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Golden and Its Emanations: The Surprising Origins of Smart Growth

John R. Nolon

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Golden and Its Emanations: The Surprising Origins of Smart Growth

John R. Nolon*

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I. Introduction

HOW EFFECTIVELY CAN LOCAL GOVERNMENTS prevent the effects of sprawl? Are they empowered to adopt smart growth strategies? Can they, acting alone, create balanced and orderly land use patterns? Does danger lurk in empowering local governments to act aggressively regarding such matters, in the absence of statewide or regional planning?

*John R. Nolon is Professor of Law at Pace University School of Law, Director of its Land Use Law Center, and Visiting Professor at the Yale School of Forestry and Environmental Studies. The author offers his sincere thanks to Kristen Kelley, his research assistant, for her capable assistance with this article. The author also thanks the practitioners and scholars who participated on a panel he moderated on Local Land Use Invention at a conference entitled *Revisiting Golden v. Ramapo (1972) and Its Current Relevance*, November 9, 2002 [hereinafter November *Ramapo* Conference]: Jayne E. Daly, the Glynwood Center; Anna L. Georgiou, the Land Use Law Center; Sean F. Nolon, the Land Use Law Center; Professor Thomas E. Roberts, Wake Forest University School of Law; George Rodenhausen, Rappaport, Meyers, et al.; and Donald W. Stever, Dewey, Ballantine, et al.

These questions, despite their contemporary relevance, are not new. Thirty years ago, land use practitioners and scholars hotly debated growth management, regionalism, and the preemption of local land use authority.

A 1972 case decided by New York's highest court catalyzed this national debate.¹ A hesitant court of appeals ceded Ramapo, a single town in the path of metropolitan area development, authority to control growth. In doing so, it set in motion three decades of experimentation and creativity responsible for a plethora of techniques now available to fight sprawl: the toolbox practitioners use to achieve smart growth at the local level. The court's ambivalence was palpable: New York's zoning regime, it said, "is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government. . . ."²

At precisely the same time, a revolution to wrest land use control from local governments was begun. It was one fueled by the understanding that local control of land use creates serious inefficiencies and inequities. A report entitled "The Quiet Revolution," prepared for the Council of Environmental Quality in 1971, contained a powerful statement of the problems caused by the delegation of land use control to towns, villages, boroughs, cities, and townships: "This country is in the midst of a revolution in the way we regulate the use of our land. . . . The *ancien regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others."³ The revolution has not succeeded, despite all the attention given to the efforts of states to create statewide, counter-regimes under the rubrics of *growth management*, *sustainable development*, and, recently, *smart growth*. After analyzing recent state planning and smart growth legislation, a preeminent practitioner and scholar concludes that one of the major problems in fighting sprawl today is "the states' failure

1. *Golden v. Ramapo*, 285 N.E.2d 291 (N.Y. 1972).

2. *Ramapo*, 285 N.E.2d at 299.

3. FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1972); see also MICHAEL ALLAN WOLF, *The Prescience and Centrality of Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 252, 253 (Charles M. Haar & Jerold S. Kayden eds., 1989) (specifying the problems identified in *Euclid* of assigning control over land use to local governments as "exclusion, anti-competitiveness, parochialism, and aestheticism").

To these must be added the propensity of local governments, most of which rely heavily on local property taxes, to favor economic development over environmental protection. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 36-37, 69-75 (1995).

to reclaim some of their authority delegated early on to localities in the land use field. . . .”⁴

This issue of *The Urban Lawyer* collects the contemporary comments of David L. Callies and Professor Robert H. Freilich, cited immediately above, other distinguished scholars and practitioners, and the architects of the Ramapo Plan upheld in the *Ramapo* case. In November, 2002, the Land Use Law Center of Pace University Law School, the Government Law Center of Albany Law School, *The Urban Lawyer*, the *National Law Journal*, and the American Bar Association Section of Local and State Government Law hosted a national conference on the case and its extraordinary contemporary relevance. The event was a reunion for the architects of the Ramapo Plan, including the town’s chief elected official, professional planner, zoning enforcement officer, and its special counsel, Professor Robert H. Freilich, whose extraordinary career and legacy as the founder and, for over thirty years, the editor of *The Urban Lawyer* was enthusiastically celebrated as part of the event. The conference was a retrospective for practitioners who reflected on the debt owed the *Ramapo* case for jump-starting local smart growth strategies, and for scholars who wondered at the wisdom of the continued devolution of land use authority to local governments.

This article provides the background for the adoption of the Ramapo ordinance, explains its precocious inventions in some detail, and describes other dramatic local inventions emanating from the Ramapo approach to smart growth. It ends with a reflection on the Quiet Revolution, the continuing disquiet that accompanies the spectacular smart growth inventions of local governments in this country, and modest recommendations for reform. Along the way, the reader will encounter the rebirth of performance zoning, local environmental laws that protect critical environmental resources, a local abandoned property reclamation act, the use of mediation to solve border wars between localities, an intermunicipal incentive zoning program based on cooperative annexation, and the emergence of a number of sub-regional land use compacts among local governments.

II. Background and Summary of *Ramapo*’s Current Relevance

Professor Robert H. Freilich was Ramapo’s legal advisor during the 1960s when it was experiencing the type of rapid growth that causes

4. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 240 (ABA 1999).

so much concern today. Like many suburban communities, Ramapo was zoned predominantly for residential development, mostly single-family homes. Low-density suburban zoning of this type causes sprawl to the great consternation of local residents.⁵ Throughout the land, local officials struggle to change zoning ordinances and master plans to absorb growth in a more creative and responsible manner. A look at how the town of Ramapo and the judiciary responded to growth pressures thirty years ago is instructive.

