



TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Digital Commons @ Touro Law
Center

Scholarly Works

Faculty Scholarship

Fall 2004

The Green Development Movement: Smart Growth With a Green Label

Patricia E. Salkin
Touro Law Center, psalkin@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

33 Real Est. L.J. 214 (Summer 2004)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Zoning and Land Use Planning

PATRICIA E. SALKIN*

The Green Development Movement: Smart Growth With a Green Label

“Urban Growth is our opportunity, not our enemy. It invites us to correct the past, to build places that are productive for business and for the people who live there, places that are infused with nature and stimulating to man’s creative sense of beauty—places that are in scale with people and so formed as to encourage and give strength to the real community which will enrich life, build character and personality; promote concern, friendship and brotherhood.”

Jim Rouse, Developer (1966).

I. Introduction

Green development¹ means that as real estate is developed, it occurs in a manner that integrates social and environmental goals with financial considerations.¹ It is more than simply green space, in fact, “for one project, the most visible ‘green’ feature might be energy performance; for another, restoration of prairie ecosystems; for yet another, the fostering of community cohesion and reduced dependence on the automobile.”² In 1991, the Rocky Mountain Institute launched “Green Development Services” to assist architects, developers, and other real estate professionals to integrate energy-efficient and environmentally responsive design into specific projects.³ The Institute identified three broad categories of threads running through typical green development projects: 1) environmen-

*Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. This column is based upon an August 2004 presentation by the author at the ALI-ABA Land Use Institute in Boston, Massachusetts.

¹Rocky Mountain Institute, *Green Development: Integrating Ecology and Real Estate* (John Wiley & Sons, Inc. 1998) at 4.

²Id.

³Id. at xi-xii.

tal responsiveness; 2) resource efficiency; and 3) community and cultural sensitivity.⁴

A number of organizations have gotten involved with the “green development” movement. For example, in 2002, the World Wildlife Federation urged the British government to encourage more eco-friendly home building because housing in the UK is a “greedy consumer of water, timber, and energy, and it is responsible for nearly 30% of the country’s carbon dioxide emissions.”⁵ In Southern California, the first “green” or environmentally sensitive housing development was unveiled in November 2003 attracting more than 2,000 curious people in the span of four hours.⁶ The project consisted of a planned 1,260 homes to exceed state energy efficiency requirements by 20% and incorporate solar panels hidden in roofs and the

use of recycled materials for the floors (including tires, bricks, bamboo, and cork).⁷

Within the “green development” movement, “‘green buildings’ are facilities designed, built, operated, renovated, and disposed of using ecological principles for the purpose of promoting occupant health and resource efficiency plus minimizing the impacts of the built environment on the natural environment.”⁸ The goal of developing a green building is to provide a structure that is sustainable, having high levels of energy and water efficiency, appropriate use of land and landscaping, and the use of environmentally friendly materials.⁹ According to one recent study, “The number of buildings applying to the U.S. Green Building Council (USGBC) for green building certification has been doubling each year since its implementation,

⁴Id. at 6.

⁵Amanda Brown, “Government Urged to Build Eco-Friendly Homes,” Press Association Limited (September 1, 2002).

⁶David Reyes, “‘Green’ Homes Aren’t a Black-or-White Issue: Some tout O.C. project as being eco-friendly, but critics said it has disturbed wild lands,” Los Angeles Times, Metro, Part B p. 5 (November 16, 2003).

⁷Id.

⁸Charles J. Kibert, “Green Buildings: An Overview of Progress,” 19 J. Land Use & Envtl. Law 491 (Spring 2004).

