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# From *Euclid* to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls

PATRICIA E. SALKIN\*

## Introduction

The last decade has witnessed an unprecedented level of state legislative activity and interest in modernizing outdated planning and zoning enabling acts.<sup>1</sup> This is a welcome focus in the public policy arena as state enabling laws were influenced by the 1920's model statutes promulgated by the United States Department of Commerce under Secretary Herbert Hoover.<sup>2</sup> A discussion of the political evolution of local environmental land use controls can only begin by starting with *Euclid v Ambler*,<sup>3</sup> the seminal United

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1. See generally AMERICAN PLANNING ASSOCIATION, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES - A SURVEY OF STATE PLANNING REFORMS AND SMART GROWTH MEASURES IN ORDER TO MANAGE GROWTH AND DEVELOPMENT (2002), available at <http://www.planning.org/growingsmart/pdf/states2002.pdf> (last visited Dec. 12, 2002) [hereinafter 2002 STATE OF THE STATES].

2. See ADVISORY COMMITTEE ON ZONING, U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926); ADVISORY COMMITTEE ON PLANNING AND ZONING, U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928). Stuart Meck, Principal Investigator to the American Planning Association's Growing Smart initiative, commented during the early drafting of the American Law Institute's Model Code during the 1970s that these early model acts from the Commerce Department had "delegated enormous power to local governments, but they imposed no significant intellectual or moral duties or obligations (such as promoting affordable housing or protecting the environment), other than following certain procedures." Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 4 (2002). The reach of the Model Acts, however, cannot be ignored since by 1930, 35 states had adopted the Standard State Zoning Enabling Act in whole or in part, and eventually all of the states adopted zoning enabling legislation, with most reflecting the influence of the Standard Act. See KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 2:21 (WestGroup 4th ed. 1996).

3. 272 U.S. 365 (1926).

States Supreme Court decision that upheld the constitutionality of local zoning as a valid exercise of the police power.<sup>4</sup> In the early part of the 20th century, zoning was viewed as a means to an end - the end being to separate incompatible land uses because there was an inherent conflict between uses that were not identical (e.g., residential, agricultural, business and commercial).<sup>5</sup> This is referred to as "Euclidean zoning," which describes the historical use of zoning as merely a tool to separate what had been viewed as incompatible land uses.<sup>6</sup> The first zoning ordinances were enacted just at the start of the industrial revolution. Overcrowding in the cities was the paramount concern since it impacted numerous public health, safety and welfare issues (e.g., spread of disease and fire). There was relatively sparse development at the urban fringes and, in hindsight, the challenges of the day were simple. Almost a century later, local governments are finding themselves limited by zoning schemes authorized by state statutes that were enacted prior to television, computers, sports utility vehicles and massive investments in the built-up infrastructure. Although at first blush it might appear as though Euclid and the environment do not belong in the same conversation,<sup>7</sup> we cannot begin to

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4. In upholding the zoning law of the Village of Euclid, Justice Sutherland, writing for the Court which found that the provisions of the local law were based in sound public policy and substantially related to the public health, safety and welfare, declared, "Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions here are involved, is a valid exercise of authority. . . ." *Id.* at 397.

5. See *id.* at 394. The U.S. Supreme Court noted:

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports . . . concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing traffic and resulting confusion. . . ."

*Euclid*, 272 U.S. at 397.

6. See Michael Kwartler, *Legislating Aesthetics: The Role of Zoning in Designing Cities*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 195 (Charles M. Haar & Jerold S. Kayden eds., 1989).

7. See Earl Finbar Murphy, *Euclid and the Environment*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 154 (Charles M. Haar & Jerold S. Kayden eds., 1989). Murphy points out that there are in fact a number of environmental concepts reflected in the *Euclid* decision. For example, Justice Sutherland's opinion referred to environment when he wrote about the use of zoning to "preserve a more favorable *environment* in which to rear children." *Euclid*, 272 U.S. at 394 (emphasis added). While this reference was to the built environment and not to the natural environment, the *Euclid* zoning ordinance itself suggests that one of its purposes was to protect the street, sewer and water systems (the text of the original law is available

strategize about reforms for the future without appreciating the foundation upon which our system of land use controls has evolved.

Fast-forward to 2002. America's cities continue to experience dramatic population declines. Federal and state infrastructure investments have shifted resources away from the urban core and redirected money, jobs and infrastructure investments into suburban and rural communities. Where families were once lucky if they owned a car, today consumers demand multi-car garages. Where once children walked to school, the park, and neighborhood religious institutions, today the mode of transportation is not our own two feet or the two wheels on a bicycle, but the four wheels on a gas-guzzling automobile. Manufacturing plants and other industrial facilities, once located in the cities next to railroads or ports, have found it more desirable and economical to relocate to suburban communities. Businesses whose names once towered over the cities in lights atop skyscrapers, now find it more desirable to plant roots in our suburbs where parking is plentiful and green space surrounds sprawling corporate campuses.

As a nation we continue to consume acreage at a rapid rate far exceeding our population growth, destroying enormous amounts of prime agricultural lands as we sprawl.<sup>8</sup> Consider again the Village of Euclid circa 1922, it stretched for 12 to 14 square miles with a population of 5,000 to 10,000 and was located along the eastern shores of Lake Erie, along major railroad rights of way.<sup>9</sup> Armed with a zoning ordinance arguably designed to preserve its rural character, by 1986 Euclid had grown to a small city of approximately 60,000, with about 99% of its land developed.

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at <http://www.wfu.edu/courses/landuse/euclidoriginal.htm>). Murphy also notes references to the environment made by the lower court, and makes the point that Alfred Bettman, in his famous *amicus curiae* brief in the *Euclid* case, argued that zoning promoted favorable environmental conditions and hence it was a benefit to all people. Earl Finbar Murphy, *Euclid and the Environment*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 154, 169-71 (Charles M. Haar & Jerold S. Kayden eds., 1989).

8. Professor Robert Freilich identifies six major crises caused by sprawl: 1) deterioration of existing built-up areas; 2) environmental degradation (including loss of wetlands and sensitive lands and poor air and water quality); 3) over-consumption of gasoline energy; 4) fiscal insolvency, transportation congestion and infrastructure deficiencies (which, he claims lead to taxpayer revolts); 5) agricultural land conversion; and 6) unaffordable housing. ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS* 16 (1999).

9. *Euclid*, 272 U.S. at 379.

These changes are among those that have exposed the shortcomings of the early model planning and zoning enabling acts.<sup>10</sup> The changes are not necessarily good or bad, but they reflect the needs and desires of a different generation. What may have seemed like a rational approach to addressing issues such as overcrowding, is now simply incapable of addressing the loss of balance in the pursuit of sustainable land development. While it is true that across the country land use controls are viewed as a matter of local concern, municipalities possess only those powers given to them by the states. No matter how creative a county, city, town or village desires to be, the statewide planning and zoning enabling acts often present a challenge for local officials and land use lawyers who recognize that traditional land use planning and control laws will not accomplish environmental protection and preservation goals.<sup>11</sup> Professors Juergensmeyer and Roberts ask, in their recent hornbook on land use planning and control, whether environmental regulation and land use regulation will merge in the 21st century or whether these two areas of the law will continue to overlap and conflict.<sup>12</sup> Through the current smart

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10. In reflecting on the 75th anniversary of the U.S. Supreme Court's decision in *Euclid v Ambler*, Professor Melvyn Durchslag suggests that since that time, "there has been a sea of change in the zoning paradigm, so much so that a good portion of modern-day zoning would be unrecognizable to Mr. Justice Sutherland and the United States Supreme Court of 1925." Melvyn R. Durchslag, *Village of Euclid v Ambler Realty Co., Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 646-47 (2001). Another author suggests that "Euclidean zoning, however, is ineffective in its protection of environmentally sensitive lands because it focuses on social and economic values rather than on natural resources." Robert J. Blackwell, *Overlay Zoning, Performance Standards, and Environmental Protection After Nollan*, 16 B.C. ENVTL. AFF. L. REV. 615, 618 (1989). Professors Haar and Kayden, while pointing to many positive effects of the *Euclid* decision, also offer that "zoning has failed to deliver on its loftier promises of producing high-quality working and living environments," and they admit that "zoning has not dealt adequately with regional problems." ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP x - xi (Charles M. Haar & Jerold S. Kayden, eds., 1989).

11. Professors Haar and Kayden offer the following view: "But perhaps the true failure rests with elected and appointed government officials charged with drafting and administering our zoning codes. Like many political issues, zoning is subject to the push and pull of many groups, including developers, environmentalists, low-income housing advocates, big business, neighborhoods, and others." ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP x - xi (Charles M. Haar & Jerold S. Kayden, eds., 1989).

12. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 7 (WestGroup 1998). The professors also ask whether sustainable development will become integrated into the substance of environmental and land use law creating a "land ethic" basis for land use and environmental law. *Id.*



growth movement, these previously separate areas of specialization in the law are in fact becoming inextricably intertwined.

This article examines the relationship of smart growth, Growing Smart and local environmental law with a particular focus on what states can do to empower and encourage the enactment of meaningful local environmental land use laws. Aspects of regionalism and inter-jurisdictional cooperation are vital to governments' ability to achieve measured success. Part I briefly discusses the history of land use reform in the United States to set the context of the reform efforts presently underway. Part II considers the impact of recent state-level smart growth reforms with respect to the traditional notion of the primacy of local governments in land use control. Part III critiques the American Planning Association's (APA's) newly released Growing Smart Legislative Guidebook (Growing Smart), specifically for its recommendations that encourage states to adopt legislative strategies that empower local governments to protect the environment, and considers whether there is an emergence of a model state enabling act for environmental protection in all of these prescriptions. Part IV discusses the continuing role of the federal government in fostering state and local land use reform efforts, and concludes with recommended next steps to sustain the momentum of land use law reform for greater local environmental protection.

### Part I. Reform Interest Surfaces After Nearly Fifty Years

For nearly fifty years the early model planning and zoning enabling acts influenced not only the legislative acts adopted by the states, but also the patterns of land development, including consumption and design, that were approved by local governments. Interest in re-examining land use laws did not surface until the late 1960s and early 1970s.<sup>13</sup> The timing was not a coincidence, but rather a direct result of society's interest in and desire to examine environmental regulation at the federal and state levels. For example, 1970 witnessed the implementation of the National Environmental Policy Act,<sup>14</sup> followed by the Clean Air Act of 1970,<sup>15</sup> the Clean Water Act<sup>16</sup> and Coastal Zone Man-

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13. See Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 453 (2000); see also Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 1 (2002).

14. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 – 4370f (2000).

