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2004

## Smart Ethics: Ethical Considerations in Promoting Smart Growth Principles

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### Recommended Citation

23 Temp. Envtl. L. & Tech. J. 63 (2004)

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# SMART ETHICS: ETHICAL CONSIDERATIONS IN PROMOTING SMART GROWTH PRINCIPLES

Patricia E. Salkin<sup>1</sup>

## I. INTRODUCTION

Literature and conferences bombard planners and municipal officials with messages promoting better planning in our communities including avoiding the unwanted side-effects of suburban sprawl, using creative techniques to preserve open space, and the designing and protecting of community character.<sup>2</sup> These are some of the major goals of the smart growth movement<sup>3</sup>

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<sup>2</sup> Hundreds of publications from national, state, regional and local advocacy organizations are published and disseminated annually. Some examples of recent publications include: BENNET HEART, ET. AL. & CONSERVATION LAW FOUND. AND VT. FORUM ON SPRAWL, COMMUNITY RULES: A NEW ENGLAND GUIDE SMART GROWTH STRATEGIES 2 (2002) (Explaining that the guidebook is intended for citizen planners, defined as individuals who serve on planning and zoning boards, it focuses on "how to steer development on a better course in towns and cities, through improved local planning, regulations, and permitting."); SMART GROWTH NETWORK, GETTING TO SMART GROWTH II: 100 MORE POLICIES FOR IMPLEMENTATION ii (2004) available at [www.smartgrowth.org](http://www.smartgrowth.org) (Suggesting, "Budget shortfalls mean communities must get the most from every dollar invested while maximizing their economic development potential."); and CONSTANCE E. BEAUMONT WITH ELIZABETH G. PIANCA & NATIONAL TRUST FOR HISTORIC PRESERVATION, WHY JOHNNY CAN'T WALK TO SCHOOL: HISTORIC NEIGHBORHOOD SCHOOL IN THE AGE OF SPRAWL, (2d ed., 2002) (pointing to, among other things, the conflicts between community planning and school planning).

<sup>3</sup> While there are a variety of definitions for smart growth, eight principles offered by the

that have started to change the attitudes of local planners and members of planning boards, zoning boards and local legislative bodies, and they have been the impetus for major state-level statutory reform packages across the country.<sup>4</sup> While these may be laudable public purposes, there is a debate brewing over the social ethics of smart growth decision-making. Specifically, critics assert that projects under the "smart growth" umbrella end up benefiting the upper and middle classes and displace low income housing with higher priced units.<sup>5</sup> Those who point to the concerns surrounding social equity, caution smart growth supporters to not ignore the possibility that limiting growth on the urban fringe and expediting infill development could in fact hurt low-income minority populations.<sup>6</sup> Furthermore, it has been suggested that "strategies that are driven only by a desire to limit suburban growth and save open space can have a harmful impact on inner-city and inner-suburban communities"<sup>7</sup> and "if the redirection of economic and residential development to inner cities does not include explicit strategies to benefit the current residents of those communities. . . it could result in large-

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Urban Land Institute California Smart Growth Initiative are: preserving and enhancing quality of life; creating viable and livable communities; investing in transportation linked to efficient land uses; enhancing housing opportunities; preserving open space, natural resources, and the environment; preserving farmland; addressing growth issues regionally; and seeking solutions at the grass roots. See URBAN LAND INST., PUTTING THE PIECES TOGETHER: STATE ACTIONS TO ENCOURAGE SMART GROWTH PRACTICES IN CALIFORNIA (2002). One synthesis of smart growth principles found the following seven common elements: 1) open space conservation, 2) urban growth boundaries, 3) compact, mixed-use development, 4) revitalization of older downtown and inner-ring suburbs, 5) viable public transit, 6) regional planning coordination; and 7) equitable sharing of fiscal resources across metropolitan regions. See RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY 288 (Island Press rev. ed. 2004) (citing O. GILLHAM, THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE 158 (Island Press 2002)).

<sup>4</sup> For examples of the impact of the smart growth movement on state statutory reform, see AM. PLANNING ASS'N, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES 6 (Feb. 2002) (noting that "more than 2,000 planning bills were introduced between 1999 and 2001 with approximately 20 percent of the bills being approved"). See also AM. PLANNING ASS'N, PLANNING COMMUNITIES FOR THE 21<sup>ST</sup> CENTURY (Dec. 1999); Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 St. Louis U. Pub. L. Rev. 271 (2002) (documenting recent state-level activity in almost 40 states). The American Planning Association also published a two-volume, almost 1,500 page Growing Smart Legislative Guidebook to provide guidance to lawmakers and policymakers on how to best modernize planning and zoning enabling statutes to allow for smart growth. See <http://www.planning.org/Guidebook.htm> (last visited Jan. 6, 2005). The constitutionality of the Guidebook was critiqued by Professor Michael Lewyn, wherein he concludes that while none of the Guidebook's controversial provisions are unconstitutional on their face, nonetheless, some of the provisions implicate significant policy concerns. Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651 (Spring 2003).

<sup>5</sup> Press Release, Local Gov't Comm'n, *Is the Smart Growth Movement really promoting equity?*, available at [http://app.outreach.psu.edu/SmartGrowth/2004/Social\\_Equity.pdf](http://app.outreach.psu.edu/SmartGrowth/2004/Social_Equity.pdf) (last visited Jan. 6, 2005).

<sup>6</sup> Fannie Mae Foundation, *Fair Growth: Connecting Sprawl, Smart Growth and Social Equity*, work in progress (2000), available at [http://www.fanniemae.foundation.org/programs/pdf/proc\\_fairgrowth\\_intro.pdf](http://www.fanniemae.foundation.org/programs/pdf/proc_fairgrowth_intro.pdf) (last visited Jan. 6, 2005). The staff report asserts that, "smart growth prescribes increasing built density; increasing density requires urban revitalization; and urban revitalization leads to gentrification, which typically displaces low-income residents." *Id.* at 1.

<sup>7</sup> Funders' Network for Smart Growth and Livable Communities, *Opportunities for Smarter Growth: Social Equity and the Smart Growth Movement*, (2000), available at <http://www.cgpc.org/newsletters/Winter%202000jp.pdf> (last visited Jan. 6, 2005).

scale displacement of low-income inner city renters as inner-city property values rise."

Practitioners must be mindful of the legal and regulatory landscape that governs ethical considerations in planning and zoning decisionmaking<sup>8</sup> that at times can subtly or blatantly conflict with certain decisions allegedly made for "smart growth purposes." Perhaps the preamble to the American Planning Association's Ethical Principals sums up the challenge best:

The planning process exists to serve the public interest. While the public interest is a question of continuous debate, both in its general principles and in its case-by-case applications, it requires a conscientiously held view of the policies and actions that best serve the entire community.

