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**IN THE SUPREME COURT OF THE STATE OF VERMONT**

**No. 2015-454**

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**IN RE: B&M REALTY, LLP**

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Appeal From  
Vermont Superior Court – Environmental Division  
Docket No. 130-8-13 Vtec

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**BRIEF OF AMICI CURIAE  
VERMONT NATURAL RESOURCES COUNCIL  
AND  
PRESERVATION TRUST OF VERMONT**

**IN SUPPORT OF APPELLANT  
TWO RIVERS-OTTAUQUECHEE REGIONAL COMMISSION**

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## STATEMENT OF INTEREST

Amici Curiae<sup>2</sup> are the Vermont Natural Resources Council (VNRC) and Preservation Trust of Vermont (PTV). Both organizations' missions include strengthening downtowns and village centers while protecting Vermont's working landscape. The VNRC is dedicated to protecting Vermont's natural environments, rural character and unique sense of place, while ensuring vibrant communities. The PTV is dedicated to helping communities save and use historic places, many of which are located in the downtowns and village centers. Each organization has a significant interest in the Court's resolution of the important legal questions raised in this case, questions which relate directly to the ability of communities, regional planning commissions, and state agencies, via Act 250, to implement Vermont's long-standing policies for protecting open space and fostering investments in established communities. Each organization has long supported the role of communities and regional planning commissions to use planning as a central tool for achieving these goals through a process that fosters citizen participation and requires consideration of the full range of costs of unplanned development and sprawl.

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<sup>2</sup> Amici Curiae have obtained the written consent of all parties to this case for filing this brief pursuant to VRAP 29.

## STATEMENT OF THE CASE

Amici Curiae VNRC and PTV adopt the Statement of the Case in the brief of Appellant Two Rivers-Ottawaquechee Regional Commission.

## SUMMARY OF THE ARGUMENT

The decision by the Vermont Superior Court Environmental Division (“Environmental Division” or “Trial Court”) to overturn the decision of the District 3 Environmental Commission (“District Commission”) approving the application by B & M Realty, LLC (“B & M Realty” or “Applicant”) to construct a major new development at Interstate 89’s Exit 1 is inconsistent with the applicable regional plan, state law and policy, and principles of smart growth. A development of this size, sprawling across an area larger than downtown White River Junction with a town center that “mimics a small version of the Church Street Marketplace in Burlington, Vermont,”<sup>3</sup> is so clearly inconsistent with the Regional Plan and Act 250 that upholding the Environmental Division’s decision will erode the protections the Vermont legislature established in this landmark law that has guided significant land use decisions for over four decades.

The Environmental Division did not look to the language and goals of Act 250, or the Vermont Planning and Development Act, 24 V.S.A. Chapter 117, which provides the overarching context in which local and regional plans are developed. Neither did the court follow the helpful guidance provided by the Two Rivers-Ottawaquechee Regional Commission (“Regional Commission”) in the Two Rivers-Ottawaquechee Regional Plan (“Regional Plan”), guidance the court is obligated under Act 250 to follow. Instead, the Environmental Division invented a new test for the term “principal retail establishments” in the Two Rivers-

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<sup>3</sup> In re B&M Realty, No. 103-8-13 Vtec, at 6 (Vt. Super. Ct. Env’tl. Div. Nov. 12, 2015)(Walsh, J.) (PC at 8).

Ottauquechee Regional Plan (“Regional Plan”). This test ignores the plain meaning, context, and obvious purpose of the Regional Plan language carefully developed by the thirty communities that comprise the Regional Commission. By evaluating the terms of the Regional Plan narrowly, and ignoring the way land use planners use these terms, the Environmental Division has created a precedent that has the potential to render other municipal and regional plans meaningless.

In addition, with its narrow interpretation, the Environmental Division not only ignored the language and goals of Act 250 but a host of other state laws and policies which evince a clear and long-standing state policy of promoting growth in designated areas developed with state oversight based on local and state planning processes. The State of Vermont’s policies are, in turn, based on a foundation of experience with the impacts of uncontrolled development on existing communities. Sprawl development, of the sort proposed by B & M Realty, causes a loss of open space and damage to natural resources, while harming the economic vitality of existing communities, primarily Vermont’s historic downtowns and village centers. For these reasons, the Environmental Division’s decision should be reversed.



## ARGUMENT

### I. THE ENVIRONMENTAL DIVISION FAILED TO PROPERLY CONSIDER AND GIVE MEANING TO THE PLAIN LANGUAGE, CONTEXT, AND PURPOSE OF THE REGIONAL PLAN

#### A. The Environmental Division Ignored the Plain Language of the Regional Plan, Which Specifically Prohibits Retail Establishments.

After correctly determining that the Regional Plan is applicable and controlling,<sup>4</sup> the Environmental Division proceeded to ignore the plain meaning of the plan's language and to invent a formula not existing in the plan that makes much of the language of the plan meaningless.<sup>5</sup> The Regional Plan provides, under the header "Town Centers" in Policy 6, that "[p]rincipal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character." PC at 68.

As explained by the Regional Commission in their brief, the term "principal" should be understood "in the lexicon of planning." Appellant Two Rivers-Ottauquechee Regional Commission Brief at 23. Here, because the proposed project will include 40,000 square feet of building space to house "principal retail establishments," it is subject to the prohibition on retail development at the Interstate 89 Exit 1 interchange. The use of the word "principal" by planners in this context should not be understood to apply to the entire project, as the Environmental

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<sup>4</sup> The Regional Plan must be satisfied in order for B&M Realty to build its project. In the event of a conflict between local and regional plans, and where the proposed project has substantial regional impacts, the regional plan controls. 24 V.S.A § 4348(h). The Project at issue in this case meets the applicable Regional Plan criteria defining substantial regional impacts and so must be consistent with the Plan in order to obtain a permit. PC at 22; 10 V.S.A. § 6086(a)(10).

<sup>5</sup> See In re Burlington Airport Permit, 2014 VT 72, ¶7, 197 Vt. 203, 103 A.3d 153 quoting In re Curtis, 2006 VT 9, ¶2, 179 Vt. 620, 896 A.2d 742 ("[w]e construe the words of a zoning ordinance according to their plain and ordinary meaning, and the whole of the ordinance is considered in order to try to give effect to every part.").

Division suggests, but instead to the buildings, the “retail establishments,” which will house the 40,000 square feet of retail to be constructed as part of the project.<sup>6</sup>

Further, the term “principal” is defined in the dictionary as the “most important, consequential, or influential.” See Principal, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/principal> (last visited Mar. 9, 2016). The 40,000 square feet of building space included in the proposal to be used for retail was designed to mimic “a small version of the Church Street Marketplace in Burlington, Vermont.” PC at 8. The retail use of Church Street Marketplace is unquestionably the “most important, consequential, or influential” use in that development. Similarly, the buildings proposed for retail use in the proposed development by B & M Realty qualify easily as “principal retail establishments” based on a plain reading of the Plan’s language.

Turning to the remaining language in Town Center Policy 6 of the Regional Plan, there can be no debate that the Exit 1 Interchange falls outside of the categories included in this provision: “Town Centers, Designated Downtowns, or Designated Growth Centers.” Finally, one could scarcely imagine a clearer example of “sprawl and strip-development along major highways” than a major new development proposed to be located in a rural area with a large block of retail proximate to the intersection of two major highways. Reading Policy 6 of the Regional Plan in its entirety and applying it to the project at issue in this matter, it is hard to imagine how the Environmental Division reached any other conclusion.

B. The Environmental Division’s Interpretation of the Regional Plan Would Lead to Absurd and Irrational Consequences Inconsistent with the Purpose of the Plan.

Instead of using the most obvious meaning of this phrase, the Environmental Division selectively read the Regional Plan and turned the concept of “principal retail establishment” into

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<sup>6</sup> See Humstone testimony at PC 145-146.

a formula not found anywhere in the Plan – not in its language or in any plausible extension of that language. The Environmental Division converted its incorrect reading of “principal” into a mathematical model based on the proportion of floor space dedicated to retail as compared to other uses of floor space within the full project proposal. PC at 23-24. Since the retail component was less than 50% of the total built space, the Environmental Division erroneously concluded that the project, and all of its component parts, did not qualify as a “principal retail establishment” subject to the Regional Plan.

The Environmental Division’s test for determining whether a development is a “principal retail establishment” fails because it would allow the extension of the court’s formula to ever-larger amounts of retail space without any constraint. The court reached this conclusion despite the clear intent of the Regional Commission as expressed in the plain language of the Plan, to restrict retail development. The amount of retail development proposed in the present application is already quite large relative to development in nearby villages and downtowns. PC at 131, 135-136, 147. Yet, under the Environmental Division’s test, the absolute size of the retail component of a proposed development does not matter. Instead, only the proportion of the retail space relative to other uses of the space in the development matters. As long as the project includes an amount of non-retail space that exceeds the space dedicated to retail purposes, the Environmental Division would find the project consistent with the Regional Plan. This interpretation encourages gamesmanship by developers in which they propose major new retail developments in areas where they would otherwise be barred from doing so, by the ruse of nesting the proposed retail establishments within larger developments that include office parks and residential buildings -- exactly the circumstance presented by this case.

In order to hold that the Regional Plan does not apply to this proposal, the Environmental Division had to ignore the fact that the retail space component of B & M Realty's proposal is designed to be a major attraction. The design shows that the Project's purpose is a retail area by the location of the retail on ground floor and the aggregation of the retail spaces in a centralized area with a main walkway intended to mimic Church Street Marketplace in Burlington. PC at 8. A development designed to mimic Church Street Marketplace could not reasonably be construed to have any other purpose but to draw customers to shop in the retail establishments located in that development. The fact that the buildings containing retail may also have floors, which are dedicated to office space or residential uses, or are surrounded by other buildings with those uses, does not make those establishments any less retail than if those other uses did not exist.

The communities that voted in favor of the Regional Plan could not possibly have intended the result that will be occasioned if the Environmental Division's ruling is left to stand. As clearly indicated by the language of the Regional Plan, the Two Rivers-Ottawaquechee Region communities instead intended to preclude such large-scale retail development. They recognized that their efforts to promote growth in designated downtowns, town centers and growth centers depended upon preventing the blighting impact of sprawl occurring outside of these designated growth areas, particularly at highway interchanges such as the one found at Exit 1 of Interstate 89.

The Regional Plan specifically prohibits development like the proposed Project off of the I-89 Exit 1 Interchange. The Regional Plan states that this Interchange,

is not an appropriate location for a growth center. White River Junction, the Regional Center and a Vermont Designated Downtown, is located 3.5 miles to the east. Development at this interchange should be of a type that does not displace the development and investment that has occurred in the regional center. The types of land development appropriate for this interchange include residential, appropriately-scaled traveler-oriented

uses, and other similar uses that are not intended to draw on regional populations. PC at 73.

This language could not be plainer: A development of the nature and scale of B & M Realty's proposal, with 40,000 square feet of retail space, must not be located off of Exit 1. Such a development would unquestionably draw on regional populations, would violate the stated intent of the Regional Plan, and would lead to the absurd and irrational result of allowing ever-larger retail development as long as nested within proposals to develop even greater levels of office space and residential development.<sup>7</sup>

Finally, the fact that the application at issue is not for approval of a growth center, as the Environmental Court deems relevant, PC at 26, misses the point. Under the Regional Plan, the only way that the District Commission could have approved B & M Realty's proposed development was if it was proposed to be located in an area designated as a growth center.

## II. THE ENVIRONMENTAL DIVISION'S DECISION IS INCONSISTENT WITH THE PURPOSE OF REGIONAL PLANNING.

The Environmental Division's ruling in this matter has the effect of virtually eliminating the benefits of regional planning, namely the ability of communities to influence the locations of major new developments in the region in order to ensure safe, orderly development, protection of natural resources, and investments in existing infrastructure. State laws, particularly Act 250 and the Vermont Planning and Development Act, 24 V.S.A. Ch. 117, are written to reward communities that put time and effort toward planning that balances competing needs for land use. Hence, consideration of regional plans is a criterion in Act 250. 10 V.S.A. § 6086(a)(10). The Vermont Planning and Development Act, as amended by Act 200 (also referred to as the

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<sup>7</sup> See In re Hartland Group North Ave. Permit, 2008 VT 92, ¶11, 184 Vt. 606, 958 A.2d 685 citing Bergeron v. Boyle, 2003 VT 89, ¶11 n.1, 176 Vt. 78, 838 A.2d 918 (courts should avoid statutory construction that leads to absurd results).

“Growth Management Act”), complements this requirement by providing for a process that involves communities in land use management through local and regional planning, and coordination with state agencies. See 24 V.S.A. §§ 4301–4498.

These statutes are not intended to stop growth nor should they. VNRC and PTV support the goals of these statutes, which are intended to promote development where appropriate, such as in designated downtowns and growth centers through comprehensive municipal and regional planning processes. The decision of the Environmental Division contradicts the purposes of these state statutes. Further, if left in place, the Environmental Division’s crabbed reading of the Regional Plan, ignoring the plain language and purposes of the Plan, will cause regional planning commissions – and municipal planning commissions as well -- to question the value of taking the time and effort to craft similar plans in other communities and regions of the state.