15. Clean Air Act, 42 U.S.C. §§ 7401 – 7515 (2000).

agement Act in 1972,<sup>17</sup> and the Safe Drinking Water Act in 1974.<sup>18</sup> In 1974 the Council on Environmental Quality released a study on the costs of sprawl.<sup>19</sup>

But for the vision of Senator Henry Jackson, who introduced the National Land Use Policy Act (and notably his vision failed to earn enough support to pass),<sup>20</sup> the federal reforms were not tied at all to notions of state and local land use controls as crafted in the model enabling acts. Rather, the government left local land use controls to the municipalities, and sought to layer state and federal environmental regulations that hardly had to consider the existence of any local land use laws.<sup>21</sup> Just as environmental statutes and regulations began to flourish at the federal and state level, our country's planning and zoning enabling acts lay dormant. It was this unfortunate public policy failure to securely link the regulation of land development with environmental conservation and protection laws that led to the challenges of sustainable land development.<sup>22</sup> It has also contributed to attempts occurring

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16. Federal Water Pollution Control Act, 33 U.S.C. §§. 1251 – 1387 (2000).

17. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 – 1465 (2000).

18. Safe Drinking Water Act, 42 U.S.C. §§ 300f – 300j-26 (2000).

19. REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL: ENVIRONMENTAL AND ECONOMIC COSTS OF ALTERNATIVE RESIDENTIAL DEVELOPMENT PATTERNS AT THE URBAN FRINGE: DETAILED COST ANALYSIS* (1974) (prepared for the Council on Environmental Quality, the Department of Housing and Urban Development, and the Environmental Protection Agency).

20. See, John R. Nolon, *The National Land Use Policy Act*, 13 PACE ENVTL. L. REV. 519 (1996) (discussing the National Land Use Policy Act, S. 3354, 91st Cong. (1970)).

21. In fact, recent calls for the decentralization of federal environmental policy have recognized the shortcomings of federal environmental laws that fail to coordinate with state and local land use controls.

The question is not whether [states] will play a role, it is the nature of that role. . . . In other words, the question is whether states will follow or lead. 'The federal government . . . is dependent upon state and local authorities to implement these policies because of the close interrelation between environmental controls and land use decisions, and federal officials' limited implementation and enforcement resources.'

Jonathan Adler, *Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 11284, 11286 (2001) (quoting Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977)).

22. Some of the shortcomings of Euclidean zoning with respect to environmental protection include the inability of Euclidean zoning to address the cumulative impacts of all permitted land uses on the environment, and the limitations of Euclidean zoning that focuses on the needs of a single political jurisdiction when the effects of land use decision-making know no political boundaries. Similarly, many local governments benefit from water supplies and other environmentally sensitive lands/resources that are not within their authority to regulate under Euclidean zoning since

twenty-five years later to establish greater connectivity between local land use laws and environmental protection and controls.

A private effort to modernize the early planning and zoning enabling acts in the 1970s by the American Law Institute produced the "Model Land Development Code,"<sup>23</sup> but there was little practical impact realized from this work beyond the academic exercise of debating drafts and promulgating a model code. In reality, the Model Code became little more than a shelf document.<sup>24</sup> Perhaps one reason for the lackluster response to the Model Code was the timing. Also, until the last decade there was simply little state legislative understanding of, and therefore almost no appreciation for, the centrality of local land use decision-making to achieving a sustainable environment.<sup>25</sup> What may make this generation different from the past is a growing frustration and disappointment with federal and state regulatory agendas that have resulted in sprawl and a lack of coordination in attempts to pro-

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they are situated all or in part in other political jurisdictions. Further, traditional Euclidean zoning does not provide fiscal incentives to developers and landowners to actively protect the environment. See Robert J. Blackwell, *Overlay Zoning, Performance Standards, and Environmental Protection After Nollan*, 16 B.C. ENVTL. AFF. L. REV. 615, 619-20 (1989). But see John R. Nolon & Kristen Kelley, *Local Environmental Law: Natural Evolution or a Mutant Form? Part I*, 12 ENVTL. LAW IN N.Y. 173 (2001) (noting that zoning can in fact achieve environmental objectives and citing examples of carefully delineated zoning district boundaries and open space zoning districts). The other "zoning techniques" cited in the Nolon & Kelley article reflect more modernized or flexible zoning techniques not truly reflected in historical Euclidean zoning schemes.

23. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE: COMPLETE TEXT AND COMMENTARY (1976). The initial funding for the effort began in 1963 with support from the Ford Foundation. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 3.23 (WestGroup 1998).

24. The Model Code has, however, been influential as persuasive authority in cases in court and in advocacy positions before state legislatures, to support growth management and regional planning models. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 3.23 (WestGroup 1998).

25. Perhaps this was foreshadowed by legendary land use attorney Richard F. Babcock in 1962 as he wrote to Professor Jacob Beuscher,

I am very dubious about a model act, with or without annotations. . . . I am also dubious about selling model enabling legislation. I do not believe the ALI [American Law Institute] is aware that practical success in marketing other model acts such as the penal code or the model business corporation act is not analogous to the raucous field of land use planning, in which every legislator is an expert and every constituent has an ox. I would rather try to sell a majority of a supreme court of almost any state on an idea in land use planning than try to get a model bill on land use planning through the state legislature.

Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 3 (2002).



tect and preserve significant environmental lands, rather than promoting sustainable environment and smart land use decisions.<sup>26</sup>

As a result of the growing interest in addressing environmental concerns, some states began to adopt major land use reform in the 1970s.<sup>27</sup> The result was a "quiet revolution"<sup>28</sup> in land use law wherein states, including Vermont (1970 and 1988), Florida (1972 and 1985), Oregon (1973) and Hawaii (1978), made significant modifications to their systems of land use control, giving more power to the regional and state governments to deal with environmental protection through land use controls. Four more states made reforms in the 1980s, New Jersey (1985), Maine (1988), Rhode Island (1988), and Georgia (1988). The interest in and lessons learned from these early experiments led to the creation of the modern smart growth movement, which promotes the reform of state and local land use laws to directly address the continued need to balance land development with notions of sustainable economic development and environmental protection. One notable difference is that the reforms of the 1970s and 1980s yielded state legislative efforts that gave the states a greater role in what had

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26. Laurence Rockefeller suggests:

Decisions about land use are now being made in a climate rather different from that of two decades ago. Our nation now seems caught in the throes of a new current fueled by frustration with government and government regulation, which has grown in a haphazard fashion, particularly since the early 1970s. . . . Many landowners, including those who are and want to be responsible stewards, find the regulatory maze cumbersome and confusing at best.

HENRY L. DIAMOND & PATRICK F. NOONAN, *LAND USE IN AMERICA: A REPORT OF THE SUSTAINABLE LAND USE PROJECT* x (1996). Professor Robert Freilich offers, "[t]he nation's attitude over the last several decades has changed - not only in the federal government's realization of the problem, but also in citizens' interest in conservation, preservation, rehabilitation, and fiscal growth." ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS* 321 (1999).

27. See John M. DeGrove, *The Emergence of State Planning and Growth Management Systems: An Overview*, in *STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT* 3 (Peter A. Buchsbaum & Larry J. Smith eds., 1993); see also George W. Liebman, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 *URB. LAW.* 1 (1991); "The so-called 'Quiet Revolution' in land use policy is . . . largely inspired by environmentally motivated concern about the conservation of agricultural, forest, and scenic coastal lands." *Id.* at 12.

28. See FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

traditionally been purely locally based land use decision making.<sup>29</sup> Today, the smart growth movement focuses more on bottom-up, rather than top-down, processes. Under these approaches the states provide authorization, guidance and incentives to local governments to promote better local land use planning and decision-making to, among other things, protect environmental interests.

## Part II. Smart Growth Offers a Challenge to the Early Enabling Acts

### A. Background

With the exception of the states that attempted to implement statewide comprehensive land use planning and growth management programs, no significant connections were made early on between land use laws and environmental laws. Perhaps because these two types of regulations were initially conceived to address different problems at different times, however, they have become mutually independent. Politically, the challenge presented to state governments is how the state can ensure a coordinated and consistent approach to local land use controls, when the power to enact and enforce comprehensive land use plans, zoning laws, and other land use controls remains a matter of local concern. Smart growth policies have received support because they represent strategies to address the environmental costs of sprawl.<sup>30</sup>

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29. A leading scholar of the evolution of growth management, John DeGrove, reflected on the state-level activity from the 1970s to the 1980s and observed:

These movements by states into the land management area previously reserved almost exclusively to local governments were driven in large part by a rising tide of citizen concern for the environment that began strengthening in the late 1950s and reached a peak in the early 1970s. As environmental groups increased in political strength and sophistication, they expressed their distrust of the ability of local governments to protect natural systems.

JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES* (Lincoln Institute of Land Policy 1992). For an excellent review and comparison of growth management programs in seven states (Florida, Georgia, Maryland, New Jersey, Oregon, Tennessee and Washington) see DEPARTMENT OF COMMUNITY AFFAIRS (FL), *GROWTH MANAGEMENT PROGRAMS: A COMPARISON OF SELECTED STATES* (2000), available at [www.floridagrowth.org](http://www.floridagrowth.org) (last visited Nov. 11, 2002).

30. Oliver A. Pollard, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000).

## B. Smart Growth Begins to Pick Up Steam

In the 1990s, the smart growth movement started building steam.<sup>31</sup> Armed with statistics about the costs of sprawl (such as unplanned leap frog development), the loss of the prime agricultural lands, and degradation of significant environmental and natural resources, the smart growth movement continues to promote statutory reforms to the state planning and zoning enabling acts. Advocates have also encouraged states to provide localities with more flexible zoning tools to best meet local and regional challenges. The smart growth legislation advocates local flexibility and promotes mixed-use development, in contrast to Euclidean zoning that promotes a more rigid separation of uses.<sup>32</sup> Different from the environmental reforms of the 1970s and 1980s, the smart growth movement attracts notable private sector support as it broadens the message to include economic vitality and quality of life as two of the key platforms for necessitating change. Urban renewal, traffic congestion and infrastructure issues have also been part of the smart growth debate.

The national Smart Growth Network has adopted ten smart growth principles,<sup>33</sup> and while arguably all would be beneficial to the environment, the principle that specifically ties in environmental goals includes preservation of open space, farmland, natural beauty and critical environmental areas.<sup>34</sup> To implement these smart growth environmental goals, advocates urge local governments to use a variety of traditional local land use controls such as: transfer of development rights; purchase of development rights and other market mechanisms that can preserve land; coordinate and link local, state, and federal planning on land conservation and development; innovative financing tools to facilitate

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31. See Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601 (1999) (discussing major statewide smart growth reform proposals in the 1990s state by state).

