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# Making "Smart Growth" Smarter

Steve P. Calandrillo

*University of Washington School of Law*

Chryssa V. Deliganis

Andrea Woods

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# Making “Smart Growth” Smarter

Steve P. Calandrillo\*  
Chryssa V. Deliganis\*\*  
Andrea Woods\*\*\*

## ABSTRACT

*The “smart growth” movement has had a significant influence on land use regulation over the past few decades, and promises to offer the antidote to suburban sprawl. But states and local governments that once enthusiastically touted smart growth legislation are beginning to confront unforeseen obstacles and unintended consequences resulting from their new policies. This Article explores the impact of growth management acts on private property rights, noting the inevitable and growing conflicts between the two sides that legislatures and courts are now being asked to sort out. It assesses the problems with creating truly intelligent urban growth, ranging from political motivations to inconsistent judicial determinations to NIMBYs to constitutional takings jurisprudence.*

*This Article predicts dramatically increased land use litigation as the likely result of smart growth legislation in the coming decades unless legislatures and courts enact sensible reforms today. If we want “smart growth” to live up to its name, we must remove it from local politics, get serious about consistently enforcing urban growth boundaries or priority funding areas, and even consider reforming America’s individualistic notion of private property rights as we know it.*

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\* Charles I. Stone Professor of Law, University of Washington School of Law, steve-cal@uw.edu. J.D., Harvard Law School; B.A., U.C. Berkeley.

\*\* Principal, Calandrillo & Deliganis. J.D., Harvard Law School; B.A., U.C. Berkeley.

\*\*\* J.D., University of Washington School of Law; B.A., Gonzaga University.

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## INTRODUCTION

Over the past century, ever-expanding urban and suburban growth in the United States has offered a clear sign of America’s economic vitality, but it has not come without unique challenges of its own. Indeed, efforts to promulgate “smart growth” legislation as an antidote to suburban sprawl have proliferated in the past three decades, but it is time we ask ourselves whether their benefits outweigh their unintended consequences. States and local governments that once enthusiastically touted such legislation are beginning to confront unforeseen obstacles—and litigation—that raise the need for immediate reform. This Article explores the impact of growth management acts on preexisting property rights, noting the inevitable and growing conflicts between the two sides that legislatures (and courts) are increasingly being forced to confront. We assess the problems with creating truly intelligent urban and suburban growth, from political pressures to inconsistent judicial determinations to NIMBYs<sup>1</sup> and even constitutional takings jurisprudence.

Let us briefly consider a few examples that highlight the nature of the land use and property law conflicts involved: Point Wells, Washington; Rajneeshpuram, Oregon; and Windsor Tract, Florida.

Point Wells, a scenic area designated to become a luxury condominium development, rests on the Puget Sound waterfront.<sup>2</sup> Formerly owned by Standard Oil and used as a fuel facility,<sup>3</sup> this area contains beautiful beachfront property nearly a mile long, with stunning views of Puget Sound and the Olympic Mountains beyond.<sup>4</sup> It is nestled on the southern part of Snohomish County, and is adjacent to the northernmost city—Shoreline—of another county, King County.<sup>5</sup> When

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<sup>1</sup> NIMBY is an acronym for “Not In My Back Yard,” an expression of opposition to the locating of an undesirable project close by in one’s neighborhood. See NIMBY, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/nimby> (last visited May 10, 2015).

<sup>2</sup> BSRE Point Wells, LP, *Point Wells*. . . *A New Vision for Living*, POINT WELLS, <http://pointwells.com> (last visited May 10, 2015) [hereinafter *Vision*].

<sup>3</sup> Noah Haglund, *Status of Point Wells Still in Limbo*, HERALDNET (July 16, 2013, 12:01 AM), <http://www.heraldnet.com/article/20130716/NEWS01/707169935>.

<sup>4</sup> See *Vision*, *supra* note 2.

<sup>5</sup> See Haglund, *supra* note 3.

developer Blue Square Real Estate<sup>6</sup> decided to create a residential community there, it was not difficult to appreciate the enormous financial rewards of constructing dwellings featuring “million dollar views.” Blue Square’s proposed plan for Point Wells would create the largest condominium development in Snohomish County, with 3000 luxury units, retail spaces, and a public pier.<sup>7</sup>

The fate of Point Wells, however, was not that simple. Situated between two cities, Woodway and Shoreline, Washington, and without any preexisting services of its own, the negative externalities<sup>8</sup> required to support a community of its size would largely fall upon Point Wells’s relatively small neighbor to the south, Shoreline.<sup>9</sup> In order to get permission to develop, however, Blue Square successfully lobbied its *northern* neighbor, Snohomish County, to designate this former fuel facility as an “urban center” for land use purposes.<sup>10</sup> This redesignation of a significant tract of land—positioned, as it was, closely to other municipalities—raised all the important questions of land use with which states across the country are grappling. To introduce a community of the size suggested by its developers implicated issues of resource management, environmental preservation, affordable housing, housing density, and negative externalities: in other words, the myriad of intersecting issues at play whenever urban (or suburban) sprawl occurs.

Just to the south in Oregon’s Cascade Mountains, when a meditation center sought incorporation as its own city, a non-profit advocacy organization opposed its incorporation on the grounds that it would increase urban expansion in an unauthorized area.<sup>11</sup> Determining whether incorporating the new city of “Rajneeshpuram” on a 64,000-acre ranch was legally permissible depended on whether or not incorporation constituted a “land use decision.”<sup>12</sup> This lawsuit implicated questions of county versus city powers, including the ability to desig-

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<sup>6</sup> Blue Square Real Estate is a large petroleum and real estate company with holdings in Israel, Europe, and the United States. Haglund, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> Economists typically define negative externalities as costs or harms that are created by one person’s activity but fall onto another party. See, e.g., EDWARD M. GRAMLICH, A GUIDE TO BENEFIT-COST ANALYSIS 18–20 (2d ed. 1990).

<sup>9</sup> See Haglund, *supra* note 3.

<sup>10</sup> See *Vision*, *supra* note 2; see also Brief for Futurewise as Amicus Curiae Supporting Petitioners at 8–9, *Town of Woodway v. Snohomish Cnty.*, 322 P.3d 1219 (Wash. 2014) (No. 88405-6), 2013 WL 5676370.

<sup>11</sup> 1000 Friends of Or. v. Wasco Cnty. Ct., 703 P.2d 207, 213 (Or. 1985).

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

nate areas to fall within Oregon’s famous land use planning tool: an urban growth boundary (“UGB”).<sup>13</sup>

Across the country in a Florida wetland area known as Windsor Tract, developer Estuary Properties had plans for massive residential and commercial building.<sup>14</sup> Estuary sought to develop 6500 acres of land, including 2800 acres of coastal rim.<sup>15</sup> The property was home to red and black mangrove forests.<sup>16</sup> Estuary had big plans—anticipating housing as many as 73,500 people in the space, creating some twenty-seven man-made lakes, and changing the elevation and topography of the land.<sup>17</sup> Anticipated destruction of forestland was the most controversial element of the proposal.<sup>18</sup>

Because of the location of the proposed development and the anticipated environmental impact, the governing board of county commissioners denied Estuary a permit.<sup>19</sup> On appeal, the court was asked to consider the competing interests of the developer’s private property rights—and whether or not denial of a development permit constituted a “taking”—and the interests of the surrounding region, such as the environmental impact on forests, waterways, and population growth.<sup>20</sup> Although the developer initially won an order providing for its development permit over regional environmental objections,<sup>21</sup> the Florida Supreme Court ultimately handed a victory to neighboring landowners, stating:

The concern of public officials over environmentally endangered lands is a laudable one and is shared by all of our citizens. On the other hand, the right of an individual to own and enjoy property was one of the foundation stones on which our government was formed. As government grows the individual property rights diminish, for we focus our attention on the welfare of the majority at the expense, and ultimate destruction, of the property owner. If one foundation stone crumbles, our form of government will fall.<sup>22</sup>

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<sup>13</sup> See *id.* at 214, 217.

<sup>14</sup> *Estuary Props., Inc. v. Askew*, 381 So. 2d 1126, 1128 (Fla. Dist. Ct. App. 1979), *aff’d in part, rev’d in part sub nom. Graham v. Estuary Props., Inc.*, 399 So. 2d 1374 (Fla. 1981).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1129.

<sup>19</sup> *Id.* at 1129–31.

<sup>20</sup> *Id.* at 1139.

<sup>21</sup> *Id.* at 1140.

<sup>22</sup> *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1385 (Fla. 1981), *aff’g in part, rev’g in part Askew*, 381 So. 2d at 1126.

The Florida Supreme Court's language, and indeed the problems highlighted in each of the above-mentioned lawsuits, identifies the growing tension between environmental welfare and private property rights in the United States. This tension touches upon a broad, long-running, and interdisciplinary challenge faced by the American legal system: smart land use, and the much-discussed issue of sprawl.<sup>23</sup> Efforts to make wise, coordinated land use planning a priority have been met with extreme political and legal difficulties.<sup>24</sup> Much of this difficulty is rooted in the very nature of private property rights in the United States.

At its core the problem is this: land is a finite resource, and its use has significant effects on quality of life, environmental sustainability, and fundamental fairness. Given the growing conflicts created by sprawl, our legal system can and must do a much better job of passing effective legislation to combat and resolve these conflicts in a sensible way. We must also consistently uphold and interpret that legislation to provide predictability and stability to private property holders, while stemming the tide of litigation that has been coming our way.

This Article explores the problems inherent in many states' noble efforts to enact sensible growth management laws, and offers normative suggestions for meaningful reform. Part I provides historical background with respect to the development of private property rights in America, including some important implications for land use and growth management. We address (the failure of) national land use planning efforts and the resulting problem of sprawl that consumed much public discourse over the past few decades, as well as other legal impediments to sensible growth management. Part II details the rise of the "smart growth" movement as the legal antidote to sprawl, examining the well-meaning but internally conflicting growth management legislation efforts passed by several states.<sup>25</sup> Not surprisingly, substantial litigation has been the inevitable result, and neither pre-

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<sup>23</sup> See, e.g., REID EWING ET AL., NAT'L WILDLIFE FED'N, ENDANGERED BY SPRAWL: HOW RUNAWAY DEVELOPMENT THREATENS AMERICA'S WILDLIFE (2005), available at <http://www.nwf.org/pdf/Wildlife/EndangeredBySprawl.pdf>; Reid Ewing et al., *Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity*, 18 AM. J. HEALTH PROMOTION 47 (2003); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997).

<sup>24</sup> See, e.g., 1 JAMES A. KUSHNER, SUBDIVISION LAW & GROWTH MANAGEMENT § 3:1, at 3-2 (2d ed. 2002).

<sup>25</sup> At least thirteen states have tried their hand at smart growth legislation: Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Pennsylvania, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, and Washington. See David R. Godschalk, *Smart Growth Efforts Around the Nation*, POPULAR GOV'T, Fall 2000, at 12, 13, available at <http://www.sog.unc.edu/pubs/electronicversions/pg/pgfal00/article2.pdf>.

dictability nor smart growth has necessarily been enhanced. Part III further analyzes these efforts in order to identify common problems in growth management from which we need to learn lest we repeat the failures of the past. Finally, Part IV offers bold legal and public policy solutions to these common dilemmas that legislators can and should take up immediately. We must remove smart growth efforts from local political manipulation, and create durable land use solutions that address the inherent conflicts of interest involved. If we fail to do so, smart growth efforts will surely never be capable of living up to their name.

## I. THE NATURE OF U.S. PROPERTY RIGHTS MAKES GROWTH MANAGEMENT AN UPHILL BATTLE

### A. *The Development of Private Property Rights in the United States*

The concept of private property rights in the United States has a long history dating back to the ancient Romans and Celts.<sup>26</sup> Roman law identified the property owner's right to use, enjoy, and transfer his land to others.<sup>27</sup> Roman soldiers were even rewarded with parcels of land for their service.<sup>28</sup> The high value placed on private property rights in Roman law was passed down to the Anglo-American common law of property.<sup>29</sup> The English conception of property rights fluctuated after the Norman Conquest, but as one author put it, "In all this history, one constant has been the keen interest in, and powerful motivation proffered by, the prospects of acquiring private ownership rights in land."<sup>30</sup>

It was not, however, until the founding of the American colonies that a never-before-seen celebration of full private property rights came into being.<sup>31</sup> Not only was owning one's own land an indication of social standing, it was considered essential to reach one's "happiest

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<sup>26</sup> See David A. Thomas, *Why the Public Plundering of Private Property Rights Is Still a Very Bad Idea*, 41 REAL PROP. PROB. & TR. J. 25, 34–37 (2006).

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.* at 37.

<sup>29</sup> *Id.* at 40. Though it exceeds, in some regard, the scope of this Article, this notion of private property rights need not have won the day. Were there a different cultural and legal understanding of communal and public use of land, our current conception of growth management could have been quite different.

<sup>30</sup> *Id.* at 46.

<sup>31</sup> *Id.*



and most productive potential.”<sup>32</sup> Land ownership has thus been part of the American dream since colonial Jamestown and Plymouth.<sup>33</sup>

As the American common law of property developed, the individual rights of the property owner have remained strong. One who invests in a parcel of land is considered to own that parcel down to the center of the earth and as high as the heavens above.<sup>34</sup> There is a strong connection between land ownership and a sense of American identity—exhibited not only in the robust defense of an owner’s individual property rights, but also in disparate areas such as criminal law<sup>35</sup> and privacy law.<sup>36</sup>

Of course, within the history of the “American dream” of land ownership, key players have been historically excluded. Persons of color, women, and immigrants, for example, faced barriers distinct from those of freed white men.<sup>37</sup> To this day, the difference in property values based on one’s race makes property ownership (as compared to renting) more difficult for persons born into lower means, or persons who by virtue of their skin color will likely own property with a lower value.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 46, 52.

<sup>34</sup> See Matt Soniak, *Do You Own the Space Above Your House?*, MENTAL FLOSS (June 25, 2012, 11:08 AM), <http://mentalfloss.com/article/31018/do-you-own-space-above-your-house> (addressing whether one literally owns all the air space above one’s house and ground space below). Soniak writes:

*Cuius est solum, eius est usque ad coelum et ad inferos* means “whoever owns the soil, it is theirs up to Heaven and down to Hell.” This property right principle asserts that a person who owns a particular piece of land owns everything directly above and below that piece of land, no matter the distance, and can prosecute trespassers who violate their border on the surface, underground and in the sky. But has that held up in court over the years?

Despite the Latin phrasing, the principle was not a part of classical Roman law, and is usually attributed to the 13th-century Italian scholar Accursius. It made its way to England and was first used in the English-speaking world by Sir Edward Coke, an Elizabethan-era lawyer/judge/politician. It gained wider popularity in *Commentaries on the Laws of England* (1766), a treatise by judge and jurist William Blackstone.

<sup>35</sup> For example, consider the more generous “stand your ground” laws when one acts in self-defense on one’s own property—otherwise known as the “Castle doctrine.” See *Debate Club: Are ‘Stand Your Ground’ Laws a Good Idea?*, U.S. NEWS & WORLD REP., <http://www.usnews.com/debate-club/are-stand-your-ground-laws-a-good-idea> (last visited May 17, 2015).

<sup>36</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (even dwindling Fourth Amendment protections were upheld by a Scalia-authored majority opinion because the case implicated one’s home).

<sup>37</sup> See generally DAVID HILFIKER, *URBAN INJUSTICE: HOW GHETTOS HAPPEN* (2002).