⁹Id.

from a few buildings in 1999 to 407 buildings in 2003.”¹⁰

A movement for more “green” residential development has emerged across the country in places such as Denver, Kitsap County, Washington, Clark County, Washington, Baltimore and Atlanta, and in 1992 the City of Denver was the recipient of an award for its green buildings at the first U.N. conference on sustainable development in Rio de Janeiro.¹¹ The City of Seattle adopted and implemented a sustainable building policy calling for, among other things, that all City-funded projects and renovations with over 5000 square feet of occupied space meet certain standards and ratings adopted by the USGBC.¹² States are responding to the

movement as well. For example, (former) Governor Ridge created by Executive Order the Governor’s Green Government Council in Pennsylvania,¹³ and Governor Edward G. Rendell established the Growing Greener II effort to invest in the future by turning existing infrastructure into vibrant new business, cleaning up the environment and creating lively towns and neighborhoods.¹⁴

II. Impact of the Green Building Movement on Local Land Use Planning

In June 2004, the Climate, Community and Biodiversity Alliance¹⁵ released for public comment the first-ever draft standards for certifying land

¹⁰Id.

¹¹Id. See also, <http://www.sustainable.doe.gov/success/gdp.shtml> (site visited July 2004). The City’s Green Builder Program aims to influence building practices to: conserve energy, water and other natural resources; preserve the health of the environment; strengthen the local economy; and promote high quality of life for residents. The Program offers certification of green homes on a scale of one to four stars. Id. For information on other cities with green building programs, see: <http://temp.sfgov.org/sfrenvironment/aboutus/innovative/greenbldg/projects.htm> (site visited July 2004) (San Francisco, CA) and <http://www.sustainable.doe.gov/buildings/gbprogrm.shtml> (site visited July 2004).

¹²See, <http://www.cityofseattle.net/sustainablebuilding/> (site visited July 2004).

¹³See, <http://www.gggc.state.pa.us/default.htm> (site visited July 2004).

¹⁴See, <http://www.growinggreener2.com> (site visited July 2004).

¹⁵The CCBA is a unique partnership among research institutions, corporations and environmental groups. The CCBA is made up of Participating Groups and Advising Institutions. The Participating Groups founded the

use projects that reduce global warming while conserving the environment and alleviating poverty.¹⁶ The comment period is due to close in July 2004, and it is anticipated that a pilot implementation program will begin shortly thereafter.¹⁷

In describing the “big picture” relationship between the green building movement and local land use, the USGBC “backgrounder” memo on land use explains:

Development and construction projects are often destructive to local ecology. For example, storm-

water runoff from developed areas can impact water quality in receiving waters, hinder navigation and recreation, and disrupt aquatic life. Site clearing and earth moving during construction often results in significant erosion problems because adequate environmental protection strategies are not employed. In addition, development activities may encroach on productive agricultural land areas and open space. Fortunately, steps can be taken to reduce impacts on previously undeveloped lands and to improve previously contaminated sites.¹⁸

The Urban Land Institute noted that it is a myth that zoning and other land use regula-

CCBA and contributed to development of the CCB standards. The Advising Institutions help process public comments on the standards and contribute to subsequent drafts of the Standards. See, <http://www.climate-standards.org/who/index.html> (site visited July 2004).

¹⁶See, <http://www.climate-standards.org/standards/index.html> (site visited July 2004). According to GreenBiz.com, “the CCB standards are primarily designed for projects that mitigate or adapt to climate change. Climate change land use projects, also called land use, land-use change and forestry projects and abbreviated LULUCF, reduce or prevent emissions (e.g., conservation of threatened ecosystems), sequester carbon (e.g., ecosystem restoration, reforestation, agro-forestry, afforestation) or develop substitutes for fossil fuels (bioenergy projects). The Standards, however, can evaluate land management projects outside of the climate change arena. The Standards will work in developing, developed or emerging economies and can be used for projects with private investment, public investment or a combination.” See, http://www.greenbiz.com/news/news__third.cfm?NewsID=26819&CFID=14936839&CFTOKEN=83946939 (site visited July 2004).

¹⁷Id. According to the CCBA, the CCB Standards are intended to serve as a voluntary tool for stakeholders to evaluate multiple-benefit projects. Qualified third-party certifiers will evaluate projects to see if they meet the minimum requirements and to score projects across the three categories. Approved projects will be able to market this fact.