A. The Environmental Division’s Decision Has the Effect of Defeating the Purpose of Vermont’s Land Use Laws to Promote Balanced Planning and Smart Growth.

The Growth Management Act, or Act 200, with goals largely mirroring those of Act 250, was enacted as part of a statewide strategy to “encourage the appropriate development of” Vermont. 24 V.S.A. § 4302(a). Such appropriate development protects Vermont’s “public health, safety, economy...[and] facilitate[s] the growth of villages, towns, and cities.” *Id.* Along with broad land use goals, 24 V.S.A. § 4302(b), the statute also gives regional and municipal planners “specific goals” to guide regional plans. 24 V.S.A. § 4302(c). These goals are not mere guidance; regional plans are required to be consistent with these goals. 24 V.S.A. § 4302(e)(2)(A); 24 V.S.A. § 4348a(a).

Vermont’s planning law includes goals preventing the type of development proposed by B & M Realty. Under this law, in planning “to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside...strip development along

highways should be discouraged.” 24 V.S.A. § 4302(c)(1). Conversely, “economic growth should be encouraged in locally designated growth areas.” Id. B & M Realty’s proposed project, away from any growth centers or towns, and in the “rural countryside,” contradicts these established goals.

Additionally, regional planning emphasizes the importance of establishing the needs of a particular region, as opposed to the needs of any one community as determined in a vacuum. The goal of regional planning is to avoid the risk that communities make land use decisions that only benefit that one community, without regard to impacts of the development they approve on other communities in the region. As noted above, a regional plan must include a definition of “substantial regional impact.” The Environmental Division properly recognized that such a decision belongs with the regional planning commission: “substantial regional impact is necessarily a region-specific concept that is likely best determined on a regional level.” PC at 20. The court, however, then proceeded to read the Regional Plan so narrowly as to make it meaningless, thereby defeating the benefit of having a regional plan in the first place.

**B. The Legislature Gave Local Citizens a Strong Voice in the Detailed Regional Planning Process; the Environmental Division’s Decision Threatens to Silence this Voice and Eliminate the Value of this Process.**

Vermont’s unique land use planning balances the need to protect the state’s landscape and natural resources with encouraging economic development by promoting growth in designated areas such as downtowns and village centers. Through an extensive planning process at the local and regional level, the legislature emphasizes its goal of including the local communities in logical and “appropriate development.” See 24 V.S.A. § 4302(a).

To achieve this end, Vermont law requires that regional planning commissions “shall engage in a continuing planning process that will further...encourage citizen participation at all

levels.” 24 V.S.A. § 4302(b)(2). By including those most affected by regional development, land use plans “are significant statements of community goals.” In re Manchester Commons Assoc., No. 8B0500, Findings of Fact, Conclusions of Law, and Order, at 28 (Vt. Env'tl. Bd. Sept. 29, 1995). Additionally, courts have recognized this citizen involvement and have focused on the “average person” when interpreting planning provisions. In re Mirkwood Group and Barry Randall, No. 1R0780-EB, Findings of Fact, Conclusions of Law, and Order, at 29 (Vt. Env'tl. Bd. Aug. 19, 1996); In re John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, 2004 WL 1038110, at 19 (Vt. Env'tl. Bd. May 4, 2004). The Two Rivers-Ottawaquechee Regional Plan was developed in accordance with this process and the resulting plan reflects significant input from citizens in the region.

When drafting a regional plan, a commission must follow a series of steps that involve local communities, fellow regional planning commissions, the municipalities within a region, and state agencies. 24 V.S.A. § 4348. The statute requires “informal working sessions that suit the needs of local people,” from the beginning and throughout to “solicit the participation of local citizens and organizations.” Id. Eventually these sessions lead to at least “two or more public hearings,” following public notice. Id. Along with the local communities, the commission must also send a copy of the proposed plan or amendment to the municipal governments, directors of “abutting regional planning commissions,” the Department of Housing and Community Development, “business, conservation, low-income advocacy, and other community or interest groups...that have requested notice,” and the Agency of Natural Resources. Id. All of those organizations then have opportunity to comment on the proposed plan or amendment and speak at the public hearings. Id. By involving interested parties at all levels, Vermont’s law



reduces the risk of any one local government acting in a manner that negatively affects other communities in the region or that is contrary to state interests.<sup>8</sup>

Once a finalized version of a plan or amendment has gone through this process, all of the municipalities within the region vote on it. 24 V.S.A. § 4348. A plan cannot pass without the approval of more than sixty percent of the municipal commissioners. *Id.* Even after this vote, a majority of the municipal legislative bodies may veto the plan by sending notice to the commission. *Id.*

This detailed process requires the time and effort of all the involved parties, particularly the regional planning commission. The commission drafts a plan, hosts public meetings, considers comments from interested parties, engages in internal discussions, and makes any necessary adjustments before a vote. Through this process, planning commissions create a detailed plan for current and future development. The Regional Plan at issue consists of almost three hundred pages addressing a wide array of development issues across its thirty municipalities. *See* PC at 58–83. To create such a plan, the Regional Commission was required to commit significant time and public resources.

The Environmental Division's focus on one word, in this instance, in order to approve B & M Realty's application for a large, sprawling retail development near a major highway intersection negates all of this time and effort. Reading the Regional Plan in this case, or any regional plan, through a such a narrow lens, ignoring clearly stated goals in the plan, eliminates the benefits of regional planning and, over the long-term, will have the effect of interfering with other regional planning commission efforts to empower communities and citizens through the

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<sup>8</sup> *See* analysis of the benefits of using a regional or state approach to reduce risks of local parochial interests trumping broader public values by Carl J. Circo, Using Mandates and Incentives to Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy Initiatives, 112 Penn St. L. Rev. 731, 766-69 (2008).

planning process. An interpretation like the one used by the Environmental Division in its construction of the phrase “principal retail establishment,” so inconsistent with planning principles and the full context and purpose of the Regional Plan, makes it even more difficult for local governments and regional planning commissions to implement the plans borne of these extensive efforts.

C. The Environmental Division’s Decision Ignores Established Principles of “Smart Growth.”

Vermont law recognizes the benefits of “smart growth,” a concept not sufficiently considered by the Environmental Division in its opinion approving a major new development at the Interstate Exit 1 Interchange. Under the Growth Management Act, “development should be undertaken in accordance with smart growth principles as defined in subdivision 2791(13) of this title.” 24 V.S.A. § 4302(c). “Smart growth principles” are defined as promoting development that maintains “historic development patterns” and keeps “mixed-use centers at a scale appropriate for the community and the region.” 24 V.S.A. § 2791(13). The scale of B & M Realty’s proposed development is plainly not appropriate for the Two Rivers-Ottauquechee Region and it will disrupt historic development patterns.

Smart growth principles were developed as a way to combat sprawl, as suburban expansion encroached on open space and reduced the quality of life for communities. F. Kaid Benfield et al., Solving Sprawl: Models of Smart Growth in Communities Across America 3 (2003) Addendum at A2. Sprawl is usually defined as construction that “leap frog[s] in areas without existing infrastructure, often on prime farmland.” Robert H. Freilich et al., From Sprawl to Sustainability 8 (2010); Addendum at A16.

Sprawl has spawned six major crises in the United States:

1. Deterioration of existing built-up areas,
2. Environmentally sensitive land damage, including loss of wetlands, hillsides, habitats, historic, archaeological, cultural and natural resources, and the depletion and degradation of the quality and quantity of water resources,
3. Global warming due to overutilization of carbon based energy, lack of renewable energy, greenhouse gas emission from excessive vehicle miles traveled and failure to utilize green development techniques for the manmade environment,
4. Fiscal insolvency, transportation congestion, infrastructure deficiencies,
5. Agricultural and open space land conversion, and
6. Mortgage foreclosure and real estate collapse due to a lack of affordable housing available to low- and moderate-income families. Id.

Nationally, these problems have led to efforts “to organize development in appropriate directions,” and “to channel development into a sustainable urban form, one that discourages low-density sprawl and encourages serviceable and walkable mixed use densities.” Id. at 15; Addendum at A23. Act 250 and the Growth Management Act, along with regional and local plans and ordinances, represent Vermont’s response to these problems; they constitute our state’s programs and process for organizing development “in appropriate directions” and discouraging “low-density sprawl.”

Contrary to the effect of approving the development proposed by B & M Realty, smart growth includes “direct[ing] development toward existing communities.” Benfield, supra, at 4; Addendum at A6. It is also instructive to look to the smart growth principles developed by Amicus Curiae VNRC, which has extensive experience in working with communities to assist them in making balanced land use decisions. Many of these principles would be violated by the construction of the development proposed by B & M Realty including the following:

1. Plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.
2. Promote the health and vitality of Vermont communities through economic and residential growth that is targeted to compact, mixed use centers, including resort centers, at a scale convenient and accessible for pedestrians and appropriate for the community.  
...
4. Protect and preserve environmental quality and important natural and historic features of Vermont, including natural areas, water resources, air quality, scenic resources, and historic sites and districts.  
...
9. Balance growth with the availability of economic and efficient public utilities and services and through the investment of public funds consistent with these principles.
10. Accomplish goals and strategies for smart growth through coalitions with stakeholders and engagement of the public.

VNRC Website, Smart Growth Resources, <http://vnrc.org/resources/smart-growth-resources/smart-growth/> (last visited March 9, 2016). VNRC's Smart Growth webpage also includes a host of links to publications and research supporting the importance of making land use decisions in accordance with these sound principles of land use management. The Environmental Division's issuance of a permit to B & M Realty is inconsistent with this significant body of research and findings developed over decades and reflected in Vermont's laws and policies.

Along with protecting the environment generally, smart growth is also intended to limit the economic waste of sprawl, such as underutilization of infrastructure like roads, water and sewer. Benfield, supra at 186; Addendum at A9. By protecting the economic vitality of existing communities, Vermont laws and regional plans like the Two Rivers-Ottawaquechee Regional Plan help to limit this waste by keeping development within town centers and designated growth centers. B & M Realty's proposal will, if approved, draw consumers away from businesses in

nearby communities in the region in conflict with this sensible approach to economic development and smart growth principles.

Development at highway interchanges, such as the present application by B & M Realty, poses a particular risk of increasing sprawl and has long been the focus of Vermont state land use policy: “Development at interchanges that competes with villages and downtowns can undermine Vermont’s efforts to maintain and improve these historic centers of social and economic activity.” Vt. Dep’t of Housing and Community Affairs, Vermont Interstate Exchange Planning and Development Guidelines, (2004)  
<http://accd.vermont.gov/sites/accd/files/Documents/strongcommunities/cd/planning/GuidelinesFinal.pdf> (last visited March 9, 2016).

B & M Realty has proposed a shopping center at a highway interchange, far from the nearest city center, and away from growth centers. PC at 6. Further, the proposed development is not in keeping with the scale of existing settled communities in the area. Reading the map titled “Attachment B: Hartford Growth Centers Overlay, Two Rivers-Ottawaquechee Regional Commission” referenced in the testimony of Elizabeth Humstone, reveals that the B & M Realty proposal has project boundaries that cover an area rivaling the size of White River Junction’s downtown; Addendum at A29. If allowed to be constructed, the proposed project would outpace development in already established community centers in the region, and defeat planning goals that help ensure incremental, transitional growth. PC at 50. Authorizing the construction of this large development in a rural landscape violates the goals of regional planning and smart growth principles.

D. The Environmental Division's Decision Would Set a Precedent Harmful to the Role of Land Use Planning Under Act 250.

The Environmental Division's interpretation method, reading one word out of context to find that the plan does not apply, despite other clear language demonstrating that the regional commission intended to bar the type of development proposed, leaves municipal and regional planners across the state with an impossible challenge. The proper standard for reviewing a regional plan is to consider how the "average person, using common sense and understanding" could interpret the meaning. In re John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Env'tl. Bd. May 4, 2004). This standard is appropriate given the nature of regional plans and the process used to develop them. It is hard to imagine how a regional planning commission could craft plans any clearer to an average person than the Regional Plan at issue in this matter.

In fact, the Two Rivers-Ottawaquechee Regional Plan has been held out as a model for other regional plans. In 2013, Vermont Association of Planning and Development Agencies (VAPDA), analyzed all of the regional plans throughout the state and evaluated their conformance with Vermont's land use planning laws. Vt. Ass'n of Planning and Dev., Regional Plan Assessments 7 (2013), <http://www.vapda.org/Publications/RegionalPlanAssessments.pdf> (last visited March 9, 2016). The report commends the Two Rivers-Ottawaquechee Planning Commission for "express[ing] their land use policies in greater detail and us[ing] more directive language." Id. VAPDA uses the provision at issue in this case, the prohibition on development of principal retail outside of designated growth areas, as a good example and "one of the most specific policies to guide development." Id.