32. See Janice Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001).

33. The Smart Growth Principles are: 1) mixed land uses; 2) take advantage of compact building design; 3) create a range of housing opportunities and choices; 4) create walkable neighborhoods; 5) foster distinctive, attractive communities with a strong sense of place; 6) preserve open space, farmland, natural beauty, and critical environmental areas; 7) strengthen and direct development towards existing communities; 8) provide a variety of transportation choices; 9) make development decisions predictable, fair and cost effective; and 10) encourage community and stakeholder collaboration in development decisions. See SMART GROWTH NETWORK, GETTING TO SMART GROWTH: 100 POLICIES FOR IMPLEMENTATION (2002).

34. *Id.* at ii.

open space acquisition and preservation (e.g., local property tax incentives); regional development strategies that better protect and preserve open space in edge areas; local green infrastructure plans; designated networks of trails and greenways; cluster development and incentive zoning to preserve open space; promoting agricultural districts as a mechanism to keep private working lands; and partnering with local land trusts and conservancies to acquire and protect open lands (e.g., through conservation easements).<sup>35</sup>

Perhaps the greatest gift from the smart growth movement, and one phenomenon that distinguishes this effort from the American Law Institute's 1976 effort, has been the ability to awaken interest on the part of state government officials in the planning and zoning enabling acts. The lack of sunshine on the enabling acts may have been due to the fact that key legislators did not understand land use law and so they were reluctant to make statutory modifications. Others believed that there was simply no crisis; whatever the problems appeared to be at the local level, they could surely be addressed in an environmental law context and there was no need to look to the planning and zoning enabling acts. Lastly, local government officials, planners and the lay people involved in planning and zoning decision-making often lack the clout necessary to secure meaningful land use reforms.<sup>36</sup>

Whatever the reason for non-action, by the end of the 1990s, there was so much activity in the business of land use law reform that it was a challenge to keep current on trends. By 1999, more than one thousand land use related bills were introduced in state legislatures across the country in one year alone.<sup>37</sup> By the beginning of 2002, more than two thousand land use planning and land use control bills had been introduced by state legislatures; seventeen governors had issued nineteen executive orders; eighteen states had created legislative task forces or study commissions to evaluate smart growth ideas and opportunities; and 553 ballot ini-

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35. *Id.* at 43-49.

36. Yet, Dean Janice Griffith points to another political reality that presents a real barrier to change, "[p]owerful stake holders in the continuation of existing land use laws, including the road building and motor vehicle industries, may thwart the smart growth movement. The patronage opportunities provided by these businesses may further influence public officials and legislators to support policies that encourage greater sprawl." Janice Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019, 1025 (2001).

37. AMERICAN PLANNING ASSOCIATION, *PLANNING COMMUNITIES FOR THE 21ST CENTURY* ch. IV (1999).



tiatives in thirty-eight states focused on issues of planning and/or smart growth.<sup>38</sup> Sifting through the ideas and approaches to evaluate which were good models proved a difficult task as state and local cultures were so diverse. However, through careful and deliberate study and analysis, aided by a network of academics and leading practitioners, as well as an advisory body of diverse stakeholder interests, the American Planning Association set out to embark on a lengthy journey to facilitate the modernization of state planning and zoning enabling acts.<sup>39</sup>

While states have taken varied approaches to enable smart growth, in most jurisdictions there is a conscious acknowledgment of the important role local governments play and the sacred nature of local control over planning and zoning decision-making within local boundaries.<sup>40</sup> The American Planning Association's recently minted *Growing Smart Legislative Guidebook*, discussed in detail below, describes the four major alternative state approaches to land use control:

1) Planning permissive only. Legislation that permits, but does not mandate, planning that is purely advisory.

2) Planning encouraged with incentives. Legislation that encourages planning by authorizing supplemental powers, such as the enactment of development impact fees, to local governments that prepare and adopt plans.

3) Planning required with sanctions. Legislation that mandates planning by local governments. Under this alternative, a government could not exercise regulatory and related powers unless it has adopted a comprehensive plan that satisfies statutory criteria. Such planning would ensure that parts of an individual plan relate to, or do not conflict with, one another, and are prepared with the same assumptions.

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38. 2002 STATE OF THE STATES, *supra* note 1, at 6.

39. Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 3 (2002). The work of the American Planning Association is discussed more fully below.

40. One distinguishing feature of the smart growth movement from the growth management movement or quiet revolution is that the smart growth approach places more decision-making authority with the local governments, and the state government role is more often to provide technical assistance and fiscal support. See Oliver A. Pollard, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000).

4) Completely integrated planning system. Legislation that mandates a state- regional-local planning system that is integrated and both vertically and horizontally consistent.<sup>41</sup>

### C. The Smart Growth Executive Orders

As previously noted, governors across the country have, in a bi-partisan fashion, endorsed the concept of smart growth, or have at least established a number of task forces and study commissions to explore options suitable to the particular state. Many of these executive orders make clear that environmental protection and preservation is a desired outcome. Notably the gubernatorial efforts are appropriately centered on what states can do in terms of what authority governors have to mandate cooperation and participation from their executive branch staff. Gubernatorial executive orders that acknowledge the role of local governments with respect to local land use planning, really focus on what the states could do to influence local behavior in this regard. For example, former Maryland Governor William Schaefer began the movement in 1992 with an executive order on state economic growth, resource protection and planning policy.<sup>42</sup> In this executive order he set forth a framework to review state projects for consistency with, among other things, environmental preservation goals.<sup>43</sup> Governor Parris Glendening took the ideas in this executive order further in 1998 when he issued his own order indicating that the state would, prior to funding growth related projects, obtain from local governments a statement that such project was located in a certified priority funding area.<sup>44</sup>

In New York, Governor George Pataki touted his environmental accomplishments<sup>45</sup> to set the tone for an executive order that created a task force to, among other things, develop recommenda-

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41. AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002) [hereinafter GUIDEBOOK]. For a discussion of the pros and cons to each of these approaches, see *id.* at 2-7.

42. Md. Exec. Order No. 01.01.1992.27 (Gov. William Schaefer).

43. *Id.* Among the responsibilities of the interagency committee created to implement the executive order, the Governor charged it to “[c]oordinate State plans, programs, and projects which affect the timing, type and location of development and assure that the State’s investments in infrastructure and resource protection are made in accord with the Policy and Act.” *Id.*

44. *Smart Growth and Neighborhood Conservation Policy*, Md. Exec. Order No. 01.01.1998.04 (Gov. Parris Glendening).

45. *Establishing the Quality Communities Interagency Task Force*, NY Exec. Order No.102 (Gov. George E. Pataki) provides in relevant part:

tions that preserve open space, promote farmland protection, and preserve and enhance environmental resources.<sup>46</sup> In Delaware, former Governor Tom Carper noted in his executive order that unguided growth leads to inefficient land use that threatens the State's water and air resources,<sup>47</sup> and continuing this theme, current Governor Ruth Ann Minner noted, as she listed her State development goals,<sup>48</sup> that "Delawareans are concerned that the quality of place in our state is threatened by sprawl, traffic congestion, loss of farmland and open space, diminished air and water quality. . . ."<sup>49</sup> In Florida, Governor Jeb Bush created a Growth Management Study Commission to, among other things, consider trends and conditions affecting the environment, economy and quality of life in Florida.<sup>50</sup> Indiana's Governor, Frank O'Bannon, began his executive order creating the Indiana Land Use Forum with the recognition of "the importance of establishing a land use policy that addresses farmland preservation, wildlife habitat and natural resources protection, open space development and urban revitalization. . . ."<sup>51</sup>

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Whereas, New York has given unprecedented protection since 1995 to the State's open space resources by acquiring fee title to or conservation easements over nearly 250,000 acres of important natural and recreational resource lands. . . . Whereas New Yorkers have acted to protect and enhance the environment through passage of the \$1.75 billion Clean Water/Clean Air Bond Act of 1996, which provides funds for environmentally important projects, such as the cleaning of brownfields, water quality protection, drinking water supply improvements, air quality protection, and the protection of farmland, open space and aquatic habitat; Whereas New York's quality of life also has been enhanced by the record high funding of the Environmental Protection Fund. . . .

*Id.* These statements clearly indicate the Governor's commitment to environmental issues and link these goals to his smart growth initiatives.

46. *Id.* The resulting report stressed the need for partnerships between the state and local governments.

47. Del. Exec. Order No. 20 (Gov. Carper 1995).

48. Among Governor Minner's development goals are: protecting important farmlands and critical natural resource areas; and protecting the state's water supplies, open spaces, farmlands and communities by encouraging revitalization of existing water and wastewater systems and the construction of new systems. *See Regarding Gov. Minner's "Livable Delaware" Agenda*, Del. Exec. Order No. 14 (Gov. Minner 2001).

49. *Id.*

50. Fla. Exec. Order No. 2000-196 (Gov. Bush 2000). Governor Bush's Executive Order calls for, among other things, a review of the current land development system and consideration of a state rural policy that could include a statewide system for transferring or purchasing of development rights through a rural lands stewardship program. *Id.*

51. Ind. Exec. Order No. 01-03 (Gov. Frank O'Bannon 2001). The Governor reminded residents that when he created the Hoosier Farmland Preservation Task

Some governors have specifically acknowledged the role of local governments in land use decision-making, and have gone out of their way to make clear that their executive orders are not intended to require local changes. For example, former Massachusetts Governor William Weld, in addressing planning growth, issued an executive order directing his state agencies, boards, commissions, and authorities to evaluate the effects of their rules, regulations, policies, plans and practices on the ability to preserve environmental quality and resources.<sup>52</sup> The Governor was cautious not to preempt local government authority with respect to land use decision-making when he urged his agencies to make the necessary changes to achieve desired preservation goals, provided that no changes infringe on the jurisdiction or authority of municipal, county or regional governments.<sup>53</sup> Oregon Governor John Kitzhaber, states up front, “[i]t is recognized that local jurisdictions may have their own set of development objectives and priorities reflecting local needs and interests,”<sup>54</sup> but he goes a step further by suggesting that the state “should negotiate to resolve differences between state and local community development objectives.”<sup>55</sup> Former acting Pennsylvania Governor Mark Singel issued an executive order noting the negative impacts of poor land use decisions,<sup>56</sup> and ordered his agencies, to the extent practical,

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Force, he charged them with conducting a “Conference on the Environment” dedicated solely to the discussion of land use policies. *Id.*

52. Mass. Exec. Order No. 385 (Gov. William F. Weld 1996). In his policy statement beginning the executive order, Governor Weld states:

[The] conflict between environmental quality and economic activity ultimately puts at risk environmental resources as well as economic opportunity; thus threatening, for example, public water supplies, clean air, swimmable and fishable waters, flood protection, open space, agricultural lands, historic sites, and community character; but also affecting the timely provision of needed infrastructure, financial assistance and regulatory approvals for appropriately sited and designed development.

