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## Environmental Justice And Land Use Planning And Zoning

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# Zoning and Land Use Planning

PATRICIA E. SALKIN, ESQ.\*

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## ENVIRONMENTAL JUSTICE AND LAND USE PLANNING AND ZONING

In the Spring of 2003, I had the privilege of working with a team at the National Academy for Public Administration (NAPA) on a study, *Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning* (2003). This column is in large part excerpted from Chapter 4 of the report, representing my contribution to the collective effort. The full report is available on the NAPA web-site ([www.NAPAWASH.org](http://www.NAPAWASH.org)) and

contains a number of case studies from across the country, as well as a series of recommendations for all levels of government to begin to open a healthy dialogue on how to best address the serious challenges of environmental justice through local land use planning and zoning decisionmaking.

## INTRODUCTION

As noted in a recent analysis of the importance of local land use laws to achieve sustainability, environmental justice goes to the core of traditional land-use decisions, such as: choosing sites for locally unwanted land uses (geographic equity); the process for deciding where to site these unwanted land uses, including the location and timing of public hearings (procedural equity); and sociological factors, including which groups hold the political power inherent in land-use decisions (social equity).<sup>1</sup>

Even following the enactment of the Civil Rights Act of

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<sup>1</sup>See Patricia E. Salkin, "Land Use," in *Stumbling Towards Sustainability* (Dernbach, ed.) (ELI 2002) at 374, citing Robert R. Kuehn, "A Taxonomy of Environmental Justice," 30 ELR 10681 (Sept. 2001); Robert Bullard, "Level-

1964, “the property regulation, planning, and zoning policies of many cities around the country had what must be called a negative impact on EJ.”<sup>2</sup> One researcher notes that “zoning tends to act as the ‘gatekeeper’ in terms of where noxious uses can be legally sited within a municipality, but the ramifications of zoning on environmental health and equity have been somewhat hidden.”<sup>3</sup> Yet, planning and traditional land-use control laws—including coordinated environmental review with local government actions—can serve as more proactive measures to address environmental justice concerns.<sup>4</sup> As one scholar has noted: “The

next frontier for both the movement and the focus of environmental justice scholarship. . . . is land use planning.”<sup>5</sup>

For more than eighty years, local officials have held the power to control the use of land by making decisions about what could be located where in a given area. The *Euclid* decision,<sup>6</sup> followed by the promulgation of the Standard City Planning Enabling Act in 1928, set the foundation of state authority over planning and zoning.<sup>7</sup> Because, in almost every state, decisions on land use planning and adoption of land use laws to implement these plans is entirely a func-

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ing the Playing Field Through Environmental Justice,” 23 Vt. L. Rev. 453 (1999). See also Paul M. Hendrick, “Racism in American Land Use Decisions: The Slicing of the American Pie,” 2 Fla. Coastal L.J. 395 (2001), and Craig Anthony Arnold, “Land Use Regulation and Environmental Justice,” 30 ELR 10395 (June 2000).

<sup>2</sup>Michael B. Gerrard, “Environmental Justice and Local Land Use Decisionmaking,” in *Trends in Land Use Law from A to Z: Adult Uses to Zoning* (Salkin, ed.) (American Bar Association 2001).

<sup>3</sup>See Juliana Maantay, “Zoning law, health, and environmental justice: what’s the connection?,” 4 J. of Law, Medicine and Ethics 572 (December 2002).

<sup>4</sup>Clifford Rechtschaffen and Eileen Gauna, *Environmental Justice: Law, Policy & Regulation* 297 (Carolina Academic Press 2002).

<sup>5</sup>Craig Anthony Arnold, “Planning Milagros: Environmental Justice and Land Use Regulation,” 76 Denver U. L.R. 1 (1998).

<sup>6</sup>*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

<sup>7</sup>Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, A Standard City Planning Enabling Act (U.S. G.P.O. 1928); and Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, A Standard Zoning Enabling Act (U.S. G.P.O. 1926 rev. ed.)

tion of local government, it is critical to examine the relationship between the legal and regulatory schemes within which these decisions are made and their relationship to environmental justice issues.<sup>8</sup> Commenting on Justice Sutherland's passing distinction in *Euclid* between the "general public interest" and "the interest of the municipality," Alfred Bettman noted: "This passage in the opinion is noteworthy in that it presents the conflict not as one between the individual and the community, but rather as between different communities, different social groups, or social interests, which is, when profoundly comprehended, true of all police power constitutional issues."<sup>9</sup>

### STATE ENABLING AUTHORITY FOR PLANNING AND ZONING

In 1999, the American Planning Association (APA), as part of its multi-year "Growing Smart" effort, surveyed state laws on local land-use planning to determine how many states continue to authorize planning based on the 1928 Standard City Planning Enabling Act.<sup>10</sup> The survey found that almost half of the states (24) had not updated their local planning statutes since 1928, and only eleven states had adopted substantial updates of their laws.<sup>11</sup> Seven states had slightly updated their planning enabling acts, and eight states were classified as having made moderate updates.<sup>12</sup> Further findings from this survey are discussed below in the section

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<sup>8</sup>Maantay, *supra* n. 3 at 572.