Planning issues commonly involve a conflict of values and, often, there are large private interests at stake. These accentuate the necessity for the highest standards of fairness and honesty among all participants.<sup>9</sup>

This essay considers some of the relevant provisions in codes of ethics for planners<sup>10</sup> and municipal officials to discern whether there is enough guidance to lead participants in the land use process through an ethics analysis to balance goals of smart growth with sometimes competing demands of social equity. In addition, this essay provides actual case studies of reported behaviors on the part of local officials<sup>11</sup> where it appears as though the motivation for questionable and sometimes illegal conduct can be traced to a desired end that furthers one or more smart growth principles.<sup>12</sup> Consideration is focused to a great extent on legal and regulatory ethical

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<sup>8</sup> For a series of articles detailing allegations in litigation of unethical conduct in land use planning and zoning decisionmaking, see Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, 26 ZONING AND PLANNING L. REP. 1 (April 2003); Patricia E. Salkin, *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, 33 URB. LAW. 687 (Summer 2001); Patricia E. Salkin, *Municipal Ethics Issues Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*, 14 BYU J. OF PUB. L. 209 (2000); Patricia E. Salkin, *1998 Survey of Ethics in Land Use Planning*, 26 FORDHAM URB. L. R. 1393 (1999).

<sup>9</sup> See Am. Planning Ass'n, *Ethical Principals*, at: [www.planning.org/ethics/](http://www.planning.org/ethics/) (last visited Jan. 6 2005).

<sup>10</sup> Leading planning ethicist Carol Barrett explained in the introduction of her recent book on ethics for planner, "as authority and influence accrue to a profession, public expectations rise. This public trust imposes increased responsibility on planners to offer an example of impeccable conduct." See CAROL D. BARRETT, FAICP, *EVERYDAY ETHICS FOR PRACTICING PLANNERS* at 1 (2001) [hereinafter *EVERYDAY ETHICS FOR PRACTICING PLANNERS*].

<sup>11</sup> See *infra* Section III (recounting numerous incidents that resulted in litigated allegations of unethical conduct).

<sup>12</sup> Although there have been literally thousands of conferences and publications addressing smart growth, there is little in the published literature on what I have termed "smart ethics" or an examination of how smart growth impacts for better or for worse the ethical decisions of participants in the planning process and the applicable legal, regulatory and voluntary guidance frameworks that exist to help municipal officials work through ethical dilemmas. In 2002 the American Institute of Certified Planners sponsored a national teleconference entitled, "Clashing Values: Planning Ethics and Smart Growth," where panelists discussed for the first time, the question of whether smart growth conflicts with planners' ethical obligations. The CD-ROM of the program is available through the American Planning Association, at <http://www.planning.org/professionals/ethicsproducts.htm> (last visited Jan. 6. 2005).

frameworks and not on ecological ethics that include a sum total of value judgments about our environment.<sup>13</sup> This essay does not discuss a host of ethical considerations in land use that may be regulated by statute and common-law dealing with issues including financial conflicts of interest, conflicts of interest based on familial relationships, conflicts of interest based upon residency, compatibility of dual office-holding, and lack of impartiality or bias towards an individual applicant since these are considered "routine" ethics issues not specifically applicable to an analysis of ethical decision-making within a smart growth context.<sup>14</sup>

#### A. Defining the End Game: Quality Communities

Although as noted above, many entities have adopted definitions and principles of smart growth, for purposes of this examination, the American Planning Association's Policy Guide on Smart Growth (hereinafter referred to as the "Guide") will be used to measure ethical conduct of the participants in the planning process.<sup>15</sup> The Guide offers that in areas experiencing intense growth pressure, development in newly urbanizing areas should be planned and developed in accordance with the following thirteen core principles of smart growth:

1. Recognition that all levels of government, and the non-profit and private sectors, play an important role in creating and implementing policies that support smart growth.
2. State and Federal policies and programs that support urban investment, compact development, and land conservation.
3. Planning processes and regulations at multiple levels that promote diversity, equity and smart growth principles.
4. Increased citizen participation in all aspects of the planning process and at

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<sup>13</sup> For example, see Timothy C. Weiskel, *Ethical Principles for Smart Growth: Steps Toward An Ecological Ten Commandments*, Paper presented at a Smart Growth Forum (March 10, 2000) available at <http://ecoethics.net/SmartGrowth> (last visited Jan. 6, 2005). In his paper, Weiskel asserts that "To be effective and enduring 'smart growth' needs to develop a strong ethical foundation that grounds human enterprise beyond the logic of energy efficiency, materials recycling and systems optimization. . . . At the core smart growth requires a new guiding metaphor for human existence based upon self-imposed self-restraint—not merely enlightened self-interest or deferred self-gratification." *Id.* See also Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. Envtl. Aff. L. Rev. 347, 386 (1998) (explaining that environmental ethics is a body of moral principles that consider the natural environment and the role of humans within it).

<sup>14</sup> There are a number of articles that chronicle legal ethics in land use planning. See Salkin, *supra*, note 8. For examples of specific state statutes that regulate certain types of ethical conduct in the land use arena, see CONN. GEN. STAT. § 8-11 (2003) (disqualification of members of zoning authorities); N.J. STAT. ANN. § 40:55D-69 (West 2004) (zoning board of adjustment, dealing with disqualification for personal or financial interest); MICH. COMP. LAWS ANN. § 125.288 (West 2004) (board of appeals, disqualification for conflict of interest); IDAHO CODE § 67-6506 (Michie 2004) (conflict of interest prohibited, planning, zoning or planning and zoning commissions); MINN. STAT. § 10A.07 (2003) (conflicts of interest).

<sup>15</sup> Am. Planning Ass'n, Policy Guide on Smart Growth (adopted and ratified Apr. 2002), available at <http://www.planning.org/policyguides/smartgrowth.htm> (last visited Jan. 6, 2005).



every level of government.

5. A balanced, multi-modal transportation system that plans for increased transportation choice.
6. A regional view of community.
7. One size doesn't fit all – a wide variety of approaches to accomplish smart growth.
8. Efficient use of land and infrastructure.
9. Central city vitality.
10. Vital small towns and rural areas.
11. A greater mix of uses and housing choices in neighborhoods and communities focused around human-scale, mixed-use centers accessible by multiple transportation modes.
12. Conservation and enhancement of environmental and cultural resources.
13. Creation of preservation of a "sense of place."<sup>16</sup>

The Guide recognizes that planners have tools to create better communities and that it is the professional and ethical responsibility of planners to use these tools to produce results that are fair for all.<sup>17</sup> The Guide continues by explaining that, "Fairness requires that we reduce inequalities and that we narrow the gap of disparities in the distribution of resources."<sup>18</sup> Of course the challenge with these aspirational goals is that reasonable minds may differ on issues of fairness and equity and these policies represent the broad public statements of a member-based organization with no ability to mandate implementation and no jurisdiction to enforce its provisions as to the conduct of its members.