Between 1950 and 1968, Ramapo, located in close proximity to New York City, experienced a population growth rate of nearly 300%.⁶ Projections indicated that the town would double in size again by 1985.⁷ In 1969, the town board adopted a number of land use strategies that became known as a growth management program.⁸ Its inventions were sophisticated, controversial, and legally dubious. Ramapo's land use devices and the courts' sanction of them are credited with accelerating the incipient growth management movement and setting the stage for smart growth.

In 1969, the Ramapo town board amended its zoning ordinance to manage the development of land within its jurisdiction over an eighteen-year period by coordinating that growth with the provision of capital improvements.⁹ The direct effect of these amendments was to postpone residential subdivision in some parts of town for as long as eighteen years. These inventions were challenged as *ultra vires*, beyond the legal authority of the town, and as a regulatory taking. The lawsuits brought by Ruth Golden, similarly situated landowners, and the Rockland County Builders Association were filed at a time when these issues had not been actively litigated.¹⁰ The 1972 opinion of the New York

5. "Sprawl" is a convenient label used to describe the land use pattern achieved by most traditional zoning ordinances and maps, particularly in outlying suburban areas where large quantities of land are dedicated to accommodating relatively modest increases in population compared to densities in established urban areas. Sprawl is the problem that smart growth aims to solve. See Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 184 (1997). They report that "sprawl has engendered six major crises for America's major metropolitan regions. These crises are: (1) central city and first and second ring suburban decline; (2) environmental degradation through loss of wetlands, sensitive lands, and air and water quality degradation; (3) massive gasoline energy overutilization; (4) fiscal insolvency, infrastructure deficiencies, and taxpayer revolts; (5) devastating agricultural land conversion; and (6) housing inaffordability." *Id.* at 184.

6. FREILICH, *supra* note 4, at 40.

7. *Ramapo*, 285 N.E.2d at 295.

8. *Id.* at 294.

9. *Id.*

10. The U.S. Supreme Court had not been heard from on land use issues since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Nectow v. Cambridge*, 277 U.S. 183 (1928).

Court of Appeals was nothing short of prescient. It has been sustained by thirty years of extensive land use and regulatory takings litigation, including several recent decisions of the U.S. Supreme Court.¹¹ The *Ramapo* decision has been examined and discussed in over 100 major decisions by subsequent courts in dozens of states¹² and evaluated in over 150 law review and journal articles.¹³ In New York, the cases that rely on *Golden v. Ramapo* are among the most influential land use cases decided by its appellate courts.¹⁴

Ramapo's master plan amendments called for a radical change in the rate of growth absorption experienced by the town. The town obtained HUD funding for master planning in 1964 and prepared a four volume study documenting the pace and effect of growth, the inability of the town to provide needed infrastructure to support the current rate of growth, and a host of related matters.¹⁵ The planning literature of the time was full of excitement about growth management, but there was little evidence, on the ground, of its legal adoption. Ramapo's law preceded by several years the passage of the much-heralded urban growth boundaries legislation in Oregon,¹⁶ the creation of the Adirondack Park Agency in New York,¹⁷ and Florida's infrastructure concurrency law.¹⁸

As a more basic matter, Ramapo's investment in comprehensive

11. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

12. See, e.g., *Morgan v. Town of W. Bloomfield*, 295 A.D. 2d 902, 904 (N.Y. App. Div. 2002); *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001).

13. See, e.g., *The Hudson River Valley: A Natural Resource Threatened by Sprawl*, 7 ALB. L. ENVTL. OUTLOOK J. 154 (2002); Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145 (2002).

14. These cases include *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975); *Charles v. Diamond*, 360 N.E.2d 1295 (N.Y. 1977); *Kamhi v. Town of Yorktown*, 547 N.E.2d 346 (N.Y. 1989); *Riegert Apartments v. Clarkstown*, 441 N.E.2d 1076 (N.Y. 1982); *Fred F. French Investing Corp. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976); *Town of Bedford v. Mount Kisco*, 306 N.E.2d 155 (N.Y. 1973); and *Asian Americans for Equality v. Koch*, 527 N.E.2d 265 (N.Y. 1988).

15. *Ramapo*, 285 N.E.2d at 294 (citing the application made under § 801 of the Housing Act of 1964 (78 Stat. 769)).

16. See OR. REV. STAT. § 457 (2001). *Ramapo* also preceded by three years the Ninth Circuit's affirmation of Petaluma, California's timed growth ordinance, an infrastructure concurrency program less intricate than Ramapo's. *Constr. Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

17. N.Y. EXEC. LAW §§ 800–820 (McKinney 2003). See also *Wambat Realty Corp. v. New York*, 362 N.E.2d 581 (N.Y. 1977); and John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 525–530 (1993); John R. Nolon, *Development Rights and Water Body Protection: Colloquium*, 10 PACE ENVTL. L. REV. 493 (1993).

18. See FLA. STAT. ANN. ch. 163.3161 (Harrison 2002). The act defines several required and optional elements. The specific content of each element is defined in FLA. ADMIN. CODE ANN. r. 9J-5 (2002).

planning put it solidly on the “pro-adoption” side of a debate emerging in the 1960s about the wisdom of adopting master plans in the majority of states where local governments have the option of doing so.¹⁹ Some advocates, even today, think local master plans unduly constrain local governments and are ineffective documents, not worth the high cost of preparation. Others believe that land use laws that conform to objectives contained in adopted master plans are highly successful in overcoming legal challenges. They strongly urge communities to adopt, and regularly update, truly comprehensive plans, backed up by detailed studies.

To implement its master plan, Ramapo adopted several amendments to its zoning ordinance.²⁰ It also adopted a six-year capital budget and a capital plan for the following twelve years that committed the town to providing supportive infrastructure to all parts of the community over an eighteen-year period.²¹ No changes were made in the town’s zoning districts or in the land uses allowed in each district. Instead, residential subdivision was designated a new class of land use, called “Residential Development Use,” and prospective subdividers were required to obtain a special permit.²² The permit could not be issued unless a critical mass of infrastructure was in place to serve the subdivision, including roads, sewers, drainage, parks, and firehouses.²³ This provision created a temporary suspension of the right to develop, similar to the effect of a development moratorium, which has become a popular technique in many states.