<sup>9</sup>Richard F. Babcock, *The Zoning Game: Municipal Practices and Policies* (The University of Wisconsin Press, 1966) at 145-46, citing Bettman, *City and Regional Planning Papers*, 55.

<sup>10</sup>An advisory committee of the U.S. Department of Commerce drafted the Standard City Planning Enabling Act. See Rodney L. Cobb, "Toward Modern Statutes: A Survey of State Laws on Local Land-Use Planning," in *Planning Communities for the 21st Century* (American Planning Association, December 1999).

<sup>11</sup>*Id.* at 9.

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

on comprehensive land-use planning.

The long history of state and local roles in land-use planning and zoning has been an important influence on current opportunities for reforms to address environmental justice issues. The nation was clearly in a different place in the 1920s when the cities were grappling with myriad social and environmental stresses.<sup>13</sup> But today, even with the technological revolution, we confront newer and perhaps more complex social and environmental issues, as the nation strives to achieve some level of sustainable development and as our challenges are no longer contained within our cities, but now are spread throughout our suburban and rural communities. The American Planning Association has identified many factors

to be considered in reforming state planning statutes, including ongoing problems of housing affordability, lack of housing diversity, exposure of life and property to natural hazards, and the obligation to promote social equity—“the expansion of opportunities for betterment, creating more choices for those who have few”—in the face of economic and spatial separation.<sup>14</sup>

Various planning and zoning enabling statutes have had an impact on the ability of local governments’ to consider and address environmental justice concerns by controlling land use.<sup>15</sup> At the start of the 21st century, there is a renewed interest in modernizing and reforming many states’ outmoded planning and zoning laws. This interest presents a unique opportunity for envi-

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<sup>13</sup>Stuart Meck, FAICP, gen. ed., *Growing Smart Legislative Guidebook* xxviii (American Planning Association 2002).

<sup>14</sup>*Id.* at xliii.

<sup>15</sup>Professor Craig Anthony Arnold has extensively studied the relationship between local land use planning and zoning and environmental justice and offers details on the following five case studies of grassroots environmental justice land use strategies: “(1) rezoning to limit industrial and commercial uses in East Austin neighborhoods of Austin, Texas; (2) rewriting Denver, Colorado’s industrial zoning code by a North Denver community group; (3) the St. Paul, Minnesota, West Side Citizens Organization’s seeking and obtaining passage of a citywide ordinance banning metal shredders; (4) the adoption of a comprehensive land use code and development code by the Confederated Tribes of the Colville Reservation in Washington; and (5) involvement of grass-roots groups from San Antonio, Texas, barrios in the formulation of overlay zoning to protect Edwards Underground Aquifer.” See, Craig Anthony Arnold, “Land Use Regulation and Environmental Justice,” 30 ELR 10395 at 10408 et seq. (June 2000).

ronmental justice advocates to provide leadership by securing the passage of revised state enabling statutes that empower local governments to address these issues more effectively through land use planning and zoning.

### COMPREHENSIVE LAND USE PLANS

Zoning is one of several legal techniques for controlling the use of land within a municipality. Zoning is usually based upon a comprehensive plan, and that plan is generally defined as “an official public document, preferably (but often not) adopted as law by the local government, [that serves] as a policy guide to decisions about the physical development of the community.”<sup>16</sup> The process of developing a locality’s comprehensive land use plan “provides a chance to look broadly at programs a local government may initiate regarding housing, economic development, provision of public infrastructure and services, environmental protection, and

natural and manmade hazards and how they relate to one another.”<sup>17</sup>

The language of the early model—the Standard State Zoning Enabling Act—permitted, rather than mandated, planning. Due to its influence, some states required that local zoning be implemented in accordance with a local comprehensive plan. However, many of these states failed to provide specific statutory guidance to local governments about what a comprehensive land use plan is or should be. States often failed also to provide a statutorily prescribed process for adopting a local comprehensive plan.<sup>18</sup> In fact, the majority of states do not require adoption of a comprehensive plan as a prerequisite for adopting and enforcing local zoning.<sup>19</sup> Although the 1928 Standard City Planning Enabling Act did set forth certain “elements” of comprehensive plans, this Act made plans optional and did not define the legal relationship between plans and zoning

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<sup>16</sup>Jurgensmeyer and Roberts, *Land Use Planning and Control Law* at 26 (West 1998).