<sup>38</sup> *Id.*

In the end, the almost-sacred nature with which the law has treated American property owners has significant implications for proponents of smart growth. First, the extensive power afforded to states, local governments, and individuals to control land use decisions has made it difficult to achieve national coordination of land use planning.<sup>39</sup> Second, the notion that every American deserves a certain kind of home<sup>40</sup> contributes to the problem of suburban sprawl that land use planning efforts have sought to address.

### *B. National Land Use Planning Efforts (and their Failure)*

There have been multiple significant efforts to engage in nationwide land use planning.<sup>41</sup> An early example came as part of the New Deal’s efforts to combat the economic effects of the Great Depression—particularly with regard to farmers.<sup>42</sup> In 1938, the Secretary of Agriculture, Henry Wallace, developed a planning scheme for farmers to address their collective needs, in which they would form local planning boards, county boards, and state boards, all of which ultimately reported to the Secretary in Washington.<sup>43</sup> Professor Todd Wildermuth has characterized this movement as a “gentle entry into national planning” as it was “chiefly procedural, limited to agricultural lands, and generated from the bottom up.”<sup>44</sup>

However, before this New Deal national agricultural planning movement could demonstrate success, it was stopped short in its tracks.<sup>45</sup> A combination of political and economic shifts, including Secretary Wallace’s departure from the U.S. Department of Agriculture, a failed attempt to delegate control locally rather than seeking national cohesion, and the beginning of World War II, led to the dismantling of the New Deal agricultural land use program.<sup>46</sup>

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<sup>39</sup> See generally Godschalk, *supra* note 25.

<sup>40</sup> “A quiet place where yards are wide, people few, and motor vehicles restricted . . . .” *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

<sup>41</sup> See, e.g., Clean Air Act, 42 U.S.C. §§ 7401–7671 (2012); Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)); Agriculture Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31; National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1–4 (2012)); see generally Todd A. Wildermuth, *National Land Use Planning in America, Briefly*, 26 J. LAND RESOURCES & ENVTL. L. 73 (2005).

<sup>42</sup> Wildermuth, *supra* note 41, at 75–76.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 75.

<sup>45</sup> *Id.* at 76.

<sup>46</sup> *Id.* at 76–77.

The 1960s and 1970s witnessed a second attempt at national land use planning, as environmental consciousness began to dawn in America. Enactment of the Clean Air Act,<sup>47</sup> the National Environmental Policy Act,<sup>48</sup> and celebration of the first Earth Day<sup>49</sup> all took place during this time frame.<sup>50</sup> In 1970, the next logical step appeared to be near as Senator Henry Jackson introduced the National Land Use Policy Bill.<sup>51</sup> Under this proposal, the federal government would fund states' efforts to compile necessary data for land use planning, and then make coordinated decisions regarding where federal funding should go based on the data.<sup>52</sup> The Land Use Policy Bill—and various iterations of it—was discussed in Congress every year from 1970 to 1975, but the bill never reached the President's desk for signature.<sup>53</sup> Opposition from various political actors including President Richard Nixon and the Chamber of Commerce thwarted the bill's progress each time around.<sup>54</sup>

### C. *Sprawl*

The individualistic cultural understanding of private property rights is not merely a thorn in the side of those who would like to see sensible national land use efforts succeed. The trend towards stronger and stronger private property rights, particularly the suburban American dream<sup>55</sup> of low-density residential housing (with a lawn, a white picket fence, and a two-door garage), have created one of the largest planning problems: sprawl.

There are competing definitions of the term “sprawl.” Frequently, sprawl is categorized as low-density development that expands in a “leapfrog”<sup>56</sup> or “hopscotch”<sup>57</sup> pattern outward from previously settled areas, typically “near a deteriorating central city or

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47 42 U.S.C. §§ 7401–7671q (2012).

48 42 U.S.C. §§ 4321–4370h (2012).

49 The first Earth Day took place on April 22, 1970. See Wildermuth, *supra* note 41, at 77 n.19 (citing PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 111–28 (1993)).

50 See Wildermuth, *supra* note 41, at 77.

51 National Land Use Policy Act, S. 3354, 91st Cong. (1970); see also Wildermuth, *supra* note 41, at 77 (citing NOREEN LYDAY, *THE LAW OF THE LAND: DEBATING NATIONAL LAND USE LEGISLATION, 1970–1975* (1976)).

52 Wildermuth, *supra* note 41, at 77–78.

53 *Id.* at 78.

54 *Id.* at 78–79.

55 See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (indicating that the proper role of government regarding sprawl would be to “lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people”).

56 See Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Develop-*

town.”<sup>58</sup> Some say that sprawl has a more ephemeral, “I-know-it-when-I-see-it” sort of quality.<sup>59</sup> Others state that sprawl “can occur anywhere within or adjoining a metropolitan region, without any necessary connection to the core city.”<sup>60</sup>

A more accurate definition of sprawl focuses narrowly on the tangible forms that sprawl assumes on the landscape. Generally, these forms include detached, single-family homes, set far from the curb, on large lots, in (almost) purely residential neighborhoods, containing wide streets upon which residents will drive to jobs and shopping centers in potentially distant commercial zones<sup>61</sup>—in other words, all of the built forms more commonly referred to as “suburban.”<sup>62</sup>

The near-complete separation of residential and commercial land uses is probably sprawl’s most evident attribute. As urban planner Oliver Gillham put it, residential housing is confined to subdivisions connecting to form an “unbroken fabric of privately owned land divided only by public roads.”<sup>63</sup> The physical appearance of these subdivisions, when viewed from above, can seem harshly monotonous—in the words of folk singer Malvina Reynolds, like “little boxes made of ticky-tacky . . . [a]nd they all look just the same.”<sup>64</sup> Meanwhile, commercial zones are generally typified by the strip mall—that is, the ubiquitous form of retail and office development “configured in long, low boxes or small pavilions surrounded by multiple acres of surface parking” and arranged alongside “huge arterial roads.”<sup>65</sup>

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*ment in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL’Y & L. 26, 29 (2003).

<sup>57</sup> See Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1175 (2005) (internal quotation marks omitted).

<sup>58</sup> Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000).

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

<sup>60</sup> OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 8 (2002).

<sup>61</sup> See *id.* (defining “sprawl” as “a form of urbanization distinguished by leapfrog patterns of development, commercial strips, low density, separated land uses, automobile dominance, and a minimum of public open space”).

<sup>62</sup> *Id.* (“Suburbanization is the spread of suburban development patterns across a region or a nation—that is, the proliferation of sprawl forms of urbanization across a region or nation.”).

<sup>63</sup> *Id.* at 7.

<sup>64</sup> MALVINA REYNOLDS, *Little Boxes*, on EAR TO THE GROUND (Smithsonian Folkways Recordings 2000) (this song accompanies the opening credits of the hit Showtime television show *Weeds*, which paints a subversive portrait of a suburban mother).

<sup>65</sup> GILLHAM, *supra* note 60, at 5.

The negative effects of sprawl are so numerous as to be the subject of many independent articles.<sup>66</sup> Briefly, sprawl has been demonstrated to contribute to higher rates of obesity,<sup>67</sup> undermine wildlife preservation,<sup>68</sup> and impede access to affordable housing.<sup>69</sup>

#### D. *Legal Impediments to Growth Management*

There are numerous legal concerns, aside from the jurisprudence concerning property rights, with which smart growth advocates must contend. Among them are: (1) substantive due process rights, (2) the Takings Clause, (3) restrictions on exclusionary zoning, and (4) the Equal Protection Clause, and the Fair Housing Act.<sup>70</sup> Although these may, at first, appear to be insurmountable barriers to the enactment of effective smart growth legislation, the standard for invalidating a growth management law under any given legal framework is difficult to meet. Each legal hurdle is discussed briefly.

##### 1. *Substantive Due Process*

Land use and zoning decisions may not violate a person's constitutional rights, including substantive due process. However, judicial interpretation of whether a due process right has been violated will take into account the police power of a state with regard to land use.<sup>71</sup> Land use regulation may not be conducted in a way that is unconstitutionally arbitrary and capricious.<sup>72</sup> Developers and residents both have substantive due process rights.<sup>73</sup> Though substantive due process

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<sup>66</sup> See Reid H. Ewing, *Characteristics, Causes, and Effects of Sprawl: A Literature Review*, in *URBAN ECOLOGY: AN INTERNATIONAL PERSPECTIVE ON THE INTERACTION BETWEEN HUMANS AND NATURE* 519, 525–26 (John M. Marzluff et al. eds., 2008); EWING ET AL., *supra* note 23; Ewing et al., *supra* note 23; Freilich & Peshoff, *supra* note 23.

<sup>67</sup> Ewing et al., *supra* note 23 (discussing the relationship between sprawl and physical activity).

<sup>68</sup> EWING ET AL., *supra* note 23, at vii.

<sup>69</sup> See Ewing, *supra* note 66, at 521 (describing how sprawl limits accessibility).

<sup>70</sup> See generally 1 JAMES A. KUSHNER, *SUBDIVISION LAW & GROWTH MANAGEMENT*, § 3:1 (Nov. 2013 ed.).

<sup>71</sup> See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926); see also *Disney v. City of Concord*, 124 Cal. Rptr. 3d 58, 60–64 (1st Dist. 2011) (finding that a city ordinance was a constitutionally permissible exercise of its police power and did not violate resident's substantive due process rights).

<sup>72</sup> See, e.g., *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 399, 402 (3d Cir. 2003); *Berger v. City of Mayfield Heights*, 154 F.3d 621, 622, 626 (6th Cir. 1998); *Dodd v. Hood River Cnty.*, 59 F.3d 852, 864 (9th Cir. 1995); *L.M. Everhart Constr., Inc. v. Jefferson Cnty. Planning Comm'n*, 2 F.3d 48, 51–52 (4th Cir. 1993); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 44 (1st Cir. 1992).

<sup>73</sup> See *Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir. 1988) (holding developer's substantive

rights are often implicated via a government action such as a taking, they are also distinct constitutional grounds for individual relief. For example, in *Elsmere Park Club Ltd. Partnership v. Town of Elsmere*,<sup>74</sup> a property owner whose building was condemned after a flood had his substantive due process rights violated because his application asking for a permit to repair the condition himself was purposefully delayed by the town. The court found this substantive due process violation even though the condemnation itself was not considered a taking.<sup>75</sup>

## 2. *The Takings Clause*

Without going too far beyond the scope of this Article, the interaction between the Takings Clause of the Constitution<sup>76</sup> and the ability of local governments to engage in regulatory takings is an essential cornerstone of the legal understanding of land use. A regulation such as a planning decision may constitute a taking subject to the Constitution’s just compensation requirement.<sup>77</sup> Applying the seminal test set forth in *Penn Central Transportation Co. v. City of New York*, a court must weigh the “economic impact of the regulation”—particularly the extent to which the regulation has interfered with the landowner’s “distinct investment-backed expectations”—against the general “character” of the governmental action.<sup>78</sup> In analyzing the “character” of the regulation, the court will ask whether the regulation “can be characterized as a physical invasion by government.”<sup>79</sup> If so, the court will be more likely to find a taking requiring the payment of just compensation.<sup>80</sup> Winning, as the landowner, on a regulatory takings claim is quite difficult, however.<sup>81</sup>

## 3. *Restrictions on Exclusionary Zoning*

Land use decisions require a balance between local control, understood as a proper exercise of state and local police power, and the

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due process rights were violated by municipality’s arbitrary decision to delay or deny issuing a building permit), *abrogated on other grounds by United Artists*, 316 F.3d at 394.

<sup>74</sup> *Elsmere Park Club Ltd. P’ship v. Town of Elsmere*, 771 F. Supp. 646, 651 (D. Del. 1991).

<sup>75</sup> *Town of Elsmere*, 771 F. Supp. at 651.

<sup>76</sup> U.S. CONST. amend V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>77</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127–28 (1978).

<sup>78</sup> *Id.* at 124.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> The well-known Supreme Court case of *Kelo v. City of New London*, 545 U.S. 469, 484–85 (2005), blesses the exercise of eminent domain pursuant to an “economic development” plan.

need to comport with the broad concepts of fairness mandated by the U.S. Constitution. Where zoning or land use decisions have an exclusionary impact, courts may assess whether or not the exclusionary impacts are a justifiable exercise of police power.<sup>82</sup> However, it is not common for land use decisions to be invalidated based on exclusionary zoning.<sup>83</sup> In order to be deemed unlawful, exclusionary zoning must not serve legitimate purposes but rather be more akin to a “thinly disguised desire to remain an exclusive community.”<sup>84</sup>

A Michigan case, *English v. Augusta Township*,<sup>85</sup> offers an example of the rare land use decision invalidated under an exclusionary zoning theory. Plaintiffs asked to have land rezoned from its agricultural designation in order to allow for a mobile home park.<sup>86</sup> The township denied their request, because it had technically zoned other land for the purposes of developing a mobile home park.<sup>87</sup> However, the land already designated for use as a mobile home park was located in an area completely unsuitable for its development.<sup>88</sup> Accordingly, the court found that the township had “relegated” mobile homes to an unusable part of town, and had therefore engaged in unconstitutional exclusionary zoning.<sup>89</sup>

#### 4. *The Equal Protection Clause and the Fair Housing Act*

Growth management and land use decisions must also comport with the Equal Protection Clause<sup>90</sup> and Title VIII of the 1968 Civil Rights Act, also known as the Fair Housing Act.<sup>91</sup> While the Equal Protection Clause requires a showing that a growth management plan had a discriminatory intent (a difficult standard to meet), the Fair

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<sup>82</sup> See, e.g., *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105–06 (5th Cir. 1996); *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 607 (Pa. 1965).

<sup>83</sup> See, e.g., *Schanzenbach v. Town of Opal*, 706 F.3d 1269, 1276–77 (10th Cir. 2013); *City of Nederland*, 101 F.3d at 1106; *Wincamp P'ship v. Anne Arundel Cnty.*, 458 F. Supp. 1009, 1027–28 (D. Md. 1978).

<sup>84</sup> See KUSHNER, *supra* note 70, § 3:9 (discussing *Kohn*, 215 A.2d at 607–10).

<sup>85</sup> *English v. Augusta Twp.*, 514 N.W.2d 172 (Mich. Ct. App. 1994).

<sup>86</sup> *Id.* at 173.

<sup>87</sup> *Id.* at 174–76.

<sup>88</sup> *Id.* at 173–74.

<sup>89</sup> *Id.* at 174–76.

<sup>90</sup> U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>91</sup> See Civil Rights Act of 1968, Tit. VIII, Pub. L. 90-284, 82 Stat. 73, 81–89. Title VIII of the Civil Rights Act of 1968 is more commonly known as the Fair Housing Act, which is codified at 42 U.S.C. §§ 3601–3619, 3631 (2012).

Housing Act may invalidate a growth management law where a disproportionate impact is made on a protected class.<sup>92</sup>

A landmark example, Mount Laurel, New Jersey, had its zoning ordinances invalidated on Equal Protection Grounds in *South Burlington County NAACP v. Township of Mount Laurel*.<sup>93</sup> The Mount Laurel township, just ten miles from Philadelphia and adjacent to Camden, New Jersey, had its population double from 2817 to 5249 during the 1940s, and then again from 5249 to 11,221 during the 1950s.<sup>94</sup> The huge influx was due largely to people moving in from nearby cities—particularly as the expansion of nearby highways enhanced access to Mount Laurel.<sup>95</sup> Many of those persons moving to the township in the early 1960s were African-American or Hispanic, and were clearly perceived as unwanted “outsiders” by the existing Mount Laurel residents.<sup>96</sup>

It was in this context that a 1964 zoning ordinance limiting density came under Equal Protection and Due Process scrutiny.<sup>97</sup> The ordinance required larger lot sizes for development and had the effect of creating very few affordable housing options within the township.<sup>98</sup> The New Jersey Supreme Court found that not only were there a lack of options, but indeed there was also open “hostility” towards Mount Laurel’s poor persons living in substandard conditions.<sup>99</sup> The Court determined that Mount Laurel had made it “physically and economically impossible” for low- or middle-income housing to be provided by its land use decisions.<sup>100</sup>

Writing about the township’s economic tunnel vision, the court offered:

This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing.<sup>101</sup>

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<sup>92</sup> See KUSHNER, *supra* note 70, §§ 3:26, 3:28.