III. THE ENVIRONMENTAL DIVISION'S DECISION IS AT ODDS WITH THE GOALS OF ACT 250 AND OTHER STATE LAWS AND POLICIES.

A. Act 250 Originated to Protect Vermont's Landscape and Resources from Uncontrolled Development.

In the late 1960s, Vermont's rate and impacts of growth alarmed Vermonters who saw the landscape so vital to the economic and environmental health of Vermont communities threatened by uncontrolled development. According to then Vermont Attorney General James Jeffords (later a United States Senator), the problem he saw was that "[d]evelopment was going all over the place – with no concept of how the sewage was going to get down into the ledge, and not run all over...it was a mess." Vt. Nat. Resources Board, Act 250: A Guide to Vermont's Land Use Law 2 (2006), <http://www.nrb.state.vt.us/lup/publications/act250brochure.pdf> (last visited March 9, 2016). The problems created by uncontrolled development led to formation of the Gibb Commission which "recommended a number of environmental laws, chief among them a new state system for review and controlling plans for large-scale and environmentally sensitive development" and "the power to review projects and grant permits be vested more locally, in a group of regional commissions." *Id.* at 3. In the months following the release of the Gibb Commission's recommendations, the Vermont legislature passed Act 250. *Id.* As discussed in more detail below, the criteria that the legislature included in Act 250 were designed to protect Vermont's landscape from development like the B & M Realty proposal for a major new development at Interstate 89 Exit 1.

B. The Environmental Division's Ruling is at Odds with the Overarching Goals of Act 250 to Promote Smart Growth over Sprawl Development.

The ten criteria of Act 250 are central to the Act's purpose of preserving the environment and working landscape of Vermont, as well to promote development of downtowns and villages. Sprawl is inconsistent with Act 250's criteria. Sprawl is, for instance, inconsistent with goals of water conservation, water efficiency, and protecting existing streams and rivers from the impacts

of erosion and polluted storm water runoff – issues addressed in Criteria 1 through 4. Sprawl also contributes to traffic and congestion and is the reason for Criterion 5. Criteria 8 and 9 reflect Vermont’s goal to protect Vermont’s open fields and forests from the impacts of development and to protect the economic benefits of our working lands, wildlife habitat, and historic settlement patterns. 10 V.S.A. § 6086(a)(1)-(5), (8), and (9).

While not part of Act 250 at the time B & M Realty submitted their application, Criterion 9L is the most recent example of the State of Vermont’s official policy to restrict sprawl and promote smart growth. 10 V.S.A. § 6086(a)(9)(L). Under this recently added criteria, Act 250 now requires applicants to show that

any project outside an existing settlement makes efficient use of land, energy, roads, utilities and other infrastructure, and either: I) will not contribute to strip development along public highways, or II) if the development or subdivision will be confined to an area that already constitutes strip development, will incorporate infill as defined in 24 V.S.A. § 2791 and is designed to reasonably minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title.

10 V.S.A. § 6086(a)(9)(L) (emphasis added). The adoption of this explicit language reinforces the long-standing policy of Vermont to restrict strip development like the project proposed by B & M Realty.

Finally, Criterion 10, directly implicated in the present case, also demonstrates that an overarching goal of the Vermont legislature in passing Act 250 was to control sprawl and direct development to designated growth areas by empowering communities to use regional plans to guide sensible development. 10 V.S.A. § 6086(a)(10).



C. The Environmental Division’s Interpretation Undermines Other State Laws and Policies which Invest in Protecting Open Space and Developing in Designated Growth Areas.

In addition to Act 250, many other Vermont laws, policies, and initiatives have been established to promote development in areas designated by communities for growth, and to protect Vermont’s iconic open spaces, working farms, and working forests that drive the economy.

Vermont has established a set of state designation programs that promote the state’s “landscape of compact centers surrounded by rural farm and forest land is integral to our economy, community spirit, and way of life.” Vt. Agency of Commerce & Cmty. Dev., State Designation Programs 3 (2016), <http://accd.vermont.gov/sites/accd/files/PlanningManualModule2low.pdf> (last visited March 9, 2016). The purpose of the state designation programs is to promote “traditional settlement pattern[s]” that build the state’s economy and help “achieve related goals like protecting the working landscape and our historical and natural resources.” Id. In this program, cities, towns, and villages can apply for five different types of designations. These “designation programs have successfully channeled public and private resources to restoring historic buildings, creating safe and pleasant pedestrian streets, reviving commercial districts, planning for thoughtful growth, and building new housing.” Id. All of these investments are for the purpose of promoting growth in designated growth areas, discouraging sprawl, and are intertwined with the work of Act 250 district commissions and regional planning commissions. Regional planning commissions approve the city, town, or villages plans and participate in the designation process.

Once designated, many options for state funding become available. Id. Such funding includes the following sources: 1) Downtown Transportation Fund, 2) Municipal Planning

Grants, 3) Strong Communities, Better connections grant program, 4) Vermont Community Development Program, 5) Transportation Alternatives Program, 6) Bicycle and Pedestrian Program, 7) Property Assessment Fund, 8) Historic Preservation Grants. Id. at 17. All of these grants exist to promote development within areas of existing development, redevelopment of existing and historical buildings, and to build in areas where the development can benefit from the substantial public investments in infrastructure by cities, towns, or villages. Id. at 3.

Also, municipalities have the option of “adopting taxing mechanisms to raise funds specifically for public facilities in the designated area.” Id. at 18. One example is the Special Assessment District (or business improvement district), which allows a designated downtown to raise funds for operating costs and capital expenses to support specific projects. Id.

Finally, Vermont has developed incentives for landowners and developers to develop in designated areas. Id. at 19. These tax incentives include a: 1) State Historic Rehabilitation Tax Credit 2) Façade Improvement Tax Credit, 3) Code Improvement Tax Credit, 4) Sprinkler System Rebate, 5) Sales tax reallocation for construction materials, 6) and an exemption from land gains tax for housing projects in neighborhood development areas. Id. In addition, developers can obtain a quicker, and less expensive, Act 250 permitting process if they choose to build in designated downtowns and growth centers. Id. at 19–20. All of these incentives are directed toward investing in the existing cities, villages, and downtowns and are designed to encourage development in these areas. Sprawl undermines these investments and erodes the ability of our communities to develop the places and buildings these tax credits are designed to promote.

Collectively, these programs and state investments have led to substantial accomplishments. In downtown and village center tax credits alone from 2010 to 2015 there

have been 134 projects awarded, 51 communities served, \$10.6 million in awarded tax credits, and \$190 million in private investment. *Id.* at 20. These programs and incentives are significant and work in unison with Act 250 in a path toward smart growth and economic vitality.

In parallel with investments in our downtowns, village centers and growth centers, Vermont law and policy also encourage keeping our fields and forests from being lost to sprawl. For instance, Vermont's Current Use Program promotes keeping working farms and forests open and undeveloped through tax incentives. The law allows "valuation and taxation of farm and forest land based on its remaining in agricultural or forest use instead of its value in the market place." Vt. Dep't of Taxes, Current Use, <http://tax.vermont.gov/property-owners/current-use> (last visited March 9, 2016). The main "objectives of the program were to keep Vermont's agricultural and forest land in production, [and] help slow the development of these lands." *Id.*

In addition, the Vermont legislature passed the Working Lands Enterprise Initiative in 2012. Vt. Dept. of Forests, Parks, and Recreation, Working Lands Initiative, [http://fpr.vermont.gov/forest/forest\\_business/working\\_lands](http://fpr.vermont.gov/forest/forest_business/working_lands) (last visited March 9, 2016). This initiative results in the investment of state funds into forestry-based and agricultural businesses. It is designed to protect the working landscape which is the "backbone of Vermont's heritage and economic viability is the working landscape" *Id.*

The B & M Realty proposal to construct a major new development at the intersection of two major highways, outside of any designated growth areas works against all of these state programs and investments. The Environmental Division's approval of an Act 250 permit for this project ignores and undermines a comprehensive framework of laws and policies intended to prevent this type of development.

## CONCLUSION

Amici Curiae, VNRC and PTV support new development when done correctly, according to the smart growth principles contained in Vermont's Act 250 as supported by the Growth Management Act, and other state laws and policies. The Environmental Division ignored the plain language of the applicable Regional Plan developed by the communities in the Two Rivers-Ottauquechee Planning Commission and approved a development that is contrary to the law and good land use policy. We ask that this Court reverse the Environmental Division's decision and deny B & M Realty's application for an Act 250 permit.

Dated: March 11, 2016.

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**VERMONT RULE OF APPELLATE PROCEDURE V.R.A.P. 32(a)**  
**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief complies with the word count limitation set forth in V.R.A.P. 32(a). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 6508 words.

Dated: March 11, 2016.

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## ADDENDUM

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# SOLVING SPRAWL

Models of Smart Growth in  
Communities Across America



**F. Kaid Benfield, Jutka Terris, Nancy Vorsanger**  
Foreword by Maryland Governor Parris Glendening



The Natural Resources Defense Council (NRDC) is a national nonprofit environmental organization with more than 500,000 members. Since 1970, our lawyers, scientists, and other environmental specialists have been working to protect the world's natural resources and improve the quality of the human environment. NRDC has offices in New York City; Washington, D.C.; Los Angeles; and San Francisco.

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I firmly believe it is time to change our culture, time to adopt a new ethos: We will work hard to sustain our incredible economic growth. We will preserve the beauty of our nation and we will protect our environment. And we will do so through land preservation, quality design, and support for our traditional communities, and solid long-range planning. If we do that, we can improve the quality of life for our citizens now and, more importantly, for our children's children.

*Governor Parris N. Glendening  
The State Hour  
Annapolis, Maryland  
May 2001*



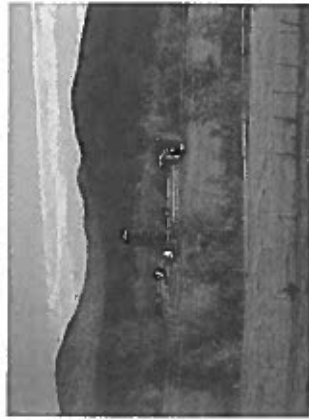
## Solving Sprawl with Smart Growth

*Civilization needs an honorable dwelling place, and the conditions of making that place ought to depend on what is most honorable in our nature: on love, hope, generosity, and aspiration.*

—James Howard Kunstler, *Home From Nowhere*

James Howard Kunstler's words provide inspiration to those of us who have been concerned about the American landscape. They also give us optimism because, when we encounter problems, Americans tend to use the attributes that Kunstler celebrates—love, hope, generosity, and aspiration—to devise solutions. We have always been a problem-solving society.

In this book, we shine a spotlight on American communities that are finding ways to solve the problem of sprawl—the all-too-familiar haphazard development pattern that has come to dominate our national landscape from sea to shining sea. And the results, though only a beginning, show wonderful promise—if the early models of smart growth are replaced—for our environment, economy, and social fabric. Instead of obliterating our countryside while jeopardizing our financial reserves and weakening our



A working farm in a preserved zone in Pennsylvania.

SOLVING SPRAWL

SOLVING SPRAWL WITH SMART GROWTH

social bonds, we are learning how to develop and grow in ways that better reflect our values. It's about time.

In a way, this book is an anomaly. At the beginning of the twenty-first century, it is an unfortunate truth that Americans concerned about the environment seldom have much in the way of progress to enjoy: Global warming, energy shortages, air and water pollution, habitat loss, a continuously spoiled landscape, and other serious problems continue to plague our society, in many cases with trends that portend worsening consequences for the future. As we documented in our 1999 book *Over There Were Greenfields*, many of these serious problems are directly related to suburban sprawl and the way that we have allowed our cities and regions to grow.

As we also noted in *Over There Were Greenfields*, however, it doesn't have to be this way. There is hope, and its name is "smart growth," an approach to developing cities, suburbs, and metropolitan regions in ways that allow us to thrive environmentally, economically, and socially while still providing all the assets of the American Dream and conserving our landscape. In short, smart growth solves sprawl.

What is smart growth? There is no single answer, of course. But one excellent articulation comes from our partners and friends at the Smart Growth Network, an association of businesses, government agencies, and nonprofit organizations committed to promoting alternatives to sprawl: "In general, smart growth invests time, attention, and resources in restoring community and vitality to center cities and older suburbs. New smart growth is more town-centered, is transit- and pedestrian-oriented, and has a greater mix of housing, commercial, and retail uses. It also preserves open space and many other environmental amenities." The network goes on to observe that successful communities "tend to have one thing in common—a vision of where they want to go and of what things they value in their community."

In this book, we use working examples to illustrate these concepts, and to

Smart student housing in California.



## SNAPSHOT: FACTS ABOUT SPRAWL

Sprawl's rapid land consumption cannot be explained away by population growth only.

► Between 1960 and 1990, the amount of developed land in metro areas more than doubled, while the population grew by less than half.

Sprawl creates automobile dependence and longer driving distances

► Total vehicle use more than tripled between 1960 and 1995 to more than 2.4 trillion miles per year.