¹⁸GreenBiz.com, “Land Use Backgrounder,” available at http://www.greenerbuildings.com/backgrounders__detail.cfm?UseKeyword=Land%20Use (site visited July 2004).

tions in and of themselves protect the environment, and that what is needed are land use regulations and policies that permit more design flexibility, facilitate the protection of natural resources, and allow developers to respond to market demands for environmentally sensitive projects.¹⁹ The US-GBC hosts a website that offers a variety of resources on green development.²⁰ The following case studies on land use are posted to the website and are offered here as examples of how local land use planning and zoning can promote green development.

A. City of San Jose, California

In 1994, San Jose's City Council adopted "San Jose 2020" as its general plan. The plan includes the "Sustainable City Major Strategy," which details goals that will make San Jose a city designed, constructed, and operated to efficiently use its natural resources and minimize waste for the use of present and future generations. In 2000, the City Council adopted three specific policies for "Green Building" incorporating green building principles and practices

into all phases of City building construction, adopting a Green Building Rating System, and providing leadership and guidance to the private sector.²¹

B. Marine, Minnesota

Jackson Meadow's 64 homes are clustered on just 40 acres of a 300-acre site — providing a sharp contrast from the endless suburban lawns found elsewhere. The rest of the land is used for agricultural crops, a tree farm, a city park, and a public nature area with a trail system. An open-space corridor — or greenbelt — is maintained, connecting the area to nearby William O'Brien State Park. In addition, native prairie and woodland were restored.

Assistance came from the City of Marine, the Jackson Meadow Homeowners Association, and the state Department of Natural Resources. The development won an Excellence in Land Use Award.²²

C. Spring Island Development – Okatie, South Carolina

Spring Island is a private residential community situated on 3,000 acres. The 410-home community offers a championship 18-hole golf course, tennis, fishing, kayaking, sporting clays, and more than 30 miles of walking, biking, and equestrian trails.

All community facilities were designed to be understated, and the

¹⁹Urban Land Institute, *Environment and Development Myth and Fact* at 10 (2002).

²⁰See, www.usgbc.org (site visited July 2004).

²¹http://www.greenerbuildings.com/case_studies_detail.cfm?LinkAdvID=39243 (site visited July 2004).

²²http://www.greenerbuildings.com/case_studies_detail.cfm?LinkAdvID=39570 (site visited July 2004).

guidelines for Spring Island's homes established new concepts — such as maximum square-footage requirements — in site planning. Setback requirements from roadways and golf fairways were more than twice the distance required by the county. A “nature curtain” concept was created to allow homeowners to landscape around their homes, but leave surrounding vegetation untouched — saving critical wildlife habitat.

Prior to purchasing the property, the developer determined that the best use of the island was the preservation of its extraordinary natural beauty and wildlife, as well as its 18th century residential ruins, slave dwellings, and other existing landmarks. The concept of a private nature park evolved, and, as a result, more than 1,200 acres have been preserved as a permanent nature reserve, managed by the Spring Island Trust. The Mobley Nature Center, headquarters for the trust, also contains a small natural history museum. The conservation programs put in place by the trust have used the island's natural beauty as a catalyst for educational opportunities.²³

Audubon International and the Florida Green Building Coalition offer the following benchmarks/principles of sustainability against which proj-

ects are rated for voluntary compliance:

- * Understanding the unique attributes of each piece of designated land
- * Protecting local wildlife
- * Conserving and maximizing native and naturalized plants
- * Commitment to water quality and conservation
- * Commitment to green building
- * Dedication to education and outreach to foster sustainable communities²⁴

As so aptly put in one of the USGBC resource memos, “As links are made between environmental improvement, economic development, and good social policy, more business decision-makers and real estate developers are recognizing the importance of selecting and maintaining sustainable sites. Thoughtful site selection and planning can also allow the developer to integrate unique neighborhood characteristics during project design — ensuring a good reception from community stakeholders.”²⁵

²³http://www.greenerbuildings.com/case_studies_detail.cfm?LinkAdvID=38916 (site visited July 2004).

²⁴“Audubon International Certifies First Eco-Friendly Community Developments” available at: http://www.greenbiz.com/news/news_third.cfm?NewsID=26273&CFID=14936839&CFTOKEN=83946939 (site visited July 2004).