<sup>93</sup> *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>94</sup> *Id.* at 718.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 725.

<sup>98</sup> *Id.* at 719.

<sup>99</sup> *Id.* at 722.

<sup>100</sup> *Id.* at 724.

<sup>101</sup> *Id.* at 723.



Mount Laurel's zoning decisions were ultimately deemed invalid as a violation of the due process and equal protection requirements of the state constitution.<sup>102</sup> Thus, the *Mount Laurel* decision stands as a seminal case requiring municipalities to use their land use regulation powers in a manner that will allow a realistic opportunity for low- and middle-income individuals to find affordable housing.

## II. GROWTH MANAGEMENT LAWS AND THEIR SHORTCOMINGS

Sprawl and other unforeseen problems can be traced to failings in our legal system. In two key ways, the legal structures meant to help ensure smart growth have actually contributed to the problem of sprawl: first, through the legal system's sanctioning—indeed, its endorsement—of municipal zoning laws, and second, through states' failures either to enact effective growth management legislation or to interpret and apply their existing growth management legislation consistently.

### A. *Sprawl Is Actually Caused in Large Part by the Nation's Laws*

At its core, some say, sprawl is caused by our nation's pursuit of the "American Dream." In *Village of Belle Terre v. Boraas*,<sup>103</sup> U.S. Supreme Court Justice William O. Douglas famously described the ideal American neighborhood as a "quiet place where yards are wide, people few, and motor vehicles restricted."<sup>104</sup> The Court went on to hold that a proper role for government was to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people [to live]."<sup>105</sup>

The *Belle Terre* decision serves as a reminder that our sprawling nation could not have come into being without the willing assistance of its legal system. The nation's legal system has encouraged sprawl through its approval of municipal zoning laws.<sup>106</sup> Conventionally, the history of municipal zoning begins with the Supreme Court's decision

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<sup>102</sup> *Id.* at 724–25. In reaching its decision under the New Jersey Constitution, the court noted that New Jersey constitutional requirements "may be more demanding than those of the federal Constitution." *See id.*

<sup>103</sup> *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.*

<sup>106</sup> *See* Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093, 1094 (2007) (explaining that "[z]oning, street design, and parking regulations discourage landowners from placing housing within walking distance of shops and jobs, force landowners to surround their buildings with parking lots, and mandate the construction of streets and highways that are too wide to be crossed comfortably on foot").

in *Village of Euclid v. Ambler Realty Co.*,<sup>107</sup> a *Lochner*-era decision that first established the constitutionality of zoning. In *Euclid*, the Court held that the Village of Euclid was free to segregate residential land uses from industrial land uses.<sup>108</sup> The Village’s power to segregate land uses derived from the state’s police power (delegated to the municipality) and from the collective will of the majority (voicing its desires through the municipality’s officials).<sup>109</sup> The Village’s zoning ordinance was held to be a proper use of the police power because it protected public health<sup>110</sup> and preserved the value of private property.<sup>111</sup> Under the ordinance, the Village’s residents could rest assured that an undesirable industrial land use would not suddenly spring up down the street, leading to negative health outcomes and precipitating a massive decline in the value of the surrounding land.<sup>112</sup>

Nobody would debate that industrial land uses (read: factories) and residential land uses (read: single family homes) ought to be segregated. The Court in *Euclid*, however, was not solely concerned with the pollution and noise associated with factories and other industrial land uses.<sup>113</sup> Less obviously, but more insidiously, the Court was also concerned with the sort of “human pollution” that the Justices seemed to associate with high-density housing options such as apartments and townhomes.<sup>114</sup> By allowing municipalities to slate large areas of land for low-density, residential development, *Euclid* ushered in the era of

<sup>107</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>108</sup> *Id.* at 389–90 (“[The Village’s] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to [prevent injury] of the residential public . . .”).

<sup>109</sup> *Id.*

<sup>110</sup> A municipality should, for example, have some way to prevent a coal plant or a paper mill from springing up in the middle of a residential neighborhood.

<sup>111</sup> *Euclid*, 272 U.S. at 389, 395.

<sup>112</sup> *Cf. Gillham*, *supra* note 60, at 16 (“[Zoning controls] provide reasonable expectations for the continued value of a given piece of land and thereby create a relatively stable marketplace.”).

<sup>113</sup> *Euclid*, 272 U.S. at 394.

<sup>114</sup> *See Ziegler*, *supra* note 56, at 47–48 (“The holding established that homeowners might properly be protected by zoning from apartment dwellings and those who occupied them. An apartment house, the Court pointed out, might operate as ‘a mere parasite’ in the neighborhood of detached homes—constructed to take advantage of the open spaces and attractive surroundings and in the process depriving children of their play areas.” (footnotes omitted) (quoting *Euclid*, 272 U.S. at 394)).

sprawl.<sup>115</sup> As Professor Ziegler has argued, *Euclid* “has operated throughout the twentieth century largely to constitutionalize low-density restrictive zoning and related local governmental actions directed at excluding less affluent housing from entire neighborhoods and suburban communities.”<sup>116</sup> In Ziegler’s view, such zoning is less a matter of public health and more a matter of snobbery or “NIMBYism.”<sup>117</sup>

The argument that sprawl is bad has become a familiar one. Perhaps most commonly, sprawl is blamed for increased congestion on our roadways. We live in an automobile-centered society, and the built landscape reflects that cultural choice.<sup>118</sup> Over the past three decades, American vehicle use has outpaced population growth by a factor of three.<sup>119</sup> The interstate highway system—our “yellow brick road to sprawl”<sup>120</sup>—has enabled the movement of people between the city and far away suburban communities. By one estimation, our nation’s roadway system can lay claim to the “largest public works project in world history.”<sup>121</sup> As urban planner Oliver Gillham has written, the “huge new freeways would become the trunk veins and arteries of a rapidly spreading membrane of development, spilling over state and regional boundaries and changing the face of the United States forever.”<sup>122</sup>

Sprawling development generally necessitates the use of open space that might otherwise be protected for future generations.<sup>123</sup> According to one report, land in certain metropolitan areas is being consumed for development at a rate almost three times faster than population growth.<sup>124</sup> By 2050, an additional 23 million acres of forestland may be lost forever.<sup>125</sup> Of course, America is a rather large country. According to one account, total urban and suburban land

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 47.

<sup>117</sup> *Id.* at 47 n.98.

<sup>118</sup> See, e.g., *id.* at 31 (concluding that hypersprawl is “totally shaped and dominated by the automobile”).

<sup>119</sup> REID EWING ET AL., URBAN LAND INST., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 2, 6 (2008), available at <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf> (citing federal highway statistics and reporting vehicle use in terms of vehicle miles traveled).

<sup>120</sup> Ziegler, *supra* note 56, at 35.

<sup>121</sup> GILLHAM, *supra* note 60, at 36.

<sup>122</sup> See *id.*

<sup>123</sup> See JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 1 (2006).

<sup>124</sup> See Freilich & Peshoff, *supra* note 23, at 185.

<sup>125</sup> NADEJDA MISHKOVSKY ET AL., INT’L CITY/CNTY. MGMT. ASS’N, PUTTING SMART GROWTH TO WORK IN RURAL COMMUNITIES 4 (2010).

use in the United States has consumed only 3.1% of the nation’s total land supply.<sup>126</sup> This, however, is a misleading statistic. Of the nation’s total supply of land, only a small percentage has the right geography to support any meaningful population density.<sup>127</sup> An even smaller percentage of land can provide a *desirable* place to live. The truth is that suburban sprawl consumes land.

Sprawl has also been blamed for cultivating social isolation within American communities.<sup>128</sup> In sprawling suburban neighborhoods, where the closest thing to a public square may be a strip mall on a major street, residents may not feel a strong “sense of place.”<sup>129</sup> This sense of detachment can have real psychological costs.<sup>130</sup> Professor Ziegler has postulated that many Americans who live in sprawling neighborhoods are disappointed that “The Way Things Actually Are” is different from “The Way Things Ought to Be”:

Instead of pastoral vistas enhanced by attractive buildings and awesomely efficient highways, we have sprawl that makes a mockery of urban vitality and turns countryside into clutter. Instead of comfortable cities that run like clockwork, we have cities that are scattered, clumsy, expensive, and increasingly hard to enjoy or even use. Instead of shining towers in a park, we have windowless discount stores in a parking lot.<sup>131</sup>

### B. *The “Smart Growth” Movement as the Antidote to Sprawl*

The antidote to sprawl is “smart growth”—whatever that means. Depending on whom you ask, smart growth is either a panacea or a

<sup>126</sup> Clint Bolick, *Subverting the American Dream: Government Dictated “Smart Growth” Is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 861 (2000).

<sup>127</sup> Ruben N. Lubowski et al., *Major Uses of Land in the United States, 2002*, USDA ECON. INFO. BULL., May 2006, at iv.

<sup>128</sup> LEVINE, *supra* note 123, at 1 (“A stunted community life is the ostensible product of the lack of casual, face-to-face interactions in lively public spaces.”).

<sup>129</sup> See Ziegler, *supra* note 56, at 40.

<sup>130</sup> See *id.* at 38 (acknowledging the “growing awareness that there may be significant psychological, emotional and civic costs associated with the rootlessness of the suburbs and of our hypersprawl lifestyle”); see also Philip Rucker, *In Loughner’s Neighborhood, Times Have Been Tough*, WASH. POST, Jan. 12, 2011, at A5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/11/AR2011011107515.html> (citing sprawl as a cause of the social isolation that may have contributed to the attempted assassination of Congresswoman Gabrielle Giffords on January 8, 2011, in Tucson, Arizona. “Tucson is divided by boulevards stretching six or eight lanes wide and extending 15 or more miles into the horizon. The subdivisions here are often separated by concrete walls.” Although sprawl might contribute to social isolation, we believe it is a stretch to connect it causally to the attempted murder of Gabrielle Giffords.).

<sup>131</sup> See Ziegler, *supra* note 56, at 39.

meaningless euphemism. When evaluating smart growth definitions, it can be hard to cut through the salesman-like puffing of the proponents and the derogatory rhetoric of the critics. Too often, for example, proponents define smart growth with tautologies like “[s]mart [g]rowth is a way of encouraging development and revitalization that makes the most sense for future livability.”<sup>132</sup>

Nonetheless, we can distill certain basic features of the smart growth movement. The term “smart growth” is shorthand for a range of alternatives to traditional suburban development.<sup>133</sup> Such alternatives include transit villages, fully contained communities, mixed-use infill projects, and many other high-density, ecologically minded, transit-oriented designs.<sup>134</sup> Through changes to municipal codes and countywide comprehensive plans, and, more recently, through enactment of statewide growth management acts, planners at all levels of state government have begun to embrace these alternative designs.<sup>135</sup>

Despite their diversity, smart growth policies all share a common goal—namely, to change the status quo (somehow). We say *somehow* because, if the question is “how will we live?” then smart growth’s most consistent response has simply been: “differently.”<sup>136</sup> Yet, despite this intractable definitional problem, the basic principles of smart growth are evident. The fundamental idea is that development should take place in the *right place*, at the *right time*, and using the *right methods*.<sup>137</sup> Thus, smart growth envisions spatial, temporal, and technical restrictions on development.

First, smart growth ensures that development occurs in the “right place” by encouraging or mandating high-density, mixed-use development as close to the urban core as is practicable.<sup>138</sup> Smart growth poli-

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<sup>132</sup> *What’s Smart Growth?*, WASHINGTON STATE COMMUNITY, TRADE & ECON. DEV. GROWTH MANAGEMENT PROGRAM, [http://smartgrowth.wa.gov/what\\_is.htm](http://smartgrowth.wa.gov/what_is.htm) (last visited May 18, 2015).

<sup>133</sup> See GILLHAM, *supra* note 60, at 153 (“[T]he term *smart growth* has become an umbrella concept endorsed by a range of diverse groups seeking a way to plan for continued growth.”).

<sup>134</sup> See *id.* at 155.

<sup>135</sup> See Edward J. Sullivan, *Comprehensive Planning and Smart Growth*, in TRENDS IN LAND USE LAW FROM A TO Z 177, 188 (Patricia E. Salkin ed., 2001) (commenting that, “[u]nlike other western industrialized countries, the United States lacks a coherent national comprehensive planning policy”).

<sup>136</sup> See *Smart Growth Programs*, NAT’L ASS’N OF REALTORS, <http://www.realtor.org/programs/smart-growth-program> (last visited May 8, 2015).

<sup>137</sup> See *What’s Smart Growth?*, *supra* note 132 (stating smart growth encourages attractive development “where it can happen best” while wisely using land and resources).

<sup>138</sup> See *Livable Communities* 1, 3 (Wash. State Cmty., Trade & Econ. Dev. Growth Mgmt. Program, Discussing Paper No. 10 of 12), available at <http://smartgrowth.wa.gov/papers/index.htm> (noting “urban densities” as one measure of smart growth initiative).

cies also encouraging “infill”—construction which makes use of vacant and underused properties in already developed areas<sup>139</sup>—or “brownfields” development, which is development on polluted or contaminated land.<sup>140</sup> In Phoenix, one of the country’s largest and most sprawling cities, tax incentives handed out by the state legislature helped spawn a \$900 million urban infill project known as CityScape.<sup>141</sup> The project, which resulted in construction of 1.8 million square feet of high-rise office buildings, fashionable storefronts, and designer restaurants,<sup>142</sup> aimed to resuscitate a dying area of Phoenix known as Patriot’s Square Park.<sup>143</sup> A project like CityScape theoretically will reuse and recycle land that is already developed, but decayed. As such, it can occur with minimal investment of additional infrastructure.

Second, smart growth ensures that development occurs at the “right time” by forestalling development in a particular area until such area has been connected with adequate transportation, water, sewer, infrastructure, and schools. For example, a city ordinance might prohibit development of an outlying neighborhood until the city’s tax base is large enough to fund an elementary school in the neighborhood.

Finally, smart growth ensures that development relies on the “right methods” by encouraging or mandating changes to building codes. For example, building codes may need to be updated to allow developers to build housing units with shared walls.

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<sup>139</sup> See ANNA READ & CHRISTINE SHENOT, INT’L CITY/CNTY. MGMT. ASS’N, GETTING SMART ABOUT CLIMATE CHANGE 1, 6–7 (2010).

<sup>140</sup> See *Brownfields and Land Revitalization*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/brownfields/> (last updated May 5, 2015) (“Brownfields are real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”).

<sup>141</sup> Jahna Berry, *250-Room Hotel on Rise at CityScape Site*, AZCENTRAL.COM (June 9, 2009, 10:46 AM), <http://www.azcentral.com/community/phoenix/articles/2009/06/09/20090609phx-cityscape0610.html>.

<sup>142</sup> CITY OF PHOENIX CMTY. & ECON. DEV. DEP’T, CITY OF PHOENIX EMPLOYMENT CENTER PROFILE: DOWNTOWN PHOENIX (2012), available at <https://www.phoenix.gov/econdev-site/Documents/104755.pdf>; *About*, CITYSCAPE PHOENIX, <http://www.cityscapephoenix.com/about/cityscape/> (last visited May 18, 2015).

