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# When Private Property Rights Collide With Growth Management Legislation

## **Abstract**

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 to constitutional takings jurisprudence.

## **Keywords**

Cornell, real estate, smart growth, suburban sprawl, sprawl, state government, local government, intelligent growth, planning, NIMBYism, NIMBY, growth management, growth management legislation, municipal zoning, American Dream, Belle Terre decision, Euclid v. Amber Realty, zoning, land values, land use segregation, population density, suburban development, transit-oriented development, mixed-use infill, Phoenix, CityScape, Hawaii, Vermont, Oregon, FLorida, Maine, Rhode Island, Georgia, Washington, Maryland, Pennsylvania, Delaware, Tennessee, Colorado, urban growth boundaries, Oregon Land Use Planning Program, Land Conservation and Development Corporation, LCDC, Land Use Board of Appeals, LUBA, UGB, Rajneeshpuram, Oregon Supreme Court, Tom McCall, Chesapeake Bay, Priority Funding Areas, PFA, Minnesota, urban service areas, enterprise zones, New Jersey, 2020 plan, Virginia, Loudoun County, Horse Country, Dulles International Airport, Washington Dulles, Leesburg, West Virginia, commuters, constitutional takings, jurisprudence, Penn Central, economic impact, leapfrogging growth, viking properties v. holm, Clean Air Act, Clean Water Act, Endangered Species Act, National Environmental Policy Act, National Land Use Planning Act, private property rights reform

# When Private Property Rights Collide With Growth Management Legislation

## Author

Professor Steve Calandrillo joined the University of Washington School of Law faculty in 2000 and was named Charles I. Stone Professor of Law in 2009. Prior to teaching, he clerked for Judge Alfred Goodwin on the Ninth Circuit and practiced corporate law at Foster Pepper in Seattle. Calandrillo graduated magna cum laude from Harvard Law School where he was a John M. Olin Fellow in Law & Economics and a member of the Harvard Journal on Legislation. Calandrillo's scholarship utilizes economic analysis to address controversial law and public policy topics, including intellectual property rights, eminent domain, organ donation, compulsory vaccinations, assisted suicide, punitive damages, baseball's designated-hitter rule, tort law's eggshell plaintiff rule, and U.S. health and safety regulatory policy. His recent articles have appeared in a variety of top law reviews, including Boston University, George Washington, William & Mary, Georgia, Ohio State, and Wake Forest Law Reviews as well as Harvard Journal of Law & Public Policy. Calandrillo teaches Contract Law, Law & Economics, and Law & Medicine, and is a frequent speaker nationally on those subjects. He is a three-time recipient of the Philip A. Trautman Professor of the Year Award.



By: Steve P. Calandrillo<sup>1\*</sup>, Chryssa V. Deliganis<sup>2\*\*</sup>, and Andrea Woods<sup>3\*\*\*</sup>

## 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 to constitutional takings jurisprudence.

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 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>2</sup> Not surprisingly, substantial litigation has been the inevitable result, and neither predictability nor smart growth has necessarily been enhanced. Part II further analyzes these efforts in order to identify common problems in growth management that we need to learn from lest we repeat the failures of the past. Finally, Part III offers bold law 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.

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Readers interested in an expanded version of this Article will find it forthcoming in *George Washington Law Review*, Volume 83 (2015).

<sup>2</sup> At least thirteen states have tried their hand at smart growth legislation: Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Minnesota, 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/electronic\\_versions/pg/pgfal00/article2.pdf](http://www.sog.unc.edu/pubs/electronic_versions/pg/pgfal00/article2.pdf).

# I. 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: (1) first, through the legal system's sanctioning – indeed, its endorsement – of municipal zoning laws, and (2) second, through states' failures to either enact effective growth management legislation or to consistently interpret and apply their existing growth management legislation.

