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Zoning and Land Use Planning

PATRICIA E. SALKIN*

Implementation of the APA Growing Smart Legislative Guidebook: Beginning to Benchmark Success

I. Introduction

A seven-year effort of the American Planning Association to help to modernize state

planning and zoning enabling legislation culminated with the release of the 2-volume Growing Smart Legislative Guidebook: Model Statutes for Planning and Management of Change (hereinafter referred to as “Guidebook”) in 2002.¹ The final 1,500-page document was preceded by two interim editions.² The Guidebook was issued during a time when there have been unprecedented active efforts to modernize state planning and zoning enabling legislation³ across the country.⁴ Reports published in 1999 and 2002 documented thousands of planning and zoning reform proposals introduced in statehouses from simple authoriza-

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¹See, <http://www.planning.org/newsreleases/2002ftp021301.htm> (site visited July 2004). The press release explains, “The *Guidebook*, edited by Stuart Meck, FAICP, principal researcher for the Growing Smart effort, and its accompanying User Manual are the culmination of APA’s seven-year Growing Smart project intended to offer modern planning reform options.” In addition to the final version of the Guidebook, an interim draft was made available as well as two volumes of working papers published as, *Modernizing State Planning Statutes: The Growing Smart Working Papers, Volume 1 and Volume 2*. Both of these reports are available from the Planners Advisory Service (PAS) at the American Planning Association (see, www.planning.org).

²Interim editions of the Guidebook were published in 1996 and 1998.

³See, Patricia E. Salkin “The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century,” 21 *St. Louis U. Pub. L. Rev.* 271 (2002).

⁴A copy of the Guidebook may be downloaded from www.planning.org/guidebook/index.htm (site visited July 2004).

tions for flexible zoning techniques to comprehensive overhauls of state and local planning and zoning systems.⁵ In April of 2002 the American Planning Association (APA) adopted a policy guide on smart growth suggesting that readers of the Guidebook refer to the policy guide as well.⁶

The Guidebook is intended to help communities respond effectively to change, and as such contains model statutes for planning and the management of change along with commentary that highlights key issues and options.⁷ Key, however, is the philosophy that there is no "one-size-fits-all" approach to land use law reform, and therefore the Guidebook presents a range of options that can be adopted by states to best fit the cultural and political climate and to best respond to jurisdictional needs.⁸

The Guidebook is organized into 15 chapters covering dozens of topics including: starting a state reform effort, types of state planning agencies, con-

tent of state plans, process for developing and adopting plans, siting of state facilities, designation of areas of critical state concern, developments of regional impact, regional planning and intergovernmental issues, local planning, land development regulations, zoning, review of plats and plans, development rights, exactions and impact fees, sequencing of development, development agreements, transfer of development rights, historic and architectural design review, land-use incentives, administration and judicial review of land-use decisions, enforcement of land development regulations, integrating environmental review, financing of local planning, tax base sharing, redevelopment and tax relief, agricultural districts, and geographic information systems. This column focuses less on analyzing the substance of the options offered in the Guidebook, but rather, in an attempt to benchmark success, examines whether the Guidebook is having an impact

⁵American Planning Association, *Planning Communities for the 21st Century* (1999) and American Planning Association, *Planning for Smart Growth: 2002 State of the States* (2002). Both of these reports may be viewed and downloaded from www.planning.org (site visited July 2004).

⁶See, www.planning.org/policyguides/smartgrowth.htm (site visited July 2004).

⁷*Guidebook* at xxx.

