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Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management

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NOTES

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I. INTRODUCTION

"Sprawl is America's most lethal disease."[1] Although such a statement appears exaggerated upon first consideration, both the scope of urban sprawl and its attendant consequences support the suggestion that sprawl threatens the vitality of the United States. For example, in California, sprawl has reached such a dangerous level that one of the nation's largest banks publicly warned of the potential devastation: "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 now threatens to inhibit growth and degrade the quality of our life."[2] The costs California faces—including damage to the environment, depletion of fiscal resources, and deterioration of inner cities—are not unique but rather similarly jeopardize the future of states throughout the nation.

Sprawl, defined as "the process in [sic] which the spread of development across the landscape far outpaces population growth,"[3] is generally identified by an "I-know-it-when-I-see it" approach.[4] As a result, it is helpful to consider what sprawl is *not* in order to understand what sprawl is. Specifically, sprawl is not the traditional American neighborhood, best characterized by mixed-use communities

1. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS, at xvii (1999).

2. *Id.* at xvii–xviii (quoting BANK OF AM., BEYOND SPRAWL: NEW PATTERNS OF GROWTH TO FIT THE NEW CALIFORNIA (1995)).

3. Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 396 (2004) (citing REID EWING ET AL., SMART GROWTH AMERICA, MEASURING SPRAWL AND ITS IMPACTS 3 (2002)).

4. Gregory V. Jolivette, Jr., Kelo v. City of New London*: A Reduction of Property Rights but a Tool to Combat Urban Sprawl*, 55 CLEV. ST. L. REV. 103, 105–06 (2007) (citing Timothy J. Dowling, *Point/Counterpoint: Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000)).

in which residents can walk to satisfy their daily needs.[5] Rather, sprawl consists of developments that rapidly consume available land beyond the outermost boundaries of established cities—developments in which citizens cannot walk to work or to the grocery store but are required to drive almost everywhere.[6] Such developments typically evoke images of large housing subdivisions and freestanding cookie-cutter homes, strip malls, big box stores such as Target or Walmart, parking lots, and six-lane highways. Sprawl effectively has five distinct components, none of which overlaps with any other: housing subdivisions, shopping centers, office parks, civic institutions, and roadways.[7] Ultimately, sprawl's characteristic leapfrog growth pattern almost always results in low-density, single-use developments on the fringes of established cities.[8]

Sprawl affects metropolitan areas throughout the United States, characterizing the growth of cities from Atlanta all the way to Phoenix.[9] Even Montana, known for its wide open spaces, has not escaped the effects of sprawling metropolitan areas.[10] Over the past sixty years, states have witnessed a migration away from cities as Americans have relocated to suburban communities. Fifteen percent of the U.S. population lived in the suburbs in 1940, but by 2000 that number had increased to sixty percent.[11] While fifty-five million Americans resided in suburbs in 1950, 141 million resided in suburbs in 2000.[12] Most alarmingly, this trend has accelerated in recent years as illustrated by the 17.7 percent increase in suburban population in the 1990s, compared with eight percent growth in central cities during that same time period.[13]

As the source of most zoning and land use regulation, local governments have been criticized for the proliferation of sprawl. In 1926, the U.S. Department of Commerce issued the Standard State Zoning Enabling Act ("SZEA"), which provides a common statutory

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5. ANDRES DUANY ET AL., SUBURBAN NATION 4 (2000).

6. *Id.*

7. *Id.* at 5–7.

8. Lamer, *supra* note 3, at 396.

9. Patrik Jonsson, *Americans Adapt Creatively to Long Commutes*, CHRISTIAN SCI. MONITOR (Boston), Sept. 19, 2007, at 1.

10. FREILICH, *supra* note 1, at xvii.

11. ROBERT W. BURCHELL ET AL., SPRAWL COSTS: ECONOMIC IMPACTS OF UNCHECKED DEVELOPMENT 16 (2005).

12. RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 185 (rev. ed. 2004).

13. URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 6 (Gregory D. Squires ed., 2002).

basis for zoning.[14] Most states have based their own zoning legislation upon the SZEA, under which state governments delegate their police power to local governments.[15] Local governments then enact zoning regulations "for the purpose of promoting health, safety, morals, or the general welfare of the community," ostensibly "in accordance with a comprehensive plan."[16] Traditionally, local governments subscribed to the theory that the intermingling of land uses would affect the health and safety of citizens negatively.[17] Thus, most local regulations required the strict segregation of residential, commercial, industrial, and agricultural land uses.[18] Such exclusive zoning by district and the separation of land uses within the city led to the development patterns characteristic of sprawl.[19] By essentially outlawing the construction of mixed-use developments, most local zoning ordinances eliminated the traditional neighborhood, the atypical examples of which today include the communities of Charleston and Nantucket.[20] Whether local governments purposefully meant to or not, "[t]he classic American main street . . . is now illegal in most municipalities."[21]

As sprawl has spread to every region of the country, unhappy citizens have begun to notice sprawl's increasingly apparent negative effects. Environmentalists focus especially on the unsustainable consumption of rural land and open space, as well as the destruction of wetlands and wildlife habitats, necessary to make room for more development.[22] To the typical American, however, the most visible consequence of sprawl is the congestion on America's roadways. Since 2000, the average American's commute from home to work has increased at the rate of a minute a year, reaching thirty-eight minutes in 2007.[23] In 2006 alone, Atlanta, with its notorious traffic problems and ever-expanding suburbs, witnessed an increase of 6,684 commuters who travel three or more hours roundtrip to work each

14. DANIEL R. MANDELKER, LAND USE LAW § 4.15 (5th ed. 2003). For a more thorough discussion of the SZEA, see *infra* Part II.C.1.

15. MANDELKER, *supra* note 14, § 4.15.

16. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS §§ 1, 3 (proposed 1926) [hereinafter STANDARD STATE ZONING ENABLING ACT].

17. Lamer, *supra* note 3, at 395.

18. *Id.* at 392.

19. *Id.* at 395.

20. DUANY ET AL., *supra* note 5, at xi.

21. *Id.*

22. Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado, as a Case Study*, 37 URB. LAW. 299, 301–02 (2005).

23. Jonsson, *supra* note 9, at 1.

day.[24] This additional time spent in the car directly corresponds to both an increase in smog and traffic fatalities.[25]

Sprawl also greatly impacts local economies. Local governments often struggle to provide municipal services—such as water and sewer lines, fire and police protection, libraries, schools, and recreational facilities—to sprawling developments that extend beyond the fringes of metropolitan areas.[26] Less intuitively, sprawl also contributes to the decline and deterioration of inner cities. Often, the wealthiest members of society move to the fringes of metropolitan areas, leaving the poorer citizens behind.[27] Jobs often follow the wealthy, and "crime, drugs, and danger" replace the void created in downtown areas.[28] As a result, inner cities collect less tax revenue, necessitating budget cuts for important programs and making those inner cities even less desirable.[29]

Given these and other serious consequences of sprawl, current zoning laws and land use regulations must be reformed to discourage future sprawl and to combat its current effects. This Note argues that traditional zoning laws, which delegate to local governments the power to enact zoning ordinances in accordance with a comprehensive plan, inadvertently lead to sprawl and its attendant consequences. As a result, this Note suggests that, to combat sprawl effectively, state authorities must reclaim some control over land use decisions from local governments. Local governments alone cannot sufficiently address the problem because of their narrow territorial reach and their typical unwillingness to consider the general welfare of the larger metropolitan area. Rather, state governments must take back some of the power that the SZEA delegates to local governments and prescribe statewide, mandatory goals or plans for localities to incorporate into their own local plans. Such an approach will obligate local governments to take into account regional and statewide considerations, such as sprawl, that they otherwise would not address on their own.

Part II of this Note discusses the history and constitutionality of zoning in the United States and addresses the role of comprehensive plans in guiding land use decisions. Part III explains that local governments alone are typically incapable of effectively

24. *Id.*

25. Lamer, *supra* note 3, at 400.

26. *Id.* at 399.

27. Jolivette, *supra* note 4, at 109.

28. *Id.* (citing Judith Haveman, *Gore Calls for 'Smart' Growth: Sprawl's Threat to Farmland Cited*, WASH. POST, Sept. 3, 1998, at A17).