## A. Sprawl is Actually Caused in Large Part by our Nation's Laws

At its core, some say, sprawl is caused by our nation's pursuit of the "American Dream." In *Belle Terre v. Boraas*,<sup>3</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>4</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>5</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>6</sup> Conventionally, the history of municipal zoning begins with the Supreme Court's decision in *Euclid v. Ambler Realty*,<sup>7</sup> a 1926 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>8</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). The Village's zoning ordinance was held to be a proper use of the police power because it protected public health<sup>9</sup> and preserved the value of private property. 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>10</sup>

Nobody would debate that industrial land uses (read: factories) and residential land uses (read: single family homes) ought to be segregated. However, the Court in *Euclid* was not solely concerned with the pollution and noise associated with factories and other industrial land uses. Less obviously, but more insidiously, the Court was also concerned with the sort of "human pollution" that its members seemed to associate with high-density housing options such as apartments and townhomes.<sup>11</sup> By allowing municipalities to slate large areas of land for low-density, residential development, *Euclid* ushered in the era of sprawl.

<sup>3</sup> *Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.*

<sup>6</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").

<sup>7</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>8</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 to the] residential public.")

<sup>9</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>10</sup> See Gillham, *supra* note 55 ("[Zoning controls] provide reasonable expectations for the continued value of a given piece of land and thereby create a relatively stable marketplace").

<sup>11</sup> See Ziegler, *supra* note 52, 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.") (quoting *Euclid*, 272 U.S. at 394).

## Author

Chryssa Deliganis graduated with high honors from U.C. Berkeley, and received her J.D. *cum laude* from Harvard Law School. A member of the Washington bar, she began her career as a litigator at the Foster Pepper law firm in Seattle. From 2000-2002 she clerked for Judge Richard C. Tallman of the Ninth Circuit Court of Appeals. Deliganis' practice is focused on property law, food and drug law, and civil appeals. She successfully briefed and argued *Viking v. Holm et al.*, 155 Wash. 2d 112 (2005), a unanimous opinion upholding a restrictive covenant, which vindicated the property rights of thousands of similarly situated Washington homeowners. Deliganis has published articles on food safety, medical waste regulation, and has a current work-in-progress addressing the conflicts created by the interaction of the Washington Growth Management Act and the state's vested property rights doctrine.



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>12</sup> In Ziegler’s view, such zoning is less a matter of public health and more a matter of snobbery or NIMBYism.<sup>13</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>14</sup> Over the past three decades, American vehicle use has outpaced population growth by a factor of three.<sup>15</sup> The interstate highway system – our “yellow brick road to sprawl”<sup>16</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>17</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>18</sup>

Sprawling development generally necessitates the use of open space that might otherwise be protected for future generations. According to one report, land is being consumed for development at a rate almost three times faster than population growth.<sup>19</sup> By 2050, an additional 23 million acres of forest land may be lost forever.<sup>20</sup> Of course, America is a pretty big country. According to one account, total urban and suburban land use in the United States has consumed only 3.1% of the nation’s total land supply.<sup>21</sup> The problems with such a misleading statistic are almost too obvious to be stated. Of the nation’s total supply of land, only a small percentage has the right geography to support any meaningful population density. 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>22</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>23</sup> This sense of detachment can have real psychological costs.<sup>24</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

## Author

Andrea Woods graduated *summa cum laude* and with honors from Gonzaga University, where she served as student body president and was the first student selected as a finalist for the Rhodes Scholarship. She was one of five students selected annually for the Gates Public Service Law Scholarship and received her J.D. with high honors in 2014 from the University of Washington School of Law. While in law school, she served as president of the student bar association and was awarded the Vivian Carkeek prize for outstanding contribution to the *Washington Law Review*. She is currently clerking for the Honorable John C. Coughenour of the U.S. District Court for the Western District of Washington.



12 *Id.* at 47.

13 *Id.* at 47 n.98.

14 *Id.* at 31 (concluding that our nation’s landscape is “totally shaped and dominated by the automobile.”)

15 Reid Ewing, Urban Land Inst., *Growing Cooler: The Evidence on Urban Development and Climate Change 2* (2008), available at <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf> (citing federal highway statistics and reporting vehicle use in terms of vehicle miles traveled).

16 Ziegler, *supra* note 52, at 35.

17 Gillham, *supra* note 55.

18 *See Id.*

19 *See Ewing, supra* note 61.

20 Nadejda Mishkovsky, Int’l City/Cnty. Mgmt. Ass’n Putting Smart Growth to Work in Rural Communities 4 (2010).

21 Clint Bolick, *Subverting the American Dream: Government Dictated “Smart Growth” Is Unwise and Unconstitutional*, 148 U. Pa. L. Rev. 859, 861 n.5 (2000).