## II. REGULATING ETHICAL CONDUCT OF MUNICIPAL OFFICIALS AND PLANNERS IN LAND USE PLANNING AND ZONING DECISION-MAKING

There are a number of government decisionmakers in the land use planning and zoning process, each guided with either aspirational guidelines to govern their conduct or subject to a mandatory code of professionalism.<sup>19</sup> Municipal officials, such as chief elected officials and members of local legislative bodies are governed first and foremost by ethical constraints in state law.<sup>20</sup> In

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<sup>16</sup> Each of these "principles" is followed by a brief explanation in the Policy Guide. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> This essay does not specifically analyze the intersection of smart growth with the ethical codes of conduct and rules of professional responsibility that govern the conduct of the legal profession. Rather, the relevancy of the discussion presented focuses on the role of the lawyer as legal counsel to the other participants in the land use decision-making process. Likewise, the essay does not specifically address codes of conduct that regulate architects and engineers who may also play some role in smart growth strategy-development and decision-making.

<sup>20</sup> See Mark Davies, *Considering Ethics at the Local Government Level*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS*, (Patricia E. Salkin, ed., 1999). Davies states, "Unfortunately for municipal

addition, many municipalities across the country have adopted local codes of ethics that further serve to regulate the conduct of these officials. A very real problem is that but for a handful of states that specifically provide ethics guidance to public officials who make land use decisions, most of the states deal with municipal ethics with broad-sweeping vague language and they tend to focus on financial conflicts of interest. While this essay does not attempt to analyze myriad legal ethical responsibilities of municipal officials in the various states, it does strive to identify the common themes<sup>21</sup> most relevant to ensuring "smart ethics" within the smart growth landscape.

The National Association of Counties published a Code of Ethics in 1991 to serve as a reference for all whom the public has placed its trust.<sup>22</sup> Among other things, the Code states that the ethical county official should: promote decisions which only benefit the public interest; actively promote public confidence in the [county] government; effectively and efficiently work with governmental agencies, political subdivisions and other organizations in order to further the interest of the county; and faithfully comply with all laws and regulations applicable to the [county] and impartially apply them to everyone.<sup>23</sup> The Code also contains the following three "negative" statements advising county officials not to: "engage in outside interests that are not compatible with the impartial and objective performance of his or her duties; improperly influence or attempt to influence other officials to act in his or her own benefit; and accept anything of value from any source which is offered to influence his or her action as a public official."<sup>24</sup>

The International City/County Management Association (ICMA), the professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities, has adopted an enforceable code of ethics with guidelines for its members.<sup>25</sup>

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officials and lawyers, ethics restrictions applicable to a municipality's officers and employees often lie scattered among a number of state and local laws. Such restrictions may be found not only in the municipality's own ethics law and interpretive opinions of the ethics board, but also in 1. The state constitution 2. State statutes 3. Local laws other than the municipality's ethics law 4. Agency regulations 5. Common law." *Id.* at 129-30.

<sup>21</sup> For example, Vera Vogelsang-Coombs, Ph.D., offers the following four perspectives that reflect shared norms and can be used to explain how decisions by municipal officials reflect shared values or widespread norms: 1) consequentialism (where an official is ethically obligated to make decisions that promote good consequences for the greatest number); 2) deontology (the government official has an unbreakable obligation); 3) natural rights (the official must make the protection of stakeholders a priority in decision making); and 4) communitarianism (this obligates the government official to involve community members in designing solutions to community problems). See Vera Vogelsang-Coombs, *LTI Speaker Links Ethics to Credibility of Local Officials*, NATION'S CITIES WEEKLY, Aug. 20, 2001, available at: <http://www.nlc.org/home/> (last visited July 2004).

<sup>22</sup> National Association of Counties, NACo Code of Ethics for County Officials (1991), available at [http://www.naco.org/Content/NavigationMenu/About\\_Counties/Code\\_of\\_Ethics/NACO\\_Code\\_of\\_Ethics.htm](http://www.naco.org/Content/NavigationMenu/About_Counties/Code_of_Ethics/NACO_Code_of_Ethics.htm) (last visited Jan. 6, 2005). The Code is intended for information and reference only and it does not represent the adopted code of ethics applicable in any county. *Id.*

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

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

<sup>25</sup> International City/County Management Association, Code of Ethics with Guidelines (July 1998), available at: <http://www.icma.org/main/bc.asp?from=search&hsid=1&bcid=72> (last visited Jan. 6, 2005).

Among the issues addressed are: maintaining public confidence in the profession, the government and in the performance of the public trust; giving the clear impression that members cannot be improperly influenced in the performance of their official duties; disclosing potential conflicts of interest; and disclosing personal relationships.<sup>26</sup>

Professional planners who provide guidance, advice and support to municipalities and to private sector clients (including developers and builders) are guided both by internal and external ethical considerations, as well as by ethical codes of conduct.<sup>27</sup> In 1992, the American Planning Association (APA) adopted "Ethical Principles in Planning" to guide the conduct of all who participate in the planning process as advisors, advocates and decision makers.<sup>28</sup> Membership in the APA is voluntary and the ethics code is designed to serve as an aspirational guide; it is not mandatory for planners (professional or volunteer) to follow specific provisions in the code.<sup>29</sup>

The American Institute of Certified Planners (AICP) adopted a Code of Ethics and Professional Conduct in 1978, which was amended in 1991.<sup>30</sup> The Code is a guide to the ethical conduct required of members of the AICP.<sup>31</sup> The Code also aims at informing the public of the principles to which professional planners are committed. Most significant perhaps is that the Code preamble states that the principles contained therein are derived from both the general values of society and from the planning profession's "special responsibility to serve the public interest."<sup>32</sup> The preamble further notes that often times this means that some of the provisions of the Code may conflict with each other.<sup>33</sup> The Code further advises, "An ethical judgment often also requires a conscientious balancing, based on the facts and context of a particular

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<sup>26</sup> *Id.* In addressing personal relationships the Code states, "Members should disclose any personal relationship to the governing body in any instance where there could be the appearance of a conflict of interest. For example, if the manager's spouse works for a developer doing business with the local government, that fact should be disclosed." *Id.*

<sup>27</sup> CAROL D. BARRETT, *EVERYDAY ETHICS FOR PRACTICING PLANNERS* (American Institute of Certified Planners ed. 2001)

<sup>28</sup> See American Planning Association, *Ethical Principles in Planning* (1992), available at [www.planning.org/ethics/ethics.html](http://www.planning.org/ethics/ethics.html) (last visited Jan. 5, 2005) [hereinafter "Ethical Principles in Planning"]. The Code, "...presents a set of principles to be held in common by certified planners, other practicing planners, appointed and elected officials, and others who participate in the process of planning." *Id.*

<sup>29</sup> According to the APA website that describes the APA Ethical Principles, "This statement is a guide to ethical conduct for all who participate in the process of planning as advisors, advocates, and decision makers. It presents a set of principles to be held in common by certified planners, other practicing planners, appointed and elected officials, and others who participate in the process of planning. . . Please note that it is a guide and not a code by which individuals may be held accountable." See Am. Planning Ass'n, *Ethical Principles for Everyone* (1992), available at [www.planing.org/knowledge/ethics.htm](http://www.planing.org/knowledge/ethics.htm) (last visited Jan. 6, 2005).