Several provisions of the Ramapo amendments softened the effect of the temporary restraint on development:

- Development of unsubdivided land was not prohibited, leaving all property owners some current land use.²⁴
- Variances could be provided to landowners who could show that their plans were consistent with the town’s strategy.²⁵
- A special permit could be obtained vesting a landowner’s right to develop the parcel in the future when infrastructure is in place.²⁶

19. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955); Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

20. *Ramapo*, 285 N.E.2d at 294.

21. *Id.*

22. *Id.* at 293.

23. *Id.* at 295.

24. *Id.* at 296.

25. *Ramapo*, 285 N.E.2d at 296.

26. FREILICH, *supra* note 4, at 52–53.

- Developers were permitted to provide infrastructure themselves to qualify for a special permit.²⁷
- A development easement acquisition commission was established to provide property tax relief to landowners not able to develop their parcels for several years.²⁸

Judge Scileppi, writing for the majority of the New York Court of Appeals, upheld Ramapo's land use amendments as being within the delegated authority of local governments, decided that the eighteen-year suspension of the right to develop did not constitute a regulatory taking, dismissed the town's argument that some of the landowners' claims were not ripe, established the concept that local zoning may not be exclusionary, carefully defined the role of the courts in land use matters versus that of the state legislature, and deferred to fact-based determinations of local lawmakers.²⁹ In all these respects, the decision clearly forecast the ensuing thirty years of land use policy and litigation. The threads used by the Town of Ramapo and the *Ramapo* court to weave the fabric of our modern land use law are as follows:

The Importance of the Comprehensive Plan: The New York Court of Appeals recently upheld the Town of Mamaroneck's adoption of a highly inventive recreational zone, limiting the use of over 400 acres to private recreational uses as part of its carefully planned response to growth pressures.³⁰ Great reliance was placed by the court on the extensive planning and study that preceded the adoption of this novel zoning device. This is recent evidence that Ramapo's reliance on its master plan was the correct approach. The use of planned unit development zoning, not authorized directly by state statutes, was sanctioned for the same reason in *Dur-Bar Realty Co. v. City of Utica*.³¹ In California, the comprehensive plan has been declared by the Supreme Court as a " 'constitution' for future development."³² All California counties and cities must adopt a comprehensive plan and all zoning ordinances must be consistent with that plan.³³ To be consistent, zoning provisions must be "compatible with the objectives, policies, general land uses, and programs specified in such a plan."³⁴

27. *Id.*

28. *Id.* at 53–54.

29. *Ramapo*, 285 N.E.2d at 291.

30. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999).

31. 394 N.Y.S.2d 913 (App. Div. 1977).

32. *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540 (1990).

33. *Id.* at 536.

34. *Id.* at 536.

Exhaustion and Ripeness: In *Ramapo*, the court held that certain plaintiffs who had not sought a special permit and therefore had not exhausted their administrative remedies could bring a constitutional challenge against the amendments. In this respect, the court mirrors the recent holding of the U.S. Supreme Court in *Palazzolo v. Rhode Island*,³⁵ in which further applications for development approvals were deemed unnecessary for ripeness purposes when it was clear, as in *Ramapo*, that the local board did not have the discretion, under the challenged ordinance, to approve the landowner's application.

Regulatory Takings: In upholding *Ramapo's* temporary restrictions on the right to develop, the New York Court of Appeals anticipated the U.S. Supreme Court's most recent regulatory takings decision: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.³⁶ In *Tahoe*, the Court held that a moratorium on all development lasting thirty-two months was not, in itself, a taking.³⁷ The landowners argued for a categorical rule that would classify a development moratorium as a taking without considering the moratorium's length, the severity of the problems addressed, or the good faith of the agency involved.³⁸ The *Ramapo* court's rationale parallels that used in the *Tahoe* opinion in rejecting these arguments.³⁹ Both indicate that property may not be segmented in time or estate for takings purposes, that benefits accrue to burdened property owners during moratoria, and that temporary suspensions of the right to develop can be in the public interest.⁴⁰

Total Takings: The measures adopted by the Town of Ramapo to mitigate the regulation's effect on property owners (variances, vested right permits, limited as-of-right development, self-help options, and tax relief), anticipated the U.S. Supreme Court's view in another seminal regulatory takings case: *Lucas v. South Carolina Coastal Council*.⁴¹ The absence of a hardship variance provision in the South Carolina beachfront management act led the *Lucas* Court to characterize a 1,000 foot setback provision, prohibiting all development on the plaintiff's parcels, as a total taking requiring compensation to the landowner.⁴² The Ramapo softening provisions prevented the ordinance from ef-

35. 533 U.S. 606, 620 (2001).

36. 535 U.S. 302 (2002).

37. *Id.*

38. *Ramapo*, 285 N.E. 2d at 304.

39. *Id.*

40. *Tahoe-Sierra*, 535 U.S. 302; *Ramapo*, 285 N.E.2d 291.

41. 505 U.S. 1003 (1992).

42. *Id.* at 1027.

fecting a “total taking,” established by *Lucas* as a *per se* violation of the Fifth Amendment’s Taking Clause.