<sup>17</sup>Meck, *supra* n. 13 at 7-6.

<sup>18</sup>Jurgensmeyer and Roberts, *supra* n. 16 at 30.

<sup>19</sup>Stuart Meck, “The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute,” 3 *Wash. Univ. J. of Law & Pol’y* 295, 305 (2000).

ordinances.<sup>20</sup> Yet, this first step in local control over land use is critical for achieving environmental justice. During the initial community visioning or planning stages, ideally, citizens can come together to decide how and where they want their community to grow and, through the goals and vision articulated in the planning process, other legal techniques and zoning ordinances can be adopted to implement the plan in ways that will promote environmental justice.

Beginning in the 1950s, under the auspices of the U.S. Department of Housing and Urban Renewal's Section 701 Program, state, regional, and local governments were influenced to craft local land use plans that met minimum considerations.<sup>21</sup> To qualify for federal funds for urban renewal and other community development initiatives over a span of

almost three decades, local governments were required to prepare and adopt comprehensive plans that consisted of the following elements: land use, housing, circulation, public utilities, and community facilities.<sup>22</sup>

State governments typically leave the detailed contents of comprehensive planning to individual municipalities. But suggestions or guidelines about the elements of a plan may be adopted by state statute. This approach, together with a requirement that land be zoned in accordance with the comprehensive plan, is finding its way into more recent state statutory reforms.<sup>23</sup> The APA's Growing Smart Legislative Guidebook offers model state legislation for adopting comprehensive plans, and provides for both required and optional elements of a local plan.<sup>24</sup> Some of these elements can be important for

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<sup>20</sup>Jurgensmeyer and Roberts, *supra* n. 16 at 30.

<sup>21</sup>See generally, Stuart Meck, FAICP, gen. ed., *Growing Smart Legislative Guidebook* (American Planning Association 2002) Chapter 7 at 7-58, discussing the history of local comprehensive planning and citing. For a history of the HUD 701 planning program, see Carl Feiss, "The Foundations of Federal Planning Assistance," 51 *Journal of the American Planning Association* 175 (Spring 1985).

<sup>22</sup>*Id.*

<sup>23</sup>Meck, *supra* n. 19 at 306. Meck reviews revised statutes in twelve states that have attempted to overcome the ambiguous language in the Model State Zoning Enabling Act that provides that zoning be adopted "in accordance with a comprehensive plan."

<sup>24</sup>Meck, *supra* n. 13 at 7-61.

ensuring that local officials at least consider environmental justice principles when crafting comprehensive land use plans.

One specific goal of the smart growth movement should be to incorporate environmental justice concerns into any proposed list of factors and/or topics that should be or may be addressed in local comprehensive plans. This goal can easily be accomplished through training, education, and technical assistance for local planners and other officials. For example, in California, recent legislation requires the Governor's Office of Planning and Research to adopt guidelines by July 1, 2003, for local agencies when addressing environmental justice issues in their general plans.<sup>25</sup> The City of Los Angeles did not wait for the state to act, as its General Plan already establishes "physically balanced distribution of land uses"<sup>26</sup> as a goal of its land use policies, thus providing a foundation for the city to ensure that its future zoning ordinances take into account environmental justice issues.

### **CITIZEN PARTICIPATION CAN PLAY A MEANINGFUL ROLE IN THE DEVELOPMENT OF THE COMPREHENSIVE LAND USE PLAN**

One of the ways to ensure consideration of environmental justice concerns in local decisions is to make certain that local officials provide traditionally underrepresented populations with a meaningful role in the future development of their neighborhoods and communities, through active citizen participation in the development of comprehensive land use plans. For most localities, municipal officials are already empowered to ensure that effective citizen participation can occur, because state enabling statutes usually give local officials broad authority to develop their plans with little or no guidance, including often-minimal mention of the process by which a plan is to be developed and adopted.

Traditionally, however, citizen participation in the development of comprehensive plans and the adopting of zoning laws has been limited to

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<sup>25</sup>Chapter 762 of the California Laws of 2001.

<sup>26</sup>Clifford Rechtschaffen and Eileen Gauna, *Environmental Justice: Law, Policy & Regulation* 301 (Carolina Academic Press 2002), citing the City of Los Angeles General Plan, Ch. 3, Goal 3A.

participation in the single public hearing that is typically required by state law prior to a local legislative body's official adoption of the plan or zoning ordinance.<sup>27</sup> The APA's Growing Smart Guidebook urges local officials to do more:

The processes for engaging the public in planning are not made clear in many planning statutes. Requirements for public notice, public hearings, workshops, and distribution and publication of plans and development regulations are often improvised. Consequently, the public may find its role and the use of its input uncertain, and it may be suspicious of plans and decisions that emerge. Planning should be doing the opposite; it should be engaging citizens positively at all steps in the planning process, acknowledging and responding to their comments and concerns. Through collaborative approaches, planning should build support for outcomes that ensure that what the public wants indeed will happen.<sup>28</sup>

While this above-cited observation is certainly true, environmental justice issues require an even more careful and proactive approach to ensuring effective participation by all citizen interest groups. Otherwise,

“ensuring what the public wants” may not offer a level playing field to local low-income and people-of-color communities, who are often disillusioned, if not disenfranchised, by most local decision-making processes.