<sup>30</sup> In April 2002, an assessment of the AICP Code of Ethics was submitted to AICP. Currently, the AICP is taking comments on proposed changes to the Code through August 2004. See Am. Planning Ass'n, *Assessment of AICP Ethics Program*, available at [www.planning.org/ethics/Salkin.htm](http://www.planning.org/ethics/Salkin.htm) (last visited Jan. 6, 2005).

<sup>31</sup> See *Ethical Principles in Planning*, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> "For example, the need to provide full public information may compete with the need to respect confidences. Plans and programs often result from a balancing among divergent interests." *Id.*



situation and on the precepts of the entire Code."<sup>34</sup>

#### A. Provisions in the APA Ethical Principles Relevant to Smart Growth

There are several provisions in the APA Ethical Principles in Planning that directly relate to core principles of the smart growth movement. For example, Section A of the Code<sup>35</sup>, provides that participants in the planning process should, among other things, 1) recognize the rights of citizens to participate in planning decisions, 2) strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons, 3) assist in the clarification of community goals, objectives and policies in plan-making, 4) strive to protect the integrity of the natural environment and the heritage of the built environment; and 5) pay special attention to the inter-relatedness of decisions and the long-range consequences of present actions.<sup>36</sup>

Section B of the Principles expresses that planning process participants, should, among other things: 1) Exercise fair, honest and independent judgment in their roles as decision makers and advisors; 2) disclose personal interests; and 3) abstain from direct or indirect participation where a personal interest exists.<sup>37</sup>

##### 1. Effective Citizen Participation

Recognition of the planner's responsibility to engage active citizen participation in the development of local comprehensive plans is a core principal of the smart growth movement. By 2001, smart growth related land use reform task forces in thirteen states had recommended increasing citizen involvement in the process.<sup>38</sup> The American Planning Association's Growing Smart Legislative Guidebook explains, "Planning statutes must do more to recognize and encourage and perhaps even mandate greater community

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

<sup>35</sup> Section A is entitled, "The planning process must continuously pursue and faithfully serve the public interest." *Id.*

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

<sup>37</sup> The heading for Section B states, "Planning process participants continuously strive to achieve high standards of integrity and proficiency so that public respect for the planning process will be maintained." There are thirteen enumerated guidelines for consideration. Providing further guidance on "personal interest," the principles provide that a participant in the planning process should, "Define 'personal interest' broadly to include any actual or potential benefits or advantages that they, a spouse, family member or person living in their household might directly or indirectly obtain from a planning decision." *Id.*

<sup>38</sup> More than 160 recommendations from the task force reports are analyzed in chart format as an appendix to Chapter 16. The states that have promoted more effective citizen participation include: Arizona, Colorado, Florida, Iowa, Massachusetts, Minnesota, New Hampshire, New York, North Carolina, Oregon, Vermont, Virginia and Wisconsin. See Patricia E. Salkin, *Land Use, in STUMBLING TOWARD SUSTAINABILITY* 380 (John C. Dernbach, ed., 2002).

involvement in local comprehensive planning."<sup>39</sup> In offering model language for public participation, the Guidebook suggests that while useful, and often required by law, public hearings alone do not adequately address effective citizen participation and involvement as the hearings may often be adversarial and often result in one-way conversations from the public to the board members.<sup>40</sup> The APA Policy Guide on Smart Growth states that, "All planning processes, as well as the distribution of resources, must be equitable. A diversity of voices must be included in the community planning and implementation."<sup>41</sup> Increasing citizen participation, according to the Policy Guide, will ensure that planning outcomes are equitable.<sup>42</sup> The Policy Guide supports planning processes that involve comprehensive strategies to engage meaningful citizen participation and that seek to find common ground for decisionmaking.<sup>43</sup>

To meet the planner's ethical responsibility under the APA Principals, planners must strive to design and guide a local land use planning process that is inclusive of all in the community. This means encouraging municipal boards to go beyond the minimal mandates of state statutes that typically require just one or two public hearings prior to adoption of new plans and land use laws, in favor of multiple public workshops and information sessions prior to formal public hearings, and further ensuring that all meetings and hearings are scheduled at times and locations to optimize maximum public participation from all segments of the community. In addition, all relevant documents should be made publicly available throughout the community for easy review. Public libraries, community centers and municipal websites should all have copies of reports, studies and proposals related to proposed community planning and land use regulations.

The planner's responsibility to assist in the clarification of community goals, objectives and policies in plan making is also critical to ensuring effective and informed citizen participation. Planners and other land use professionals who interact with the public on proposed land use plans and regulatory changes have an ethical duty to explain in simple, easy to understand terms, the process being used, the data and information being relied upon and the decisions which confront the municipality. In furtherance of enabling participation by all, this may include securing the services of a translator to ensure that there is meaningful communication will non-English speaking segments of the local population. These examples represent actions that are not required by law,

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<sup>39</sup> AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK 7-195 (Sturat Meck ed., 2002) [hereinafter GROWING SMART LEGISLATIVE GUIDEBOOK].

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

<sup>41</sup> Am. Planning Ass'n, Policy Guide on Smart Growth (2002), *available at* <http://www.planning.org/policyguides/smartgrowth.htm> (last visited Jan. 6, 2005) [hereinafter Policy Guide on Smart Growth].

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

<sup>43</sup> The commentary accompanying the policy guideline explains, "In an increasingly diverse society, citizen participation is an important means of developing plans that reflect the needs and aspirations of citizens. Planners have an ethical responsibility to involve citizens in planning, especially those affected by the plans. Participation can help to develop social capital, promote a sense of common goals and develop citizen involvement in implementation. Better plans are a result." *Id.*

but are recommendations to fulfill the principals contained in the smart growth movement and the ethical principals espoused by the planning profession.