29. *Id.* at 109–10.

combating sprawl due to their parochialism and lack of authority beyond their own borders. This Part additionally asserts that the combination of the developing tradition of local home rule authority, the inevitability of future population growth, and the political pressures exerted by those who have benefited from sprawl has contributed to state inaction in land use decisionmaking. Part IV examines the efforts of the two states most actively engaged in statewide reform: Oregon and Florida. Given the success of their statewide programs, both states serve as excellent models for other states seeking an increased role for state governments in zoning policy. Part V then proposes the creation of a state commission to review current land use policies and to devise solutions to problems of state concern. Additionally, this Part suggests that states amend their zoning and planning enabling acts to mandate that local governments adopt local plans that conform to state goals and that harmonize with the plans of neighboring communities.

II. THE RISE OF ZONING AND COMMUNITY PLANNING IN AMERICAN LAND USE LAW

A. The History of Zoning

The era of comprehensive planning in American land use law dates back to 1916, when New York City adopted the first comprehensive zoning scheme. Prior to 1916 and for most of the early years of this country's history, courts resolved land use disputes pursuant to the law of nuisance.[30] Because of the then-prevailing view that private property rights were paramount, landowners generally were left to do with their property whatever they wished so long as their activity did not injure another person's property.[31] Typical challenges to a landowner's use of his property arose when a commercial or industrial use invaded a residential neighborhood; the argument was that such uses were injurious to the already-established residential use.[32] Whether a particular use of land harms a plaintiff's property is necessarily a question of fact, and as a result, courts made each decision on a case-by-case basis without set rules on which to rely.[33]

30. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 1–3 (4th ed. 2004).

31. Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 231 (App. Div. 1932).

32. MANDELKER, *supra* note 14, § 1.04.

33. *Bove*, 258 N.Y.S. at 232.

By the early twentieth century, the inadequacies of relying on nuisance law to handle land use disputes began to surface. As the population grew and the development of land continued, after-the-fact determinations of whether a particular land use was appropriate for a particular location proved cumbersome.[34] Case-by-case determinations eliminated any semblance of predictability for landowners in the process of developing new parcels.[35] Landowners could not know whether the proposed use of their land qualified as a nuisance until a court labeled it as such, a fact that likely resulted in the development of nuisances that otherwise would have been avoided. Additionally, in practice, nuisance law reached only the most interruptive activities and did not deal with the increased importance placed on aesthetics.[36] As a result of these shortcomings, legislatures began to adopt zoning ordinances to regulate land use and to manage land use disputes.

In contrast to nuisance law, zoning is a proactive device; it allows local governments to prevent the creation of nuisances before they occur.[37] By enacting comprehensive zoning schemes, governments relieve the pressure on courts by eliminating the case-by-case determinations of appropriateness of land use.[38] Under a comprehensive zoning scheme, the local government divides the entire community into districts as illustrated on a zoning map.[39] The text of the accompanying zoning ordinance lists the use, density, and site development regulations applicable to each district.[40] Land located in a particular district must conform to the zoning requirements of that district.

The scheme designed by New York City in 1916 divided the entire city into residential, commercial, and industrial use districts while simultaneously mandating height and bulk restrictions on the buildings within those districts.[41] New York City officials claimed that the use, height, and bulk restrictions protected the citizens' health and safety and were justified by the city's police power.[42] Between 1916

34. CALLIES ET AL., *supra* note 30, at 13.

35. *Id.*

36. *Id.*

37. DONALD L. ELLIOTT, A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES 17 (2008).

38. *See id.* (describing how zoning expanded the use of a city's police power beyond the traditionally retroactive approach "by removing nuisances that were already threatening citizens' health and safety").

39. MANDELKER, *supra* note 14, § 1.04.

40. *Id.*

41. Lamer, *supra* note 3, at 393.

42. *Id.* For a more complete explanation of the reasons New York City adopted its comprehensive plan, see EDWARD M. BASSETT, ZONING 9–14 (1932).

and 1926, numerous state courts upheld the constitutionality of schemes similar to that implemented in New York.[43] However, some communities, concerned with the legitimacy of zoning under the authority of the police power, enacted their first zoning laws under the authority of eminent domain and the payment of just compensation instead.[44]

B. The Constitutionality of Zoning

In 1926, the U.S. Supreme Court addressed the constitutionality of zoning, upholding the comprehensive zoning plan of the village of Euclid, Ohio.[45] In *Euclid v. Ambler Realty Co.*, a property owner facially challenged a comprehensive zoning ordinance that divided the entire village into six use districts.[46] The property owner's land was categorized as "residential," and the property owner claimed that this categorization substantially reduced the land's value because it was best suited for industrial uses.[47] Holding that comprehensive zoning is constitutional so long as it has a substantial relationship to the health, safety, morals, or general welfare of the public, the Court stated that a zoning regulation must be arbitrary and unreasonable to be overturned—a tough standard for a property owner to meet.[48] In this case, the Court determined that the segregation of uses enhanced the community's health and safety by protecting citizens' home lives; by reducing traffic and congestion and enforcing street regulations; and by making it easier for the village to provide fire apparatuses.[49] Hence, the zoning scheme was a valid exercise of the police power.[50] However, the Court left open the possibility that a property owner could challenge a zoning ordinance as it specifically applied to his own land rather than the

43. *See, e.g.*, Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209, 210 (N.Y. 1920) (holding that an individual's use of property could be regulated as a proper exercise of the police power).

44. BASSETT, *supra* note 42, at 8. At the time, many lawyers were concerned that courts would ultimately construe zoning as unreasonable regulation amounting to a taking. The safe approach was to zone entire municipalities through the use of eminent domain, a process that would become very expensive and time-consuming. Thus, zoning plans would ultimately be viable only if effected through the police power.

45. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

46. *Id.* at 380.

47. *Id.* at 384–85.

48. *Id.* at 395.

49. *Id.* at 394.

50. *Id.* at 394–95.

comprehensive plan as a whole. In fact, the Court has upheld such challenges.[51]

Notably, the Court stated in *Euclid* that the village need not consider the effects of its ordinance on other surrounding villages and municipalities. It explained that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit."[52] However, the Court later qualified this sweeping assertion: "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[53] The Court thus intimated that although local governments generally can consider local interests to the exclusion of interests beyond their borders, there conceivably could be circumstances in which issues of broader concern force local governments to plan and zone with regional or state interests in mind. Part V of this Note argues that sprawl is one of those issues of broader concern and that as a result, state governments should play a prominent role in the planning and zoning process.

C. The Authority for Local Land Use Regulations

1. The Standard State Zoning Enabling Act

The U.S. Department of Commerce issued the Standard State Zoning Enabling Act in 1926 to provide a common statutory basis for zoning by local governments. When designing New York City's comprehensive zoning scheme in 1916, the city's officials focused on the health and safety of the city's residents and thus relied on the authority of the police power to implement zoning ordinances. The police power, however, belongs to state governments, not to local officials. Thus, for local governments to make zoning decisions, state governments necessarily must delegate their police power.[54] The U.S. Department of Commerce drafted the SZEA as a model that state governments could use for such a delegation.

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51. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (holding that the zoning regulation as applied to the plaintiff's property did not bear a substantial relation to public health, safety, morals, or general welfare).

52. *Euclid*, 272 U.S. at 389.

53. *Id.* at 395.

54. *See* BASSETT, *supra* note 42, at 14–15 (asserting that local governments must obtain the power to zone from the state).

The SZEA authorizes local governments to divide their communities into zoning districts in which only compatible uses were allowed:[55]

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes.[56]

This language gives local governments the authority to zone, subject to a major restriction: their ordinances are required to be "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community."[57] The local zoning ordinance must serve a legitimate purpose, such as lessening traffic congestion; ensuring safety from fire and other dangers; promoting the health and general welfare of the community; providing adequate light and air; preventing the overcrowding of land and the undue concentration of population; or facilitating the adequate provision of transportation, water, sewage, schools, and parks.[58] Thus, the SZEA delegates to local governments the state's police power in accordance with which those local governments could enact zoning regulations.

The SZEA additionally authorizes the creation of a local zoning commission, the members of which are to be appointed by the local legislative body. Pursuant to the SZEA, the zoning commission makes zoning recommendations before the adoption of any zoning regulations by the local governments.[59] A separate zoning board of adjustment makes special exceptions to any enacted land use laws.[60]

By 1926, when the Department of Commerce issued its final draft of the SZEA, forty-three states had adopted the Act.[61] Despite the near universal adoption of the SZEA, the actual extent of the authority exercised by municipalities varied from state to state, depending on whether a particular state continued to function under Dillon's Rule, or whether the state's constitution authorized a municipal "home rule." Traditionally, under Dillon's Rule,[62] local

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55. MANDELKER, *supra* note 14, § 4.15.

56. STANDARD STATE ZONING ENABLING ACT, *supra* note 16, § 1.

57. *Id.*

58. *Id.* § 3.