<sup>143</sup> See *Development: CityScape Transforms Downtown Phoenix*, RED DEV., <http://www.reddevelopment.com/properties/case-studies/development/> (last visited May 18, 2015). As described on the project’s official website, CityScape aims to be Phoenix’s “focal point for urban living and community activity in a revitalized downtown.” *CityScape: Phoenix, Arizona*, PK ASSOCIATES LLC, [http://pkstructural.com/files/projects/Cityscape/1\\_Commercial\\_CityScape.pdf](http://pkstructural.com/files/projects/Cityscape/1_Commercial_CityScape.pdf) (last visited May 18, 2015).

### C. *A Brief History of Smart Growth Legislation*

As mentioned previously, thirteen states have enacted growth management legislation in an effort to bring smart growth under regional control.<sup>144</sup> States have adopted differing methods to tackle smart growth and land use decisions, although each approach has its pitfalls. A brief history and examination of these efforts is in order.

“Growth management” as a goal of state planning first appeared as a term of art in 1975.<sup>145</sup> Though the phrase originally conjured connotations of slowing or stopping development altogether,<sup>146</sup> “growth management” is more commonly used to define local and state governments’ efforts to “influence the amount, type, location, design, rate, or cost of private and public development in order to achieve public interest goals.”<sup>147</sup> The goals of smart growth movements typically include balancing business and development interests with environmental concerns such as maintaining clean air and water, as well as a high quality of life for residents.<sup>148</sup>

There were three key phases to the modern “smart growth” movement. The birth of the movement came in the 1960s and 1970s, driven by environmentally concerned individuals in Hawaii, and then later in Vermont, Florida, and Oregon, who together ushered in a “quiet revolution in land use.”<sup>149</sup> City planners began to promote the idea of compact urban villages that utilized public transportation, bicycling, and walking as an alternative to combat the increasing congestion created by the rise of automobiles.<sup>150</sup> The second phase involved states such as Florida, Vermont, New Jersey, Maine, Rhode Island, Georgia, and Washington, all of which enacted specific legislation that focused on comprehensive planning in the decade leading up to 1991.<sup>151</sup> Finally, political support increased and expanded to even more states, with funding and gubernatorial support growing in states such as Maryland, Pennsylvania, Delaware, Tennessee, and Colorado in the years between 1992 and 2000.<sup>152</sup> However, as this Article will explore, political attitudes towards smart growth have been far from consistent over time.

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<sup>144</sup> *Supra* note 25.

<sup>145</sup> *See* Godschalk, *supra* note 25, at 13.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 15, 18.

<sup>150</sup> *See id.* at 13–15.

<sup>151</sup> *Id.* at 15, 18.

<sup>152</sup> *Id.* at 15.

Although each state had its own political, social, and geographical needs in enacting its smart growth legislation, most of these state-based programs involved coordination of local land use planning efforts through a “stick and carrot” package of obligations and incentives.<sup>153</sup> The means employed to meet the generally accepted goals of using land sustainably and responsibly varied widely across different states. For example, Oregon pioneered smart growth by establishing urban growth boundaries beyond which development was highly disfavored in order to preserve its rural and agricultural land.<sup>154</sup> Maryland adopted a different approach, by directing state grants to fund infrastructure for “priority funding areas” rather than by designating urban growth boundaries.<sup>155</sup> Local planning has been voluntary in Georgia and (until recently), mandatory in neighboring Florida.<sup>156</sup> Washington State employs a decentralized, local-led growth management program while Hawaii uses a top-down, centralized system.<sup>157</sup>

Which system is preferred by any given state has far more to do with the interests of various parties—including political interests—than many lawmakers are willing to admit. For example, local governments may prefer a smart growth system that is incentive-based and provides resources for projects of chief importance to the community, while state authorities often prefer a centralized program that ensures land use compliance even by reluctant localities.<sup>158</sup> Ultimately, popular attitudes may have the greatest influence over what the elected and appointed officials at each level of government decide to do with their land use authority. States with strong environmental consciousness like Vermont or Oregon thus look quite different than states that have stronger business and development pressures.

#### *D. Various States’ Efforts at Growth Management Legislation—and Their Pitfalls*

Let us consider a few examples of smart growth management legislation in depth in order to better understand their goals, and their common problems that we must strive to avoid going forward.

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<sup>153</sup> *Id.* at 16.

<sup>154</sup> *Id.* at 16–18. See generally PETER A. WALKER & PATRICK T. HURLEY, *PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON* (2011).

<sup>155</sup> Godschalk, *supra* note 25, at 17–18.

<sup>156</sup> *Id.* at 18.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



### 1. *Washington: Too Many (Conflicting) Goals Create Lack of Clarity*

Washington State enjoys diverse terrains, from the Olympia National Park and rain forest in the west, to the Cascade Mountain Range, to the island chains scattered about Puget Sound, to the rolling hills of Eastern Washington.<sup>159</sup> Growth rates, particularly in the Puget Sound region, had skyrocketed so much by 1990 that Washington legislators took action by enacting the Growth Management Act (“GMA”).<sup>160</sup> The GMA converted a formerly relaxed approach to local land use and planning into a decentralized but mandatory process.<sup>161</sup> Under the Washington GMA, local cities and counties are responsible for developing their own comprehensive plans, subject to review by one of the state’s Growth Management Hearing Boards.<sup>162</sup>

The Washington GMA vests most of the authority to make planning decisions at the local level.<sup>163</sup> Counties that meet certain criteria based on size and growth rate are required to comply with the GMA, even if the county later falls out of those criteria.<sup>164</sup> These rapid-growth counties are required to create local plans under the GMA and submit a countywide planning policy to their local governing bod-

<sup>159</sup> See, e.g., *Geology of Washington*, WASHINGTON STATE DEP’T OF NATURAL RESOURCES, <http://www.dnr.wa.gov/ResearchScience/Topics/GeologyofWashington/Pages/geolofwa.aspx> (last visited May 18, 2015).

<sup>160</sup> See Growth Management Act, WASH. REV. CODE § 36.70A (2012) (effective July 1, 1990). The constitutionality of the statute was challenged nine years later, when Mason County unsuccessfully appealed the invalidation of its comprehensive plan. See *Diehl v. Mason Cnty.*, 972 P.2d 543 (Wash. Ct. App. 1999). Mason County argued, albeit halfheartedly, that the GMA was unconstitutionally vague. Though the statute is not specific in the direction it provides local governments as to methodology, the Washington Court of Appeals held that the forms of review and desired outcomes are clear from the law. Mason County later brought an unsuccessful separation of powers challenge to the quasi-judicial nature of the Growth Management Hearing Boards, which was also denied by the Court of Appeals. *Diehl*, 972 P.2d at 551–52.

<sup>161</sup> Compare Planning Enabling Act, WASH. REV. CODE ANN. § 36.70 (West 2011), with Growth Management Act, WASH. REV. CODE § 36.70A (2012).

<sup>162</sup> See 24 TIMOTHY BUTLER & MATTHEW KING, WASHINGTON PRACTICE SERIES, ENVIRONMENTAL LAW & PRACTICE, § 18.3 (2d ed. 2007).

<sup>163</sup> *Id.*

<sup>164</sup> WASH. REV. CODE § 36.70A.040(1) (2012). Counties meeting the following criteria are required to adopt comprehensive planning policies and comply with the GMA:

- A county with a population of 50,000 or more, and prior to May 16, 1995, experiencing a population increase of more than ten percent in the previous ten years;
- A county with a population of more than 50,000 that, on or after May 16, 1995, has had its population increase by more than seventeen percent in the previous ten years; or
- A county, regardless of its current population, that has had a population increase of more than twenty percent in the previous ten years.

*Id.*

ies.<sup>165</sup> The local authority must identify natural resources that need to be protected, urban growth areas where appropriate infrastructure exists to encourage development, and compile an extensive, harmonious growth plan to submit to the state Department of Community, Trade, and Economic Development.<sup>166</sup>

A major flaw in Washington’s GMA, however, can be found in its structure of thirteen internally conflicting goals.<sup>167</sup> The statute lays out these disparate goals without any guidance as to how local governments are to rank or prioritize them in creating their land use plans.<sup>168</sup> Some of the goals clearly contradict one another. For example, the pro-development goals such as “encourage economic development” and “protect private property rights,” frequently come into tension with the environmentally-focused goals of “maintain and enhance natural resource industries,” “encourage the retention of open space,” and “protect the environment.”<sup>169</sup> There is also a goal that seeks to “protect the rights of interested citizens” and one that focuses on creating affordable housing.<sup>170</sup> What’s more, some of the language in the statement of goals appears to be the product of patent political pandering—for instance, the desire to “enhance the state’s high quality of life.”<sup>171</sup> In the end, there is no consistent, helpful guidance or insight into the essential purpose of the GMA for the courts or interested parties to rely on.

Not surprisingly then, the internally inconsistent goals of the GMA have led to confusion and costly litigation.<sup>172</sup> The natural con-

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<sup>165</sup> BUTLER & KING, *supra* note 162, § 18.5.

<sup>166</sup> *Id.* §§ 18.5, 18.17.

<sup>167</sup> The statute lays out the following goals: (1) encourage urban growth in areas where adequate public facilities already exist or where they can be provided in an efficient manner; (2) reduce urban sprawl; (3) encourage efficient, coordinated transportation systems; (4) encourage the availability of affordable housing; (5) encourage economic development; (6) protect private property rights; (7) process permits in a timely and fair manner, thereby encouraging predictability; (8) maintain and enhance natural resource industries such as the timber, fishing, and agricultural industries; (9) encourage the retention of open space, conservation of wildlife habitat, and development of recreational opportunities; (10) protect the environment and enhance the state’s high quality of life, including quality of air and water; (11) encourage citizen participation and community coordination in the planning process; (12) ensure public facilities and services are adequate to serve the development; and (13) encourage preservation of historic lands, sites, and structures. *See* WASH. REV. CODE § 36.70A.020.

<sup>168</sup> BUTLER & KING, *supra* note 162, § 18.2.

<sup>169</sup> *See id.*

<sup>170</sup> WASH. REV. CODE § 36.70A.020(4), (11).

<sup>171</sup> WASH. REV. CODE § 36.70A.020(10).

<sup>172</sup> *E.g.*, Viking Props., Inc. v. Holm, 118 P.3d 322 (Wash. 2005) (en banc); Town of Woodway v. Snohomish Cnty., 291 P.3d 278 (Wash. Ct. App. 2013), *aff’d*, 322 P.3d 1219 (Wash. 2014) (en banc).

flict between would-be developers seeking permission to move forward with plans versus neighbors opposing their projects on environmental grounds has required Washington courts to interpret the GMA on numerous occasions. Parties seeking opposite outcomes each argue vociferously (and correctly) that they are merely doing what is dictated by GMA.

One such conflict resolved by the state's highest court pitted private property rights against a developer in *Viking Properties, Inc. v. Holm*.<sup>173</sup> In *Viking*, the Washington Supreme Court refused to invalidate a covenant restricting density in a small subdivision near Seattle even though the developer argued he was required to build at greater density to serve the GMA's goal of reducing sprawl.<sup>174</sup> The Court explained that it would not invalidate a restrictive covenant unless the covenant was clearly "injurious to the public" or unless it found a clear legislative directive to override the private restriction.<sup>175</sup> The Court found neither to be the case because the covenant actually furthered another GMA goal: protecting private property rights.<sup>176</sup> Although *Viking Properties* argued that the GMA also established a clear public policy against sprawl, the Court refused to elevate the goal of higher density development above all other GMA goals.<sup>177</sup> In addition, the Court noted that the restrictive covenant had the additional meritorious effect of preserving open space in the neighborhood affected by the covenant.<sup>178</sup> Finally, the *Viking* Court opined that the state legislature did not clearly direct courts to override private property restrictions in favor of public policy.<sup>179</sup> The GMA was proscriptive in nature, and, therefore, the legislature never intended to override contractual rights (e.g., private property density restrictions), even from "bygone eras."<sup>180</sup>

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<sup>173</sup> *Viking Props., Inc. v. Holm*, 118 P.3d 322 (Wash. 2005) (en banc). Two of the authors of this paper, Chryssa Deliganis and Steve Calandrillo, served as counsel to one of the defendants in the *Viking* case.

<sup>174</sup> *Id.* at 324–26.

<sup>175</sup> *Id.* at 329.

<sup>176</sup> *Id.* at 330.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 331.

<sup>180</sup> *Id.* at 330. The *Viking* Court also cited its decision in *Mains Farm Homeowners Ass'n v. Worthington*, 854 P.2d 1072 (Wash. 1993) (en banc), in which it refused to allow an adult family home on a property restricted by covenant to single family homes. The court looked for explicit indication from the legislature that it intended to override restrictive covenants when it provided that adult family homes were to be considered "residential" for zoning purposes. *Viking*, 118 at 327. An example of an explicit indication is found in WASH. REV. CODE § 49.60.224 (2014), which expressly outlawed racial restrictions in private property agreements.

The conflicting goals allegedly served by Washington’s GMA led again to bitter, ongoing litigation in the case of *Town of Woodway v. Snohomish County*,<sup>181</sup> mentioned briefly in the introduction to this Article.<sup>182</sup> The case offers a textbook illustration of the way in which the GMA can be manipulated into opposing arguments to suit one’s needs.<sup>183</sup> Developer Blue Square sought permission to create a massive residential development, potentially up to eighteen stories tall, on the scenic Point Wells property.<sup>184</sup> Of course, it cited the GMA-sanctioned goal of reducing sprawl and protecting private property rights. Residents in neighboring Richmond Beach who would bear the negative externalities from a project of this magnitude understandably opposed the development because of its traffic and environmental impacts.<sup>185</sup> What was worse was that the developer received permission for this endeavor from the county it was situated in even though nearly all of the environmental impact would fall upon Richmond Beach to the south, a very old community which had no voice in the planning process.<sup>186</sup> The Washington Growth Management Hearing Board found that Blue Square and Snohomish County had indeed failed to comply with the GMA in planning this development, but the developer appealed on the ground that his rights were “vested” by his reliance on the initially approved permit.<sup>187</sup> The Washington Supreme

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In sum, the legal question in *Viking* came down to whether the GMA created bright line rules or anti-sprawl policy making the covenant’s density restriction per se too low. The Washington Supreme Court rejected the idea that the GMA in any way mandated certain density levels. *Id.* at 331. It said that “the growth management hearings boards do not have authority to make ‘public policy’ even within the limited scope of their jurisdictions, let alone to make *state-wide* public policy.” *Id.*

“[T]he existence of restrictive covenants that predate the enactment of the GMA and limit density within the urban growth areas are the type of ‘local circumstances’ accommodated by the GMA’s grant of a ‘broad range of discretion’ for local planning.” *Id.* The GMA “does not prescribe a single approach to growth management.” *Id.* at 329. The GMA “acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.” *Id.*

<sup>181</sup> *Town of Woodway v. Snohomish Cnty.*, 291 P.3d 278 (Wash. Ct. App. 2013), *aff’d*, 322 P.3d 1219 (Wash. 2014) (en banc).

<sup>182</sup> See *supra* notes 2–10 and accompanying text.

<sup>183</sup> See Opening Brief of Appellant BSRE, *Woodway*, 291 P.3d 278 (Nos. 68048-0-I, 68049-0-I), 2012 WL 601318.

<sup>184</sup> See *supra* notes 2–10 and accompanying text.

<sup>185</sup> Response Brief of Respondent Town of Woodway at 47, *Woodway*, 291 P.3d 278 (Nos. 68048-0-I, 68049-0-I), 2012 WL 1122950, at \*47. For instance, the Point Wells development would bring many thousands more car trips per day through a narrow two-lane road that ran only through Richmond Beach. *Id.*

<sup>186</sup> See *supra* notes 7–10 and accompanying text.

