policies,” but for the purposes of increasing their chances on judicial review if they decide a more nuanced decision given the facts of a particular case is desirable).

<sup>258</sup> New Urbanism, Creating Livable Sustainable Communities, <http://www.newurbanism.org> (last visited Apr. 26, 2011).

<sup>259</sup> Duany Presentation, *supra* note 25; Posting of Paul Shigley, California Planning & Development Report, *The Public Process: How NIMBYs Encourage Suburban Sprawl* (Oct. 29, 2009, 18:16 PST), available at <http://www.cp-dr.com/node/2462> [hereinafter Blog of Paul Shigley] (describing presentation).

was not democratic but instead a “process that enables mobs.”<sup>260</sup> For example, Duany explained: “America’s public review process requires you to notify all the people near the project area and these individuals decide the fate of the project.”<sup>261</sup> The Australian planner referred to such individuals as “vested interests,” and explained that while in her opinion they should be given a voice, they should not be confused with “the community,” which should *also* be given a voice. Moreover, the Australian system, Duany explained, works much like how the American justice system puts together a jury pool. For example, “when a development project is proposed, the city rounds up about 150 citizens” and then the city

asks this group for volunteers to participate in [the] review process. . . . [w]hich involves some education about land use planning and the project, [3 days of hearings] a few charettes and a handful of public meetings. When it comes time for a decision on [approval of] the project, a representative of the opponents gets to speak, as does a representative of the developer. But the “jury” called by the city testifies as to what it sees as best for the community as a whole.<sup>262</sup>

Based upon pure common sense, Duany points to this *public* versus *neighbor* participation as a necessary element in any reformation of the land use permitting approval process to overcome NIMBYism.<sup>263</sup> For instance, in his presentation he reminds the audience that “[m]ost of what we need to do for the next generation—and maybe for much longer—will amount to retrofitting suburbia [which] means tearing down and building lots of new stuff in people’s backyards.”<sup>264</sup>

In the case of infill development, Duany could not be more correct. These projects are especially susceptible to becoming battlegrounds because such projects are surrounded by already-developed land; therefore, they inevitably come with what Duany termed “a built-in group of opponents,” meaning the neighboring property owners, or *vested interests*. For example, one study found that “[o]ne in five Americans, or 21 percent, have actively opposed development in their

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<sup>260</sup> Duany Presentation, *supra* note 25.

<sup>261</sup> *Id.*

<sup>262</sup> Blog of Paul Shigley, *supra* note 259.

<sup>263</sup> Duany is not alone in his cynicism regarding the need to come up with a process that can avoid NIMBY battles. *See generally* P. MICHAEL SAINT ET AL., NIMBY WARS: THE POLITICS OF LAND USE 195 (2009) (“[P]lanners will increasingly find themselves at odds with their own local citizens: high-density mixed-use development is fine in theory, but suburban property owners do not want it in their backyards, generating traffic and noise and invading their sylvan privacy.”).

<sup>264</sup> Blog of Paul Shigley, *supra* note 259.



communities by attending hearings, writing or calling officials, or gathering petitions against a new proposal.”<sup>265</sup> And while opposing development is not necessarily bad, at present there is no safeguard to ensure that the opposition is to bad development, and not just opposition to *any* development. While debates usually engender good compromises, the debate needs to include everyone affected by the outcome. In other words, a community’s voice should be that of both neighbors and other residents further removed from the project area. In this manner, the larger community is also given a voice in approval of projects that will aid Oregon’s chances to meet its GHG emissions reduction goals.

### ***B. Oregon’s Alternative Permitting Process for Siting Renewable Energy Facilities***

Similar to California, Washington, and Montana, Oregon has established a consolidated energy facility siting process.<sup>266</sup> In general, this means that all applicable state and local permits and approvals are incorporated into one process, and the state-level decision-maker’s determination of compliance is binding on all other state agencies and local governing bodies.<sup>267</sup> Oregon’s Energy Facility Siting Council (EFSC) has jurisdiction to perform comprehensive review of proposed geothermal, solar, or wind energy facilities that have a generating capacity of greater than 105 MW,<sup>268</sup> as well as facilities that chose this process rather than seeking approval through the local-level process.<sup>269</sup> EFSC determines compliance with its standards<sup>270</sup> as well as the regulations and permitting requirements of other state

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<sup>265</sup> P. MICHAEL SAINT ET AL., *supra* note 263, at 204.

<sup>266</sup> See Oregon Department of Energy, *Energy Facility Siting—Comparison of Siting Requirements*, OREGON.GOV, <http://egov.oregon.gov/ENERGY/SITING/compare.shtml> (last updated Aug. 1, 2007) (comparing siting requirements and processes of Washington, Oregon, California, and Montana).

<sup>267</sup> See *id.* (noting differences in state-level decision-makers: in Oregon and Montana, the decisions are made by citizen volunteer appointees; in California, the members of the responsible commission “are full-time with much broader policy responsibilities than siting”; whereas in Washington, the council is made up of state agency representatives with a public chair and a local government representative where the energy facility is being sited, and that the “decision is a recommendation of the governor”).