*Id.*

53. *Id.* § 3.

54. *Use of State Resources to Encourage the Development of Quality Communities*, Or. Exec. Order No. EO 97-22 (Gov. John Kitzhaber 1997).

55. *Id.* Governor Kitzhaber sets forth “Quality Development Objectives” to be used in combination with state and local partnership principles that sound like traditional local land use controls. For example, he advocates for promoting compact development, giving priority to a quality mix of development and encouraging mixed use and energy-efficient development, supporting development where there are adequate public facilities and services, and facilitating development compatible with community and regional environmental concerns. *Id.*

56. Governor Singel stated, “the negative impacts of poor land use decisions, such as traffic congestion, inadequate water and sewer services, increased risk of flooding, the destruction of prime farmland and other hardships do not respect municipal



to assist in: establishing efficient land use patterns by encouraging growth consistent with existing infrastructure; preserving the Commonwealth's natural resources and protecting clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic value of the environment; and establishing consistent and coordinated land use practices statewide.<sup>57</sup>

The aforementioned executive orders are examples of the approaches being used to articulate a state role in what has traditionally been viewed as, and remains today, to be a matter that is dominated by local government control. Most of these executive orders, and the ones not specifically identified, are aimed at task force or study commission creation to begin a dialogue, issue a report, and hope for some type of behavior modification at the local land use planning and decision-making level. The emerging theme in more recent task force reports and recommendations stress the need for partnerships between the state and local governments.

#### D. The Smart Growth Task Forces

By the end of 2001, smart growth task forces or study commissions in twenty-four states had issued a combined 160 recommendations to address needed modifications in our system of land use control.<sup>58</sup> These recommendations can generally be categorized into: land use, conservation (including farmland), environment, transportation, housing, technology, and citizen participation issues. In the area of land use, almost half of the states reported the ten recommended strategies for inter-jurisdictional cooperation. Nine state groups recommended that the state provide more funding for comprehensive local land use planning and innovative projects. Working to channel growth into existing built areas was also popular. In general, there was support throughout many of the task force reports for promoting better town-gown relationships and alliances to leverage university resources and information about local land use issues.

In addressing conservation goals, seventeen states urged that funding continue to be available for open space and farmland preservation. More than half a dozen states supported programs

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boundaries." *State Land Use Planning Goals and Objectives for Commonwealth Agencies*, Pa. Exec. Order No. 1993-3 (Acting Gov. Mark S. Singel 1993).

57. *Id.*

58. See Patricia E. Salkin, *Using Smart Growth to Achieve Sustainable Land Use Policies*, 32 ENVTL. L. R. 11385 (2002).

concerning conservation easements, purchase of development rights and the transfer of development rights. Environmental goals included encouraging the adoption of comprehensive plans that would address air, transportation, open space, solid waste, waste water, and water sources. Several reports recommended that the states should assist local governments with environmental conservation issues, and that state and local environmental efforts should be streamlined.

Since the majority of these task forces were created by gubernatorial executive order, their focus was limited to what the states could do to foster smart growth. Many of these reports were further narrowed by addressing recommendations that were clearly within the purview of the executive branch of government to control. Therefore, modernization of state planning enabling statutes was not a major focus nor outcome of the reports. Local governments could benefit greatly, however, if many of the key recommendations are implemented. Organizing the statehouse through interagency task forces and coordinating committees, re-examining the impact of state policies on local land development, providing funding to promote conservation, and providing incentives for more comprehensive local planning and for inter-municipal cooperation, would all do wonders toward promoting more environmentally friendly local land use planning and decision-making.

#### E. Legislative Action

The statistics regarding the level of reform activity across the country are astounding. According to the summary report accompanying the main text of the American Planning Association's 2002 exposé on the state of the states with respect to land use reform:

- Approximately one-quarter of the states are implementing moderate to substantial statewide comprehensive planning reforms (these states include: Delaware, Florida, Georgia, Maryland, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington and Wisconsin);
- One-fifth of the states are pursuing additional statewide amendments strengthening local planning requirements, or they are working to improve regional or local planning reforms already adopted (these states include: Arizona, California, Hawaii, Maine, Nevada, New Hampshire, New York, Texas, Utah and Virginia); and

- Nearly one-third of the states are actively pursuing their first major statewide planning reforms for effective smart growth (these states include: Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Mexico, North Carolina and South Carolina).<sup>59</sup>

With so much activity in the legislative arena, land use practitioners are challenged to keep up with new statutes and regulations as well as proposed modifications that change the way in which some may be accustomed to doing business.

### Part III. Growing Smart: A New Framework is Proposed for the 21st Century

In January 2002, the American Planning Association released the final (revised) edition of its Growing Smart Legislative Guidebook.<sup>60</sup> The two-volume work contains fifteen chapters and nearly 1,400 pages detailing best practices to guide state legislatures in their efforts to modernize state planning and zoning enabling acts.<sup>61</sup> This two-volume reference book is the culmination of a seven-year effort to study and build consensus on new models for state planning and zoning enabling legislation.<sup>62</sup> Change is controversial. The players in the land use game have much at stake: profits, housing, health, quality of life and natural resource conservation. A balanced system that promotes sustainable development can integrate and manage each of these concerns simultaneously. To best balance and guide the Growing Smart initiative, the American Planning Association assembled a Project Directorate consisting of representatives from organizations and

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59. See 2002 STATE OF THE STATES, *supra* note 1, at 31 – 139.

60. See generally GUIDEBOOK, *supra* note 41. A user manual was simultaneously released to assist legislators in navigating through the bulky text of the two-volume report. See JERRY WEITZ, AMERICAN PLANNING ASSOCIATION, GROWING SMART USER MANUAL FOR THE GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING THE MANAGEMENT OF CHANGE 2002 (2002), available at [www.planning.org](http://www.planning.org) (last visited Dec. 12, 2002) (abstract).

61. See generally GUIDEBOOK, *supra* note 41. Authorizing legislation for the following topics are covered in the Guidebook: state, regional and local comprehensive and functional planning; urban growth area designations; zoning; subdivision control; impact fees; administrative and judicial review of zoning decisions; enforcement; streamlining of development permit systems; land use incentives; smart growth acts; traditional neighborhood development; scenic, farmland and historic preservation; redevelopment tools; affordable housing tools; environmental planning; and capital budgeting.

62. Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 3 (2002).

agencies that represent both the built and natural environments.<sup>63</sup> This advisory body met formally thirteen times from 1995 to 2001 for the purpose of reviewing each of the Guidebook chapters.<sup>64</sup> Funding for the project came from the public, private and non-profit sectors.<sup>65</sup> In addition, the Guidebook underwent intensive peer review by leading experts, noted scholars, and practitioners in the fields of planning, zoning and community development: the level of scrutiny and involvement by these individuals and the balancing of opinions, attitudes and beliefs was no small feat. The model statutory language offered throughout the document is “intended to provide governors, state legislators, state legislative research bureaus, local elected and appointed officials, planners, citizens, and advocates for statutory change with ideas, principles, methods, procedures, phraseology, and alternative legislative approaches drawn from various states, regions and local governments across the country.”<sup>66</sup> The Guidebook is accompanied by a Growing Smart User Manual to assist in honing in on issues of interest.

In making the case for reform, the Guidebook offers that many of our current planning and zoning enabling laws are based upon outdated national enabling acts<sup>67</sup> that “are shopworn and inadequate for the job at hand.”<sup>68</sup> The preface to the Guidebook captures the essence of why local land use laws have morphed into local environmental land use laws by explaining:

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63. GUIDEBOOK, *supra* note 41, at xxxiv. The Directorate consisted of representatives from the following entities: the American Planning Association; The Council of Governors’ Policy Advisors; the Council of State Community Development Agencies; the National Conference of State Legislatures; the National Association of Counties; the National Association of Regional Councils; the National Association of Towns and Townships; the National Governor’s Association; the National League of Cities; and the U.S. Conference of Mayors. In addition, members-at-large represented the built environment, local government law and the natural environment. *Id.* at xxxiv.

64. *Id.* at xlii.

65. The following entities provided funding for the Growing Smart Project: Henry M. Jackson Foundation; U.S. Department of Housing and Urban Development; Federal Highway Administration, U.S. Department of Transportation; U.S. Environmental Protection Agency; Federal Emergency Management Agency; Federal Transit Administration; Rural Economic and Community Development Administration, U.S. Department of Agriculture; Annie E. Casey Foundation; Siemens Corporation; and the American Planning Association. *Id.* at xxxviii.

66. *Id.* at xlv.

67. *Id.* at xli. Readers are told up front that the model statutes offered are designed to update the Standard City Planning and Zoning Enabling Acts drafted in the 1920s by the U.S. Department of Commerce as well as the 1976 Model Land Development Code published by the American Law Institute.

68. GUIDEBOOK, *supra* note 41, at xxx.



People no longer believe, as they did in the nineteenth century, that land is something merely to be bought and sold. We now also regard land as a resource. Where we once encouraged the filling and development of swamps, we now regard those same wetlands as a vital part of nature's system of flood control and important for wildlife and their habitats that should be protected for the benefit of future generations. Where we once built without concern for scenic protection, we now value scenic beauty as an irreplaceable regional asset. We see vacant, developable land as having competing social values—it can be used for the construction of affordable housing or for the continuation of agriculture. We recognize that how we develop our land—at what density or intensity—will have consequences for the form and relative compactness of metropolitan areas, which in turn will affect how much we have to travel to conduct our lives and what consequences that has for the air we breathe.<sup>69</sup>

The Guidebook is presented as a series of model statutes that contain commentary including options or alternate language and approaches. The commentary is based in part upon a collection of working papers commissioned by the American Planning Association in the mid-1990s. These papers helped to form the conceptual foundation for some of the approaches offered in the Guidebook.<sup>70</sup>

It is no surprise that many of the recommendations in the Guidebook directly link land use with local environmental regulation. Principal investigator Stuart Meck asked at an early stage in the process, during a meeting in 1991 of “who’s who” in land use reform, exactly how model land use legislation could address pressing environmental issues.<sup>71</sup> Furthermore, a number of the

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69. *Id.* at xxix. In addition, the Guidebook offers more reasons why planning law reform is needed: There is a more significant intergovernmental dimension for planning; there is a more active and sophisticated citizenry that expects to be involved in decision-making; and there is a more challenging legal environment today than there was eighty years ago.

70. *Id.* at xlii. The Working Papers, authored by law professors, planning professors and leading practitioners, have been published in separate volumes by the American Planning Association. See MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS vol. 1 (1996) & vol. 2 (1998). A third volume was published in 2002.