⁸*Id.*

on land use reform approximately two years after its final publication.⁹

A quick search using the Westlaw database revealed that approximately 100 law review and law journal articles published in the last three years reference the APA Guidebook. This is an indication of the interest in the Guidebook from the academic community (the articles run the gamut from mere mention in a footnote, to the Guidebook as the focus of the publication, and while many articles laud the Guidebook, there are articles critical of content). In addition, the Guidebook is being used, sometimes as required reading, in graduate programs, where

the next generation of planners is being trained.¹⁰

A. Background on the Development of the Guidebook

Before delving into the documented impacts of the Guidebook, it is useful to understand exactly how this effort came about placed in the perspective of a previously failed attempt to redefine planning and zoning enabling acts.¹¹ The APA successfully attracted a combination of public and private funding to support the new initiative, and they assembled a national directorate of key stakeholders to provide guidance and input on the models as they were developed.¹² The directorate met as a group 13 times over the course of the

⁹This paper follows a Spring 2002 column in the Real Estate Law Journal which asserted upon its release, that the Guidebook would make a difference. See, Patricia E. Salkin, "The Next Generation of Planning & Zoning Enabling Acts is on the Horizon: 2002 Growing Smart Legislative Guidebook is a Must-Read for Land Use Practitioners," 30 Real Estate L.J. 353 (Spring 2002).

¹⁰For example, Stephen Villavaso, FAICP, JD, states "I teach the only graduate course in Land Use Law and Zoning Law" in the State of Louisiana. The Guidebook is one of my required textbooks . . . I also require the Guidebook in another graduate course called: "Development and Environmental Management Techniques." (e-mail from Stephen Villavaso July 17, 2004) (on file with the author).

¹¹The American Law Institute's Model Land Development Code effort in the 1970s was the only other organized effort to produce reform models for land use planning and zoning. The impact of the Model Land Development Code, however did not realize expectations, and but for the Model's section on development of regional impacts that was adopted by the State of Florida, the effort had little influence on planning and zoning enabling acts and local land use laws across the country.

¹²See, *Guidebook*, xxviii (acknowledging support from the Henry M. Jackson Foundation, U.S. Department of Housing and Urban Development, Federal Highway Administration (U.S. Department of Transportation), U.S.

project, to not only review and suggest changes, but also to discuss and recommend approaches not presented as options.¹³ In addition, many people and organizations not specifically represented on the directorate but affected by potential legislative reform, participated in the process by providing written comments and suggestions to the project staff, who in turn shared information with the directorate.¹⁴ It is an important fact, however, that the final product represents general consensus of the directorate, not unanimous agreement on each and every approach presented.¹⁵ Lastly, the forward and acknowledgement to the Guidebook mentions by name more than 100 academics, lawyers and planners in the public and private sectors from across the United States who contributed research, writing and/or comments on one or more aspects of the Guidebook, making this effort far-reaching and ensuring that key advocates and scholars were aware of the ongoing effort.

Environmental Protection Agency, Federal Emergency Management Agency, Federal Transit Administration, Rural Economic and Community Development Administration (U.S. Department of Agriculture), Annie E. Casey Foundation, Siemens Corporation, and the American Planning Association. See also, Guidebook, xxxiv-xxxv for a complete listing of members of the directorate and the individuals who represented these stakeholder interests.

¹³Guidebook, xxxiv.

¹⁴Id. at A-1.

¹⁵For example, Appendix A to the *Guidebook* contains statements from two members of the Directorate, James McElfish who represented the interests of the natural environment, and Paul Barru who represented the interests of the built environment. Both of these individuals offered statements taking issue with some of the items in the Guidebook. The introduction to the Appendix states, "The project team retained editorial control over the content of the *Guidebook*; however, more often than not, when an alternative or change was suggested, the team found a way to modify the draft statutory language or commentary to accommodate the suggestion . . . As in any professional research project, the project team made judgments, and there was not always consensus about the approach." See, *Guidebook* at A-1. The forward to the Guidebook also makes clear, "Membership on the Directorate, however, does not imply or mean endorsement of any aspect of the Growing Smart project; each member organization retains its right to act independently with respect to any proposal contained in the *Guidebook*. The APA Board of Directors has stated that the Guidebook is a research product and does not necessarily represent the policy of APA, unless specifically identified as such in a policy guide or other Board action." See, *Guidebook* at xxxiv.

II. Recent State Reform Efforts

Public and non-profit leadership in some states have publicly reached-out to the APA and have invited APA staff participation in modeling legislative reform proposals on language in the Guidebook. In other cases, legislation has been introduced/enacted that mimics the concepts and language in the Guidebook. What follows is a brief summary of examples of recent legislative activity where language in new laws and proposals can be directly linked to language in the Guidebook. These select examples are meant to demonstrate that the Guidebook is in fact influencing lawmaking and policymaking in various statehouses as some of the model language is being implemented.

