

POINT / COUNTERPOINT

SUBVERTING THE AMERICAN DREAM: GOVERNMENT DICTATED "SMART GROWTH" IS UNWISE AND UNCONSTITUTIONAL

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"Sprawl." It's an ugly word, conjuring images of some unshaven guy with a massive beer-gut in a T-shirt spread out over a ratty sofa in front of a television set droning endless football games.

Given such imagery, "sprawl" is a clever and effective euphemism to denigrate a phenomenon in which tens of millions of Americans have affirmatively taken part: suburbanization. In search of a better life for themselves and their families, many individuals freely choose to endure longer commutes and greater inconveniences in exchange for larger, more affordable homes in safe neighborhoods. The debate among the relative desirability of urban, suburban, and rural lifestyles has raged forever and probably always shall; but in our free society, reconciliation of competing preferences in the realm of habitation always has been entrusted to free individual choice.

Until now. The latest wave of politically correct conventional wisdom holds that government planners, rather than individual choices collectively expressed through the marketplace, should determine where people live. Obviously such a proposition, starkly stated, would make most Americans recoil. After all, homeownership is a cornerstone of the American Dream, and private property rights are its essential foundation.

So, the planning enthusiasts necessarily effect a beneficent façade. They are not against suburbs; they are against urban sprawl. They are

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not against development; they favor “smart growth.”¹ They condemn congestion, which everyone hates, and propose modest-sounding initiatives that promise to solve most of mankind’s problems without cost or inconvenience. The dirty, unstated secret, however, is that the core of any effective smart-growth agenda is coercion—substituting free individual choice with government edicts.

Not only is such a program profoundly contrary to core American values, but like many episodes of government planning, it is certain to produce perverse consequences. Moreover, the Constitution places important constraints on coercive government regulation that bestows benefits upon some while imposing burdens on others in the exercise of property rights.² One way or the other, free choice will win out. We should direct our energies toward expanding rather than contracting individual autonomy, especially in such an important area as homeownership.

In this Article, I shall first examine the policy issues raised by smart-growth advocates, and then the constitutional parameters by which such a debate is constrained.

I. POLICY CONSIDERATIONS

According to the Sierra Club, “sprawl” is “low-density development beyond the edge of service and employment, which separates where people live from where they shop, work, recreate, and educate—thus requiring cars to move between zones.”³ Ordinarily, I would not quibble over the definition of a policy someone else is advocating. I wonder, however, whether there is a single instance of “sprawl” meeting the Sierra Club’s definition. Even the most remote suburban enclaves provide basic services such as restaurants, parks and recreation, and certainly schools. Indeed, the only areas that might meet this definition of “sprawl” would be rural communities—which are one of

¹ Not surprisingly, the most comprehensive catalogue of euphemisms is provided by Vice President Al Gore, the most prominent guru of the smart-growth movement, who variously describes his anti-“sprawl” agenda as “sustainability,” “smart growth,” “metropolitan strategies,” “regionalism,” “livability,” and “community villages.” Al Gore, Remarks at the Brookings Institution (Sept. 2, 1998), *available in Gore 2000, Speeches: Building Livable Communities* (visited Aug. 5, 1999) <<http://www.algore2000.org/speeches/sprawl.html>>.

² For the seminal work setting forth the conceptual framework for constitutional restraints on property regulation and wealth redistribution, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

³ Sierra Club, *What is Sprawl?* (visited Nov. 16, 1999) <<http://www.sierraclub.org/sprawl/report98/what.html>>.

the lifestyles (along with urban areas) *favored* by smart-growth advocates.