Affordable Housing and the Exclusion of Growth: The *Ramapo* decision established the fundamental proposition that the rights of citizens in search of a place to live are bound in the due process rights of developers who bring actions challenging the exclusionary effect of local zoning.⁴³ This notion underlies the court’s subsequent decision in *Berenson v. New Castle*,⁴⁴ holding that local zoning must accommodate present and future housing needs of the community and region. In the *Ramapo* court’s words, “What we will not countenance, then, under any guise, is community efforts at immunization or exclusion.”⁴⁵ It was important to the court that the *Ramapo* Plan did not attempt “to freeze population at present levels but to maximize growth by the efficient use of the land, and in so doing testify to this community’s continuing role in population assimilation.”⁴⁶ This is cautionary advice to communities that attempt to use their delegated land use power to resist, rather than to accommodate, growth.

Role of the Courts: The *Ramapo* majority was troubled by the role of local governments in making decisions about growth control, and recognizing growth management as a regional, not a local issue.⁴⁷ The court acknowledged criticisms of local land use control, calling the delegation of such power a largely antiquated notion, causing distortions in metropolitan growth patterns, and crippling efforts toward regional and statewide problem solving.⁴⁸ The role of the judiciary in these matters, which has been highly deferential in the thirty years since the decision, was precisely defined by the court: “Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and [the courts] are constrained to resolve the issues accordingly.”⁴⁹ The *Ramapo* court deferred to the local legislature’s findings, giving its regulations a presumption of validity, and placing the burden of proving the invalidity of local land use legislation on the challenger. This pattern of deference has persisted ever since.⁵⁰

43. *Ramapo*, 285 N.E.2d at 300.

44. 341 N.E.2d 236 (N.Y. 1975).

45. *Ramapo*, 285 N.E.2d at 301.

46. *Id.* at 302.

47. *Id.* at 300.

48. *Id.* at 299.

49. *Id.* at 300.

50. The *Ramapo* court cited *National Land and Investment Co. v. Easttown Township Bd. Of Adjusters*, 215 A.2d 597, 606–07 (Pa. 1966), referencing with favor this comment:

In the span of years since 1926 when zoning received its judicial blessing, the art

Ultra Vires: The central issue in *Ramapo* was whether the town had the power under its delegated authority to control growth. In reviewing the history of the adoption of zoning and land use controls, such as subdivision regulation, the court concluded that municipalities have considerable room for invention, so long as their objective is to create a balanced and well-ordered community.⁵¹ This broad interpretation of local land use authority has become a clear trend among courts nationally and has fueled a great expansion of local invention to deal with the problems of sprawl, the provision of infrastructure, the costs of development, and, recently, the protection of natural resources and the environment.⁵²

Localism: Despite its deferential attitude toward legislative bodies, the court was aggressive in pointing out the limits of localism and in urging the state legislature to re-align land use responsibilities.⁵³ *Ramapo*'s plan of postponing development was called by the court "inherently suspect."⁵⁴ The court noted the "serious defects" in local control, "pronounced insularism," and the importance of "regional interdependence."⁵⁵ It concluded with a ringing criticism of the devolution of land use authority to localities: "Of course, these problems [of growth] cannot be solved by *Ramapo* or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, state-wide or regional control of planning would

and science of land planning has grown increasingly complex and sophisticated. The days are fast disappearing when the judiciary can look at a zoning ordinance and, with nearly as much confidence as a professional zoning expert, decide upon the merits of a zoning ordinance and its contribution to the health, safety, morals, or general welfare of the community.

The Pennsylvania courts, prior to *Ramapo*, also sanctioned local land use invention. This parallels a contemporary realization by the judiciary in Pennsylvania. In *Cheney v. Village 2 at New Hope, Inc.*, 241 A.2d 81 (Pa. 1968), planned unit development zoning was approved. Recognizing the predicament of local governments with respect to land use control, the Pennsylvania Supreme Court wrote:

It would seem that this decision is a forerunner of a necessary change in the law of planned development. Caught between increasing population pressure and urban sprawl and the reluctance of the rural communities to absorb their fair share of the load, planners have been faced with an unpleasant choice. They are now equipped with a proper instrument to meet the challenge. The scope of this decision is by no means limited to residential and ancillary usage. It can just as effectively be applied to commercial and industrial development as well as to new combinations of land use which are only limited by the ingenuity of the planner and developer.

Appeal of the Township of Concord, 268 A.2d 765, 769 (Pa. 1970), referring to the *New Hope* decision.

51. *Ramapo*, 285 N.E. 2d at 301.

52. *Tahoe-Sierra*, 535 U.S. at 302.

53. *Ramapo*, 285 N.E.2d at 301.

54. *Id.* at 300.

55. *Id.* at 299-300.

insure that interests broader than that of the municipality underlie various land use policies.”⁵⁶ New York’s legislature, and most other states, have left this advice virtually unheeded since 1972, electing instead to expand the extent of local control over land use matters and the techniques available to them to create balanced communities.

Empowering Local Land Use Inventions—The Birth of Smart Growth: Perhaps *Ramapo*’s greatest relevance lies in its reliance on local governments to achieve smart growth and the degree to which it endorsed the local power of invention. Doctrinally, the New York Court of Appeals held that the state legislature had delegated vast implied powers to municipalities to time growth, to achieve the most appropriate use of the land, and to invent the mechanisms for doing so. Pragmatically, the court left balls in two courts: local officials were told to pick up theirs and invent land use controls in their self interest, while the state legislature was admonished to create regional and statewide solutions to hedge against the risks of parochialism run amok. How the game has been played in both venues is the subject of the remainder of this article.

III. *Ramapo*’s Inventions in Detail⁵⁷

The *Ramapo* Plan comprised not one, but ten mechanisms aimed at growth control.⁵⁸ Many of them were unknown or untested at the time. All but one enjoyed considerable success. A description of each follows:

Comprehensive Plan: Supported by a grant from HUD,⁵⁹ the town conducted population projections, prepared detailed water, sewer, and transportation studies, confirmed that the present rate of growth was unsustainable, and articulated a policy of growth control. This led to the adoption of a comprehensive plan that contained a phased growth strategy.⁶⁰

56. *Id.* at 300.