<sup>268</sup> *Id.*

<sup>269</sup> JOHN G. WHITE, OREGON DEPT. OF ENERGY, OREGON’S SITING PROCESS FOR LARGE WIND ENERGY FACILITIES 1 (2002), available at <http://egov.oregon.gov/ENERGY/SITING/docs/WindSite.PDF>.

<sup>270</sup> OR. ADMIN. R. 345-024-0010 et seq. (2007); see also Or. Dep’t of Energy, *supra* note 266.

agencies and local authorities.<sup>271</sup> Significantly, EFSC “applies local land use ordinances to determine whether the proposed energy facility is an allowed land use and “if the proposed energy facility meets the siting standards,”<sup>272</sup> then EFSC “*must* issue a site certificate.”<sup>273</sup> Even when the applicant chooses to have EFSC “make the land use determination . . . [l]ocal officials are asked to identify the ‘applicable substantive criteria’ from local land use ordinances and comprehensive plan that the Council should apply to the proposed facility.”<sup>274</sup> Thus, EFSC’s delegated authority is appropriately limited to the extent it is bound by specific standards<sup>275</sup> and by local land use ordinances.<sup>276</sup>

The energy facility siting process in Oregon also involves a significant public process component. For example, once an applicant submits a notice of intent, the Oregon Department of Energy issues a public notice to nearby landowners and holds a public meeting in the proposed project area.<sup>277</sup> Additionally, that department summarizes comments from the public hearing when it presents its draft proposed order to EFSC, and any party that raised the issue at the public hearing—whether in person or in writing on the record—has sixty

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<sup>271</sup> Or. Dep’t of Energy, *Energy Facility Siting—The Siting Process for Energy Facilities*, OREGON.GOV, <http://egov.oregon.gov/ENERGY/SITING/process.shtml> (last updated Nov. 23, 2010).

<sup>272</sup> WHITE, *supra* note 269, at 6; *see also* Or. Dep’t of Energy, *The Siting Process for Energy Facilities*, *supra* note 266.

<sup>273</sup> WHITE, *supra* note 269, at 2.

<sup>274</sup> Or. Dep’t of Energy, *supra* note 266.

<sup>275</sup> OR. ADMIN. R. 345-015-0300 et seq. *But see* OR. ADMIN. REV. 345-022-0000(2) (“[EFSC] may issue or amend a site certificate for a facility that does not meet one or more of the standards adopted under [Oregon Revised Statute §] 469.501 if [EFSC] determines that the overall public benefits of the facility outweigh the damage to the resources protected by the standards the facility does not meet.”); WHITE, *supra* note 269, at 9 (discussing this special provision). Significantly, however, there are specific factors that EFSC must consider in evaluating the energy facility’s purported “overall public benefits,” as well as certain standards that may not be overcome by this balancing test; notably, the land use standard. OR. ADMIN. R. 345-022-0000(2)(b), (3).

<sup>276</sup> EFSC does, however, have the authority to make exceptions if it finds that a local land use ordinance does not comply with statewide land use goals. *See* WHITE, *supra* note 269, at 6 (“If the proposed facility does not comply with one or more local ordinances, the Siting Council can make the required land use finding by directly applying the statewide land use goals.”).

<sup>277</sup> The notice of intent step does not, however, apply to projects that qualify for an expedited process, such as small capacity facilities, *see* OR. ADMIN. R. 345-015-0300, or special criteria facilities. *See* OR. REV. STAT. § 469.373 (2009); OR. ADMIN. R. 345-015-0310, -0320. But the same opportunity for public hearing and appeal is provided to affected parties. *See* Or. Dep’t of Energy, *supra* note 271.

days in which to challenge EFSC's issuance of a site certificate.<sup>278</sup> Significantly, a council's decision to approve the siting of an energy facility is appealed directly to the Oregon Supreme Court.<sup>279</sup> In contrast, if an applicant chose the local-level process, then any appeal of that local government's land use decision will be subject to three levels of judicial review.<sup>280</sup>

Oregon's renewable energy facility siting process is heavily influenced by the state's overall energy policy, which preferences renewable energy generation over nonrenewable source generation.<sup>281</sup> Similarly, Oregon's policy goal to significantly reduce GHG emissions by 2050,<sup>282</sup> as well as its statewide planning goal that a transportation plan "minimize adverse social, economic and environmental impacts and costs,"<sup>283</sup> and support institution of a modified permitting process for green-infill development that incorporates smart growth components.<sup>284</sup> For example, Oregon's S.B. 1059 was declared "necessary for the immediate preservation of the public peace, health and safety."<sup>285</sup> State law and policies that are designed to benefit all state citizens, and which require immediate action, should not be entirely dependent upon local government implementation. Instead, a layer of oversight more effectively guarantees that both the state council and local land use authorities are reasonable in assessing the effects of the proposed project,

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<sup>278</sup> See OR. REV. STAT. § 469.370(5); Or. Dep't of Energy, *supra* note 271; WHITE, *supra* note 269, at 3–4.

<sup>279</sup> WHITE, *supra* note 269, at 5.

