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John R. Nolon

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Champions of Change: Reinventing Democracy Through Land Law Reform*

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JOHN R. NOLON**

I. INTRODUCTION

Can we reform land law to respond effectively to storm surges, raging fires, cascading slopes, and the other crises of our time? Will the images of thousands of homeless in the gulf states, homeowners fleeing their flooded New Hampshire homes, and evacuees waiting in motels as the latest fire ravages communities in California induce such change? If so, how will it occur?

At the beginning of the last century, land law changed quickly to remedy the vice of chaotic development patterns. In *Village of Euclid, Ohio v. Ambler Realty*,¹ in which the U.S. Supreme Court first determined zoning to be constitutional, the Court noted:

Building zone laws are of modern origin Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day,

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** Professor of Law, Pace University School of Law; Counsel, Pace University School of Law Land Use Law Center; and Visiting Professor, Yale School of Forestry and Environmental Studies. The author is grateful for the assistance of Susan Moritz, Research Consultant to the Law School's Land Use Law Center, and Sarah Samp, research assistant.

1. 272 U.S. 365, 387 (1926).

for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.²

Our legal system exhibits great resiliency in the face of change, the influence of which has led to its reform from the inception. By the 12th century in England, just over 100 years after the Norman Conquest, the common law had evolved rapidly from a potpourri of parochial influences to a coherent set of norms and procedures applicable throughout the land. The common law of 1189 was uniform yet malleable. The whole cloth stretched slowly, sometimes imperceptibly, to accommodate the needs of a maturing society. The cleverness of this approach was its assumptions that the law was observable in the customs of the people, and that it evolved as those customs changed.³

Judges were tradition-bound decision-makers; stability in the law was achieved by following precedents. In those areas of society where conditions were in flux, new customs emerged and were embraced by the application of earlier decisions to new sets of facts. Judges had leeway—methods of interpreting facts, of categorizing a case, and of applying nuanced principles to changing contexts. A body of law, a collection of related precedents applicable to an evolving enterprise, formed the skeleton that supported the system's growth and development.⁴

In time, statutory law enacted by elected representatives stretched further to accommodate change that outpaced the common law's hesitant resiliency.⁵ Today, in the United States, fed-

2. *Id.* at 386-87.

3. See WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES*, 177 (1956) See also MAGNA CARTA, para. 39 ("No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.").

4. See CHURCHILL, *supra* note 3, at 177

5. See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 25 (2nd ed. 1986) ("The common law of land grew up around the forms of action which brought litigation concerning land before the royal justices, and thus enabled them to begin to impose a uniform system of rules of landholding upon the whole realm; eventually in this century the legislature has completed the task, and local customary departures from the common law have been all but totally extinguished."). See also RUTHERFORD H. PLATT,

eral, state, and local legislatures adopt new rules to respond to constituent needs at each level of government. We understand that federal law is the supreme law of the land, state laws are paramount in areas reserved for state action, and local laws are controlling where municipalities are delegated power by their states to act. Statutes at all three levels supplement and supplant common law rules; judges interpret their ambiguities and resolve their inconsistencies and tensions.⁶ Legislators, like the judges who discern the customs of the land, respond when constituents feel threatened by new circumstances or seek new opportunities.

Our legal system embraces and incorporates change into its growing framework of principles and practices. Law is society's ordering mechanism and survival technique. The law, however, can be frustratingly complex, fragmented, and inefficient, given its multiple sources and constantly changing influences. We understand too little how to reform the law so that it is sufficiently coherent and clear to serve democracy's chaotic demands.

Consider a contemporary context that involves the American legal system struggling to adjust to global change, a process that implicates federal, state, and local law. In November 2001, the newly formed United States Commission on Ocean Policy⁷ unanimously passed a resolution urging the United States to accede to the United Nations Convention on the Law of the Sea.⁸ In describing the need for this global convention to protect oceans, the United Nations points to the concerns of scientists that "the ocean's regenerative capacity will be overwhelmed by the amount of pollution it is subjected to by man."⁹ The United Nations also notes that signs of catastrophic effects on oceans and marine life

LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY (rev. ed. 2004), for a survey of "Historic Roots of Modern Land Use Institutions," at 65-94, and of the development of local governments in the United States, at 120-49.

6. See, e.g., Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 333-34 (Charles M. Haar & Jerold S. Kayden eds. 1989) (citation omitted)

7. U.S. Commission on Ocean Policy, established by Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644 (2001), amended by Pub. L. No. 107-206, 116 Stat. 833 (2003), Pub. L. No. 107-372, 116 Stat. 3096 (2003).

8. U.S. Commission on Ocean Policy Resolution, United Nations Law of the Sea Convention, Nov. 14, 2001, available at http://www.oceancommission.gov/documents/los_resolution.pdf. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

9. United Nations Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea (A Historical Perspective), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (last

are clearly observable, particularly along heavily populated coasts.¹⁰ Land-based activities are, of course, among the major sources of marine pollution. The Convention obliges signatory nations to protect the marine environment.¹¹ Coastal nations are "empowered to enforce their national standards and anti-pollution measures within their territorial sea."¹²

If Congress accedes to the Convention, the effect of this "empowerment" would be a curious thing. The Convention assumes federal power to regulate land-based activities in coastal states.¹³ Legal competence regarding environmental and land use matters generally is assumed by other critical international agreements.¹⁴ The Tenth Amendment, however, reserves the power to regulate land use and define property rights to the states and their local governments, unless the matter is one of interstate commerce or affects federal waters.¹⁵ There is obvious tension between this reserved power in the states and that granted to Congress.¹⁶ The political understanding, worked out through thirty years of federal legislation and based on two centuries of tradition, is that federal law will not disturb the power of the states to regulate land

visited Oct. 28, 2005) (on file with the Harvard Environmental Law Review) [hereinafter UN, A Historical Perspective].

10. *Id.*

11. United Nations Convention on the Law of the Sea, *supra* note 8, Article 192. "General obligation: States have the obligation to protect and preserve the marine environment."

12. UN, A Historical Perspective, *supra* note 9.

13. Conventions, however, are not entirely self-executing. Because of Tenth Amendment complications and the grant of legal authority to coastal states over territory within three to six miles of the shore, the current authority of the federal government to regulate land-based sources of pollution is anything but clear. For an overview of federal, state, and international jurisdiction over coastal waters, see REVIEW OF U.S. OCEAN AND COASTAL LAW: THE EVOLUTION OF OCEAN GOVERNANCE OVER THREE DECADES, Appendix 6 to AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY (published separately 2005), available at http://www.oceancommission.gov/documents/full_color_rpt/welcome.html#final.

14. See, e.g., Report of the United Nations Conference on Environment and Development, U.N. GAOR, 46th Sess., Annex II, Agenda Item 21, U.N. Doc. A/CONF. 151/26 (June 3-14, 1992) [hereinafter Agenda 21], available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter1.htm>

15. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) See also 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1.2 (Edward H. Ziegler, Jr., ed. 2005) (citations omitted)

16. See Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711 (1991) . . . (citing Coastal Zone Management: Hearing before the Nat'l Ocean Pol'y Study of the Comm. on Commerce, Science, and Transport. of the Senate, 100th Cong., 1st Sess. 1 (1987)).

use.¹⁷ Although this is not a binding commitment, it is anchored in durable political tradition, reflected in the dominant political mood of the moment, and reinforced by recent case law.¹⁸

States authorize their local governments to conduct land use planning, adopt zoning and other land use laws, and approve development projects, even in coastal watersheds, where nonpoint source pollution emanating from locally approved developments is a major cause of pollution of the sea and other natural resources. At the federal level, a variety of laws expresses national policies, defines acceptable levels of pollution of the air, water, and land, and pursues and punishes violators while requiring federal permits for various private sector activities. In all, there are nearly 40,000 governmental jurisdictions involved in the national land use system.¹⁹ No sustained attempt has been made to coordinate their disparate influences to achieve greater efficiency, resiliency, competency, and reliability.

This Article examines the process of legal reform to achieve policy coherence in the important and paradigmatic area of land use regulation. It addresses the problems of fragmentation in the legal system, and examines how lawmaking can become more comprehensive, collaborative, and adaptable to rapidly changing circumstances. It suggests a strategic path for law reform in the 21st century.

Part II explores how grassroots perturbations effect change within the legal system. Just as early common law courts discovered legal norms in the customs of the people, local communities today discern challenges and adopt responsive local laws. Their need for greater legal authority, clear guidelines in exercising that authority, and assistance from state and federal governments

17. For example, the Clean Air Act, at 42 U.S.C. § 7431, states: "Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use." See also 1 Rathkopf's *THE LAW OF ZONING AND PLANNING*, *supra* note 15

18. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001), in which the majority found that § 404(a) of the Clean Water Act does not permit the Army Corps of Engineers to extend the definition of "navigable waters" to include intrastate waters visited by migratory birds

19. In addition to the federal government and fifty state governments, there are 38,971 general purpose local governments: 3,034 county governments, 19,431 municipal governments, and 16,506 township governments. A large percentage of these general purpose governments have some power to regulate private land use. See U.S. CENSUS BUREAU, *PRELIMINARY REPORT NO.1: THE 2002 CENSUS OF GOVERNMENTS* (2002), available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

highlights the reforms needed at these higher levels. This Part recounts the history of fragmentation in the national land use system, a principal barrier to effective reform, and presents a road map for integrating governmental influences. In responding to grassroots impulses, state and federal laws will become better ordered, coordinated, and integrated. Research in the fields of Diffusion of Innovations and Complex Adaptive Systems is used to demonstrate that outside governmental influences such as state and federal resources, assistance, and guidelines can hasten the rate of positive change at the local level. This Part also makes the point that the process of responding to change can be institutionalized by developing a unifying framework law that discovers, emphasizes, and builds upon the unique competencies of each level of government.

Part III examines and evaluates the role of local, state, and federal governments in achieving sustainable land use patterns and practices. It presents examples of initiatives at each level that illustrate how legal systems can move from fragmentation to integration. These illustrations, which range from coastal area protection to smart growth and growth management measures, demonstrate an important function of local governments in our democracy. They show how the nation's historical understanding of the importance of the local role in these matters can be respected while pursuing critically important state, national, and global interests.

Part IV looks more deeply at four examples of local and state land use law reform. These illustrations demonstrate the importance of coalition building, the positive influence of outside assistance, the key role played by dedicated and trained leaders, the need to adapt innovative ideas to local circumstances, and the importance of taking time in the adaptation process to ensure that all relevant interest groups are involved and that their interests are accommodated. These case studies demonstrate that the process of change can become an enduring process capable of tackling new and more challenging issues.

Part V concludes by focusing on the role of champions of change, the leaders within local, state, and federal governments who become animated when threats occur and who mobilize successful law reform movements. At the local level, law reform initiatives aimed at the ubiquitous symptoms of deteriorated local economies and environments stimulate civic and social engagement. This creates bonds that are central to the efficient operation

of democracy and strengthens the all-important grassroots foundation of the legal system. Calling on state and federal lawmakers to enable and guide local action has the salutary effect of ordering top-down reform efforts. This gives those lawmakers purpose and direction and suggests proper roles for each level of government in a national framework of laws. The result will be a more integrated, efficient, and resilient system, poised for the challenge of adjusting to the momentous change in the global economy and environment that is just over the horizon.

II. GRASSROOTS INFLUENCES ON LAND LAW REFORM

During the last decade, local governments have adopted numerous innovative land use laws that achieve sustainable development.²⁰ They have encouraged “the most appropriate use of land”²¹ by designating priority growth districts in developing suburban areas and by providing for the expansion and redevelopment of cities and urban settlements.²² Local legislatures have

20. See John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15, 30–54 (2003). For a survey of local efforts to achieve sustainable development, see Robert R. M. Verichick, *Why the Global Environment Needs Local Government: Lessons from the Johannesburg Summit*, 35 URB. LAW. 471 (2003). At the United Nations Conference on Environment and Development, the Rio Declaration on Environment and Development was endorsed by 172 nations. U.N. Doc. A/CONF. 151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992). The core of the Declaration and its 27 principles is a commitment to economic efficiency, environmental protection, and equity, the three pillars of sustainability. The Rio Declaration is a study in connectivity. Principle 1 of the Declaration expresses an entitlement running from present to future populations: “Human beings . . . are entitled to a healthy and productive life in harmony with nature.” Principle 3 connects development, equity, and the environment by declaring: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”

21. U.S. Department of Commerce, A Standard State Zoning Enabling Act, § 3 (1924, reprinted 1926). The phrase “encouraging the most appropriate use of land” was incorporated into most state laws that authorize local governments to adopt zoning laws. It explains the essential purpose to be achieved through the adoption of local land use laws. The text of the Standard Act can be found at 5 RATHKOFF’S THE LAW OF ZONING AND PLANNING app. A, *supra* note 15. A PDF version of the 1926 Department of Commerce publication is available on the American Planning Association website at <http://www.planning.org/growingsmart/enablingacts.htm>.

22. See F. KAID BENFIELD ET AL., SOLVING SPRAWL: MODELS OF SMART GROWTH IN COMMUNITIES ACROSS AMERICA (2001); ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (1999); JERRY WEITZ, SPRAWL BUSTING: STATE PROGRAMS TO GUIDE GROWTH (1999); AMERICAN PLANNING ASSOCIATION, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES (2002); Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 145 (2002).

virtually invented a new field properly called “local environmental law” and clarified their focus on preserving large and critical environmental areas.²³ They are at work infusing equity in human settlements by legislating to develop affordable housing.²⁴

Viewed as an organic whole, these local laws and practices demonstrate remarkable adaptation to contemporary needs and challenges.²⁵ This burst of political reform in land use planning and law merits careful examination.²⁶ How and why did it occur? In considering this question, we may discover the strategic path to reform at the state and federal level as well.

A. Evidence of Intelligent Life at the Local Level

Five years ago, several of my students began collecting, studying, and analyzing local environmental laws.²⁷ Although certain types of local protection laws have existed for well over thirty years, we found that that these laws expanded in scope and expressly focused on protecting critical natural resources.²⁸ Three years ago, these students turned their attention to local development law and encountered a rapid increase in the adoption of

23. See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002) [hereinafter Nolon, *In Praise of Parochialism*]. See also JAMES M. McELFISH, NATURE-FRIENDLY ORDINANCES: LOCAL MEASURES TO CONSERVE BIODIVERSITY (2004); GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002); JOHN R. NOLON, OPEN GROUND: EFFECTIVE LOCAL STRATEGIES FOR PROTECTING NATURAL RESOURCES (2003).

24. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U.L. REV. 221, 226–27 (1997). See also Verichick, *supra* note 20, at 475–76

25. Examples of local laws that have been adopted across the country can be reviewed by accessing the Land Use Law Center of Pace University School of Law, Gaining Ground Information Database, <http://www.landuse.law.pace.edu> (last visited Sept. 18, 2005).

26. This movement is anything but ubiquitous. Citing impressive evidence of local reform is not the same as asserting that all is well in the American land use system. This Article is intended to probe whether and how this trend at the base of the system can be facilitated. The rapid spread of innovative land use laws in the past decade parallels the rapid adoption of zoning enabling laws by state legislatures and the adoption of zoning as the preferred method of land use control in the 1920s.

27. These include students in land use classes and seminars at Pace University School of Law and masters degree students at Yale’s School of Forestry and Environmental Studies.

28. See Nolon, *In Praise of Parochialism*, *supra* note 23, at 376. “The gradual evolution toward environmental sensitivity in local land use controls has proceeded far enough that a distinct environmental ethic, as opposed to an incidental one, is evident.”

growth district laws in developing suburban areas²⁹ and a reinvention of 1970s urban redevelopment law in cities and urban villages.³⁰ Last year, they undertook an exploration of expansive new state enabling statutes that authorize localities to enact such laws, that build the capacity of local officials to implement them, and that guide or direct municipal land use action.

New York's Hudson River Valley region, located in the epicenter of the sprawl occurring in the New York metropolitan area, is our laboratory. There, we have trained and assisted hundreds of local land use leaders and have taken a closer look at the challenges, influences, and processes of local land use reform and innovation. By learning from this extended exposure to change over a period of years in the Hudson River Valley and interviewing local leaders responsible for land use innovations throughout the country, we have gleaned some understanding of how such positive reform happens and how state and federal action can encourage it.³¹

B. How Does Local Land Law Reform Happen?

When local leaders were asked why they adopted particular land use law reforms,³² the most frequent response was that they

29. Mixed-use, higher density developments have experienced an average increase of 28% per year for the past seven years. See Robert Steuteville, *New Urban Neighborhoods Make Big Gains*, NEW URBAN NEWS, Jan./Feb. 2004, available at <http://www.newurbannews.com/SurveyStoryJan04.html>.

30. A draft report on the reappearance and adaptation of urban revitalization techniques is on file with the author.

31. The author founded the Land Use Law Center in 1994 after conducting a study on the sustainability of land development patterns in the Hudson River Valley for the President's Council on Sustainable Development. This study indicated that training local land use leaders was essential if currently unsustainable development trends in the region were to be reversed. With funding from Congress and a variety of additional sources, the Land Use Law Center created and has conducted extensive multi-day training programs for local land use leaders from over 150 towns, villages, and cities in the valley. The program, known as the Local Land Use Leadership Alliance Training Program (LULA), has educated over 600 local leaders. The curriculum of the training program includes in-depth exposure to embodying land use strategies in local law and consensus-based decision-making techniques to effect change responsive to unique local crises and circumstances. The Center has created a technical assistance program consisting of local strategic workshops, regional conferences, and an electronic newsletter called Gaining Ground, which is published quarterly and sent to all graduates.

32. Students in the author's classes at the Yale School of Forestry and Environmental Studies conducted research on local environmental and smart growth laws adopted by municipalities in all fifty states, identifying well-crafted and exemplary laws and interviewing the local land use leaders involved in drafting and securing the adoption of these laws. See YALE SCHOOL OF FORESTRY & ENVIRONMENTAL STUDIES,

were faced with a crisis and had no choice but to respond. We labeled this the "perturbation effect." Local officials have much to attend to other than land use law reform; it is when the ill effects of sprawl, the decay of their neighborhoods, or the adverse impacts of outside land use decisions get their attention that they act. In the absence of a perturbing crisis, we found that local leaders were often encouraged to adopt innovative land use plans and laws because of citizen agitation or through the intervention of their advisers or higher levels of government. This we call the "anticipatory effect." Anticipating future land use challenges, local leaders can be motivated to act when faced with change, armed with good ideas, and encouraged by technical assistance or grants. In other words, local land use change can be spontaneous or planned: a reaction to a crisis or a considered response to anticipated, adverse change in community character.

In their perturbation and anticipatory postures, municipal leaders are often helped in adapting to change by land use lawyers, professional planners, environmental advocates, citizens, and state and federal agency personnel. These "change agents" are armed with data, technical information, guidebooks, best management protocols, case studies of successful innovations, persuasive policies, and economic incentives. These tools, properly used, can alert local leaders and guide them as they evaluate local circumstances and adapt solutions to their particular circumstances.

C. Diffusion of Innovations, Nested Hierarchies, and Networks

Two areas of academic theory and research are particularly useful in understanding the dynamic interactions within local land use law: the scholarship of scientists who examine the behavior of "complex adaptive systems"³³ and a field called the "diffu-

REPORT NUMBER 2: GAINING GROUND INFORMATION DATABASE (John R. Nolon et al. eds., 2004) (describing the methodology and conclusions of this research), *available at* <http://www.yale.edu/environment/publications>.

33. See MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR: ADVENTURES IN THE SIMPLE AND THE COMPLEX* (1994). Gell-Mann describes biological evolution, the behavior of organisms in ecological systems, learning and thinking in human beings, the evolution of human societies, and the behavior of investors in financial markets as "processes." Within each process, he asserts:

A complex adaptive system acquires information about its environment and its own interaction with that environment, identifying regularities in that information, condensing those regularities into a kind of "schema" or model, and acting in the real world on the basis of that schema. In each

sion of innovations.”³⁴ These descriptions parallel descriptions of change within and among communities that we have seen from our experience working directly with local governments. What follows is an outline of the process of adoption of land use innovations and an explanation of why and how state and federal influences can help further positive local change.

In the fields of physics and ecological studies, scientists have studied complex adaptive systems that exist in nature and how they successfully adapt when challenged by change. Their theories gradually migrated to the study of business associations, governmental entities, and public law. Broadly defined, a complex adaptive system is an organized entity comprising various components: niches in ecosystems, divisions in corporations, departments in governments, and stakeholder groups in localities, to name a few.³⁵ Diffusion theorists refer to “social systems” and observe and describe the diffusion of innovations as they are communicated and adapted through defined processes over time by members within a system.³⁶ Urban planning scholars reference the behavior of complex adaptive systems and the field of diffusion of innovations to define how regional planning networks can work to rationalize land use planning and control.³⁷

case, there are various competing schemata, and the results of the action in the real world feed back to influence the competition among those schemata.

Id. at 17. Until perhaps the late 1950s, traditional zoning techniques sufficed to order the external development pressures on communities in the United States. As development pressures mounted, this model of land use control failed many communities whose leaders then reacted to this feedback of failure by adopting new land use techniques, a process that evolves within and spreads among communities through the process Gell-Mann describes as a complex adaptive system. *See generally* MITCHELL M. WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (1992) (providing details of the work conducted by the Santa Fe Institute on the science of complexity).

34. *See* EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 6 (5th ed. 2003) (“Diffusion is a kind of *social change*, defined as the process by which alteration occurs in the structure and function of a social system. . . . In this book, we use the word ‘diffusion’ to include both the planned and spontaneous spread of new ideas.”).

35. *See* GELL-MANN, *supra* note 33, at 9

36. ROGERS, *supra* note 34, at 5. “*Diffusion* is the process in which an innovation is communicated through certain channels over time among the members of a social system.”

37. *See* David E. Booher & Judith E. Innes, *Network Power in Collaborative Planning* 12–13 (2000–01) (unpublished working paper, U. Cal. at Berkeley Inst. of Urb. and Regional Dev., on file with the Harvard Environmental Law Review):

Network power emerges from communication and collaboration among individuals, agencies, and businesses in a society. Network power emerges as diverse participants in a network focus on a common task and

Regarding grassroots change in land use law and practices, the relevant system is the community and its formal decision-makers, the members of the local legislature and those who influence their actions. At this level, land use "innovations"³⁸ include laws that provide for the transfer of development rights or the protection of wildlife habitat, for example. The larger system relevant to land use reform comprises the locality, state and federal legislatures and their land use agencies, and their constituent civic and private-sector stakeholders.

In nature and in human organizations, the systems that thrive are those that have established effective mechanisms for exchanging, evaluating, and reacting to information among their component parts. As stress occurs, information is gathered at the lowest level of the system and relayed to higher levels that digest and synthesize that information. Then, through continued communication, system behaviors are reordered to react and adapt to change.³⁹

Connectivity among components is the key to successful adaptation. In a fully connected system, the components can be described as nested into one another, forming a loose network of interdependent parts. They constitute a hierarchical form that enables the system to self-regulate, adapting organically as stresses occur. This process of change is not necessarily orderly, nor does the nested hierarchy necessarily exhibit consistent rational behavior. Through continued and effective communication, however, the system adapts in unpredictable but generally successful ways as it deals with external events.⁴⁰

Serious land use threats are felt first and most profoundly at the local level and stimulate "perturbed" or "anticipatory" local action, always led by individuals who become innovators in the pro-

develop shared meanings and common heuristics for action. It grows as these players identify and build on their interdependencies to create new potential. In the process, innovations and novel responses to environmental stresses can emerge. These innovations, in turn, make possible adaptive change and constructive action of the whole.

See also id. at 3 ("Like a complex adaptive system, [the planning network] as a whole is more capable of learning and adaptation in the face of fragmentation and rapid change than a set of disconnected agents.").

38. *See* ROGERS, *supra* note 34, at 12 ("An *innovation* is an idea, practice, or object that is perceived as new by an individual or other unit of adoption.").

39. GELL-MANN, *supra* note 33, at 17

40. *See* ROGERS, *supra* note 34, at 404-35.

cess of adapting to change.⁴¹ For example, when a community experiences a serious groundwater pollution problem, its leaders immediately react by figuring out what happened and crafting a solution, such as an aquifer protection law, because they are perturbed. In some communities, leaders get advance warning about such problems by attending technical seminars, learning about events in nearby places, talking to extension agents, or through their general reading and studies. In these cases, they sometimes succeed in proposing and getting protective laws adopted in anticipation of pending problems. Diffusion research clarifies the types of localities that will most successfully adopt innovations capable of managing this change in a positive way over time. They are arranged as "organizations" that have leaders who take a positive attitude toward change, that are linked internally through interpersonal networks, and that are open to outside ideas.⁴² Such organizations have leaders who seek needed innovations outside the system, are open to considering such ideas, and communicate effectively so that the information and interests of others within the system are instrumental in adapting new ideas to the needs of the organization.

Within an innovative organization, leaders champion change, and they do it effectively to the degree that they have the power, charisma, or most importantly the interpersonal skills needed to overcome inevitable indifference and resistance. "Champions of change" occupy a key position where they can link others into the decision-making process; they understand the interests and concerns of others and they are effective negotiators.⁴³ Their instinct,

41. See *id.* at 434. "The presence of an innovation champion contributes to the success of innovation in an organization Research has shown that innovation champions may be powerful individuals in an organization, or they may be lower-level individuals who possess the ability to coordinate the actions of others.

42. ROGERS, *supra* note 34, at 411.

43. According to Rogers, "[a] champion is a charismatic individual who throws his or her weight behind an innovation, thus overcoming indifference or resistance that the new idea may provoke in an organization." A local government is an "organization" with a chief elected officer, a legislative body, and land use agencies such as a planning commission, zoning board of appeals, conservation committee, and master plan committee. It is influenced by those affected by land use decisions when they vote and when they organize constituents to speak at public meetings and hearings. Our experience shows that effective champions of change in local land law can be members of any one of these boards or committees and, at times, even particularly effective stakeholders. Rogers writes that, according to studies of organizational change, the "important qualities of champions were that they (1) occupied a key linking position in their organization, (2) possessed analytical and intuitive skills in understanding various individuals' aspirations, and (3) demonstrated well-honed

often, is to form a coalition within the organization to study, adapt, adopt, and implement a needed innovation. This coalition building approach is a key strategy, because innovations that are adapted to local circumstances by those affected are more likely to succeed over time.⁴⁴ When the process of adopting an innovation is hurried, the imported idea is less likely to be adjusted appropriately to local circumstances, and there will be less constituent commitment and a greater likelihood of failure, with difficulties in its implementation less likely to be remedied.

Successful innovations spread horizontally among organizations with common characteristics. Land use leaders, for example, are more likely to adopt an innovation that they learn about that has worked well in a neighboring or similar community. The process of adapting smart growth and environmental protection laws to local circumstances involves the entire apparatus of local land use decision-making, which varies from state to state. Often it requires the input of planning boards, conservation commissions, landowners, and citizens at public hearings, which results in action by the local legislative body—the elected representatives of the people. For new laws to be adopted, clever and enlightened local leaders must shape and direct the debate and see that the desired local legislative reform occurs. In that process, it is critical that local voters and elected leaders believe that the proposed change is credible. This is aided by knowledge that similar changes have been adopted in similar places by similar people, that they are supported by sound public policy, or that there are incentives available for those who make such changes.⁴⁵

It is well known that zoning law in the first decades of the 20th century rapidly spread from state to state and locality to locality and was adapted to grassroots circumstances along the way.⁴⁶ In the same fashion, local smart growth and environmental protection laws move among communities as the adaptation process proceeds. One way to plan change, then, is to find a community in crisis or one seriously anticipating adverse change, identify

interpersonal and negotiating skills in working with other people in their organization." *Id.* at 414–15.

44. *Id.* at 429.

45. *See infra* Part IV.

46. *See* BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 91-34, at 200–01 (1969) [hereinafter REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS]

leaders who exhibit the characteristics of champions of change,⁴⁷ and put innovative laws from other communities in their hands. This is the work of change agents, paid professionals, or those who work for federal, state, or non-governmental agencies whose mission is to ensure the appropriate use of the land. State statutes themselves can be agents of change if they are drafted so that they contain persuasive guidelines and are supported by technical assistance or grants to encourage their adoption.⁴⁸

D. Lessons in Dysfunction and Disconnection

The history of our nation's land use system is freighted with discontinuity, dysfunction, and tumultuous disconnections.⁴⁹ This persists within all components of the system from its grassroots engagements to its removed state and federal interventions. A few illustrations suffice to make the point.