A. Arizona

Statewide land use reform began in Arizona in 1998 with

the passage of the Growing Smarter Act.¹⁶ This Act, which included a provision on citizen participation in plan making, was based on language from the Guidebook that suggested mandating local jurisdictions to give greater thought to how and where growth would occur and how it would be financed.¹⁷ The APA Chapter continues to use the Guidebook at their annual “Planners Day at the Capitol” where they distribute sections of the Guidebook and discuss various provisions with legislative staff.¹⁸ In addition, the Governor has asked the Governor’s Oversight Council on Growing Smarter to evaluate the need for state wide planning principles, and especially since the APA is represented on that Council, it is expected that the Guidebook will become invaluable in this task.¹⁹

B. California

In 2002, AB 857 was enacted,²⁰ incorporating many of the core principles of the

¹⁶American Planning Association, *Planning for Smart Growth: 2002 State of the States* at 35 (2002).

¹⁷*Id.*

¹⁸E-mail from Debra Stark, Legislative Liaison, APA Arizona Chapter (July 19, 2004) (on file with the author).

¹⁹*Id.*

²⁰To view a copy of the legislation see, www.leginfo.ca.gov (site visited July 2004).

Guidebook.²¹ The bill was sponsored by the California Chapter of the APA.²²

C. Illinois

The passage in 2002 of the Illinois Local Planning Technical Assistance Act was based on a model statute in the Guidebook.²³ The act updates the State's 1920s planning statutes, defines what should be included in a comprehensive plan, and authorizes the state Department of Commerce and Community Affairs²⁴ to offer a variety of planning-related

technical assistance.²⁵ A number of bills introduced but not enacted in 2001 were based on the Guidebook.²⁶

D. Louisiana

For the first time in 78 years (and the first time since the initial passage of the planning laws of the State of Louisiana), Governor Kathleen Blanco signed Act 859 on July 13, 2004, making sweeping reforms to the State's planning and zoning enabling acts.²⁷ Among the changes are: required four hours of training for every new planning com-

²¹E-mail from Sande George, APA California Chapter Legislative Liaison (July 19, 2004) (on file with the author).

²²Id.

²³See, www.plannng.org/newsreleases2002/ftp0815.htm (site visited July 2004).

²⁴Note that the Department of Commerce and Community Affairs has recently been reorganized and re-named as the Department of Community and Economic Opportunity.

²⁵Id. A copy of the Act can be accessed through this web address as well.

²⁶American Planning Association, *Planning for Smart Growth: 2002 State of the States* at 58 (2002). The legislation introduced included: "H.B. 1084, which would have authorized counties and municipalities to adopt a program for the purchase of development rights and to allow them to adopt ordinances to authorize development incentives for affordable housing and public amenities. H.B. 1086 would have allowed counties and municipalities to adopt design review ordinances to preserve the exterior architectural appearance of buildings within a design review district . . . H.B.3185, the Land Use Decision Act, which was aimed at revamping the process of obtaining development permits . . . H.B. 3186, the Local Land Development Act, would have authorized an entire suite of land development regulations, as well as clarified vested rights of development, and authorized the adoption of adequate public facilities ordinances . . . H.B. 505, the Local Planning Technical Assistance Act, would have provided state technical assistance funds to local communities to help them prepare and implement comprehensive plans . . ." Id.