<sup>280</sup> *Id.*

<sup>281</sup> See WHITE, *supra* note 269, at 1 ("Oregon is a state that has a care that 'future generations not be left a legacy of vanished or depleted resources' as a result of a 'growth in demand for nonrenewable energy forms.'" (quoting OR. REV. STAT. § 469.010(1))). See generally RNP Responds to Recent Media Articles on Wind Energy, RENEWABLE NW. PROJECT (Mar. 15, 2010), <http://www.rnp.org/index.php?q=node/878> (describing the economic benefits of new renewable energy projects in Oregon and its impact on rural communities).

<sup>282</sup> OR. REV. STAT. § 468A.205 (2009).

<sup>283</sup> OR. ADMIN. R. 660-015-0000(12) (2007).

<sup>284</sup> As used in this Article, smart growth components are characteristics that have been proven to significantly reduce GHG emissions. See discussion *supra* Part II. For a listing of such components, see ONTARIO PROF'L PLANNERS INST., MINISTRY OF MUNICIPAL AFFAIRS AND HOUS., PLANNING BY DESIGN: A HEALTHY COMMUNITIES HANDBOOK 6 (2009), <http://www.mah.gov.on.ca/AssetFactory.aspx?did=7171>.

<sup>285</sup> S.B. 1059 § 10, 75th Leg., 2010 Spec. Sess. (Or. 2010).

imposing conditions to mitigate those impacts; and ultimately, whether conformance with standards is objectively determined.<sup>286</sup>

***C. Permitting for Qualifying Projects  
Through Either Local or Alternative State Process  
Allows for Community and Stakeholder Collaboration  
Without Compromising Predictability and Cost-Effectiveness***

Modeled after the siting process described above, this proposal seeks to modify traditional land use permitting in the same manner. Specifically, the proposed modified process does not circumvent local land use ordinances altogether, but merely provides developers the option of having a state council determine compliance with the local government's form-based code. Thus, a local government still controls the development of its community through creation of that code; however, this process reduces the potential that political pressure will lead to denial of a building permit.<sup>287</sup> Furthermore, similar to California SB 375 discussed in Part II.C *supra*, the presence of an alternative permitting process provides an incentive to developers to build projects that qualify for such treatment. Thus, in effect this proposal seeks to achieve more sustainable growth by promising more objective analysis in trade for green building design and connectivity components.

At a recent lecture, a representative from a construction company stated that as much as he would desire to build green buildings, they are more expensive to build than conventional buildings, and with so little financial funding available he cannot compete against other firms that put forth cheaper and less green designs.<sup>288</sup> Essentially advocating for the legislature to level the playing field to promote green buildings, he argued that unless a local government provides some means to offset that additional expense, or it requires all new buildings to utilize sustainable architectural techniques, no one can expect a contractor to build green. Therefore, this proposal levels the

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<sup>286</sup> It is important to note that the provision of an available alternative process does not mean that a developer would necessarily choose to proceed through the state-level process. Importantly, it is the mere presence of an alternative process that in some measure ensures each decision-maker is reasonable.

<sup>287</sup> Indeed, the construction industry has legitimate reasons to complain when a local government provides a post hoc rationalization for being for or against certain features of a project. *See generally* P. MICHAEL SAINT ET AL., *supra* note 263.

<sup>288</sup> This discussion took place at Robert Young's lecture hosted by the Cascadia Green Building Council at the University of Oregon's Stag Building in Portland, Oregon. *See* note *supra* 48.

playing field by reducing the costs of a protracted approval process or of marketing a project caused by our current reactive land use process, and replaces it with proactive community planning process to effectively achieve the appropriate balance of deference to local control *and* respect for predictability, fairness, and cost-effectiveness.

## VI POTENTIAL OPPOSITION OR LEGAL CHALLENGES TO THIS PROPOSAL

Limitations on growth may be justified in resort communities, beach and lake and mountain sites, and other rural and recreational areas; such restrictions are generally designed to preserve nature's environment for the benefit of all mankind. They fulfill our fiduciary obligation to posterity. As Thomas Jefferson wrote, the earth belongs to the living, but in usufruct.

But there is a vast qualitative difference when a suburban community invokes an elitist concept to construct a mythical moat around its perimeter, not for the benefit of mankind but to exclude all but its fortunate current residents.

Justice Stanley Mosk<sup>289</sup>

In this well-known quote, Justice Mosk addresses the tension between utilizing land use planning and ordinances to promote the public good versus preservation of an environment for the benefit of the local citizenry.<sup>290</sup> Tensions between opponents and advocates of a particular project run high for understandable reasons. In some cases, on one side of a dispute are long-time residents of a community who sought a low-density neighborhood for the quiet and open space it provided. And while the city expanded to surround the area, these residents are depicted as fighting to maintain the character of their neighborhood against a perceived greedy developer whose sole interest in the nearby property is to make the most amount of money from the least amount of space. Unfortunately, the typical vilification of one side versus the other in a land use dispute hinders opportunity for reasonable compromise. Moreover, it detracts from the legitimacy of both parties' valid desire to protect their property rights—the residents,

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<sup>289</sup> Associated Home Builders of Greater Eastbay, Inc. v. Livermore, 557 P.2d 473, 616 (1976) (Mosk, J., concurring).