<sup>187</sup> *Woodway*, 291 P.3d at 280–81.

Court agreed with the developer despite the negative impacts and externalities imposed on Richmond Beach.<sup>188</sup>

Ultimately, the Washington Growth Management Act does not provide sufficient clarity or guidance to developers, property owners, or conservationists to prevent complicated litigation. Rather, it inspires exactly the opposite result. Interest groups on both sides of every land use debate can claim compliance with the GMA due to its internally conflicting goals, while the only interests that are served are those of the attorneys billing the hours to keep up the fight.

## 2. *Florida: Something Is Better than Nothing at All*

Florida faced a unique challenge when it drafted its growth management legislation—extremely rapid population growth.<sup>189</sup> The state gains a staggering three million residents each decade.<sup>190</sup> The 2010 Census shows a growth rate of 17.6% for Florida (2.8 million people more in 2010 than 2000).<sup>191</sup> In the 1970s, as the population surged, the geography of the state was unable to manage this growth without facing a water crisis.<sup>192</sup> Put less gently, “[f]rom the end of World War II until the mid to late 1970s, Florida sold itself on the cheap to anybody with a dollar and a shovel.”<sup>193</sup> Then, Governor Reubin Askew of Florida took leadership and saw three critical pieces of planning legislation enacted:<sup>194</sup> (1) the Water Resources Act,<sup>195</sup> (2) the Land Conservation Act (also known as the Land Management Act),<sup>196</sup> and (3) the Comprehensive Planning Act.<sup>197</sup> These three laws created sig-

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<sup>188</sup> See *Town of Woodway v. Snohomish Cnty.*, 322 P.3d 1219, 1221 (Wash. 2014) (en banc), *aff'g* 291 P.3d 278 (Wash. Ct. App. 2013).

<sup>189</sup> See *State Growth Management Summaries*, VIRGINIA PRESERVATION.ORG, <http://www.vapreservation.org/growth/state.htm> (last visited May 18, 2015) [hereinafter *State Growth Management Summaries*].

<sup>190</sup> Laura C. Morel, *Fla. Gets Growing*, TAMPA BAY TIMES, Jan. 5, 2013, at 1A (at the time of the 2013 article, Florida's population was approximately 18.8 million compared to New York's 19.3 million).

<sup>191</sup> U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. This was the third highest increase in sheer numbers but not the highest rate—Nevada grew by thirty-five percent in those ten years. *Id.*

<sup>192</sup> See Editorial, *Finding Our Voices on Water Crises*, OCALA STAR-BANNER, July 12, 2012, available at <http://www.ocala.com/article/20120712/OPINION01/120719916>.

<sup>193</sup> See Howard Troxler, Editorial, *Florida Unwisely Repeals its Growth Laws*, TAMPA BAY TIMES, May 25, 2011, available at <http://www.tampabay.com/news/politics/stateroundup/florida-unwisely-repeals-its-growth-laws/1171755>.

<sup>194</sup> *State Growth Management Summaries*, *supra* note 189.

<sup>195</sup> Florida Water Resources Act of 1972, 1972 Fla. Laws 1082.

<sup>196</sup> Land Conservation Act of 1972, 1972 Fla. Laws 1126.

<sup>197</sup> Local Government Comprehensive Planning Act of 1975, 1975 Fla. Laws 794.

nificant structures for locally developed land use plans with state administrative oversight.

The Water Resources Act of 1972 established broad power to protect Florida’s waterways. The law charged state and regional authorities with protecting Florida’s water sources and declared the protection of such sources a priority of the state Legislature.<sup>198</sup> The law also created a Department of Environmental Protection charged with overseeing the “conservation, protection, management, and control of the waters of the state.”<sup>199</sup> The department was authorized to conduct research, surveys, and data collection regarding topography, flood risks, and other geological information relevant to the use of water.<sup>200</sup> Using this information, the Department of Environmental Protection was then the arbiter of water use decisions—coordinating among local water districts to implement the state water plan, as a constant monitor of water quality.<sup>201</sup>

The Land Management Act authorized the governor (or state officials) to designate areas of “critical concern” for preservation, such as those with significant historical, environmental, or archaeological importance.<sup>202</sup> Under the Land Management Act, the regional planning authority or even the governor and his or her cabinet could conduct special review of “Developments of Regional Impact”—including, for example, larger projects such as airports, large housing projects, or projects that crossed jurisdictional lines.<sup>203</sup>

The Comprehensive Planning Act required state agencies to prepare strategic plans, which were combined to create a “State Comprehensive Plan.”<sup>204</sup> Rather than the state providing specific parcels of land for identified purposes, there were twenty-five goals listed and over 360 “strategic policies” to be considered in forming a “comprehensive plan.”<sup>205</sup>

Under these growth management laws that Florida employed prior to 2011, a state planning agency (the Department of Community Affairs) reviewed local plans, while other state agencies could provide input throughout the process.<sup>206</sup> The state agency would compile its

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<sup>198</sup> See FLA. STAT. § 373.016(4)(a) (1972).

<sup>199</sup> FLA. STAT. § 373.016(5) (1972).

<sup>200</sup> See *id.* § 373.026(1)–(2).

<sup>201</sup> See *id.* § 373.036.

<sup>202</sup> *State Growth Management Summaries*, *supra* note 189.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Kathryn Barkett Rossmell, Note, *From Tools to Toys—The Gutting of the Infamous*

objections, recommendations, and comments into an “ORC Report” and send that to the local government implicated.<sup>207</sup> The local government could then modify its plan and resubmit it, and the state planning board had another chance to review.<sup>208</sup> The growth management legislation also gave affected citizens the right to be heard through a petition if the state agency provided them notice that a plan or amendment would likely be approved.<sup>209</sup>

In essence, the growth management structure in Florida prior to 2011 afforded its *state* government substantial opportunity to review local plans, mediate disputes through administrative law judges, and ensure that local plans were in compliance with general state goals.

Florida’s authority to engage in state review of local land use decisions, however, was severely undercut in 2011 when the growth management legislation on the books was repealed and replaced with the Community Planning Act in an effort to promote economic growth.<sup>210</sup> The Community Planning Act stripped the state’s authority to mandate local government compliance, making local adaptation of state plans permissive rather than required.<sup>211</sup> The repeal of prior growth management legislation was a political priority for both Florida House Speaker Dean Cannon and Governor Rick Scott, who campaigned on pro-development platforms.<sup>212</sup> At approximately the same time that Florida repealed its prior growth management laws, it became more difficult for citizens to issue challenges relating to developers gaining water permits.<sup>213</sup> A decision by the District Court for the Southern District of Florida sums up the about-face that Florida has done when it comes to centralized planning: “What . . . is clear is that the State of Florida and the South Florida Water Management District

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*Primary Indicators: How the Florida Legislature Accidentally Encouraged Urban Sprawl . . . Again*, 23 U. FLA. J.L. & PUB. POL’Y 215, 220–22 (2012).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Community Planning Act, 2011 Fla. Laws 1997 (codified as amended at FLA. STAT. § 163.3161 (2014)). See Mary Ellen Klas, *Growth Laws Weakened*, ST. PETERSBURG TIMES, May 7, 2011, at 1B.

<sup>211</sup> See Community Planning Act, 2011 Fla. Laws 1997; see also Kacie A. Hohnadell, Note, *Community Planning Act: The End of Meaningful Growth Management in Florida*, 42 STETSON L. REV. 715, 728–29 (2013).

<sup>212</sup> Klas, *supra* note 210.

<sup>213</sup> *Id.*

(“SFWMD”), notwithstanding protests to the contrary, have not been true stewards of protecting the Everglades in recent years.”<sup>214</sup>

The new law of the land in Florida, the Community Planning Act, supersedes over thirty years of precedent and administrative memory and creates a new method of land use planning and review. The previously strong state authority is now whittled down to two forms of review: “state coordinated review” and “expedited state review.”<sup>215</sup> Where the previous growth management structure afforded state reviewing officials forty-five days to review a local land use plan, under the current “state coordinated review” structure, they now have only five.<sup>216</sup> Moreover, where the state used to have thirteen “primary indicators” to consider in determining whether a proposed land use plan comported with the state comprehensive plan, the Community Planning Act creates eight factors<sup>217</sup> to establish whether or not something is considered “sprawl.”<sup>218</sup> These eight factors are binding; if four of

<sup>214</sup> *Micosukee Tribe of Indians of Fla. v. United States*, No. 04-21448-CIV, 2011 WL 1624977, at \*1 (S.D. Fla. Apr. 26, 2011).

<sup>215</sup> Rossmell, *supra* note 206, at 222.

<sup>216</sup> *Id.* Additionally, under “expedited state review,” interested state agencies have thirty days total to submit limited comments to local governments and the Department of Community Planning regarding a proposed local land use plan. *Id.*

<sup>217</sup> *Id.* at 220. Under the Act, “[t]he future land use element or plan amendment shall be determined to discourage the proliferation of urban sprawl if it incorporates a development pattern or urban form that achieves four or more” of the following eight factors:

[1] Directs or locates economic growth and associated land development to geographic areas of the community in a manner that does not have an adverse impact on and protects natural resources and ecosystems.

[2] Promotes the efficient and cost-effective provision or extension of public infrastructure and services.

[3] Promotes walkable and connected communities and provides for compact development and a mix of uses at densities and intensities that will support a range of housing choices and a multimodal transportation system, including pedestrian, bicycle, and transit, if available.

[4] Promotes conservation of water and energy.

[5] Preserves agricultural areas and activities, including silviculture, and dormant, unique, and prime farmlands and soils.

[6] Preserves open space and natural lands and provides for public open space and recreation needs.

[7] Creates a balance of land uses based upon demands of the residential population for the nonresidential needs of an area.

[8] Provides uses, densities, and intensities of use and urban form that would remediate an existing or planned development pattern in the vicinity that constitutes sprawl or if it provides for an innovative development pattern such as transit-oriented developments or new towns as defined in [section] 163.3164.

FLA. STAT. § 163.3177(6)(a)(9)(b)(I)–(VIII) (2014).

<sup>218</sup> Rossmell, *supra* note 206, at 224 (“The eight factors are clearly the most powerful part of the statute, and the guillotine that killed the thirteen primary indicators.”).



them are considered met, then a local land use plan “shall be determined to discourage the proliferation of urban sprawl.”<sup>219</sup> The fact that these eight factors immediately follow the preexisting thirteen “primary indicators” in the statute<sup>220</sup> does not provide a clear resolution, and it is uncertain how courts will attempt to interpret and resolve these different and potentially conflicting criteria in the coming years.<sup>221</sup>

### 3. *Oregon: If It Ain't Broke, Keep Enforcing It!*

Oregon has long been considered a pioneer in land use law due to its creation of “urban growth boundaries” (“UGBs”) as part of its comprehensive land use planning laws adopted in 1973.<sup>222</sup> The Oregon Land Use Planning Program created both a citizen commission with authority to oversee land use decisions, the Land Conservation and Development Commission (“LCDC”), as well as a state Department of Land Conservation and Development (“Department”) to implement the program.<sup>223</sup> The citizen LCDC appoints the director of the Department.<sup>224</sup> The express purpose of this land use legislation was to “stop a process of cumulative public harm resulting from uncoordinated land use,”<sup>225</sup> not unlike what a layman might refer to as the “tragedy of the commons.”

Under the Oregon Land Use Planning Program, local governments submit land use plans subject to periodic review by the Department and LCDC.<sup>226</sup> However, extensive delays in the process led to amendments in the growth management legislation in 1991.<sup>227</sup> Now, in addition to the prior structures, there exists a Land Use Board of Appeals, comprised of three attorneys appointed by the state governor.<sup>228</sup> Attempts to coordinate the review being conducted by the state agencies, the LCDC, and Land Use Board of Appeals have proven unsuccessful, particularly as the attorney general interpreted case law to preclude certain state agencies from being required to par-

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219 *Id.*; FLA. STAT. § 163.3177(6)(a)(9)(b).

220 The thirteen indicators are listed in FLA. STAT. § 163.3177(6)(a)(9)(a).

221 Rossmell, *supra* note 206, at 224, 228–29.

222 See Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10,367, 10,368, 10,374 (1992).

223 *Id.* at 10,368.

224 *Id.* at 10,369.

225 1000 Friends of Or. v. Wasco Cnty. Ct., 703 P.2d 207, 212 (Or. 1985).

226 Liberty, *supra* note 222, at 10,372.

227 An Act Relating to Land Use Periodic Review, 1991 Or. Laws 1148 (1991).

228 See Liberty, *supra* note 222, at 10,373.

participate in coordination efforts.<sup>229</sup> Thus, even in what is arguably one of the most progressive and environmentally conscious states in the nation, coordination of various government actors (including citizens) with regard to land use planning and review has proven elusive.

Oregon is nonetheless still deserves praise for offering a revolutionary tool to land use legislators: namely, the creation of UGBs. UGBs were created by 1974 legislation, as part of the state's planning goals, which are binding on local plans.<sup>230</sup> Goal 14, entitled "urbanization," requires that every incorporated community draw a UGB based on seven factors, including the need to accommodate long-term population growth and environmental impacts.<sup>231</sup> Drawing an appropriate UGB, however, is a complicated and nuanced task, particularly if population growth does not follow expected projections. Because Oregon experienced population decline followed by rapid growth from the 1980s to the 1990s, some UGBs were drawn too broadly for the period of population decline, while other cities added land to their UGBs to accommodate perceived growth that never manifested.<sup>232</sup>

Goal 14 classifies land into three possible categories: urban, urbanizable, and rural.<sup>233</sup> Urban land exists within or adjacent to an incorporated city, with emphasis on an already-existing high concentration of people and supporting public facilities and infrastructure.<sup>234</sup> Urbanizable land exists within a UGB and is considered necessary and suitable for future urban uses, able to be served by existing infrastructure, and necessary for the expansion of an urban area.<sup>235</sup> Lastly, rural lands are found outside a UGB, and are generally agricultural, forest, or open spaces (though they are essentially everything that is not urban or urbanizable).<sup>236</sup> In general, residential and urban growth

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<sup>229</sup> *Id.* at 10,375; *see also* In re State Agency Coordination Program of the Dep't of Revenue, LCDC No. 91-CERT-707, at 3, 4, 7 (Jan. 10, 1991) (citing Attorney General Letter of Advice, No. OP-6390 (Oct. 11, 1990)).

<sup>230</sup> *See* LCDC, OREGON'S STATEWIDE PLANNING GOALS 2, 10, 12 (1990).

<sup>231</sup> *Id.* at 12–13. The factors are as follows: "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals; (2) Need for housing, employment opportunities, and livability; (3) Orderly and economic provision for public facilities and services; (4) Maximum efficiency of land uses within and on the fringe of the existing urban area; (5) Environmental, energy, economic, and social consequences; (6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and (7) Compatibility of the proposed urban uses with nearby agricultural activities." *Id.* at 12.

<sup>232</sup> Liberty, *supra* note 222, at 10,376.

<sup>233</sup> 1000 Friends of Or. v. Wasco Cnty. Ct., 703 P.2d 207, 214–15 (Or. 1985).

<sup>234</sup> *Id.* at 215 (citing Statewide Planning Goal Definitions).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 214–15.