57. Much of the detail contained in this section is based on statements made by *Ramapo* officials at the November *Ramapo* Conference and interviews with these officials before the conference. Conference and interview notes prepared by students working for the Land Use Law Center are on file with the author. The individuals relied on, and their positions in 1969, are John A. McAlevey, Town Supervisor; Professor Robert H. Freilich, Town Counsel; Jack Keough, Town Zoning Administrator; William S. Gould, Town Planning Commissioner; and Manuel S. Emanuel, Town Planning Consultant. Notes of speeches and interviews were prepared by law students Clara Beitin, Alex Berger, Kristen Kelley, Jessica Van Tine, and Tiffany Eisberg.

58. TOWN OF RAMAPO BUILDING ZONING AMENDMENT ORDINANCE, § 46–13.

59. FREILICH, *supra* note 4, at 44 (discussing § 701 of Housing Act of 1954).

60. Supervisor McAlevey stated that the secret to the success of the growth management plan was the fact that they knew the mechanisms would be challenged in court by builders and that they anticipated litigation every step of the way. Among the devices used to this effect was dividing the relatively short master plan into four volumes to

Concurrency: The Town of Ramapo's "invention" of requiring concurrency between land development and supportive infrastructure was novel and, although not wholly new, brought the concept to the nation's attention, largely by prevailing in the *Ramapo* litigation. The timing of urban development was proposed as early as 1955 in *Regulating the Timing of Urban Development*.⁶¹ That article referenced emerging efforts to sequence land development in Mountain Lakes, New Jersey, Moser Lake, Washington, and Clarkstown, New York, adjacent to Ramapo. The Clarkstown ordinance, adopted in 1955, created two special zoning districts, one for immediate development, the other for future construction. Most of the undeveloped areas of the town were placed in an RA-1(x) district.⁶² The district required two acres for the construction of a single family house but allowed residential development on one-third acre lots by special permit when the planning board found that the development would be served by water, sewer, and other community facilities.⁶³

*Special Permit Point System*⁶⁴: The subdivision of land for residential purposes was designated a special use for which a special use permit was required.

The standards for the issuance of special permits were framed in terms of the availability to the proposed subdivision of five essential facilities or services: (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) state, county, or town roads—major, secondary, or collector; and (5) firehouses.⁶⁵ No special permit shall issue

increase its weighty appearance. The *Ramapo* court, indeed, referred to the "four volume plan" with favor.

61. Henry Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROBS. 298 (1955). Professor Robert H. Freilich relied on the ideas in Professor J. H. Beuscher's casebook: J.H. BEUSCHER, LAND USE CONTROLS (4th ed. 1966). Supervisor McAlevey credits Professor Robert Anderson of Syracuse University, author of ANDERSON'S NEW YORK ZONING LAW AND PRACTICE treatise, for many of the ideas employed and for credibility, "since many of us were neither national nor state-wide experts."

62. Source documents on file with the author include the Clarkstown ordinance and a descriptive letter by Richard May, Jr., AICP, who was planning director of Rockland County from 1953 to 1958. Mr. May's letter indicates that the Clarkstown ordinance was prepared by him in collaboration with Norman Williams, who served as director of the Division of Planning and chief of the Office of Master Planning for New York City's Department of City Planning from 1950 to 1960.

63. See CLARKSTOWN, N.Y., ZONING ORDINANCE § 4.32(F) (1955); MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890 508-09 (U. Cal. Press 1971). "This reliance on the work of predecessors, and our subsequent reliance on Ramapo's inventions, brings to mind the words of Sir Isaac Newton, '[I]f I have seen further it is by standing on [the shoulders] of Giants.' " Letter to Robert Hooke (Feb. 5, 1675).

64. *Ramapo*, 285 N.E.2d at 294.

65. *Id.* at 295.

unless the proposed residential development has accumulated fifteen development points, to be computed on a sliding scale of values assigned to the specified improvements under the statute.⁶⁶

The town adopted capital budgets and plans that projected the provision of these services and improvements over an eighteen-year period, clearly demonstrating that the development restrictions were temporary, rather than indefinite, in duration.⁶⁷

*As-of-Right Use*⁶⁸: The owners of land rendered ineligible for subdivision were allowed to develop the unsubdivided parcel as-of-right under the current zoning, giving them some ability to utilize their land for a limited economic use. Under this provision the owner of a twenty-acre parcel, for example, could develop one single family home with the right to subdivide the property for future development when infrastructure became available. By allowing some use of the land during the infrastructure build-out period, this provision blunted arguments that the zoning amendments constituted a regulatory taking.

*Reduction of Tax Assessments*⁶⁹: Owners who could not develop their land for several years were provided a method of obtaining a reduction in their property tax assessment. The town board created a seven member Development Easement Acquisition Commission, unique at the time. Landowners were encouraged to offer to the town what today would be called a conservation easement or lease of development rights to the town, restricting the owner's right to develop until infrastructure became available.⁷⁰ That easement was "leased" to the town in exchange for annual reductions of property taxes during that period. A

66. *Id.*

67. See *Toll Brothers, Inc. v. West Windsor Township*, 712 A.2d 266 (N.J. Super. Ct. App. Div. 1998) (holding that a local timed growth scheme was inconsistent with the moratoria restrictions in New Jersey's Municipal Land Use Law (MLUL)). The ordinance recognized "basic" rights and "additional" rights. A basic right is a right to develop immediately. Additional rights could be used at some definite point in the future depending on where the land was located. Ultimately, the ordinance was ruled a "de facto moratorium" in violation of the MLUL, N.J. STAT. ANN. §§ 40:55D-90 (West 2002).

68. *Ramapo*, 285 N.E.2d at 294.

69. *Id.* at 304.