<sup>290</sup> For example, as one commentator candidly stated: "As a matter of local fiscal policy, each locality has an economic interest in using its planning and zoning powers to exclude new residents and activities that cost more in services than they contribute to the tax base." Briffault, *supra* note 37, at 8.

for some mitigation of the project's negative impact, and the developer, for the ability to utilize the property as the code permits.

Recently, one journalist remarked how this typical situation has created factions among self-proclaimed liberal environmentalists, some who fight against increased density in their communities and others who see the threat of climate change as requiring such growth.<sup>291</sup> Determining the appropriate balance between mitigating a project's negative impacts and not allowing a community to erect insurmountable barriers to growth is inherently difficult, and pursuit of such balance will likely involve litigation. As shown in *Associated Home Builders of Greater Eastbay v. Livermore*, land use ordinances may become subject to challenge as a form of exclusionary zoning.<sup>292</sup> Moreover, since land use decisions have traditionally been left to local governing bodies, the growing state and federal involvement in the land use planning arena may also lead to challenges that such a transfer of power is an inappropriate infringement on local authority.

***A. Overcoming the Challenge: Requiring Infill Development to Incorporate Smart Growth Principles and Meet Green Building Standards Is a Form of Exclusionary Zoning***

Some may argue that requiring infill development to conform to green building standards is a form of exclusionary zoning because it makes any construction in this depressed economy cost-prohibitive.<sup>293</sup> This proposal, however, is not a case of the perfect being the enemy

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<sup>291</sup> See, e.g., Robert Gammon, *You're Not an Environmentalist If You Are Also a NIMBY*, EAST BAY EXPRESS, July 1, 2009 ("Climate change has forced a paradigm shift in the environmental movement. If you live in an urban area, you can't call yourself an 'environmentalist' and continue to act like a NIMBY by blocking new housing."). This reporter specifically described a debate in the San Francisco East Bay area, where smart-growth advocates chastised Oakland for its perceived halting of new housing development, while an Oakland City Council member claimed such advocates "need to learn how to 'work with people who have lived in neighborhoods for years.'" See *id.*

<sup>292</sup> See also Richard BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 473 (7th ed. 2009) (referring to the Massachusetts Supreme Court's decision to invalidate an ordinance that restricted development because it stated that "a town may allow itself breathing room to plan for the channeling of normal growth, it may not turn that breathing room into a choke hold against further growth") (quoting *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 850 (Mass. 2004)).

<sup>293</sup> See, e.g., Gammon, *supra* note 289 (illustrating that advocating to "increase [Berkeley's] affordable housing requirement[s] to 25 percent and force[] developers to adhere to strict green building standards" may be "simply putting up barriers to smart growth" because advocates know such development is economically infeasible).

of the good.<sup>294</sup> Certainly, the economy is grim and municipalities may hope for any development at all for needed tax revenues. However, by allowing conventional development, a local government will ultimately be saddled with the future cost of environmental cleanup associated with cheap, dense, non-green development projects. To withstand constitutional challenge, a municipal ordinance must be reasonably calculated to achieve a legitimate interest.<sup>295</sup> Thus, requiring infill development meet green building standards will likely be upheld because that requirement is a reasonable measure to promote the community's economic and environmental interests by reducing demand on regional water resources.

However, as all processes can be abused, courts are still called upon to determine whether the facts and circumstances warrant a finding that an ordinance is an invalid exercise of that local government's delegated authority.<sup>296</sup> For example, as one court stated:

[I]t is a fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power . . . . [T]he welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.<sup>297</sup>

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<sup>294</sup> Notably, in 2009 President Obama built upon this common phrase, pronouncing instead: "I urge all of us not to make the perfect the enemy of the absolutely necessary." President Barack Obama, Remarks by the President at the House Democratic Caucus Issues Conference (Feb. 5, 2009) (urging Congress to move quickly to pass the American Reinvestment and Recovery Act).

<sup>295</sup> See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 375, 395 (1926) (holding that zoning regulations are constitutional unless "clearly arbitrary and unreasonable"). Significantly, in land use disputes, whether challenging a local government's zoning or permitting scheme, the challenger bears the burden of proving the local government has exceeded its police powers because the measure bears no rational relationship to promoting the public interest. BRIFFAULT & REYNOLDS, *supra* note 292, at 475. *But see* Cal. Evid. Code § 669.5 (requiring that in challenges to local ordinances pertaining to residential construction that "the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county").

<sup>296</sup> See, e.g., *Britton v. Town of Chester*, 595 A.2d 492, 498 (N.H. 1991) (holding a local zoning ordinance invalid because it was "blatantly exclusionary" in failing to provide sufficient low and moderate income families affordable housing).

<sup>297</sup> *S. Burlington Cty N.A.A.C.P. v. Twp. of Mt. Laurel*, 336 A.2d 713, 726–27 (N.J. 1975); accord *Britton*, 595 A.2d at 496 ("Municipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to service their own residents, and their regulations should promote the general welfare, both within and without their boundaries.").

