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SYMPOSIUM 1999

LAND USE IN THE 21ST CENTURY: THE NEXT FRONTIER FOR ENVIRONMENTAL LAW

On January 11, 1999, Vice President Al Gore proposed a bold new federal initiative to curb sprawl and build “more livable communities.”¹ Aimed specifically at the suburbs, where fifty percent of the nation’s population now reside,² the Clinton-Gore Livability Agenda for the 21st Century includes more than \$10 billion in incentive programs for localities to preserve green space, ease traffic congestion, and pursue regional growth management strategies.³ Specifically, the administration is proposing \$700 million in new tax credits for state and local bonds to preserve open space and redevelop abandoned brownfields, \$6.1 billion in grants for public transportation programs, and \$1.6 billion for state and local efforts to reduce air pollution and traffic congestion.⁴

The Livability Agenda is but the latest recognition that sprawl has become an important national issue. Spurred on by federal subsidies, development has transformed the American landscape. Metropolitan areas across the country have expanded at rates far exceeding population growth.⁵ Fire and flood disasters increase as people infringe in ever-greater numbers on sensitive natural areas.⁶ Green spaces are fragmented. Runoff from roads, parking lots, lawns and farmland carry a toxic soup of pollution into the nation’s ground and surface water.⁷ As development surges out beyond the beltways, center cities suffer economic blight, and

¹ Al Gore, *Remarks As Prepared For Delivery By Vice President Al Gore: Livability Announcement* (last modified Jan. 12, 1999) <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/1/12/6.text.1>>.

² See Alison Mitchell, *Two Parties Prepare for Biggest Battle Yet in Fight for Suburbs*, N.Y. TIMES, May 4, 1999, at A1.

³ See Gore, *supra* note 1.

⁴ See *id.*

⁵ See LAND USE IN AMERICA 85-94 (Henry L. Diamond & Patrick F. Noonan eds., 1996); Kenneth T. Jackson, *America’s Rush to Suburbia*, N.Y. TIMES, June 9, 1996, at E15.

⁶ See LAND USE IN AMERICA, *supra* note 5, at 3.

⁷ See *id.* at 2-3; William K. Reilly, *Across the Barricades*, in LAND USE IN AMERICA, *supra* note 5, at 187, 195-96.

society is further segmented along race and class lines.⁸ Productivity lost to time spent stuck in traffic is measured in millions of dollars.⁹ Aldo Leopold perhaps put it best: “[t]hat land yields a cultural harvest is a fact long known but latterly forgotten.”¹⁰

Increasingly, America is at odds with itself over how to satisfy the public’s competing demands for jobs, housing, economic development, transportation, environmental quality, farmland, open space, wildlife, and recreation.¹¹ Growth fuels prosperity, but less apparent are its attendant social, economic and environmental costs. As Diamond and Noonan cogently note, “[i]n the face of these and other problems, America’s land is not yielding the full measure of benefits that people desire.”¹²

The rise of sprawl as a political issue suggests Americans are growing dissatisfied with the pace and quality of development in their communities. Rooted in that discontent, smart growth initiatives are a natural response to unfettered development, a clarion call for a new sensitivity to place and design. Growth may be inevitable, but smart growth initiatives insist that the ugliness and degradation that often accompany development are not.

Nine states have enacted state-wide growth management plans, and many more localities have enacted plans to curb sprawl and promote smarter growth.¹³ In 1998 alone, nearly 200 state and local governments approved ballot initiatives related to controlling suburban development.¹⁴

⁸ See LAND USE IN AMERICA, *supra* note 5, at 1; J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2286 (1997) (book review). For more detailed discussions of how land use impacts racial issues, see CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES (1996) and DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

⁹ See Jason Rylander, *The Crawl of Sprawl: The Northeast’s Biggest Environmental Problem*, AMC OUTDOORS, Oct. 1997, at 16.

¹⁰ ALDO LEOPOLD, *Foreword* to A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE ix (1987).

¹¹ See John Turner & Jason Rylander, *Land Use: The Forgotten Agenda*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 60, 61 (Marion R. Chertow & Daniel C. Esty eds., 1997).

¹² LAND USE IN AMERICA, *supra* note 5, at 3.