22 Jonathan Levine, *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use 1* (2005) (“A stunted community life is the ostensible product of the lack of casual, face-to-face interactions in lively public spaces.”)

23 *See Ziegler, supra* note 52, at 40.

24 *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 Tucson’s Sprawling Suburbs, Recession has Dimmed the American Dream*, Wash. Post, Jan 12, 2011, available at <http://www.washingtonpost.com/archive/local/localnews/2011/01/12/> (citing sprawl as a cause of the social isolation that may have contributed to the attempted assassination of Congresswoman Gabrielle Giffords Jan. 8, 2011, in Tucson Arizona. “Tucson,” the article noted, “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.” While sprawl might contribute to social isolation, the author thinks it is a stretch to connect it causally to the attempted murder of Gabrielle Giffords.)



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>25</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 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 “smart growth is a way of encouraging development and revitalization that makes the most sense for future livability.”<sup>26</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>27</sup> Such alternatives include transit villages, “fully-contained communities,” mixed-use infill projects, and many other high-density, ecologically-minded, transit-oriented designs. Through changes to municipal codes and county-wide 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>28</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>29</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*. 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. Smart growth policies also encourage “infill”<sup>30</sup> or “brownfields” development. 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>31</sup> The project, which includes plans for an eventual 1.8 million square feet of high-rise office buildings, fashionable storefronts, and designer restaurants,<sup>32</sup> aimed to resuscitate a dying area of Phoenix known as Patriot’s Square Park – described in early 2011 as a “blighted stretch of dead trees, failed electronic light shows, broken promises, and homeless squatters.”<sup>33</sup> A project like CityScape theoretically will reuse and recycle land that is already developed – and 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 school. 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.

25 See Ziegler, *supra* note 52, at 39.

26 See *What’s Smart Growth*, Wash. State Cmty., Trade & Econ. Dev., [http://smartgrowth.wa.gov/what\\_is.htm](http://smartgrowth.wa.gov/what_is.htm) (last visited Feb. 7, 2014).

27 See Gillham, *supra* note 55, 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.”)

28 See Edward J. Sullivan, *Comprehensive Planning and Smart Growth, Trends in Land Use Law from A to Z 188* (Patricia E. Salkin, ed., 2001) (commenting that, “[u]nlike other western industrialized countries, the United States lacks a coherent national comprehensive planning policy.”)

29 *Smart Growth Program*, Nat’l Ass’n of Realtors, <http://www.realtor.org/programs/smart-growth-program> (last visited Feb. 7, 2014).

30 See Anna Read & Christine Shenot, *Int’l City/Cnty. Mgmt. Ass’n Getting Smart About Climate Change 1* (2010) (defining infill developments as construction which makes use of “vacant and underused properties in already developed areas”).

31 Editorial, *City of the Future?*, Phoenix Magazine, Nov. 2010, at 32.

32 CityScape Vision, <http://www.cityscapephoenix.com/cityscape-vision/>

33 See *Id.* 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.” *Id.*

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.

### 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>34</sup> While states have adopted differing methods of tackling smart growth and land use decisions, 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>35</sup> Though the phrase originally conjured connotations of slowing or stopping development altogether,<sup>36</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>37</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>38</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>39</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. 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>40</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>41</sup> As this Article will explore, however, political attitudes towards smart growth have been far from consistent over time.

While 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>42</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>43</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>44</sup> Local planning has been voluntary in Georgia and (until recently), mandatory in neighboring Florida.<sup>45</sup> Washington

<sup>34</sup> See *Developing Effective State-Level Growth Management Legislation*, The Sierra Club, <http://www.sierraclub.org/sprawl/resources/challenge/state.asp> (last visited Dec. 24, 2013).

<sup>35</sup> See Godschalk, *supra* note 21, at 13.

<sup>36</sup> *Id.*

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

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

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 16.

<sup>43</sup> *Id.* at 18. See also Patrick Hurley & Peter Walker, *Planning Paradise: Politics and Visioning of Land Use in Oregon* (Society, Environment, and Place) (2011).

<sup>44</sup> Godschalk, *supra* note 21, at 18.

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



State employs a decentralized, local-led growth management program while Hawaii uses a top-down, centralized system.<sup>46</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. 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.

We consider several representative state efforts below.