Moreover, even the nub of the matter—massive traffic congestion, causing long commutes from home to work⁴—is overstated. Increasingly, jobs are located where people live. According to Steven Hayward of the Pacific Research Institute, “Over the past 25 years, more than 80 percent of new jobs have been generated in the suburbs.”⁵ In reality, Hayward explains, “Only a tiny fraction of commuting today is from suburb to central city; most commuting is now from suburb-to-suburb.”⁶ Whether suburb-to-suburb commuting constitutes movement between “zones” is unclear; what is clear, however, is that if more people were crowded into central cities, like the smart growth advocates urge, many of them would have to commute to the suburbs to follow the jobs.⁷

Taking the definition at face value, what are the concerns supposedly animating smart growth proponents? The Sierra Club contends that sprawl hurts cities because it “erodes [their] tax base,” “destroys downtown commerce” by attracting shoppers to regional malls, “increases unemployment and concentrates poverty,” and “undercuts property values and investment opportunities.”⁸ Sprawl also allegedly consumes rural farmland and “chews up the countryside rolling over millions of acres of forest, wetlands, and prairie, fragmenting landscapes, disrupting wildlife habitat, and altering rivers[,] streams[,] and watersheds.”⁹

The hysteria is without foundation. Total urban and suburban uses of land in the United States constitute only sixty million acres—only 3.1% of the nation’s land.¹⁰ Approximately one million acres are urbanized each year; at that pace, “it would take nearly 200 years . . . [to urbanize] 10 percent of the total land in the Continental

⁴ See *id.* (listing six social, environmental, and economic consequences of sprawl, including traffic problems).

⁵ Steven Hayward, A Survey of Research on the Issues of Suburban Growth 3 (Feb. 1995) (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

⁶ *Id.* at 13.

⁷ One need only travel the freeways near San Francisco to witness that phenomenon: traffic is easily as heavy commuting from San Francisco to the Silicon Valley and to other presumed “sprawl” suburbs, as it is from the suburbs into the city.

⁸ Sierra Club, *supra* note 3. The Sierra Club’s newfound concern for downtown commerce and property values is striking.

⁹ Sierra Club, *The Costs of Sprawl* (visited Aug. 5, 1999) <<http://www.sierraclub.org/sprawl/report98/costs.html>>.

¹⁰ See Hayward, *supra* note 5, at 11 (arguing that the facts show that, in reality, very little land is being converted into urban development).

U.S.”¹¹ Moreover, as Hayward points out, “the amount of land dedicated exclusively for parks, wilderness, and wildlife has been growing twice as fast as urbanized land since the end of World War II.”¹²

Still, Vice President Al Gore attributes all manner of social dysfunction to sprawl. In a single speech, he blamed sprawl for causing pollution, crime, congestion, and “road rage;” impeding welfare reform; and causing parents to get home “too late to read a bedtime story.”¹³ Mr. Gore’s “livable community,” by contrast, “lets you and your spouse walk through a natural ecosystem as you simply take an evening stroll down your street. That’s spiritually renewing.”¹⁴ In the smart growth advocates’ “dream,” as Carl Pope depicts it,

[t]he homes are in cozy neighborhoods, with quiet, intimate streets that are not always clogged with traffic. Around the corner is a grocery for milk and bread. The children walk to school on safe sidewalks every morning, and families swim and fish in nearby lakes. That is the dream we want to protect in our fight against sprawl.¹⁵

The image is so bucolic one can almost smell apple pie baking in the oven.

What are the policies necessary to ensure that all Americans occupy livable neighborhoods with natural ecosystems in which everyone lives a short walk from a grocery store, a school, and a lake? According to smart growth advocates, they are modest and benign. The Sierra Club’s two top proposals are “purchasing environmentally sensitive land or farmland to prevent development,” and implementing an “urban growth boundary,” which “is an official line that separates an urban area from its surrounding greenbelt of open lands, including farms, watersheds and parks.”¹⁶ Vice President Gore has blended those concepts, proposing to preserve green and open spaces by providing “\$1 billion in federal funds to promote smart growth policies—leaving all decisions in local and community hands.”¹⁷

Certainly, with only one billion dollars, planners will not be able to buy a lot of land with government funds. In order to achieve their

¹¹ *Id.*

¹² *Id.*

¹³ Gore, *supra* note 1.

¹⁴ *Id.*

¹⁵ Carl Pope, *Pro & Con: Finding Common Ground in a Suburban War* (visited Aug. 5, 1999) <<http://www.intellectualcapital.com/issues/issue178/item1355.asp>>.

¹⁶ Sierra Club, *Sprawl Solutions: Smart Growth* (visited Nov. 19, 1999) <<http://www.sierraclub.org/sprawl/report98/solutions.html>>.