47. See *supra* note 43.

48. See *infra* Part III.B.

49. In 2005, the Final Report of the U.S. Commission on Ocean Policy outlined the "complex mosaic of legal authorities" affecting coastal management in the United States:

Management of ocean and coastal resources and activities must address a multitude of different issues, and involves aspects of a variety of laws—at local, state, federal, and international levels—including those related to property ownership, land and natural resource use, environmental and species protection, and shipping and other marine operations—all applied in the context of the multi-dimensional nature of the marine environment. Several of those aspects of law may come into play simultaneously when addressing conflicts over public and private rights, boundaries, jurisdictions, and management priorities concerning ocean and coastal resources. In addition, some laws result in geographic and regulatory fragmentation and species-by-species or resource-by-resource regulation.

U.S. COMMISSION ON OCEAN POLICY, FINAL REPORT, *supra* note 13, App. 6 at 2. Following the great Midwest floods of 1993, a five-state consortium of natural resource managers reported that in the Upper Mississippi Basin—in addition to relevant federal statutes—there existed:

[A] planning, regulatory, and management framework that included at least 20 different categories of agencies (from federal to local) with jurisdiction over one or more of some 33 different functional areas of activity on the river. This includes at least six federal agencies with significant roles, 23 state agencies in five states, and 233 local governments.

Upper Mississippi River Conservation Committee, Facing the Threat: An Ecosystem Management Strategy for the Upper Mississippi River (Dec. 1993), <http://www.mississippi-river.com/umrcc/Call-for-Action.html> (on file with the Harvard Environmental Law Review). See also Peter A. Buchsbaum, *Permit Coordination Study by the Lincoln Institute of Land Policy*, 36 URB. LAW. 191, 191–92 (2004) ("[T]he problem of regulatory coordination will not go away. Over the decades, federal land use regulation has grown more, not less intense."). The author lists various federal regulations that involve land use controls and permitting. See *id.*

At the local level, a certain dysfunction sets in due to the fact that land use decision makers are elected, or are appointed by elected officials. As a result, those who live next to proposed developments—projects that must be reviewed by local land use boards—have influence and power because they are constituents of the decision-makers and they resist change. This is usually an automatic, rather than thoughtful, reaction.⁵⁰ The unintended consequence of this serious discontinuity is to shift development pressures elsewhere, often to the countryside. Comprehensive land use plans cannot be implemented without developers who build in conformance with the community's vision. Developers and their financiers, however, are pushed away by local opposition, rather than drawn into partnerships with local plans and planners.⁵¹

State policies that rely heavily on local property taxes to fund education and pay municipal service costs create fierce competition among municipalities, all of which seek industrial and commercial projects that promise higher assessed values and produce few schoolchildren. This state policy also leads to local land use laws that zone out affordable types of housing, causing alarming housing price spirals in many metropolitan areas and denying housing opportunities to workers needed by the businesses that are zoned in. Fiscal zoning causes both municipal border wars and housing discrimination; it is as ubiquitous and dysfunctional as neighbor opposition, if not as well understood.⁵²

Congress often adopts spending and finance programs that have unintended and dysfunctional consequences. Federal interstate highway funding and low-cost mortgage programs famously fueled the forces of sprawl in the 1950s and 1960s that are with us still.⁵³ There is little evidence that these federal projects and pro-

50. See PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW* 336–338 (1998). See also ANDRES DUANY, ELIZABETH PLATER-ZYBERK, & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 242–43 (2000) (“Only generalists can be trusted to offer reasonable advice. The role of the generalist must be played by citizens, but citizens can forfeit that role by becoming specialists of their own backyard.”).

51. See generally MICHAEL C. THOMSETT, *NIMBYISM: NAVIGATING THE POLITICS OF LOCAL OPPOSITION* (2004).

52. See generally, MILLENNIAL HOUSING COMMISSION, *MEETING OUR NATION'S HOUSING CHALLENGES 2* (2002), available at <http://govinfo.library.unt.edu/mhc/MHCReport.pdf>.

53. See Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 329–30 (1993) (“Various federal

grams bore any relationship to, or even considered, state and local policies regarding environmental protection, farmland preservation, or housing development. Today, the frustrated efforts of the Environmental Protection Agency (EPA) to force local land use policies to respect pollution standards for federally impaired waters is a contemporary manifestation of this same disconnection.⁵⁴ Single, focused, top-down federal agency actions often discombobulate rather than further the broad-based land use policy objectives of the nation's thousands of local governments, each dealing with its own development needs and unique geography, environment, and political history.⁵⁵

E. Integrated Federalism

Law reform taking place at the grassroots level must be integrated into a federal system of laws, organized within a framework that accounts for and marshals the resources of all levels of government. The United Nations Environment Programme ("UNEP") recommends that national legislatures adopt a framework law for land, resource, and environmental protection.⁵⁶ The

policies and programs have powerfully propelled the suburbanization of America." See also James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 210 (1982).

A survey conducted by the Fannie Mae Foundation on the 50th anniversary of the 1949 Housing Act asked an interdisciplinary group of urban specialists to rank the "top 10 influences on the American metropolis of the past 50 years," and the #1 ranked influence was "[t]he 1956 Interstate Highway Act and the dominance of the automobile." Robert Fishman, *The American Metropolis at Century's End: Past and Future Influences*, 11 HOUSING POLICY DEBATE 199, 200 (2000), available at <http://www.fanniemaefoundation.org/programs/hpd/v11i1-fishman.shtml>.

54. See Nolon, *In Praise of Parochialism*, *supra* note 23, at 366-72.

55. Charles W. Powers & Marian R. Chertow, *Industrial Ecology: Overcoming Policy Fragmentation*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 19, 21 (Marian R. Chertow & Daniel C. Esty eds., 1997) ("Within the U.S. environmental protection system, there are several categories of fragmentation: by type of pollution, by life-cycle stage, and by organizational characteristics."). See also *id.* at 7 ("Redefining the role of government is, perhaps, the central question of our age.").

56. See John R. Nolon, *Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina*, 13 PACE ENVTL. L. REV. 685, 710 n.83 (1996) (citing Lawrence J. Jensen, *Environmental Protection in Latin America: A Rapidly Changing Legal Framework*, 8 NAT. RESOURCES & ENV'T 23 (1993)); United Nations Environment Programme, Technical Assistance, http://www.unep.org/dpdl/Law/Programme_work/Technical_assistance/index_more.asp (last visited Nov. 29, 2005) (on file with the Harvard Environmental Law Review) [hereinafter "UNEP, Technical Assistance"]. UNEP has collected examples of framework laws in a COMPENDIUM OF ENVIRONMENTAL LAWS OF AFRICAN COUNTRIES, VOL. 1, FRAMEWORK LAWS AND EIA REGULATIONS (1996 & SUPPS.), available at <http://www.unep.org/padeli/publications/laws.html>.

United Nations describes a framework law as one that establishes basic legal principles but does not attempt to create or codify regulatory standards and provisions.⁵⁷ Framework laws begin with a statement of land use and environmental goals and policies and articulate the institutional arrangements among levels and agencies of government as well as the common procedural principles for environmental decision-making.⁵⁸ Existing land use and environmental laws are not disturbed when a framework law is adopted; rather, they are left in place with the intention that they will be amended as the more integrated governmental system progresses.⁵⁹

Implicit in the concept of a national framework law for land use control and management is the interesting notion that a conversation can occur among the several levels of government involved. Since no framework law could be effective without the consent and cooperation of each level, the exercise of developing such a law will establish the connections that are critically important for the national land use system to adapt properly to contemporary challenges. The immediate fruit of negotiating a framework law will be the exchange of information so necessary to discerning new strategies and behaviors needed to respond to adverse environmental and economic change.

If there were to be negotiations regarding the creation of a framework law, the distinct competencies of each level of government that need to be coordinated would become clear. The extensive taxing and spending power of the federal government, for example, would be understood as a potent force for encouraging state and local governments to further legitimate national land use interests. The federal 701 Program⁶⁰ provided funding for lo-

57. UN Economic and Social Commission for Asia and the Pacific, ESCAP Virtual Conference: Integrating Environmental Considerations into Economic Policymaking Processes, http://www.unescap.org/drrpad/vc/orientation/legal/2F_frame_intro.htm (last visited Nov. 29, 2005) (on file with the Harvard Environmental Law Review).

58. See Felipe Pérez, *Environmental Framework Laws in Latin America*, 13 PACE ENVTL. L. REV. 625, 678-84 (1996).

59. See UNEP, Technical Assistance, *supra* note 56.

60. The Urban Planning Assistance Program, Housing Act of 1954, Pub. L. No. 83-560 § 701, 68 Stat. 590, 640 (repealed 1981). For discussions of the 701 Program's influence at the state and local level, see ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 2 (1999); Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 186 n.35 (2000) (citing Carl Feiss, *The Foundations of Federal Planning Assistance*, 51 J. AM. PLAN. ASS'N 175 (1985)); and Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 PACE L. REV. 505, 510-11

cal comprehensive planning that generated a vast number of local plans, many of which have remained unchanged since 701 funding disappeared years ago.⁶¹ Imagine the federal government repeating that experiment today and working with states to encourage and assist localities to devise grassroots solutions for protecting federally impaired waters. Localities in coastal areas could accommodate federal coastal policies in their plans, those in floodplains could reference FEMA and federal floodplain standards, and those with stormwater systems could respond to federal policies regarding stormwater management.

State legislatures drawn into these framework law negotiations would better understand the importance of their power to authorize local governments to adopt a wide range of land use strategies to respond to unique local conditions while establishing policies and priorities to guide local planning and regulation. Clear policies, data on local and regional needs, Geographical Information Services ("GIS"), technical assistance, and financial support could become means of enabling local governments to accommodate state housing, transportation, open space, and watershed management interests.

Representatives of local governments at the table to negotiate a framework law would explain their need to be supported in their role of receiving, reviewing, and revising applications for development permits. They would request state and federal assistance—in the form of relevant data, GIS, model ordinances, and best management practices, for example—to enable them to carry out that role effectively and, in return, tolerate guidance and direction in accommodating regional, state, and federal interests.

The idea of a national land use framework law is not new; in fact, it almost became a reality over thirty years ago. In 1969, the Douglas Commission, appointed by President Johnson, issued its report on urban problems entitled *Building the American City*.⁶²

(1993). In a timeline tracing the history of New Jersey's land development policies, the state's Department of Community Affairs, Office of Smart Growth, estimates that from 1954 to 1981 "more than \$50 million had been spent in assisting local, county, regional and state planning in New Jersey" under the 701 Program. N.J. Dep't of Community Affairs, *New Jersey Has a Long Tradition of Smart Growth*, <http://www.nj.gov/dca/osg/smart/chronology.shtml> (last visited Oct. 29, 2005) (on file with the Harvard Environmental Law Review).

61. See Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004) (arguing that the federal government should not retreat, as it apparently is doing, from investing in cities to help them deal with problems of revitalization and affordable housing).

62. *Supra* note 46.

The Commission recommended that each state create an agency for land use planning and prepare state and regional land use plans: "The State governments, much closer to the firing line, and with basic legal power over local government structure and financing, are in a more strategic position Clearly essential, then, is a set of concerted and mutually reinforcing efforts involving all three levels of government—local, State and National."⁶³

In 1970, as a counterpart to the National Environmental Protection Act (NEPA),⁶⁴ Senator Henry Jackson proposed the national Land Use Policy and Planning Assistance Act,⁶⁵ a framework law with a clear vision of the proper role of each level of government.⁶⁶ The Act proposed several powerful incentives to encourage states to create strategic land use plans⁶⁷ based on local input and public participation. This was a direct response to the then recent experience of a few states that were adopting comprehensive growth management statutes to rationalize their activity with that of their local governments.⁶⁸ The incentives in the Act included \$100 million annually in direct planning grants,⁶⁹ the provision of a network of data needed to plan efficiently,⁷⁰ and the promise that federal actions of all types would conform to state land use plans after they were adopted and accepted.⁷¹ State plans were to designate areas for growth and areas for conservation.⁷² Federal resources would then have been directed to encourage growth and conservation, in accordance with the state plan.⁷³ The Act would have designated a federal agency to coordi-

63. *Id.* at 323.

64. 42 U.S.C. §§ 4321–4347 (2005).

65. See S. Rep. No. 91-1435, at 1 (1970).

66. See generally Jayne Daly, *A Glimpse of the Past—A Vision of the Future: Senator Henry M. Jackson and National Land Use Legislation*, in PACE ENVTL. L. REV., COMMEMORATIVE EDITION 1995 at 25.

67. See S. Rep. No. 91-1435, at 9 (1970).

68. Oregon's statewide planning legislation was initiated in 1969, when the state's Senate Bill 10 mandated that local governments adopt comprehensive land-use plans in accordance with state standards. Senate Bill 100, in 1973, established the Department of Land Conservation and Development, which created the state's fourteen planning goals. See Or. Dep't. of Land Conservation & Dev., Chronology: 1969 to Present, at <http://www.oregon.gov/LCD/history.shtm> (last visited Nov. 29, 2005)(on file with the Harvard Environmental Law Review).

69. See Daly, *supra* note 66, at 37.

70. See *id.* at 36.

71. See *id.* at 38.

72. *Id.*

73. *Id.*

nate federal action; states were encouraged to establish coordinating agencies for the same purpose.⁷⁴

During the early 1970s, this bill passed the Senate twice⁷⁵ but was not adopted in the House. On June 12, 1974, the Rules Committee called for a vote on whether the bill should be debated on the floor of the House; this measure was rejected by seven votes—211 to 204—and a comprehensive approach to ordering the nation's land use system has not been seriously reconsidered since.⁷⁶ Along the way, the Act generated critics who labeled it "federal zoning" and an "insidious violation of the Constitution," referring to the reserved powers clause of the Tenth Amendment. Incentives proposed in the bill were labeled "sanctions," and the overall effort was dubbed "new feudalism," an attempt to usurp power from local governments.⁷⁷ Apparently, resistance to a national framework law persists.⁷⁸ We ignore at our peril the task of integrating our efforts to manage land use and natural resources comprehensively, since reform at any given level should not be ignorant of its effect on the whole.⁷⁹

III. MOVING FROM FRAGMENTATION TO INTEGRATION: CASE STUDIES OF REFORM WITHIN THE FEDERAL SYSTEM

The lessons learned from the foregoing are that the national land use system will benefit from greater connectivity within and among its components and that each level of government needs to be assigned roles related to its central competency. Before reviewing useful models of connectivity and capacity building, another look at the relevant roles of each level of government is advisable.

The Sustainable Use of the Land Project conducted by the Lincoln Institute of Land Policy resulted in a book that is perhaps the last significant review of land use in America.⁸⁰ It explained

74. *Id.* at 27–31.

75. *See id.* at 48, 54.

76. *See* John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson's 1970 Policy Act*, 48 LAND USE L. & ZONING DIG. 3, 5 (1996).

77. *See id.* at 5.