²⁵GreenBiz.com, “Land Use Backgrounder,” available at <http://www.greenerbuildings.com/>

III. Drafting Plans and Regulations to Produce Green Friendly Projects

At the local government level, municipalities may have an unprecedented opportunity to join the “green friendly” movement by adopting and amending land use controls and standards that promote sustainable development.²⁶ The Next Generation Project, undertaken by the Yale Center for Environmental Law and Policy, pointed to the unfortunate disconnect between local environmental policy and land use decisionmaking.²⁷ Professor John Nolon, former director of the Land Use Law Center at Pace University School of Law, has been researching and writing in the area of local environ-

mental regulation for some time.²⁸ He offers the following observation:

. . . there has been a remarkable and unnoticed trend among local governments to adopt laws that protect natural resources. These local environmental laws take on a number of forms. They include local comprehensive plans expressing environmental values, zoning districts created to protect watershed areas, environmental standards contained in subdivision and site plan regulations, and stand-alone environmental laws adopted to protect particular natural resources such as ridgelines, wetlands, floodplains, stream banks, existing vegetative cover, and forests. The purposes of these laws are to preserve natural resources from the adverse impacts of land development and to control non-point source pollution.²⁹

To assist local governments in implementing the Economic Growth, Resource Protection

[backgrounders__detail.cfm?UseKeyword=Land%20Use](#) (site visited July 2004).

²⁶For an excellent source on achieving a sustainable environment, see, John C. Dernbach, ed., *Stumbling Toward Sustainability* (Environmental Law Institute 2002).

²⁷Daniel C. Esty, “Preface: The Next Generation of Environmental Law,” in *New Ground: The Advent of Local Environmental Law* (John Nolon, ed.) (Environmental Law Institute, 2003).

²⁸A few years ago, Professor Nolon convened a symposium consisting of law professors teaching land use law, environmental law and state and local government law to examine “The Advent of Local Environmental Law.” The papers from this program lend analysis and offer recommendations that are consistent with green development. The papers are reprinted in John Nolon, ed., *New Ground: The Advent of Local Environmental Law* (Environmental Law Institute, 2003).

²⁹John R. Nolon, “In Praise of Parochialism: The Advent of Local Environmental Law,” at 3 in *New Ground: The Advent of Local Environmental Law* (John Nolon, ed.) (Environmental Law Institute, 2003).

and Planning Act, the Maryland Office of Planning published a comprehensive booklet offering models and guidelines to achieve environmentally sensitive design through the use of techniques that can protect wetlands, steep slopes, forests and wildlife habitats.³⁰ In explaining how well-intentioned regulations can the environment and slow down economic development, the Maryland approaches stresses that zoning must be flexible, rules about road widths and parking lots must be adjusted, road grades must be examined to best avoid erosion and that governments must consider whether regulations that protect one nature feature cause harm to the total ecology.³¹ Focusing on considerations including road widths, trees, sewer location, floodplains, viewsheds and streamlining of ordinances, the booklet offers a number of case studies to demonstrate how developers and municipalities have worked together across the State to

achieve environmentally sensitive development.³² The following are offered as examples of the types of flexible ordinances that encourage environmental design:

1) Montgomery County, Maryland assembled many of its environmental management policies into one publication that contains details for inventorying and protecting a wide variety of resources and then provides flexibility to the planning board in meeting environmental goals.³³

2) West Vincent Township, New Jersey adopted a Visual Resource Protection Development Option (“Village Cluster”) allowing for minimum lot area and yard requirements to be reduced to preserve visual resources and preserve common open spaces, with the resources to be protected identified on the Visual Resources Map of the Township’s Open Space and Recreation Plan.³⁴

3) Calvert County Zoning Ordinance/Solomons Master Plan and Zoning Ordinance was developed as a collaborative effort among interested parties and includes a Town Center District and

³⁰The Maryland Office of Planning, *Achieving Environmentally Sensitive Design in Growth Areas Through Flexible and Innovative Regulations* (April 1995) available at: www.mdp.state.md.us/smartgrowth/pdf/mmg11.pdf (site visited July 2004).