When adopting statutes, states have taken varied approaches to encourage or require effective citizen participation in local land-use planning. Maine and Arizona laws offer two examples of these approaches:<sup>29</sup>

In order to ensure citizen participation in the development of a local growth management program, municipalities may adopt local growth management programs only after soliciting and considering a broad range of public review and comment. The intent of this subsection is to provide for the broad dissemination of proposals and alternatives, opportunity for written comments, open discussions, information dissemination and consideration of and response to public comments.<sup>30</sup>

When preparing a general land use plan, local planning agencies in Arizona are required to:

seek maximum feasible public participation from all geographic,

<sup>27</sup>Meck, *supra* n. 13 at 7-195.

<sup>28</sup>*Id.* at xlvii.

<sup>29</sup>See Patricia E. Salkin, “Collaborative Processes for Preparing and Adopting a Local Comprehensive Plan,” in *The Growing Smart Working Papers*, vol. 2, Planning Advisory Service Report No. 480/481 (1998).

<sup>30</sup>A Me. Rev. Stat. § 4324(3).

ethic, and economic areas of the municipality and consult and advise with public officials and agencies, public utility companies, civic, educational, Professional and other organizations, and citizens generally to the end that maximum coordination of plans may be secured and properly located sites for all public purposes may be indicated on the general plan.<sup>31</sup>

Moreover, the APA's Growing Smart study proposed a model state statute on public participation and public hearings for comprehensive plans.<sup>32</sup>

The public participation procedures shall provide for the broad dissemination of proposals and alternatives for the local comprehensive plan or such part or other amendments in order to ensure a multidirectional flow of information among participants in advance of and during the preparation of plans. Examples of measures contained in such procedures may include, but shall not be limited to:

(a) Surveys and interviews of the local government's residents and business owners, operators, and employees;

(b) Communications programs and information services, such as public workshops and training, focus groups, newsletters a speaker's bureau, radio and television broadcasts, and use of computer-accessible information networks;

(c) Opportunity for written comments on drafts of the plan or such part or other amendment;

(d) Appointment of a person to serve as a citizen participation coordinator for the planning process; and/or

(e) The creation of advisory task forces.

Ideally, a requirement to ensure meaningful citizen participation by all cross-sections of the local population should be included in state planning and zoning enabling statutes. Providing for active involvement by people-of-color and low-income residents in developing the goals of a localities comprehensive plan, at least as it relates to their own neighborhoods, will help to ensure that local zoning laws or ordinances are developed and/or amended to reflect the desires of these communities. Once their concerns are part of the comprehensive plans, the local zoning will run the risk of being invalidated if it does not accomplish the goals of the comprehensive plans for addressing the environmental justice concerns.<sup>33</sup>

#### **ADOPTING ZONING AT THE LOCAL LEVEL**

When a municipality is ready to implement its plan or vision, typically it does so by

<sup>31</sup>Az. Rev. Stat. § 9-461.05(e).

<sup>32</sup>See Salkin, *supra* n. 29 at 151-52.

<sup>33</sup>Arnold, *supra* n. 5.

enacting a zoning law or ordinance. Zoning is a process whereby land in a municipality is organized into any number of districts. These districts are then labeled, and the text of the zoning law describes what uses are allowable within each district. Municipalities may have multiple districts with the same label—e.g., three R-1 (residential one family) districts or two M-1 (light manufacturing) and in these cases, the zoning requirements for districts with the same label must be uniform. However, regulations may vary from one type of district to the next, e.g., the R-1 district may differ from the R-2 (residential two-family) or R-3 (multi-family) districts.

This form of zoning—also called “Euclidean zoning” from the famous Supreme Court case upholding the constitutionality of zoning<sup>34</sup>—is designed to separate different land uses that are believed to be incompatible. What has emerged, however, is a pattern of land uses that produced different residential neighborhoods, often identifiable on the basis of race or socio-economic status. Specifically, the “haves” who can afford the proverbial American

Dream—to own a single-family detached home—are able to live next door to others similarly situated. Those who rent because they cannot afford to own their own home rarely live next door to single-family homeowners. Rather, lower-income individuals tend to live among those of similar economic status and are concentrated together in the same areas, because Euclidean zoning has separated single-family residential use into one or more zoning districts that are separate from the multi-family and apartment housing that is situated in different districts.