78. *See* Peter A. Buchsbaum, *Permit Coordination Study by the Lincoln Institute of Land Policy*, *supra* note 49 (stating that an initiative proposed recently by the American Planning Association entitled "The Cooperative Federalism Act" was opposed by its advisory group on smart growth policies).

79. *See* GELL-MANN, *supra* note 33, at 345–46 *See also* Booher & Innes, *supra* note 37, at 21 (citing PAUL CILLIERS, COMPLEXITY AND POSTMODERNISM: UNDERSTANDING COMPLEX SYSTEMS (1998))

80. HENRY L. DIAMOND & PATRICK F. NOONAN, *LAND USE IN AMERICA* (1996).

the relevance of the subject of sustainable land use and the importance of understanding and reinforcing appropriate governmental roles. The study's authors note that, with continued population pressures and without a focus on "using land well," "the countryside will be chewed up, ugliness will prevail, urban cores will continue to decline, public service costs will be unnecessarily high, and water, air pollution, and waste problems will get worse."⁸¹ The study concluded with the presentation of a land use agenda that provided ten recommendations for the future of land use policy.⁸² According to this reform agenda, local governments must take the lead role in securing good land use, state governments must establish the ground rules on matters that affect more than one locality, and federal policies and actions must be better coordinated to properly influence the direction and pace of development.⁸³

The authors of this review of land use in America, based on extensive deliberations and contributions of many experienced practitioners and scholars, confirmed that the focus of reform should be localism.⁸⁴ They affirmed the need to guide and assist local officials and the importance of state and federal influences in ordering this system from the ground up.⁸⁵ The next Section examines several instructive examples of land use law reform that either create connections within, between, or among components of the system or increase the competence of localities at the grass roots level to perform their critical role. These reforms have begun the important work of connecting local, state, and federal land use activities and illustrate how this agenda for reforming land use in America can be implemented.

A. Federal Action

A positive example of achieving effective communication throughout the nation's land use system is the Coastal Zone Management Act (CZMA),⁸⁶ adopted by Congress in 1972. The Strat-

81. *Id.* at 99.

82. *Id.* at 100–32.

83. *Id.* at 100–10 (Agenda Items #1, #2, and #3).

84. *Id.* at 100–06, 112–13 (Agenda Items #1, #2, and #5).

85. *See id.* at xvii. *See also* GELL-MANN, *supra* note 33, at 330 ("[I]n the long run[,] attempts to impose solutions on human societies from above often have destructive consequences. Only through education, participation, a measure of consensus, and the widespread perception by individual people that they have a personal stake in the outcome can lasting and satisfying change be accomplished.").

86. 16 U.S.C. §§ 1451–1465 (2005).

ton Commission on Marine Science, Engineering, and Resources prompted Congressional action when it reported:

The coast of the United States is, in many respects, the Nation's most valuable geographic feature Rapidly intensifying use of coastal areas already has outrun the capabilities of local governments to plan their orderly development and to resolve conflicts. The division of responsibilities among the several levels of government is unclear, and the knowledge and procedures for formulating sound decisions are lacking The key to more effective use of our coastland is the introduction of a management system permitting conscious and informed choices among development alternatives, providing for proper planning, and encouraging recognition of the long-term importance of maintaining the quality of this productive region in order to ensure both its enjoyment and the sound utilization of its resources.⁸⁷

Congress recognized that state and local institutional arrangements for planning and regulating land and water uses in coastal areas were inadequate, and the CZMA adopted an integrated approach that encouraged responsible economic, cultural and recreational growth in coastal zones.⁸⁸

Drafters of the CZMA realized that in order for a coastal management program to be successful, administration needed to take

87. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, OUR NATION & THE SEA: A PLAN FOR NATIONAL ACTION 49 (1969), *available at* <http://www.lib.noaa.gov/edocs/stratton/title.html> [hereinafter STRATTON REPORT].

88. See CZMA § 302(b),(h), 16 U.S.C. § 1451(b),(h) (2001). The devastation wrought by hurricanes Katrina and Rita demonstrates that the CZMA did not extend far enough to create disaster resilient communities or clear plans for rebuilding after major weather events. Such results, however, can be negotiated within the framework of the CZMA. Perhaps the extraordinary losses suffered in the Gulf Coast in 2005 will encourage coastal leaders to consider needed reforms within the structure of the CZMA

U.S. COMMISSION ON OCEAN POLICY, *supra* note 13, at 154. The Pew Oceans Commission has recommended the development of a new National Ocean Policy Act "that, at a minimum . . . addresses geographic and institutional fragmentation by providing a unifying set of principles and standards for governance . . . establishes processes to improve coordination among governments, institutions, users of ocean resources, and the public . . . [and] provides adequate funding to accomplish these goals." PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 102 (2003), *available at* http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf. The Commission further recommended that "[t]he consistency authority of the Coastal Zone Management Act should be expanded to include regional ocean governance plans. This will allow states to hold federal actions to consistency with regional ocean governance plans." *Id.* at 104.

place at a local level aided by a strong state role.⁸⁹ Since many of the problems surrounding coastal areas are geographically specific, drafters reasoned that state and local governments should control coastal policy, consistent with national objectives. Thus, the CZMA did not create a centralized federal agency to dictate coastal zone management but, rather, articulated national policies and then established a process for the development of state coastal zone management programs.⁹⁰ Rather than mandate state involvement, the CZMA provided incentives to encourage state participation. It offered states that meet consistency requirements effective regulatory control of their coastal areas, provided federal funds for coastal planning, projects, and program administration, and promised that federal actions would respect state and local coastal plans and policies.⁹¹ This approach of articulating national policies, encouraging and supporting state action, and recognizing the important role of local governments⁹² not only was important to the program's success but probably was the reason it was adopted by a Congress sensitive to state prerogatives in the land use arena.⁹³

This connected national strategy under the CZMA operates effectively at the grassroots level in New York. The New York De-

89. See CZMA § 303, 16 U.S.C. § 1452 (2005). Prior to the enactment of CZMA, the Stratton Report noted:

[T]he States are subject to intense pressures from the county and municipal levels, because coastal management directly affects local responsibilities and interests. Local knowledge frequently is necessary to reach rational management decisions at the State level, and it is necessary to reflect the interests of local governments in accommodating competitive needs The States must be the focus for responsibility and action in the coastal zone. The State is the central link joining the many participants, but in most cases, the States now lack adequate machinery for [the] task. An agency of the State is needed with sufficient planning and regulatory authority to manage coastal areas effectively and to resolve problems of competing uses. Such agencies should be strong enough to deal with the host of overlapping and often competing jurisdictions of the various Federal agencies. Finally, strong State organization is essential to surmount special local interests, to assist local agencies in solving common problems, and to effect strong interstate cooperation.

STRATTON REPORT, *supra* note 87, at 56–57.

90. See CZMA § 303(2), 16 U.S.C. § 1452(2) (2001).

91. See Malone, *supra* note 16, at 714–15 (1991).

92. See CZMA § 303, 16 U.S.C. § 1452 (2005)

93. See Malone, *supra* note 16, at 727 (“[I]f the requirements for state programs were more specific, the CZMA would come close to the most controversial form of land control—federal land control. The passage of the CZMA was possible because the Act required state programs to implement federal policy rather than federal regulations.”).

partment of State, through its Division of Coastal Resources and Waterfront Revitalization, provides grants to coastal communities to prepare Local Waterfront Revitalization Plans and encourages intermunicipal land use agreements among localities that share coastal resources such as harbors, bays, and riverfronts.⁹⁴ The Division's combination of funding resources, technical assistance, and emphasis on intermunicipal approaches to coastal resource protection has been a catalyzing force in creating intermunicipal agreements regarding the protection of the Long Island Sound, the Hudson River, Manhasset Bay, and Oyster Bay-Cold Spring Harbor.⁹⁵

In Florida, the Waterfronts Florida Partnerships Program works with communities to develop plans for local waterfront revitalization and offers an initial grant to make a visible improvement in the waterfront.⁹⁶ In Michigan, the Department of Environmental Quality has allocated grants to municipalities through the Michigan Waterfront Redevelopment Grant Program.⁹⁷ The grant program requires that the project must provide public access to the waterfront.⁹⁸ Washington State's Coastal Zone Management Program—the first such program in the country—was initiated under the CZMA in 1976. The state's Shorelands and Environmental Assistance Program is administered by the state Department of Ecology, and in 2004-2005 awarded grants to eleven cities and counties for comprehensive shoreline master program updates and inventories.⁹⁹

94. See New York State Department of State Division of Coastal Resources, Environmental Protection Fund Local Waterfront Revitalization Program, http://www.nyswaterfronts.com/grantopps_EPF.asp (last visited Nov. 29, 2005) (on file with the Harvard Environmental Law Review).

95. See also John R. Nolon, *Grassroots Regionalism Through Intermunicipal Compacts*, 73 ST. JOHN'S L. REV. 1011, 1034 (1999) (citing The Historic River Towns of Westchester Intermunicipal Agreement (Sept. 26, 1994), The Manhasset Bay Protection Committee Agreement (1995), and The Oyster Bay-Cold Spring Harbor Complex Agreement (1995)). See also The Long Island Sound Watershed Intermunicipal Council, *infra* note 136.

96. See Florida Dep't of Community Affairs, Waterfronts Florida Partnership, <http://www.dca.state.fl.us/fdcp/dcp/waterfronts/index.cfm> (last visited Sept. 18, 2005) (on file with the Harvard Environmental Law Review).

97. See Michigan Dep't of Environmental Quality, Waterfront Redevelopment, http://www.michigan.gov/deq/0,1607,7-135-3311_4110_4229-11504--,00.html (last visited Sept. 18, 2005) (on file with the Harvard Environmental Law Review).

98. *Id.*

99. See Washington Dep't of Ecology, Coastal Zone Management Grants, <http://www.ecy.wa.gov/programs/sea/grants/czm/index.html> (last visited Sept. 18, 2005) (on file with the Harvard Environmental Law Review).

B. State Action: Examples

Many state legislatures are adopting laws to empower and guide local land use decision-makers and to build local capacity. The following is a sample of recent instances of state legislative actions that integrate state and local land use policy.

In 1999, the State of Wisconsin adopted smart growth legislation that directs every city to enact a comprehensive smart growth plan by 2010.¹⁰⁰ Each local plan must incorporate specific smart growth elements, including agricultural, natural resource, inter-governmental cooperation, and land use plan elements. Traditional neighborhood developments (TNDs) are encouraged.¹⁰¹ The TND ordinance adopted in River Falls, Wisconsin, exemplifies a local government's successful implementation of this state smart growth initiative.¹⁰²

Land clearing and development speed up and intensify stormwater runoff, result in soil erosion, destabilize slopes, and cause surface water sedimentation. To address these problems, Michigan mandates the adoption of local land use regulations to combat erosion.¹⁰³ A state commission adopts recommendations, guidelines, and specifications for erosion control.¹⁰⁴ Local governments then pass ordinances based on the commission's program and have primary responsibility for the administration and enforcement of plan and permit procedures for land-disturbing activities.¹⁰⁵ Iowa's state-mandated erosion control program is locally designed and enforced.¹⁰⁶ The state gives conservation districts broad guidelines for adopting erosion control ordinances.¹⁰⁷ Adopted regulations are subject to approval by a state committee.¹⁰⁸ In Connecticut, the zoning enabling law requires that local zoning ordinances "shall provide that proper provision be made for soil erosion and sediment control."¹⁰⁹

100. WIS. STAT. § 66.1027 (2004).

101. A MODEL ORDINANCE FOR A TRADITIONAL NEIGHBORHOOD DEVELOPMENT (Wis. State Legislature 2001), available at http://www.1kfriends.org/Community_Planning/pdf/tndord.pdf. See also *infra* Part IV.D.

102. RIVER FALLS, WIS. MUN. CODE ch. 17.112 (2002) . . .

103. See Soil Erosion and Sedimentation Control, Natural Resources and Environmental Protection Act, MICH. COMP. LAWS ANN. ch. 324, art. II, pt. 91 (West 2005). See, e.g., ANN ARBOR, MICH. CODE, tit. v, ch. 63, § 5.650.

104. MICH. COMP. LAWS ANN. § 324.9104(1).

105. *Id.* § 324.9106.

106. IOWA CODE §§ 161A.5-12 (2003).

107. *Id.* at 161A.7.

108. *Id.* at 161A.4, 161A.7.

109. CONN. GEN. STAT. § 8-2(a) (2003).

In order to ensure that local governments have the capacity to make critical land use decisions, some states provide them with technical assistance. In Illinois, for example, the state legislature adopted the Local Planning Technical Assistance Act on August 6, 2002.¹¹⁰ The law's purpose is to provide technical assistance to local governments for the development of land use ordinances, to promote and encourage comprehensive planning, to promote the use of model ordinances, and to support planning efforts in communities with limited funds.¹¹¹ The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to be used by local governmental units to "develop, update, administer, and implement comprehensive plans, subsidiary plans, [and] land development regulations . . . that promote and encourage the principles of comprehensive planning."¹¹²

In Massachusetts, the legislature adopted a statute that directs its Department of Housing and Community Development to provide assistance to communities in solving local land use, housing, and development problems both individually and intermunicipally. The Department is directed to help with data, studies, coordination with other state agencies, and training for local land use decision-makers.¹¹³ The state has also established the Citizen Planning Training Collaborative that provides land use training by professionals on a regular basis throughout the state.¹¹⁴

Washington State has been at the forefront of developing local protection for fish and wildlife habitats. The state's Growth Management Act of 1990¹¹⁵ implements what the Washington Department of Fish and Wildlife (WDFW) calls a "bottom-up" approach to land use planning.¹¹⁶ It requires all counties, cities, and towns in the state to classify and designate resource lands and critical areas, including fish and wildlife habitats, and to adopt develop-

110. 20 ILL. COMP. STAT. ANN. 662/1-99 (2004).

111. *See id.* at 662/5.

112. *Id.* at 662/15.

113. *See* MASS. GEN. LAWS ANN. ch. 23B, § 3 (West 2004).

114. *See* Massachusetts Citizen Planner Training Collaborative, <http://www.umass.edu/masscptc/about.html> (last visited Sept. 18, 2005) (on file with the Harvard Environmental Law Review).