## **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.

### **i. 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” (UGB's) as part of its comprehensive land use planning laws adopted in 1973.<sup>47</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 or LCDC, as well as a state Department of Land Conservation and Development (“Department”) to implement the program.<sup>48</sup> The citizen LCDC appoints the director of the Department.<sup>49</sup> The express purpose of this land use legislation was to “stop a process of cumulative public harm resulting from uncoordinated land use,”<sup>50</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>51</sup> However, extensive delays in the process led to amendments in the growth management legislation in 1991.<sup>52</sup> Now, in addition to the prior structures there exists a Land Use Board of Appeals (LUBA), comprised of three attorneys appointed by the state governor.<sup>53</sup> Attempts to coordinate the review being conducted by the state agencies, the LCDC, and LUBA have proven unsuccessful, particularly as the attorney general interpreted case law to preclude certain state agencies from being required to participate in coordination efforts.<sup>54</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.

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

<sup>47</sup> See Robert Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 *Envir. L. Reporter*, 10367, 10368 (1992).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 1000 Friends of Or. v. Wasco Cnty. Ct., 299 Or. 344, 347 (1985).

<sup>51</sup> *Id.* at 10372.

<sup>52</sup> An Act Relating to Land Use Periodic Review, ch. 612 1991 Or. Laws 1148 (1991).

<sup>53</sup> See Liberty, *supra* note 185, at 10373.

<sup>54</sup> *Id.* at 10375; see also *In re State Agency Coordination Program of the Department 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)).

Oregon is nonetheless still deserving of praise for offering a revolutionary tool to land use legislators: namely, the creation of urban growth boundaries (UGBs). Legislation adopted in 1974 created the UGBs in Goal 14 of the state's planning goals, which are binding on local plans.<sup>55</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>56</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 1980's to 1990's, 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>57</sup>

Goal 14 classifies land into three possible categories: urban, urbanizable, and rural.<sup>58</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>59</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>60</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>61</sup> In general, residential and urban growth (including incorporation of new cities) is not permitted outside a UGB, though exceptions are authorized under Goal 2 of the legislation.<sup>62</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 96 percent of its residential growth permits from 1984-1988 approved within its UGB and only four percent approved for sites outside the UGB.<sup>63</sup> Similarly, the Portland metropolitan area saw 95 percent of residential units built within its UGB during a five-year study.<sup>64</sup> However, Bend, Oregon's UGBs were less astonishing in their success rates, as 59 percent of new residential units were built *outside* its UGB and 81 percent of industrial development permits were authorized *inside* its UGB, creating the opposite result of that intended.<sup>65</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>66</sup> an advocacy group opposed the incorporation of a meditation center as a new city, Rajneeshpuram. Whether or not 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 creating UGBs, prohibited this incorporation, and (3) whether Goals 3 and 14 (pertaining to agricultural land) of the planning statute affected the incorporation decision.<sup>67</sup> The Oregon Supreme Court held that the decision whether or not to

55 LCDC, Oregon's Statewide Planning Goals (1990), at Goal 14.

56 (1) the demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals; (2) the need for housing, employment opportunities, and livability; (3) the orderly and economic provision for public facilities and services; (4) the maximum efficiency of land uses within and on the fringe of the existing urban area; (5) the environmental, energy, economic, and social consequences; (6) the retention of agricultural land as defined, with Class I the highest priority for retention and Class VI the lowest priority; and (7) the compatibility of the proposed urban uses with nearby agricultural activities. *Id.*

57 Liberty, *supra* note 185, at 10376.

58 *1000 Friends of Or. v. Wasco Cnty. Ct.*, 299 Or. 344, 350-51 (1985).

59 *Id.* at 351 (citing Statewide Planning Goal Definitions).

60 *Id.*

61 *Id.*

62 *Id.* at 352-53.

63 *Id.* (citing Wash. Cnty Dept. of Land Use & Transp., Joint Legis. Comm. on Land Use, Briefing on Washington County Land Use and Transp. Issues (1989)).

64 Liberty, *supra* note 185, at 10378 (citing Eco. Northwest et al., Portland Case Study: Urban Growth Management Study (1990)).

65 *Id.* (citing Eco Northwest et al., Bend Case Study: Urban Growth Management Study 3 (1990)).

66 299 Or. 344 (1985).