(including incorporation of new cities) is not permitted outside a UGB, though exceptions are authorized under Goal 2 of the legislation.<sup>237</sup>

There are numerous examples of UGBs accomplishing precisely what they were intended to do—i.e., the promotion of growth within an urban boundary and the deterrence of sprawl outside of it in agricultural or rural areas. For instance, Washington County just outside of Portland saw ninety-six percent of its residential growth permits from 1984 to 1988 approved within its UGB and only four percent approved for sites outside the UGB.<sup>238</sup> Similarly, the Portland metropolitan area saw ninety-five percent of residential units built within its UGB during a five-year study.<sup>239</sup> However, Bend, Oregon's UGBs were less astonishing in their success rates, as fifty-nine percent of new residential units were built *outside* its UGBs and eighty-one percent of industrial development permits were authorized *inside* its UGB, creating the opposite result of that intended.<sup>240</sup>

Whether or not a land use project may be approved depends on whether or not it complies with Oregon's legislative goals regarding land use. For example, in *1000 Friends of Oregon v. Wasco County Court*,<sup>241</sup> an advocacy group opposed the incorporation of a meditation center as a new city, Rajneeshpuram. Whether incorporation of the city was legal depended on (1) if incorporation constituted a "land use decision" for the purposes of the state planning statute, (2) if Goal 14 prohibited this incorporation, and (3) whether Goals 3 (pertaining to agricultural land) and 14 of the planning statute affected the incorporation decision.<sup>242</sup> The Oregon Supreme Court held that the decision whether or not to allow Rajneeshpuram to incorporate was indeed a land use decision and thus fell under the jurisdiction of the Land Use Planning Act; that Goal 14 did not prohibit the incorporation of the new city; and that statewide goals pertaining to the development of agricultural land were at issue in this decision.<sup>243</sup>

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<sup>237</sup> *Id.* at 215.

<sup>238</sup> Liberty, *supra* note 222 at 10,377–78 (citing WASH. CNTY. DEP'T OF LAND USE & TRANSP., JOINT LEGIS. COMM. ON LAND USE, BRIEFING ON WASHINGTON COUNTY LAND USE AND TRANSPORTATION ISSUES (1989)).

<sup>239</sup> *Id.* at 10,378 (citing ECO Nw. & D. NEWTON & ASSOC., PORTLAND CASE STUDY: URBAN GROWTH MANAGEMENT STUDY (1990)).

<sup>240</sup> *Id.* (citing ECO Nw. & D. NEWTON & ASSOC., BEND CASE STUDY: URBAN GROWTH MANAGEMENT STUDY 3 (1990)).

<sup>241</sup> *1000 Friends of Or. v. Wasco Cnty. Ct.*, 703 P.2d 207 (Or. 1985).

<sup>242</sup> *Id.* at 213.

<sup>243</sup> *Id.*

Despite Oregon’s land use planning successes, its smart growth legislation has faced opposition via statewide ballot measures attempting repeal.<sup>244</sup> Part of its survival is attributed to former governor Tom McCall, whose popularity continues to stimulate Oregon land use preservation efforts.<sup>245</sup> Not long before his death in 1983, McCall famously stated, “[i]f the legacy we helped give Oregon and which made it twinkle from afar—if it goes, then I guess I wouldn’t want to live in Oregon anyhow.”<sup>246</sup> His heartfelt desire to create an enduring, responsible growth policy was crucial in defeating a ballot measure aimed at repealing his signature land use legislation.<sup>247</sup>

Public sentiment did not remain on the side of state land use planning advocates, however. In 2000, Ballot Measure 7 was passed, providing compensation to land owners whose “property values were reduced by land use regulations.”<sup>248</sup> This marked a substantial victory for reclaiming and preserving private property rights in the face of regional planning.<sup>249</sup> The Oregon Supreme Court subsequently overturned Ballot Measure 7 in 2002 on a technicality.<sup>250</sup> However, a subsequent ballot initiative, Ballot Measure 37, was passed in 2004 and accomplished in practice what Ballot Measure 7 aimed to do.<sup>251</sup> Ballot Measure 37 required state and local governments to either waive land use planning regulations, or pay compensation for all the declines in property values shown to result.<sup>252</sup> In effect, disappointed developers who desired to build in areas otherwise not permitted under the state’s UGB structure could now demand compensation from the government if their permit was denied. As claims for compensation reached \$19.8 billion (more than the state’s overall two-year budget) in 2007, many state and government actors were forced to succumb to

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<sup>244</sup> See WALKER & HURLEY, *supra* note 154, at 9 (occurring in years 1976, 1978, and 1982). The continuing work of the 1000 Friends watchdog group is largely attributable to Governor Tom McCall’s legacy. *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* The ballot measure would have changed more than one part of Oregon’s constitution. See *League of Or. Cities v. Oregon*, 56 P.3d 892, 910–11 (Or. 2002) (invalidating Ballot Measure 7 on grounds that it violated state procedural requirements for constitutional amendments).

<sup>251</sup> See WALKER & HURLEY, *supra* note 154, at 9.

<sup>252</sup> *Id.*

the financial pressure and waive the land use regulations that had been so widely praised for the prior three decades.<sup>253</sup>

In the end, even Oregon was not immune to the pressures that plague land use planning—namely, the competing tensions between private property rights, including those of developers implicating economic growth, and the public interest in collaborative regional planning.

#### 4. *Maryland: A Good Rule, If It Were Followed*

Maryland is home to the lion's share of the Chesapeake Bay—an enormous waterway that affects the environment and economy of six states.<sup>254</sup> In addition to carrying the bulk of the bay-preservation burden, Maryland is the fifth most densely populated state in the nation.<sup>255</sup> One estimate found that Maryland was slated to lose 240,000 acres of farmland and 307,000 acres of forest by the year 2020.<sup>256</sup> Recognizing the need to be responsible stewards of their land, Maryland lawmakers crafted innovative—indeed, award winning—growth management legislation.<sup>257</sup> However, failure to consistently apply its growth management legislation has left Maryland in nearly the same place it started when it comes to development and sprawl.<sup>258</sup>

Maryland had laws as early as the 1970s designed to protect wetlands,<sup>259</sup> water sources,<sup>260</sup> forests,<sup>261</sup> and farmland.<sup>262</sup> Maryland then joined the nationwide growth management legislation movement in 1992 with the passage of the Economic Growth, Resource Protection,

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<sup>253</sup> *Id.*

<sup>254</sup> See Philip J. Tierney, *Bold Promises but Baby Steps: Maryland's Growth Policy to the Year 2020*, 23 U. BALT. L. REV. 461, 461–64 (1994).

<sup>255</sup> *Id.* at 464; DEPT. OF LEGIS. SERVS., OFFICE OF POLICY ANALYSIS, UPDATE ON SMART GROWTH AND PLANNING POLICY IN MARYLAND 1 (2009).

<sup>256</sup> See Tierney, *supra* note 254, at 461–62.

<sup>257</sup> See Md. Dep't of Planning, *Smart Growth Planning Topics*, MARYLAND.GOV <http://planning.maryland.gov/OurWork/smartGrowth.shtml> (last visited May 21, 2015) (detailing key pieces of “Smart Growth Legislation”); see also Rebecca Lewis et al., *Managing Growth with Priority Funding Areas: A Good Idea Whose Time Has Yet to Come*, 75 J. AM. PLAN. ASS'N 457, 457–72 (2009) (describing the “numerous awards” Maryland's 1997 growth management legislation had won before even being implemented).

<sup>258</sup> See Lewis et al., *supra* note 257, at 471–72.

<sup>259</sup> Natural Resources Article, ch. 4, sec. 1, tit. 9, 1973 Md. Laws 1st Spec. Sess. 446, 1257 (codified as amended at MD. CODE ANN., NAT. RES. §§ 9-101–9-603 (LexisNexis 2013)).

<sup>260</sup> Natural Resources Article, ch. 4, sec. 1, tit. 8, 1973 Md. Laws 1st Spec. Sess. 446, 1017 (codified as amended at MD. CODE ANN., NAT. RES. §§ 8-1201–8-1301 (LexisNexis 2013)).

<sup>261</sup> Natural Resources Article, ch. 4, sec. 1, tit. 5, 1973 Md. Laws 1st Spec. Sess. 446, 765 (codified as amended at MD. CODE ANN., NAT. RES. §§ 5-101–5-1302 (LexisNexis 2013)).

<sup>262</sup> Act Concerning the Maryland Agricultural Land Preservation Foundation, 1974 Md. Laws 2179 (codified as amended at MD. CODE ANN., AGRIC. §§ 2-501–2-519 (LexisNexis 2013)).

and Planning Act, which articulated eight “visions” for land use.<sup>263</sup> Like other states, Maryland delegated the creation of land use plans to local governments, at least initially.<sup>264</sup>

Given the shared nature of state usage of the Chesapeake Bay, Maryland partnered with neighboring states Pennsylvania and Virginia, as well as the District of Columbia and the U.S. Environmental Protection Agency, to establish a “2020 Panel” to make land use plans for the future.<sup>265</sup> While this partnership marked a significant opportunity for regional land use planning, the bills establishing a 2020 vision were quickly defeated in the Maryland legislature, largely due to opposition from property rights activists, developers, farmers, and financial organizations.<sup>266</sup>

Instead of a plan with sights set on 2020, Maryland enacted a package of growth management laws in 1997, including the innovative Smart Growth Areas Act, which established the new concept of “Priority Funding Areas” (“PFAs”).<sup>267</sup> The creation of PFAs quickly generated national attention, and Maryland was credited with starting a “third wave” in the land use revolution.<sup>268</sup>

PFAs were, in 1997, a Maryland novelty, though they resembled other growth management policy tools such as urban growth bounda-

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<sup>263</sup> Economic Growth, Resource Protection, and Planning Act of 1992, ch. 437, sec. 1, art. 66B, § 3.06(B), 1992 Md. Laws 2961, 2967–68 (repealed 2012). The eight visions are:

- (1) Development is concentrated in suitable areas.
- (2) Sensitive areas are protected.
- (3) In rural areas, growth is directed to existing population centers and resource areas are protected.
- (4) Stewardship of the Chesapeake Bay and the land is a universal ethic.
- (5) Conservation of resources, including a reduction in resource consumption, is practiced.
- (6) To assure the achievement of items (1) through (5) of this section, economic growth is encouraged and regulatory mechanisms are streamlined
- (7) Adequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur.
- (8) Funding mechanisms are addressed to achieve these Visions.

See Md. Dep’t of Planning, *Smart Growth Legislation: 1992 Economic Growth, Resource Protection, and Planning Act*, MARYLAND.GOV <http://planning.maryland.gov/ourwork/1992planact.shtml> (last visited May 21, 2015).

<sup>264</sup> Economic Growth, Resource Protection, and Planning Act of 1992, 1992 Md. Laws at 2963.

<sup>265</sup> See Tierney, *supra* note 254, at 465.

<sup>266</sup> *Id.* at 468 (citing Howard Schneider, *Views on Md. Growth Control Plan Range from ‘Threat’ to ‘Vision,’* WASH. POST, Feb. 27, 1991, at D3; Roll, *Growth Bill Draws Fire from Builders, Farmers*, MONTGOMERY J., Feb. 27, 1991, at A5).

<sup>267</sup> Lewis et al., *supra* note 257, at 457.

<sup>268</sup> *Id.* at 457–58.

ries (originated in Oregon), metropolitan urban service areas (used in Minnesota), and enterprise zones (used by several states including New Jersey).<sup>269</sup> Priority Funding Areas are, as their name would suggest, areas targeted for public investment and therefore designed to encourage development.<sup>270</sup> PFAs were created as a “more politically acceptable alternative to urban growth boundaries,” in which local and state governments would direct funding for roads, housing, schools, and the infrastructure necessary to spur growth.<sup>271</sup>

Like urban growth boundaries, the intended purpose of PFAs was to curb growth outside of certain urban areas.<sup>272</sup> However, UGBs make it legally difficult to develop outside of a boundary line, while PFAs attempt to create the same outcome via financial incentives rather than by prohibition.<sup>273</sup> Analogously, urban service areas limit the expansion of public services and infrastructures such as water and roads, but do not legally limit the expansion of housing projects into new areas.<sup>274</sup> Lastly, enterprise zones are like PFAs in that they encourage development by lowering taxes and easing regulatory requirements—again, trying to encourage responsible growth outcomes by using more “carrot” than “stick.”<sup>275</sup>

Though PFAs were highly regarded as a creative combination of these preexisting policy instruments, they did not produce the outcomes originally envisioned.<sup>276</sup> In overseeing the growth management laws, some counties allowed PFA boundaries to be drawn too generously so as to accommodate growth.<sup>277</sup> Reporting and review of spending as it pertained to PFAs was not done in a complete manner.<sup>278</sup> According to some commentators, the amount of funding allocated for PFAs was inadequate to make a meaningful difference.<sup>279</sup> While some progress was seen, including increased investment and de-

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<sup>269</sup> See *id.* at 458; *About UEZ*, N.J. DEPARTMENT OF COMMUNITY AFFAIRS, <http://www.nj.gov/dca/affiliates/uez/about> (last visited May 21, 2015); *Urban Growth Boundary*, OREGONMETRO.GOV, <http://www.oregonmetro.gov/urban-growth-boundary> (view “History” tab) (last visited May 21, 2015).

<sup>270</sup> Lewis et al., *supra* note 257, at 458–59.

<sup>271</sup> Jerry Weitz, *The Next Wave in Growth Management*, 42/43 URB. LAW. 407, 413 (2011).

<sup>272</sup> See Lewis et al., *supra* note 257, at 458.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 458–59.

<sup>276</sup> See Weitz, *supra* note 271, at 413.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*; see also Lewis et al., *supra* note 257, at 464, 471.

<sup>279</sup> See Weitz, *supra* note 271, at 413.

velopment of wastewater management systems within PFAs,<sup>280</sup> the outcomes left much to be desired. Ultimately, the amount of growth and development of low-density parcels (i.e., the amount of sprawl), was not improved in the ten years following passage of the Smart Growth Areas Act.<sup>281</sup> In fact, some growth and development was actually increased *outside* of PFAs—precisely the opposite of what the legislation sought to effectuate.<sup>282</sup>

Ultimately, though PFAs represent an innovative and politically viable solution to urban sprawl and growth management problems, their implementation was inconsistent and ineffective. Too many local actors worked around the intended purpose of the PFAs, drawing boundary lines too broadly, and reporting funding too vaguely. In the end, Maryland’s approach provides an informative lesson for current growth management efforts: good rules only work if they are followed.

### III. ASSESSING THE COMMON PROBLEMS IN GROWTH MANAGEMENT

Many commentators have surveyed the growth management laws of various states, but such efforts are usually conducted in order to generate a list of options for future legislation.<sup>283</sup> However, it may prove more helpful to think beyond the list of statutory frameworks already provided by other states’ attempts—particularly because consistent success under any growth management plan remains elusive. We therefore need to assess the common problems witnessed in growth management efforts across the United States in order to learn lessons for the future.

#### A. *Political Motivations and Interest Group Pressures Lead to Inconsistent Legislation*

Decisions concerning land use implicate almost every other aspect of the political process. Land use decisions affect the environment, the economy, businesses, private property rights, affordable housing, and human health and well-being.<sup>284</sup> It is not difficult to un-

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<sup>280</sup> See Lewis et al., *supra* note 257, at 458.

<sup>281</sup> *Id.* at 467–72, 473 (includes tables summarizing development in many Maryland counties).

<sup>282</sup> *Id.* at 467.

<sup>283</sup> See, e.g., Godschalk, *supra* note 25; Rebecca Lewis & Gerrit-Jan Knaap, *Institutional Structures for State Growth Management: An Examination of State Development Plans*, 44 ST. & LOC. GOV'T REV. 33, 34, 40–42 (2012).