¹⁷ Gore 2000, *Issues & News: Building Livable Communities* (visited Aug. 5, 1999) <<http://www.algore2000.org/issues/livable.html>>.

goals, the planners will have to spend a great deal more money to acquire property through voluntary transactions or the power of eminent domain, or they will be forced to regulate private property rights in ways designed to induce people to comply with the desired model. Not surprisingly, the coercive model, effectuated through urban growth boundaries and other regulations, is more politically palatable than massive tax increases. Here the beneficent façade slips away and reveals the ugly reality underneath.

Nevertheless, urban growth boundaries are increasingly popular around the nation. If people vote with their feet by moving to the suburbs, why would they vote politically to prevent further suburbanization? The answer is simple: once people move to the suburbs, they become interested in preventing additional traffic congestion or similar burdens associated with other people who might follow their lead. So they eagerly roll up the welcome mat. Such is the nature of politics.

This approach creates inherent unfairness in that growth restrictions implicitly benefit people who already have what they want, to the detriment of those who aspire to the same. Portland, Oregon, which Hayward describes as “[e]veryone’s favorite model for enlightened growth management these days,”¹⁸ provides an example of this phenomenon. Portland’s urban growth boundary is “literally a line in the land outside of which growth is heavily discouraged or even prohibited.”¹⁹ The policy is implemented by Metro, a regional planning authority.²⁰ Metro “has not increased the boundary sufficiently to meet new demand,” enlarging available space by only 2% in 1997 despite an expected 80% increase in population projected by the year 2040.²¹ In trying to defy demographic trends and individual prefer-

¹⁸ Steven Hayward, *Testimony to Senate Environment and Public Works Committee*, March 17, 1999 (visited Aug. 13, 1999) <<http://www.pacificresearch.org/issues/enviro/shstestimony.html>>.

¹⁹ Sam Staley, *The Price of Urban Growth Controls*, SAN DIEGO UNION-TRIB., Aug. 9, 1998, at G-3.

²⁰ The proliferation of regional authorities and special districts, which are a vital component of regional smart-growth policies, is itself worrisome. Such entities typically possess sweeping governmental powers, such as regulation, taxation, and eminent domain, but are not directly accountable (or in many cases even known at all) to the electorate. By 1985, more than one of every four local governments was a regional authority or special district, and their numbers were escalating far more rapidly than those of other municipal governments. See CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* 76-79 (1993) (describing the “rabbit-like” growth of local governments and public authorities).

²¹ Staley, *supra* note 19.

ences, Portland soon will become a city that is bursting at the seams, with nowhere to expand. Metro has responded to these dire forecasts by planning to “shrink the average lot size for single-family homes by almost a third,” thereby squeezing many more people within the same space.²² It also will restrict retail development to thirty acres, thereby precluding many popular retailers, such as the smart growth advocates’ favorite bogeyman, the dreaded Wal-Mart.²³ Predictably, the artificial diminution of suburban housing development has led to sharply escalating prices: Staley reports that Portland’s housing prices rose by 63.8% from 1990-1995, much faster than the U.S. median of 18.2% and faster than the price rises experienced by fifty other large metropolitan areas.²⁴

The urban growth boundary produces numerous perverse effects. One effect is a system of haves and have-nots: all growth restrictions lead to higher prices, disproportionately impacting lower-income and first-time homebuyers. Another is that while open space outside the boundary is off-limits for development, space inside the city comes increasingly at a premium. As Dr. Staley puts it:

This poses a serious challenge to the ethical foundations of regional planning. If Metro’s plan is fully implemented and boundaries are not expanded, residents will be forced to live in more crowded cities, smaller houses, and more congested neighborhoods in order to conform to Metro’s vision of what Portland “ought” to be.²⁵

Indeed, Portland’s growth controls are proceeding even at the expense of the city’s economic base. The government has imposed a one thousand dollar per job “growth impact fee” on Intel if it adds too many new employees.²⁶ As the state director of economic development explained, “We aren’t just interested in jobs, jobs, jobs.”²⁷

Smart growth advocates also complain that sprawl fails to pay for itself in terms of new services required by residents.²⁸ Carl Pope con-

²² Steven Hayward, *Legends of the Sprawl: Liberals Have a New Scapegoat for Their Urban Failures: Suburban Growth*, POLYREV., Sept.-Oct. 1998, at 26, 31.