71. In his personal account of the beginnings of the Growing Smart Project, Stuart Meck recalls that he addressed an early meeting of advisors and asked, “[w]hat substantive duties should planning enabling legislation place on governments to consider regional and statewide concerns such as providing affordable housing, protecting wetlands and agricultural land, and restricting development in floodplains? How should the legislation address siting issues such as sanitary landfills, prisons and power plants?” Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 4 (2002).

papers commissioned by the American Planning Association in the 1990s recognized this critical link.<sup>72</sup> In explaining the process of developing the Model Guidebook, Meck stated, “We mapped out an ambitious program of drafting legislation for state, regional and local levels of government; looking at how states could manage large-scale development and protect environmentally sensitive areas. . . .”<sup>73</sup> Lastly, it is important to note that the Project Directorate, a group of stakeholders assembled to serve as an advisory board to the project, was expanded after its inception to include three at-large members to represent the built environment, the natural environment and municipal law.<sup>74</sup>

#### A. The Growing Smart Philosophy of Modernizing State Land Use Statutes

The Introduction to the Guidebook offers an eleven-point philosophy that guided the drafting of the document. Simply put, these are:

1. There is no single “one size fits all” model for planning statutes;
2. Model statutes should provide for planning that goes beyond the shaping and guidance of physical development;
3. Model statutes should build on the strengths of existing organizations that undertake and implement planning;
4. Planning statute reform should not look just at regulation but also at provision of infrastructure and property taxation;
5. Model statutes should account for the intergovernmental dimension of planning and development control;
6. Model statutes should prescribe the substantive content of plans;

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72. The American Planning Association published two volumes of working papers in 1996 and 1998. Among the Growing Smart Working Papers were the following: Catherine Preston, *Environmental Analysis of Alternatives in Comprehensive Planning*; Daniel Mandelker, *Melding State Environmental Policy Acts with Land-Use Planning and Regulation*; and Peter Buchsbaum, *Model Acts: Integrating Federal Permitting with Local Land-Use Planning and Regulation*. All are available in AMERICAN INSTITUTE OF CERTIFIED PLANNERS, MODERNIZING STATE PLANNING STATUTES THE GROWING SMART WORKING PAPERS vol. 2 (1998).

73. Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 5 (2002).

74. *Id.* at 7. The Initial Directorate consisted of the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures, the National Association of Towns and Townships, the Council of State Community Development Agencies, the National Association of Regional Councils, and the American Planning Association.

7. Model statutes should anticipate the potential for abuse of planning tools and correct for it;
8. Model statutes should use familiar terminology;
9. Model statutes should expressly provide for citizen involvement;
10. Model statutes should allow flexibility in planning administration; and,
11. Model statutes should be based on an appraisal of what has worked.<sup>75</sup>

The Growing Smart Guidebook also provides a checklist of what can be accomplished through statutory reform. The following seven goals for statutory reform are identified:

1. Certainty and efficiency in the development review and approval process can be improved;
2. Statutes will contain a mix of carrots and sticks to promote planning;
3. People affected by the planning process can be involved early in the process;
4. Plans can address the interrelationships of employment, housing, fiscal impacts, transportation, environment, and social equity;
5. Governments are empowered with a range of planning tools to manage growth and change locally to create quality communities;
6. The timing, location, and intensity of development can be linked to existing or planned infrastructure; and
7. Mechanisms to monitor the ongoing performance of planning systems can be created.<sup>76</sup>

Organized into fifteen chapters, the Guidebook maintains that it is important to reform planning enabling legislation due to today's more significant intergovernmental dimension for planning, a marked shift in society's view of land, a more active citizenry and a more challenging legal environment.<sup>77</sup> Major topics covered in the Guidebook address environmental land use controls and include: the planning process and implementing plans (at the state, regional and local levels); development controls (including zoning, subdivision, site plan, uniform development standards,

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75. GUIDEBOOK, *supra* note 41, at xlii - xlviii (discussing each of these principles in detail in the Introduction).

76. *Id.* at xlv.

77. *Id.* at xxix.

vested rights, nonconforming uses and development agreements); siting of state facilities, infrastructure and capital improvement plans; special and environmental land development regulations and incentives (e.g., historic preservation, transfer of development rights, conservation easements, purchase of development rights); mitigation; administration; and judicial review of land-use decisions enforcement, taxation, financing planning, geographic information systems and public records.

The User Manual instructs readers that each chapter in the Guidebook follows the same basic format: a chapter outline that identifies the major topics in the chapter (along with section numbers where model statutes and alternative model statutes are located in the text); where appropriate, cross-references to other model statutes; an introduction that sets forth a general discussion of the subject matter covered and summarizes the key content including recommendations and alternatives; commentary that precedes the model language to provide insights into why the models were selected (including discussions of how the model is similar or different to the 1920s Standard Acts and the 1976 Model Code); statutory language along with alternatives; notes inserted where appropriate to assist in drawing attention to particular state or local approaches that have proven successful and influenced the drafters; and footnotes that provide extensive citation to literature, statutes and regional and local approaches.

A key feature of the User Manual is found in Part 2: “user needs checklists.” This section is organized into four categories of needs and goals relating to states, regional and local governments, and specific subject areas. In a user-friendly manner, the checklists say “we want to. . .” and offer a menu of potential objectives (e.g., decide how to approach statutory planning reform; see what goals have been adopted by other states; designate sub-state planning districts and agencies; guide the review, adoption and amendment of plans by local governments; provide for smart growth technical assistance by the state to local governments; authorize local governments to adopt development agreements; clarify when a development has vested rights; ensure that local land development regulations relate properly and legally to state and federal laws; provide local land-use incentives for good community design; consider the pros and cons of urban growth boundaries; etc.). These options are then followed in the chart by the applicable chapter number and division of the Guidebook, along with the



model statute section number. More than 150 topics are covered in the checklist.

The User Manual then serves as an executive summary of sorts for each of the fifteen chapters in the Guidebook, providing one to two page summaries or key highlights of the chapter. The Manual ends with seven sample applications of the Growing Smart model statutes by using hypothetical scenarios to illustrate how lawmakers and policymakers could use the wealth of information in the Guidebook.

It is also important to realize that while it is true that in many cases decisions were made to put forth one or two models as best practices approaches, it is ultimately the intent of the Guidebook to provide discussion and alternatives through commentary that highlights the pros and cons of each alternative. This is consistent with the starting philosophy of the Growing Smart project, that there is no one-size-fits-all, and that states must select the approach that offers the best fit.

#### B. The Guidebook Outlines Local Land Use Tools Necessary for Local Environmental Protection

The Guidebook is rich in ideas for promoting and enabling local environmental control through land use regulation. The remainder of this Part discusses the chapters in the Guidebook where environmental land use law emerges as a significant theme.

Chapter One of the Guidebook begins with strategies for initiating the planning statute reform process. This chapter is significant in laying the foundation for a local environmental land use ethic as it clearly links land use decision-making and controls with environmental effects. In the models offered for creating study commissions, users are advised to survey stakeholders, including the environmentalists.<sup>78</sup> One option suggests that an environmental representative serve on the study commission.<sup>79</sup> It is recommended that the commissions propose innovative and cooperative planning and land use approaches that will protect the environment and scenic resources.<sup>80</sup> In an alternate approach that would create a joint legislative study committee, it is recommended that some of the committee functions and duties would be

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78. *Id.* at 1-16.

79. *Id.* at 1-18.

80. *Id.* at 1-16.

to study, evaluate and make recommendations to the legislature on, among other things, the environmental effects of the state's land use planning program on local governments,<sup>81</sup> measures to minimize the effects of natural hazards on existing and future development,<sup>82</sup> and the "impact of planning, land use, and growth management laws on the environment and natural resources."<sup>83</sup>

Chapter Four focuses on state planning. In discussing the various options for a state planning agency, the Guidebook describes the potential role of a department of the environment as one potential model.<sup>84</sup> Should states choose to establish a cabinet coordinating committee, it is recommended that the directors of the departments of agriculture and environment be members.<sup>85</sup> Among the matters on which the committee should report to the Governor are: the management and use of state resources including land, water, air, forest, scenic resources, wildlife and energy;<sup>86</sup> efficient and productive use of water resources (including watershed management and maintenance of water quality);<sup>87</sup> the location and need for sewage, wastewater treatment, solid waste disposal, and electrical generating facilities;<sup>88</sup> the preservation of prime agricultural lands;<sup>89</sup> and preservation of scenic resources.<sup>90</sup> In addressing the preparation of a state comprehensive plan, the Guidebook suggests studies be completed that examine, among other things: natural resources (such as air, water, open spaces, scenic corridors or viewsheds, forests, soils, rivers and other waters, shorelines, fisheries, wildlife and minerals);<sup>91</sup> geology and ecology;<sup>92</sup> agriculture;<sup>93</sup> the presence, potential for and mitigation

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81. GUIDEBOOK, *supra* note 41, at 1-20.

82. *Id.* at 1-21.

83. *Id.*

84. *Id.* at 4-17. The commentary explains, "Under this type of agency, the planning function would be a division within a larger department that has an environmental or natural resources focus. An example from Britain is the English Department of the Environment (DOE), which combines housing, land-use regulation, and environmental control." *Id.* (citing H.W. DAVIES, "ENGLAND" IN PLANNING CONTROL IN WESTERN EUROPE 36 (Her Majesty's Stationary Office 1989).

85. *Id.* at 4-22.

86. GUIDEBOOK, *supra* note 41, at 4-23.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 4-40.

92. GUIDEBOOK, *supra* note 41, at 4-40.

93. *Id.*

of natural hazards;<sup>94</sup> and energy types (availability and use).<sup>95</sup> The following items are offered as part of the topical list of items to be covered in the plan: agriculture, air and water quality, natural resources (living and non-living), natural hazards, and scenic resources.<sup>96</sup> It is suggested that the state plan “establish priorities for state acquisition of land and interests in land for natural resources protection, scenic corridor or viewshed protection, open space and recreational needs, water access, and natural hazard mitigation purposes.”<sup>97</sup> The commentary discusses the use of state biodiversity conservation plans as another alternative to achieve some of these goals.<sup>98</sup> A proposed smart growth act follows that is designed to, among other things, direct growth away from agricultural land or critical and sensitive areas.<sup>99</sup> Chapter Four concludes with a discussion of state planning goals, and offers examples of language in various existing state planning goals that address various environmental goals.<sup>100</sup>

Chapter Five addresses state land use control. It begins with a discussion of siting undesirable or controversial facilities, which are often viewed negatively due to real or perceived detrimental environmental impacts, and offers a model state siting statute.<sup>101</sup> Areas of critical state concern are dealt with next,<sup>102</sup> with a comprehensive model ordinance proposed to assist with designation, management plans and the ability of state and local governments to regulate within these areas. Developments of regional impact are then addressed as a method of state governments dealing with

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94. *Id.*

95. *Id.*; see also GUIDEBOOK, *supra* note 41, § 4-204(3), at 4-44 (addressing the preparation of the state plan and enumerating the same types of issues).