67 *Id.* at 348.

allow Rajneeshpuram to incorporate was indeed a land use decision and thus fell under the jurisdiction of LUPA; 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>68</sup>

Despite Oregon's land use planning successes, its smart growth legislation has faced opposition via statewide ballot measures attempting repeal.<sup>69</sup> Part of its survival is attributed to ex-governor Tom McCall, whose popularity (especially as he was dying of prostate cancer) continues to spur Oregon land use preservation efforts.<sup>70</sup> Not long before his death in 1983, McCall famously stated, "if 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." 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>71</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. This marked a substantial victory for reclaiming and preserving private property rights in the face of regional planning.<sup>72</sup> The State Supreme Court subsequently overturned ballot Measure 7 in 2002 on a technicality.<sup>73</sup> However, a subsequent ballot initiative, Measure 37, was passed in 2004 and accomplished in practice what Measure 7 aimed to do. The state and local governments were now required to either waive land use planning regulations, or pay compensation for all the declines in property values shown to result.<sup>74</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 the financial pressure and waive the land use regulations that had been so widely praised for the prior three decades.<sup>75</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.

## ii. 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>76</sup> In addition to carrying the bulk of the bay-preservation burden, Maryland is the fifth most densely populated state in the nation.<sup>77</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>78</sup> Recognizing the need to be responsible stewards of their land, Maryland lawmakers crafted innovative – indeed, award winning – growth management legislation.<sup>79</sup> However, failure to consistently apply its growth management

68 *Id.*

69 See Patrick Hurley & Peter Walker, *Planning Paradise: Politics and Visioning of Land Use in Oregon* 9 (Society, Environment, and Place) (2011) (in 1976, 1978, and 1982). The continuing work of the 1000 Friends watchdog group is largely attributable to Governor McCall's legacy.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* The ballot measure would have changed more than one part of Oregon's constitution.

74 *Id.*

75 *Id.*

76 See Philip J. Tierney, *Bold Promises but Baby Steps: Maryland's Growth Policy to the Year 2020*, 23 U. Balt. L. Rev. 461 (1994).

77 Dept. of Legis. Serv., Office of Policy Analysis Update on Smart Growth and Planning Policy in Maryland 1 (2009).

78 See Tierney, *supra* note 214, at 461.

79 See Md. Dept. of Planning, *Smart Growth Legislation*, available at [planning.maryland.gov](http://planning.maryland.gov) (last visited Jan. 15, 2014); see also Rebecca Lewis et al., *Managing Growth With Priority Funding Areas: A Good Idea Whose Time Has Yet To Come*, 75 J. Am. Planning Ass'n 457, 457-472 (2009)

legislation has left Maryland in nearly the same place it started when it comes to development and sprawl.<sup>80</sup>

Maryland had laws as early as the 1970's designed to protect wetlands,<sup>81</sup> water sources,<sup>82</sup> forests,<sup>83</sup> and farmland.<sup>84</sup> Maryland then joined the nationwide growth management legislation movement in 1992 with the passage of the Economic Growth, Resource Protection, and Planning Act, which articulated seven "visions" for land use.<sup>85</sup> Like other states, Maryland delegated the creation of land use plans to local governments, at least initially.<sup>86</sup>

Given the shared nature of state usage of the Chesapeake Bay, Maryland partnered with neighboring states Pennsylvania and Delaware, 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>87</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>88</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>89</sup> The creation of PFAs quickly generated national attention, and Maryland was credited with starting a "third wave" in the land use revolution.<sup>90</sup>

PFAs were, in 1997, a Maryland novelty, though they resembled other growth management policy tools such as urban growth boundaries (originated in Oregon), urban service areas (used in Minnesota), and enterprise zones (used by several states including New Jersey). Priority Funding Areas are, as their name would suggest, areas targeted for public investment and therefore designed to encourage development.<sup>91</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>92</sup>

Like urban growth boundaries (UGBs), the intended purpose of PFAs was to curb growth outside of certain urban areas.<sup>93</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>94</sup> Analogously, urban service areas (USAs) 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 – a

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(describing the "several awards" Maryland's 1997 growth management legislation won before even being implemented).