²³ See *id.* (explaining that Metro “won’t permit any retail development larger than 30 acres, because it requires too much parking space and causes too much driving”).

²⁴ Staley, *supra* note 19, at G-3.

²⁵ *Id.*

²⁶ Steven Hayward, *The Scourge of New Jobs*, N.Y. TIMES, June 12, 1999, at A15.

²⁷ *Id.*

²⁸ See Sierra Club, *supra* note 9 (arguing that “increases in tax revenue are eaten up by the costs to the community of delivering new services . . . for people who live far away from existing infrastructure”). See generally DAVID BOLLIER, HOW SMART GROWTH CAN STOP SPRAWL (1998) (listing the numerous constituencies claimed to be disadvan-

tends, without apparent irony, that sprawl "has been forced on suburbanites by government programs run amuck."²⁹ Certainly, Pope is correct about misguided government policies in general.³⁰ For example, minimum lot sizes and restrictions on multiple uses, often popular tactics among suburban governments to keep their communities pristine and exclusive, definitely contribute to "sprawling" suburbs and to the surfeit of services (like grocery stores and gas stations) in some areas. Cheerfully, those policies may end up pitting two schools of big-government politicians against one another.

The claim that current policies subsidize sprawl is difficult to evaluate, however, because development does not only impose costs but also generates revenues, such as property taxes, employment, retail sales taxes, and so forth. Moreover, such claims often are used to justify the imposition of "impact fees," which are politically expedient because, by definition, they are borne by newcomers. But such fees add to the cost of housing, again harming people of modest means who are moving to the suburbs precisely because housing is more affordable.³¹

Certainly, local and regional governments should strive for economic policy neutrality,³² so that government does not promote (or deter) suburban development. Another approach is to stop providing lavish local government services,³³ and to rely more heavily on private

tagged by sprawl and proposing a number of anti-sprawl policies).

²⁹ Pope, *supra* note 15.

³⁰ See, e.g., BOLICK, *supra* note 20, at 111-21 (describing the disastrous effects some government actions and regulations can have for individual owners of private property).

³¹ See Hayward, *supra* note 5, at 18-19 (noting that "[i]mpact fees lead to an increase in new housing prices" and that "the costs of fees . . . is [sic] almost always passed along to the homebuyer").

³² See SAMUEL R. STALEY, *THE SPRAWLING OF AMERICA: IN DEFENSE OF THE DYNAMIC CITY* 59 (Reason Public Policy Institute Policy Study No. 251, 1999) (arguing that neutrality is preferred because "economic development programs and strategies intended to aid one industry inevitably tilt the balance away from others").

³³ My favorite example of excess is Fairfax County, Virginia, which operates a waterslide park as well as state-of-the-art health club facilities, the latter concentrated in the newest and most affluent parts of the county. See, e.g., Stephen C. Fehr, *In New Wave of Summer Aquatics, Water Parks Supplant Plain Pools*, WASH. POST, July 22, 1996, at A1 (noting that Fairfax County was in the process of replacing its forty-year old pool with the county's first "water playground"); Donna Niewiaroski, *Public or Private: Working Out What's Healthiest for You*, WASH. POST, June 18, 1989, at B11 (reporting that over the last ten years, "two bond referendums in Fairfax County provided funds for eight multi-dimensional recreational facilities that were used by 1,861,921 people in 1988" and that the equipment in these facilities "is keeping in pace with that offered in the private clubs").

services in such areas as transportation and garbage collection. Privatization imposes all costs upon the people who use the services, usually at a lower price than the government.

Beyond subsidization, the other legitimate problem raised by smart growth proponents is traffic congestion. Even here, however, the problem is not correctly diagnosed, let alone effectively remedied, by a smart growth agenda. The belief that sprawl creates congestion is based on the old "concentric" model of urban areas, wherein people living outside the city commute in for jobs. Increasingly, as job growth proliferates mainly in the suburbs, commuting goes on in myriad directions.³⁴ Even if urban areas attracted more economic development, that simply would shift greater congestion from suburbs to the cities.