<sup>284</sup> See, e.g., Freilich & Peshoff, *supra* note 23, at 183, 190.



derstand that politicians would be wary of telling developers (who create jobs and donate money) that they cannot develop. And it is also easy to understand that it would be unwise to tell one's constituents that a large company was on the verge of moving in to their backyards in order to build thousands of condominiums. Eventually though, excessive political emphasis on economic development (while simultaneously assuring private property owners the right to continue to use their land as they please) will lead to significant problems including sprawl. This is the basic tragedy-of-the-commons problem—there is not enough land for everyone to have what they want, and too much growth without preservation and conservation could be irrevocably damaging to the environment. Competing political interests around land use run rampant.<sup>285</sup>

The hot-button nature of land use planning is evident from the continuing fight over smart growth legislation, even decades after its initial passage in some states.<sup>286</sup> Legislators, judges, state actors, and even the public have eventually buckled to the ever-changing (and forceful) pressures coming from various sides of the issue. Without consistency over time, legislation swings back and forth, and long-run solutions to land use dilemmas prove elusive.<sup>287</sup>

This lack of consistency can be traced directly to lawmakers' discomfort with antagonizing large groups of citizens in the short-term in order to seek long-run goals. In land use legislation, this often takes the form of legislators' desire to be seen as "pro-business" and in favor of economic development—meaning there is often strong support for legislation that is friendly to developers (because of its immediate impact) without rigorous consideration of long-term regional planning or other delayed external effects.<sup>288</sup> After all, those latter interests are usually significantly less obvious and certainly less organized.

The reluctance of legislators to take bold and consistent stands in land use planning is perhaps best illustrated by the failure of the Maryland legislature to pass the 2020 vision despite the immense regional buy-in that the plan had generated.<sup>289</sup> Language in the Washington state GMA is also strong evidence of legislators' attempts to please all

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<sup>285</sup> See Manan M. Yajnik, Comment, *Challenges to "Smart Growth": State Legislative Approaches to Comprehensive Growth Planning and the Local Government Issue*, 2004 WIS. L. REV. 229, 250.

<sup>286</sup> See, e.g., Troxler, *supra* note 193.

<sup>287</sup> See, e.g., Klas, *supra* note 210.

<sup>288</sup> See, e.g., Freilich & Peshoff, *supra* note 23, at 186.

<sup>289</sup> See *supra* Part II.D.4.

the people all of the time, particularly its internally conflicting goal statement and the unnecessary portion about maintaining “the state’s high quality of life.”<sup>290</sup> And perhaps more than any other example, Florida’s recent repeal of its growth management legislation after three decades of state land use coordination, in an effort to promote “economic development,” represents the ultimate power of the dollar and a defeat for consistent smart growth over time.<sup>291</sup>

### B. *Inconsistent Application by Courts*

Not only have states demonstrated that it is difficult to keep smart growth management legislation on the books,<sup>292</sup> but it has also proven challenging for courts to apply these laws in a manner that is predictable and consistent. A Florida decision, *Board of County Commissioners v. Snyder*,<sup>293</sup> which pre-dated the repeal of Florida’s growth management law, is a prime example. By 1993, when the *Snyder* case was decided, there were wide inconsistencies as to the way rezoning determinations were reviewed—namely, whether they were to be considered judicial or quasi-judicial.<sup>294</sup> In *Snyder*, the standard of review for the Florida Supreme Court was contingent upon a determination as to whether the action of the zoning board was considered judicial or quasi-judicial.<sup>295</sup> However, rather than making one of those two decisions, the *Snyder* court essentially created a third form of rezoning review: direct petition to the circuit court.<sup>296</sup> This created considerable confusion in the lower courts about how to apply the decision. Commentator Mary Dawson describes the morass:

For example, if a government made a compromise decision to allow more intense development on a property . . . the property owner, third-party intervenors, and the involved state agencies could challenge the decision. Until a court rules on whether the decision is legislative or quasi-judicial, the property owner must seek constitutional relief, injunctive relief and review by writ of certiorari. Regardless, the state agencies and intervenors would challenge consistency through the administrative process. The property owner or

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<sup>290</sup> See WASH. REV. CODE § 36.70A.020 (2015).

<sup>291</sup> See *supra* Part II.D.2.

<sup>292</sup> See *supra* Part III.A.

<sup>293</sup> Bd. of Cnty. Comm’rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

<sup>294</sup> See Paul R. Gougelman III, *The Death of Zoning as We Know It*, 67 FLA. B.J. 25, 29 (1993).

<sup>295</sup> *Id.* at 26.

<sup>296</sup> See Mary Dawson, *The Best Laid Plans: The Rise and Fall of Growth Management in Florida*, 11 J. LAND USE & ENVTL. L. 325, 343 (1996).

the third party could also seek actual damages in circuit court, but only the third party could seek injunctive relief in the circuit court, if a development order is involved.<sup>297</sup>

The *Snyder* decision thus made it unclear how zoning decisions were to move forward and be appealed in the future, and represented a dramatic judicial undercutting of Florida's growth management structure.

In addition, the Washington state cases of *Viking* and *Town of Woodway* illustrate the difficulty courts have had consistently applying growth management laws even absent the judicial tinkering that occurred in *Snyder*.<sup>298</sup> Where legislation points in as many different directions as the Washington GMA does, it becomes difficult to predict how court decisions will come out. In turn, this uncertainty decreases confidence in the law, inevitably leads to conflicting judicial opinions, and undermines predictability for all parties involved.<sup>299</sup>

### C. *Gubernatorial Leadership Is Temporary*

The work of Governors McCall in Oregon and Governor Askew in Florida is illustrative of the profound impact that political leaders can have. Although the effective leadership of these governors was integral to the passage of each state's land use legislation,<sup>300</sup> it is clear that legislation needs to be passed with a longer shelf life than the governorship. Unfortunately, the hard work of both governors has been undercut by later ballot measures (e.g., Ballot Measure 37 in Oregon),<sup>301</sup> or by the near total repeal of the state-coordinated smart growth legislation passed in Florida.<sup>302</sup> Strong gubernatorial leadership is essential to the creation of these laws, but political leaders must be cognizant of the need to structure the legislation with long-term sustainability in mind.

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<sup>297</sup> *Id.* at 344 (citing a 1995 interview with Richard Grosso, Legal Director for 1000 Friends of Florida).

<sup>298</sup> See *supra* notes 173–88 and accompanying text.

<sup>299</sup> Both the *Viking* and *Town of Woodway* cases have a tortured legal history, lasting years and involving numerous reversals and conflicting decisions at various levels of the court system. See *supra* Part II.D.1.

<sup>300</sup> See *supra* Part II.D.2; see also *supra* Part II.D.3.

<sup>301</sup> See *supra* Part II.D.3; see also Patricia E. Salkin & Amy Lavine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 URB. LAW. 1065, 1065–66 (2006).

<sup>302</sup> See Klas, *supra* note 210.

#### D. *Political Motivations by State Agencies*

Independent state agencies also have not been immune from political influences. For example, the lack of review or reporting by the Maryland agencies responsible for overseeing Priority Funding Areas is a strong indication that even state agency actors—who, one would think, would be shielded from the political pressures of elected office—have failed to be reliable stewards of the growth management tools in their states.<sup>303</sup> Though Priority Funding Areas were the law of the land, the state officials involved did not meaningfully fund or record what was occurring in the decisionmaking process.<sup>304</sup> As a result, residential development (and indeed, even funding) was just as likely to occur outside a Priority Funding Area as inside one—and in some places even less so.<sup>305</sup>

#### E. *Popular Sentiment May Change*

To solely blame government actors for the inconsistencies and failings in state growth management laws, however, would be misguided. The key development that led to the undercutting of Oregon’s renowned Urban Growth Boundaries was a citizen-driven ballot measure.<sup>306</sup> Even in what was an extremely environmentally conscious state—indeed Oregon is a leader in the environmental movement—developer’s dollars and declining property values in some areas were eventually able to sway a popular vote measure that led to slackened enforcement of the UGBs and eviscerated the state land use planning program.<sup>307</sup>

#### F. *The “NIMBY” Phenomenon*

The “Not In My Backyard” or “NIMBY” phenomenon is another important factor in eroding support for smart growth efforts. Previously supportive citizens suddenly withdraw their backing as soon as they realize that the growth might actually occur in their own backyards. As Clint Bolick put it, “once people move to the suburbs . . . they eagerly roll up the welcome mat.”<sup>308</sup> The NIMBY attitude is un-

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<sup>303</sup> See *supra* Part II.D.4.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> See *supra* Part II.D.3.

<sup>307</sup> See *supra* notes 244–53 and accompanying text.

<sup>308</sup> Bolick, *supra* note 126, at 863.

derstandable. In fact, NIMBYs often “think of themselves as heroes, not villains” for fighting development.<sup>309</sup>

One of the great ironies in the debate over sprawl is that liberal environmentalists—the constituency most likely to support smart growth legislation—is also a constituency that is filled with NIMBYs. “After all,” observed one writer, “it is one thing to be a passionate proponent of recycling, and another to welcome a particular recycling plant—with the attendant garbage-truck traffic—on your street.”<sup>310</sup>

If the NIMBY dilemma is pervasive, and all available data suggest that it is,<sup>311</sup> what are the implications for smart growth? One possibility is that the NIMBY problem will eventually spell the demise of any smart growth program that attempts to increase density through an urban growth boundary. Those living inside the UGB will not want outsiders coming in. But where will the outsiders go? That is the unsolvable question.

Let us consider a representative example. Virginia’s Loudoun County has been described above as a region that is well-situated to take on additional growth.<sup>312</sup> Its proximity to the nation’s capital makes it a highly desirable place to live.<sup>313</sup> Indeed, 2010 census data show that Loudoun County grew by 84.1% in the past decade, far outpacing growth in all other Virginian counties.<sup>314</sup> The influx of new homes, cars, and people rankled more than a few existing residents.<sup>315</sup> The mayor of Leesburg, a town in Loudoun County, was quoted in the local newspaper as saying that her town “has grown too fast.”<sup>316</sup> The mayor claims to have voted against every major residential rezoning during her tenure on the Town Council.<sup>317</sup>

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<sup>309</sup> Edward Glaeser, *How Skyscrapers Can Save the City*, ATLANTIC, Mar. 2011, at 40, 50.

<sup>310</sup> See Elisabeth Rosenthal, *Not in My (Liberal) Backyard*, N.Y. TIMES, Mar. 13, 2011, at WK 3.

<sup>311</sup> Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 497–502 (1994) (detailing the variety of projects and techniques NIMBY organizers target and utilize).

<sup>312</sup> See Joel Kotkin, *America’s Fastest-Growing Counties: The ‘Burbs Are Back*, FORBES (Sept. 26, 2013, 10:00 AM), <http://www.forbes.com/sites/joelkotkin/2013/09/26/americas-fastest-growing-counties-the-burbs-are-back/>.

<sup>313</sup> *Id.*

<sup>314</sup> Crystal Owens, *UPDATE: Loudoun Fastest Growing County in Virginia*, LOUDOUN TIMES.COM (Feb. 4, 2011), [http://www.loudountimes.com/index.php/news/article/loudoun\\_fastest\\_growing\\_county\\_in\\_virginia898/](http://www.loudountimes.com/index.php/news/article/loudoun_fastest_growing_county_in_virginia898/).

<sup>315</sup> *See id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* For perspective’s sake, we should note that the other members of the town council have supported increased density. *Id.*

The mayor of Leesburg is not the only individual fighting new development in Loudoun County. A citizens’ network calling itself the “Campaign for Loudoun’s Future” also has denounced new residential construction.<sup>318</sup> “For several decades, Loudoun County has been the target of national developers and their proposals for massive increases in residential development beyond what our roads, schools and other community services can handle,” the group’s website warns.<sup>319</sup> “Thousands of us fought back, seeking a say in the future of our home and the way it is planned.”<sup>320</sup> The website includes a picture of a little girl holding a sign displaying the group’s slogan: “Don’t Supersize Loudoun!”<sup>321</sup>

Yet, while Loudoun residents praise themselves for growing responsibly and maintaining the “charm and small-town feel” of communities such as Leesburg,<sup>322</sup> outsiders look at Loudoun with contempt. As mentioned above, residents of commuter neighborhoods as far away as West Virginia must drive through miles of untouched land on their hour-long commutes into metropolitan Washington, D.C.<sup>323</sup> As one West Virginian county planner explained, Loudoun County’s restrictive land use regulations may have saved Loudoun from the worst effects of sprawl—but, as a result, sprawl simply leapfrogged Loudoun and ended up in West Virginia.<sup>324</sup> “They’ve only accelerated it,” said the planner, speaking about the leapfrogging phenomenon.<sup>325</sup> “They’ve pushed it out here.”<sup>326</sup>

Professor Jonathan Levine’s 2001 survey cataloguing developer perceptions of the land use market provides evidence of the NIMBY problem’s severity.<sup>327</sup> Although developers believed that restrictive zoning regulations posed the greatest barrier to the expansion of smart growth, they also saw “neighborhood opposition” as a major

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<sup>318</sup> See *A Platform for Loudoun’s Future*, CAMPAIGN FOR LOUDOUN’S FUTURE, <http://loudounsfuture.org> (last visited May 21, 2015).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Owens, *supra* note 314.

<sup>323</sup> See Peter Whoriskey, *Washington’s Road to Outward Growth*, WASH. POST, Aug. 9, 2004, at A1.

<sup>324</sup> See *id.*

<sup>325</sup> *Id.* at A9.

<sup>326</sup> *Id.*

<sup>327</sup> See Jonathan Levine & Aseem Inam, *The Market for Transportation-Land Use Integration: Do Developers Want Smarter Growth than Regulations Allow?*, 31 TRANSPORTATION 409, 417–19 (2004).

impediment.<sup>328</sup> When neighbors oppose smart growth developments, they tend to do so by asking local planners to reject or modify the project.<sup>329</sup> Thus, at a conceptual level, it may be hard to distinguish between the “regulatory” problem and the NIMBY problem. They are frequently two sides of the same coin. However, neighborhood opposition to smart growth poses a fundamentally different problem from regulatory opposition. Neighborhood opposition is an older, more pervasive, and more intractable problem.<sup>330</sup>

### G. *Constitutional Takings Jurisprudence*

An aggressive program of smart growth will likely provoke a backlash, not only from NIMBY citizens, but also from frustrated developers who may claim that the legislation or regulation (or land use planning decision) amounts to a taking of their property deserving of just compensation under the Constitution. Under the Supreme Court’s *Penn Central* test,<sup>331</sup> a court must weigh the “economic impact of the regulation”—particularly the extent to which the regulation has interfered with the landowner’s “distinct investment-backed expectations”—against the general “character” of the governmental action.<sup>332</sup> In analyzing the “character” of the regulation, the court will ask whether the regulation “can be characterized as a physical invasion by government.”<sup>333</sup> If so, then the court will be more likely to find a taking.<sup>334</sup>

One study of regulatory takings claims in nine southeastern states suggests a relationship between the aggressiveness of a state’s smart growth agenda and the number of regulatory takings claims that resulted in published opinions.<sup>335</sup> For example, Chris Williams’s study found that a comparatively “overwhelming number of regulatory takings cases were brought by developers in Florida.”<sup>336</sup> The author attributed the result in part to the fact that Florida was the only state out of the nine studied that had a comprehensive, statewide growth

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 419.

<sup>330</sup> *Id.*

<sup>331</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978).

<sup>332</sup> *Id.* at 124.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 910–13 (2004).