## *2. Expanding Choices and Opportunities for All including the Disadvantaged*

This aspirational goal in the APA Ethical Principals is consistent with the smart growth and sustainable communities agenda that recognize the importance of safe and affordable housing for all income levels. In instructing planners about the purpose of a housing element in local land use plans, the APA Smart Growth Guidebook offers the following commentary:

The purpose of such an element is to assess local housing conditions and project future housing needs, especially for affordable housing, in order to ensure that a wide variety of housing is available for a community's existing residents (who may be underserved by the choices available to them, such as the need for rental units for large families and the disabled, or who may be paying a disproportionate amount of their income in rent) as well as those who might reside there in the future.<sup>44</sup>

As planners strive to meet these needs, unfortunately at times they may be confronted by vocal citizen and elected official opposition to the provision of certain types of housing for a variety of reasons. The bottom line is that it remains relatively easy for local governments to adopt plans and regulations that have the effect of excluding certain segments of the population from designated areas in the community,<sup>45</sup> yet from an ethical perspective planners have at least a moral obligation to advocate against such action.

The APA's Policy Guide on Smart Growth supports increased social, economic and racial equity in communities and calls upon the federal government to increase community development funds to remedy inequities, to include input from all segments of the population in the planning processes, and to ensure that planning and development decisions do not unfairly burden economically disadvantaged groups.<sup>46</sup> In support of this smart growth policy goal, the APA explains that, "The spatial distribution of jobs in a region, along with adequate transportation options between work and home, and sufficient housing choice for workers at all levels of compensation, is key to attaining the goals of social, economic, and racial equity."<sup>47</sup>

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<sup>44</sup> GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 39 at 7-120 to 7-121.

<sup>45</sup> See JULIAN CONRAD JURGENSMEYER AND THOMAS R. ROBERTS, LAND USE PLANNING AND CONTROL LAW 268-301 (1st ed., 1998) (discussing the evils of exclusionary zoning and the types of techniques that are typically employed to achieve this result (e.g., minimum lot size, minimum floor space, exclusion of multi-family housing from zoning districts and limitations on the siting of manufactured housing)).

<sup>46</sup> Policy Guide on Smart Growth, *supra* note 41.

<sup>47</sup> The Policy Guide calls upon the federal and state governments to develop and implement policies that further these goals. *Id.*

### 3. *Striving To Protect the Natural Environment and Built Heritage*

The smart growth movement advocates protection of the natural environment as well as the built heritage in communities, but these goals also present a challenge where private property owners are involved who do not necessarily wish to protect at their own expense environmental and heritage areas that could be viewed as benefiting the community as a whole. Further, where planners work for private sector clients who may desire to maximize profits on particular projects, planners are caught in the ethical dilemma of serving the best interests of the client while striving to protect and preserve environmentally significant features on the land. Beyond proposals of innovative ways in which to achieve these goals, planners must ultimately follow the wishes of their clients.

The APA Policy Guide on Smart Growth supports a new level of partnership to preserve and enhance ecological integrity both in the short term and in the long term.<sup>48</sup> The ethical principal in support of this stems from the core belief that "...all planning must be a sense of stewardship or 'caring for the earth,' along with an expanded understanding of the long-term implications of daily decisions and the benefits of conservation."<sup>49</sup> Biodiversity planning is urged to be included as an integral part of the early stages of land use planning, and green development is listed as a core goal.<sup>50</sup>

#### B. Provisions in the AICP Code of Ethics Relevant to Smart Growth

The first section of the AICP is entitled "The Planner's Responsibility to the Public."<sup>51</sup> This section contains seven obligations of the planner to serve the public interest and largely includes the concepts discussed above as language significantly overlaps with the APA Planning Principles. The AICP obligation addressing citizen participation does, however, go further, requiring that participation be broad enough "to include people who lack formal organization or influence."<sup>52</sup> In addition, the Code adds to the planner's responsibility to plan for the needs of disadvantaged groups, the responsibility to "urge the alteration of policies, institutions and decisions which oppose such needs."<sup>53</sup> It is perhaps through these more explicit articulations that both the APA Ethical Principles in Planning and the AICP Code of Ethics and Professional Conduct address the responsibility of planners to ensure a balance of social equity in planning and zoning decision-making.<sup>54</sup> The

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<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.*

<sup>51</sup> Am. Planning Ass'n, AICP Code of Ethics and Professional Conduct (*as amended* Oct. 1991) available at <http://www.planning.org/ethics/conduct.html> (last visited Jan. 6, 2005) [hereinafter AICP Code of Ethics and Professional Conduct].

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

environmental justice (EJ) movement has gained momentum over the last decade and the principles espoused by EJ demands that participants in the planning process consider the social equity impacts of their decisionmaking.<sup>55</sup>

In 1972, the American Institute of Planners published a booklet "Guidelines for the Social Responsibility of the Planner" which helps to explain the Code provision dealing with social responsibility.<sup>56</sup> The Guidelines are organized into general guidelines, guidelines for planners in local areas, guidelines for professional planners in regional jurisdictions and guidelines for professional planners in state and federal programs.<sup>57</sup> Among the general guidelines is the statement that planners owe a "primary commitment to maximize opportunity and expand the extent of choice available to those restricted by social, economic, personal or other constraints."<sup>58</sup> The Guidelines further state that "the urgency of social needs and undesirable or inequitable human consequences resulting from public actions should be transmitted to those with power to influence those actions."<sup>59</sup>

The second section of the Code addresses the planner's responsibility to clients, covering similar concepts in the APA Principles as well as, among other things, the responsibility to: exercise independent judgment;<sup>60</sup> avoid conflicts of interest including situations where there is a potential for conflict of interest and the appearance of impropriety; and avoid representing a private client before a public planning body if the planner worked for that public body within the last year.<sup>61</sup>

The third section of the Code deals with the planner's responsibility to the profession and to colleagues, and the fourth section addresses a planner's self-responsibility. In this last section, a planner is obligated to "strive to contribute time and effort to groups lacking in adequate resources. . . ."<sup>62</sup> This Section of the Code serves to advance the social equity concerns in smart growth and environmental justice and it complements earlier suggestions of making certain to engage the entire community to solicit input prior to final decision making.

While all of these provisions in ethical codes and standards of professionalism complement important goals and principles of the smart growth movement, implementing organizations lack true meaningful

<sup>55</sup> See National Academy for Public Administration, Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning, (2003), available at [http://www.napawash.org/pc\\_economy\\_environment/recent\\_publications.html](http://www.napawash.org/pc_economy_environment/recent_publications.html) (last visited Jan. 6, 2005).

<sup>56</sup> THE GUIDELINES FOR SOCIAL RESPONSIBILITY OF THE PLANNER, reprinted in EVERYDAY ETHICS FOR PRACTICING PLANNERS, *supra* note 10, at 215.