115. WASH. REV. CODE § 36.70A (2004).

116. *See* Washington State Department of Fish and Wildlife, FISH AND WILDLIFE AND THE GROWTH MANAGEMENT ACT, available at <http://wdfw.wa.gov/hab/gma-phs.pdf>.

ment regulations for them.¹¹⁷ The WDFW has created detailed checklists to assess the wildlife potential of urban areas and to aid local governments in reviewing the elements of their development regulations and comprehensive plans.¹¹⁸

In Utah, the state's program for providing technical assistance to its localities is part of a larger land use planning initiative. In 1999, the State legislature adopted the Quality Growth Act, which establishes a state Quality Growth Commission to advise the legislature on smart growth issues, provide planning assistance to local governments, and administer a state program for the preservation of open space and farmland.¹¹⁹ In 1997, the Envision Utah Public/Private Partnership was established to guide the state in creating a quality growth strategy.¹²⁰ The organization conducted a series of studies, forums, and media events over the next five years involving thousands of residents and hundreds of stakeholder groups. In addition to supporting state smart growth legislation, Envision Utah has helped unify the planning goals of the citizenry and constituent local governments; it has also provided local officials with "quality growth efficiency tools" to help them determine the consequences of current zoning and land use patterns and the legal strategies available to adjust them to the evolving planning vision.¹²¹

Several states have adopted statutes that create urban growth areas. These statutes aim to achieve the essential goal of smart growth: to contain growth in defined and serviceable districts. They are guided by various objectives, including the creation of cost-effective centers, preservation of agricultural districts, promotion of affordable housing, protection of significant landscapes containing critical environmental assets, and the preserva-

117. *Id.* at 2–3. See WASH. REV. CODE §§ 36.70A.030, 36.70A.050(3), 36.70A.170 (2004).

118. See WDFW Checklist for Reviewing Comprehensive Plans, Checklist for Reviewing Development Regulations, and Criteria for Assessing Wildlife Potential of an Urban Area, <http://www.wdfw.wa.gov/hab/gmapage.htm> (last visited Dec. 2, 2005) (on file with the Harvard Environmental Law Review).

119. UTAH CODE ANN. § 11-38-101 (2004).

120. See Envision Utah, <http://www.envisionutah.org/> (last visited Sept. 18, 2005) (on file with the Harvard Environmental Law Review).

121. See Introduction to Envision Utah, <http://www.envisionutah.org/index.php?id=NDY4> (last visited Nov. 29, 2003) (on file with the Harvard Environmental Law Review). See also ENVISION UTAH, QUALITY GROWTH STRATEGY AND TECHNICAL REVIEW (2000), available at <http://www.envisionutah.org/January2000.pdf>.

tion of open lands for the future.¹²² Not all of these state growth management statutes are regional in nature. Maine, for example, requires local land use plans to identify areas suitable for absorbing growth and other areas for open space protection.¹²³ On the other hand, Minnesota encourages, but does not require, localities to designate urban growth areas in local and county comprehensive plans.¹²⁴

The Oregon growth management statute, adopted in 1973, is the most directive of its kind.¹²⁵ It created a state agency known as the Land Conservation and Development Commission (LCDC), articulates a number of statewide land use planning goals, requires local governments to adopt comprehensive plans consistent with state designated urban growth boundaries, and requires local plans to be approved by the Commission. The statute also created the Metropolitan Service District (Metro) to supervise the intermunicipal urban growth boundary in the greater Portland area.¹²⁶ Strong public support and an enduring coalition of growth management advocates blocked several attempts within the state legislature to repeal or significantly modify this initiative.¹²⁷ Ballot Measure 37, however, adopted in November 2004 by an impressive margin, threatens the Oregon initiative by granting property owners compensation for the enactment or enforcement of land use laws that diminish their land values.¹²⁸

122. For a state-by-state survey of growth management provisions, see ENVIRONMENTAL LAW INSTITUTE/DEFENDERS OF WILDLIFE, PLANNING FOR BIODIVERSITY: AUTHORITIES IN STATE LAND USE LAWS (2003).

123. See ME. REV. STAT. ANN. tit. 30-A, § 4326 (2003).

124. See MINN. STAT. ANN. § 462.3535 (West 2005).

125. See Richmond, *supra* note 53, at 348–49.

126. Yan Song and Gerrit-Jan Knapp, *Measuring Urban Form: Is Portland Winning the War on Sprawl?*, J. AM. PLAN. ASS'N, Spring 2004, at 211 (noting that Metro in Portland “is the only directly elected regional government in the United States”), available at <http://www.planning.org/japa/pdf/JAPAsong.pdf>.

127. See Richmond, *supra* note 53, at 348–49.

128. Measure 37 was found unconstitutional on October 14, 2005 by the Circuit Court of Marion County in *MacPherson v. Department of Administrative Services*, No. OSC1044. The opinion is available at: <http://www.friends.org/issues/documents/M37/constitutional-challenge/M37-Opinion-Order-MSJ.pdf>. One basis for the decision is that Measure 37 “imposes limitations on government’s exercise of plenary power to regulate land use in Oregon.” *Id.* at 12. The ballot title and text of Measure 37 are available at the website of the Oregon Secretary of State: http://www.sos.state.or.us/elections/nov22004/m37_bt.pdf (last visited Nov. 1, 2005) (on file with the Harvard Environmental Law Review). Measure 37 is entitled: “Governments must pay owners, or forgo enforcement, when certain land use restrictions reduce property value.” *Id.* The summary of the measure contained on the ballot reads: “Currently, Oregon Constitution requires government(s) to pay owner ‘just compensation’ when condemning private property or taking it by other action, including laws precluding all substantial

C. Regional and Intermunicipal Action

The Standard City Planning Enabling Act,¹²⁹ promulgated by the Hoover Commission in 1928, provided for regional planning by authorizing local planning commissions to petition the governor to establish a regional planning commission and to prepare a master plan for the region's physical development. Provisions were included in the planning enabling act for communication between the regional and municipal planning commissions with the objective of achieving a certain degree of consistency between local and regional plans.

Much of the country, at one time or another, was brought within the jurisdiction of some form of regional planning organization through a variety of influences. The most powerful of these was the promise of funding for regional efforts under housing, water, and public works programs of the federal government.¹³⁰ Predominant among these organizations were voluntary area-wide regional councils of government and regional economic development organizations.¹³¹

With few exceptions, these regional bodies are not empowered to preempt or override local land use authority. They have become, however, effective vehicles for communication, education, collaboration, and networking. An early study of the positive effects of voluntary regional councils of governments found that "the most significant contribution of councils is that they have furthered the concept and interests of regionalism."¹³² Among their most significant contributions is the education of local land use officials. In these regional bodies, leaders learn about the common problems and mutual dependence of localities that share the same economic or housing market area or that have regulatory power

beneficial or economically viable use. Measure enacts statute requiring that when state, county, metropolitan service district enacts or enforces land use regulation that restricts use of private property or interests therein, government must pay owner reduction in fair market value of affected property interest, or forgo enforcement." *Id.*

129. U.S. DEP'T OF COMMERCE, ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, A STANDARD CITY PLANNING ENABLING ACT (1928). A PDF version of the original text of the Standard Act is available on the American Planning Association website at <http://www.planning.org/growingsmart/enablingacts.htm>.

130. See NELSON WIKSTROM, COUNCILS OF GOVERNMENTS 85 (1977) ("[C]ouncils, largely through federal stimulus, have become involved in a myriad array of specific functional planning activities.").

131. See *id.* at 85-101.

132. *Id.* at 130-31 ("Local officials identify more strongly than ever before with their respective council organizations.").

over river basins and watersheds that cannot be protected without intermunicipal cooperation.¹³³

Under New York's Town, Village, and General City Law, local governments are authorized to enter into intermunicipal agreements to adopt compatible comprehensive plans and zoning laws as well as other land use regulations.¹³⁴ Local governments also may agree to establish joint planning, zoning, historic preservation, and conservation advisory boards, and to hire joint inspection and enforcement officers.¹³⁵ Several dozen intermunicipal land use councils have been created under this authority.¹³⁶

State statutes in New York also enable county governments to assist constituent localities in land use matters.¹³⁷ Cities, towns, and villages may enter into intermunicipal agreements with counties to receive professional planning services from county planning agencies. Through this capacity for partnership, municipalities lacking the financial and technical resources to engage in professional planning activities can receive assistance from county planning agencies to carry out their land use plan-

133. Wikstrom made the point that the gatherings of local officials in regional councils promoted a healthy conversation among them. *Id.* at 84. ("Councils of governments have functioned rather successfully as forums for the discussion of common and regional problems."). See also Booher & Innes, *supra* note 37, at 21 ("Without this kind of dialogue, meanings will not become truly shared nor will identification develop with a common system or community. Without such dialogue, opportunities for reciprocity will be missed, important information about the problem will not surface, and creative solutions are far less likely to emerge.").

134. See N.Y. GEN. CITY LAW § 20-g (Consol. 2005); N.Y. TOWN LAW § 284 (Consol. 2005); N.Y. VILLAGE LAW § 7-741 (Consol. 2005).

135. See, e.g., VILLAGE OF LOWVILLE, N.Y., AND TOWN OF LOWVILLE, N.Y., AGREEMENT, Aug. 12, 1982 (creating joint planning board); TOWN OF NUNDA, N.Y., LOCAL LAW ONE 1993 (adopted July 12, 1993) (creating joint Zoning Board of Appeals with the Village of Nunda); TOWN OF DEKALB, N.Y., SITE PLAN REVIEW LAW, LOCAL LAW 001 1991 (adopted Mar. 2, 1991) (establishing consolidated town and village planning board with the Village of Richville). See also MONROE COUNTY COUNCIL OF GOVERNMENTS INTERMUNICIPAL COOPERATION REPORT 2001 (surveying cooperative efforts among 21 municipalities in the county, and reporting 385 agreements for 45 functions) available at <http://www.growmonroe.com/documentView.asp?docID=1998>.

136. See, e.g., LONG ISLAND SOUND WATERSHED INTERMUNICIPAL COUNCIL (formed by an Intermunicipal Agreement, signed April 1, 1999, between the Cities of Mount Vernon, New Rochelle, and Rye, the Town of Mamaroneck, the Town-Village(s) of Harrison and Scarsdale, the Villages of Larchmont, Mamaroneck, Pelham Manor, and Rye Brook which have jurisdiction over the watershed of Long Island Sound in Westchester County, N.Y.), available at <http://www.liswic.org>; MONROE COUNTY COUNCIL OF GOVERNMENTS (bylaws adopted May 25, 2000), available at <http://www.growmonroe.com/org267.asp?orgID=267&storytypeid=&storyID=&#doc>.

137. See, e.g., N.Y. GEN. MUN. LAW §§ 119-u, 239-d (McKinney 2005); N.Y. GEN. CITY LAW § 20-g (McKinney 2005); N.Y. TOWN LAW § 284 (McKinney 2005); N.Y. VILLAGE LAW § 7-741 (McKinney 2005).

ning and regulatory functions. County planning agencies can, in turn, act in an advisory capacity, assist in the preparation of a comprehensive plan, assist in the preparation of land use regulations, and participate in the formation of individual or joint administrative bodies. Several counties in New York are now signatories on intermunicipal land use agreements involving local governments in watershed, riverfront, harbor, and other land use partnerships.¹³⁸

Using this broad legal authority in New York, the Rockland Riverfront Communities Council (RRCC) was created in 2002.¹³⁹ It comprises the towns of Clarkstown, Haverstraw, Orangetown, and Stony Point; the villages of Grand View, Haverstraw, Nyack, Piermont, South Nyack, Upper Nyack, and West Haverstraw; the Palisades Interstate Park Commission; and the County of Rockland.¹⁴⁰ The council is organized under an intermunicipal agreement and is charged with exploring ways to obtain funding and carry out programs for conservation, development, and other land use and water-related activities along the Hudson River.¹⁴¹ Its goals are to protect, enhance, and utilize the unique assets of the Hudson River; to enhance and promote historic preservation; to educate the public on environmental issues; to provide public access to the Hudson River where possible; to preserve and protect natural, historic, and cultural resources; and to encourage sustainable economic development.¹⁴²

The incentive funding provided to the Rockland Riverfront Communities Council was part of an experimental funding program initiated by the State of New York.¹⁴³ For fiscal year 2000–2001, the state created the Quality Communities Demonstration Grant Program, offering \$1.15 million on a competitive basis to local governments for their quality community or smart

138. See, e.g., IRONDEQUOIT BAY MANAGEMENT PROJECT, INTERMUNICIPAL AGREEMENT BETWEEN TOWN OF IRONDEQUOIT, TOWN OF PENFIELD, TOWN OF WEBSTER, COUNTY OF MONROE, N.Y.S. DEPARTMENT OF ENVIRONMENTAL CONSERVATION (July 1997); ALBANY COUNTY WATERFRONT COMMITTEE, INTERMUNICIPAL AGREEMENT BETWEEN THE COUNTY OF ALBANY AND THE MOHAWK AND HUDSON RIVER WATERFRONT MUNICIPALITIES IN ALBANY COUNTY (July 18, 2000).

139. See ROCKLAND RIVERFRONT COMMUNITIES INTERMUNICIPAL AGREEMENT (Mar. 11, 2002).

140. *Id.* § 1 at 1.

141. *Id.* § 1 at 2.

142. *Id.* § 3 at 3.

143. See N.Y.S. Department of State Quality Communities Clearinghouse, <http://qualitycommunities.org/index.asp> (last visited Dec. 3, 2005) (on file with the Harvard Environmental Law Review).

growth projects.¹⁴⁴ The Department of State, which administers the program, made it clear that localities were more likely to receive grants if they joined with neighboring communities in developing smart growth strategies. Over 180 applications were received, totaling more than \$17 million in requests, and over 80 percent of the applications were intermunicipal in nature.¹⁴⁵ This type of intermunicipal cooperation is unprecedented in New York and we attribute it largely to the state's decision to make funding available on a priority basis to intermunicipal smart growth projects.

D. Local Action

Communities have a number of mechanisms at their disposal to connect the participants in land use decision-making. Case studies of citizen participation in local planning in the New York communities of Dover and Warwick¹⁴⁶ demonstrate effective public involvement in formulating comprehensive plans and land use regulations. New York's planning enabling act stresses the importance of citizen participation in comprehensive planning in all cases and provides a special mechanism to ensure that all stakeholder groups may be involved in drafting the plan.¹⁴⁷ It provides for the formation of a special board to prepare the plan, to which representatives of interest groups may be appointed and which involves one member of the local planning board.¹⁴⁸ The Act also requires the board to have meetings with the public at large.¹⁴⁹

Even with respect to controversial development projects, effective communication processes can be created between developers and those who will support and oppose their projects during

144. See N.Y.S. Department of State Quality Communities Task Force, Quality Communities Demonstration Program Awards (October 2000), <http://www.dos.state.ny.us/qcp/qcpawrds.html> (on file with the Harvard Environmental Law Review).