80 See Lewis, *supra* note 217, at 471.

81 Md. Code Ann., Nat. Res. §§ 9-101 to 9-502, 8-1201 to 8-1211 (1990 & Supp. 1994).

82 Md. Code Ann., Nat. Res. § 8-1204 (1990 & Supp. 1994).

83 Md. Code Ann., Nat. Res. §§ 5-1601 to 5-1613 (Supp. 1994).

84 Md. Code Ann., Agric. §§ 2-501 to 2-516 (1985 & Supp. 1994).

85 Smart Growth Legislation, Maryland Dept. of Planning, available at [planning.maryland.gov](http://planning.maryland.gov) (last visited Jan. 15, 2014). The seven 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.

86 *Id.*

87 See Tierney, *supra* note 214, at 465.

88 *Id.* (citing Howard Schneider, *Views on Maryland 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).

89 See Lewis, *supra* note 217, at 457.

90 *Id.*

91 *Id.* at 458.

92 See Jerry Weitz, *The Next Wave in Growth Management*, 42/43 Urb. Law. 407, 413-14 (2011).

93 See Lewis, *supra* note 217, at 457.

94 *Id.*

model that PFAs very much resemble.<sup>95</sup> Lastly, enterprise zones (EZs) encourage development by lowering taxes and easing regulatory requirements – again, trying to encourage responsible growth outcomes by using more “carrot” than “stick.”<sup>96</sup>

Though PFAs were highly regarded as a creative combination of these pre-existing policy instruments, the outcomes of the PFA system were not as originally envisioned. In overseeing the growth management laws, some counties allowed PFA boundaries to be drawn too generously so as to accommodate growth.<sup>97</sup> Reporting and review of spending as it pertained to PFAs was not done in a complete manner.<sup>98</sup> According to some commentators, the amount of funding allocated for PFAs was inadequate to make a meaningful difference.<sup>99</sup> While some progress was seen, including increased investment and development of wastewater management systems within PFAs,<sup>100</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>101</sup> In fact, some growth and development was actually increased *outside* of PFAs – precisely the opposite of what the legislation sought to effectuate.<sup>102</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 then, Maryland’s approach provides an informative lesson for current growth management efforts: good rules only work if they are followed.

## II. 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>103</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 U.S. 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, business, private property rights, affordable housing, and human health and well-being. It is not difficult to understand 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 backyard in order to build thousands of condominiums. Eventually though, excessive political emphasis on economic development (while simultaneously assuring

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

<sup>96</sup> *Id.* at 457-58.

<sup>97</sup> See Weitz, *supra* note 230, at 413-14.

<sup>98</sup> *Id.* See also Lewis, *supra* note 217, at 471.

<sup>99</sup> See Weitz, *supra* note 230, at 414.

<sup>100</sup> See Lewis, *supra* note 217, at 458.

<sup>101</sup> *Id.* at 467-72 (includes tables summarizing development in many Maryland counties).

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., Godschalk, *supra* note 21; Rebecca Lewis and Gerrit-Ja Knaap, *Institutional Structures for State Growth Management: An Examination of State Development Plans*, State & Local Gov’t Rev. (Jan. 24, 2012).



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.

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. 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.

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 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. 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>104</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>105</sup>

## **B. Political Motivations By State Agencies**

Independent state agencies have also not been immune from political influences. For example, the lack of review and reporting that occurred in 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 state.<sup>106</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 decision-making process. 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.

## **C. 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>107</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>108</sup>

<sup>104</sup> See Part II.D.iv, *supra*.

<sup>105</sup> See Part II.D.ii, *supra*.

<sup>106</sup> See Part II.D.iv, *supra*.

<sup>107</sup> See Part II.D.iii, *supra*.

<sup>108</sup> See discussion of Ballot Measure 37 in Part II.D.iii, *supra*.

## D. 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 back yards.” As Clint Bolick put it, “once people move to the suburbs . . . they eagerly roll up the welcome mat.”<sup>109</sup> The NIMBY attitude is understandable. In fact, NIMBYs often “think of themselves as heroes (for fighting development), not villains.”<sup>110</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>111</sup>

If the NIMBY dilemma is pervasive, and all available data suggest that it is, what are the implications for smart growth? One suggestion 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’s consider a representative example. Virginia’s Loudoun County has been described above as a region that is well-situated to take on additional growth. Its proximity to the nation’s capital makes it a highly desirable place to live. Indeed, 2010 census data show that Loudoun County grew by 84.1% in the past decade, far outpacing growth in all other Virginian counties. The influx of new homes, cars, and people rankled more than a few existing residents. Residents in western Loudoun’s “Horse Country” have successfully resisted changes to zoning ordinances that preserve the region’s rural character. But residents of the county’s developed eastern half – home to Washington Dulles International Airport – do not want the additional growth either. The Mayor of Leesburg, a town that lies just fifteen minutes south of the airport, was quoted in the local newspaper as saying that her town “has grown too fast.” The mayor claims to have voted against every major residential rezoning during her tenure on the Town Council.