³¹*Id.* at 6.

³²*Id.*

³³*Id.* at 40.

³⁴*Id.* at 41.

a transfer of development rights program.³⁵

4) Prince George's County, Maryland adopted an illustrated Landscaping Manual that contains all of the County's regulations for landscaping, buffering, and screening.³⁶ The County also adopted a Neighborhood Conservation and Revitalization Strategy seeking to streamline redevelopment inside the Beltway through the creation of M-U-TC (mixed use town center) and U-L-I (urban light industrial) zones with flexible permitting procedures.³⁷

In March 2004, the State of New York published the "Local Open Space Planning Guide" designed to provide a toolbox of voluntary strategies and recommendations that local governments may employ to enhance quality of life through open space conservation and planning.³⁸ The publication discusses the use of the following types of land use regulations that can be used to promote open space:

*zoning

*site plan approval
 *subdivision regulations
 *cluster development
 *planned unit development
 *recreation land dedication, or alternatively, recreation fees
 *transfer of development rights
 *State Environmental Quality Review Act (SEQR) — Critical Areas Designation³⁹

Remarkably, local governments have all of the tools they need to promote green or environmentally friendly development. The challenge is expressing the need and identifying the rights tools that can be employed to meet local environmental goals. In many respects, the "growing green" movement promoting sustainable development is simply another way of explaining or defining smart growth.⁴⁰ For example, the Smart Growth Network released a report in January 2002 entitled *Getting to Smart Growth: 100 Policies*

³⁵Id at 42-3.

³⁶Id, at 44.

³⁷Id. at 51.

³⁸A copy of the Guide is available at <http://www.dos.state.ny.us/lgss/pdfs/openspaces.pdf> (site visited July 2004).

³⁹Id. In addition, the publication discusses myriad other techniques such as voluntary deed restrictions/restrictive covenants, conservation easements, tax policy, land acquisition and financing tools.

⁴⁰The U.S. Department of Energy makes this connection well as part of their Smart Communities Network. See, <http://www.sustainable.doe.gov/landuse/luintro.shtml> (site visited July 2004).

for Implementation⁴¹ that included a list of land use ideas that promote smart growth, and they also happen to promote green development.⁴² *Getting to Smart Growth II: 100 More Policies for Implementation* was recently released as a companion publication, providing examples of how to implement smart growth policies that promote sustainable development.⁴³

IV. Conclusion

However a municipality chooses to define “green development” or environmentally friendly development, a host of voluntary programs and tools abound to assist in designing and implementing regulations

to meet the identified needs and goals of individual jurisdictions. While the phrase “green development” may be trendy now and accepted and somewhat embraced by the building and real estate communities,⁴⁴ this is, in essence, the marriage of local land use regulation with local environmental regulation supported by state and federal agencies and a host of non-governmental organizations that support the public and private sector interests. For the time being, it appears as though developers and builders are increasingly supportive of efforts to promote and recognize green development, perhaps, anecdotally, more so than embracing these

⁴¹The publication is available at: www.smartgrowth.org/pdf/gettosg.pdf (site visited July 2004).

⁴²Id. For example, Professor Michael Wolff notes that the principles of “Getting to Smart Growth” are familiar examples of local environmental law: “1. Mix 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 toward existing communities. 8. Provide a variety of transportation choices. 9. Make development decisions predictable, fair, and cost effective. 10. Encourage community and stakeholder collaboration in the development of decisions. See, Michael Allen Wolff, “Earning Deference: Reflections on the Merger of Environmental and Land Use Law,” in *New Ground: The Advent of Local Environmental Law* (John Nolon, ed.) (Environmental Law Institute, 2003).”

⁴³The new publication is available at: www.smartgrowth.org/pdf/gettosg2.pdf (site visited July 2004).

⁴⁴For examples of how the National Association of Home Builders is promoting Green Development, see, www.nahb.org (site visited July 2004). See also, the materials prepared by the Urban Land Institute at www.uli.org (site visited July 2004).

concepts under the rubric of “smart growth” — a phrase that has become a political hot button in many circles.