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

<sup>58</sup> *Id.*

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

<sup>60</sup> Yet as the Code mandates that the planner exercise independent judgment, Section B states, "A planner must accept the decisions of a client or employer concerning the objectives and nature of the professional services to be performed unless the course of action to be pursued involves conduct which is illegal or inconsistent with the planner's primary obligation to the public interest." AIPC Code of Ethics and Professional Conduct, *supra* note 51.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



enforcement for their provisions. Although some organizations, such as the American Institute of Certified Planners, can enforce its Code of Ethics as to its members, the bottom line is that complaints and investigations are relatively rare and all of the professional organizations admit, as noted above, in their preambles, that to achieve "ethical conduct," a balancing or weighing of particular facts and circumstances is required. With little or no enforcement, these statements remain merely aspirational and the community as a whole is responsible for ensuring that all involved in the process following these principles in accordance with community standards and needs.

### III. EXAMINING ETHICAL CONDUCT OF MUNICIPAL OFFICIALS AND SMART GROWTH

In contrast to the broad policy statements embodied in the unenforceable or rarely enforced planning Codes, litigants have launched legal ethical allegations challenging the conduct of members of planning boards, zoning boards and local legislative bodies where the underlying action subject to the ethics allegation involved a smart growth related decision. This part focuses on three areas: the goal of ensuring adequate open space and residential housing; the goal of engaging in effective planning through the use of planning moratoria; and the adoption of a smart growth centered comprehensive plan and zoning ordinance. In each of these instances, it was alleged that the conduct of one or more municipal officials in furtherance of these planning activities, was in violation of ethical standards.

#### A. Smart Growth Goals: Bad Judgments/Actions

In January 2003 the Court of Appeals for the Third Circuit considered a case regarding the payment of voluntary fees to help pay for certain desired community amenities.<sup>63</sup> Specifically, United Artists Theatre Circuit, Inc. sought land development approval from the Township of Warrington to construct and operate a multiplex movie theater on land owned by United Artists.<sup>64</sup> At the same time, Regal Cinema was seeking approval to develop a movie theater, and the situation turned into a race to see who would get their approval first since it was believed that the Township could not support two movie theaters.<sup>65</sup> United Artists refused to pay a voluntary annual impact fee of \$100,000 for open space, but the developer for Regal Cinemas did agree to make the payments (the Township lacked the legal authority to require an impact fee in this case).<sup>66</sup>

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<sup>63</sup> *United Artists Theatre Circuit, Inc. v Township of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003).

<sup>64</sup> *Id.* at 394.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 395.

After many months of submissions of plans and studies to the Township, United Artists alleged that the Township's ultimate refusal to support its proposal was motivated by Regal Cinema's agreement to pay the impact fee.<sup>67</sup> To back-up this claim, United Artists alleged that it took 14 months to receive preliminary approval (and Regal received this approval in one month) and the Board tabled its vote on United Artists' application for final approval on three occasions, each time inquiring as to whether United Artists would be willing to pay the \$100,000 fee.<sup>68</sup> In the end, although both applicants had their proposals approved, only the Regal Cinema project was completed. United Artists brought suit alleging a substantive due process claim consisting of improper motive in the delay of their approval in favor of the applicant who essentially agreed to pay an illegal fee.

In articulating a new standard of review based upon the 1998 U.S. Supreme Court case of *Sacramento v. Lewis*,<sup>69</sup> the Court acknowledged that the Supreme Court pronouncement overturned the line of cases in the third circuit that had held that a municipal land use decision violates substantive due process where it was made for a reason "unrelated to the merits."<sup>70</sup> In land use cases, the newer "shock the conscious" standard applies, bringing the third circuit into line with other courts.<sup>71</sup> The Court noted, "that every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority. . . ."<sup>72</sup> Finally, the Court stated, "Land-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper motives.'"<sup>73</sup>

This case followed on the heels of another Pennsylvania case where the board of supervisors attempted to pressure a landowner who requested to rezone a parcel to allow for a supermarket to pay a "voluntary" open space fee to help compensate for the loss of residential zoning that would be caused by the proposed rezoning.<sup>74</sup> Although the loss of land for residential purposes could be a valid consideration when debating the merits of the application, and maintaining appropriate housing stock along with appropriate commercial activities to support the needs of the community is certainly consistent with smart growth concepts, in this case, without statutory authorization to require the payment, the Court reasoned that, "The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issues

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<sup>67</sup> *Id.*

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

<sup>69</sup> 523 U.S. 833 (1998).

<sup>70</sup> *United Artists Theatre Circuit, Inc.*, 316 F.3d at 400.

<sup>71</sup> *Id.* at 401. The Court cites to *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) and *PZF Propis., Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991).

<sup>72</sup> *United Artists Theatre Circuit, Inc.*, 316 F.3d at 402.. (citing *Creative Env'ts, Inc. v. Eastabrook*, 680 F.2d 822, 833 (1st Cir. 1982)).

<sup>73</sup> *Id.*

<sup>74</sup> *Thornbury Noble, Ltd. v. Thornbury Township*, No. CIV.A.99-6460, 2002 WL 442827 at\*4 (E.D. Pa. Mar. 20, 2002).

building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits."<sup>75</sup>

While the municipal actions in the first instance, to wit, seeking to secure needed funding for legitimate quality community or "sense of place" amenities are consistent with smart growth principles, they run afoul of ethical guidelines as the demanded "voluntary" fees are not authorized by state statute and in both cases the communities were using the fees as leverage with competing applicants to extract as much funding as possible perhaps without regard to other routine planning considerations. Perhaps under aspirational codes that mandate a balancing of needs to promote just and fair results, a payment for loss of open space or loss of residentially zoned lands would seem appropriate, but this is one example of where state regulatory schemes control the behavior or conduct of the local boards.

#### B. Using Moratoria and Ethical Problems

While municipalities have been using moratoria for some time to take a "time out" in the permitting process to enable planners and communities to work together to develop and/or update comprehensive land use plans, zoning ordinances and other land use controls, the U.S. Supreme Court finally acknowledged the value and validity of this planning technique in 2002.<sup>76</sup> Planners are advised that acting ethically means taking a long-term view with special concern for the long-range consequences of present actions and consideration for the inter-relatedness of decisions, critics have warned that planners should not use moratoria "as a crutch in place of long term planning. . ."<sup>77</sup> Planners must be careful to balance the needs of the community with the property interests of community residents in judiciously deciding how and when to recommend the use of moratoria. While temporary halts in the development process may result in positive long-range planning for the municipality, the short term effects of potential increases in housing costs and impacts on other real estate values must be considered. Of course, municipalities are free to adopt moratoria without the advice of planners.<sup>78</sup>

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<sup>75</sup> In reaching this conclusion, the Court relied on the following, among other things: 1) minutes of a board meeting demonstrating that the entire board had knowledge of the motive alleged by the landowner for the denial of the zoning request; 2) minutes from another meeting that showed the rezoning might have been possible if a trade-off was reached; and 3) a letter from the township supervisor indicating support for a competing project because the other developer agreed to voluntarily "donate" \$600,000 to purchase open space. *Id.* at \*9.