59. 9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53A.01[1] (Eric Damian Kelly ed., 2007).

60. *Id.*

61. CALLIES ET AL., *supra* note 30, at 33.

62. Dillon's Rule derived its name from John Forrest Dillon, former Chief Justice of the Iowa Supreme Court. In the 1868 case *City of Clinton v. Cedar Rapids & Missouri Railroad Co.*,

governments possessed only the powers delegated to them expressly or by necessary implication.[63] In the context of land use policy, governments subject to Dillon's Rule could regulate only the substantive issues specifically listed in their state's version of the SZEA, and they were required to use the exact administrative structure and process provided in the SZEA.

Over time, however, the principles behind Dillon's Rule were relaxed, and under constitutional home rule authority, "local governments may exercise all powers the state legislature is capable of delegating to them even though the legislature has not delegated the power."[64] Thus, in the area of land use, home rule allows local governments to regulate beyond what is expressly listed in the SZEA, including, for example, aesthetic controls.[65] Although at least one scholar has suggested that Dillon's Rule continues to govern most state-local relations,[66] a majority of state constitutions provide for municipal home rule,[67] and most state courts have held that land use regulation is included in the home rule grant.[68] As a result, most local governments possess expansive authority to make broad land use regulations, and so long as those regulations further some component of the police power, courts will uphold them. Under the current land use regulatory system, local governments are extremely powerful.

2. The Role of the "Comprehensive Plan": The Standard City Planning Enabling Act

The SZEA also requires local land use regulations to be "in accordance with a comprehensive plan."[69] A comprehensive plan protects land owners from arbitrary zoning decisions, facilitates consistency in the promulgation and enforcement of land use laws, and gives landowners the ability to predict and rely on particular

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Justice Dillon articulated America's legal doctrine on local governments, referring to them as "mere *tenants at will* of the legislature" and stating that "[a]s [the legislature] creates, so it may destroy." 24 Iowa 455, 475 (1868).

63. CALLIES ET AL., *supra* note 30, at 200.

64. MANDELKER, *supra* note 14, § 4.24.

65. *Id.*

66. *See* Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again?*, 21 J.L. & POL. 397, 404–05 (2005) ("Notwithstanding intermittent scholarly work and occasional judicial opinions praising decentralization and local autonomy, the overarching background principle of state-local relations remains the late-nineteenth century Dillon's rule.").

67. MANDELKER, *supra* note 14, § 4.24.

68. *Id.* § 4.25.

69. STANDARD STATE ZONING ENABLING ACT, *supra* note 16, § 3, at 6.

zoning regulations.[70] Additionally, local governments engage in a rational, deliberate, and thoughtful process when they create a comprehensive plan, thereby ensuring that a proposed regulation is not merely a knee-jerk reaction to a land use problem.[71]

Despite the SZEA's explicit requirement that local governments zone in accordance with a comprehensive plan, the Act failed to define "comprehensive plan" or to state how local governments should develop such a plan.[72] In their early interpretations of the SZEA, many courts suggested that the precise nature of a comprehensive plan was unclear.[73] Rather than require a separate document detailing a locality's plan for development, a majority of courts looked to other evidence to determine whether particular zoning regulations conformed to a comprehensive plan.[74] For example, New York state courts examined "all relevant evidence," which might include developmental policies issued by the locality, the zoning map, or all the zoning ordinances considered as a whole.[75] So long as a zoning change conformed to the municipality's basic land use policies, the courts would uphold such a change as in accordance with a comprehensive plan.[76] Even in states where comprehensive plans were adopted, courts often deemed such plans "non-binding guides."[77] Only a minority of state courts required consistency with a separately adopted land use plan.[78]

Most courts likely disregarded the SZEA's requirement that zoning be done in accordance with a comprehensive plan because the U.S. Department of Commerce did not publish the Standard City Planning Enabling Act (the "Standard Planning Act") until 1928—two

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70. *See, e.g.*, Udell v. Haas, 235 N.E.2d 897, 900–01 (N.Y. 1968) (describing the rationales behind the statutory requirement for a comprehensive plan).

71. *See, e.g., id.* at 901:

> Where a community, after a careful and deliberate review of "the present and reasonably foreseeable needs of the community," adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served.

(internal citations omitted).

72. CALLIES ET AL., *supra* note 30, at 36.

73. *Udell*, 235 N.E.2d at 902 ("Exactly what constitutes a 'comprehensive plan' has never been made clear.").

74. *See* MANDELKER, *supra* note 14, § 3.14 (describing the majority view of courts not requiring a comprehensive plan per se, but instead applying consistency, reasonable relationship to police powers, or other more diffuse requirements in examining planning and zoning regulations).

75. *Udell*, 235 N.E. 2d at 902.

76. MANDELKER, *supra* note 14, § 3.14.

77. CALLIES ET AL., *supra* note 30, at 463.

78. MANDELKER, *supra* note 14, § 3.15.

years after it published the SZEA.[79] As a result, many courts failed to integrate the two Acts.[80] Local governments also failed to see the connection and often interpreted the Acts as giving them the authority to zone, to plan, to do both, or to do neither—whichever they preferred.[81] Perhaps unsurprisingly, by 1930 only ten states had adopted legislation based on the Standard Planning Act, far fewer than the number that had enacted legislation based on the SZEA.[82]

The Standard Planning Act grants local legislatures the authority to plan the development of their communities, addressing in particular "master plans," street plans, and controls for the subdivision of land.[83] However, the Standard Planning Act is entirely process-oriented and gives local governments the discretion to develop substantive planning policies.[84] Most importantly, the Standard Planning Act makes planning optional rather than mandatory for local governments.[85] As a result, the SZEA and the Standard Planning Act are seemingly inconsistent: while the SZEA requires that zoning be done in accordance with a comprehensive plan, the Standard Planning Act does not impose a mandatory obligation on local governments to adopt a plan.

The decision by the U.S. Department of Commerce to make planning optional under the Standard Planning Act likely contributed to most state courts' reluctance to require consistency between zoning regulations and a separately adopted land use plan.[86] Additionally, by holding that a comprehensive plan need not be a separate document but instead can be determined by the current zoning ordinances and development policies of a community, courts eliminated any incentive for a local government to plan for the future. Instead, courts allowed local governments to use past zoning policies to justify current zoning decisions.[87] Because the courts did not require local governments to devise and pursue a comprehensive plan actively, no future planning occurred (or, at best, poor planning occurred), and sprawl and other

79. CALLIES ET AL., *supra* note 30, at 36.

80. MANDELKER, *supra* note 14, § 3.05.

81. ELLIOTT, *supra* note 37, at 16.

82. *Id.*

83. *Id.*

84. MANDELKER, *supra* note 14, § 3.05.

85. *Id.*

86. *Id.* The Standard Planning Act is entirely process-oriented and does not mandate any substantive planning policies. *Id.* The development of substantive planning policies is primarily left to the discretion of the local governments, but the Standard Planning Act does specify certain issues and elements that local governments must address in their comprehensive plans. *Id.*

87. *Id.* § 3.14.

undesirable development patterns resulted.[88] In the words of former Vice President Al Gore, "[p]lan badly, and you have what so many of us suffer from first-hand—gridlock [and] sprawl."[89]

Recently, however, courts have begun to recognize the consequences of zoning without a plan, and they have elevated the comprehensive plan to a more prominent position in land use law. Courts now construe a local government's plan as "law" and have assigned it constitutional status.[90] With this new respect for the importance of the plan, courts uphold only those zoning regulations deemed to be consistent with the particular locality's development plan.[91] Simultaneously, state legislatures have begun to require local governments to prepare a separate plan before enacting any zoning regulations.[92] For example, the California Code provides that "[e]ach planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning."[93] In Florida, local governments must adopt a plan that contains goals, policies, and measurable objectives to guide future land use decisions.[94] Each state has approached the reconciliation of planning and zoning in its own way, with approaches ranging from mandatory planning (under which each locality must have a plan), to mandatory consistency (mandating that the local governments must follow a plan if one exists), to mandatory implementation (whereby each local government must update all of its implementing tools to match a new plan), to no reconciliation at all.[95]

Given that only ten states had adopted the Standard Planning Act in 1930, new state statutes such as those in California and Florida illustrate the increasingly recognized importance of comprehensive plans. Although most states still have not adopted a requirement that localities follow a mandatory, comprehensive plan, one notable scholar has described such a trend as unavoidable: "The inevitable march

88. *See* CALLIES ET AL., *supra* note 30, at 679–81 (describing how courts' failure to recognize or require prospective planning of the timing and sequencing of growth significantly contributed to sprawl and haphazard growth patterns).