145. Telephone interview with Carmella Mantello, Assistant Secretary of State, New York Department of State (May 2, 2000).

146. See *infra* Part IV.A-B.

147. N.Y. TOWN LAW § 272-a(1)(e) (Consol. 2004) ("The participation of citizens in an open, responsible and flexible planning process is essential to the designing of the optimum town comprehensive plan."). See also N.Y. VILLAGE LAW § 7-722(1)(e) (Consol. 2004); N.Y. GEN. CITY LAW § 28-a(2)(e) (Consol. 2004).

148. N.Y. TOWN LAW §§ 272-a(2)(c), 272-a(4) (Consol. 2004); N.Y. VILLAGE LAW §§ 7-222(2)(C), 7-222(4) (Consol. 2004); N.Y. GEN. CITY LAW §§ 28-a(3)(c), 28-a (5) (Consol. 2004).

149. N.Y. TOWN LAW § 272-a(6) (Consol. 2004); N.Y. VILLAGE LAW § 7-222(6) (Consol. 2004); N.Y. GEN. CITY LAW § 28-a(7) (Consol. 2004).

the land use review process.¹⁵⁰ These techniques provide an opportunity for those involved to negotiate solutions face-to-face, rather than to attempt to influence the outcome via adversarial litigation. In the Hudson Valley, trained local land use leaders have helped developers form concept committees involving the developer and community stakeholders. Local land use laws have been amended to provide for a pre-application submission process that does not trigger the time periods required by state or local law for the review and approval of the proposal.¹⁵¹ State enabling acts allow for the project review process to be put on hold for a short time while the applicant negotiates with interested parties.¹⁵²

In the California case of *Santa Margarita Area Residents Together v. San Luis Obispo County*, all principal stakeholders affected by a proposal to develop the Santa Margarita Ranch participated in a pre-application mediation of disputes concerning the development.¹⁵³ The mediation arrived at a consensus regarding the number and location of housing units, the preservation of agricultural land, and open space conservation easements. This became the basis for a development agreement between the developer and the county. The court upheld the agreement as valid, finding that the agreement retained the county's authority to exercise its discretion in approving the developer's application under existing zoning rules.¹⁵⁴

Turning to other states, we find interesting examples of the mediation of land use disputes among affected stakeholders and other innovations. In *Medeiros v. Hawaii County Planning Commission*, the court enthusiastically endorsed mediation of a land use dispute with these words: "[S]ince it allows the interested parties the opportunity to meet with the developers on a one-to-one basis and to attempt to resolve their differences, mediation may, as a practical matter, provide the residents and property owners

150. See WESTCHESTER COUNTY EXECUTIVE'S TASK FORCE ON ENVIRONMENT AND DEVELOPMENT, COLLABORATIVE DEVELOPMENTS: A REPORT ON DEVELOPMENT APPROVALS ACHIEVED THROUGH COLLABORATION 2 (2003) ("Several recent developments in the Lower Hudson Valley of New York State illustrate a new approach to seeking land use approvals. In these cases, the approval processes emphasized inclusiveness, transparency, and accountability and produced proposals that unite and satisfy rather than divide and infuriate.").

151. See, e.g., TOWN OF WAWAYANDA, N.Y. CODE § 195-75 (1998).

152. N.Y. TOWN LAW § 274-a(8) (Consol. 2004); N.Y. VILLAGE LAW § 7-725-a(8) (Consol. 2004); N.Y. GEN. CITY LAW § 27-a(8) (Consol. 2004).

153. 100 Cal. Rptr. 2d 740, 742 (Cal. Ct. App. 2000).

154. See *id.* at 749.

with greater impact on the decision than a contested case.”¹⁵⁵ The concurring opinion by Justice Bryson in the Oregon Supreme Court decision in *Fasano v. Board of County Commissioners of Washington County*¹⁵⁶ is also instructive:

The basic facts in this case exemplify the prohibitive cost and extended uncertainty to a homeowner when a government body decides to change or modify a zoning ordinance or comprehensive plan . . . No average homeowner or small business enterprise can afford a judicial process such as described above nor can a judicial system cope with or endure such a process in achieving justice. The number of such controversies is ascending.¹⁵⁷

Idaho, Pennsylvania, and Hawaii provide for mediation once an application for a land use proposal is submitted for approval; that is, before a final decision is rendered on the application.¹⁵⁸ Under these proceedings, involved and affected parties have the opportunity to influence modifications to a plan before it is approved or adopted by the governing authority. As these statutes, cases, and case studies demonstrate, adversaries in the local land use decision-making process can be engaged in effective dialogue that results in more beneficial development projects.

IV. THE ROLE OF CHAMPIONS OF CHANGE: EFFECTIVE LAW REFORM THROUGH COALITION BUILDING

At the local, state, and federal levels, innovative land use laws have been adopted that respond to the pressures of change in ways that integrate stakeholders at the local level, build on the competencies and resources of multiple levels of government, and exhibit successful approaches that suggest a strategic path toward the reform of our national land use system. By looking at a few examples in a bit more depth, we can probe how these changes have happened and better understand how to emulate and encourage them.

155. 797 P.2d 59, 67 (Haw. Ct. App 1990).

156. 507 P.2d 23 (Or. 1973) (Bryson, J., concurring).

157. *Id.* at 30 (Bryson, J., concurring).

158. See IDAHO CODE ANN. § 67-6510 (2001); 53 PA. CONS. STAT. ANN. § 10908.1 (West 2005); HAW. REV. STAT. § 205-5.1(e) (2005) (for geothermal permits proposed in certain areas).

A. Dover, New York

The town of Dover sits along the eastern edge of New York's Hudson Valley at the northern boundary of the New York metropolitan area.¹⁵⁹ A rural community with fewer than 10,000 residents, it is intersected by a large and critical freshwater wetland system and Route 22, a major state transportation arterial. It shares with its neighbors two distinct aquifers that supply much of the region's water.

With reasonable housing costs in a tight housing market, Dover has experienced "heightened growth pressure and residential in-migration."¹⁶⁰ The town is located to the north of, and just beyond, the New York City drinking water supply watershed, where industrial land uses and facilities are strictly regulated by New York City's Department of Environmental Protection to protect the city's drinking water.¹⁶¹ Both the absence of such regulations and the town's considerable sand and gravel resources attracted many heavy industries, including mining and deposition businesses, to the town.¹⁶² These potential new land uses are perturbations: they pose a great threat to the community's aquifers and cause traffic congestion, particulate contamination, and other impacts that are inconsistent with the town's present residential character.

These circumstances were anticipated by local leaders over a decade ago. In 1991, a committee with members from several stakeholder groups was appointed to revise the community's outdated comprehensive plan.¹⁶³ At this early stage, Dutchess County's Planning Department encouraged town leaders to act, as did the staff of a county-wide land trust. Physical studies were

159. Information regarding Dover was obtained from the author's experience, interviews with several town officials, and three articles written by former students: Kristen Kelley ed., *Aquifer Protection in Dover*, in SMART GROWTH CASE STUDIES (Starting Ground Series, Pace Land Use Law Center, 2003); Jayne Daly, *What's Really Needed to Effectuate Resource Protection in Communities*, 20 PACE ENVTL. L. REV. 189 (2002); and Brian Marcaurelle, *Change and Innovation in Two Hudson Valley Communities: Lessons Learned from Warwick and Dover* (Dec. 2003) (unpublished Masters project, Yale University on file with the Harvard Environmental Law Review). The law school programs mentioned in this Section are the Environmental Litigation Clinic ("Pace Environmental Litigation Clinic") and the Land Use Law Center ("Pace Land Use Law Center"), separate institutions sponsored by Pace University School of Law.

160. See Marcaurelle, *supra* note 159, at 14.

161. See Kelley, *supra* note 159, at 9.

162. See Marcaurelle, *supra* note 159, at 14 (citing Daly, *supra* note 159).

163. See Kelley, *supra* note 159, at 9.

done, a survey of town residents was completed, and the results were incorporated into the amended plan, adopted in 1993.¹⁶⁴ A critical hydro-geological study completed by the town was funded by the Hudson Valley Greenway Communities Council, a state agency charged with voluntary regional planning activities in the valley. In the new plan, the town committed itself to take a variety of actions to protect its natural resources and community character.¹⁶⁵

Because of continued intensive development pressures, the Dover town board adopted a moratorium in 1997 drafted by students from the Pace Land Use Law Center.¹⁶⁶ In 1999, Dover adopted its new zoning and further amended its comprehensive plan to provide for greater protection of natural resources. The new zoning ordinance included provisions for cluster development and resource conservation zones to preserve open space and discourage building where it would be incompatible with the landscape.¹⁶⁷ Additionally, the new code created four overlay districts: a Floodplain Overlay District, a Stream Corridor Overlay District, a Mixed Use Institutional Conversion Overlay District, and an Aquifer Overlay District.¹⁶⁸ The Aquifer Overlay District ultimately provided the solution that defeated a highly controversial proposed landfill proposal for a C&D operation. A series of legal challenges against the town ensued, but in each case Dover's actions were validated by the courts.¹⁶⁹

During the course of this process of citizen involvement, comprehensive plan revision, and zoning amendment, eleven of Dover's community leaders—elected and appointed board members and citizens—attended the Land Use Leaders Alliance Training Program, an intensive four-day experience.¹⁷⁰ The program, conducted by law school staff attorneys and funded in part by the Hudson Valley Greenway Communities Council, a state agency, instructs participants on how to use the dozens of innovative land use strategies authorized by state law. It also trains them in the

164. See Marcaurelle, *supra* note 159, at 14.

165. *Id.* at 14–15.

166. See *id.* at 16.

167. See Daly, *supra* note 159, at 199.

168. See Marcaurelle, *supra* note 159, at 17 (citing DOVER, N.Y., ZONING LAW (1999)). These overlay districts are found in the CODE OF THE TOWN OF DOVER (updated Aug. 15, 2005) (Supp. No. 5), §§ 145-13–145-16, available at www.generalcode.com/webcode2.html.

169. Dover was defended by the Pace Environmental Litigation Clinic.

170. See note 31, *supra*.

process of community decision-making and methods of bringing the community to consensus on how to resolve complex land use issues and the tensions they inspire.

B. Warwick, New York

Warwick is located at the western edge of the New York Metropolitan Area, defined by rich farmland and rural vistas.¹⁷¹ The Ramapo Mountain range to its east served, until recently, as a barrier to sprawl. Historically, most of the settlers in the area resided in three incorporated villages within the town, and most of the land within the town's land use jurisdiction was devoted to farming or forests.¹⁷² The town's 1999 comprehensive plan states that, despite its rural past, its population is projected to increase by almost 30% between 1990 and 2005.¹⁷³ It was these population projections and the evidence of sprawling land patterns to the east of Warwick that led local leaders to anticipate an imminent crises and hasten their efforts to adapt.

The town and its three villages have been working together on land use issues since 1965, when they adopted a common comprehensive plan that articulated a shared vision for future land use; in 1987, that plan was amended in anticipation of further growth pressures and community change.¹⁷⁴ By 1999, a new plan was adopted which reflected citizen goals for future growth as determined by public opinion polls, steering committee sessions, and informational meetings.¹⁷⁵ In 1994, a grassroots coalition of Warwick citizens known as Community 2000, concerned with further evidence of growth pressures, requested another review of the plan.¹⁷⁶

The local legislature responded by appointing a seventeen-member Master Plan Review Coordinating Committee in July of 1994 to study the current plan and to make recommendations for

171. Information regarding Warwick was obtained from the author's experience, interviews with several town officials, and articles written by two former students: Kelley, *supra* note 159, at 11-15; and Marcaurelle, *supra* note 159, at 2-13.

172. See Marcaurelle, *supra* note 159, at 2 (citing U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING (1990)).

173. See Marcaurelle, *supra* note 159, at 2-3 (citing TOWN OF WARWICK, N.Y., COMPREHENSIVE PLAN §§ 1.1, 1.2 (adopted Aug. 19, 1999) [hereinafter WARWICK COMPREHENSIVE PLAN]).

174. Marcaurelle, *supra* note 159, at 3 (citing WARWICK COMPREHENSIVE PLAN, *supra* note 173, § 1.3).

175. See *id.* (citing WARWICK COMPREHENSIVE PLAN, *supra* note 173, § 1.3).

176. See Marcaurelle, *supra* note 159, at 3.

its revision.¹⁷⁷ Community 2000 hosted a series of public forums and town-wide meetings to engage the greater public in exercises designed to create a vision for the future of Warwick.¹⁷⁸ The citizens' group involved more than 500 residents, who reached a general consensus that they wanted the town to retain its rural character, agricultural lands, and scenic beauty. Twenty-two leaders, representing all stakeholder interest groups involved in the Community 2000 process, emerged during this process and were appointed to serve on the Comprehensive Plan Board, which was charged with making recommendations regarding a new land use plan.¹⁷⁹

In 1995, the committee submitted its report to the town board recommending actions to preserve the town's rural character and natural resources. Additional public hearings were held, and in 1997 the town formed a special board to begin preparing the new comprehensive plan. The board continued to involve the public by hosting regular public meetings and to reach outside the community for help by interviewing local, county, and state officials.¹⁸⁰

In 1997, Cornell University conducted a cost-of-services study that showed the positive impact on the town budget of agricultural operations and the high cost to the town of low-density residential development. Cornell also assisted the town in interviewing farmers and found that 85% wished to remain in the agricultural business.¹⁸¹ Between 1997 and 1999, the town received four large grants from the New York State Department of Agriculture and Markets for the purchase of development rights on agricultural lands.¹⁸²

Beginning in 1997, leaders involved in the town's land use planning participated in the Land Use Leaders Alliance Training Program, which exposed them to available legal strategies and community decision-making processes.¹⁸³ By 2002, over a dozen local leaders had completed this four-day program, including local developers; citizen leaders; and members of the town board, zon-

177. *Id.*

178. *Id.*

179. *See id.* (citing WARWICK COMPREHENSIVE PLAN, *supra* note 173, § 1.3).

180. *See id.*

181. *See id.* at 5 (citing telephone interview by Brian Marcaurelle with Leonard DeBuck, Councilman, Town of Warwick, N.Y. (Nov. 3, 2003) [hereinafter DeBuck Interview]).

182. Marcaurelle, *supra* note 159, at 6 (citing Charlie Murphy, N.Y. Dep't of State, Guest Lecture at Albany Law School (Mar. 14, 2003)).

183. For details on the Pace Law School Land Use Law Center's LULA program, see note 31, *supra*.

ing board of appeals, comprehensive plan committee, conservation advisory board, and planning board.