To overcome these effects of traditional approaches to zoning, state zoning reforms must include methods whereby environmental justice principles are adequately addressed as part of the process for revising and adopting local zoning laws. Disparate environmental impacts often exist even in the absence of any intent to create those effects. The potential promise of effective coordination among local zoning, the comprehensive land-use plan, and environmental justice is explained by one author:

First, an owner or operator of a prospective LULU [locally un-

<sup>34</sup>See *Euclid*, supra n. 6.

wanted land use] would have much more difficulty obtaining approval for siting . . . the LULU in a minority or low-income neighborhood, if the comprehensive plan and zoning ordinances prohibited the LULU in that neighborhood than if they allowed the LULU, either by right or conditionally . . . Second, land use planning and regulation create greater certainty about what land uses will or will not be allowed in a neighborhood . . . Third, land use planning and [zoning] regulations improve the community's capacity to achieve its goals . . .

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The process of amending existing zoning ordinances offers another significant opportunity to address environmental justice concerns.<sup>36</sup> Because planning, by its definition, requires prospective thought and vision, rezoning consistent with a new updated plan is essential for a locality to achieve its articulated goal and remedy an ongoing injustice that is allowed or caused by current zoning.<sup>37</sup> One author explains:

Low-income and minority neighborhood groups will be more successful in achieving valid rezon-

ing of neighboring properties from more intensive to less intensive uses if they follow four guiding principles: (1) seek rezoning before controversial specific land use proposals arise; (2) carefully document the incompatibility of existing high-intensity use designations and their impact or potential impact on the health and safety of local residents, as well as community character; (3) seek rezoning for all neighboring parcels with similar use designations and similar impacts (do not leave a landowner the argument that only his or her property has been downzoned while neighboring parcels remain zoned for more intensive uses); and (4) do not downzone so greatly that the landowner suffers a substantial diminution in the property's value (leave the owner some economically viable use—for example, downzone from industrial use to a commercial use, instead of all the way to a single-family use).<sup>38</sup>

Typically, the only state statutory mandates that govern local rezoning or amendments to zoning simply require that any reforms be enacted by following the same process as adoption of the original local zoning ordinances or law, and that any changes in the zoning be

<sup>35</sup>Craig Anthony Arnold, "Land Use Regulation and Environmental Justice," 30 ELR 10395, 10407-8 (June 2000).

<sup>36</sup>Arnold, *supra* n. 5.

<sup>37</sup>Arnold, *supra* n. 35 at 10404.

<sup>38</sup>Craig Anthony Arnold, "Planning Milagros: Environmental Justice and Land Use Regulation," 76 Denver U. L.R. 1 (1998), reprinted in part in Clifford Rechtschaffen and Eileen Gauna, *Environmental Justice: Law, Policy & Regulation* 299 (Carolina Academic Press 2002).

consistent with the current local comprehensive plan.

### **ELIMINATING NON-CONFORMING USES**

When municipalities adopt zoning codes, they often grandfather existing uses that were allowed prior to the adoption or amendment of the new zoning laws. These nonconforming uses typically include uses that are no longer consistent with the current land-use goals for the future of the community, and which may pose significant environmental and health hazards.<sup>39</sup> There is little statutory authority for addressing non-conforming uses; most states and local governments follow the common law on this subject. Nevertheless, unwanted nonconforming uses can typically be eliminated in one of two ways: adopting a local amortization law to eliminate the use,<sup>40</sup> or obtaining a judgment that the use constitutes a public nuisance and must therefore cease. One strategy to address environmental justice issues could be for states

to require that municipalities must “survey their nonconforming uses and determine whether any of them pose such health and environmental problems that they should be targeted for closure.”<sup>41</sup> Local governments can then effectively amortize the use, thereby beginning the process of improving conditions in people-of-color or low-income communities, and starting to achieve neighborhood-based environmental justice.

### **THE RELATIONSHIP BETWEEN ZONING AND ENVIRONMENTAL REVIEW**

The APA’s has noted that state environmental policy acts “bring a new dimension to land use planning and regulation.”<sup>42</sup> Its *2002 Legislative Guidebook* for model statutes to guide state-level planning and zoning law reforms devoted an entire chapter to discussing the need for integration of existing state environmental policy acts—“little NEPAs”—into local planning, as well as advocating

<sup>39</sup>Michael B. Gerrard, “Environmental Justice and Local Land Use Decisionmaking,” 148, in *Trends in Land Use Law from A to Z: Adult Uses to Zoning* (Salkin, ed.) (American Bar Association 2001).