<sup>76</sup> *Tahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339 (2002). In recognizing that locally enacted moratoria are an essential tool for successful development, the Supreme Court states, "To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth." *Id.* at 1488.

<sup>77</sup> See Michael M. Berger, *Tahoe Sierra's Impact on the Law of Temporary Takings*, in *TAKING SIDES ON TAKING ISSUES: THE IMPACT OF TAHOE-SIERRA* (Thomas E. Roberts, ed. 2003) (quoting Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under Lucas*, 46 *LAND USE L. & ZONING DIG.* 3 (JUNE 1994)).

<sup>78</sup> See Patricia E. Salkin, *U.S. Supreme Court Hands Two Big Wins to Municipal Governments*

One reported case, recently decided by the Texas Supreme Court demonstrates another way in which a municipal official's support of a moratorium could lead to an ethics allegation.<sup>79</sup> A developer who was represented by a law firm in connection with the sale of real estate owned by the developer brought a suit for legal malpractice and breach of fiduciary duty and the duty of loyalty against the law, a partner in the law firm who was also a member of the city council, because the lawyer-councilman had voted twice in his official capacity on issues that adversely affected the developer.<sup>80</sup> Specifically, the developer alleged that the lawyer-councilman made a motion to adopt a building moratorium on apartments, which passed unanimously, causing the purchasers of an 11-acre apartment tract to reject the developer's contract for sale.<sup>81</sup>

This case raised a significant question as to the applicability of legislative and official immunity to local legislators who are also practicing attorneys when both worlds appear to collide. In reversing the Court below, the Supreme Court held that the attorney-councilman was protected by legislative immunity since he was performing legitimate legislative functions and he was acting in good faith while executing the discretionary functions of his public office.<sup>82</sup> In analyzing the lawyer-legislator's actions in voting to support the imposition of a 90-day moratorium, the Court concluded that "his actions involved personal deliberation, decision, and judgment characteristic of a discretionary act that was delegated to him as a public official."<sup>83</sup>

### C. Ethics Allegations as a Sword to Prevent Smart Growth

On September 25, 2003, Dutchess County Supreme Court Judge James V. Brands handed down a harsh summary judgment decision preventing an elected Town Board member from voting on a proposed revised comprehensive plan, draft generic environmental impact statement, a revised zoning law and a revised subdivision law for the Town of Hyde Park.<sup>84</sup> The Court determined that the Board member had a conflict of interest based upon his employment with a local engineering firm that does a lot of work in the county and in the town.<sup>85</sup>

At the time of his election to the Town Board on November 6, 2001, Russell

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in 2001-2002 Term, 31 REAL ESTATE L. J. 83 (Summer 2002) (explaining that to date, only eight states regulate the use of moratoria by statute and the other states employ moratoria subject to common-law principles).

<sup>79</sup> Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150 (Tex. 2004). For a review of the lower court opinion, see Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Dockets*, 26 ZONING AND PLANNING L. REP. 1 (April 2003).

<sup>80</sup> Joe, 145 S.W.3d at 154.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id. at 163.

<sup>84</sup> Ciampaglionev Russell Urban-Mead, Index No: 1447/03 (2003).

<sup>85</sup> Id.

Urban-Mead was employed as a senior hydro geologist/air project manager for an established engineering and consulting firm doing business, among other places, in the Hudson Valley, including within Dutchess County and the Town of Hyde Park. Mead campaigned for this seat on the town board on a land use reform platform (not surprising given the development pressures facing the Town and surrounding communities). The Town of Hyde Park has, for the last several years, been engaged in smart growth related studies, and had put forth a series of proposed changes in local land use laws to implement many of the recommendations from these efforts. These proposed new laws were highly controversial, attracting active support and opposition from various segments of the community. The Judge, in his decision, acknowledged that Board Member Mead's vote in favor of the proposed new laws was "critical and indeed, perhaps pivotal."<sup>86</sup>

In the past, when Urban-Mead thought he had a conflict of interest, he would abstain from voting. For example, in a December of 2002 the Town Board was voting on a building moratorium in the Town, and Urban-Mead voluntarily abstained from voting since his employer had a matter pending before the Town Planning Board that could have been affected by that vote.<sup>87</sup> Again, following proper "ethical protocol", in the Spring of 2003, Urban-Mead sought an opinion from the local Hyde Park Board of Ethics regarding allegations that had been made regarding his participation as a Town Board Member for votes on the sweeping new land use laws.<sup>88</sup> Although on May 20, 2003, the Town Ethics Board issued an advisory opinion finding no conflict of interest and no need for Urban-Mead to recuse himself from voting on these matters,<sup>89</sup> a group of large landowners opposed to the proposed new zoning and subdivision law brought an action to prevent Urban-Mead from voting on the land use issues alleging that his employment with an engineering firm, that did work in the Town, either for the Town or for clients who appeared before various agencies in the Town, prohibited his participation as an elected Town Board Member when it comes to matters involving important zoning issues.<sup>90</sup> These plaintiffs relied on the Town of Hyde Park's local ethics law as the legal basis for their complaint alleging that Urban-Mead had a disqualifying conflict of interest or an appearance of the same. The plaintiffs also cited to a number of instances where it was alleged that the line between the Board member's duties as a town official and allegiances to his business had become blurred.<sup>91</sup>

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<sup>86</sup> *Id.*

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

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

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

<sup>90</sup> *Id.*

<sup>91</sup> Judge Brands recounts the following allegations regarding Urban-Mead's conduct in his opinion:

In December 2002 he was called into a meeting at his employer's office with developers who were needing assistance with property in Hyde Park. It was understood that he was brought to the meeting as he was on the Town Board and could "...bring them up to date on what was happening with those back parcels." (Defendant's examination before trial page 129).

Articles which the defendant has authored in a publication for the association of towns identify him as a councilman and additionally note his business affiliation.



Even if one or more of these additional allegations of unethical conduct were deemed to be inappropriate behavior, none should have had bearing on the specific question at bar, namely whether a local elected legislator may vote on specific legislative matters currently before the Board the represent broad municipal public policy directions. The Court opened Pandora's box to the question of whether a local legislator may be involved in any way in any private business or outside organization that could possibly have some interest in any matter that comes before that board. Generally, courts across the country have not gone this far.