In 1999, the town board adopted a new comprehensive plan that anticipated future land use changes, described their detrimental impacts, and called for a number of innovative land use laws and strategies available to the town board. These included a purchase of development rights program and a density transfer program guided by smart growth principles and supported by a \$9.5 million bond issue, both aimed at preserving agricultural lands.¹⁸⁴ Later that month, the town board appointed a Citizen Code Revision Committee to draft regulations recommended by the plan.¹⁸⁵

Based on this considerable effort, Warwick was selected for a Countryside Exchange program by the Glynwood Center, a non-profit organization that supports land preservation in rural areas.¹⁸⁶ The program engaged seven experts in community planning, conservation, and economic development from several countries to review local policies and laws and make recommendations.¹⁸⁷ Their findings confirmed that Warwick's current zoning code encouraged sprawl, and therefore they recommended remedial action.¹⁸⁸

In 2000, the town board placed an open space bond referendum on the town ballot.¹⁸⁹ This referendum was inspired by a Pace Land Use Law Center research team's study on the legal authority of municipalities in New York to use their financial authority to issue bonds for open space preservation purposes.¹⁹⁰ The referendum was controversial in two of the three villages, whose residents wondered whether the benefits in the town were worth the tax increase within their villages, but, ultimately, the ballot measure passed by a very slim margin.¹⁹¹

184. See Kelley, *supra* note 159, at 11–12.

185. See Marcaurelle, *supra* note 159, at 6.

186. See GLYNWOOD CENTER, COUNTRYSIDE EXCHANGE REPORT: THE EXCHANGE IN THE TOWN OF WARWICK (2000), available at http://www.glynwood.org/resource/ex_reports/reports_index.htm.

187. *Id.*

188. See *id.* (mentioning “residual sprawl overtaking the central part of the town”).

189. Marcaurelle, *supra* note 159, at 7.

190. See *id.* (citing Jeffrey LeJava et al., Open Lands Acquisition: Local Financing Techniques Under New York State Law, Metropolitan Conservation Alliance Technical Paper Series, No. 2 (Mar. 2000) (on file with the Harvard Environmental Law Review)). The law in question is N.Y. LOCAL FIN. LAW §§ 33.10, 34.00 (Consol. 2004).

191. Marcaurelle, *supra* note 159, at 7.

Following the election, village leaders threatened to challenge the ballot measure's legality, to oppose applications for state grants, and to derail the bond issue and open space plan in other ways. A Pace Land Use Law Center mediator was engaged to resolve the dispute, and by mid-2001 the town and its three villages reached a mutually acceptable agreement on the bond issue. The town agreed to allocate bond money ratably for village open space protection and the village leaders agreed to support farmland protection in the town.¹⁹²

The town board assumed control of the zoning review in early 2001, enacted a moratorium on subdivision review, received a \$75,000 Quality Community grant from the Department of State, conducted a build-out analysis of the current zoning, and secured the pro-bono legal assistance of a senior staff attorney from the Department of State.¹⁹³ By December, the board had adopted new zoning designed to effectuate the comprehensive plan's objectives. The new zoning contained several new districts, including a land conservation district, an agricultural protection overlay district, a ridgeline overlay district, a traditional neighborhood overlay district, and a senior housing floating zoning district. It also prescribed low density or clustered development in rural areas and allowed for mixed uses in the town's hamlets.¹⁹⁴

In 2002, the town received an Outstanding Planning Project Honorable Mention from the American Planning Association and a Quality Communities Award for Excellence from New York Governor George Pataki.¹⁹⁵ In that same year, the town and village of Warwick signed an intermunicipal agreement regarding annexation. Assisted by the Pace Land Use Law Center's technical assistance program, village and town leaders agreed to adopt a floating zoning and incentive zoning system which would allow annexation and provide developers in the annexed territory additional development density on the annexed land in exchange for a significant cash payment. These funds are to be used to acquire additional town land that serves as the village's watershed and viewshed.¹⁹⁶

192. See *id.* at 8 (citing DeBuck Interview, *supra* note 138).

193. *Id.* at 9–10.

194. *Id.* at 10–11 (citing TOWN OF WARWICK, N.Y., ZONING LAW, art. 4 (2002)).

195. See *id.* at 11 (citing Leonard DeBuck, Councilman, Town of Warwick, N.Y., Codes Revision Timeline 1987–1999 in Warwick Planning Process: Presentation to Scenic Hudson (2000), available at http://www.scenichudson.org/rivercomm/planning/warwick_debuck.pdf).

196. See Marcaurelle, *supra* note 159, at 11–12. See also *supra* note 194 and accompanying text.

C. New York State¹⁹⁷

In both Dover and Warwick, it was essential that local leaders understood the legal authority that they possessed to adopt effective land use strategies to react to change. The New York state legislature, in turn, responded to this local need by adopting dozens of land use law amendments between 1990 and 2004 that carefully organized, significantly clarified, and considerably expanded local land use authority. These changes in state land use enabling laws were made incrementally, beginning with needed organizational changes and then moving on to more innovative matters. They were based on the input of citizens, local leaders, developers, and others affected by land use decisions gleaned from numerous regional roundtables conducted by the legislature. Widespread concern regarding local land use problems was instrumental in convincing reluctant legislators to take land use law reform seriously. State lawmakers also understood that sixty years had passed since enabling legislation for city, town, and village planning and zoning was enacted and that there had been little effort to update the New York approach.¹⁹⁸

A Land Use Advisory Committee was appointed by the legislature and charged with making recommendations to recodify and modernize state enabling statutes for municipal planning and zoning.¹⁹⁹ This committee was established to guide legislative staff in this effort. It comprised experienced land use attorneys, planners, academics, local government representatives, and state agency representatives. The process was led by the Legislative Commission on Rural Resources headed by a leading member from both the New York Senate and Assembly and staffed by an executive director skilled at building consensus. All bills were submitted to both houses at the same time on behalf of the bi-partisan Commission.²⁰⁰

The first law recommended by the Commission and adopted by the legislature clarified provisions regarding the adoption of a

197. This section is based on the author's experience and on interviews with Ronald C. Brach, Executive Director of the Legislative Commission on Rural Resources. All interviews were done during the Spring semester, 2004, by telephone from 31 Crane Avenue, White Plains, N.Y., and a paper by Pace University School of Law student Daniel Laub, *Surveying the Political Landscape: Land Use Reform Efforts in New York and Maryland* (May 13, 2004) (unpublished manuscript, on file with the Harvard Environmental Law Review).

198. See Laub, *supra* note 197, at 3-4.

199. *Id.* at 4.

200. *Id.* at 5.

town's or village's first zoning law.²⁰¹ This was adopted in 1990. Four bills were passed in 1991. They concerned the following: procedures for adopting land use laws; procedures for the appointment and functioning of zoning boards of appeals; standardization of criteria for the issuance of variances; allowances for joint appointments to local and county planning boards; and mechanisms providing developers zoning incentives in exchange for public benefits.²⁰²

Twenty additional bills were enacted between 1992 and 1996 touching on a range of issues, from the mundane to the exceptional. They included provisions assisting planning boards with the proper density calculation when approving clustered subdivisions, guiding the appointment of planning board members, and clarifying the procedures and standards for site plan approval.²⁰³ Between 1992 and 1996, amendments were added encouraging highly innovative intermunicipal land use planning, regulation, and enforcement and allowing planning boards to require developers to cluster lots in subdivisions. The amendments also clearly explained the importance of comprehensive plans, their components, and the participation of the public in their creation.²⁰⁴

Over a dozen new laws were adopted between 1997 and 2004, including provisions that clarify (1) the authority of localities to adopt planned unit development ordinances, (2) the formation of county planning boards and regional councils, and (3) the formation of agricultural districts and their coordination with local zoning laws.²⁰⁵ Bills pending for consideration in the current legislative session²⁰⁶ deal with the authorization of temporary land use planning and zoning moratoria,²⁰⁷ mediation of land use disputes,²⁰⁸ training for local planning and zoning board mem-

201. Senator Patricia K. McGee, Chair, New York State Legislative Commission on Rural Resources, Community Planning & Land Development Laws Enacted 1990–2003.

202. Laub, *supra* note 197, at Appendix I, 28–29 (citing 1991 N.Y. Laws ch. 657; 1991 N.Y. Laws ch. 692; 1992 N.Y. Laws ch. 248; 1993 N.Y. Laws ch. 208; 1991 N.Y. Laws ch. 629; 1992 N.Y. Laws ch. 247).

203. Laub, *supra* note 197, at Appendix I, 29–34 (citing 1992 N.Y. Laws ch. 230; 1992 N.Y. Laws ch. 663; 1992 N.Y. Laws ch. 694).

204. *Id.* (citing 1992 N.Y. Laws ch. 724; 1995 N.Y. Laws ch. 417; 1993 N.Y. Laws ch. 209; 1995 N.Y. Laws ch. 418).

205. *Id.* at Appendix I, 34–39 (citing 2003 N.Y. Laws ch. 213; 1997 N.Y. Laws ch. 451; 1998 N.Y. Laws ch. 411).

206. See N.Y.S. Assembly, <http://www.assembly.state.ny.us/leg> (last visited Nov. 29, 2005) (on file with the Harvard Environmental Law Review).

207. N.Y.S. Assembly Bill No. A07994 (S 722) (pending 2005).

208. N.Y.S. Assembly Bill No. A05631 (Uni. S. 2749) (pending 2005).

bers,²⁰⁹ and encouragement of inclusionary zoning.²¹⁰ As a result of these legislative changes, the land use provisions of New York's town, village, and general city law have been clarified, standardized, and expanded; practice throughout the state is now uniform and the broad authority of local governments to adopt innovative land use strategies that encourage the most appropriate use of the land is clear.

D. Wisconsin²¹¹

Response to land use perturbations, anticipation of future problems, and strategic coalition building all are evident in Wisconsin leading up to the adoption of its smart growth legislation in 1999.²¹² The law requires Wisconsin municipalities to make specified land use actions after January 1, 2010, consistent with the municipalities' comprehensive plans.²¹³ Local plans must contain nine enumerated elements.²¹⁴ Grants are authorized to local governments to prepare and implement their land use plans, but preference for grants is accorded to communities whose plans evidence intergovernmental cooperation, identify smart growth areas, contain implementation plans, and address fourteen planning goals articulated by the state.²¹⁵ The law engages the University of Wisconsin to develop model laws for local adoption.²¹⁶

The passage of Wisconsin's smart growth bill can be traced to events beginning in the mid-1990s that were influenced by two judicial decisions, a citizens group, two industry groups, an academic institution, the governor, and the state legislature. Armed with traditional land use authority, local governments in Wisconsin were unprepared for an economic boom and increased develop-

209. N.Y.S. Assembly Bill No. A07985 (pending 2005).

210. N.Y.S. Assembly Bill No. A00484 (S 1762) (pending 2005), N.Y.S. Assembly Bill No. S 02027 (pending 2005).

211. The information in this section is adapted from a paper published by Pace University School of Law student Susan Huot, *Breaking Down the Barriers to Statewide Land Use Reforms: A Case Study of Political Leadership and Citizen Participation in Wisconsin and Illinois*, 28 ZONING & PLAN. L. REP. 1 (2005). See also Ohm, *supra* note 60.

212. WIS. STAT. ANN. § 66.1001 (West 2004).

213. WIS. STAT. ANN. § 66.1001(3) (West 2005). These actions include official mapping, subdivision regulation, zoning, and shoreland zoning.

214. WIS. STAT. ANN. § 66.1001(2)(a)-(i) (West 2005). The nine elements are: issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; intergovernmental cooperation; land use; and implementation.

215. WIS. STAT. ANN. § 16.965(4) (West 2005).

216. WIS. STAT. ANN. § 66.1027(2)(a) (West 2005).

ment pressures in the early and mid-1990s. In some cases their actions were exclusionary and they rejected affordable housing and mixed-use development decisions. Two controversial actions of this type were sustained by courts applying Wisconsin law at the time.²¹⁷

These decisions alerted the Wisconsin Builders Association and the Wisconsin Realtors Association to the need for improved planning legislation and motivated them to work with more traditional advocates for land use reform.²¹⁸ 1000 Friends of Wisconsin, an environmental advocacy group, got involved in the land use regulation reform movement in Wisconsin because of increasing citizen complaints about local land use decisions. In 1994, Republican Governor Tommy Thompson issued Executive Order No. 236, which created the State Interagency Land Use Council.²¹⁹ The Council's charge was to develop a renewed vision for land use in Wisconsin, to recommend consistent land use policy objectives for state agencies, and to establish a framework for state agency participation in land use discussions currently being undertaken by other state-level bodies.²²⁰ The Council created the Wisconsin Strategic Growth Task Force, and the Governor appointed a former head of the Wisconsin Realtors Association as its chair, a leader who had a strong personal interest in land use issues and saw the Task Force as a mechanism to address land use decision-making broadly. Also appointed to the Council were homebuilders, environmentalists, real estate professionals, academics, land use experts, and state and local government officials.²²¹

The Task force issued a final report on July 1, 1996. [It] concluded that primary responsibility for land use decisions should remain at the [local level], but [that] the state [needed to en-

217. In *Lake Bluff Housing Partners v. City of South Milwaukee*, 540 N.W.2d 189, 190 (Wis. 1995), a developer purchased land intending to build low-income multi-family housing on the site. The city, responding to a neighbor's requests, re-zoned the property exclusively for single-family residential use. The court held that the developer had not established vested rights under the previous zoning and, because the zoning had changed, could not build the planned multi-family housing. *Id.* at 199. In *Lake City v. City of Mequon*, 558 N.W.2d 100, 108 (Wis. 1997), the Wisconsin Supreme Court held that "a city plan commission may rely on an element contained solely in a master plan to reject plat approval." This allowed the city to frustrate a multi-use development project simply by amending its master plan.

