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Zoning and Land Use Planning

PATRICIA E. SALKIN*

**The Next Generation of
Planning & Zoning
Enabling Acts Is On the
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Introduction

Much of the current state planning and zoning enabling legislation is based upon 1920s model statutes promulgated by the United States Department of Commerce under Secretary Herbert Hoover. Eighty years later, municipalities are limited by the statutes that were en-

acted prior to television, computers, and massive investments in the built-up infrastructure. In the 1920s, zoning was seen as a means to end...the end was to separate incompatible land uses because there was an inherent conflict between uses that were not identical (e.g., residential and commercial). The first zoning ordinances were enacted just at the start of the industrial revolution. Overcrowding in the cities was a paramount concern because 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.

Fastforward approximately 80 years. The cities are on a continuing population decline. Infrastructure investments have shifted from the urban core to the suburban and rural communities. Where families

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were once lucky if they owned a car, today consumers demand two- and three-car attached garages. Manufacturing plants and other industrial facilities, once located in the cities next to railroads and/or ports, have found it more desirable and economical to relocate to suburban communities, and as a nation we consume acreage at a rapid rate far exceeding our population growth. Homeowners and businesses in our suburban and rural communities desire fiber optics cabling and other costly amenities to support the technology boom.

These changes are among those that have exposed the shortcomings of the early model planning and zoning enabling acts. These acts reflect society in a very different generation. What may have seemed a rational approach to addressing issues such as overcrowding is 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 city, town, or village desires to be, the statewide planning and zoning enabling act often presents a challenge for local

officials and land use lawyers who support changing "business as usual."

An effort to modernize these acts in the 1970s by the American Law Institute produced a publication, a Model Land Development Code, 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. 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. No significant connections were made early on between land use laws and environmental laws. Perhaps because these two types of regulation were initially conceived to address different problems at different times, they became for many years mutually independent.

Smart Growth Offers a Challenge to the Early Enabling Acts

In the 1990s, the smart growth movement started building steam. Armed with statistics about the cost of sprawl (such as unplanned leapfrog development), loss of prime agricultural lands, and degradation of significant envi-

ronmental and natural resources, this movement has promoted statutory reform of the state planning and zoning enabling acts, and its advocates have encouraged states to provide localities with more flexible zoning tools to best meet local and regional challenges. Different from the environmental reforms of the 1970s and 1980s, the smart growth movement attracted notable private sector support as it wisely broadened the message to include economic vitality and quality of life as two of the key platforms for necessitating change. Urban renewal, traffic congestions, and infrastructure issues have also been part of the smart growth debate.

Prior to the smart growth movement, legislative history reveals minor adjustments to planning and zoning enabling acts nationwide. While it is true that some states had overhauled their comprehensive planning systems (e.g., Oregon, Washington, Georgia, and Florida), for the majority of the states, things were essentially the same. In the last five years, the legal literature on smart growth has increased exponentially, and today one can hardly attend a CLE or read a land use publication without the topic appearing.

Perhaps the greatest gift from the smart growth move-

ment 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 didn't understand land use law and so 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 decisionmaking often lack the clout necessary to secure meaningful land use reforms.

Whatever the reason was for non-action, by the end of 1990s, there was so much activity in the business of land use law reform that it was difficult to keep up. By 1999, more than one thousand land use related bills were introduced in statehouses across the country in one year alone (see American Planning Association, *Planning 21st Century Communities*, Dec. 1999). 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.

A New Framework Is Proposed

In January 2002, the American Planning Association released its long-awaited Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change (available on-line at www.planning.org). 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. Funded through a combination of public, private, and non-profit support, this document promises to be the seminal resource on land use regulation during this Century. The model statutory language offered throughout the document is "intended to provide governors, state legislators, state legislative research bu-

reaus, 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" (See the Guidebook at p. xli). The Guidebook is accompanied by a Growing Smart User Manual to assist in honing in on issues of interest.

The Introduction 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 intergov-

- ernmental dimension of planning and development control;
6. Model statutes should prescribe the substantive content of plans;
 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.¹
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.²

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;
- Organized into 15 chapters, the Guidebook maintains that it is important to reform planning enabling legislation due to today's more significant inter-governmental dimension for planning, a marked shift in society's view of land, a more active citizenry, and a more chal-

¹Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change (2002 Edition) at xlii to xlviii (referred to hereafter as "Guidebook"). Each of these principles is discussed in detail in the Introduction to the Guidebook.

²Id. at xlv.

lenging legal environment.³ Major topics covered in the Guidebook address: the planning process and implementing plans (at the state, regional, and local levels), development controls (including zoning, subdivision, site plan, uniform development standards, 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 decision 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, chapters offer cross-references to other model statutes; each chapter begins with an introduction that

sets forth a general discussion of the subject matter covered and summarizes the key content including recommendations and alternatives; commentary 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 is offered along with alternatives; notes are inserted where appropriate to assist in drawing attention to particular state or local approaches that have proven successful and influenced the drafters, and footnotes 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, local governments and specific subject areas. In a user-friendly manner, the checklists say “we want to...” and offers a menu of potential objectives (e.g., decide how to approach statutory planning reform, see what goals have been adopted by other states, designate substate planning districts and

³Id. at xxix.