89. Michael Janofsky, *Gore Offers Plan to Control Suburban Sprawl*, N.Y. TIMES, Jan. 12, 1999, at A16.

90. CALLIES ET AL., *supra* note 30, at 464.

91. *Id.* at 463–64.

92. *Id.* at 463.

93. CAL. GOV'T CODE § 65300 (West 1977).

94. FLA. STAT. § 163.3177(6)(a) (2000).

95. 9 ROHAN, *supra* note 59, § 53A.01[3].

toward a comprehensive plan as the legal equivalent of a constitution for future growth is gaining momentum. The focus . . . has switched from whether the plan will be given primacy to the implications of such primacy."[96] This new emphasis on comprehensive plans is the first step toward combating sprawl and ensuring that the problem does not become worse. By planning its future development, a locality can determine its ideal growth patterns and thus avoid the construction of random, haphazard developments that characterize sprawl. Such planning at the local level is a necessary element of any land use system designed to combat sprawl. This Note argues, however, that localities alone are unable to combat sprawl effectively and that states therefore should not require merely that local governments enact plans, but also that those plans—now essentially required for courts to uphold challenged zoning regulations—conform to state plans and goals, as well as the plans of neighboring communities.

III. THE DILEMMA: LOCAL INEFFECTIVENESS AND STATE INACTION

A. The Inability of Local Governments to Combat Sprawl Adequately

Traditionally, local governments have made land use decisions pursuant to the authority granted them by the SZEA, and states have chosen not to enter this area of predominantly local concern. Such a system makes intuitive sense as local officials likely have a better understanding of the types of regulations most suitable to a particular locality than do regional or state officials. State governments reasoned that each locality confronts different problems at different times and therefore delegated the authority to regulate land use to local governments.

This delegation of authority to local governments has become a fundamental cause of sprawl. Typically, individual communities enact zoning regulations to solve the narrow problems they face or to advance their particular goals without taking into consideration the effect such regulations may have on other communities or the metropolitan area as a whole.[97] Under the dictates of *Euclid*, so long as a regulation falls within the police power as exercised by the municipality, the regulation will stand regardless of its effect on the

96. Edward J. Sullivan, *The Plan as Law*, 24 URB. LAW. 881, 887 (1992).

97. Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 254 (2002).

region at large.[98] As a result, local municipalities, the smallest unit of U.S. political geography, can enact policies that cause substantial harm to an entire region freely and without hesitation.[99] For example, as localities have sought to decongest their urban areas by reducing population density and using zoning techniques that strictly segregate differing uses of land, they have simply pushed inevitable growth and development to other communities within the region or farther out into the countryside where similar regulations are not in effect.[100] When one community reduces its sprawl, another community sprawls even farther.

This inability and unwillingness of communities to consider the general welfare of the entire region in which they are located has led to today's undesirable sprawling pattern of development.[101] To please political constituencies, local governments aim to maximize the benefits to their citizens while simultaneously externalizing as much harm as possible onto neighboring communities.[102] This externalization problem is exacerbated in communities without comprehensive plans because local governments make ad hoc decisions every time a potential harm to their particular community arises. Additionally, metropolitan areas facing a pattern of sprawling development are often composed of dozens, if not hundreds, of municipal governments trying to satisfy the demands of their particular constituencies.[103] These large metropolises often lack an integrated development plan, so their governance is inevitably fragmented.[104] Without the intervention of a state government, individual municipalities are unlikely to engage in the communication necessary to prevent or to attack sprawl, a problem that affects the metropolis as a whole.

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98. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 396–97 (1926).

99. Briffault, *supra* note 97, at 266–67; *see also* PLATT, *supra* note 12, at 426 (describing local governments as the smallest unit of geography and providing examples of situations in which zoning without a centralized plan has left regions vulnerable to catastrophe). Although the *Euclid* Court indicated that in some circumstances a local government must consider the effect of its zoning regulations on the surrounding region as a whole, in most cases each local government has "powers of its own and authority to govern itself as it sees fit." *Euclid*, 272 U.S. at 389.

100. Myron Orfield, *Building Regional Coalitions Between Cities and Suburbs*, *in* GROWING SMARTER: ACHIEVING LIVABLE COMMUNITIES, ENVIRONMENTAL JUSTICE, AND REGIONAL EQUITY 323, 334 (Robert D. Bullard ed., 2007).

101. Briffault, *supra* note 97, at 269 (stating that sprawl results in part from conflicting self-interested actions by multiple localities in the same region).

102. Aoki, *supra* note 66, at 417.

103. Orfield, *supra* note 100, at 336.

104. BURCHELL ET AL., *supra* note 11, at 14.

Therefore, sprawl is often too big a challenge for a single local government.[105] While states have a broad territorial reach and can enact policies to guide the development of an entire metropolitan area, local governments only have the authority to manage growth within their limited territories and are unlikely to have the power to combat the problem of sprawl effectively on a regional scale.[106] Without a regional or statewide plan, the efforts of local governments acting alone will not contain sprawl successfully and may actually make the problem worse.[107]

B. States' Justifications for Refusing to Intervene in Land Use Decisionmaking

Given the unwillingness of most localities to devise a plan to combat regional sprawl and the ineffectiveness of those that have tried, one must wonder why more states have not asserted their authority and involved themselves more deeply in land use planning. In fact, some scholars have suggested that it is unlikely that many more states will attempt to do so.[108] The developing tradition of home rule authority for local governments, continued population growth, and political pressures (most notably, as discussed in more detail below, the public's infatuation with the perceived benefits of sprawl) all likely play a significant role in states' reluctance to impose statewide requirements on individual localities.

To regain a role in the land use decisionmaking process, state governments must confront a continuing trend toward home rule authority. In the past century, most states have enacted statutes or amended their constitutions to provide for home rule, which allows local governments to exercise powers beyond those expressly delegated to them by the state.[109] Thus, in recent years, local governments have enjoyed an increasing amount of power. Although some local governments have acquiesced to state intervention from the beginning, most are likely to resist any attempts to limit home rule authority.[110]

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105. Orfield, *supra* note 100, at 334.

106. ERIC DAMIAN KELLY, MANAGING COMMUNITY GROWTH 101 (1993).

107. Orfield, *supra* note 100, at 334.

108. KELLY, *supra* note 106, at 126.

109. MANDELKER, *supra* note 14, § 4.24.

110. John M. DeGrove, *The Emergence of State Planning and Growth Management Systems: An Overview*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING 3, 12 (Peter A. Buchsbaum & Larry J. Smith eds., 1993) [hereinafter STATE AND REGIONAL COMPREHENSIVE PLANNING].

Additionally, the inevitability of future population growth likely discourages states from devising plans to combat sprawl. An ever-increasing population necessarily forces metropolitan areas to accommodate more people and eventually requires an expansion of the metropolis's boundary.[111] In the 1990s, for example, ninety-three percent of the 335 metropolises in the United States experienced a population increase, and by 2000, seventy-eight percent of the nation's total population lived in these metropolitan areas.[112] In addition, an increase in incomes has corresponded to a demand for larger homes, and the reduced costs of transportation and communications technology have made living in lower-density neighborhoods less expensive.[113] This combination of more people with more money looking for larger homes contributes to the perception that outward, low-density growth is inevitable. Naturally, states have less incentive to expend limited resources to try to prevent inevitable problems and thus are less likely to combat sprawl.

Finally, despite all the negative consequences of sprawl outlined in Part I, the public generally likes sprawl. Since the early twentieth century, American culture has embodied the dream of suburban home ownership and a life away from the perceived corruption and filth of inner cities.[114] Beyond the city limits, members of the public can purchase affordable, "single-family homes on large lots, [located in] safe communities with good school systems."[115] These individuals are not deterred by three-hour commutes to and from work each day on increasingly congested roadways.[116] This style of living has become so popular that prime development land is increasingly located farther away from the urban core.[117]

Given the current public sentiment, it is hardly surprising that more states have not imposed statewide comprehensive plans designed to curb or eliminate sprawl. In fact, in an effort to appease public desires, even legislation on the federal level has served to promote the development of sprawl. For example, while federal mortgage interest income tax deductions encouraged home ownership, the federal interstate highway program subsidized the construction of

111. BURCHELL ET AL., *supra* note 11, at 146–47.

112. *Id.* at 147.

113. *Id.* at 146.

114. Edward J. Sullivan, *Comprehensive Planning and Smart Growth*, *in* TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING 177, 177 (Patricia E. Salkin ed., 2001).

115. BURCHELL ET AL., *supra* note 11, at 2.

116. Robert W. Burchell, *Issues, Actors, and Analyses in Statewide Comprehensive Planning*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 110, at 18, 21.