¹³ See *id.* at 25-42. As of 1995, statewide growth management plans were enacted in Florida, Georgia, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont and Washington. Other states have enacted programs to protect specific regions like Cape Cod, Massachusetts, the Lake Tahoe Basin of California and Nevada, and the Adirondacks of New York. See *id.* See also Matthew W. Ward et al., *National Incentives for Smart Growth Communities*, NAT. RESOURCES & ENV’T, Summer 1998, at 325 (discussing the rise of smart growth initiatives nationally).

¹⁴ See *Sprawl Brawl*, REASON ONLINE (last modified Apr. 8, 1999) <<http://www.reasonmag.com/bisprawl.html>>.

What, then, should be the federal role in growth management? How can economic development, property rights, environmental protection and quality of life be reconciled? What tools are available to policymakers to impact these issues? How much say should people have in designing their communities?

Taking a cue from the proliferation of state and local legislation, numerous books, pamphlets, and campaign speeches across the country on the problems of sprawl, the *William & Mary Environmental Law and Policy Review* sought out leading figures in growth management who could shed some light on these questions. Together with the Environmental Law Institute and the Southern Environmental Law Center, we hosted a symposium, on April 9, 1999, consisting of three panels aimed at exploring the history and future of land use and growth management in the United States. *Growth Management in the 21st Century: The Next Frontier for Environmental Law* brought together land use lawyers, academicians, students, and policymakers to focus on a movement that combines law, the environment, and individual rights in a way few topics can.

The first panel, which consisted of Douglas Porter of the Growth Management Institute, Professor Leonard Shabman of Virginia Polytechnic Institute, and moderator Susan Casey-Lefkowitz of the Environmental Law Institute, explored America's land settlement patterns and the environmental, social and economic implications of growth, development and transportation choices. The second panel, which featured Dwight Merriam of Robinson & Cole, LLP, Professor Peter Byrne of Georgetown University Law Center and moderator Lynda Butler of the College of William & Mary School of Law, analyzed land ethics and legal paradigms that govern attitudes toward property and property rights. Panel three was moderated by Professor Ronald Rosenberg of the College of William & Mary School of Law and featured Professor Daniel Mandelker of Washington University School of Law and Edward Thompson, Jr. of the American Farmland Trust. The speakers focused on the future of growth management, discussing emerging approaches to the topic and evaluating them in terms of sustainability, economic growth, governmental involvement and consumer choices.

This issue of the *Review* completes and commemorates the symposium, bringing together the insights of four of our speakers and Professor Eric Freyfogle of the University of Illinois College of Law.¹⁵ We are confident that the opinions expressed and the research provided

¹⁵ Professor Freyfogle was unable to attend the symposium, but his paper was presented as part of the second panel.

will significantly contribute to future analysis of this timely and critical topic.

Porter argues that growth management in the twenty-first century should focus on developing regional and multi-jurisdictional growth plans and the corresponding regional institutions to implement such plans.¹⁶ Examining the history of urban and community planning in America, he explains how government policies at all levels traditionally encourage sprawl.¹⁷ The rising interest in growth management, he argues, compels public initiative.¹⁸ Government has an important role to play, but more collaborative approaches, legally and institutionally, are needed to address the issue properly.

Shabman and Fina apply economists' perspectives to the sprawl issue.¹⁹ Contrary to most authors in this issue, they argue that the litany of "problems" associated with sprawl can be viewed in a more favorable light.²⁰ In contrast with higher density development, sprawl may actually minimize the time that households spend in travel, engender a sense of security, satisfy family preferences for housing, and provide needed economic growth.²¹

No debate over land use control would be complete without a discussion of property rights and the concept of regulatory takings, and Professor Freyfogle takes a fresh look at the evolution of the legal theories that influence land use law.²² Private property is a "central institution in American culture" that undergirds both the nation's identity and its economic prowess.²³ He argues, however, that conceptions of property must reflect modern times; landowners inevitably belong to multiple communities, and their actions may implicate local, regional, national, and even global concerns.²⁴ Solutions that reconcile biodiversity conservation and economic development, thus, must be achieved within a paradigm that recognizes the place of rights in society.²⁵ In thinking about private

¹⁶ See generally Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 705 (1999).

¹⁷ See *id.* at 712.