70. Conservation easements were not authorized by statute in New York until 1984 under Title 3, N.Y. ENVTL. CONSERV. LAW §§ 49-0301-49-0309 (McKinney 1984). The Commission was established before the growth control amendments were adopted to encourage landowners to postpone subdivision of their land until after protective regulations were adopted. The easement provision combined with an interim development law, also adopted by the town board, that prohibited the issuance of building permits in designated slow growth areas to protect the growth management strategy from defeat before it could be officially adopted. The development easement acquisition program was continued after the 1969 amendments as a means of treating fairly the landowners who were subject to the phased growth provisions.

five-year easement merited a 50 percent reduction in taxes and a ten-year easement qualified the owner for a 90 percent reduction.⁷¹

*Acceleration*⁷²: A prospective developer could advance the date of subdivision approval by agreeing to provide services and improvements to bring the proposed plat within the number of development points required to qualify for a special use permit. Among the possible methods of obtaining the required fifteen service and infrastructure points, it was most practical for developers to provide recreation facilities and to provide for drainageways. In one case, the developer secured four additional points for building two little league ballfields with lighting to secure a total of fifteen.

*Vested Rights*⁷³: Developers were allowed to apply for a special permit vesting their rights to proceed with their development in the future when the required infrastructure and services were in place. This provision prevented the planning board from frustrating developer plans for site development and density by means of its discretionary authority. Vested rights, and development agreements that define and protect them, have become a highly valuable commodity in an age of increased discretion and lengthened periods of proposal review. Scholars and practitioners are engaged in efforts to secure both vested rights and developer agreements that insulate land from changes in land use regulations and provide a more predictable review and approval process.⁷⁴

71. Ramapo appears to be the first community to use this approach, one still not widely employed, probably because of lack of municipal awareness. Open space protection plans may be based on this invention. The Ramapo experience illustrated how local governments may lease development rights from the owners of open lands in exchange for a reduction in property tax assessments during the lease's term. The landowner agrees to a limited-term lease of the land's development rights, a conservation easement is imposed on the land for that term, and during that term a reduced tax assessment is applied, lowering the taxes that must be paid by the owner. The Town of Perinton, in Monroe County, adopted such a program. It uses a tax assessment table that establishes various percentages of tax reduction that are applied in exchange for the town's lease of development rights. The amount of reduction increases when the owner agrees to a longer lease term. A twenty-five year lease term, for example, earns a 90% tax reduction. Penalties must be paid by owners who default on their lease obligations. These revenues are placed in a capital reserve fund, which is used to purchase development rights on other open lands. See Town of Perinton, *Conservation Easement Program Summary & Fact Sheet* (1999); Town of Perinton, *Example of Tax Abatement on Hypothetical Property* (materials on file with the author).

72. *Ramapo*, 285 N.E.2d at 295-96.

73. *Id.*

74. Conference speaker Daniel J. Curtin recently wrote that "[o]ne of the most important goals a developer must achieve is to protect its ability to complete the project once all land use and discretionary approvals have been obtained." He further describes a 1979 California statute establishing a development agreement procedure to strengthen vested rights. See Daniel J. Curtin, Jr., *Effectively Using Development Agreements to Protect Land Use Entitlements: Lessons From California*, 25 ZONING & PLANNING L. REP. 33 (2002).

*Hardship Variance*⁷⁵: Another softening provision of the 1969 Ramapo amendments was a provision for issuing variances. "Upon application to the town board, the development point requirements could be varied should the board determine that such a modification was consistent with the ongoing development plan."⁷⁶ This was used primarily to allow the owners of small parcels to proceed with two and three lot subdivisions, providing further evidence of the plan's reasonableness. The town board retained the power to issue this variance from its special permit requirements, upon a full report by the planning board, following a public hearing.⁷⁷

Affordable Housing Program: The town board balanced the effects of growth control on affordable housing by taking direct action to produce over 800 units of public and subsidized housing. It created a public housing authority, cooperated with the county government, and took advantage of HUD subsidy programs.⁷⁸ Although these initiatives were not mentioned in the *Ramapo* decision, their existence may have blunted any claim that the lack of provision for affordable housing in the growth control areas was exclusionary.⁷⁹

Village Incorporation Law: In what became one of the salient aspects of the Ramapo story, the town board adopted a law that prevented the incorporation of additional villages within the town unless the town board determined that such incorporation was in the best interests of the town as a whole.⁸⁰ This one technique failed. The provision was invalidated in *Marcus v. Baron*, a 1982 decision of the New York Court of Appeals.⁸¹ Because of the subsequent formation of villages within

75. *Ramapo*, 285 N.E.2d at 296.

76. *Id.*

77. FREILICH, *supra* note 4, at 53.

78. *Id.* at 44.

79. See, e.g., Richard May, Jr., *Golden v. Planning Board of the Town of Ramapo*, APA PLANNING MAGAZINE, Sept. 1972:

The Ramapo ordinance, many may be surprised to hear, has *no* multi-family districts whatsoever and the vast majority of the unincorporated area of the township is zoned for single family lots ranging in size from 25,000 to 80,000 square feet. . . . Timing the development of \$50,000 to \$60,000 single family homes is hardly an approach to the solution of regional housing problems.

According to Supervisor McAlevey, the town's promotion of this affordable housing subjected it to twelve lawsuits. He notes that much of the criticism of the projects was not on the merits of the sites or the proposals but rather personal in nature and related to ethnic and religious bias. Professor Freilich notes that the capital plan placed the existing villages in the first six years of capital improvement planning, allowing them to be developed at greater densities where multi-family housing was allowed by zoning. Instead of replicating villages in the unincorporated areas, the plan looked at the town as a whole.