117. BURCHELL ET AL., *supra* note 11, at 2.

highways, including perimeter roads on the fringes of established cities that encourage longer commutes between work and home.[118] If states are going to fight sprawl, therefore, they must first overcome the political pressure they face.

Despite the disincentives states face in fighting sprawl and the perceived benefits of sprawl to the public, the destructive consequences of sprawl remain, and they must be addressed. The increase in traffic and congestion on the roadways has taken a disastrous toll on the environment, and local government treasuries have suffered because they have had to provide for the expansion of public facilities to the fringes of cities.[119] The farther development sprawls from the city center, the greater the deterioration of the inner cities.[120] In the long run, none of these trends is sustainable. As a result, both states and the public ultimately *should* want to combat sprawl, no matter the difficulties in doing so. The next Part of this Note discusses in detail the efforts that two states have made to intervene in local land use regulation and to ensure that sprawl and other concerns of a regional nature are addressed in the zoning process. Although in most states zoning remains primarily an issue of local authority, as far back as 1971, a few scholars recognized an optimistic trend:

> This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law. It is a quiet revolution, and its supporters include both conservatives and liberals. It is a disorganized revolution, with no central cadre of leaders, but it is a revolution nonetheless.
>
> The *ancien regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.
>
> The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.[121]

As more states gradually recognize the serious land use problems they face, they are likely to realize that a zoning system in which every decision is left to the thousands of individual local governments is unsustainable. These states can then seek guidance from the examples set by states that already have intervened in land

118. *Id.* at 15–16.

119. *See supra* notes 2, 7–8, 22–25 and accompanying text.

120. *See supra* notes 26–29 and accompanying text.

121. FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN STATE LAND USE PLANNING 1 (1971).

use policymaking—most notably Oregon and Florida—as discussed below.

IV. STATE INTERVENTION IN LAND USE LAW: THE EXPERIENCES OF OREGON AND FLORIDA

In 1961, in response to its rapid pace of urban development, Hawaii became the first state to implement a system of statewide zoning.[122] The state faced a conflict between its two primary forms of economic livelihood—tourism and the cultivation of sugar cane—and decided to "protect its agricultural heritage."[123] As a result, the state government enacted planning and zoning policies to monitor the rapid pace of urban development and to preserve agricultural land and tropical forests.[124] Since that time, several additional states have adopted their own statewide systems of land use and growth management designed to control not only the uses available in certain districts but also the timing, sequencing, and location of growth.[125] The states that have enacted such systems, although limited, span the width of the United States, from Vermont and Rhode Island to Washington and California.[126] In particular, Oregon and Florida have implemented binding, statewide land use policies focusing on growth management.[127] Because of their success in limiting sprawl, Oregon's and Florida's systems provide excellent models for other states to consult when trying to counter sprawl within their own boundaries.

A. Oregon

For much of its history, Oregon was primarily a rural state.[128] However, as people discovered Oregon's wide variety of recreational opportunities, its population grew rapidly, putting tremendous pressure on its established land use system.[129] In 1973, Oregon enacted a statewide growth management system to protect the environment, "to conserve natural resources, to provide public

122. 9 ROHAN, *supra* note 59, § 53A.01[2].

123. *Id.*

124. *Id.* § 53A.12[1].

125. CALLIES ET AL., *supra* note 30, at 679–83.

126. 9 ROHAN, *supra* note 59, § 53A.01[2].

127. *Id.* § 53A.01[4].

128. Terry D. Morgan & John W. Shonkwiler, *Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues*, *in* THE LAND USE AWAKENING: ZONING LAW IN THE SEVENTIES 247, 247 (Robert H. Freilich & Eric O. Stuhler eds., 1981).

129. *Id.*

facilities and services, and to prevent further urban sprawl."[130] In so doing, Oregon has provided more state oversight of local land use decisions and policies than any other state.[131] Its statewide program requires local governments to incorporate state policies into mandatory local comprehensive plans and also requires neighboring cities and counties to agree on the location of urban growth boundaries.[132] Each plan is subject to the state's acknowledgment and periodic review.[133] Local governments must make all land use decisions on the basis of their acknowledged plan.[134] These efforts have resulted in one of the most effective statewide planning programs in the United States. This Section discusses Oregon's successful system as a means of determining techniques other states might consider in devising their own programs to combat sprawl.

1. Oregon's Creation: The Land Conservation and Development Commission

Oregon's 1973 legislation created the Land Conservation and Development Commission ("LCDC"), a seven-member body appointed by the governor and confirmed by the state senate.[135] The LCDC's responsibilities include adopting binding state goals, reviewing local plans for consistency with state goals, and enforcing state planning requirements.[136] Thus, the LCDC serves as the overseer of local comprehensive planning processes to ensure that such local plans satisfactorily incorporate state goals.[137]

Despite the statewide goals and consistency requirements, Oregon's program leaves most planning and implementation responsibilities to the municipalities.[138] Local governments must incorporate all binding state goals in their local plans, but they decide how to address those goals based on the unique characteristics of their individual communities. In *Fasano v. Board of County Commissioners*

130. FREILICH, *supra* note 1, at 222.

131. Peter A. Buchsbaum & Larry J. Smith, *Introduction to* Edward J. Sullivan, *Oregon Blazes a Trail*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 110, at 50, 50.

132. Edward J. Sullivan, *Oregon Blazes a Trail*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 110, at 51, 53.

133. *Id.*

134. *Id.*

135. Sullivan, *supra* note 114, at 179.

136. FREILICH, *supra* note 1, at 222.

137. Morgan & Shonkwiler, *supra* note 128, at 255.

138. *See* Sullivan, *supra* note 132, at 79 (stating that, despite notoriety for its statewide nature, the program in fact leaves most responsibilities for implementation and planning to various local governmental bodies).

of Washington County, the Oregon Supreme Court held that all local governments must enact an individualized, comprehensive plan,[139] defined statutorily as:

> a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including, but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs.[140]

These local comprehensive plans must be consistent with state goals, and whenever the state adopts a new a goal or amends an existing goal, the local government must revise its plan and regulations to maintain that consistency.[141] The result is a local comprehensive plan in accordance with state policies but simultaneously suited to a particular locality.

In addition to complying with the LCDC's goals, local governments must coordinate planning with all the other governments within the same county.[142] A plan meets coordination requirements "if the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible."[143] This typically means that the makers of a plan must at least attempt to engage in an exchange of information with all governmental units that will be affected by their plan, and additionally, they must use such information to balance the needs of their own citizens with the needs of their neighboring communities.[144]

Once a local government has created a comprehensive plan, the LCDC must "acknowledge" the plan; that is, the LCDC must confirm that the local government's plan and corresponding regulations meet the state's land use and development goals.[145] Upon a request for acknowledgement, the LCDC analyzes whether the local plan complies with all applicable state goals and prepares a detailed report of its findings.[146] For each plan, the LCDC takes one of three possible actions: it can grant the request, deny the request, or continue the acknowledgement process for an extended period to give the local government an opportunity to cure any deficiencies in its

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139. 507 P.2d 23, 27 (Or. 1973), *partially superseded by statute*, OR. REV. STAT. § 227.175(3) (2001), *as recognized in* Menges v. Bd. of County Comm'rs, 606 P.2d 681, 685 (Or. Ct. App 1980).

140. OR. REV. STAT. § 197.015(5) (2001).

141. Sullivan, *supra* note 114, at 179.

142. FREILICH, *supra* note 1, at 222.

143. OR. REV. STAT. § 197.015(5).

144. Sullivan, *supra* note 132, at 80.

145. *Id.* at 59.

146. *Id.* at 60.

comprehensive plan.[147] Once the LCDC has acknowledged that a plan and its implementing regulations are in compliance with statewide goals, the plan and regulations become the sole approval criteria for future land use regulations.[148] Every five to fifteen years, the LCDC reviews the plan and regulations to ensure continued compliance with the promulgated goals.[149] If a local government fails to apply its comprehensive plan correctly, the LCDC may bring an enforcement action.[150]

2. Goal 14: The Establishment of Urban Growth Boundaries

One of Oregon's key growth management objectives was to establish a clear limit on sprawl.[151] To this effect, the LCDC issued Goal 14, the most celebrated component of Oregon's statewide land use program.[152] Goal 14 requires local governments to establish a twenty-year urban growth boundary "to provide for an orderly and efficient transition from rural to urban land use."[153] Urban growth boundaries combat sprawl by defining a line beyond which development may not occur.[154] In Oregon, urban growth boundaries are not permitted to include more land than the locality "needs" for future growth,[155] thereby encouraging compact development within the boundary and prohibiting the development of land on the fringes of an established community.[156]

As with any other zoning regulation promulgated by a local government in Oregon, the establishment of an urban growth boundary requires both coordination with neighboring localities and consistency with the local government's comprehensive plan.[157] If local governments merely drew urban growth boundaries without consulting neighboring communities, the boundaries might force development to leapfrog even farther so as to fall under another community's jurisdiction.[158] By contrast, a widely drawn regional

147. *Id.* at 59–60.