Therefore, while the institution of form-based codes and modified process is specifically designed to serve the best interests of the regional and local interests, and because such ordinances are very likely to pass constitutional muster, legal challenges may be necessary when specific facts warrant judicial oversight.<sup>298</sup>

***B. Overcoming the Argument that This Proposal  
and Modified Process Inappropriately Infringes on Local Authority***

This modification to the permitting approval process for green-infill projects that have certain smart-growth characteristics does not infringe on local authority for two reasons. First, unsustainable growth affects nearby cities and the region; therefore, while local authority is appropriate to govern matters of local concern, it is not appropriate when an issue affects surrounding localities and the general population.<sup>299</sup> This proposal effectively redresses the negative impact of one locality's unsustainable growth on its surrounding localities. Second, this proposal does not abrogate a local government's essential powers because the state council will be assessing the project's compliance with the community's form-based code and not its own standards. Thus, this proposal merely limits the extent to which local political pressure may impede progress towards achieving a state's goal to reduce GHG emissions for the benefit of all state citizens.

*1. Historical and Legal Basis for Local Authority*

Briefly, a local government's authority to impose land use restrictions stems from a state's constitution and or statutes.<sup>300</sup> A state's broad delegation of power to its political subdivisions is referred to as home rule authority, where a local government may

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<sup>298</sup> Of course, the local government's form-based codes will present the greatest challenge. For example, since local authority stems from the state's delegation of police, the ordinance must clearly reference objective criteria. *See generally* Robert J. Sitkowski, *Form and Substance: What Land Use Lawyers Need to Know About Form-Based Land Development Regulations*, 30 ZONING & PLANNING L. REPORT 1, 4, 6-7 (2007) (discussing three potential legal issues surrounding the use of form-based codes: authorization, discretion, and delegation).

<sup>299</sup> *See* Briffault, *supra* note 37, at 21 (refuting the claim that localism "enables the people affected by government decisions to participate in the processes by which those decisions are made . . . [Because] local government land use decisions . . . regularly affect people outside local borders who are unable to participate in that decision-making process").

<sup>300</sup> *See* BRIFFAULT & REYNOLDS, *supra* note 292, at 68 ("The [Federal] Constitution is utterly silent on the subject of local government. It gives local units no role in the national government, and says nothing about their powers or relationship to the states.").



“adopt laws that affect local property, affairs, and government so long as those laws do not conflict with general or preemptive state laws.”<sup>301</sup> In contrast, in some states a local government may not act without a specific, clear legislative delegation.<sup>302</sup> However, in general, most states have left the creation and enforcement of land use regulation to local governments,<sup>303</sup> necessarily making zoning and building permit approval a local political issue.<sup>304</sup>

Since the founding of the United States, people have debated the benefits and disadvantages of delegating state authority to local governments versus maintaining more centralized, regional control.<sup>305</sup> For example, in 1787, James Madison argued that a strong national government was less susceptible to the “influence of factious leaders” calling for “improper or wicked project[s]” because its large, diverse population spread across distant areas provided inherent protection against revolt.<sup>306</sup> In contrast, in 1848, Alexis de Tocqueville posited that centralized government cannot hope to deal with all the individual problems of so many localities, and concluded that “[w]hen it attempts unaided to create and operate so much complicated

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<sup>301</sup> JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE IN A NUTSHELL* 6 (2006); see also Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 97 (2003) (“States determine the rules under which local governments are created, the powers they exercise, and the relationships they have to the other local governments in the state.”).

<sup>302</sup> See BRIFFAULT & REYNOLDS, *supra* note 292, at 314–15 (“A municipal corporation possesses and can exercise only the following powers: (1) those granted in *express words*; (2) those *necessarily or fairly implied* in or incident to the powers expressly granted; (3) those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.”) (quoting Judge John F. Dillon’s pronouncement in *Commentaries on the Law of Municipal Corporations*, which became known as Dillon’s Rule).

<sup>303</sup> Interestingly, Laurie Reynolds observed that states’ statutory frameworks are “decidedly anti-regional,” citing the delegation of “broad municipal powers to regulate land use development without consideration of its impact on the overall regional welfare” as one example of how “legal rules shore up the insular and insulated status of American municipalities.” Reynolds, *supra* note 301, at 97.

<sup>304</sup> Cf. P. MICHAEL SAINT ET AL., *supra* note 263, at 2 (“[The fact that land use is controlled by local ordinances and enforced by local boards] makes zoning and rezoning a local, political issue and affords citizens considerable influence over matters that will directly affect their lives and those of their families, neighborhoods, and communities.”).

<sup>305</sup> See Reynolds, *supra* note 301, at 101 n.29.

<sup>306</sup> BRIFFAULT & REYNOLDS, *supra* note 292, at 21; Reynolds, *supra* note 301, at 101 n.29.

machinery, it must be satisfied with very imperfect results or exhaust itself in futile efforts.”<sup>307</sup>

Moreover, de Tocqueville believed that localized power provided better protection against tyranny because local governance fostered direct citizen participation.<sup>308</sup> He reasoned that people are less likely to revolt if they both feel they have a share in the management of the rules that determine the extent of their rights and understand the reasoning for the existence of such rules.<sup>309</sup> Significantly, Thomas Jefferson shared de Tocqueville’s belief in the value of self-governance, stating that democracy depended upon the citizenship training it provided.<sup>310</sup>