► Despite technological improvements, highway vehicles are still responsible for about 60 percent of total carbon monoxide emissions in the United States, 30 percent of the chemicals that cause urban smog, and 50 percent of carcinogenic and toxic air pollutants. Transportation contributes 32 percent of total U.S. emissions of carbon dioxide, the most prevalent greenhouse gas.

Sprawl irrevocably damages natural resources

► Runoff from new residential development is 10 times that of predevelopment conditions and runoff from commercial development is as much as 18 times higher. Runoff pollution is now the nation's leading threat to water quality.

► Sprawl leads to habitat loss, fragmentation, and even the extinction of species. Of 20,000 species of native U.S. plants and animals, fully a third are "of conservation concern"; extinct, imperiled, or vulnerable.

► Between 1982 and 1992, the United States lost an average of 400,000 acres of "prime" farmland (the land with the best soils and climate for growing crops) to development every year!

tell the story of how smart growth has caught hold in America. We report the good news that smart-growth developments can now be found all across our country, in cities small and large, suburbs old and new. We show that communities embrace these smart-growth neighborhoods, people choose to live and work in them, governments support them and, yes, developers can make money on them. We provide examples demonstrating that, at the same time that we are reinvesting in existing communities and building new ones in smarter ways, we are also strategically saving valuable countryside from the threat of inappropriate development. We bring the good news that communities are implementing a wide array of smart-growth solutions on the ground, and the solutions are working.

Our book also celebrates the American heroes who are leading the way in solving sprawl. We celebrate political leaders, like Governor

#### SNAPSHOT: BASIC PRINCIPLES OF SMART GROWTH

There is no single template, no one-size-fits-all definition of how to solve sprawl, or what makes a community or a development "smart." Instead, the features that distinguish smart growth from sprawl vary from place to place. The Smart Growth Network has developed a set of ten basic principles that can be applied in various combinations to create smart, nonspreading communities:

- ▶ Mix land uses
- ▶ Take advantage of compact neighborhood design
- ▶ Create housing opportunities and choices
- ▶ Create walkable communities
- ▶ Foster distinctive, attractive communities with a strong sense of place
- ▶ Preserve open space, farmland, natural beauty, and critical environmental areas
- ▶ Strengthen and direct development toward existing communities
- ▶ Provide a variety of transportation choices
- ▶ Make development decisions predictable, fair, and cost effective
- ▶ Encourage community and stakeholder collaboration in development decisions

Glendening, who has honored this book with his eloquent foreword and who is often credited with popularizing the phrase "smart growth" while infusing it in his state's basic philosophy of how to develop. We feature enlightened corporations, like Auldas, who are choosing to redevelop abandoned city properties rather than build still more automobile-dependent "campuses" in the countryside. We honor bold developers, like Atlanta's Post Properties, who are putting their money and ideas behind new smart-growth communities. We showcase faith-based organizations, like Chicago's Bethel New Life, that have been instrumental in redeveloping inner-city neighborhoods.

We also celebrate creative local officials, like Ken Mamilack of Cleveland Heights, Ohio, who are demonstrating that municipalities can work together to preserve and strengthen older suburbs. We honor visionary architects and planners, like California's Peter Calthorpe and Miami's Andres Duany, who are showing how to design communities and regions that solve sprawl. And we feature the work of alert and energetic citizens, like Barry Harper of Almiraz Township, Michigan, whose organization Save Pearl Lake lived up to its name. We cannot stress enough that these heroes, as well as the others whose stories we

SOLVING SPRAWL WITH SMART GROWTH

tell in this book, and the many more who are working on solving sprawl, are doing so with great creativity and ingenuity.

This book details 35 diverse smart-growth stories from around the country. We have organized our examples according to their locations: first, we introduce a diversity of smart-growth development and redevelopment projects in cities; second, we highlight examples of smart-growth successes in the suburbs; and third, we concentrate on forest, farm, and landscape conservation in places where development is not appropriate.

Within each of these chapters, we strive to show a wide variety of solutions to sprawl, to include projects of all sizes, and to have geographic diversity—to present many different and colorful pieces of the smart-growth mosaic. Interspersed throughout these principal stories, we include sidebars featuring additional examples of smart growth and reminders of the sprawl-related environmental and social problems that smart growth helps us overcome. We have also provided a glossary at the end of the book that may assist readers in learning more about planning terms and land-use concepts that might be unfamiliar.

#### SNAPSHOT: AMERICANS SUPPORT SMART GROWTH

Polls show that Americans strongly support smart growth and the strategies necessary to implement it. Indeed, 78 percent of voters believe that it is important for the U.S. Congress to help communities solve problems associated with urban growth, according to the Millennium Planning Survey, a comprehensive telephone survey conducted by the American Planning Association in October 2000. Another poll, conducted in September 2000 by Smart Growth America, a coalition of over 60 public interest groups, found a similarly high level of support: more than three-quarters of those surveyed said they favored "giving priority to improving services, such as schools, roads, affordable housing and public transportation in existing communities rather than encouraging new housing and commercial development and new highways in the countryside."

Respondents of the SGA poll also overwhelmingly supported a number of specific government policies related to smart growth, including giving priority to funding services in existing communities rather than encouraging new development in the countryside; creating zones for green space, farming, and forests outside existing cities that are off limits to developers; requiring that affordable housing be included in all new developments; and giving funding priority to public transportation over new highways.

SOLVING SPRAWL WITH SMART GROWTH



Car-dependent commercial sprawl in Virginia.

Some may find it surprising that an environmental organization would place as much emphasis on “brick and mortar” smart-growth developments as on the preservation of natural areas. But a basic underpinning of smart growth is the acceptance that growth is inevitable; after all, in the first half of the twenty-first century, the U.S. population is expected to grow

JESSICA FOLKERTS

by half, adding some 140 million people who will need housing and places to work, shop, attend school, and relax. It is critical that, in order to keep “dumb growth” out of our most precious wilderness and rural areas—to solve sprawl—we must embrace growth somewhere else.

For the most part, we have chosen not to write about policies and plans—however enlightened—that have not yet materialized. The developments we highlight are already partially or fully built, and many are occupied. The natural areas we feature are already enjoying protection. These developments and protected green spaces can inspire us with their tried-and-true solutions; even their imperfections, which we also discuss occasionally, provide valuable lessons about what works and what doesn't in the real world of solving sprawl.

Our hope is that the reader will come away from *Solving Sprawl* with a renewed sense of hope and inspiration about smart growth, although not with a false sense of complacency. Indeed, as Governor Glendening's foreword reminds us, the status quo is still suburban sprawl, not smart growth. We will need years of hard work to change our policies to make smart growth easier; for developers to try different solutions; for elected officials to take a long-term view; for planners and other public servants to think “outside the box”; and for citizen activists to be planning ahead for growth, not just opposing developments. As a nation, we must become more ambitious. We must not accept blindly the limited choices that have been presented to us in the past. To solve sprawl, we must pursue our dreams for better places to live.

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enough of them decide to get together and do the right thing for their community."<sup>14</sup> It was an equally notable example of a community coming together and strengthening its ties. To save Pearl Lake, fifth-generation farmers worked with recent arrivals, forming friendships as they worked toward their shared goal.

All told, Concerned Citizens and Save Pearl Lake raised nearly \$260,000 through their varied efforts to save the lake. Combined with the state's grant, as well as a contribution from the Grand Traverse Regional Land Conservancy, it was enough to make the periodic payments required by the agreement with McKenough. The final payment was made in April 1999. The conservancy transferred the property to the state in August, and it is now part of Pere Marquette State Forest.

In September, residents held a celebration at the southwest bay of Pearl Lake. About 60 people who had worked to preserve the lake were on hand. So, too, was one of the objects of their efforts: a bald eagle, which punctuated the ceremony by swooping across the water.



## The Not-So-Impossible Dream

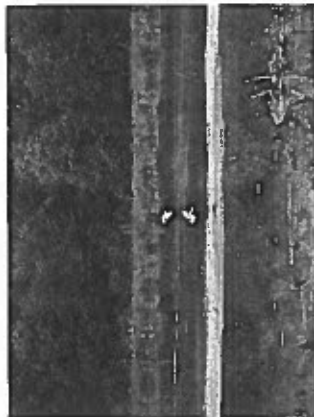
*Make sure that when we change a place, the change agreed upon nurtures our growth as capable and responsible people while also protecting the natural environment and developing jobs and homes enough for all.*

—Tony Hiss, *The Experience of Place*

When we wrote our last book on sprawling land development, *Once There Were Greenfields*, we noted that the story of sprawl was, in part, a story of the so-called American Dream of finding prosperity, a comfortable and convenient lifestyle, and a pleasant place to live. We noted that our story was about astonishing rates of growth and about progress and prosperity in our country, which, in our view, are good things.

But we also observed that the story of sprawl was about the dream's unanticipated twists. It was about patterns of haphazard development that had led to lost landscapes, congested traffic, polluted air and water, endangered public health, and a looming energy crisis that could make those of the 1970s seem mild by comparison. It was about how nearly all of the positive strides that we have taken in improving our

Preserved wetlands near Alexandria, Virginia.



JAMES L. MCARDEN

environmental quality in recent decades could be reversed if we do not change the way we grow.

We noted that the story of sprawl was also about economic waste, rising taxes, and the unfair burdens that dumb growth places on taxpayers and governments. And it was about the consequences for those left behind as we have placed more and more of our investment and energy in new places—in our vanishing greenfields—rather than in the places where people already live.

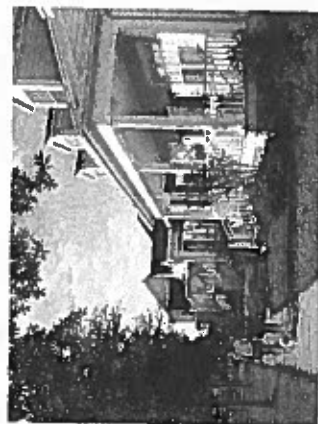
As the stories in this volume demonstrate, however, the story of sprawl need not have a tragic ending. They illustrate that there is a better way, a path of smart growth that, if we choose it, can provide Americans with all the benefits of the American Dream, but without the accompanying nightmares. While the brighter dream of smart growth will not come quickly or easily, we believe now, as we observed then, that we *can* solve sprawl.

Few readers will be surprised to learn that there are those who disagree with us—who contend that the brighter dream we are pursuing is, at its core, an impossible dream. That those of us who are advocating smart growth are so many Don Quixotes tilting at windmills of consumer and business preferences that, despite what we may think, are not amenable to change; that attempting to solve sprawl is foolishly attempting to overcome destiny.

The stories in this book constitute our rebuttal to those who say that solving sprawl is an impossible dream. These stories make clear not only that sprawl can be solved, but also that America is clamoring to do just that. In fact, our biggest challenge in researching the book

was narrowing down the hundreds of smart-growth success stories we found into a manageable and representative number.

As our examples also make clear, there is no magic answer, no single best approach to solving sprawl. Instead, there are many approaches, many incremental changes that we believe can collectively add up to a solution, to a more sustain-



Fleetsy from parcels in Celebration, Florida.

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SOLVING SPRAWL

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able future. We hope readers are as inspired by these stories as we were when we found them. At a minimum, we hope readers will be motivated to conduct their own investigations and form their own conclusions about what we believe to be a fascinating subject.

Finally, we are honored to praise the men and women who are proving that the brighter American dream is not so impossible after all: the leaders, developers, investors, planners, architects, and citizens whose ideas and toil are showing us how to grow smartly. In the end, *Solving Sprawl* is not our book but theirs, and we are grateful for the opportunity to tell their stories.



New England farmland after a winter dusting.

THE NOT SO-IMPOSSIBLE DREAM

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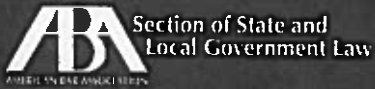
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# From Sprawl to Sustainability

Smart Growth, New Urbanism, Green Development,  
and Renewable Energy

Second Edition

Robert H. Freilich, Robert J. Sitkowski, and Seth D. Mennillo



# The Recurrent Problem of Sprawl

*Sprawl has created enormous costs that California can no longer afford. Ironically, unchecked sprawl has shifted from an engine of California's growth to a force that threatens to inhibit growth and degrade the quality of our life.*

—Bank of America, *Beyond Sprawl: New Patterns of Growth to Fit the New California*, 1995

## The Current Crises of Sprawl and Their Antidotes: Introduction

Traditionally, the United States has been thought of as a place of limitless land and resources.<sup>1</sup> American history reveals a conscious preoccupation with continuous, outward, and ever-increasing growth. From the nineteenth century onward, the federal government actively encouraged population settlement in the vast and largely uninhabited spaces of the expanding country.<sup>2</sup> By offering land from the public domain at little or no cost, the government provided incentives to citizens and immigrants to locate in the new territories.