148. Sullivan, *supra* note 114, at 179–80.

149. *Id.* at 180.

150. *Id.*

151. CALLIES ET AL., *supra* note 30, at 722.

152. Sullivan, *supra* note 114, at 184.

153. *Id.*

154. KELLY, *supra* note 106, at 23.

155. City of Salem v. Families for Responsible Gov't, 668 P.2d 395, 398–99 (Or. Ct. App. 1983).

156. Sullivan, *supra* note 114, at 184.

157. *Id.* at 185.

158. KELLY, *supra* note 106, at 134–35.

urban growth boundary can achieve both a clear urban edge and increased densities, which together constitute the antithesis of sprawl.[159]

The results accomplished by the urban growth boundary surrounding the Portland metropolitan area demonstrate the effectiveness of the Goal 14 requirement. Portland has witnessed a dramatic increase in both the volume and proportion of multiple-family and attached single-family housing, as well as an increase in the proportion of smaller and more affordable developed, single-family lots—all of which indicate an increase in the density of the region.[160] This increase in density directly corresponds to less sprawl and greater preservation of rural landscapes:

> Drive south on I-5 from Portland, a city of 1.3 million, to Salem, the state capital less [sic] than 50 miles away, and you won't see the typical commercial strip sprawl, runaway roadside development and far-flung subdivisions that characterize many other highly-traveled corridors in the U.S. What you see instead are pastoral landscapes of farms and fields in the fertile Willamette Valley, broken by occasional copses of evergreens.
>
> Make no mistake about it: the fact that much of the countryside is still rural can largely be attributed to Oregon's statewide land use planning program . . . .[161]

Without Goal 14 and the statewide planning program, Oregon likely would not have escaped such typical characteristics of sprawl.

3. Oregon's Plan as a Solution to Sprawl

Oregon's system provides a model for other states to follow as they try to control their own undesirable, sprawling development patterns. Put simply, Oregon requires each local government to enact a coordinated and comprehensive plan that incorporates the state's major land use goals, especially those relating to growth management and the containment of sprawl.[162] Oregon's urban growth boundaries have accomplished exactly what they were designed to accomplish: orderly and contained development without stagnation of growth. From the mid-1980s to the mid-1990s, Portland's population grew by twenty-six percent, but the total vehicle miles traveled increased by a mere two percent.[163] Similarly, average commute times in Portland

159. *Id.* at 144.

160. *Id.* at 138.

161. *Id.* at 120.

162. Sullivan, *supra* note 114, at 185.

163. BURCHELL ET AL., *supra* note 11, at 89–90.

actually decreased by nine percent.[164] These numbers demonstrate that Oregon's growth management efforts succeeded in increasing density within established cities and in discouraging the development of land on the fringes of communities.

The establishment of urban growth boundaries does not alone account for Oregon's success, however. Rather, Oregon's requirements that local governments coordinate with neighboring localities and enact policies consistent with both the local and state comprehensive plans were crucial components of the state's efforts to contain sprawl. The situation in Boulder, Colorado best illustrates the assertion that an urban growth boundary drawn unilaterally by a single locality is insufficient. Boulder drew an urban growth boundary that included a greenbelt of preserved open space, but neighboring communities continued to permit uncontrolled and unlimited growth.[165] As a result, development continued outside the boundary, and residents crossed the greenbelt to get to their jobs in Boulder, entirely defeating the plan's purpose.[166] Today, Boulder is surrounded by small, satellite communities, the precise result that would have obtained had it never implemented its urban growth boundary plan.[167] The opposite result realized in Portland and other communities in Oregon highlights the necessity of communication amongst local governments and the benefits of state involvement in land use planning.

In sum, Oregon's success in combating sprawl is the result of its statewide, comprehensive planning program taken in its entirety. The coordination requirement eliminates the ability of local governments to adopt a parochial outlook and to avoid communication with other municipalities as to the general welfare of the community at large, while the requirement that each local government specifically adopt an urban growth boundary reduces the scope and growth of sprawl. Without coordination amongst communities, growth management efforts by individual local governments cannot effectively combat sprawl, as demonstrated by the Boulder example. Without state guidance and mandates, local governments likely would continue to operate in isolation and attempt to address sprawl and its consequences unsuccessfully. As a result, the system Oregon devised now can serve as a useful model for other states beginning to recognize the need to resist sprawl within their own borders.

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164. *Id.* at 90.

165. *Id.* at 148–49.

166. *Id.*

167. *Id.* at 149.

B. Florida

Like Oregon, Florida directs many facets of its land use policies at the state level. Notably, however, Florida has strikingly different demographics than Oregon. In 2006, Florida's population numbered 18,089,888 and covered 53,926.82 square miles.[168] By contrast, in that same year, Oregon was home to a mere 3,700,758 people spread across 95,996.79 square miles.[169] The effectiveness of state planning programs in both of these dissimilar states demonstrates that state intervention is a valuable tool for states of many different sizes and populations.

Of the states that have intervened in land use policymaking, Florida was one of the later to act.[170] Prior to 1975, Florida had a rich history of promoting growth and even relied on massive land grants to attract railroads to the southern parts of the state.[171] Between 1970 and 1980 alone, the state's population increased from 6.7 million to ten million.[172] As a result, members of the public, the media, and several governmental leaders became concerned about the effects of such massive population growth on the environment.[173] The state legislature responded to these concerns with the Local Government Comprehensive Planning Act of 1975 ("LGCPA"), which required every local government in Florida to adopt a comprehensive plan pursuant to statutory requirements and which provided for review by the state land planning agency.[174] In 1985, the legislature adopted amendments to strengthen the LGCPA,[175] arguably creating the most comprehensive statewide land use program.[176]

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168. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: FLORIDA, http://quickfacts.census.gov/qfd/states/12000.html (last visited Mar. 29, 2009).

169. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: OREGON, http://quickfacts.census.gov/qfd/states/41000.html (last visited Mar. 29, 2009).

170. KELLY, *supra* note 106, at 112.

171. *Id.* at 113.

172. Thomas G. Pelham, *The Florida Experience: Creating a State, Regional, and Local Comprehensive Planning Process*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 110, at 95, 97.

173. *Id.*

174. *Id.*

175. *Id.* at 98.

176. KELLY, *supra* note 106, at 113.

1. Florida's System: A Pyramidal Planning Hierarchy

Under the LGCPA, Florida established a pyramidal planning hierarchy.[177] Under this hierarchy, the state, regional, and local governments all enact comprehensive plans, linked by a consistency requirement.[178] Florida's state comprehensive plan is a tool to guide regional and local plans; it is a "direction-setting document."[179] The state plan addresses twenty-seven statewide goals covering economic, environmental, natural resource, conservation, and land use planning issues.[180] The policies it suggests in support of these goals are binding on both regional and local governments.[181] In addition to accommodating the goals and policies of the state plan, regional comprehensive plans drafted by each of the state's eleven regional planning agencies must address the specific issues and problems faced by the particular region and must assert regional goals and policies, including growth management.[182]

Finally, each local government adopts a comprehensive plan to serve as the blueprint for the future development of the community.[183] State statutes provide local governments with a list of mandatory elements to be included in these plans.[184] To ensure that local plans consider and accommodate the policies of the region and the state, local governments must coordinate with neighboring communities to address extraterritorial issues, and all local comprehensive plans are subject to review by the state land planning agency.[185] After its adoption, the local comprehensive plan becomes the major tool for regulating land use, and all local development and zoning regulations must be consistent with it.[186]

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177. Pelham, *supra* note 172, at 99.

178. *Id.*

179. FLA. STAT. § 187.101(1)–(2) (2000).

180. Pelham, *supra* note 172, at 100.

181. *See id.* at 101 (noting that although the plan does not create regulatory authority, the state plan has a legally binding effect on regional and local plans because other state legislation requires regional and local plans to be consistent with the goals and policies of the state plan).

182. *Id.*

183. *Id.* at 102.

184. *See* FLA. STAT. § 163.3177 (detailing the mandatory elements local governments must include in their statutory plans).