Like the majority of states, state law in New York provides little guidance for municipal officials on the subject of ethics, nonetheless specific directives in the area of land use planning and zoning. The most comprehensive coverage of municipal ethics is found in Article 18 of the General Municipal Law. The bulk of the subject matter in this Article, however, focuses on prohibited conflicts of interests based upon contractual relationships.<sup>92</sup> The law prohibits local officials from acting in matters involving contracts where there is a personal interest in that contract on the part of the official or a member of his/her immediate family.<sup>93</sup> The law further provides a process for disclosure, recusal and discusses the adoption of local ethics laws as well as the creation of local ethics boards.<sup>94</sup> There is no specific mention of ethical considerations in state statute dealing with members of planning boards, zoning boards or local legislative bodies in the land use arena, except for a provision in the Town Law and Village Law allowing for the appointment of alternate members of planning and zoning board (note: not legislative bodies) in cases of board member conflict of interest.<sup>95</sup> There is scant caselaw in New York on the subject of conflicts of interest in land use decision-making.<sup>96</sup> Even Judge Brands acknowledged, "At the outset it should be noted that there is very little guidance from the higher courts in our state relating to an application such as the instant one before this court."<sup>97</sup> Since there was no

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At association of town meetings with potential clients he is identified both as a councilman and again with his business by name tags that combine both.

The defendant's website for the Town of Hyde Park prominently identifies his employer, the work that they do and his professional capacity including working with large capital budgets, managing staff and the like.

At the time of the proposed moratorium on subdivisions within the Town of Hyde Park, he took the initiative of contacting a principal involved with a subdivision to discuss how the moratorium would affect his project (Defendant's examination before trial, page 100).

During the defendant's tenure on the Town Board of the Town of Hyde Park the recreation committee which the defendant serve on recommended to the Town Board that defendant's firm be hired to prepare a recreation master plan. In voting for this it was his belief that he could do so as the plan itself was being approved, not payment. (Resolution 2:24-17 2003). *Id.*

<sup>92</sup> See N.Y. GEN. MUN. § 18 (McKinney 1999).

<sup>93</sup> *Id.* § 801.

<sup>94</sup> *Id.* § 806.

<sup>95</sup> For a national survey of state statutes addressing appointment of alternate board members in cases of conflicts of interest and other matters, see *Planning for Conflicts of Interest in Land Use Decision-making: The Use of Alternate Members of Planning and Zoning Boards*, 31 REAL ESTATE L. J. 375 (Spring 2003).

<sup>96</sup> See NEW YORK ZONING LAW AND PRACTICE, Chap. 31 (4th ed 1999).

<sup>97</sup> Ciampaglione v. Russell Urban-Mead, Index No: 1447/03 (2003).

contract before the Board to approve, and the adoption of a new zoning regime of municipal-wide applicability could hardly be classified as a "contract," there is no prohibition in the state statute for the Board Member's actions. Should a state statute prohibit participation under these circumstances, then all engineers, architects, realtors, bankers, title searchers, insurance agents and similar professions might be ill-suited to serve on local legislative bodies. This is a harsh and perhaps unintended result, but a reality nonetheless under the rationale put forth in the Judge's decision.

Pursuant to Section 806 of the General Municipal Law, the Town of Hyde Park adopted their own local ethics law in 2001.<sup>98</sup> That law states, in part:

No town officer. . . shall participate in any matter that comes before the Town Board that would result in financial or other benefits to him or her. . . outside employers, business associates, clients. . . In the event that such matter comes before the Town, the officer. . . shall promptly recuse himself or herself in accordance with Section 11-7B of this Code of Ethics.

The plaintiffs alleged that Urban-Mead was prohibited under this section of the local law from participating in the votes on the land use reforms. Again, the irony here is that it was well-known that based on Urban-Mead's land use reform platform, he was expected to vote in favor of the proposed changes. Such an action might more appropriately be viewed as an action against his employer's interests since the potential clearly existed that overall there would be less intense development in the Town. In any event, there was no specific contract or development application being discussed, what was on the table was a purely legislative determination regarding future land policy direction for the Town as a whole. The plaintiffs, however, attempted to strengthen their stance by alleging more than half a dozen instances where in their opinion Urban-Mead had an alleged conflict or the appearance of a conflict based upon his employment.

Unable to rely on a particular state statute, Judge Brands noted that although the plaintiffs could not prove that Urban-Mead would personally reap any financial benefit from a vote on the issues before the Board, "There need not be any interest specifically forbidden by the General Municipal Law nor is the test whether there is a conflict but whether there might in fact be. [citation omitted] As noted by our courts. . . A public official must be beyond suspicion."<sup>99</sup> Concluding that Urban-Mead must recuse himself from any further involvement with these particular matters, the Court noted, "Whether conspicuously or not, the co-mingling of business and legislative interests to date has resulted in a Darwinian hybrid where it is difficult to discern where the legislative responsibilities separate from his business responsibilities."

The impact of this trial court decision simply stated is that the residents of a municipality were denied the representation/vote of an elected official whose term of office was ending three months later. Urban-Mead's constituents were

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (citing to *Matter of Tuxedo Conservation and Taxpayers Ass'n v Town Board of Town of Tuxedo*, 69 A.D. 2d 320 (N.Y. App. Div. 1979)).

disenfranchised on a very important issue without a clear finding by the Court of any actual conflict of interest on the part of Urban-Mead. In fact, played out the way the vote might have gone, Urban-Mead had allegedly been an outspoken advocate for the new laws which would have curtailed development in the Town, an action that could more appropriately be viewed as a vote against his employer's interests, not a vote that would yield any personal financial benefits to him. .

The Poughkeepsie Journal Editorial Board has called for a further review of this lower court decision, stating that it should not be allowed to stand.<sup>100</sup> The editorial sums up the situation well. "Brand's decision provides a dangerous precedent for municipalities across New York. Now, anytime somebody doesn't like what's going on in local government, they can try to arrange a vote to their liking—simply by going to court and alleging an appearance of conflict against certain official."<sup>101</sup>

Ironically, Judge Brands later recused himself from further involvement in this case after discovering that his stepson was employed by one of the plaintiffs.<sup>102</sup>

#### IV. CONCLUSION

Addressing ethical issues in smart growth involves a delicate balancing of considerations of fairness and equity that may be personal to each individual participant in the process. The adoption of ethical codes of conduct and professionalism, along with policy guides to assist in achieving more sustainable communities serve to help direct the inner moral compass of the individual participant in the process. The types of balancing required to accomplish desired results in diverse communities cannot possibly be legislated, rather, communities must rely on the commitment of professionals guiding the planning process to "do the right thing." The instances of court intervention or organizational investigation and sanction for failure to follow a provision in the Code of Ethics are rare. While this does not mean that there are no transgressors, the bottom-line is that consistent messages are delivered between codes of ethics and the smart growth principles providing a framework for the ethical conduct of planners and those involved with the land use planning and decisionmaking in furtherance of smart growth. Achieving social equity and full fairness in land use decisionmaking is a challenge not within the exclusive purview of the planner, and thus all in the community must develop a shared ethic and commitment to the implementation of smart growth principles to work towards sustainability.

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<sup>100</sup> *Hyde Park Judge has Ties to Plaintiff*, POUGHKEEPSIE JOURNAL, Oct. 25, 2003 at 6A.

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

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