96. GUIDEBOOK, *supra* note 41, at 4-41. The Commentary offers that certain land uses or lands may have statewide or regional impacts, such as wetlands, coastal zones, earthquake fault zones, landslide areas, floodplains, etc.

97. *Id.* at 4-46.

98. *Id.* at 4-47. A number of states, including Florida, Maryland and New Jersey have adopted these types of plans. Model statutory language is provided in section 4-204.1 at pages 4-51 to 4-54.

99. *Id.* at 4-129.

100. *Id.* at 4-138 to 4-146. Examples of state plan language to deal with land use, natural resource protection, air quality, energy, agricultural and forestland preservation, critical environmental areas, and natural disasters and hazards are provided.

101. Examples of controversial environmental land uses include: landfills, sewage treatment facilities, and solid and hazardous waste disposal facilities. See *id.* at 5-6.

102. An area of critical state concern may be defined as a large tract of land that is “critical” to the “environmental health of the state, or represent some other critical resource.” GUIDEBOOK, *supra* note 41, at 5-24.

impacts (especially environmental impacts) that cross over jurisdictional boundaries.<sup>103</sup>

Chapter Six begins the transition from state to more local roles in land use with a focus on regional planning. After discussing the history of regional planning in the United States and various options for designing regional planning agencies and entities, the chapter provides options for the preparation of regional comprehensive plans suggesting that various environmental considerations be addressed in the plans.<sup>104</sup> Regional functional plans covering topics such as, parks and open space, water, sanitary sewerage and sewage treatment, water supply and distribution and solid waste, are outlined in the chapter.<sup>105</sup>

Chapter Seven begins to address local planning. It reminds us that local planning agencies are often charged with making inquiries and studies regarding a wide range of topics including environmental protection, natural and scenic resource preservation, stormwater management, and conservation.<sup>106</sup> With respect to the local comprehensive plan, the Guidebook offers a series of plan elements to be included in the locally developed plan. The recommended environmental elements include: protection of agricultural lands; protection of state, regional and local areas of critical environmental concern; conservation and management of natural resources and mineral resources; promotion of energy conservation; and an agricultural, forest and preservation element.<sup>107</sup> The Guidebook specifically offers model language for defining the critical and sensitive areas element,<sup>108</sup> and the agriculture, forest and scenic preservation element.<sup>109</sup> The chapter discusses the creation of various sub-plans including a redevelopment area plan that can aid in the redevelopment of, among other lands, those that have been environmentally contaminated.<sup>110</sup> The chapter concludes by suggesting that local governments provide for benchmarks to measure achievement with the local comprehensive plan.<sup>111</sup> Among the environmental benchmarks offered are measuring “[a]n increase in the amount (in acres) of environmen-

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103. *See id.* at 5-55 to 5-67.

104. *Id.* at 6-37 to 6-43.

105. *Id.* at 6-62.

106. *Id.* at 7-40 to 7-41.

107. *Id.* at 7-69 to 7-74.

108. GUIDEBOOK, *supra* note 41, at 7-139 to 7-142.

109. *Id.* at 7-156 to 7-162.

110. *Id.* at 7-190.

111. *Id.* at 7-263 to 7-265.



tally sensitive land that is protected by land development regulations or special state programs; [a]n increase in the amount of neighborhood parkland per capita; [a] reduction of the acreage of residential development that is located in floodplains; [and] [f]or communities that are in arid climates or are experiencing water shortages, a reduction in the gallons/per capita/per day of domestic water use to a certain number.”<sup>112</sup>

Chapter Eight focuses on local land regulation. The model statute providing authority for local governments to adopt various land development regulations incorporates significant tools to protect the environment including: ordinances to transfer development rights; ordinances to regulate development in critical and sensitive areas; ordinances to regulate development in floodplain areas; ordinances regulating stormwater and/or erosion and sedimentation; ordinances to authorize mitigation banking; and ordinances regarding infill and Brownfield redevelopment.<sup>113</sup>

Chapter Nine is devoted to special environmental land development regulations and land use incentives. The Guidebook offers models on how local governments can regulate critical and sensitive areas and natural hazard areas;<sup>114</sup> authorization for local transfer of development rights programs;<sup>115</sup> and purchase of development rights programs and conservation easement programs,<sup>116</sup> mitigation laws,<sup>117</sup> and incentive zoning.<sup>118</sup>

Chapter Twelve offers options for integrating state environmental policy acts with local planning.<sup>119</sup> Three models are set forth that would clearly establish a link between environmental regulation and land use. The options include the following: requiring local governments to conduct an analysis of alternatives in the comprehensive land use plan; making certain that state environmental review regulations require an environmental statement be prepared for comprehensive plans; or substituting environmental policies in a comprehensive plan and requirements

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112. *Id.* at 7-263 to 7-264.

113. *Id.* at 8-27 to 8-28.

114. GUIDEBOOK, *supra* note 41, at 9-3 to 9-10.

115. *Id.* at 9-37 to 9-63.

116. *Id.* at 9-64 to 9-76.

117. *Id.* at 9-76 to 9-88. This section primarily deals with the mitigation of development on wetlands.

118. *Id.* at 9-88 to 9-106. Incentives, which typically include bonus density, can be used to achieve certain environmental goals such as open space preservation.

119. *See id.* at 12-1 to 12-32. This chapter will not be discussed in this article, as it is the subject of Professor Mandelker's article.

within development regulations for environmental review under state law when a project receives development approval.<sup>120</sup>

Chapter Fourteen explores tax equity devices and tax relief programs, and most significant for environmental interests, discusses incentives to promote redevelopment<sup>121</sup> and contains a model for agricultural districts and the use valuation of agricultural lands.<sup>122</sup> The Guidebook concludes with Chapter Fifteen discussing statewide geographic information systems, a critical planning tool more widely available that can produce maps of and present data about existing and future land uses that contain valuable environmental information.<sup>123</sup>

### C. Early Reviews of the Guidebook

The Guidebook is more than a major historical document that walks readers through the development of land use controls in America since the turn of the last century, as it rationally lays out a roadmap for the future of land use controls. While many have applauded the work of the American Planning Association, it has not been entirely without detractors. For example, James M. McElfish, Jr., a member of the Growing Smart Directorate representing the natural environment,<sup>124</sup> provided a statement which appears at the end of the two-volume work where he points to areas in the Guidebook which are, in his opinion, problem areas requiring some caution.<sup>125</sup> Specifically, McElfish criticizes the model language for the comprehensive plan element, as it does not include a required element for the protection of natural and scenic resources.<sup>126</sup> McElfish further criticizes the Guidebook's approach to protect natural resources, waterways, forest cover and habitat connections which, in his opinion, rely too heavily on the use of overlay districts. He argues that this is an old way of thinking and that "[m]any important landscape features and elements

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120. GUIDEBOOK, *supra* note 41, at 12-4.

121. *Id.* at 14-29 to 14-51.

122. *Id.* at 14-75 to 14-89.

123. *Id.* at 15-3 to 15-16.

124. James McElfish is the Director of the Sustainable Land Use Program at the Environmental Law Institute.

125. GUIDEBOOK, *supra* note 41, at A-2 to A-7.

126. Rather, the Guidebook allows for this element to be optional. McElfish notes that Pennsylvania's recent Growing Smarter law requires all local comprehensive plans to include "[a] plan for the protection of natural and historic resources to the extent not preempted by federal or state law. This clause includes, but is not limited to, wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, flood plains, unique natural areas and historic sites." *Id.*

are not limited to 'critical and sensitive areas' but are more pervasive; and impacts on the environment are now understood to be cumulative as well as acute."<sup>127</sup> He suggests that states enable local governments to adopt protective and mitigative local laws that apply to critical and sensitive overlay areas.<sup>128</sup> McElfish also raises concerns about the impact of the Guidebook's effort to promote timely land use decision-making by local governments in Chapter Ten, specifically the approach that renders an application to be "deemed approved" for failure to act within a prescribed period of time.<sup>129</sup>

Representatives of the built environment also offered a critique of divergent perspectives from what was contained in the Guidebook.<sup>130</sup> Among the concerns identified by Paul Barru were a lack of a definition of "natural resource," which could lead to overly restrictive local regulations,<sup>131</sup> and a focus on limiting development in sensitive areas without more guidance as to what they are and what might be the best ways to protect them.<sup>132</sup>

With the passing of several months since the release of this comprehensive publication, a number of property rights organizations have begun to weigh in opposition to the final product. For example, the Signage Foundation for Communication Excellence believes that "[t]he Legislative Guidebook pushes for widespread and zealous control of actions on private property, both outside and inside."<sup>133</sup> Organizations such as these miss the point that

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127. *Id.*

128. *Id.* at A-4.

129. *Id.* McElfish states that "[t]his is bad policy and bad law, and it does not represent best practice among the states." *Id.* While acknowledging that timely decision-making is important and even critical, he believes that this approach allows for subversion of the comprehensive plan. GUIDEBOOK, *supra* note 41, at A-4.

130. Penned by Paul S. Barru, a member of the Directorate representing the built environment, his report was joined by the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the International Council of Shopping Centers, the Self Storage Association, the National Multi Housing Council/National Apartment Association, and the American Road and Transportation Builders Association. *Id.* at A-8 to A-27.

131. *Id.* at A-26.

132. *Id.* at A-8 to A-9. Barru's report identifies seven additional specific concerns with the Guidebook approach, offering recommendations in each of these areas. They are: standing and reopening of settled issues, supplementation of the record, sanctions on local governments for failure to update plans, exhaustion of remedies, moratoria, vested rights and third party initiated zoning petitions. *See id.* at A-10.

133. R. James Clause, PhD, *Planners Ploy Imperils Property Rights*, SIGN OF THE TIMES, May 2002. Clause, co-executive director of the Signage Foundation for Communication Excellence, continues his criticism of the Guidebook in his editorial by asserting:

the Guidebook is neither recommending one particular course of action, nor charting new territory for the granting of any additional governmental rights not already authorized by state statutes or by common law. Syndicated columnist Neal Pierce summarized the entire Growing Smart effort well. Upon the release of the Growing Smart Legislative Guidebook he commented, "I call it an extraordinary gift to the nation—tools we need to cope with a tidal wave of development."<sup>134</sup> He called this a "landmark planning guide" that "may remake America's future."<sup>135</sup> With the wealth of resources in the Guidebook that include information, options and citations to more information and options, this publication offers one-stop shopping for anyone interested in exploring how to make the land development more efficient, more dynamic and more sustainable. It should take its place as a "must read" resource for land use practitioners including all of those involved in the real estate development arena.<sup>136</sup>

#### Part IV

##### A. The Role of the Government In Providing Funding is Critical

One of the greatest challenges in achieving state statutory and regulatory reform in this area is the lack of funding to support outreach, fact finding and the reasoned study to generate viable recommendations. Even once this work is done, fiscal resources will need to be available for states and municipalities to implement the modern strategies. This is one significant place where the federal government can, and to some extent has attempted to, take the lead. Bi-partisan legislative task forces, study groups and caucuses exploring smart growth related agenda items are visible in the House of Representatives and the Senate. Congress

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It creates handpicked committees of unaccountable people and vests them with incredible powers over everyday activities. It designs cumbersome bureaucratic processes in an effort to exhaust administrative remedies, reach finality and pursue justice in the courts. It empowers neighbors to check on each other's activities and report them to authorities. It grants politically connected nonprofit organizations unfettered access to private property that exceeds access enjoyed by law-enforcement agencies today. All with no personal liability.