<sup>40</sup>See Margaret Collins, “Methods of Determining Amortization Periods for Non-Conforming Uses,” 3 Wash. Univ. J. of Law & Pol’y 215 (2000).

<sup>41</sup>Gerrard, *supra* n. 37.

<sup>42</sup>See Meck, *supra* n. 13 at 12-3.

environmental reviews for key elements of proposed comprehensive plans prior to their adoption.<sup>43</sup> This *Guidebook* chapter emphasizes strategies for streamlining environmental impact reviews and combining them with local land use planning and zoning decisions to integrate these considerations and avoid duplication in the two review processes.

**LITTLE NEPAs AND  
LOCAL LAND USE  
ACTIONS THAT COULD  
TRIGGER  
ENVIRONMENTAL  
REVIEW**

Only fifteen states, the District of Columbia, and the Commonwealth of Puerto Rico have adopted state environmental review laws—“little NEPAs”—requiring advance consideration of acts that may

have significant environmental impacts.<sup>44</sup> These “[S]tate environmental policy acts bring a new dimension to land-use planning and regulation,” because these statutes require an environmental review of certain types of proposed land uses, facilities, or developments.<sup>45</sup> States have adopted these policies “in part, because planning failed to consider the environmental effects of the role of planning in evaluating environmental impacts.”<sup>46</sup>

Although less than half of the states have enacted specific statewide authority for local governments to conduct local environmental impact assessments, localities in other states may find authority under state municipal home rule laws, or planning and zoning enabling acts, to adopt their own locally developed environmental im-

<sup>43</sup>See *id.* at Ch. 12.

<sup>44</sup>See Daniel R. Mandelker, “Melding State Environmental Policy Acts with Land-Use Planning and Regulations,” in *Modernizing State Planning Statutes: The Growing Smart Working Papers*, vol. 2, Planning Advisory Service Report No. 480/481 (American Planning Association 1998) (Professor Mandelker identifies the following states as having little NEPAs: California, Connecticut, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin).

<sup>45</sup>See Meck, *supra* n. 13 at 12-3.

<sup>46</sup>*Id.* at 12-4.

pact laws.<sup>47</sup> As one leading environmental lawyer has opined: “It is unrealistic to expect many municipalities that do not now require EISs to start doing so in order to address EJ concerns;[but] where EISs are already prepared, they could be required to address demographics and other EJ matters in a manner similar to what is now required under NEPA.”<sup>48</sup> However, because comprehensive planning by its nature does not usually include site-specific development proposals, state-level legislation to expand the scope of planning and require effective local environmental reviews, particularly in those states that do not have little NEPAs, would enable communities to have greater input with respect to proposed uses that may create environmental stressors.<sup>49</sup>

### COMMUNITY IMPACT STATEMENTS

One variation on local environmental impact statements is

the community impact statement, or CIS.<sup>50</sup> A CIS provides a mechanism for local officials to formulate their own statement of what they believe the results will be if a particular use is approved or allowed to expand.<sup>51</sup> Local reliance on the CIS process could be authorized by state legislatures; in some cases, local governments may already possess the necessary power to adopt local laws or ordinances to adopt the CIS process. One potential benefit of preparing a CIS is that it can be a stand-alone review, totally separate from an environmental impact review, which may not always be conducted under the “control” of members of the impacted community. If conducting CIS reviews becomes part of local zoning reviews, local officials could be required take the results of a community group’s CIS into consideration, to hold one or more public hearings on the document, and to use the CIS as a vehicle for negotiation, on

<sup>47</sup>Kathryn C. Plunkett, “The Role of Local Environmental Impact Review,” in *New Ground: The Advent of Local Environmental Law* (J. Nolon, ed.), 299 (Environmental Law Institute, 2003).

<sup>48</sup>Gerrard, *supra* n. 39 at 147.

<sup>49</sup>See Meck, *supra* n. 13 at 12-7.

<sup>50</sup>Sara Pirk, “Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond,” 17 *J. Env’tl. L. & Litig.* 207, 235 (2002).

<sup>51</sup>*Id.*

behalf of residents of the affected community, with the person seeking approval of a new or expanded use.<sup>52</sup> Requiring that CISs be prepared and used in local zoning decisions could be important for affected communities who might not otherwise have access to or influence over local decision-makers and the results of other environmental reviews.

### OTHER OPPORTUNITIES

There are numerous other opportunities to utilize existing land-use planning and zoning techniques at the local level to address environmental justice concerns. Professor Craig Anthony Arnold catalogues these options in a recent article discussing, among other things, flexible zoning techniques such as:<sup>53</sup>

- Conditional uses—imposing certain restrictions on uses that could create EJ concerns.
- Overlay zones—imposing additional requirements over an existing zoning district to ensure, for example, additional environmental protections, and used, for example, to impose a variety of specific requirements on industrial

and commercial activities in predominantly low-income and minority neighborhoods.