Westward expansion became a basic national goal in the nineteenth century. The major national growth policy, “manifest destiny,” provided the justification, and free land provided the impetus, as settlers rushed into the new lands of the frontier.<sup>3</sup> The

1. ROBERT H. FREILICH & ERIC D. STUHLER, *THE LAND USE AWAKENING* 32–33 (1981); see also Patrick J. Skelley II, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273 (1997); DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 555 (5th ed. 2008).

2. See Raleigh Barlowe, *Federal Programs for the Direction of Land Use*, 50 IOWA L. REV. 337 (1965).

3. Even after the Homestead era, the federal government today owns approximately 740 million acres of land; 440 million of these are “disposable” administratively, without congressional approval, except for



emphasis was on growth, and incentives were provided by the disposal of federal land and construction of canals, roads, and rails.<sup>4</sup>

The westward surge of population went hand-in-hand with another movement in its early stages—the urban movement.<sup>5</sup> As the westward migration was beginning, the cities along the Atlantic also began to grow. Industrialization, with its promise of wealth and prosperity, began to lure workers and their families to the cities, where jobs were plentiful and wages were higher. With the coming of the twentieth century, the rate of urban development in the nation at large began to surpass that of rural development.<sup>6</sup>

Most of America's urban growth since World War II, however, has taken place in the suburban-rural fringes of major metropolitan areas rather than in the central cities or older post-World War I suburbs. Cities and first-ring suburbs became less desirable places to live because of deterioration, abandonment, high crime, and racially segregated housing and school systems.<sup>7</sup> Numerous "patchwork" federal programs to aid cities—urban renewal, "701" planning grants, the war on poverty, and model cities—actually accelerated the suburbanization through various housing, taxation, and transportation policies.<sup>8</sup> Incentives for the construction of sprawling, low-density, detached, single-family housing were provided by federally insured mortgage money, and the absence of tax advantages of home ownership led to major social problems in the cities and first-ring suburbs.<sup>9</sup> Concurrently to the residential exodus, the interstate highway system, particularly metropolitan ring roads, provided access to suburban areas for industrial and commercial uses. The net effect of these centrifugal forces was to leave the central city with severe housing, educational, underemployment, and

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national parks, forests, and wildlife refuges. See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 9, 21 (1980).

4. See James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 211 (1982).

5. See C. GLAAB & A. T. BROWN, *A HISTORY OF URBAN AMERICA* (1967).

6. In 1870, the vast majority of the American population lived in rural areas. Only 5 percent lived in communities of more than 2,500 people, and only half of those in cities of more than 10,000. See U.S. PRESIDENT (NIXON), REPORT ON NATIONAL GROWTH 14 (1972). Between 1890 and 1900, 40 percent of the population lived in urban areas of 2,500 or more, and more than 60 percent of the economically active population worked outside of agriculture. In 1920, for the first time, the census showed more than half the population living in urban areas, and by 1990, 78 percent of the population resided in a metropolitan area. See Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 331 (1993); see also Felicity Barringer, *Those Lights in Big Cities Get Brighter, Census Finds*, N.Y. TIMES, Dec. 18, 1991, at A24.

7. DAVID RUSK, CITIES WITHOUT SUBURBS 9 (1993).

8. Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69 (1998); see also MARK BALDASSARE, *THE GROWTH DILEMMA* (1981); JESSE AUSUBEL & ROBERT HERMAN, *CITIES AND THEIR VITAL SYSTEMS: INFRASTRUCTURE PAST, PRESENT, AND FUTURE* (1988); ERIC H. MONKKONEN, *AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES AND TOWNS, 1780-1980* (1990); ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* (1995).

9. Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 186-87 (1997).

environmental problems, while destroying important natural resources and environmentally sensitive lands in the path of suburban development. Moreover, the desire for a rural lifestyle—spacious housing with lavish kitchens, master baths, and “great rooms”—on large lot “ranchettes,” but, ironically, with a demand for urban services and access to urban income, became the dominant motivator for the population migration of the new “cappuccino cowboys.”<sup>10</sup>

There were other causes of suburbanization, such as the nationwide property tax revolt and the decreasing fiscal ability of central city governments to provide services and build capital facilities due to cutbacks on federal assistance generally.<sup>11</sup> The tremendous outmigration of commerce and industry from the central city and first-ring suburbs<sup>12</sup> and the spiraling costs of rebuilding existing built-up areas’ deficient infrastructure<sup>13</sup> have, until the mortgage and oil crises of 2007–2010, resulted in most regions being unable to cope with the trends of modern urban demographics and economics.<sup>14</sup> Recent studies of our nation’s deficient capital facilities testify to crumbling infrastructure and the need for large expenditures for repairs and upgrades. The American Society of Civil Engineers 2005 Report Card for America’s Infrastructure (ASCE Report)<sup>15</sup> estimates that \$1.6 trillion is needed for the nation’s roads over a five-year period simply to bring them to good condition. Such poor road conditions also pose safety and economic problems. In 2007, the Mississippi River bridge collapse on Interstate 35 in Minneapolis, dramatically forewarned by the ASCE Report, revived the nation’s attention to this crisis.<sup>16</sup> The same year, raging California forest fires highlighted the disastrously inadequate provision of water supply and firefighting facilities and equipment throughout the Los Angeles and San Diego metropolitan areas.<sup>17</sup>

The fiscal impacts of sprawl versus planned growth are dependent upon two influences on development patterns.<sup>18</sup> First, the ability of rational planning to influence

10. ROBERT H. FREILICH, *TO SPRAWL OR NOT TO SPRAWL: NATIONAL PERSPECTIVES FOR KANSAS CITY* 10 (Charles Kimball Lecture, Western Historical Manuscript Society 1998).

11. James Nicholas, *Paying for Growth: Creative and Innovative Solutions*, in *GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990S* (1993).

12. JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4 (1991); Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL’Y 513, 514 (1996).

13. NANCY RUTLEDGE, *REPORT OF PRESIDENT REAGAN’S NATIONAL COUNCIL ON PUBLIC WORKS IMPROVEMENT* (1989).

14. Peter Dreier, *America’s Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1378 (1993).

15. Available at <http://www.asce.org/reportcard/2005/index.cfm>.

16. Susan Saulny & Jennifer Steinhauer, *Bridge Collapse Revives Issues of Road Spending*, N.Y. TIMES, Aug. 7, 2007, at A1.

17. *Sprawl Exceeds Reach of Hydrants*, U.S.A. TODAY, July 2007.

18. A study of infrastructure costs, “The Costs of Sprawl,” was conducted in the early 1970s by the U.S. Department of Housing and Urban Development, the Council on Environmental Quality, and the Environmental Protection Agency. In addition, a 1989 study by James E. Frank found that capital costs of infrastructure for a subdivision of three houses per acre could be cut in half by developing near basic public facilities and employment centers, at densities averaging twelve houses per acre. See JAMES E. FRANK, *THE*

the type and location of development can reduce the public service costs and negative fiscal impacts of development (see table 1.1). Second, sprawl inhibits greater densities, mixed use, pedestrian access to centers, and compactness of new neighborhoods. Where planned development can provide more compact development patterns, public service costs will be less.<sup>19</sup> A 2007 study shows the enormous fiscal and land development savings of a proposed 4,000-unit new urbanist community in Albuquerque, New Mexico, over a comparable subdivision developed in a sprawl pattern. The study showed a reduction of 243.5 acres of land consumed and \$54.75 million in infrastructure service and housing costs.<sup>20</sup> Development near transportation corridors or where public facilities already exist will also help reduce costs. In Florida, a study found public facility costs were between \$16,000 and \$17,000 per unit for corridor and nodal developments and almost \$24,000 for scattered developments.<sup>21</sup> A New Jersey study found that infrastructure costs in dispersed growth areas were 9 percent more than those in planned development patterns.<sup>22</sup> Ongoing operating costs for infrastructure are markedly reduced when unneeded capital commitments are eliminated.<sup>23</sup> One reality of our changing political climate is that it will no longer tolerate unacceptable fiscal, if not environmental, waste.<sup>24</sup>

### Sprawl: Definition and Impacts

Richard Moe, president of the National Trust for Historic Preservation, describes sprawl as “low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent [and] designed without regard to its surroundings.”<sup>25</sup> Echoing this characterization, a Pennsylvania Supreme Court decision, *In re Petition of Dolington Land Group*, provides another useful definition of sprawl:

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COSTS OF ALTERNATIVE DEVELOPMENT PATTERNS: A REVIEW OF THE LITERATURE (1989); see also ROBERT W. BURCHELL, FISCAL AND SPRAWL IMPACTS OF THE SUNCAL COMPANIES LOWER PETROGLYPHS DEVELOPMENT, ALBUQUERQUE, NEW MEXICO, CENTER FOR URBAN POLICY RESEARCH, RUTGERS UNIVERSITY, Sept. 10, 2007, at 176.

19. Burchell, *supra* note 18, at 180.

20. Burchell, *supra* note 18; see also Kevin Kasowski, *The Costs of Sprawl, Revisited*, PAS MEMO (Am. Planning Ass'n 1993); ROBERT W. BURCHELL, WILLIAM R. DOLPHIN & CATHERINE GALLEY, CENTER FOR URBAN POLICY RESEARCH, RUTGERS UNIVERSITY, THE COSTS AND BENEFITS OF ALTERNATIVE GROWTH PATTERNS: THE IMPACT ASSESSMENT OF THE NEW JERSEY STATE PLAN (2000).

21. Maryann Froelich, *Smart Growth: Why Local Governments Are Taking a New Approach to Managing Growth in Their Communities*, PUB. MGMT., May 1998, at 8.

22. Burchell, *supra*, note 18, at 8.

23. Burchell, *supra* note 18, at 180.

24. CALLIES, FREILICH & ROBERTS, *supra* note 1, at 555.

25. LINCOLN INSTITUTE OF PUBLIC POLICY, ALTERNATIVES TO SPRAWL 4 (1995).

**Table 1.1 Relative Infrastructure Costs of Sprawl versus Planned Development from Two Major Studies**

Infrastructure Costs Category	Sprawl Development	Planned Development: Findings from Burchell and Frank Studies <sup>a</sup>		Planned Development: Synthesis from the Burchell and Frank Studies <sup>a</sup>
		Burchell	Frank	
Roads	100%	76%	73%	75%
Schools	100%	97	99	98
Utilities	100%	92	66	79
Other	100%	NA	100	NA
Assumed Percentages <sup>b</sup>				
<i>Density and Dwelling Types<sup>c</sup></i>		<i>Sprawl Development</i>		<i>Planned Development</i>
1 dwelling unit/4 acres		6.8%		6.2%
1 dwelling unit/acre		20.4		6.2
3 dwelling units/acre		34.0		37.2
5 dwelling units/acre (clustered)		<u>6.8</u>		<u>12.4</u>
		<b>68.0</b>		<b>62.0</b>
10 dwelling units/acre (townhouse)		20.0		22.0
15 dwelling units/acre		<u>12.0</u>		<u>16.0</u>
		<b>100.0%</b>		<b>100.0%</b>

<sup>a</sup>Robert W. Burchell et al., 1992 *Impact Assessment of the New Jersey Interim State Development and Redevelopment Plan, Report III: Supplemental AIPLAN Assessment*, Report prepared for New Jersey Office of State Planning (Apr. 30, 1992); FRANK, *supra* note 18.

<sup>b</sup>Derived from Robert W. Burchell et al., 1992 *Impact Assessment of the New Jersey Interim State Development and Redevelopment Plan, Report II: Research Findings*, Report prepared for New Jersey Office of State Planning (Feb. 20, 1992).

<sup>c</sup>The percentages are applied as weights to the findings in FRANK, *supra* note 18, by dwelling type to derive a weighted unit distribution. It is further assumed that development will be leapfrog and at a 10-mile distance under sprawl, and contiguous and at a 5-mile distance under planned development.

"The term 'sprawl' is typically used to describe development that is inefficient in its use of land (i.e. low density); constructed in a 'leap frog' manner in areas without existing infrastructure, often on prime farmland; auto dependent and consisting of isolated single use neighborhoods requiring excessive transportation."<sup>26</sup>

Sprawl has engendered six major crises for America's major metropolitan regions:

1. Deterioration of existing built-up areas (cities and first- and second-ring suburbs)
2. Environmentally sensitive land damage, including loss of wetlands, hillsides, habitats, historic, archaeological, cultural and natural resources, and the depletion and degradation of the quality and quantity of water resources
3. Global warming due to overutilization of carbon based energy, lack of renewable energy, green house gas emissions from excessive vehicle miles traveled and failure to utilize green development techniques for the man made environment
4. Fiscal insolvency, transportation congestion, infrastructure deficiencies, and restrictions on funding health care and educational programs through taxpayer initiatives
5. Agricultural and open space land conversion
6. Mortgage foreclosure and real estate collapse due to a lack of affordable housing available to low- and moderate-income families

The abundance of open space is rapidly disappearing because of the extraordinary loss of rural and agricultural land to the encroachment of urban sprawl, which was estimated in 1981 to consume 1.5 percent of our prime agricultural land and in California actually accelerated in the next twenty years.<sup>27</sup> The gross loss in agricultural acreage is nearly 5 million acres each year<sup>28</sup> and is predicted to continue at that pace well through the twenty-first century.<sup>29</sup> This conversion of agricultural land is producing many serious effects, including the diminishment of domestic and export food capacity, the availability of biofuels for renewable energy, the destruction of rural and open space environments, wasteful spending on scattered capital improvements with concomitant fiscal inefficiencies, and the increase of global warming.<sup>30</sup>

26. See *In re Petition of Dolington Land Group*, 839 A.2d 1021, 1029 n.8 (Pa. 2003).

27. CALIFORNIA DEP'T OF CONSERVATION, DIVISION OF LAND RESOURCE PROTECTION, FARMLAND MAPPING AND MONITORING PROGRAM, FARM LAND CONVERSION REPORT 10 (2002).