*Id.*

134. Neal Peirce, *Landmark Planning Guide May Remake the U.S.*, THE TIMES, Feb. 13, 2002, available at <http://www.postwritersgroup.com/archives/peir0211.htm> (last visited Sept. 17, 2002).

135. *Id.*

136. *Id.*



has also directed the General Accounting Office to conduct a series of studies to assess the impact of federal policies on sprawl<sup>137</sup> and to determine what it is that the federal government can do to assist municipal officials.<sup>138</sup> But perhaps most important, legislation has been introduced to provide some level of financial support to facilitate reform efforts in the states. This proposal is a welcome effort in the spirit of federal funding programs that supported widespread comprehensive planning and regional planning in the 1970s.

## B. The Community Character Act of 2001

In April and May of 2001, Representative Earl Blumenauer (OR) and Senator Lincoln Chafee (RI) introduced the Community Character Act of 2001 (HR 1433/S 975) "to assist States with land use planning in order to promote improved quality of life, regionalism, sustainable economic development, and environmental stewardship."<sup>139</sup> Reiterating the federal government's belief that land use planning should be conducted at the state and local level, the Act asserts that there is an important role for the federal government in supporting state and local comprehensive planning and community development.<sup>140</sup>

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137. GENERAL ACCOUNTING OFFICE, EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR (1999). In a somewhat disappointing report for lack of substantive findings, the GAO explains, "The shortage of quantitative evidence does not mean that federal programs and policies do not have an impact on 'urban sprawl'; it simply means that the level of the federal influence is difficult to determine." *Id.* at 3. However, the conclusion in their follow-up report five months later, that federal influence on sprawl is small as compared with the influence state and local governments have in local growth issues, was a point of disagreement between the GAO and the Environmental Protection Agency. See GENERAL ACCOUNTING OFFICE, LOCAL GROWTH ISSUES-FEDERAL OPPORTUNITIES AND CHALLENGES 146-48 (2000).

138. GENERAL ACCOUNTING OFFICE, LOCAL GROWTH ISSUES-FEDERAL OPPORTUNITIES AND CHALLENGES (2000). Among the GAO findings was a recognition that "Opportunities exist for federal agencies to improve their coordination with communities on local growth issues. . . ." *Id.* at 33.

139. See H.R. Res. 1433, 107th Cong. (2001); S. Res. 975, 107th Cong. (2001).

140. See H.R. Res. 1433, 107th Cong. (2001); S. Res. 975, 107th Cong. (2001). The Act makes the following findings in Section 2:

- (1) inadequate land use planning at the State and tribal levels contributes to-
  - A) increased public and private capital costs for public works infrastructure development;
  - B) environmental degradation;
  - C) weakened regional economic development; and
  - D) loss of community character
- (2) land use planning is rightfully within the jurisdiction of State, tribal and local governments;

The two bills have a common goal of revamping outmoded land use policy, however, the programs would be administered differently. The Senate bill charges the Secretary of Commerce with the responsibility of establishing a program to award grants to the States. In the House bill, the Secretary of Housing and Urban Development is responsible for enacting the program. Both bills cap an award to \$1,000,000. However, under the Senate's bill, the Secretary may award an additional \$100,000 to fund pilot programs. The cap was raised over the 2000 proposal, which would have only authorized grants of up to \$500,000 to states for the purpose of assisting in the development or revision of land use planning legislation in the states where the enabling acts are inadequate or outmoded. In addition, and as a second priority, for states that do have updated land use planning legislation, the grants could support the creation or revision of state comprehensive land use plans or plan elements.<sup>141</sup> Either way, the Community Character Act represents a potential annual appropriation of \$50 million.

It is clear that the proposed legislation was influenced by the American Planning Association's Growing Smart initiative.<sup>142</sup>

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- (3) comprehensive land use planning and community development should be supported by the Federal, State and tribal governments;
  - (4) State and tribal governments should provide a proper climate and context through legislation in order for appropriate comprehensive land use planning, community development, and environmental protection to occur;
  - (5) (A) many States and tribal governments have outmoded land use planning legislation; and  
(B) many States and tribal governments are undertaking efforts to update and reform land use planning legislation;
  - (6) the federal government and States should support the efforts of tribal governments to develop and implement land use plans to improve environmental protection, housing opportunities and socioeconomic conditions for Indian tribes; and
  - (7) the coordination of use of State and tribal resources with local land use plans requires additional planning at the State and tribal levels.

H.R. Res. 1433, 107th Cong. (2001); S.Res. 975, 107th Cong. (2001).

141. H.R. Res. 1433, 107th Cong. § 2 (2001); S. Rep. 975, 107th Cong. § 2 (2001); S. Rep. 2995, 106th Cong. § 2 (2000).

142. Observers are acknowledging that this bill will help to ensure that the Guidebook reforms will get on to the legislative agendas in the statehouses. Letter from Samuel Staley, Director, Urban Futures Program, Reason Public Policy Institute, to Patricia Salkin, Associate Dean and Professor of Government Law, Albany Law School (Apr. 10, 2002) (on file with the author). Staley also correctly predicts:

If history is any indication . . . these funds will have far flung impacts. After all, technical assistance grants in the 1950s were largely responsible for the growth of the modern planning profession as well as the much

For example, to be eligible for funding, the Act requires that states demonstrate consistency with the following: citizen participation in the development, adoption and updating of land use plans; a routine schedule of plan updates; multi-jurisdictional cooperation in the development of the plans to provide for resource sustainability; an implementation element in the state plan that provides timetables for action, definition of roles, consistency with State capital budget objectives, and future infrastructure needs; land use plans that are consistent with established professional planning standards; and comprehensive planning that would: (a) promote sustainable economic development and social equity; (b) enhance community character; (c) coordinate transportation, housing, education, and social equity; (d) conserve historic resources, scenic resources and the environment; and (e) sustainably manage natural resources. These are many of the themes contained in the Growing Smart Working Papers and in the Growing Smart Guidebook.

#### 1. March 2002 Congressional Hearing on the Act

A Congressional hearing on the Community Character Act was held on March 6, 2002 before the Senate Committee on Environment and Public Works.<sup>143</sup> Senator Lincoln Chafee, a co-sponsor of the bill, reiterated the belief that land use control is best left to the state and local levels.<sup>144</sup> He pointed out that “[t]hrough enactment of numerous and often-times incompatible laws regarding transportation, housing, environment, energy, and economic development, the federal government has created a demand for state and local planning.”<sup>145</sup> Not everyone is enthusiastic, however,

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maligned, pro-sprawl zoning ordinances ensconced in the vast majority of today’s cities and counties.

*Id.*

143. See *Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env’t & Pub. Works*, 107th Cong. (2002), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002).

144. In his statement to the Senate Committee, Senator Chafee explained, “The bill recognizes that land use planning is appropriately vested at the state and local levels. . . . The bill does not prescribe any particular approach to land use planning, because each community must decide for itself what is appropriate.” See *id.*

145. *Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env’t & Pub. Works*, 107th Cong. (2002), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002). The Senator also offered that “The Community Character Act should be viewed as providing the federal payment for an un-funded mandate whose account is overdue.” *Id.*

about the proposed Act. David A. Sampson, Assistant Secretary for Economic Development at the U.S. Department of Commerce testified that, “[t]he Administration cannot support S. 975 because it calls for resources that are not included in the President’s budget to support activities that can be accomplished through existing authorities and appropriations, and a centralized approach to land use planning is not the most effective solution to address issues of sprawl and unfocused economic development.”<sup>146</sup> The Assistant Secretary may have misunderstood the proposed legislation in that it does support and enable a decentralized local land use planning and control function by providing the necessary funding to facilitate better-planned and more strategic land development.

Elizabeth Humstone, Executive Director of the Vermont Forum on Sprawl, testifying on behalf of the American Planning Association pointed out that, “unlike the Hoover model, the Community Character Act does not suggest imposing a single model on all of the states but rather supports reform and implementation that is developed based on the unique needs and context of individual states and communities.”<sup>147</sup> She makes the environmental connection in explaining the reason for the Act’s strong support, offering, “it responds to widespread citizen interest in smart growth by providing critical resources to help state and local leaders, business and environmental interests, and concerned citizens bring about positive change in their communities through better planning.”<sup>148</sup> Humstone pointed out the need to promote multi-state cooperation on these issues “because natural resources, watershed, city borders, and development impacts do not stop at artificial political boundaries.”<sup>149</sup> She reminded the

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146. *Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env’t & Pub. Works*, 107th Cong. (2002) (testimony of David A. Sampson), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002). Given the statements made by Administrator Whitman and others, one can surmise that perhaps the Department of Commerce is facing a political issue - to wit, the original Hoover model acts came from the Department of Commerce in the 1920s, and today, the reform efforts to modernize those Acts are not being led by the Department of Commerce, but rather by the Environmental Protection Agency and by the Department of Housing and Urban Development.

147. *Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env’t & Pub. Works*, 107th Cong. (2002) (testimony of Elizabeth Humstone), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002).

148. *Id.*

149. *Id.*



Committee that Environmental Protection Agency Administrator Christie Todd Whitman expressed Administration support when she remarked that, "[a]ddressing new environmental challenges requires us to manage all of our resources better - economic, social and environmental - and manage them for the long term. That is why Smart Growth is so important - it is critical to economic growth, the development of healthy communities, and the protection of our environment all at the same time. The Bush Administration - and the EPA especially - understands the importance of Smart Growth."<sup>150</sup> In a letter signed by major national environmental and land use organizations, the link between land use decision-making and environmental regulation was again emphasized.<sup>151</sup>

A statement in support of the Act was submitted by the National Association of Realtors (NAR).<sup>152</sup> The NAR support for the bill is based upon the fact that it recognizes that land use planning is rightfully a state and local government function; that it provides needed assistance to states and localities to better plan for inevitable growth; that it requires the planning performed under the Act to provide for housing opportunity and choice, as well as for a range of affordable housing options, and that it promotes improved quality of life, sustainable economic development and protection of the environment.<sup>153</sup>

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150. *Id.*

151. In a letter to Senators Jeffords and Smith dated March 4, 2002, representatives of the American Institute of Architects, the American Planning Association, the American Society of Landscape Architects, the Defenders of Wildlife, the National Association of Regional Council, the Natural Resources Defense Council, the National Trust for Historic Preservation, the National Wildlife Federation, Scenic America, the Sierra Club and Smart Growth America wrote:

Americans are increasingly aware and concerned about unplanned growth and its byproducts-loss of open space, congestion, limited housing options and loss of ecological biodiversity. . . . Good planning and design make good business sense, in addition to minimizing some of the harmful impacts that unmanaged growth can have on local and regional ecosystems.