185. Pelham, *supra* note 172, at 99.

186. *Id.* at 102.

2. Growth Management in Florida: The Concurrency Requirement

As part of its land use policies and laws, Florida has focused on discouraging sprawl.[187] In furtherance of this goal, the state comprehensive plan includes a mandate to all local governments to adopt a growth management system that includes a concurrency requirement.[188] Tying capital improvements to local land use planning and regulation, concurrency provides that new development can occur only when adequate public facilities exist to support such development, and thus adds timing, sequencing, and phasing components to traditional zoning laws.[189] In Florida, public facilities must be "concurrent with the impacts of such development."[190] Effectively, developers must wait for the expansion of the requisite underlying utilities infrastructure before developing new land, unless the developers choose instead to expend their own capital for such utilities expansion. The state concurrency rule covers the services of transportation, sanitary sewer, solid waste, drainage, potable water, recreation, and open space, but local governments can add additional services to the rule in their local plans.[191]

Florida's concurrency requirement fights sprawl by encouraging new development to occur in areas that already have in place the necessary public facilities.[192] Although developers theoretically could build on the fringes of a community, the concurrency requirement substantially delays them from doing so because they first must wait for the extensions of the required public facilities.[193] As a result, Florida's system incentivizes developers to develop land within the existing urban core and to maximize the use of currently available public facilities while simultaneously discouraging scattered development in rural areas.

187. *Id.* at 105.

188. Thomas G. Pelham, *From the Ramapo Plan to Florida's Statewide Concurrency System: Ramapo's Influence on Infrastructure Planning*, 35 URB. LAW. 113, 113–14 (2003).

189. 9 ROHAN, *supra* note 59, § 4.01[2].

190. FLA. STAT. § 163.3177(10)(h) (2000).

191. Pelham, *supra* note 172, at 108.

192. Pelham, *supra* note 188, at 125.

193. *See* FLA. STAT. § 163.3177(3)(a) (indicating that a locality's comprehensive plan may include capital improvements that are the responsibility of developers so long as the "financial feasibility" of such improvements is "guaranteed in an enforceable development agreement" or similar agreement).

3. Florida's Plan as a Solution to Sprawl

Florida's system of land use policies provides an alternative model for states that aim to control undesirable, sprawling development patterns. Like Oregon, Florida requires its local governments to enact coordinated and comprehensive land use plans that incorporate the state's goals and, additionally, the state mandates an intermediate, regional level comprehensive plan. Florida also focuses on growth management concerns and requires that all local plans and development meet a concurrency requirement. Like Oregon, Florida has filled the void created by local governments unwilling to confront the problem of urban sprawl, albeit with a different solution. Although Oregon's statewide comprehensive planning came first, some scholars argue that the sophistication of Florida's comprehensive planning legislation has surpassed that of its predecessor.[194]

Perhaps the greatest difference between the Florida and Oregon plans is the growth management technique chosen by each state. Oregon requires each local government to draw an urban growth boundary, while Florida implemented a concurrency requirement under which development cannot expand without the existence of public facilities adequate to support the new development. The pros and cons of any particular growth management policy are beyond the scope of this Note. However, the key finding in an analysis of the programs implemented in Oregon and Florida is that the two states—very dissimilar in demographics—both have fought successfully the common problem of sprawl in the same way: by giving the state government a role in zoning and land use planning decisions.

V. FILLING THE VOID: GREATER STATE INVOLVEMENT AS THE SOLUTION TO SPRAWL

Sprawl is a serious problem facing communities across the country, and an effective solution requires action at the state level. Most local governments lack the funds necessary to accommodate the continuous development on and beyond the fringes of established communities, and sprawling developments continue to consume valuable rural and agricultural land. This Note has discussed the inability of local governments acting alone to combat sprawl, has detailed the efforts of the two most successful states that have intervened in local land use decisions, and has considered some of the

194. Pelham, *supra* note 172, at 95.

difficulties the remaining states face in deciding whether to enact statewide comprehensive plans. No single solution will work equally well in every state; each jurisdiction faces individual and unique challenges as it tries to modify its development patterns and direct growth back to the central city. Thus, this Note does not advocate any particular growth management policy, such as the establishment of urban growth boundaries or a concurrency requirement, but rather offers a generic solution to serve as a starting point for states that finally realize their local governments need help.

The examples of the statewide plans enacted in Oregon and Florida prove that when states insert themselves into the planning process, they can devise effective plans to prevent the development of sprawl. States that have adopted statewide comprehensive plans have managed to combat sprawl more effectively than those states that have left the problem to their local governments. For example, comprehensive state planning systems improve the quality of local plans and plan implementation, and they facilitate intergovernmental communication, thus positively impacting coordination between neighboring communities.[195] As a result, this Note posits that in order to confront the problem of sprawl effectively, states must intervene in land use policymaking and take back some of the powers previously delegated to their local governments.

Originally, when state governments adopted the SZEA and the Standard Planning Act to delegate their authority to zone to local governments, they did so wholesale.[196] Thus, states took the language drafted by the U.S. Department of Commerce as given and either enacted the model statutes or did not. Over time, however, it became clear in some states that the SZEA and the Standard Planning Act as drafted contained flaws, and in the 1960s and 1970s, some states changed their approaches to drafting legislation.[197] These states began to follow a more systematic approach to address the procedural, substantive, and structural components of planning legislation, and they additionally encouraged citizen involvement in the process.[198] Most importantly, these states moved away from the precise language of the model Acts.[199]

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195. DeGrove, *supra* note 110, at 14.

196. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 1–3 (2002) [hereinafter GUIDEBOOK].

197. *Id.*

198. *Id.*

199. *Id.*

To combat sprawl effectively, the remaining states similarly should change their approach and revise their enabling acts to avoid the precise language of the SZEA and the Standard Planning Act. Specifically, state governments should amend and revise their zoning and planning enabling acts to limit the delegation of police power to the local governments and to mandate planning before zoning. State governments should reserve the authority to enact a statewide comprehensive plan or to enact statewide goals for local governments to incorporate into their zoning ordinances. An effective planning enabling act would require that local governments enact comprehensive plans prior to zoning and additionally would mandate periodic state review of all local comprehensive plans.

A. The Creation of a State Commission

To intervene effectively in local land use decisionmaking, a state should first statutorily create a commission charged with reviewing current land use policies and devising solutions to the problems identified. The LCDC fulfilled this role in Oregon, and Florida's state land planning agency performed a similar function. In the states that have already enacted comprehensive state planning systems, the governor, the legislature, or both established consensus-building organizations.[200] Watchdog groups such as 1,000 Friends of Oregon and 1,000 Friends of Florida have been integral in sustaining support for the full implementation of new state systems.[201] Their success lies in their ability to represent all stakeholders in the planning system.[202] Thus, by bringing together all the stakeholders and allowing them to voice their opinions, a state commission can discern the problems underlying current land use policies and can begin to devise new strategies for how to manage future growth.[203] To ensure the representation of the views and opinions of all the stakeholders, such a commission should include environmentalists, corporate leaders, developers, builders, municipal officials, county officials, municipal or regional planners, and an at-large member.[204]

Because the challenges to greater state involvement in land use policymaking likely will be political rather than legal, these

200. *Id.*

201. *Id.*

202. *Id.* at 14–15.

203. DeGrove, *supra* note 110, at 11.

204. *Id.* at 14–15; GUIDEBOOK, *supra* note 196, at 1–18.

commissions assume special importance.[205] Local governments likely will balk at any state attempts to minimize local authority. For almost a century, states have adopted enabling statutes that delegate authority to local governments to zone their municipalities however they see fit and have refrained from interfering with the local decisionmaking process. Perhaps most importantly, local governments are likely to consider any state involvement to be an erosion of their home rule authority.[206] By including these "reluctant" stakeholders in the commission and by allowing them to voice their opinions and concerns, a state commission can begin to devise effective solutions to land use problems while simultaneously preempting a major political obstacle to future state involvement.

Although each state can define by statute the precise responsibilities it wants its commission to assume, every commission's ultimate duty should be to identify state goals to guide regional and local planning.[207] In particular, the commission should study growth patterns across regions and metropolitan areas throughout the state and promulgate a future growth management policy for local governments to follow. In Oregon, local governments were required to draw an urban growth boundary around their communities, and in Florida, each local government instituted a concurrency requirement so that no development would occur unless adequate public facilities existed to support that development. Other potential growth management strategies include rate-of-growth programs, which establish a long-term growth rate by limiting annual development to the amount necessary to support that rate, and phased growth programs, which set priorities for the areas in the community that will be developed first.[208] This Note does not suggest that one growth management strategy is better than any other, or that one strategy should apply in every state. Although urban growth boundaries have contained sprawl in Oregon and concurrency has done the same in Florida, these strategies may not suit the particular conditions and circumstances in other states. Ultimately, however, to combat sprawl effectively, each state commission must prescribe a mandatory growth management tool to guide local governments in their future land use decisionmaking.