Ironically, smart growth advocates typically support increased mass transit. There may be valid reasons for such efforts, but they do not square with the professed objectives of the anti-sprawl agenda as mass transit heavily subsidizes suburbanization. By contrast, roads often pay for themselves through tolls and other user fees. Moreover, mass transit typically cannot respond to trends such as suburb-to-suburb commutes or picking up children at daycare—cars can. If smart growth advocates actually cared about traffic congestion, they would support road construction to ease commuting headaches. But they don't: according to Hayward, Portland "plans to force people out of their cars and onto public transit by limiting new road-building and deliberately increasing traffic congestion over the next 40 years."³⁵

Finally, smart growth is urged as a means of reinvigorating the central cities. People flock to the suburbs to escape crime, high taxes, poor schools, and economic decay. The philosophy of smart growth is to force people back into the cities in order to cure the problems, rather than solving the problems as a means of luring people back.

The Sprawl Watch Clearinghouse is remarkably candid about the income redistribution agenda associated with growth control. As one example, it asserts,

School reform advocates are not likely to make significant progress in equalizing funding between the cities and suburbs until they address regional sprawl—the engine for the racial and economic disparities they decry. Neither busing nor lawsuits have proven successful in assuring

³⁴ See Hayward, *supra* note 5, at 12-13 ("[M]ost new job growth over the last generation has taken place in the suburbs . . . [and] most commuting is now from suburb-to-suburb.").

³⁵ Hayward, *supra* note 22, at 30-31.

equal educational opportunity. Regional development planning could.³⁶

A number of policies could be used to foster urban renaissance, such as school vouchers, economic deregulation, and community-based delivery of social services.³⁷ If successful, those policies will encourage suburbanites to consider moving into cities. Forcing people to live in cities when they prefer to live elsewhere, however, seems alien to a free society.

At its center, the ideology of smart growth is profoundly paternalistic. Its proponents believe they know better than individuals themselves about the quality of life and where best to pursue it. They cannot bring themselves to consider that more than half of all Americans now live in the suburbs, and they live there because they want to. As Dr. Staley puts it,

The problem with this anti-suburban view is that these cities—and they are cities—are not really the bland, faceless, non-communities described in social studies textbooks. People live here. People choose to live here, and they choose not to move out. In fact, suburban residents are less likely to move than their central city counterparts.³⁸

Beyond paternalism, the smart growth advocates indulge the conceit that they are better able to plan efficaciously on a grand scale than the market, which expresses the collective sum of individual preferences. As Steven Hayward observes, “many of the problems that the new urbanists now decry are largely the product of a previous era of government land-use regulation and intervention.”³⁹ Given the perverse consequences emanating from early experiments in smart growth, it seems the new breed of social engineers is no more adept than the old.

II. CONSTITUTIONAL PARAMETERS

Fortunately, no matter how the political process shakes out, the Constitution places constraints on the power of government to evis-

³⁶ *Sprawl Watch Clearinghouse: The Politics of Smart Growth* (visited Jan. 12, 2000) <<http://www.sprawlwatch.org/grpolitics.html>> (excerpting from BOLLIER, *supra* note 28, at 39).

³⁷ See, e.g., CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* (1998) (outlining an agenda for empowerment and arguing that we need to eliminate the barriers that prevent those Americans with the fewest resources from controlling their destinies).

³⁸ Sam Staley, *Urban Sprawl: A Grassroots Defense* (visited Aug. 5, 1999) <<http://www.urbanfutures.org/opedstaley.html>>.

³⁹ Hayward, *supra* note 22, at 29.

cerate private property rights.

Proceeding from the desire to secure public goods without paying for them, local governments in recent years have pursued various means to pass on the associated costs to property owners. Two mechanisms are particularly popular: (1) regulating property so that owners cannot use it in any meaningful sense, and (2) imposing costly and onerous conditions on owners wishing to develop their property.⁴⁰ In recent years, the Supreme Court has sharply curtailed both practices under the Fifth Amendment's Takings Clause.

The question in all these cases is this: when government seeks to fulfill a broad public objective, who should bear the costs—individual property owners or the general public? If the government can pass off the costs, it will exhibit little restraint in imposing them. If taxpayers must foot the costs, however, the government may think twice about how much it values the particular goal. That is precisely the type of calculation the Constitution requires.