In sum, the predominant concern in the debate over distribution of power is preservation of democracy. Madison found that governance by a larger number of people inherently made it more difficult to form majorities and therefore making insurrections less likely,<sup>311</sup> whereas, de Tocqueville felt that active citizen cooperation in governance created its own defense against tyranny.<sup>312</sup>

## 2. *Negative Effects of Unsustainable Growth Justify Limiting Local Governments’ Authority over Land Use and Development*

The central premise for local authority is aligned with de Tocqueville’s belief that local governments are more fit to address uniquely local concerns.<sup>313</sup> Advocates of strong local powers argue

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<sup>307</sup> BRIFFAULT & REYNOLDS, *supra* note 292, at 22–23; *see also id.* at 22 (explaining that organization of local governments in the United States “depends upon the same idea, viz., that each man is the best judge of his own interest and the best able to satisfy his private needs.”).

<sup>308</sup> Reynolds, *supra* note 301, at 101 n.29.

<sup>309</sup> BRIFFAULT & REYNOLDS, *supra* note 292, at 22 (“The New Englander is attached to his township because it is strong and independent; he has an interest in it because he shares in its management; he loves it because he has no reason to complain of his lot . . . he gets to know the formalities without which freedom can advance only through revolutions, and . . . in the end accumulates clear, practical ideas about the nature of his duties and the extent of his rights.”).

<sup>310</sup> *See id.* at 27. For example, both felt that citizens that were active participants in government became “committed to maintaining and defending self-government.” *Id.*

<sup>311</sup> *Id.* at 25.

<sup>312</sup> *Id.* at 26–27.

<sup>313</sup> Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 274 (Ill. 1984) (“Home rule . . . is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the

that more nuanced, creative solutions to problems are possible at the local level. However, local governments are no longer geographically isolated, and U.S. citizens now cross over city, county, and special district lines on a daily basis. Thus, the close geographic proximity of smaller units of government simultaneously controlling land use makes the argument that a certain regulation addresses a matter of local concern increasingly debatable—and in some cases, specious.<sup>314</sup> Moreover, in modern metropolitan areas, the argument that preserving local authority can redress unsustainable growth loses salience because increasingly citizens have no control over the land use decisions made by surrounding governmental units that negatively affect them.<sup>315</sup> Therefore, regional and statewide mandates for land use and transportation planning reform should be viewed as preserving democracy, because such mandates more appropriately distribute power among all citizens impacted by unsustainable growth.<sup>316</sup>

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problem.”); *see also* Briffault, *supra* note 37, at 16 (“Democratic participation is presumably more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national level. . . . Where the unit is small, each individual can be heard by and potentially influence a significant portion of the polity.”).

<sup>314</sup> *Cf.* *Associated Home Builders of Greater Eastbay, Inc. v. Livermore*, 557 P.2d 473, 487 (1976) (“[M]unicipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.”). For example, even in states with broad home rule authority, such as Colorado, courts inquire into the impact of municipal regulations on people that live outside city limits as a factor in deciding whether an inconsistent local regulation is preempted by a state law. *See Fraternal Order of Police, Colorado Lodge #27 v. City and County of Denver*, 926 P.2d 582, 589 (Colo. 1996) (listing “extraterritorial impact—i.e., the impact of the municipal regulation . . . on persons living outside the municipal limits” as one of the factors that the court considers in “determining whether the state’s interest in the matter at hand is sufficient to justify preemption”).

<sup>315</sup> For example, while residents of one municipality might suffer the negative impact of a nearby city’s pollution, citizens may only be able to vote for institution of a development fee to address the problem within their own segregated area and be unable to reach the underlying cause of the problem. *Cf. NOLON & SALKIN, supra* note 301, at 46 (stating that environmental concerns, as well as transportation and housing policy considerations, led to increasing involvement of the federal and state governments in land use planning).

<sup>316</sup> *Cf.* Briffault, *supra* note 37, at 21–22 (“In metropolitan areas, democracy requires giving the regional electorate a voice in local decisions that have regional consequences. Only by widening the scale of participation to include all of those affected by local actions can local decision-making in metropolitan regions be made truly democratic.”); *Associated Home Builders*, 557 P.2d at 487 (1976) (establishing a new constitutional test such that if an ordinance “significantly affects the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative” then that ordinance must reasonably relate “to the welfare of those whom it significantly affects”).

This proposal's modified process for green-smart-growth infill development is appropriate because unsustainable growth is not only a matter of local concern. As one commentator pointed out, "local land use controls can have a ripple effect across the region."<sup>317</sup> Specifically, this author noted that local governments seek to protect themselves from neighboring communities' exclusionary zoning practices by enacting similar ones, therefore worsening the problem.<sup>318</sup> And moreover, as opposed to regional planning, the "leapfrog pattern of development" that results from local governments piecemeal approach is one of the primary causes of urban sprawl.<sup>319</sup> Thus, in the case of prescribing green infill development that conforms to smart growth principles, the involvement of a state decision-maker is both reasonable and more democratic because that council can effectively reduce the negative impacts of one locality's unsustainable growth on other communities in the state.