28. See Green, *supra* note 8, at 80, citing Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Issue for the 1980s*, 21 WASHBURN L.J. 443, 444 (1982) (from 1954 to 1974, 119 million farmland acres, or nearly 6 million acres per year, were lost to suburban sprawl).

29. William L. Church, *Farmland Concession: The View from 1986*, 1986 U. ILL. L. REV. 521, 536-37 (in which Church predicted cropland losses to continue at an unabated pace to 2020).

30. Robert H. Freilich & Linda Kirts Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW. 27, 28 (1981); FREILICH &

## Current Hiccups in Sprawl and Consequent Opportunities for Sustainable Systems

In a groundbreaking article appearing in the *Atlantic*, Christopher Leinberger draws upon an article written by Professor Arthur C. Nelson, former director of Virginia Tech's Metropolitan Institute,<sup>31</sup> to conclude that low-density suburbs may become what inner cities became in the 1960s—slums characterized by poverty, crime, and decay:

The decline of [suburban] places is usually attributed to the subprime-mortgage crisis with its waves of foreclosure. . . . But the story of vacant suburban homes and declining suburban neighborhoods did not begin with the crisis, and will not end with it. A structure change is underway in the housing market—a major shift in the way Americans want to live and work. It has shaped the current downtown, steering some of the worst problems away from the cities and toward the suburban fringes. And its effects will be felt more strongly, and more broadly, as the years pass. Its ultimate impact on the suburbs, and the cities, will be profound.<sup>32</sup>

Other factors apart from the mortgage crisis are also influencing this decline in the growth of far-out suburban places. White flight is reversing course, moving toward central cities, where black population is declining. Between 2000 and 2006, eight of the fifty largest cities, including Boston, Seattle, and San Francisco, saw the proportion of white residents increase. The previous decade, only three cities saw increases.<sup>33</sup> The most prominent cause of suburban decline, however, is the rise in gasoline and energy costs. In 2003, the average suburban household spent \$1,422 a year on gasoline. By April 2008—when gas prices hit \$3.60 per gallon—the same household was spending \$3,196 a

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STUHLER, *supra* note 1; PLOWING THE URBAN FRINGE: AN ASSESSMENT OF ALTERNATIVE APPROACHES TO FARMLAND PRESERVATION (Hal Hiemstra & Nancy Bushwick eds., 1989); FRANK SCHNIDMAN, MICHAEL SMILEY & ERIC G. WOODBURY, RETENTION OF LAND FOR AGRICULTURE: POLICY, PRACTICE AND POTENTIAL IN NEW ENGLAND (1990); A DECADE WITH LESA: THE EVOLUTION OF LAND EVALUATION AND SITE ASSESSMENT (Frederick R. Steiner, James R. Pease & Robert E. Coughlin eds., 1994); TOM DANIELS, WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE (1999); ROBERT H. FREILICH & S. MARK WHITE, REPORT TO CALIFORNIA HIGH SPEED RAIL COMMISSION ON ALTERNATIVE RIGHT-OF-WAY ALIGNMENT TO SAVE THE CRITICAL AGRICULTURAL CENTRAL VALLEY OF CALIFORNIA (2004); CALLIES, FREILICH & ROBERTS, *supra* note 1, at 555.

31. See Dan Mitchell, *Suburbia's March to Oblivion*, N.Y. TIMES, Dec. 23, 2008, at B5 ("Mr. Leinberger cites the work of Arthur C. Nelson, who has predicted that, by 2025, there will be a surplus of 22 million low density suburban homes on lots of one-sixth of an acre or greater.")

32. Christopher B. Leinberger, *The Next Slum?* ATLANTIC, Mar. 2008, at 71.

33. Conor Daugherty, *The End of White Flight*, WALL ST. J., July 19–20, 2008, at A1; see also Leslie Eaton, *Housing Slowdown Hits Towns at the Outskirts of Texas Boom*, N.Y. TIMES, Feb. 20, 2008, at A1.

year. In March 2008, Americans drove 11 billion fewer miles on public roads than in the same month a year before.<sup>34</sup>

The effect of these trends is that many Americans are seeking to reduce the number of vehicle miles traveled by moving to new, urban, walkable communities. They want to replace oil and propane heating with renewable energy created by biofuel, solar and wind systems, more efficient hydroelectric energy, and, most important, properly designed sustainable green development buildings and projects that reduce heating and electric bills by 30 percent or more.<sup>35</sup> The Congress of New Urbanism, which commenced the advocacy of building higher density, mixed use, walkable communities in both suburban and urban places, now reports that most new urbanism projects are occurring in and closely around cities and urban corridors, such as Denver to Boulder.<sup>36</sup> The positive effect on home prices is considerable. A recent study found that housing prices in the urban centers of Chicago, Los Angeles, Pittsburgh, Portland, and Tampa have fared significantly better than those in the suburbs. Exurban growth, areas of growth beyond the first three rings of suburban growth, have suffered worst of all.<sup>37</sup>

The drought in the Southwest is also slowing growth in the suburbs. States are implementing new restrictions on far-out suburban developments, such as in California's Riverside and Kern counties outside of Los Angeles, that cannot assure an entitled water supply over a fifty-year horizon.<sup>38</sup> The Census Bureau has demonstrated that the rapid growth of Sunbelt suburban areas in eastern California, Nevada, and Arizona dramatically decreased in 2006 due to water, traffic, and energy concerns, while coastal urban and first-ring suburban cities continued to gain ground.<sup>39</sup> The *Los Angeles Times* editorial of March 24, 2008, opines: "If local officials are smart, they'll take advantage of sprawl's apparent stall to plan more carefully for future growth."<sup>40</sup>

34. See Peter S. Goodman, *Fuel Prices Shift Math for Life in Far Suburbs*, N.Y. TIMES, June 25, 2008, at A1 (quoting economist Joe Cortright: "It's like an ebbing of the suburban tide. There's going to be this kind of reversal of desirability. Typically Americans have felt the periphery was most desirable.").

35. See ROBERT H. FREILICH, S. MARK WHITE & KATE F. MURRAY, 21ST CENTURY LAND DEVELOPMENT CODE 13 (2008) (citing the 2003 California Sustainable Building Task Force exhaustive study). If 2008 energy prices were used, the percentage would be much greater.

36. See Robert Steuteville, *Where New Urbanism Is Strong*, NEW URBAN NEWS, June 2008, at 1.

37. See Roger Vincent, *Gas Prices Magnify Pressure on Housing*, L.A. TIMES, June 17, 2008, at A1, A10 ("Long commutes make homes in outlying areas, already stung by plunging values, even less attractive, falling most precipitously in distant suburbs."); Goodman, *supra* note 34, at A18 (citing Joe Cortright).

38. See Jennifer Steinhauer, *Water-Starved California Slows Development*, N.Y. TIMES, June 7, 2008, at A1 (describing SB-610, enacted in 2001).

39. Editorial, *Plan on It, A Slowdown in Our Region's Growth Offers an Opportunity to Cope with Water, Traffic and Other Issues*, L.A. TIMES, Mar. 24, 2008, at A14.

40. *Id.*

This book echoes the sentiment that now is the time to permanently rein in sprawl. We use the umbrella term “sustainability” to describe four major movements in the United States: (1) smart growth (also referred to as growth management), (2) new urbanism, (3) green development, and (4) renewable energy. Through the use of these four interconnected techniques, America can become a better place to live, with clean air, walkable quality communities, and more vibrant cities and suburbs, replacing our deficient infrastructure, reducing our impact on global warming, and creating millions of jobs through new industries for renewable energy and a sustainable environment. The creation of new biofuel technologies has led to a resurgence of jobs; the revitalization of midwestern cities, counties, and states; and the reduction of U.S. dependence on foreign oil and of burgeoning trade deficits.<sup>41</sup>

This book will show how the sustainable revolution in the United States has been building since 1972. In that year, the New York Court of Appeals and the U.S. Supreme Court approved the Ramapo Plan, thus establishing the constitutionality of smart growth. (The Ramapo Plan, which Dr. Freilich prepared and defended, is discussed in detail in chapter 3.) This book will demonstrate the sound techniques and programs that the federal government, states, regions, cities, and counties can take in achieving sustainability. We will begin with the inadequacy of traditional land use tools to combat sprawl and then move to the successful sustainability strategies—smart growth, new urbanism, green development, and renewable energy—that have begun, and will continue in the future, to build a sustainable society and nation.

### **Traditional Land Use Tools and Their Ineffectiveness to Combat Sprawl**

By the turn of the nineteenth century, many Americans began to realize that laissez-faire left unregulated was not the best means of building spacious, beautiful, and efficient cities.<sup>42</sup> Some government regulation was deemed necessary if the ruthless exploitation of land and other natural resources was to be modified. Since 1926 land use planning in the United States has been traditionally utilized by local governmental units. The states initially defined their primary role in land development regulation as a delegator, by providing local governmental bodies with the power to zone through planning and zoning land use enabling legislation. This early delegation of planning

41. ROBERT H. FREILICH & BRUCE PESHOFF, PLANNING WORKS: PRIMAFUEL FACILITY SMART GROWTH SITING ANALYSIS: SUMMARY REPORT ON BENEFITS OF BIO-FUEL UTILIZATION TO THE CITY OF SACRAMENTO, CALIFORNIA (May 2008) (complete analysis of the sustainable benefits of renewable biofuel energy resources in the United States).

42. For a history of development of land use controls in America, see John E. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965).



and zoning responsibility by the states permitted local governments to dominate land use control and to determine the course of development in terms of their own local self-interest.<sup>43</sup> The problems caused by fractionalized governments and local parochialism translated into a lack of local governments' ability to coordinate necessary planning strategies throughout metropolitan regions.<sup>44</sup>

Local governments were particularly unable to deal effectively with the problems that urban sprawl created. In large part, this was a product of a system that allowed each community to attempt to solve its own problems without regard to the general needs and wants of the region of which the community was a part.<sup>45</sup> As the congressionally authorized Douglas Commission report pointed out in 1968:

Today, a basic problem results because of the delegation of the zoning power from the States to local government of any size. This often results in a type of Balkanization, which is intolerable in large urban areas where local government boundaries rarely reflect the true economic and social watersheds. The present indiscriminate distribution of zoning authority leads to incompatible uses along municipal borders, duplication of public facilities, attempted exclusion of regional facilities.<sup>46</sup>

The reality of this situation is reflected both in uncoordinated development, which has taken place on the suburban fringe, and in the domination of policy programs by local values.

A further barrier to affirmative planning mechanisms has been the collision of planning considerations with a common but misleading notion of property ownership. As one commentator states, "The conventional concept of 'ownership' in land is detrimental to rational land use, obstructive to the development of related environmental policies, and deceptive to those innocent individuals who would trust it for protection."<sup>47</sup>

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43. Note, *State Land Use Control: Why Pending Federal Legislation Will Help*, 25 HASTINGS L.J. 1165, 1167 (1974); Jayne E. Daly, *A Glimpse of the Past, a Vision for the Future*, Senator Henry M. Jackson and National Land Use Legislation, 27 URB. LAW. 1 (1996).

44. John F. Kain, *Failure in Diagnosis: A Critique of the National Urban Policy*, 11 URB. LAW. 261 (1979) (the irrational placement of governmental entities and geographical jurisdiction makes it inordinately difficult to correct the structural deficiencies).

45. James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

46. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 19 (1968).