<sup>336</sup> *Id.* at 912.

management law on its books.<sup>337</sup> He concluded that “the interests of developers will likely be best served by avoiding the mandatory, highly-restrictive forms of smart growth regulation that include urban growth boundaries and development moratoria and choosing regulations that create incentives for the kind of development that will meet the goals of smart growth and avoid sprawl.”<sup>338</sup>

#### IV. CONCLUSIONS AND SOLUTIONS: MAKING SMART GROWTH SMARTER

In many ways then, “smart growth” has failed to live up to the hype. As detailed above, smart growth has been stymied both by unintended consequences and unforeseen circumstances, sometimes producing counterproductive results. In Maryland, the critically acclaimed smart growth program seems to have frozen growth in the very areas it was trying to encourage.<sup>339</sup> Opponents of smart growth also claim in numerous studies that smart growth legislation inevitably results in higher housing prices by restricting the supply of land.<sup>340</sup>

In other situations, smart growth policies have collided headlong with preexisting private property rights. In *Viking*, for example, a developer attempted to exploit a state policy preference for higher density as a pretext for invalidating a private covenant that called for lower density.<sup>341</sup> This conflict has been described by Jonathan Levine as a “mismatch between fealty to property rights and deference to municipal regulations impinging on those rights.”<sup>342</sup>

Other times, consequences are unanticipated because few envisioned the degree to which lack of political will would hamstring progress.<sup>343</sup> The smart growth movement even has the potential to divide environmentalists, with smart growth proponents struggling to shake off accusations of NIMBY attitudes.<sup>344</sup>

Finally, growth management advocates may have underestimated NIMBY opposition from current residents. Such “opposition can take

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 913.

<sup>339</sup> See *supra* Part II.D.4.

<sup>340</sup> See Wendell Cox, *The Costs of Smart Growth Revisited: A 40 Year Perspective*, NEW GEOGRAPHY (July 8, 2011), <http://www.newgeography.com/content/002324-the-costs-smart-growth-revisited-a-40-year-perspective> (reviewing studies).

<sup>341</sup> See *Viking Props., Inc. v. Holm*, 118 P.3d 322, 329 (Wash. 2005) (en banc).

<sup>342</sup> LEVINE, *supra* note 123, at 89.

<sup>343</sup> See Yajnik, *supra* note 285, at 255 (“A legislature that defers excessively to local governments could result in an inconsistent statewide land-use policy.”).

<sup>344</sup> See Zusha Elinson, *Smart-Growth Policy Splits Environmentalists*, N.Y. TIMES, Nov. 5, 2010, at A21B; see also Rosenthal, *supra* note 310.



the form of political pressure, for example, city residents voicing their concerns at planning commission meetings, or, in many states, through direct democracy, such as referenda and initiatives.”<sup>345</sup>

Given this grim portrait of the fate of smart growth efforts, what lessons can we glean and what solutions can we offer to the next wave of land use legislators?

A. *Remove Smart Growth from Local Politics: National Land Use Planning*

Removing land use decisions from political pressure seems a nearly impossible feat, but it must be done. After all, the states surveyed in this Article have employed almost every possible government actor to perform its land use governance—from appointed state agencies, to governor-appointed review boards, to citizen commissions, to judges, to the state legislatures, to popular vote ballot measures.

Shifting government control over certain critical land use decisions from the local to the federal level would not be an unprecedented solution to this dilemma. Congress has already enacted federal legislation with strong implications on local land use, including the Clean Air Act, the Clean Water Act,<sup>346</sup> the Endangered Species Act,<sup>347</sup> and the National Environmental Policy Act.<sup>348</sup> Even the birth of the U.S. National Parks and National Forests represents a heavy exertion of federal control over land. These efforts required that vast tracts of property be set aside for public use and long-term conservation, rather than for the kind of economic development at issue in many of the lawsuits mentioned in this Article (e.g., housing developments or shopping centers).<sup>349</sup> Those lawmakers fearful of public backlash for curbing development in the name of conservation should be encouraged by the astronomically high approval ratings given by the public for the creation and maintenance of national parks.<sup>350</sup>

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<sup>345</sup> Winter King, *Smart Growth Meets the Neighbors*, 34 *ECOLOGY L.Q.* 1349, 1355–56 (2007) (reviewing LEVINE, *supra* note 123).

<sup>346</sup> Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012).

<sup>347</sup> Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

<sup>348</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

<sup>349</sup> See, e.g., *Town of Woodway v. Snohomish Cnty.*, 322 P.3d 1219 (Wash. 2014) (en banc), *aff'g* 291 P.3d 278 (Wash. Ct. App. 2013); *Viking Props., Inc. v. Holm*, 118 P.3d 322, 329 (Wash. 2005) (en banc).

<sup>350</sup> A nonpartisan poll found that ninety-five percent of likely voters “cherished” national parks and “want the federal government to ensure they are protected.” Press Release, Nat’l Parks Conservation Ass’n, *New Poll of Likely Voters Finds Unity in Public Support for National Parks* (Aug. 7, 2012), available at <http://www.npca.org/news/media-center/press-releases/2012/>

Similarly, Congress could refocus long-stalled efforts on formulating and promulgating a National Land Use Planning Act. Rather than vesting politically sensitive land use decisions with local and regional bodies that can easily fall prey to the forces of public sentiment, reviving the national movement seems like a better long-run alternative. Given the shortcomings of state-based planning, a broader regional and even a national structure may be able to ensure greater consistency across the states currently engaging in land use planning, and jump start the majority of states that still lack growth management laws.

Indeed, in the 1970s, efforts to enact a National Land Use Planning Act came within a few votes of success.<sup>351</sup> The law, as proposed by Senator Henry M. Jackson, would have made federal grants available for states that adopted strong regional land use plans.<sup>352</sup> Rather than risk the political minefield of seeking direct federal involvement in formulating land use decisions, Senator Jackson’s bill would have instead offered strong incentives for local leadership and authority to enact and enforce growth management laws.<sup>353</sup>

This federal scheme is not unlike other incentive-based approaches that utilize Congress’s power of the purse such as those at issue in *South Dakota v. Dole*.<sup>354</sup> Time and time again, states have demonstrated a willingness to comply with federal schemes when there are significant grant dollars in play.<sup>355</sup>

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poll\_parks\_support\_080712.html. A June 2013 Gallup poll showed sixty-eight percent of participants indicated they were “satisfied” with the job the federal government is doing on national parks, an approval rating second only to “responding to national disasters” on a list of nineteen prompts. Jeffrey M. Jones & Steve Ander, *Americans Praise Government Work on Natural Disasters, Parks*, GALLUP (July 12, 2013), <http://www.gallup.com/poll/163487/americans-praise-gov-work-natural-disasters-parks.aspx>.

<sup>351</sup> See Fred Bosselman, *The Twilight of National Land Use Policy*, 45 J. MARSHALL L. REV. 237, 237 (2012).

<sup>352</sup> *Id.* at 242.

<sup>353</sup> *Id.*

<sup>354</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the constitutionality of a federal statute that withheld funding from states who refused to raise the legal drinking age to twenty-one).

<sup>355</sup> See generally Glen Elsasser, *Over-21 Liquor Law Upheld*, CHI. TRIB., June 24, 1987, at 5 (at the time of the *Dole* decision, forty-seven states and the District of Columbia had already set twenty-one as the minimum drinking age); see also American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

An analogy could be drawn to President Obama’s education initiative, *Race to the Top*. The federal program offers financial carrots to states that enact certain education reforms, such as data-based performance reviews to improve teacher quality and increased student access to more “rigorous” learning opportunities. See *Setting the Pace: Expanding Opportunity for America’s Students Under Race to the Top*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/sites/>

The federal government could, therefore, implement reform in two ways: (1) create a national scheme involving strong financial incentives for state and regional land use planning, and/or (2) set aside land for the public benefit by exercising federal eminent domain powers.

Monetary incentives may be particularly effective in spurring neighboring states to create regional plans addressing broader land use issues they face (witness, for example, the efforts to protect the Chesapeake Bay across Maryland, Pennsylvania and Delaware).<sup>356</sup> A similar collaborative effort may be necessary in the American Southwest where the drying Colorado River has affected numerous communities across jurisdictional lines.<sup>357</sup>

If a federal stick-and-carrot approach to incentivizing strong planning programs is less favored or proves unsuccessful, the government could also rely on its eminent domain powers to set aside land for park space, conservation, or affordable housing. If political buy-in resembled that of the U.S. National Parks, and land were used strategically to meet actual needs (rather than to appease special interests), this effort could have a dramatic impact on the way that land use planning is conducted far into the future. First, with the federal government taking the lead, long-term land use planning decisions would not fall prey to the unique pressures felt by local leadership (and local leaders could point to the federal government as a convenient scapegoat). Second, if communities truly saw the benefit to broad-scale public land uses in a way that we today view our National Parks movement, it could trigger a fundamental shift in perspective from our current attitude towards private property rights. Put differently, if more people saw practical and positive outcomes associated with the public use of land, they would be far more willing to forego certain private property rights in order to make better, more community-focused decisions concerning land use going forward.

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default/files/docs/settingthepacertreport\_3-2414\_b.pdf (last visited May 16, 2015). Indeed, despite initial resistance based on the notion that education, like land use, should be a local concern, forty-one out of fifty-one state educational agencies (including Washington, DC) filed applications for Phase 1 of Race to the Top. See *States' Applications, Scores and Comments for Phase 1*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/racetothetop/phase1-applications/index.html> (last visited May 16, 2015).

<sup>356</sup> See Tierney, *supra* note 254, at 465.

<sup>357</sup> Populations in seven U.S. states as well as Mexico have historically depended upon the Colorado River as a source of water. See Sarah Zielinski, *Running Dry*, SMITHSONIAN, Oct. 2010, at 70, 71.

*B. Create Urban Growth Boundaries or Priority Funding Areas, but for Keeps*

Two of the more successful tools employed by the states surveyed for this Article appeared to be the (1) urban growth boundary (in Oregon)<sup>358</sup> and (2) the priority funding area (in Maryland).<sup>359</sup> However, both of the key efforts to use these tools faltered somewhere within the political system. The success of UGBs in curbing development in open areas was quite promising before financial pressures and budgetary pitfalls made continuation impossible.<sup>360</sup> If the smart growth movement is going to remain stuck on a state-based system, then a much more stringent, consistent, and robust application of UGBs or PFAs would appear to be a useful approach.

It is an obvious goal of an effective smart growth scheme that it be enforced in a way that is meaningful (read: has some teeth) and consistent (read: does not disappear with changing political sentiment). This is especially true of the UGB or PFA provisions that showed such promise before changing political tides or lax implementation spelled their doom. Meaningful enforcement and application of these planning mechanisms could be provided through federal oversight and a strong incentive-based approach, as discussed above.<sup>361</sup>

Alternatively, lawmakers could devise a scheme that is more “stick” than “carrot,” and look harshly upon the approval of new building permits or projects outside of UGBs or PFAs.<sup>362</sup> Along with enforcement practices to ensure that new construction occurs only with a valid permit, a strict policy of denying permits in areas where growth is not intended could be highly successful. Without government support, large residential and commercial developments are bound to be unsuccessful—either due to a lack of permitting or lack of infrastructure. Where private parties resisted (i.e., sought development outside sanctioned UGBs or PFAs), government officials could seek penalties or ultimately engage in a taking of the land, though of

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<sup>358</sup> See *supra* Part II.D.3.

<sup>359</sup> See *supra* Part II.D.4.

<sup>360</sup> WALKER & HURLEY, *supra* note 154, at 8–9.

<sup>361</sup> See *supra* Part IV.A.

<sup>362</sup> To reiterate, the approval rating of such projects as national parks is unbelievably high, even though the presence of national parks serves to curb certain types of economic development. See *National Parks Poll*, NAT'L PARKS CONSERVATION ASS'N, <http://www.npca.org/protecting-our-parks/policy-legislation/national-parks-poll.html> (last visited May 21, 2015) (citing to a Hart Research Associates and North Star Opinion Research study that found that ninety-five percent of voters see “protecting and supporting the National Parks” as an appropriate role for the federal government).

course the latter option would require payment of “just compensation.”

While it is not a foregone conclusion that stronger UGBs or PFAs would have met with long-term success, it is evident that the failure to consistently enforce and oversee the programs ultimately led to their demise.<sup>363</sup> Instead, policymakers could create a meaningful, incentive-based program through a National Land Use Planning Act, with UGBs and PFAs that carried teeth in their enforcement mechanisms and consistency in their implementation.

Of course, in order for these tools to achieve maximum long-term impact, we might be better off removing them from the hands of locally elected officials who face the pressures of fluctuating political sentiment. A nonpartisan, appointed commission or a politically insulated committee might actually be the best actor to oversee and enforce the UGB or PFA if this is the route that future land use planning efforts take.

### C. *Reform Private Property Rights*

Though it would clearly take a complicated revamping of many areas of American law (not to mention cultural expectations), it is rarely—if ever—suggested that the United States reexamine its individualistic conception of private property rights. The historic and legal ways that private property rights are construed in the United States, namely, the robust “bundle of rights” provided to persons who own property and the accompanying sense of entitlement manifested in the “American Dream,” both pose significant impediments to sustainable, coordinated land use management.

A movement—both social and legal—to educate Americans about the destructive nature of our expectations concerning land use may contribute significantly to a transformation in the way that land is treated. There is simply not enough suitable land, water, or open space for everyone to have the idyllic single-family home, white picket fence, and beautiful scenery. More and more, the U.S. population is moving to urban settings.<sup>364</sup> In fact, this movement into the city is also linked to positive health outcomes, including a longer life expectancy.<sup>365</sup> Compact cities come with more socioeconomic opportunity

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<sup>363</sup> See *supra* Parts II.D.3–4.

<sup>364</sup> See, e.g., Mohammad Arzaghi & Anil Rupasingha, *Migration as a Way to Diversify: Evidence from Rural to Urban Migration in the U.S.*, 53 J. REGIONAL SCI. 690, 693 (2013).

<sup>365</sup> See Steve Hargreaves, *America's Most Sprawling Cities*, CNN MONEY (Apr. 2, 2014, 1:49 PM), <http://money.cnn.com/2014/04/02/news/economy/sprawling-cities/index.html>.

and healthier, longer lives.<sup>366</sup> Without a realization that the quality of our lives is interconnected, and a sense of the shared nature of responsibility for preserving resources, lasting smart growth will prove elusive. We will quite simply run out of space and resources if people continue to live with the land use expectations that they can have it all, no matter the consequences on their neighbors.<sup>367</sup> A shift in popular sentiment, if robust enough, may also lead to political pressure—a movement that would alleviate some of the difficulties in instigating lasting and meaningful growth management reform thus far.

### CONCLUSION

Continued movement towards smart growth in America is imperative if we are to maintain basic fairness with regard to property rights as well as continue to use land in a way that is sustainable and responsible. While several states have utilized a number of different structures in seeking smart growth, almost all of them have met with unintended consequences and dramatically increased litigation, particularly because political sensitivities around land use decisions run hot in multiple directions. If we are to be successful in achieving enduring smart growth over the long term, it is time to stop half-heartedly choosing from a menu of failed options. Rather, we must devise ways to remove smart growth decisions from local politics, borrow successful smart growth tools from other states, and have the courage to stay the course when we pass responsible land use legislation. We must implement regulation consistently, and even consider the idea of a federal National Land Use Planning Act. More radically, it is time we seriously rethink the nature of private property rights in the United States so that all citizens understand that our land use decisions impact everyone else around us. If we fail to take affirmative steps today, our efforts to achieve smart growth will never live up to their name.

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<sup>366</sup> *Id.*

<sup>367</sup> By way of illustration, numerous cities and developments in the American Southwest such as Phoenix, Las Vegas, Palm Springs, and Tucson, have contributed to the drying of the Colorado River delta and drought conditions on the Navajo Indian Reservation. *See generally* Brian Clark Howard, *8 Mighty Rivers Run Dry from Overuse*, NAT'L GEOGRAPHIC, available at <http://environment.nationalgeographic.com/environment/photos/rivers-run-dry/> (last visited May 21, 2015).