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. “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. “Thousands of us fought back, seeking a say in the future of our home and the way it is planned.” The website includes a picture of a little girl holding a sign displaying the group’s slogan: “Don’t Supersize Loudoun!”

Yet, while Loudoun residents praise themselves for growing responsibly and maintaining the “charm and small-town feel” of communities such as Leesburg, 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. 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. “They’ve only accelerated it,” said the planner, speaking about the leapfrogging phenomenon. “They’ve pushed it out here.”

Professor Jonathan Levine’s 2001 survey cataloguing developer perceptions of the land

109 Clint Bolick, *Subverting the American Dream: Government Dictated “Smart Growth” is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000).

110 *Id.*

111 See Elizabeth Rosenthal, *Green Development: Not in My (Liberal) Backyard*, NY Times (March 12, 2011).

use market provides evidence of the NIMBY problem's severity. 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 impediment. When neighbors oppose smart growth developments, they tend to do so by asking local planners to reject or modify the project. 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 than regulatory opposition. Neighborhood opposition is an older, more pervasive, more intractable problem.

## E. 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>112</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>113</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>114</sup> If so, then the court will be more likely to find a taking.<sup>115</sup>

One study of regulatory takings claims in nine southeastern states found a correlation between the aggressiveness of a state's smart growth agenda and the number of regulatory takings claims that resulted in a published opinion.<sup>116</sup> For example, Chris Williams' study found that a comparatively "overwhelming number of regulatory takings cases were brought by developers in Florida."<sup>117</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 management law on its books.<sup>118</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, development moratoria and incentives for the kind of development that will meet the goals of smart growth and avoid sprawl.<sup>119</sup>

## III. Conclusions and Solutions: Making Smart Growth Smarter

### A. Smart Growth has Failed to Live Up to its Promise

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, their critically acclaimed smart growth program seems to have frozen growth in the very areas it was trying to encourage. 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>120</sup>

In other situations, smart growth policies have collided headlong with preexisting private

112 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

113 *Id.* at 124.

114 *Id.*

115 *Id.*

116 Chris J. Williams, Comment, *Do Smart Growth Policies Invited Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 Ala. L. Rev. 895 (2004).

117 *Id.* at 912.

118 *Id.*

119 *Id.*

120 See Wendell Cox, *The Costs of Smart Growth Revisited: A 40 Year Perspective*, New Geography (July 8, 2011), available at <http://www.newgeography.com/content/002324-the-costs-smart-growth-revisited-a-40-year-perspective>.

property rights. In *Viking Properties v. Holm*, 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>121</sup> This conflict has been described by Jonathan Levine as a “mismatch between fealty to property rights and deference to municipal regulations that impinge on those rights.”<sup>122</sup>

Other times, consequences are unanticipated because few envisioned the degree to which lack of political will would hamstring progress.<sup>123</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>124</sup>

Finally, growth management advocates may have underestimated “NIMBY” opposition from current residents. Such opposition “can take the form of political pressure, for example, city residents voicing their concerns at planning commission meetings, or, in many states, direct democracy, such as referenda and initiatives.”<sup>125</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?

## **B. Remove Smart Growth From Local Politics: National Land Use Planning**

Removing land use decisions from political pressure seems a nearly impossible feat. 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,<sup>126</sup> the Clean Water Act,<sup>127</sup> the Endangered Species Act,<sup>128</sup> and the National Environmental Policy Act.<sup>129</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>130</sup> Those lawmakers fearful of public backlash for curbing development in the name of conservation should look no further than the astronomically high approval ratings given by the public for the creation and maintenance of national parks.<sup>131</sup>

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

121 *Viking Props., Inc. v. Holm*, 155 Wn.2d 112 (2005).