218. See Ohm, *supra* note 60, at 199-200.

219. State of Wisconsin, Office of the Governor, Exec. Order No. 236 (Sept. 15, 1994).

220. See *id.*

221. See Huot, *supra* note 211, at 6.

courage and guide local land use planning]. It . . . recommended that the state create a multi-level land use framework to produce comprehensive plans and implementation programs [including] intergovernmental cooperation, [obligatory adoption of] comprehensive plans, [and mandatory compliance of land use laws with] land use plans. The Council [also] recommended the use of the University of Wisconsin resources to facilitate achieving these goals.²²²

The University then initiated a broad-based consensus-building effort.²²³ Included in the planning group were the Wisconsin Towns Association, Wisconsin Builders Association, Wisconsin Alliance of Cities, Wisconsin Counties Association, Wisconsin Realtors Association, Wisconsin Road Builders Association, Wisconsin Chapter of the American Planning Association, 1000 Friends of Wisconsin, and others. The Governor agreed that if the group could come to consensus on a framework for land use decision-making, he would support and advance their recommendations.²²⁴ After a series of meetings, the recommendations were framed into a proposed bill and submitted to the Governor.²²⁵

The bill was presented to the Joint Finance Committee of the Wisconsin legislature, which took several months to review and negotiate its provisions. It was reported that the Republican members of the committee would oppose the bill on property rights grounds.²²⁶ Task Force members friendly with these opponents gradually worked out an agreement designed to preserve their positions without compromising the essential components of the proposed legislation.²²⁷

This collaboration between the coalition and members of the legislature resulted in the passage of Wisconsin's smart growth legislation. Since it was adopted, approximately 100 municipalities have completed work on their comprehensive plans and another 600 communities are in the process of formulating and

222. *Id.* at 2-3 (citing STATE INTERAGENCY LAND USE COUNCIL, STATE OF WISCONSIN, PLANNING WISCONSIN: REPORT OF THE INTERAGENCY LAND USE COUNCIL TO GOVERNOR TOMMY THOMPSON (1996)). This recommendation recognizes the prior effective work of the Department of Urban and Regional Planning at the University of Wisconsin.

223. Telephone interview with Brian Ohm, Assistant Professor, University of Wisconsin, Madison (Mar. 22, 2004).

224. *See id.*

225. *See id.*

226. *See* Huot, *supra* note 211, at 3.

227. *Id.*

adopting theirs.²²⁸ The state has awarded nearly \$9.5 million in planning grants to support these activities.²²⁹ The coalition responded to concerns about the breadth of the statute's consistency requirements by proposing Assembly Bill 608 (A.B. 608), which was signed into law on April 13, 2004.²³⁰ A.B. 608 clarifies and simplifies which actions must be consistent with a local governmental unit's comprehensive plan.²³¹ Interestingly, "A.B. 608 had no opposition in the legislature and was fully supported by the new Democratic leadership in the governor's office."²³²

Opposition to the legislation has come from property rights groups and some municipalities. Bills submitted to the legislature to repeal the law have been blocked and legitimate local concerns mitigated by legislative amendments.²³³ Despite these coalition-building efforts in Wisconsin, Republican opposition to the state's smart growth legislation continues.²³⁴

V. THE ORDERING INFLUENCE OF LOCAL REFORM—REINVENTING DEMOCRACY

These case studies from the local, state, and federal level illustrate how the land use system is adapted to changing situations by leaders working in collaboration with one another. This was the case in Dover's aquifer protection overlay zone, in Warwick's annexation zoning, in Wisconsin's smart growth legislation, in Utah's regional plans, in New York's recodification effort, and in the federal Coastal Zone Management Act—all paradigms of positive change.²³⁵ In these cases the ethic of local control persists

228. *Id.* at 4.

229. Wisconsin State Dep't of Administration, Office of Land Information Services, Comprehensive Planning Law Factsheet, http://www.doa.state.wi.us/dir/documents/Factsheet_022804.pdf (last visited Nov. 1, 2005) (on file with the Harvard Environmental Law Review).

230. A.B. 608, 96th Leg., Reg. Sess. (Wis. 2003).

231. *Id.*

232. Huot, *supra* note 211, at 4.

233. *See id.*

234. On July 14, 2005, the Governor's office announced that Governor Doyle would "veto a provision added into the budget by legislative Republicans that would repeal the Smart Growth program initiated under Governor Thompson with wide bipartisan support." Press Release, State of Wisconsin, Office of the Governor, Governor Doyle Announces Budget Vetoes to Protect Wisconsin's Environment (July 18, 2005), available at <http://www.1kfriends.org/documents/0718govveto.pdf>. A new bill to repeal the Smart Growth Act was introduced in the Wisconsin Assembly on August 30, 2005, and was referred to the Committee on Rural Development. A.B. 645, 97th Leg., Reg. Sess. (Wis. 2005).

235. The Wisconsin and New York stories differ dramatically from early attempts to reform state land use laws. *See* JOHN M. DEGROVE, LAND GROWTH & POLITICS

as a dominant force and anchoring concept.²³⁶ When the United States was formed there was no evidence of national or state land use control, only local control based upon the centuries-old tradition derived from the medieval municipal corporation. As our land use system has evolved, the strong role of local governments has persisted but has been shaped by state and federal influences, demonstrating system-wide adaptability.

In his first lecture at the Lowell Institute in Boston, Oliver Wendell Holmes noted that “[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”²³⁷ In Wisconsin, we observed realtors, developers, local officials, and environmentalists working to understand what is “convenient” in the 21st Century given the state’s historical reliance on local control, the “form and machinery” of the American land use system. They engaged in a serious and protracted process of inquiring whether their individual groups’ interests could be promoted, while accommodating those of the other stakeholders. In the end, they not only found an answer—a change in the system that reformed it in a positive way—but they built a continuing coalition that is tending reform efforts and adjusting them to meet coalition members’ interests in the implementation stage.²³⁸

Parallels are seen in the Land Use Advisory Council in New York, in the powerful grassroots coalitions within the towns of Dover and Warwick, and among the communities cooperating in the

376–78 (1984). DeGrove studied the efforts in the 1970s and early 1980s to create growth management framework laws in seven states. He concluded that where such efforts were successful, the legislation was not a partisan effort. In most cases, efforts succeeded because of strong gubernatorial support and backing by strong legislative leaders. Where a broad base of support was lacking, however, major compromises in the reform proposal were necessary. Where reform efforts were not preceded by coalition building, local government groups often aligned themselves with private interests to defeat or dilute proposals.

236. See A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, in *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* 213, 232 (John R. Nolon ed., 2003). (“Watershed management provides an opportunity for local government to play a central role in the conservation of biodiversity and the promotion of environmentally sustainable development The local role should, instead, be exercised in partnerships with other units of government—both vertically and horizontally—and the major stakeholders in the watershed . . .”).

237. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Transaction Publishers 2005).

238. See *supra* Part IV.D.

Rockland Riverfront Communities Council. Additional connected networks of leaders are gradually organizing within other municipalities and among adjacent communities in New York's Hudson Valley, where they have been encouraged to collaborate through shared training experiences and the incentives of grant programs administered by two state agencies, the Department of State and the Hudson River Greenway Communities Council.²³⁹

Productive connections are being created between state and local governments in a host of ways as state policies and local authority are clarified and local governments receive assistance in addressing local problems like soil erosion in Michigan, Iowa, and Connecticut and habitat protection in Washington. In Maine, Wisconsin, Minnesota, and Oregon, laws require or encourage local governments to define urban growth boundaries and support proper land uses there, changing the historical pattern of land development spawned by Euclidian zoning. In Illinois, Massachusetts, and New York, local land use leaders are being trained and provided with technical assistance under programs established or funded by state agencies. State and federal agencies and universities are helping by distributing best management practices and exemplary local ordinances to local leaders alerted to the possible dangers of change.

At the graduation ceremony for participants in the Land Use Leadership Alliance Training Program held in 1996, Mayor Marc Molinaro, of the small New York village of Tivoli, explained an epiphany he had experienced during the program. He noted that he had come to the program to learn how to solve the land use problems that plagued his community, problems that had vexed and exhausted him prior to enrolling. In fact, he confessed, he had been thinking of stepping down at the end of his term. When he received his graduation certificate, he told the assembled leaders that during the program he had redefined his job. He was going home, he said, not to solve the latest development dispute, but—as he confronted each problem—to build a constituency for good planning, to teach his community how to come to consensus on incremental improvements in the land use system. In a burst of

239. See N.Y.S. Hudson River Valley Greenway, <http://www.hudsonongreenway.state.ny.us/commcoun/overview.htm> (last visited Nov. 30, 2005) (on file with the Harvard Environmental Law Review).

optimism, he said, "I am returning home to reinvent democracy."²⁴⁰

Mayor Molinaro decided to be a champion of change in his perturbed community.²⁴¹ He planned to open the system up to consider land use innovations, to build coalitions to search for new ideas, and to adapt them to local circumstances. He learned that by seeking and reinventing land use reforms, his citizens would coalesce around the process of change and commit themselves to the reforms adopted and to refining and defending them during implementation. As they proceed, they expect to have the legal authority to translate their new ideas and strategies into local law as well as outside assistance in the form of technical assistance, training, policy direction, and financial support. These expectations influence state and federal legislators from Tivoli's legislative districts, who can provide a forceful impetus for positive change in state and federal laws and programs. They reflect the feedback from the base of the system where intelligence on current crises and challenges is gathered, interpreted, and communicated.

Mayor Molinaro (who is still in office eight years later), his coalition of land use leaders, and their counterparts in Dover and Warwick are not alone at the base of the American land use system. Such leaders are emerging and becoming animated wherever land use crises occur or change is imminent. They are telling would-be reformers at the state and federal level what they need: flexible authority, training, technical assistance, clear policy guidance, and resources.²⁴²

This clear message and the felicitous examples of change described in this article, at all levels of government, teach the same lessons as those learned from reviewing diffusion research,²⁴³ the studies of complex adaptive systems,²⁴⁴ and recent reports on re-

240. Marc Molinaro, Mayor, Village of Tivoli, N.Y., Remarks at the First Graduation Ceremony of the Local Land Use Leadership Alliance Training Program (1996). See also generally <http://www.marcmolinaro.com> (last visited Nov. 29, 2005) (on file with the Harvard Environmental Law Review). See also *supra* note 31. Thomas Jefferson, writing in 1816, concurred: "[M]aking every citizen an acting member of the government, and in the offices nearest and most interesting to him, will attach him by his strongest feelings to the independence of his country, and its republican constitution." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON—WRITINGS, at 1399 (Merril Peterson ed., 1984).

241. See *supra* note 43 and accompanying text.

242. See ROBERT D. PUTNAM, *BOWLING ALONE* 18–28 (2000)

243. See ROGERS, *supra* note 34.

244. See GELL-MANN, *supra* note 33.

gional planning.²⁴⁵ They show the interdependence of all the components within the system, the interplay of bottom-up and top-down forces, and the importance of developing a legal framework for ordering the roles, resources, and competencies of each.

In 1911, the Chicago city planning commission adopted the General Plan of Chicago, an advisory document incorporating for the first time a number of basic and important municipal planning principles.²⁴⁶ Zoning, too, began at the local level. In 1916 the City of New York adopted the nation's first comprehensive zoning law.²⁴⁷

A few years later, in reaction to perturbation and innovation at the local level, a federal commission organized by Herbert Hoover, then Secretary of Commerce, formulated the model act known as the Standard State Zoning Enabling Act ("SZE").²⁴⁸ Still later, the Hoover Commission promulgated the Standard City Planning Enabling Act.²⁴⁹ These models were to be considered, adapted, and then adopted by state legislatures to make it clear that their localities had the power to plan and zone—a power, incidentally, that local governments had already seized through novel interpretations of their charters, home rule authority, or other municipal power.²⁵⁰

245. See Booher & Innes, *supra* note 37. See also PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 126 (2001) (concluding that the Envision Utah experience, a voluntary regional land use program in the Salt Lake City area, "demonstrates that a regional plan is often more a process than a set of policies or a map. It is research, discovery and education combined. The process itself can fundamentally reframe the issue of growth and community and create a new vision of the region's economic and environmental future"). See also Robert Fishman, *The Death and Life of American Regional Planning*, in *REFLECTIONS ON REGIONALISM* 107, 119 (Bruce Katz ed., 2000) ("American planning today is most effective and comprehensive precisely when it eschews all-embracing powers and works instead within the limits of the pluralistic systems that actually define the American-built environment.").

246. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 21–22 (Thomson-West, Hornbook Series, 2d ed. 2003).

247. See PLATT, *supra* note 5, at 169. See also JUERGENSMEYER & ROBERTS, *supra* note 246, at 23–24. For a comprehensive discussion of the adoption of the New York law, see SEYMOUR I. TOLL, *ZONED AMERICAN* 143–87 (1969).

248. See *A STANDARD STATE ZONING ENABLING ACT*, *supra* note 21. For surveys of the historical background of the standard enabling acts, see Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in 1 AM. PLAN. ASS'N, *MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS* 1, 1–10 (1996), and Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 *LAND USE L. & ZONING DIG.* 3, 3 (Feb. 1996).

249. See *A STANDARD CITY PLANNING ENABLING ACT*, *supra* note 21.

250. See JUERGENSMEYER & ROBERTS, *supra* note 246, at 16–23.

By 1926 when the U.S. Supreme Court declared zoning constitutional in *Village of Euclid v. Ambler Realty*,²⁵¹ 564 local governments had already adopted comprehensive zoning laws and forty-three states had enacted the SZEA.²⁵² Because of locally-demonstrated need for clear authority to control land use, virtually all fifty states have adopted some version of the model zoning enabling act, and courts in all jurisdictions have upheld the division of communities into zoning districts which strictly regulate land use and building on privately-owned land.

As they react to pressures and crises at the local level, municipal leaders and their governments have discovered and adopted new strategies in a constant process of experimentation. As these innovations relay critical information to higher levels of government, state and federal legislators and judges react and a "system" of law evolves. The Hoover Commission's enabling laws guided and emboldened countless state legislatures to create rational and uniform practices for local governments. The U.S. Supreme Court in *Euclid* protected this critical movement by insulating it from legal challenge.

Local leaders struggle today to encourage the development of workforce housing, prevent the destruction of valuable habitat and wetlands, dig their way out from under the rubble of natural disasters, and understand the effects of climate change in all its manifestations. As they continue to create new and untested strategies for the land, the legal system within which they operate will continue to respond in a variety of unpredictable and spontaneous ways, but it will respond nonetheless.

Nearly a century ago, we thought the threats to the land, public health, and the economy serious enough to form a federal commission to view matters comprehensively and codify the nation's response to the serious challenges it faced at the time. Is it then time for another commission? Have conditions sufficiently perturbed policymakers at the state and federal level to lead them to adopt a framework law capable of reordering the legal system into a more integrated and efficient whole? If so, we have the lessons of a century of innovation to learn from. We understand the critical importance of localism—the need to listen to grassroots influ-

251. 272 U.S. 365 (1926).

252. JUERGENSMEYER & ROBERTS, *supra* note 246, at 24. See also TOLL, *supra* note 247, at 204 ("By the late twenties, only six states had cities with neither zoning ordinances nor a completed comprehensive plan.").

ences, the resources required by local champions of change, and the importance of creating clear guidelines for them to follow.