80. RAMAPO, N.Y., LOCAL LAW 3 (1967).

81. *Marcus v. Baron*, 442 N.E.2d 437 (N.Y. 1982).

the town, which continues to the present day, and its effect on the success of Ramapo's growth management plan, this topic is covered in further detail below.⁸²

IV. Golden Emanations⁸³

The several techniques used by the Town of Ramapo to control growth departed radically from the traditional approach to zoning used in the 1960s, and by many communities even today, to control local land use. Traditional zoning predetermines land use through use of specific zoning districts, maximum densities, lot coverage maximums, and finite building dimensions.⁸⁴ In this section, we examine other radical departures from the classic approach. These examples can be called *Golden emanations*: inventions created by adventuresome local officials and sustained by courts encouraged, we believe, by Ramapo's success. Among these are performance zoning, incentive zoning, purchase of development rights, and others that mimic in some form one or more of the Ramapo suite of inventions.

A. Performance Zoning in Hyde Park

Performance zoning is a land use invention that emerged in the late 1960s.⁸⁵ It gained widespread attention in 1973 in Bucks County, Pennsylvania, which advocated its use by localities to provide developers more flexibility in site and building design while protecting open space and natural resources.⁸⁶ The model was adopted, at least in part, by most of the communities in Bucks County.⁸⁷

82. See *infra* notes 146–151 and accompanying text.

83. The material in this section is drawn from the author's personal involvement in each of the localities discussed, presentations made by panelists at the November *Ramapo* Conference, and the sources cited. For an extensive treatment of the influence of *Ramapo* in other states, see FREILICH, *supra* note 4, at ch. 4.

84. See STATE STANDARD ZONING ENABLING ACT (U.S. DEPARTMENT OF COMMERCE 1926), 5 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING App. A (2001).

85. See LANE KENDIG, PERFORMANCE ZONING (1980); see also Alan C. Weinstein, *Performance Zoning: A Silver Anniversary Evaluation*, 21 ZONING & PLANNING L. REP. 7, 53 (July–August 1998).

86. Performance zoning, as introduced here, is a new approach to the orderly growth of suburban areas such as Bucks County. Rather than rely on the conventional standards that dictated zoning ordinances in the past, performance zoning allows any one of a variety of considerations to govern—depending on the site and how it is designed. Performance standards deal with land use intensity measures, site variables, design variables, and facilities. Performance zoning places the responsibility for sound design on the developer and his land planner. The test of their evaluation of site capacity for various forms of development will be their ability to perform.

BUCKS COUNTY PLANNING COMMISSION, PERFORMANCE ZONING 1 (1973) [hereinafter PERFORMANCE ZONING].

87. See Weinstein, *supra* note 85, at 54.

The Bucks County model regulates development not by using traditional dimensional and use standards but by reference to performance standards that measure the impact of a development on a particular site.⁸⁸ In Bucks County, performance zoning was limited to housing development: all types of housing were permitted in all zoning districts and were regulated by impact measures regarding impervious coverage,⁸⁹ retained open space,⁹⁰ and protection of wetlands, watercourses, and other natural resources.⁹¹

Some aspects of traditional zoning, such as zoning districts⁹² and certain use prescriptions,⁹³ were retained in the Bucks County model. Each was governed, however, by performance standards⁹⁴: an open space ratio,⁹⁵ intensity factors such as building volume,⁹⁶ transportation impacts,⁹⁷ impervious coverage,⁹⁸ and landscaping.⁹⁹ Dense buffering was required¹⁰⁰ between incompatible uses, and a site capacity calculation¹⁰¹ was used to limit development impacts on each parcel and its surroundings. Traffic impact analyses were used,¹⁰² density transfers were allowed to prevent hardships,¹⁰³ and bonus densities were allowed to encourage affordable housing.¹⁰⁴

Despite its promise and growing relevance in an environmentally challenged society, performance zoning has not gained wide acceptance.¹⁰⁵ The approach is thought to be less predictable and somewhat harder to administer than the classic use and dimension based approach.¹⁰⁶ Its principal contribution to local land use practice has been to encourage the gradual insinuation of performance standards into tra-

88. PERFORMANCE ZONING, MODEL ORDINANCE, TECHNICAL APPENDIX (1973), Art. V [hereinafter 1973 MODEL ORDINANCE].

89. *Id.* §§ 208–209.

90. *Id.* §§ 217–218.

91. *Id.* §§ 227, 505.

92. *Id.* Art. III.

93. 1973 MODEL ORDINANCE Art. IV.

94. PERFORMANCE ZONING, *supra* note 86, at 38. *See also* 1973 MODEL ORDINANCE, *supra* note 88, Art. V.

95. 1973 MODEL ORDINANCE, *supra* note 88, § 218.

96. PERFORMANCE ZONING, *supra* note 86, at 11–14.

97. *Id.* at 33–36.

98. *Id.* at 6.

99. 1973 MODEL ORDINANCE, *supra* note 88, § 503.

100. *Id.* § 506.

101. *Id.* § 502.

102. PERFORMANCE ZONING, *supra* note 86, at 33–36.

103. 1973 MODEL ORDINANCE, *supra* note 88, § 305.

104. *Id.* § 508.

105. *See* Douglas R. Porter, *Flexible Zoning: A Status Report on Performance Standards*, ZONING NEWS, January 1998.