*See Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env't & Pub. Works, 107th Cong. (2002) (testimony of Elizabeth Humstone), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002).*

152. *Community Character Act: Hearing on S. 975 & Brownfield Site Redevelopment Assistance Act: Hearing on S. 1079 Before the Senate Comm. on Env't & Pub. Works, 107th Cong. (2002) (statement of the National Association of Realtors), available at [http://www.senate.gov/~epw/stm1\\_107.htm](http://www.senate.gov/~epw/stm1_107.htm) (last visited Oct. 17, 2002).*

153. *Id.* These are consistent with the five principles that have been identified by NAR as essential for all smart growth policies: 1) Housing opportunity and choice; 2) Building better communities; 3) Protecting the environment; 4) Protecting private

On April 25, 2002, the Senate Committee approved the Act by a vote of 12-7.<sup>154</sup> Senators voting in favor of the measure were: Republican Senators Lincoln Chafee (RI) and Arlen Specter (PA); and Democratic Senators Max Baucus (MT), Harry Reid (NV), Bob Graham (FL), Joseph Lieberman (CT), Barbara Boxer (CA), Ron Wyden (OR), Thomas Carper (DE), Hillary Rodham Clinton (NY), Jon Corzine (NJ) and James Jeffords (VT).<sup>155</sup> It is worth noting that there have been significant smart growth reforms introduced and/or enacted in each of the states that these members represent. Senators voting against the Act at the Committee meeting included the remaining Republican members of the Committee: Michael Crapo (ID), Ben Nighthorse Campbell (CO), Christopher Bond (MO), George Voinovich (OH), Robert Smith (NH), James Inhofe (OK),<sup>156</sup> and John Warner (VA).<sup>157</sup> None of these votes were surprising based upon the national "state of the states" research recently completed by the American Planning Association,<sup>158</sup> except for the Senator from Colorado who seemed to go against the smart growth movement in his state.

## 2. The Critics and Advocates Continue to Debate

Both the critics of the Community Character Act and the advocates favoring its passage continue to wage debate in the media and on Internet web sites. The American Association of Small Property Owners (AASPO) has dedicated space on their web site to fight the passage of this Act,<sup>159</sup> as has the American Policy

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property rights; and 5) Implementing fair and reasonable public sector fiscal measures. *Id.*

154. See Audrey Hudson, *Bill to Give Feds Control of Zoning Kept Private*, WASH. TIMES, Apr. 26, 2002, available at <http://www.washtimes.com/national/20020426-496130.htm> (last visited Jan. 24, 2003).

155. *Id.*

156. Senator Inhofe issued a press release announcing that he is leading the fight against the Community Character Act over his concerns that the legislation transfers too much power to the federal government at the expense of states and local communities. He argues that although proponents insist that the federal grant program would be voluntary, "this ignores the fact that such a program creates a strong incentive for conducting planning activities solely in accord with federally-imposed guidelines." Press Release, Senator James M. Inhofe, Inhofe Leads Fight Against Land-Use Bill: Says "Community Character Act" Undermines Federal-State Balance (Apr. 25, 2002), at <http://inhofe.senate.gov/environment.htm> (last visited Dec. 12, 2002).

157. *Id.*

158. See generally 2002 STATE OF THE STATES, *supra* note 1.

159. See Am. Assoc. of Small Property Owners, *AASPO Alert - U.S. Senate Sneak Attack on Property Rights*, at <http://www.aaspo.com/aaspohighlights/sneakattack.asp> (last visited Jan. 23, 2003). The Association issued a web alert entitled "U.S. Senate Sneak Attack on Property Rights," and described that "the kamikaze duo of Jeffords

Center who declared the Act “Eco-tyranny from Washington.”<sup>160</sup> In fact, the President of AASPO likened the Senate hearing to watching a horror movie.<sup>161</sup> She continued in a Washington Times Commentary, “[s]eeing the issues threaded throughout, such as ‘pedestrian oriented’, creating statutes to preserve ‘vistas and views,’ and ‘affordable housing,’ makes it quite clear that this is just the tip of the iceberg.”<sup>162</sup> The conservative National Center for Public Policy Research describes the Act as representing, “nothing more than bribe money for use by far-left environmentalists to advance their political agenda.”<sup>163</sup>

Just as the critics have been flinging rhetoric and some misperceptions of the Act, the proponents too have been busy trying to keep support and positive attention focused on the legislation. For example, the American Society of Landscape Architects has published a fact sheet on the Act for their members announcing the Society’s support for the measure.<sup>164</sup> The Society explains that the bill does not mandate that states change their existing laws; that the program is completely voluntary; that the Act addresses Americans’ concerns with sprawl and its by-products (loss of open space, congestion, strip malls, and loss of ecological biodiversity); that good planning and design makes good business sense; that coordinated land use planning can minimize some of the harmful impacts that unplanned development can have on lo-

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and Chafee have swung into action to take away your property rights.” *Id.* Furthermore, they label the Act as “federal zoning.” *Id.* Their website also links to a Wall Street Journal article by Thomas Bray, a staff columnist with the Detroit News, who asserts that the Act is akin to the federal government running a local zoning board. See Thomas J. Bray, ‘Character’ Development? Jim Jeffords wants to run your local zoning board, OPINIONJOURNAL.COM (Apr. 30, 2002), at [http://www.aaspo.com/aaspo\\_highlights/wsjoopedcca.asp](http://www.aaspo.com/aaspo_highlights/wsjoopedcca.asp) (last visited Jan. 23, 2003).

160. The conservative American Policy Center told their members in April 2002 that, “S. 975 is simply a bribe offered by the federal government to localities to update their zoning plans. The feds promise to pay for 90% of the costs of the updates - BUT ONLY IF THE LOCALITY DOES IT THEIR WAY.” See *S. 975: Eco-tyranny from Washington*, APC NEWS WIRE, Apr. 18, 2002, at [http://www.americanpolicy.org/news\\_wire/v5n4.htm](http://www.americanpolicy.org/news_wire/v5n4.htm) (last visited Jan. 23, 2003).

161. F. Patricia Callahan, *Smart Growth Plan’s Perils*, WASH. TIMES, Apr. 3, 2002, available at <http://www.aaspo.com/resources/ccaoepd.asp> (last visited Dec. 12, 2002).

162. *Id.*

163. *Lincoln Chafee Advances Bill to Usurp Local Control of Land Use Planning and Zoning*, Apr. 10, 2002, at [www.libertymatters.org/4.17.02characteract.htm](http://www.libertymatters.org/4.17.02characteract.htm) (last visited Jan. 23, 2003).

164. Am. Soc’y of Landscape Architects, *Fact Sheet: Community Character Act*, at [www.asla.org/Members/publicaffairs/factsheets/communitycharacter.html](http://www.asla.org/Members/publicaffairs/factsheets/communitycharacter.html) (last visited Jan. 23, 2003). The Society explains that it supports the Act, “as a means to promote more livable communities and stewardship of the natural environment, both of which are important aspects of the landscape architecture profession.” *Id.*

cal and regional ecosystems; and the Act recognizes that land use planning should not stop at arbitrary jurisdictional boundaries.<sup>165</sup> Paul Farmer, Executive Director of the American Planning Association, announced the organization's support of the measure explaining that "effective planning is the best way to deal with growth issues facing state and communities and passing [CCA] is among the important things Congress could do to help states and communities tackle everything from downtown revitalization and traffic congestion to urban sprawl and open space protection."<sup>166</sup> Dozens of other groups, including the Sierra Club, the National Wildlife Federation and the National Multi Housing Council have expressed support for the Act.

One thing is clear from the positions that have been creatively carved out by the various stakeholder/advocates: sustained vocal leadership will be critical to ensuring that the public is fairly educated on the various aspects of the Community Character Act, because without it, the opposition has waged a war of words carefully selected to reach middle America. Simultaneous with a public education campaign,<sup>167</sup> an effort must be made to continue to educate state and local lawmakers about both the options in the Guidebook and about the potential for federal fiscal support to enable state and local planning and better decision-making about the quality of life in our communities. All of these constituencies are critical supports necessary to attract the attention of Members of Congress and the White House who must ultimately appropriate and allocate the funding to make a difference.

### Conclusion

There can be little doubt that the publication of the Growing Smart Legislative Guidebook legitimizes the transformation of American land use law from an arcane technique designed to separate different types of uses, to a recognition that land use law, policy and practice have evolved into a much more dynamic network of locally adopted laws and regulations designed to, among

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165. *Id.*

166. *Community Character Act Introduced in the House*, Legislation & Policy From Washington, Sept. 19, 2000, at <http://www.planning.org/fromwashington/fromwash106/vol1no16.htm> (last visited Jan. 23, 2003).

167. This can be done in very cost-effective means through the creative use of the web sites of various organizations, list serves and other studies and reports that can be made available on-line. The investment is in the sweat-equity of organizational staff, not so much in printing and postage costs that might have put non-profit budgets over the top in the past.



other things, promote sound environmental protection goals. The evidence of unprecedented gubernatorial and legislative interest in the subject of land use reform bodes well for the future of the Guidebook in terms of real time opportunities for stakeholders to advocate for modernization of restrictive enabling acts based on models nearing centurion status. One distinguishing feature of the next wave of local land use and environmental regulation is that by necessity we will witness a plethora of intermunicipal and interjurisdictional cooperation. Renewed partnerships between the state and regional and local governments will undoubtedly produce more sophisticated and strategic approaches to best protect and preserve environmental concerns and resources under the guise of local land use regulation. The bottom-up approach will succeed with proper funding and technical assistance from the states and federal government. It will still remain appropriate for the federal and state governments to set forth a broad sustainable environment policy agenda and goals, but the local governments will be better equipped with a new and/or revised set of local planning and land use law tools to implement appropriate mechanisms that can achieve these goals.

Although Euclidean zoning will not go into full retirement, more flexible zoning and land use control techniques that can more effectively address complex environmental land use issues will reshape local development regulations in the next quarter century.