47. For a recent expansion of the property rights movement, see CALLIES, FREILICH & ROBERTS, *supra* note 1, at 612 (describing the *Kelo* revolution resulting from the U.S. decision in *Kelo v. City of New London*, 565 U.S. 469 (2005), upholding the public purpose of condemnation for economic development; as a result of the outcry over the decision, thirty-four states enacted legislation restricting condemnation utilization and land use regulation); see also EMINENT DOMAIN, REPORT OF NATIONAL CONFERENCE OF STATE LEGISLA-

Americans have traditionally treated land as a commodity; as a consequence, land has been bought and sold much like commercial goods. A strong sense of a private right of ownership in land has resulted. When this is combined with the historical abundance of land in America and the relative disinclination of government to interfere with private land use, it is easy to understand why some notions of private property, which are in large part refuted by hundreds of years of Anglo-American common law requiring all private property to be subject to reasonable health, safety, and general welfare legislation, have been highly resistant to utilization of public land use controls.<sup>48</sup>

A few extreme advocates of private property rights argue that the interests of private landowners are destroyed by regulation at all levels of government.<sup>49</sup> Well before the 2005 *Kelo* decision, pro-property rights leaders have led an attack against governmental regulation of land by introducing takings and vested rights legislation in Congress and in virtually every state.<sup>50</sup> In addition to the takings legislation movement, coalitions of local groups that are pro-property rights have sought to undermine the ideological and policy success of mainstream environmentalism. Neither do they dislike sprawl. Some contend that life in suburbia is what people want—and not just Americans, but people across the world. One such smart growth critic is Robert Bruegmann, who says that the anti-sprawl, smart growth movement operates from the premise that the supposed villains (federal highway and housing policies, developers, big oil, and banks) simply follow, rather than create, the reality of wealthier people engaging in white flight. He proposes an alternative explanation, arguing that without regard for wealth or race, most people do not like high-density living, do not like waiting for buses, and enjoy the freedom that cars give them.<sup>51</sup> Critics of smart growth also contend that the regulatory steps employed to stop sprawl often have not worked and that where they do work, they unduly raise the cost of housing. The free market, they think, would do a better job of producing affordable housing.<sup>52</sup>

The goal of the private property rights movement is to chill or slow down governmental regulation of land use. The property rights movement has been partially

TURES (2008). For analysis of the traditional conflict over land use regulation of private property, see Lynton K. Caldwell, *Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974).

48. Caldwell, *supra* note 47, at 761; Richmond, *supra* note 6, at 327; see also C. MADDEN, LAND AS A NATIONAL RESOURCE 6–30 (C. L. Harris ed., 1974).

49. See Marianne Lavell, *The "Property Rights" Revolt*, NAT'L L.J., May 10, 1993, at 36; R. Minitier, *You Just Can't Take It Anymore: America's Property Rights Revolt*, 70 POL'Y REV. 40, 40–46 (1994); H. M. Jacobs & B. W. Ohm, *Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals*, 2 WIS. ENVTL. L.J. 173 (Summer 1995).

50. Robert H. Freilich & Roxanne Doyle, *Takings Legislation: Misguided and Dangerous*, 46 LAND USE L. & ZONING DIG. 3 (Oct. 1994).

51. ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* (2005).

52. See Nicole Stelle Garnett, Essay, *Save the Cities, Stop the Suburbs?* 116 YALE L.J. (Pocket Pt.) 192 (2006).

successful in creating legislation, both through initiatives and statutes that authorize statutory inverse condemnation litigation at the state level, punishing recent attempts to develop smart growth legislation to control urban sprawl.<sup>53</sup> This legislation reduces the amount of economic loss from 90 percent to far lower percentages or even minor loss required to successfully bring an inverse condemnation statutory suit than would otherwise be required under the Fifth Amendment and state constitutional takings and just compensation clauses.<sup>54</sup>

Not all thinking by property rights groups is wrong. Local governments often do make planning decisions based upon parochial considerations, which not only fail to take account of the problems of sprawl, but in many instances are detrimental to the legitimate interests of private development.<sup>55</sup> This is partly a result of local protectionist and exclusionary considerations, but it also reflects a lack of foresight about the need for controlling sprawl and the local government's inability to perceive a larger role than solely protecting its own perceived self-interest. Most local governments lack both administrative and fiscal resources to deal effectively on their own with problems beyond a very limited scope. Without the capacity to plan at the metropolitan region level for solutions of sprawl, local governments cannot deal with the inherent difficulties of modern urban life.

Traditional Euclidean zoning ordinances do not deal with urban sprawl problems. On the contrary, such ordinances protect owners and occupiers of land from the effects of discordant land uses by segregating different types of uses in separate zones or districts. To the proponents of Euclidean zoning, the ideal, planned community is viewed as "a great patchwork of contrasting zones rigidly segregating incompatible land uses, each zone being furnished with appropriate density, light and air, and open-space regulations, all 'in accordance with a comprehensive plan.'"<sup>56</sup> As a result, Euclidean zoning has become a negative mechanism—the object is to separate out different uses—rather than an affirmative vehicle for sustainability and dealing with the problems of the locality and the region.

53. John Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENV'T'L L.J. 439–524 (2009); Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997); CALLIES, FREILICH & ROBERTS, *supra* note 1, at 387–88.

54. See Robert H. Freilich & Seth D. Mennillo, *The Kelo Revolution Ends in California*, CAL. REAL EST. L.J., Nov. 13, 2006 (pointing out that property rights efforts have been successful in Arizona, Florida, and Oregon but have failed in California, Idaho, and Washington).

55. See M. H. Feiler, *Metropolitanization and Land-Use Parochialism: Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971); ROBERT L. LINEBERRY & IRA SHARKANSKY, URBAN POLITICS AND PUBLIC POLICY 154 (3d ed. 1978); Patricia E. Salkin, *Statewide Comprehensive Planning: The Next Wave*, in STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 236 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

56. Roger A. Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 382 (1965).

## The Ramapo System and the Creation of Smart Growth

The challenges of sprawl, coupled with the absence of state policies and detrimental federal policies, created the need to organize development in appropriate directions. The goal was to channel development into a sustainable urban form, one that discourages low-density sprawl and encourages serviceable and walkable mixed use densities.<sup>57</sup>

The breakthrough of smart growth in the United States came in 1972 with the landmark decision of *Golden v. Planning Board of the Town of Ramapo*.<sup>58</sup> In *Ramapo*, a case developed and successfully litigated in the courts by Dr. Freilich, the New York and U.S. high courts upheld the timing and sequential control of residential subdivision activity for periods of up to eighteen years. This was the first instance of a state supreme court and the U.S. Supreme Court upholding the uncompensated restriction of land development by means of timed and sequential phasing under the Due Process Clause and Takings Clause. In essence, *Ramapo* established the principle of "reasonable use" over a "reasonable period of time," as measured by the life of the comprehensive plan.<sup>59</sup> The principles and techniques upheld in *Ramapo* were the innovative linking of timing and sequencing over an eighteen-year period with capital improvements;<sup>60</sup> tying this to the purchase of development easements to reduce tax assessments;<sup>61</sup> and integrating the development plan, the capital improvement budget, subdivision regulation, affordable housing, and zoning.<sup>62</sup>

57. Freilich & Davis, *supra* note 30, at 33; Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915 (1991).

58. *Golden v. Planning Board of Town of Ramapo*, 285 N.E.2d 291 (N.Y.), appeal dismissed, 409 U.S. 1003 (1972); David Elliott & Norman Marcus, *From Euclid to Ramapo: New Directions in Land Use Controls*, 1 HOFSTRA L. REV. 56 (1973); ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* 30 (1993); John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15 (2003).

59. Robert H. Freilich, Elizabeth Garvin & S. Mark White, *Economic Development and Public Transit: Washington Growth Management*, 16 U. PUGET SOUND L. REV. 949, 952 (1993).

60. Sequencing is "the phasing of development permission consistent with the availability of services, facilities and other infrastructure necessary to accommodate development." JAMES A. KUSHNER, *SUBDIVISION AND GROWTH CONTROL LAW* § 2.12 (2005) (citing Robert H. Freilich & S. Mark White, *Effective Transportation Congestion Management*, 43 LAND USE L. & ZONING DIG. 3 (1991)). See also DAVID BROWER ET AL., *URBAN GROWTH MANAGEMENT THROUGH DEVELOPMENT TIMING* (1976); Julie Hayward Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 URB. LAW. 285 (1990).

61. See generally Robert H. Freilich & John W. Ragsdale, *Timing and Sequential Controls, The Essential Bases for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974), cited in Freilich, Garvin & White, *supra* note 59, at 15.

62. For a complete review of the Ramapo Plan, see the *30th Ramapo Anniversary Symposium*, 35 URB. LAW. (2003), in particular Nolon, *supra* note 58. *Ramapo* has been determined to be the father of smart growth in the United States. See IRVING SCHIFFMAN, *ALTERNATIVE TECHNIQUES FOR MANAGING GROWTH* 17 (1989); Stephen P. Chinn & Elizabeth A. Garvin, *Designing Development Allocation Systems*, 44 LAND USE L. & ZONING DIG. 3 (1992); Eric D. KELLY, *MANAGING COMMUNITY GROWTH* 30-32, 78, 79, 185 (1993); DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA'S COMMUNITIES* 20, 31, 123 (1997); Thomas G. Pelham, *From the*

*Ramapo* has been ranked the most significant land use regulation case since the inception of zoning's constitutionality in the *Euclid* case, nearly fifty years before.<sup>63</sup> The leading treatise in the field has the following observation regarding the significance of *Ramapo*:

The *Ramapo* decision shifted the balance of power from the developer to the land use agencies. The developer no longer has an absolute right to proceed with development, irrespective of whether public facilities can reasonably accommodate the development. Instead the developer can be made to wait a reasonable period to allow public facilities to catch up or be forced to expend funds to ripen the land for development. At the same time, the *Ramapo* case has expanded the judicial view of just what incidental costs affiliated with development may be shifted to the developer. . . . The *Ramapo* decision and rationale also permanently altered the courts' perspective of the land use regulatory process and paved the way for subsequent decisions that have favored public regulation over the developer or landowner's immediate right to develop property (irrespective of the harm such development might inflict upon the public good). . . .<sup>64</sup>

The importance of the Ramapo Plan is the recognition of the fundamental constitutional principle that techniques to handle growth can be controlled by linking the proposed development with the planned extension of capital improvements over the twenty-year span of a comprehensive plan.<sup>65</sup> The use of a regional "urbanizing tier" system developed from the sophisticated Ramapo smart growth technique was first developed by Dr. Freilich in the seven-county Minneapolis–St. Paul metropolitan area by organizing a twenty-year period of timed and sequenced urbanization within orderly corridors, centers, and tiered urban growth boundaries to prevent sprawl and then quickly expanded to other regions.<sup>66</sup>

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*Ramapo Plan to Florida's Statewide Concurrency System: Ramapo's Influence on Infrastructure Planning*, 35 URB. LAW. 113 (2003). Many cases have subsequently cited *Ramapo*; among the most significant are *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997); *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 908 (9th Cir. 1975); *Associated Homebuilders v. City of Livermore*, 557 P.2d 473 (Cal. 1976); *Williamson v. Pitkin County*, 872 P.2d 1263 (Colo. App. 1993); *Sturges v. Town of Chilmark*, 402 N.E.2d 1346 (Mass. 1980); *Rancourt v. Town of Barnstead*, 523 A.2d 55 (N.H. 1986); and *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975).

63. Michael Dozier & Donald Hagman, ENVTL. COMMENT, Aug. 1978, at 4 (after a nationwide survey of land use professors and practicing land use lawyers and planners).

64. 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 4.05 (1984 & 1997 Supp.).

65. For a history of Ramapo's capital improvement programming as a guide to land use planning, see Stuart L. Deutsch, *Capital Improvement Controls as Land Use Devices*, 9 ENVTL. L. REV. 61 (1978); Thomas G. Pelham, *From the Ramapo Plan to Florida's Statewide Concurrency System: Ramapo's Influence on Infrastructure Planning*, 35 URB. LAW. 113 (2003).

66. See FREILICH, LEITNER & CARLISLE, GROWTH MANAGEMENT APPROACHES FOR THE NEW JERSEY STATE DEVELOPMENT AND REDEVELOPMENT PLAN, Tech. Ref. Doc. 87-15 (1987); FREILICH, LEITNER & CARLISLE, RENO-WASHOE COUNTY REGIONAL PLAN (Nov. 1991). Another example of this approach is found in the

The urbanizing tier concept is a far more sophisticated application of the urban growth boundary approach.<sup>67</sup> A principal tenet of the tier system involves the geographic and functional division of the region into functional tiers. Tier I constitutes the existing central city and the first or second ring of built-up suburbs. Tier II constitutes the area where future growth is channeled (the Ramapo tier). Tier III is the rural and agricultural preservation area. The functional tiered planning area concept recognizes that different areas of the community present different problems relating to growth and development. Therefore, the different areas utilize different techniques, such as subsidies in Tier I; timing, sequencing, and charging new development with the cost of capital facilities in Tier II; and economic incentives, transfers of development rights (TDRs), and development easement contribution in Tier III to preserve agricultural and open space lands.