Three seminal cases have set the boundaries in this area. In *Nollan v. California Coastal Commission*, the State conditioned its approval of construction of a beachfront home on the property owners' allowing unlimited public access to their beach.⁴¹ In other words, the State wished to provide public beach access—but wanted the Nollans to bear the costs and surrender an important part of their property rights.

The Court recognized that government may, of course, impose reasonable police-power conditions on construction permits.⁴² Likewise, a regulation of property use "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] the landowner economically viable use of his land.'"⁴³ But the Court

⁴⁰ For a revealing compendium of methods to appropriate property rights without paying for them, see Douglas T. Kendall & James E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan and Dolan*, 81 VA. L. REV. 1801 (1995).

⁴¹ 483 U.S. 825, 828 (1987).

⁴² See *id.* at 834-37 (discussing the validity of conditions placed on the granting of a building permit, in the context of the police power, but concluding that there must be a "nexus" between the police-power objective to be served and the condition imposed).

⁴³ *Id.* at 834 (alterations in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Even a government action that temporarily deprives an owner of all economically viable use creates a requirement of compensation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 305 (1987) (holding that the invalidation of an ordinance that had denied appellant all use of its property for a number of years requires a payment of fair value for the use of the property, in order to satisfy the Fifth Amendment's requirement of "just compensa-

found that the condition exceeded police power justifications, did not substantially advance a legitimate government interest, and allowed a permanent physical occupation of part of the Nollans' property.⁴⁴ Writing for the majority, Justice Scalia condemned the State's action as "an out-and-out plan of extortion."⁴⁵ The Court ruled that if the State wanted beach access, it would have to pay for it.⁴⁶

In 1992, the Court addressed the case of David Lucas, who had purchased two beachfront lots in South Carolina with plans of building houses on them.⁴⁷ Two years after Lucas purchased the lots, the State enacted the Beachfront Management Act, forbidding any construction along the beach ostensibly for environmental reasons.⁴⁸ Overnight, Lucas's property declined in value from \$1.6 million to \$0.⁴⁹

The Supreme Court ruled that Lucas was entitled to proceed with a takings claim,⁵⁰ because he had been denied all economically viable use of the property.⁵¹ Given that the property was located in a residential area, and that the State changed the rules after Lucas purchased the property, the Court declared that the State could justify its action without compensation only if the use of the property would constitute a nuisance.⁵² As the Court explained, the State "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."⁵³ In other words, no property owner has the right to create a nuisance, so if the government regulates to

tion").

⁴⁴ See *Nollan*, 483 U.S. at 832, 837 (finding that "a 'permanent physical occupation' has occurred," and holding that "[w]hatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them").

⁴⁵ *Id.* at 837 (citing *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

⁴⁶ See *id.* at 841-42 (holding that California may use its power of eminent domain to acquire access to the beach, but California must pay for this access).

⁴⁷ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006-07 (1992).

⁴⁸ See *id.* at 1008-09 (explaining that the Act prohibited construction of occupiable improvements seaward of a certain line).

⁴⁹ See *id.* at 1009 (noting "the Act's complete extinguishment of [Lucas's] property's value").

⁵⁰ See *id.* at 1010-13 (holding that Lucas had a ripe takings claim).

⁵¹ See *id.* at 1020 (acknowledging the trial court's finding that "Lucas's two beachfront lots [were] rendered valueless").

⁵² See *id.* at 1031-32 (stating that "South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found in order to avoid the need to pay compensation").

⁵³ *Id.* at 1027.

prevent a nuisance, no compensation is necessary. But if a person buys property in a residential zone, and the city subsequently decides it wants to preserve the property as open space, the costs of that preference must be borne by the city, not the property owner. This holding should shift the policy calculus away from voracious regulators.