*3. Local Authority Should Not Impede the State's Ability  
to Protect Interests of All Present and Future State Citizens*

Additionally, this proposal to institute form-based codes and modify the traditional building approval process effectively limits the extent to which state political subdivisions can impede progress towards achieving a state's goal to reduce GHG emissions. For example, California has set a goal to achieve 1990-level emissions by 2020,<sup>320</sup> while Oregon's goal is ten percent below its 1990 levels.<sup>321</sup> These aggressive targets require instituting fundamental changes in land use planning for two reasons. First, the present system requires that a developer challenge a local government's denial of a building permit on a case-by-case basis without any oversight or requirement that the local government make findings with respect to how the negative impacts of that development outweigh the progress it may make towards achieving the state's GHG emissions reduction target. Given the scientific studies that prove the reductions achieved by siting certain types of buildings in particular areas, this process must be replaced by more efficient project review when projects meet such criteria. Second, the potential for protracted land use disputes strains

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<sup>317</sup> See Briffault, *supra* note 37, at 9.

<sup>318</sup> See *id.*

<sup>319</sup> See *id.*

<sup>320</sup> *Facts About Assembly Bill 32*, CAL. EPA, AIR RES. BD., <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf> (last updated Dec. 7, 2009).

<sup>321</sup> OR. REV. STAT. 468A.205(b) (2009).

the ability to finance any project, especially technologically advanced green building projects.<sup>322</sup> Thus, the proposed modifications to a local government's traditional land use process will serve to level the playing field for projects that will aid the state achieve its targets.

Furthermore, a state's action to reduce GHG emissions may be viewed as an exercise of its proper role as sovereign to promote sustainable growth for the benefit of all state citizens. In particular, Oregon's S.B. 1059 exemplifies the de Tocqueville and Jeffersonian ideal of citizenship training by requiring the state to provide guidance and extensive studies to support local efforts to implement policies that promote sustainable growth.<sup>323</sup> Such reports are useful for two reasons. First, explanation of the benefits of sustainable growth fosters citizens' support, which is necessary to keep politicians in office who implement sound growth policies. Second, as de Tocqueville posited long ago, a citizen is much less likely to resist a restriction on his rights when informed of the reasoning for its imposition.

## VII CONCLUSION

The purpose of [the Magnusen-Stevens Act as amended by the Sustainable Fisheries Act] is clearly to give conservation of fisheries priority over short-term economic interests. The Act sets this priority in part because the longer-term economic interests of fishing communities are aligned with the conservation goals set forth in the Act. Without immediate efforts at rebuilding depleted fisheries, the very long-term survival of those fishing communities is in doubt.

Honorable Raymond C. Fisher<sup>324</sup>

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<sup>322</sup> Certainly Oregon's 120-day rule makes the land use permitting process efficient and consequently avoids much of the protracted review process witnessed in other parts of the country. See OR. REV. STAT. § 215.427 (2009) ("[F]or land within an urban growth boundary . . . the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under OR. REV. STAT. 215.422 (Review of decision of hearings officer or other authority), within 120 days after the application is deemed complete."). However, this proposal does provide states without such a rule a significantly improved timeline, and if combined with Oregon's rule, it reduces both political and time pressure on local governments by removing some land use reviews to the state council.

<sup>323</sup> See S.B. 1059, 75th Or. Leg., Spec. Sess., ch. 85, §§ 3, 4 Or. Laws Spec. Sess. 2010.

<sup>324</sup> Natural Res. Def. Council v. Nat'l Marine Fisheries Serv., 421 F.3d 872, 879 (9th Cir. 2005) (citations omitted).

What's fish got to do with it? Remarkably, the battle being waged every day by the scientists at the National Marine Fisheries Service (NMFS)—which sets the quotas based upon maximum sustainable yield for the fishing industry—is surprisingly similar to that of local planning bodies with respect to setting sustainable building standards for the construction industry.<sup>325</sup> For example, NMFS is tortured by ambiguous legislative mandates that require it to coordinate with regional councils and determine a quota that addresses the economic needs of the local fishing community, while at the same time ensuring the long-term survival of a fish species.<sup>326</sup> Likewise, planning and local government officials are placed in the political heat between local opposition groups and developers, and are forced to work with ambiguous codes to determine appropriate and often expensive mitigation in light of the community's demands.<sup>327</sup>

Similarly, bills such as California's SB 375 and Oregon's S.B. 1059 evidence how legislators promoting smart growth must seek to convince the opposition and its constituency that while in the short term the solution might cause economic harm, smart growth is necessary to avoid more catastrophic consequences in the long run.<sup>328</sup> Several courts have approved the government's legitimate interest and rational means of instituting quotas as necessary for the long-term survival of the commercial fishing industry.<sup>329</sup> Likewise, legislators

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<sup>325</sup> See generally *id.* at 875, 880 (involving the Agency's balancing of Congress's "mandate to rebuild a species in 'as short [a time period] as possible' while giving consideration to 'the needs of fishing communities,' meaning the short-term economic consequences on the affected fishing industry").

<sup>326</sup> See generally Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1882 (2006); Magnuson-Stevens Act Provisions: Annual Catch Limits: National Standard Guidelines, 73 Fed. Reg. 32,526 (June 9, 2008).