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205. *See* CALLIES ET AL., *supra* note 30, at 772 (describing the major impediment to successful state controls as political, not legal); ALEXANDRA D. DAWSON, LAND-USE PLANNING AND THE LAW 95 (1982) (same).

206. DeGrove, *supra* note 110, at 12. For a more complete description of a local government's "home rule authority," see *supra* notes 61–68 and accompanying text.

207. GUIDEBOOK, *supra* note 196, at 1–15.

208. 9 ROHAN, *supra* note 59, § 4.01[2].

B. Amendments to the Zoning and Planning Enabling Acts

After developing growth management goals and prescribing specific tools to meet those goals, a state must have the ability to make local governments adhere to those goals and use those tools. Because local governments derive all their authority to plan and zone from state governments through the state's enabling acts, a state can limit a local government's authority and reclaim some of its own authority by amending its version of the SZEA and the Standard Planning Act.

1. Building State Authority into the SZEA

Section 1 of the SZEA delegates to local governments the authority to regulate the use of land and to restrict the bulk of buildings in particular districts.[209] Under this section, local governments receive all the power to zone, subject only to the requirement that such zoning be done "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community."[210] The SZEA imposes no other apparent restrictions on local governments. By inserting an additional restriction in this introductory section, however, a state government can further limit a local government's authority by providing that local governments have the power to regulate and restrict, subject to any superseding regulations, restrictions, or goals prescribed by the state commission. For example, an amended SZEA, Section 1 could read as follows:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative bodies of cities and incorporated villages are hereby empowered to regulate and restrict, *subject to any superseding regulations and restrictions promulgated by the state government or any agency or subdivision thereof*, the height, number of stories, and size of other buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes.

Thus, by adding a mere phrase to the language of a zoning enabling act, a state government can ensure that the zoning ordinances and other land use decisions of a local government will comply with state goals, even while local governments continue to exercise the general authority to zone to meet the unique needs of their particular communities.

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209. STANDARD STATE ZONING ENABLING ACT, *supra* note 16, § 1.

210. *Id.*

Critics of this suggested amendment to a state's zoning enabling act will argue that the imposition of state goals on the local zoning process deprives local governments of needed autonomy and flexibility. Land use decisions historically have belonged to local governments because local officials theoretically have the best understanding of the particularities of their community. Rarely will a state have the requisite expertise to develop regulations that equally suit all communities statewide. Such arguments overlook the language of the proposed enabling statute, however. The statute vests in the local government the power to make land use decisions, and that power is compromised only when the state government actively inserts itself in land use planning. Thus, in most cases, local officials retain the autonomy to design unique and suitable regulations for their communities, with the state goals serving as a "direction-setting document."[211]

2. Requiring a Consistent Local Plan

In addition to revising the SZEA, an effective solution to sprawl demands revision to each state's version of the Standard Planning Act to require that local governments enact comprehensive plans prior to zoning. According to its Statement of Purpose, the Standard Planning Act was designed to "authorize[] and empower[]" planning.[212] Although the Standard Planning Act imposed planning procedures on local governments when those governments chose to plan, it did not impose any affirmative duty to plan.[213] Local governments were thus given the power to plan but were only obligated to use such power if they wished.[214] As explained above, without such a requirement, local governments rarely plan for the future, a circumstance that leads to haphazard and random development on the fringes of established communities—or sprawl.[215] Therefore, each state must revise the statement of purpose in its planning enabling act to require—and not merely authorize and empower—local governments to enact comprehensive plans to serve as law and not just "non-binding guides"[216] for future land use decisions.

Although a mandatory, local comprehensive plan will hinder local governments from enacting zoning ordinances in a knee-jerk

211. FLA. STAT. § 187.101(1)–(2) (2000).

212. GUIDEBOOK, *supra* note 196, at 2–3.

213. *Id.*

214. *Id.*

215. *See supra* Part II.C.2.

216. CALLIES ET AL., *supra* note 30, at 463.

reaction to land use problems they confront, such a plan alone cannot suffice to fight the development of sprawl. In addition, the statement of purpose in a state's planning enabling act should require vertical consistency between local plans and the goals and plans articulated by the state commission, especially those relating to growth management, as well as horizontal consistency amongst the comprehensive plans of neighboring communities. This Note argues that each locality's inability to consider the effects of its land use decisions on its neighboring communities and on the region as a whole both facilitated the development of sprawl and prevented individual local governments from effectively combating sprawl once it had begun. By contrast, state governments have both the perspective and the territorial authority to consider the problem of sprawl on a regional basis and therefore can devise solutions to deal effectively with sprawl. By requiring vertical consistency between local and state plans, state governments can ensure that effective regional solutions to the problem of sprawl are implemented. Similarly, the horizontal consistency requirement guarantees that local governments at least hear the concerns of other communities regarding particular local plans before they are enacted, theoretically expanding a locality's parochial perspective. To ensure that local governments plan with both vertical and horizontal consistency, the Statement of Purpose should provide for a periodic review and approval of the comprehensive plan of each local government by the state commission.

3. Previous Attempts to Update Land Use Laws

The suggested revisions to the SZEA and the Standard Planning Act, designed to leave states with some authority to govern land use decisions at the local level, are not entirely without precedent. In the 1960s and 1970s, many states adopted laws intended to increase state control over zoning regulations and ordinances, and in 1975 this trend culminated in the American Law Institute's Model Land Development Code (the "Code").[217] The Code proved controversial, however, especially with regard to its proposed state override of purportedly deficient or detrimental local zoning decisions in three major areas.[218] Although no state adopted the Code in its entirety, a few states, including Florida and Oregon, did adopt zoning

217. PLATT, *supra* note 12, at 347.

218. *Id.* The three major areas in which states could exercise their power to override local decisions were (1) areas of particular concern, (2) large-scale developments, and (3) developments of regional benefit. *Id.*

laws based on the spirit of the Code's provisions.[219] Given the successes both Florida and Oregon have had in combating sprawl within their own borders, laws returning some authority to states in the area of land use regulation should seem less controversial and much more appealing today.

Ultimately, an effective solution to land use problems in the United States will require some level of intervention by state governments. The current status quo in most states whereby states refrain from engaging in any planning whatsoever has failed to meet the land use demands of modern America.[220] Sprawl not only affects single communities but also impacts regions as a whole, and owing to the scarcity of regional governments throughout the United States, state governments must fill this planning void.[221] The amendments to a state's zoning and planning enabling acts as proposed by this Note should prove much less controversial than those originally suggested by the Code and thus should facilitate greater state involvement in land use planning. In contrast to the Code's strict language and anticipated state "overrides" of "deficient" local plans, the amendments proposed in this Note continue to leave significant planning authority with local governments, allowing those governments to devise the specific laws and regulations for their particular communities, as long as such laws and regulations further state policies.

VI. CONCLUSION

Sprawl may be America's most lethal disease, but it is also a curable disease. Land use decisions traditionally have been delegated to local governments under the belief that those people to be governed by the rules should design the rules. This Note, however, has demonstrated not only that local governments have been ineffective in limiting sprawl and fighting its effects, but also that the policies of local governments directly caused the growth of the undesirable, haphazard development patterns that define sprawl.

This Note advocates an increase in the involvement of state governments in the land use decisionmaking process. It suggests that state governments should establish commissions designed to evaluate existing land use policies and to promulgate new growth management

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219. *Id.* at 348.

220. *See* FREILICH, *supra* note 1, at 240–41 (suggesting that the lack of statewide and regional planning is the cause of this failure).

221. DUANY ET AL., *supra* note 5, at 229.

goals and tools. Additionally, states should amend their zoning enabling acts so as to take back some of the authority delegated to local governments and to allow states to reinsert themselves in land use policymaking, and states also should revise their planning enabling acts to make vertically and horizontally consistent comprehensive plans mandatory for all local governments. Such a system truly captures the best of both worlds: as state governments require local governments to implement policies to address issues of regional concern, local governments retain the autonomy to adapt land use regulations to the specific conditions and concerns of their particular communities. In the end, state leadership is a critical component to an ultimate cure for a heretofore incurable disease: "If the goal is to stop sprawl or to protect certain lands . . . while still accommodating development, only the state can do a fully effective job."[222]

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222. KELLY, *supra* note 106, at 125–26.

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