Most recently, in *Dolan v. City of Tigard*, the owners of a hardware store wanted to expand it.⁵⁴ The city agreed to the expansion, but only if the owners agreed to provide a greenway and a pedestrian/bicycle path.⁵⁵ The Supreme Court ruled that the city must demonstrate that a direct and specific "nexus" exists between the permit conditions and legitimate government interests, and that there is a "rough proportionality" between the regulatory burden and the project impact.⁵⁶ Specifically, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."⁵⁷

In this case, the city established its legitimate interests, but failed to show that the expansion of the hardware store would have an impact on the community to an extent that would justify the permit conditions.⁵⁸ Again, the city's conditions were extortionist. Writing for the majority, Chief Justice Rehnquist stated that "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"⁵⁹ If the city wanted its greenway and pedestrian/bicycle path, the taxpayers, not the Dolans, would have to foot the bill.

The principles yielded by these cases bode significant ramifications for urban growth boundaries and other growth-control restrictions. To the extent that such policies change the rules of the game so that property owners are deprived of the preexisting right to develop their property, the restrictions could trigger a claim for compensation akin to *Lucas*. The owners would have to demonstrate that

⁵⁴ 512 U.S. 374 (1994) (holding that the city's dedication of land requirement would constitute an uncompensated taking of property).

⁵⁵ See *id.* at 380 (explaining the dedication of land requirement).

⁵⁶ See *id.* at 386-88, 390-91 (explaining the "essential nexus" requirement and stating that "a term such as 'rough proportionality' best encapsulates what [the Supreme Court] hold[s] to be the requirement of the Fifth Amendment").

⁵⁷ *Id.* at 391.

⁵⁸ See *id.* at 394-96 ("The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done.").

⁵⁹ *Id.* at 384 (citation omitted).

the restrictions deprived them of all or mostly all of the value of their property. This requirement should not present a difficult hurdle because the objective of the restrictions is to prevent development consistent with the otherwise predictable use of the property. A nuisance justification would be unavailing to the governments implementing such policies, as it was in *Lucas*, because the property owners are using their property only for ordinary residential or commercial purposes. Likewise, a development moratorium could trigger compensation obligations for a temporary taking, as in *First English Evangelical Church of Glendale v. County of Los Angeles*.⁶⁰

Nor are development conditions that might accomplish the same objectives without depriving the owners of all viable use of their property—such as minimum lot sizes or exactions for desired municipal purposes—likely to escape without scrutiny. The lesson of *Nollan* and *Dolan* is that such conditions must serve a legitimate public objective (which, of course, is determined on a case-by-case basis) and must be roughly proportionate to the costs imposed by the development. Even if growth controls were themselves deemed a legitimate public objective, as described in the previous part of this Article, many of the actual regulations conflict with the purposes of these alleged objectives. No one can legitimately object to conditions that force the owners to bear their own costs for roads, sewer lines, schools, and the like. If the real objective is to curtail development as an end in itself and to compel specific property owners to carry the weight of those policies, the courts will strip away the façade of regulating for the public good and either require the public at large to pay for the desired objectives or invalidate the conditions.

The rules applied by the Supreme Court in this context make abundant sense. I surmise that the public only wants “smart growth” if someone else has to pay for it. Growth control policies inevitably impose substantial costs on property owners who are suddenly unable to realize their legitimate expectations. If the community wants to control growth, it should bear the costs of its decision. If the taxpayers balk, then the government should not pursue its action.

As Justice Kennedy recently observed in *United States v. James Daniel Good Real Property*, “Individual freedom finds tangible expression in property rights.”⁶¹ The message of the recent takings precedents is

⁶⁰ 482 U.S. 304 (1987) (holding that, in normal circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property).

⁶¹ 510 U.S. 43, 61 (1993) (holding that, in normal circumstances, the Due Process

clear: government may not run roughshod over private property rights. Government "planning" must take into account the constitutional right of Americans to own and enjoy their property.

CONCLUSION

Happily, as is often the case, common sense and the Constitution cohere behind a common understanding: in a free society, the government is constrained to fulfill legitimate public objectives in a manner that is duly respectful of precious individual liberties. Sweeping "smart growth" planning is poorly suited to solving the handful of real problems it purports to address. Its core objective is not to curb traffic congestion or to give parents more time with their children, but to tell people where and how they should live. In the process, smart growth policies will put home ownership out of reach for many Americans of modest means.

The bottom line is that if its advocates feel the need to call it "smart," it probably isn't. If the people do not reject this latest experiment in social engineering, ultimately the courts will.