<sup>327</sup> See MICHAEL C. THOMSETT, NIMBYISM: NAVIGATING THE POLITICS OF LOCAL OPPOSITION 3 (2004) (portraying a rather cynical view of land use disputes, stating that "[t]he zoning code, and local and state laws, may provide you with legal authority to pursue your plans and you may even have the full support of the Planning Department. But if elected politicians feel the heat from an organized opposition they may be persuaded to vote against your development plans").

<sup>328</sup> Cf. Briffault, *supra* note 37, at 5 (describing how some regionalist proposals "leave local powers and structures in place, but through a combination of incentives or requirements that local actions conform to regional standards, would superimpose on local decision-making regional goals or norms").

<sup>329</sup> See, e.g., *A.M.L. Int'l, Inc. v. Daley*, 107 F. Supp. 2d 90, 103, 108 (D. Mass. 2000) ("A collapsed fishery will not be economically viable for decades, creating drastically worse economic consequences than the temporary measures contained in the [fishery plan at issue]. . . . As a sick person must undergo painful surgery and then convalesce for a short time in order to regain his health, a sick fishery must suffer this drastic procedure and then conserve itself for a short time to recover its full vitality.").

pushing for low GHG reduction emissions targets argue that the upfront cost of sustainable land use and building design is far less than what it would cost later to deal with the negative impact of poorly planned development's resulting degradation to the environment.

Like an irresponsible person given an unreasonably high credit limit, our rampant growth came quickly and easily as the United States cut corners to provide cheap power, cheap housing, cheap highways, and even cheap gas to travel long distances between work and home.<sup>330</sup> This pattern caused millions of dollars of environmental damage, or debt, to our nation's natural resources in the form of air and water pollution. And now, this country can no longer continue to spend irresponsibly and pay only the minimum payments on that debt. In short, we are wise to make a significant modification to the land use planning process. While stepping back and looking at the big picture may require measures that may hurt economically in the short term, the proponents of smart growth are correct: it is much cheaper than dealing with the full-blown negative consequences of unsustainable growth.

John W. Frece, currently the director of the Office of Sustainable Communities at the EPA,<sup>331</sup> published a book in 2008 that contained twenty political lessons he derived from his experience working on Maryland's smart growth initiative.<sup>332</sup> Sadly:

Faced with political realities, the Smart Growth initiative made very little headway in changing the paradigm of local land use control. . . . Any effort to transfer land use authority from the local governments to the state surely would have been met with vehement opposition from the counties and would have been unlikely to pass. But without such change, there was still no governmental entity with the authority to look at the overall development picture and

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<sup>330</sup> For example, the gas tax has not been raised since 1993. Blumenauer Presentation, *supra* note 247. See generally U.S. DEPT. OF TRANSPORTATION, TRANSPORTATION'S ROLE IN REDUCING U.S. GREENHOUSE GAS EMISSIONS VOL. I: SYNTHESIS REPORT 3–21 (2010) (setting forth several potential strategies to reduce GHG emissions in Chapter 3 of this Report to Congress, published on Earth Day 2010).

<sup>331</sup> U.S. Environmental Protection Agency, Office of Sustainable Communities, <http://www.epa.gov/aboutepa/opei.html#OSC> (“The Office of Sustainable Communities (OSC) collaborates with other EPA programs; federal agencies; regional, state, and local governments; and a broad array of nongovernmental partners to help communities become stronger, healthier, and more sustainable through smarter growth and green building.”).

<sup>332</sup> JOHN W. FRECE, SPRAWL AND POLITICS: THE INSIDE STORY OF SMART GROWTH IN MARYLAND 153–67 (2008).

decide what decisions would result in the greatest good for the greatest number of people.<sup>333</sup>

As testament that some concerned states and citizens have not given up yet, Oregon's S.B. 1059 and California's SB 375 evidence a growing Madison-like desire for more centralized, regional control over land use. Hopefully, as the population becomes more educated regarding the benefits of sustainable development in comparison to the negative economic and environmental effects of continuing the status quo, similar legislation will appear in other states.<sup>335</sup>

Going forward, if governments do as Andrés Duany suggests and ensure that the *actual* public—not just *vested interests*—determine which projects are beneficial and which projects are at odds with the common good, then government will have succeeded in enabling a democracy to decide land use development in this country. Significant reductions in GHG emissions can be achieved by providing an alternative permitting approval process for green-infill development projects that comply with local form-based codes and include smart growth components. It is time that Oregon, and other states, make such reforms in order to begin immediately to achieve quantifiable progress towards a healthy future—for all people and the environment.

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<sup>333</sup> *Id.* at 166.

<sup>335</sup> *C.f.* FARR, *supra* note 5, at 53 (2008) (“Generation X . . . —the 77 million Americans born between roughly 1977 and 1988—have been raised with recycling and other environmental values. Over the next generation, they will become a powerful societal force—voting and buying real estate.”). For an excellent law review article that argues “timely, meaningful progress toward sustainability in the U.S. building industry requires state-level legislation that promotes, and sometimes even mandates, green building standards at the regional and local levels,” see Carl J. Circo, *Using Mandates and Incentives to Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy Initiatives*, 112 PENN. ST. L. REV. 731, 732–33 (2008) (setting forth numerous mandates and incentives that have been tried in different localities).