- Performance zoning—a technique used not to regulate a land use, but rather to regulate the impacts of the use by, for example, providing standards to limit certain nuisance-like activities.
- Buffer zones—usually local zoning districts that “buffer” or serve as a transitional district between two or more uses that might be considered incompatible. Professor Arnold notes that these zones are often the principal historical cause for locating industrial and commercial uses next to low-income and people-of-color communities, rather than siting such undesirable uses next to single-family housing. However, he also notes that buffer zones could include physical screening, landscaping, significant setbacks, open spaces, and even other lower-intensity commercial uses that might serve as better transitions from residential neighborhoods to more industrial areas.
- Floating zones—zoning districts described in the

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

<sup>53</sup>Arnold, *supra* n. 35 at 10415-10420.

text of a zoning ordinance, but not specifically placed on the zoning map, so they can “float” until they are located based upon the presence of certain identified criteria and a request from a landowner to locate that type of district at a specific site for a particular development or facility. Professor Arnold warns, however, that community advocates need to keep careful watch over these floating districts, because it can be difficult to predict where they will land.

- Exactions and mitigation fees—fees that localities can assess developers to reimburse the costs associated with their new developments and thus fund, subject to constitutional limitations, important public infrastructure needs in low-income or people-of-color communities.

Most of these tools are not specifically authorized by state statutes, but have been recognized over the years by the courts as valid exercises of the police power by municipalities, thus enabling these techniques to be used with little statutory guidance at the local level.

In most states, many other decisions about planning and

land use requirements that could be used to address environmental justice concerns are left to the discretion of local officials. They include membership on planning commissions, planning boards, and zoning boards; investment in training for zoning officials, planners, and other local decisionmakers; and commitments to conduct more effective community outreach and information sharing.

At the State level, more can be done to ensure education and training. Typically, members of local planning and zoning boards, as well as members of local legislative bodies, are not required to receive any specific training on planning and zoning laws. Yet scholars have documented that zoning and other land use controls such as large-lot zoning, minimum floor area requirements, large setbacks, low-density zoning, and restrictions on manufactured housing and multi-family housing, have been used to exclude certain populations from settling in a particular area, a phenomenon known as exclusionary zoning.<sup>54</sup> These controls may be purposeful or unintentional. However, exclusionary zoning is illegal and a violation of civil rights, and

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

can result in legal judgments or costly settlements against municipalities that engage in it. Some of the local decisions that produced these results could have been avoided by proper training for members of local land use planning and zoning boards.

Access to important environmental information is also key for local regulators. To address environmental justice issues effectively, local officials must have access to reliable information and sound science, and they need the capacity to incorporate this information into carefully designed land use plans, zoning ordinances, and regulations.<sup>55</sup> In part, this need relates to training because, in some instances, the information exists and local officials need only to know how to access it. But in other respects, it is a separate issue that calls for state and federal agencies to provide local officials with access to meaningful environmental information so that they can make more considered land use and zoning decisions. One proponent of local environmental law offers the following suggestions: (1) Follow the ex-

ample of environmental impact assessment laws in California and New York that “require local governments with actions subject to these review laws to obtain the necessary expertise and information and to assure that it is paid for—often by project proponents in the case of privately initiated projects”;

(2) Provide special funding to local governments seeking and using high-quality environmental information; (3) Provide incentives for, or require, the acquisition of good environmental information; and (4) Establish statewide GIS clearinghouses that supply local governments with significant environmental information prior to adopting local zoning laws and land use plans, thereby also enabling states to play a more meaningful role in improving the quality of local land use decisions.<sup>56</sup>

#### **APPOINTMENT OF INDIVIDUALS REPRESENTATIVE OF THE COMMUNITY TO PLANNING AND ZONING BOARDS**

In most localities environmental justice considerations

<sup>55</sup>James M. McElfish, Jr., “Learning from the Past and Looking Towards the Future,” in *New Ground: The Advent of Local Environmental Law* (J. Nolon, ed.), 404 (Environmental Law Institute, 2003).