²⁷See, H.B. 1082, which was enacted as Act 859 at <http://www.legis.state.la.us> (site visited July 2004).

missioner, including city planning commissions, parish planning commissions, boards of adjustments and all similar boards and commissions; a requirement that local Master Plans must be considered whenever a decision is made by the local, regional or statewide officials; and changes of the description of some of the elements in a Master Plan.²⁸ According to the incoming President of the APA Louisiana Chapter, the Chapter was instrumental in the development and passage of this new law and they used (and continue to use) the Guidebook in the drafting, management and several other aspects of getting Act 859 enacted.²⁹ Using the Guidebook, the Louisiana Chapter is now designing a study guide, lesson plans and a

training program to help implement Act 859.³⁰

E. Michigan

By January 2004, over a four-month period, Michigan Governor Jennifer M. Granholm had issued two smart growth executive orders and signed 17 bills passed by the Legislature that, among other things, encourages regional planning, permits townships to include open space in their mixed-use zoning laws and empowers municipalities to get tough on blighted property.³¹ Hailed as a breakthrough, one news account stated, “Not since Maryland passed land use policy reforms in 1997, has a state taken such extraordinary political steps to begin to reduce the harmful consequences of how it grows.”³² Many of the concepts in the new laws

²⁸Id. See also, article from Louisiana APA Chapter, “HB 1082 on the Governor’s Desk” (on file with the author).

²⁹E-mail correspondence from Stephen Villavaso, Louisiana Chapter of the APA Legislative Chair and Incoming President (July 17, 2004) (e-mail on file with the author).

³⁰E-mail correspondence from Stephen Villavaso (September 26, 2004) (e-mail on file with the author). Villavaso also noted that the Louisiana Chapter has recently applied for a grant from the APA to design a model urban/rural training program for planning commissioners, and that if successful, the Chapter would use the Guidebook in this endeavor.

³¹Charlene Crowell, “In Lansing, A Legislative Breakthrough,” (Great Lakes Bulletin News Service, 1/8/2004), available at www.mlui.org/print.asp?fileid=16609 site visited July 2004).

³²Id.

reflect the policies discussed in the Guidebook.

In March 2004, The Michigan Society of Planning, APA's state chapter, released *New Directions: Recommendations for Planning, Zoning, and Subdivision Law in Michigan*.³³ The report proposes 27 important substantive and technical changes to Michigan planning laws. The report's recommendations point to specific model statutory language in The Guidebook that can be adapted to fit Michigan's need.

F. Missouri

The Missouri Chapter of the APA has a working group that is actively developing legislation to reform antiquated county planning acts.³⁴ The

working group is relying on elements contained in the Guidebook including the chapter on planning and Chapter 10.³⁵

G. New Mexico

At the time of this writing, it is believed that Governor Richardson is about to appoint a task force to study smart growth reform in New Mexico.³⁶ It is anticipated that the APA Guidebook will play an important role in shaping the work and debate of the task force.³⁷

H. Ohio

According to the Ohio APA Chapter, a legislative subcommittee is currently working on land use reform recommendations that may incorporate items from the Guidebook, but

³³The full report can be viewed and downloaded at: www.planning.org/clearinghouse/pdf/newdirections.pdf (site visited July 2004). According to the APA Planning Statute Reform Clearinghouse maintained by the APA, this report analyzes current statutes, case law, Michigan Attorney General opinions, and previous state-level land use studies. It was prepared by Stuart Meck, FAICP (editor of the Guidebook), and Marya Morris, AICP, of APA's Research staff. They worked with an advisory committee of chapter members to complete the report. Part of the research entailed meetings with a series of intensive focus groups in East Lansing, Michigan that included professional planners, attorneys, builders, farmers, and local elected officials. See, www.planning.org/clearinghouse/michigan04/htm (site visited July 2004).

³⁴E-mail from Prof. Daniel R. Mandelker, Washington School of Law, St. Louis, MO. (July 19, 2004) (on file with the author).

³⁵*Id.*

³⁶While no public announcement has been made yet, at a recent meeting attended by members of the New Mexico APA Chapter, this information was shared. (Conversation with Lora Lucero, Esq., July 17, 2004).