¹⁸ See *id.*

¹⁹ See generally Mark Fina & Leonard Shabman, *Some Unconventional Thoughts on Sprawl*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 739 (1999).

²⁰ See *id.* at 742.

²¹ See *id.* at 767-75.

²² See generally Eric Freyfogle, *Eight Principles for Property Rights in the Anti-Sprawl Age*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 777 (1999).

²³ See *id.* at 784.

²⁴ See *id.* at 785.

²⁵ See *id.* at 787-88.

property, takings, and the common good, Freyfogle argues for more “narratives that show how a new, more ecologically sensitive understanding of private property can fit together with America’s understanding of itself and its history.”²⁶

Such narratives of innovative thinking in growth management abound, and in these pages Professor Mandelker explores how the cities of San Diego, California, and Portland, Oregon, have incorporated space management principles into their efforts to control development.²⁷ In analyzing the relative merits of each system, Mandelker explains how more attention must be paid within a growth program to designating where growth cannot occur and where it can be encouraged.²⁸ Urban growth boundaries and similar attempts to manage space, he argues, depend on the effectiveness of subordinate management programs to achieve a balance of growth and restriction.²⁹ Increased attention to how such plans function on the ground is critical to their success and replication.³⁰

Edward Thompson provides another example.³¹ His analysis of “hybrid” farmland protection methods shows how property rights and ecological sensitivity can meld to protect a landscape and a way of life.³² Just as Freyfogle argues for a new conception of property, Thompson proposes a new understanding of “just compensation.”³³ To succeed in this politically charged arena, he argues, land use regulations must be flexible and reasonable.³⁴ Montgomery County, Maryland’s growth management scheme achieves this by combining zoning, transferable development rights, and municipal purchase of development rights into one program. This mixture of “carrots” and “sticks,” he argues, avoids regulatory takings by providing innovative forms of compensation to landowners while conserving open space and controlling development.³⁵

²⁶ *Id.* at 799.

²⁷ See generally Daniel Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 801 (1999).

²⁸ See *id.* at 820.

²⁹ See *id.* at 826.

³⁰ See *id.* at 828-29.

³¹ See generally Edward Thompson, Jr., “Hybrid” Farmland Protection Programs: A New Paradigm for Growth Management, 23 WM. & MARY ENVTL. L. & POL’Y REV. 831 (1999).

³² See generally *id.*

³³ See *id.* at 832.

³⁴ See *id.* at 842-43.

³⁵ See *id.* at 835-50.

Growth management is the next frontier of environmental law. The past twenty-five years have seen significant achievements in curbing air and water pollution, protecting biodiversity, and cleaning up hazardous wastes, but the prohibitive policies that drove those successes offer diminishing returns.³⁶ Future environmental progress depends on stemming the environmental costs of poor land use policies.³⁷ The next challenge in water quality, non-point source pollution, is rooted in land use. Air pollution control increasingly depends on reducing traffic congestion and vehicle miles traveled—another consequence of sprawl. Protecting parks and open space likewise depends on reducing land fragmentation caused by sprawl.

The movement toward smarter growth that is advocated in most of these articles stems from a century's experience and advancement in ecological understanding. It marks recognition of the interdependence of economic and ecological systems. At its essence, smart growth is "development intended to serve economy, environment, and community."³⁸ For much of this century the nation served development; in the twenty-first century, our commentators argue, development must be made to serve the nation.

Forging comprehensive, effective, and community-sensitive land use policies will not be easy, but many tools and models now exist to guide their development. Much can be learned, however, from the efforts of states and counties across the nation that are turning to growth management techniques to preserve their economies and quality of life. By bringing together scholars and practitioners with diverse perspectives, this symposium was designed to serve as a vehicle for debate and action on this critical issue. Those who attended the panels or are reading the fruits of our efforts here for the first time are encouraged to continue this important work. The ideas expressed here offer but a few approaches on which to build comprehensive regionally-sensitive programs that make the best use of land—America's most important resource.

JASON RYLANDER & ERIKA KROETCH,
1999 SYMPOSIUM EDITORS

³⁶ See Turner & Rylander, *supra* note 11, at 61.

³⁷ See *id.*

³⁸ Ward et al., *supra* note 13, at 326.