122 Jonathan Levine, *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use* 89 (2005).

123 See Comment, *Challenges to Smart Growth: State Legislative Approaches to Smart Growth and the Local Government Issue*, 2004 Wisc. L. Rev. 229, 255 (2004) (“A legislature that defers excessively to local governments could result in an inconsistent statewide land-use policy”).

124 [http://www.nytimes.com/2010/11/05/us/05bcshort.html?\\_r=1](http://www.nytimes.com/2010/11/05/us/05bcshort.html?_r=1).

125 Walter King, *Book Review: Smart Growth Meets the Neighbors*, 34 Ecology L.Q. 1349, 1355-56 (2007).

126 See 42 U.S.C. § 85.

127 33 U.S.C. § 1251.

128 16 U.S.C. § 35.

129 42 U.S.C. § 4321 (1969).

130 See, e.g., *Town of Woodway v. Snohomish County*, 2013 WL 5676370; *Viking Properties v. Holm*, 155 Wash. 2d 112 (2005);

131 A nonpartisan poll found that 95 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/poll\\_parks\\_support\\_080712.html](http://www.npca.org/news/media-center/press-releases/2012/poll_parks_support_080712.html) A 2013 Gallup poll showed 68 percent of participants indicated they were “satisfied” with the job the federal government is doing on national parks, an approval rating second only to “national disasters” on a list of nineteen prompts. Gallup poll June 20-24, 2013, available at <http://www.gallup.com/poll/163487/americans-praise-gov-work-natural-disasters-parks.aspx>.

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 which lack growth management laws currently.

Indeed, in the 1970's, efforts to enact a National Land Use Planning Act (LUPA) came within a few votes of becoming successful.<sup>132</sup> The law, as proposed by Senator Henry M. Jackson, would have made federal grants available for states that made strong regional land use plans.<sup>133</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>134</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>135</sup> Time and time again, states have demonstrated a willingness to comply with federal schemes when there are significant grant dollars in play.<sup>136</sup>

### C. 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>137</sup> and (2) the priority funding area (in Maryland).<sup>138</sup> However, both of the key efforts to use these tools met with failings somewhere along 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. 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 in Part IV.B.

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>139</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 course the latter option would require payment of "just compensation."

<sup>132</sup> See Fred Bosselman, *The Twilight of National Land Use Policy*, 45 J. Marshall L. Rev. 237, 237 (2012).

<sup>133</sup> *Id.* at 241.

<sup>134</sup> *Id.*

<sup>135</sup> 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 21).

<sup>136</sup> See *Id.*; see also The American Recovery and Reinvestment Act of 2009 Pub. L. 111-5, Feb. 17, 2009, 123 Stat. 115.

<sup>137</sup> See *supra*, Part II.D.iii. [NEED update section numbers throughout paper]

<sup>138</sup> See *supra*, Part II.D.iv.

<sup>139</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, available at <http://www.npca.org/protecting-our-parks/policy-legislation/national-parks-poll.html> (citing to a Hart Research Associates and North Star Opinion Research study that found that 95% of voters see "protecting and supporting the National Parks" as an appropriate role for the federal government.)



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. 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.

#### D. 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 U.S. reexamine its individualistic conception of private property rights. The historic and legal ways that private property rights are construed in the U.S., 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 land, enough water, enough 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. In fact, this movement into the city is also linked to positive health outcomes, including a longer life expectancy.<sup>140</sup> Compact cities come with more socio-economic opportunity and healthier, longer lives.<sup>141</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 expectation that they can have it all, no matter the consequences on their neighbors.<sup>142</sup> A shift in popular sentiment, if robust enough, may also lead political pressure to follow – 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 to 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 U.S. 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.

<sup>140</sup> See Steve Hargreaves, *America's Most Sprawling Cities*, CNN.com, April 2, 2014, available at [http://money.cnn.com/2014/04/02/news/economy/sprawling-cities/index.html?hpt=hp\\_t2](http://money.cnn.com/2014/04/02/news/economy/sprawling-cities/index.html?hpt=hp_t2) (last visited April 5, 2014).

<sup>141</sup> *Id.*

<sup>142</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 *Eight Mighty Rivers Run Dry from Overuse*, National Geographic, available at [environment/photos/rivers-run-dry/](http://environment/photos/rivers-run-dry/).