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 adopted development agreements, clarify when a development has vested rights, ensure 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.), which is 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.

Will Growing Smart Make a Difference?

The short answer is yes, Growing Smart and the Legislative Guidebook will have and has already had an impact on state land use reform. Although the final version of the Guidebook was released in January 2002, the American Planning Association released a first Interim Edition in 1996 and a second Interim Edition in 1998. In addition, the American Planning Association distributed as a Planners Advisory Service publication the commissioned papers that formed the basis of a good deal of the discussion in the Guidebook. In the just over the five years that have passed since the early publication of a working draft, it has been easy to track the profound impact of the documents as assessed through adopted statutory language in many state statutes.

In part to begin to substantiate this, the American Planning Association published a second report released in February 2002 to coincide with the publication of the Guidebook and User Manual. This study, *Planning for Smart Growth: 2002 State of the States* (also available at www.planning.org), reports on the recent trends and extent of legislative efforts to reform outdated planning and zoning enabling legislation. The report identifies eight trends that consistently emerged in state activities related to planning and smart growth reform. For example, implementing recently enacted reforms has proven to be an ongoing challenge as many states continue to work towards full implementation that balances competing needs and interests. Identifying and sustaining political leadership has proven critical to realizing meaningful reform. State governors and key legislators must commit to staying with the process for the long haul, and not lose interest after the first couple of years. Linking smart growth planning reforms with issues such as traffic congestion, housing, affordability, environmental protection, and other quality-of-life issues has helped to secure a spot for the issues on the various govern-

ment reform platforms. To better ensure success, coalitions have been built and time has been expended to develop consensus among the various stakeholders. Many states have opted to create task forces and commissions to further study the issues and offer recommendations for further action. There has been an increased level of citizen activity at the ballot box on smart growth related initiatives, indicating that if government is not yet prepared to move forward, their constituents are happy to push the agenda in another arena. Although many would advocate for a comprehensive overhaul to planning and zoning enabling acts in one fell swoop, the fact remains that most of the states have made progress through a piecemeal approach to statutory reform. Lastly, there has been the need to offer some responses to backlash from groups that are of the opinion that land use reforms may impinge upon property rights.

The statistics regarding the level of reform activity across the country are astounding. According to the summary report accompanying the main text:

- Approximately one-quarter of the states are implementing moderate to substantial statewide com-

prehensive 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);
- 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); and
- Approximately one-quarter of the states have not made and are not currently pursuing significant statewide planning reforms (these states include: Alabama, Alaska, Indiana, Kansas, Louisiana, Montana, Nebraska,

North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, and Wyoming).

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.

The *Planning for Smart Growth* publication provides a detailed descriptive accounting of the history of key activities in each of the fifty states. Individual state pages may be also be downloaded from the American Planning Association website (www.planning.org) for those who want to quickly review the level of reform in one state or in neighboring jurisdictions.

Federal Government Support

One of the greatest challenges to 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 signifi-

cant place where the federal government can, and to some extent has attempted to, take the lead. There are significant bipartisan legislative task forces, study groups, and caucuses exploring smart growth-related agenda items. Furthermore, Congress has directed the General Accounting Office to conduct a series of studies to assess the impact of federal policies on sprawl and to determine what it is that the federal government can do to assist municipal officials. But perhaps most important, legislation has been introduced to provide some level of financial support to facilitate reform efforts in the states.

In April and May 2001, Representative Blumenauer and Senator Chafee 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[.]" 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.⁴

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 Secre-

⁴The 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;
- (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;

tary 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 at \$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 that contained in 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; 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.⁵

It is clear that the proposed legislation was influenced by the American Planning Association's Growing Smart initiative. For example, to be

eligible for funding, the Act requires that states demonstrate: 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.

(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 require additional planning at the State and tribal levels.

⁵S. 2995, Section 4 (July 27, 2000).

Congress has scheduled hearings on the Community Character Act for March 2002.

Conclusion

Syndicated columnist Neal Pierce summed it up 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[.]" He called this a "landmark planning guide" that "may remake America's future." 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.

Author's Note: I have been privileged to have the opportunity to make small contributions to the Growing Smart effort. As the author of a couple of working papers, and a contributing author to the 1999 *Planning Communities for the 21st Century* and the 2002 *Planning for Smart Growth* reports, it has been absolutely wonderful to watch the growth and development of an effort that will continue to profoundly impact the future of the profession. Special kudos to the staff of the American Planning Association who have been with this project all along, including Stuart Meck, FAICP, the project's Principal Investigator and General Editor of the Final Guidebook.