³⁷*Id.*

the report is not expected to be released until later this year.³⁸

I. Oklahoma

In February 2000, S.B. 1151 was introduced at the request of APA's Oklahoma chapter. The bill, which did not pass, would have established a 15-member state Planning and Land-Use Legislative Study Task Force with representation from both houses of the legislature, state departments, and various state interest groups and professions, including local elected officials, builders or developers, and city and regional planners. The task force would have been responsible for evaluating the effectiveness of current state, regional, and local planning and land-use laws, and completing a report to the legislature. This proposal was based on a model act contained in Chapter 1 of the Guidebook.³⁹

J. Pennsylvania

The 1999 predecessor to the Act 67 and Act 68 reforms in 2000, H.B.1866, which would have established a process to ensure consistency between an adopted comprehensive plan

and local development regulations and land-use decisions, incorporated language directly from the Guidebook.⁴⁰

K. Kentucky

In 2000, H.B. 924 was introduced to authorize development impact fees. The bill is based on draft model statute drafted in Phase III of the Growing Smart project as part of a chapter on local land development regulation.⁴¹

L. Massachusetts

In July 2004, as part of the State FY 2005 Budget, the State of Massachusetts added Chapter 40R to the Mass. General Laws providing for smart growth zoning districts to encourage smart growth and increased affordable housing production.⁴² In addition to authorizing municipalities to adopt "smart growth zoning districts" that may include areas eligible for tax increment financing and district improvement financing, which districts are submitted to the State Department of Housing and Community Development for approval, the municipality must

³⁸E-mail from Chris Gawronski, Chair, Legislative Committee of the Ohio Planning Conference (July 19, 2004) (on file with the author).

³⁹www.planning.org/growingsmart/news0300.htm (site visited July 2004).

⁴⁰American Planning Association, *Planning for Smart Growth: 2002 State of the States* at 109 (2002).

⁴¹www.planning.org/growingsmart/news0300.htm (site visited July 2004).

⁴²See, MA03RHB 4850 (filed June 15, 2004).

also submit a comprehensive housing plan that includes, among other things, a projected number of housing units of new construction.⁴³ Municipalities will receive zoning incentive payments for housing creation in the smart growth districts, funded through the establishment of a Smart Growth Housing Trust Fund.⁴⁴ Many of the concepts in this new housing and smart growth program can be traced to the ideas and principles enunciated in the Guidebook.

M. South Carolina

The Land Use Dispute Resolution Act⁴⁵ was enacted to settle disputes between private property owners and local governments. Language in this law is drawn directly from the Guidebook.⁴⁶

N. Tennessee

In 1998, Tennessee adopted a Growth Policy Law⁴⁷ that significantly updated the State's comprehensive planning statutes and it incorporated language from the Guidebook.⁴⁸

O. West Virginia

In 2004 West Virginia enacted a major new land use planning chapter that was developed with significant input from the APA Chapter and relies on language from the Guidebook.⁴⁹

P. Wisconsin

The passage of a major growth management law in 1999⁵⁰ used language from the Guidebook in the description of the elements of a local comprehensive plan.⁵¹

III. Conclusion

Undoubtedly, the Guidebook has already realized much greater success than ALI

⁴³Id.

⁴⁴Id.

⁴⁵For a copy of the law see, www.scstatehouse.net/sess115__2003-2004/bills/204.htm (site visited July 2004).

⁴⁶Conversation with Stuart Meck, FAICP, American Planning Association (June 2004).

⁴⁷Public chapter 1101 (1998).

⁴⁸American Planning Association, Planning for Smart Growth: 2002 State of the States at 118 (2002).

⁴⁹S.B. 454 (2004).

⁵⁰A.B. 133, the state budget bill (1999).

⁵¹American Planning Association, Planning for Smart Growth: 2002 State of the States at 134 (2002).

Model Land Development Code of the 1970s. It has received sustained attention from the public, private and non-profit sectors that all continue to discuss, debate and use or counter its contents. The Guidebook's organization, approach and explanations, provide a variety of options and a wealth of background information for all interested in aspects of state statutory planning and zoning enabling act reform. With so many pages addressing dozens of topics, it is difficult to imagine that some aspect of this publication would not influence legislative policy on one or more land use related topics. The Guidebook has become the state-of-the-art guidance on modernizing planning and zoning statutes. There is still more work to be done and hopefully either the American Planning Association, the Smart Growth Network or another national organization will commit the resources necessary to both benchmark the influence of the Guidebook over the coming years, and to provide regional and state-specific training and technical assistance to further enhance the usefulness of Guidebook.