Nevertheless, while individual geographical or functional areas may receive specialized treatment, they must also be viewed in terms of their interrelationships with the other areas and with the community as a whole. The tier system divides the community into *growth* and *limited growth* categories and adds the tiers as subdivisions of those general categories.<sup>68</sup> It is the growth category that is typically designated as the urbanizing tier.<sup>69</sup>

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Puget Sound, Washington, Region, which has divided development into the following land use categories: major urban centers, activity centers, employment areas, and residential neighborhoods. BELLEVUE CONFERENCE CENTER, TRANSIT/LAND USE LINKAGES: MAKING IT WORK 4 (July 1993). Major Urban Centers are areas that contain high concentrations of housing and employment, with direct service by high-capacity transit, and a wide range of other land uses such as retail, recreational, public facilities, parks, and open space. Major Urban Centers are a focus of regional activity and provide services to the general region. Activity Centers are locations that contain many of the same land uses as Activity Centers but tend to be more automobile-oriented because of their physical layout. Low Density/Intensity Employment Areas include office parks, industrial areas, and manufacturing locations that are developed at relatively low densities. These areas are typically automobile-oriented, single-use areas and do not generate a high degree of transit use. Residential Neighborhoods generally include single-family residences with varying degrees of multi-family, depending on location. Commercial services can range from numerous and convenient to nonexistent. See Freilich, Garvin & White, *supra* note 59.

67. Other "tier systems" were developed by Freilich, Leitner & Carlisle (Dr. Freilich's predecessor firm) in San Diego, Los Angeles, Riverside, and Ventura County, California; Baltimore, Montgomery, Prince George's, and Howard Counties, Maryland; Lexington-Fayette County, Kentucky; Palm Beach and Sarasota Counties, Florida; Washoe (Reno) and Clark Counties (Las Vegas), Nevada; Pierce County (Tacoma), Washington; and over two hundred others. Freilich & Ragsdale, *supra* note 61; ROBERT H. FREILICH, A FIVE-TIERED GROWTH MANAGEMENT PROGRAM FOR SAN DIEGO, 2-7 to 2-11 (1976); Freilich & White, *supra* note 57; CALLIES, FREILICH & ROBERTS, *supra* note 1, at 586.

68. FREILICH, *supra* note 67.

69. See CALLIES, FREILICH & ROBERTS, *supra* note 1, at 204. The tiers within the limited growth category would be "Rural/Future Urbanizing," "Agricultural," and "Conservation/Open Space." Each of the tiers has specific geographical boundaries and is capable of being mapped. The Rural/Future Urbanizing area may be a permanent rural density development area or may be a temporary "holding" zone until the growth areas are built out; it generally contains lands that are presently unanswered and that have a lower population density. The Agriculture tier is intended to identify those lands that should be preserved either temporarily or permanently for agricultural production. The Conservation/Open Space tier consists of lands containing natural resources or environmentally sensitive areas.

The urbanizing tier consists of those areas that are undergoing active urbanization and are served by public facilities. The urbanizing tier is generally delineated based on a number of factors, which include the following:

1. The proximity to existing and planned transportation and transit corridors and corridor centers
2. The degree of contiguity to already developed areas available for infill
3. The recognition of planned public capital improvement projects currently served by sewer or logical capital improvement phasing
4. The development of mixed use commercial and neotraditional walkable residential centers

Management within this tier situates and directs growth, which is vital for incentivizing rehabilitation, infill, and revitalization efforts in already built-up suburban and urban areas. The urbanizing tier is the place at which planners and developers can control growth to contain sprawl and save agricultural land.

Beginning in the early 1990s, three supporting and complementary systems to the smart growth tier system—new urbanism, green development, and renewable energy—have emerged.<sup>70</sup> As indicated above, the four systems are denominated under the umbrella of sustainability. New urbanism encourages traditional neighborhood and transit-oriented development, including conservation subdivisions in rural tiers, new suburban walkable town centers, transit-oriented corridors, and city center town squares designed to preserve open space, reduce vehicle trip lengths and greenhouse gas emissions, interconnect neighborhoods to reduce congestion, and avoid interference with environmental habitats.<sup>71</sup> Within the tiers, these techniques translate into the living reality of mixed use, walkable communities and quality-of-life neighborhoods. At the same time, green development has reinforced both the environmental design of buildings and the required relocation of such buildings toward achieving renewable energy systems, adequate public facilities, transit, and existing built-up neighborhoods.<sup>72</sup>

Moreover, new urbanism pays, while also controlling urban sprawl and reducing our impact on global climate change. Research shows that certain attractive elements of new urbanism—better interconnectivity of streets in lieu of cul-de-sacs, smaller blocks providing closer proximity to light rail, new traditional design including porches and rear garages, and pedestrian accessibility to shops and other commercial users—

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70. FREILICH, WHITE & MURRAY, *supra* note 35, at 11, 13.

71. Doris S. Goldstein, *New Urbanism—Planning and Structure of the Traditional Neighborhood*, PROB. & PROP., Dec. 2003; CALLIES, FREILICH & ROBERTS, *supra* note 1, at 728.

72. FREILICH, WHITE & MURRAY, *supra* note 35, at 13.

have created a class of buyers willing to pay more to live in a new urban community.<sup>73</sup> Suburbanites are moving in increasing numbers to walkable new communities close to their employment to save on rapidly escalating gasoline prices, which reflect oil prices that have fluctuated between \$70 and \$103 per barrel from 2008 to 2010.<sup>74</sup>

A number of factors determine whether a project falls under the sustainability umbrella. In a report written for the National Governors Association, Joel Hirschhorn and Paul Souza ask these questions, among others, as to how we judge whether a project is sprawl or smart, new urban sustainable growth:<sup>75</sup>

1. Is it located in an already developed area?
2. Is there a mix of housing, office space, schools, retail shopping, outdoor recreation, and civic open space?
3. Does the housing include multiple types, from single-family detached to multi-family condos, and does it have a range of prices from luxury to affordable?
4. Does the project convert prime agricultural land or environmentally sensitive land, or does its density consume less agricultural and environmental land than the average sprawl development?
5. Does the project use renewable energy and efficient and green building methods?
6. Is there access to public transit?
7. Does the design and layout of buildings and streets promote real neighborhood interaction and compatible style?
8. Has the local government adopted zoning codes that give as much support for mixed use communities as it does for segregated single use Euclidean zoning?<sup>76</sup>

Today communities that use the techniques of sustainability will reap the benefits of growth and development, such as jobs, tax revenues, and other amenities, while lessening the disasters of growth, such as degradation of the environment, escalation of local taxes, global warming, and worsening traffic congestion. While there is no special formula for sustainability, there are common features in each community that has adopted it. Wherever it occurs, sustainable smart growth (1) enhances a sense of community; (2) protects investment in existing neighborhoods; (3) provides a greater

73. See NATIONAL CENTER FOR SMART GROWTH RESEARCH AND EDUCATION, UNIVERSITY OF MARYLAND, *NEW URBANISM AND HOUSE VALUES* (2003).

74. WALL ST. J., Mar. 2, 2008, at A1, A9.

75. JOEL HIRSCHHORN & PAUL SOUZA, NATIONAL GOVERNORS ASSOCIATION, *NEW COMMUNITY DESIGN TO THE RESCUE: FULFILLING ANOTHER AMERICAN DREAM* (2001).

76. A recent case, *Albuquerque Commons Partnership v. City of Albuquerque*, 184 P.3d 411 (N.M. 2008) (finding a change to high-density mixed use zoning constituted a denial of procedural due process to the owner of the tract), highlights the difficulty of, and need for, implementing new urbanist codes in replacing Euclidean zoning.



certainty in the development process; (4) protects environmental quality; (5) rewards developers with profitable products, financing, and flexibility; (6) decreases congestion by providing alternative modes of transportation; and (7) makes efficient use of public money.<sup>77</sup>

Sustainability efforts have taken place on national, state, regional, and local levels. In 1997, the Smart Growth Network was created by the U.S. Environmental Protection Agency to allow local government officials across the nation to share growth strategies and exchange information on the latest and best trends in sustainable development. In 2002, the American Planning Association produced the Growing Smart Legislative Guidebook, which offers statutory models for comprehensive planning and neighborhood planning.<sup>78</sup> Voters generally respond positively to smart growth programs. In recent years, voters have approved plans to preserve historical sites, parks, farmland, and open space and approved an estimated \$7 billion for conservation, urban revitalization, and smart growth initiatives.<sup>79</sup> Alabama, Arizona, Florida, Georgia, Michigan, Minnesota, Nevada, New Jersey, Oregon, Rhode Island, and Wisconsin are some of the states that have passed smart growth plans since 1998.<sup>80</sup>

Today's states, regions, counties, and cities have begun to take up the quest of halting sprawl. *Ramapo's* 1972 path of ingenuity has evolved into today's smart growth, new urbanism, green development, and renewable energy systems. New anti-sprawl mechanisms culminating from the state level have seeped upward into federal government programs and downward into local governmental bodies. This book will explore this exciting venture from sprawl to sustainability.

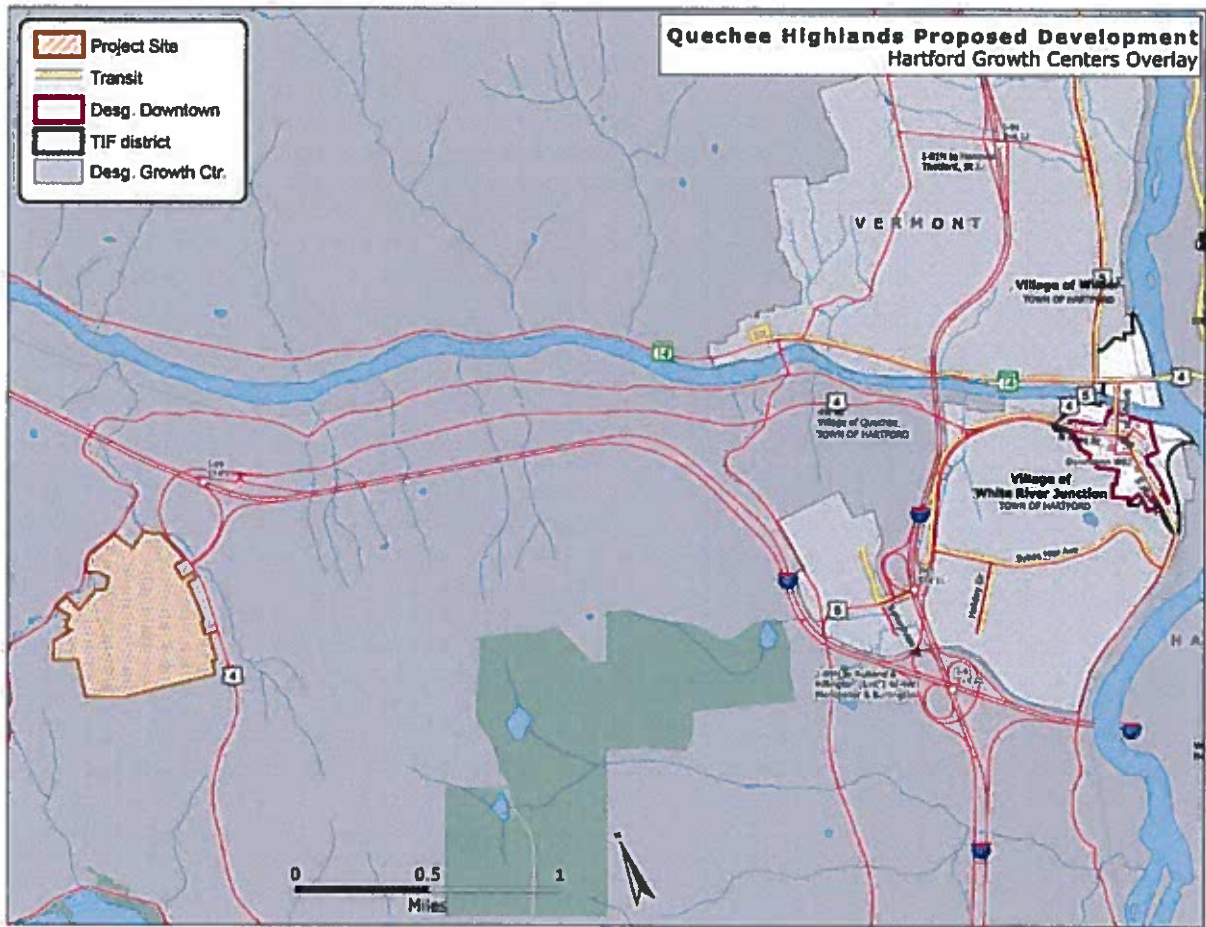
77. Robert H. Freilich, *Smart Growth: Why Local Governments Are Taking a New Approach to Managing Growth in Their Communities*, PUB. MGMT., May 1998, at 5.

78. For more information about the network, see <http://www.smartgrowth.org>.

79. See Daniel Curtin, *Battling Sprawl in Northern California: Initiatives, Referenda, Interim Development Ordinances, Adequate Public Facilities and Population Controls*, in PROCEEDINGS OF THE INSTITUTE OF PLANNING, ZONING, AND EMINENT DOMAIN (2000).

80. Richard Moe, *Fed Up with Sprawl*, N.Y. TIMES, Nov. 12, 1998, at A24; see Francesca Ortiz, *Smart Growth and Innovative Design: An Analysis of the New Community*, 24 ENVTL. L. REP. 10003 (2004).

## Attachment B: Hartford Growth Centers Overlay, Two Rivers-Ottawaquechee Regional Commission



Source: Two Rivers-Ottawaquechee Regional Commission