<sup>56</sup>*Id.* at 404-06.

will be factored into local land use planning, zoning, and siting decisions only where the affected communities are represented on the bodies empowered to make these critical decisions. A 1987 survey by the APA revealed the following:

- Nearly eight out of ten members of planning boards were men;
- More than nine out of ten members were white, although in some larger cities the number was closer to seven out of ten;
- Almost eight out of ten were 40 years of age or older; and
- Most board members were professionals such as businesspeople, lawyers, engineers, educators, and real estate agents.<sup>57</sup>

This study confirmed the findings of planning consultant Harvey S. Moskowitz, who examined the characteristics of

New Jersey's planning boards between 1981 and 1982. He concluded that the members of these boards differed from the general population, and were drawn from more elite groups than the general population.<sup>58</sup> Specifically, Moskowitz found that board members were predominantly white professional males whose family incomes were considerably higher than the median family income of the general population. They were also married, owned their own homes, and had dependent children at home.<sup>59</sup> This arguable "elitism" in the composition of local boards is a major barrier to addressing environmental justice concerns and promoting effective citizen participation for all communities in local planning and zoning decisionmaking. These data also explain and substantiate the fact that marginalized citizens are not sufficiently em-

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<sup>57</sup>See Stuart Meck, FAICP, gen. ed., *Growing Smart Legislative Guidebook* (American Planning Association 2002) at Chapter 7, citing, Welford Sanders and Judith Getzels, *The Planning Commission: Its Composition and Function*, Planning Advisory Service Report No. 400 (American Planning Association 1987), 4-6 (based upon 4,380 nationwide questionnaires).

<sup>58</sup>*Id.* at Chapter 7, citing Harvey S. Moskowitz, "Planning Boards in New Jersey: Current Realities and Historical Perspectives ii" (unpub. Ph.D. dissertation, Rutgers University, New Brunswick, N.J., 1983).

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

powered to impact community development decisions.<sup>60</sup>

To address this situation, states could advocate or require that localities appoint board members who may represent the diversity of the community as a whole, including race, gender, income, homeownership, renters, and age. There is also precedent for states to authorize, but not require, that municipalities appoint individuals to planning boards who may serve in a representative capacity. For example, New York statutes authorizing the creation of planning boards provide that, in certain situations (where there is a locally established agricultural district pursuant to state law), municipalities may appoint one or more members of local planning boards who derive a certain threshold of their income from agricultural pursuits in the same municipality.<sup>61</sup>

The APA's *Growing Smart Guidebook* also offers states an option for modernizing their planning statutes in this regard, by recommending appointment

of at least one member "who lives [or who will represent the viewpoint of those who live] in rental, affordable, or multifamily housing."<sup>62</sup> The *Guidebook* stops short, however, of identifying any other members who should be appointed to serve in other representative capacities. Examples might include specifically selecting a board member to represent any ethnic or cultural groups that comprise a certain percentage of the local population, appointing a board members who could represent the interests of community residents below a certain income level, or selecting a board member to represent the interests of residents in a neighborhood or area that already suffers severe environmental exposures from nearby hazardous land uses.

Because the studies documenting membership on planning boards are now fifteen to twenty years old and did not include membership on zoning boards of appeal or other local land use bodies, a new nationwide study is needed to deter-

<sup>60</sup>See, for example, Ora Fred Harris, Jr., "Environmental Justice: The Path to A Remedy That Hits the Mark," 21 U. Ark. Little Rock L. Rev. 797 (Summer 1999).

<sup>61</sup>N.Y. Town Law § 271(11); and N.Y. Village Law § 7-718(11).

<sup>62</sup>Meck, *supra* n. 13 at 7-32. The *Guidebook* notes that the bracketed language is "targeted to those small communities where the number of persons who live in rental, affordable, or multifamily housing is limited and where residents may not be willing to volunteer." *Id.*

mine the current extent to which low-income or people-of-color groups are underrepresented among the members of local in planning and zoning bodies. A new survey would not only yield updated data, but also could include an explanation of environmental justice concerns and how they relate to the planning and zoning decisionmaking process, thus providing another opportunity for educating local officials about how they can address these issues.

## CONCLUSION

Commentators, professors of environmental and land use law, and community advocates have only recently started to write about the critical connections between environmental justice problems and local land use planning and zoning decisionmaking. While there are significant challenges to incorporating environmental justice principles into our nation's planning and zoning system, in large part due to the fragmented nature of local land use decisions, the opportunities and potential rewards are great. Given the magnitude of local land use planning and zoning efforts, environmental justice

advocates should not ignore this critical step in community decisionmaking and community development. Professor Arnold argues that "land use planning and regulation foster choice, self-determination, and self-definition for local neighborhoods, not paternalism that insists that there is a single correct environmental justice goal."<sup>63</sup> From a timing perspective, the opportunity for changes that address environmental justice concerns has never been better, due to the currently active national movement for modernizing of state planning and zoning statutes. Significant investments in training and education through a network of partnerships are necessary, but can yield substantial returns for enabling local officials to address environmental justice concerns. There is already a growing network of public, private, and nonprofit interests all committed to ensuring that environmental justice issues are taken into account through local planning and zoning. Increasing collaboration and cooperation, shared resources, and joint efforts will help to remedy past environmental justice problems and prevent their repetition in the future.

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<sup>63</sup>See Arnold, *supra* n. 35 at 10427.