106. *See* Weinstein, *supra* note 85, at 56–57.

ditional mechanisms such as zoning ordinances and subdivision regulations.¹⁰⁷ Many localities, particularly in New York, have become accustomed to administering complex and flexible environmental reviews of their land use decisions and enforcing a growing number of environmental standards that they have adopted. These developments challenge the criticisms of performance zoning as too complex and indeterminate. The recent advent of environmental standards in local land use may have proceeded far enough to merit a fresh look at performance zoning and its practicality.¹⁰⁸

Such a look is being taken by the Town of Hyde Park, New York.¹⁰⁹ A draft of its proposed performance zoning ordinance, subdivision regulations, and performance-based community map was discussed at the November *Ramapo* Conference.¹¹⁰ What follows is a brief description of the Hyde Park proposal.¹¹¹

The Hyde Park approach to performance based land use regulation begins with a division of the town into six areas: a greenbelt, the Hudson River waterfront, ten neighborhoods, four hamlets, a planned development district (PDD), and a town center.¹¹² Within the neighborhood, hamlet, and town center districts, core areas are established where mixed use, higher density development is encouraged.¹¹³ In the waterfront district, there are five landing districts where higher density development of water related land uses is encouraged.¹¹⁴ The PDD connects the nationally known Franklin and Eleanor Roosevelt sites, a national park, and the Culinary Institute of America. The PDD encourages a mix of tourism-related development and open space amenities that aspire to attract a large number of visitors, fuel the local economy, and strengthen the tax base.¹¹⁵ Major subdivision of land is discouraged in the waterfront and greenbelt districts. This is the regulatory base on which the more specific performance standards rest. This

107. See PERFORMANCE STANDARDS FOR GROWTH MANAGEMENT, APA PLANNING ADVISORY SERVICE REP. NO. 461 (Douglas R. Porter ed. 1996).

108. See generally John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002).

109. HYDE PARK, N.Y., CODE ch. 96 (Subdivision Law), ch. 108 (Zoning Law) (Draft July 22, 2002).

110. George A. Rodenhausen, *Impact Zoning in the Town of Hyde Park*, available at <http://www.rapportmeyers.com/notes/details.cfm?Id=7>.

111. The draft regulations discussed below can be obtained at www.hydeparkny.us. The details of the proposal discussed here are found in HYDE PARK, N.Y., CODE ch. 108, §§ 108-3.1-1(A)-108-7.3(A).

112. See <http://www.hydeparkny.us/masterplan.shtml>.

113. *Id.*

114. *Id.*

115. *Id.*

overall community design appears in, and is taken from, the adopted comprehensive plan of the community.¹¹⁶

The organizing principle of the proposed Hyde Park zoning ordinance is to encourage “organic growth in community centers”; in addition, the ordinance establishes three additional “strategic directions”: enhancement of community identity, economic expansion, and civic cohesion. Specific purposes of the new zoning are pedestrian orientation, orderly expansion of existing centers, integrity of Hudson River views, historic preservation, affordable housing, and reduction of traffic congestion.¹¹⁷ The zoning is calculated to encourage a pattern of land use in which mixed uses and development with higher density, scale, and intensity of use occur in community centers supported by infrastructure and services. “Outlying areas” are reserved for lower density, scale, and intensity of use and for the maintenance of open space and natural resources.¹¹⁸ A list of land uses is permitted in various districts; it includes six residential, sixteen nonresidential, and nine “community” uses.¹¹⁹

The Hyde Park zoning ordinance proposes the use of site plan review to achieve its four strategic objectives.¹²⁰ In neighborhood core areas, for example, residential densities up to eight units per acre, multifamily residences, bed and breakfast establishments, and commercial and community uses serving the neighborhood are encouraged.¹²¹ Low intensity industrial uses close to the center of the core are deemed appropriate, as are small front yards, and common and connected open space with

116. HYDE PARK, N.Y., COMPREHENSIVE PLAN (1997), at 3–4.

117. See <http://www.hydeparkny.us/masterplan.shtml>.

118. Available at <http://www.hydeparkny.us/masterplan.shtml>. As defined on page thirty-nine (pdf form) of the Comprehensive Zoning Plan, “density” refers to “the relationship between the proposed use and the acreage upon which it is to be placed;” “scale” is “the total area of all uses proposed for a parcel;” and “intensity” is “a measure of the number of vehicle trips per day generated by each use.” *Id.*

119. See <http://www.hydeparkny.us/masterplan.shtml>. These thirty-one uses may be combined: the ordinance encourages mixed uses in the core areas of all districts “provided that the scale, density, and intensity of all uses” complies with the standards established for each district. Bulk regulations are established including height, size, lot coverage, and yards.

120. See <http://www.hydeparkny.us/masterplan.shtml>. Site design requirements regulate parking, ingress and egress, separate pedestrian ways and bicycle paths, landscaping, architectural features, storm water management, erosion control, lighting, and infrastructure. Central water and sewer systems are required for all major developments proposed in the neighborhood, hamlet, town center and landing districts, including their core areas. Site standards list a variety of environmental performance factors, including wetland, stream, and natural area protection. The segmentation of any significant natural habitat or wildlife corridor is to be avoided. Protected open space is to be contiguous with that on adjacent lots and designed as a cohesive whole. Historic and scenic overlay districts are created.

121. See *id.*

associated commercial and community gathering places.¹²² Buildings should incorporate attractive bays, balconies, and porches, use traditional building forms and natural materials, and building facades should vary, but not dramatically.¹²³ Design consistency along streets is encouraged.¹²⁴

The preservation of contiguous open space is encouraged in hamlet districts.¹²⁵ A variety of other provisions are included that protect the environment.¹²⁶ Notable among them is a 500-foot wetland buffer within which land uses are to be limited to those that are consistent with high quality wetlands.¹²⁷ The Hyde Park zoning draft contains guidelines for site plan review in the designated town center.¹²⁸ In the Bellefield planned development district, immediately to the south of the town center district, development is encouraged that promotes tourism-related businesses while complementing the Roosevelt park, library, and homes, including a nonvehicular trail linking these sites through an environmentally sensitive area that is to be preserved.¹²⁹ The Bellefield PDD is to be the gateway to the town as well as a regional hub serving the tourism industry.¹³⁰

122. *See id.*

123. *See id.*

124. *See id.*

125. *See* <http://www.hydeparkny.us/masterplan.shtml>. In the four designated hamlet districts, residential uses at a density of up to six units per acre are permitted along with limited nonresidential uses. In the hamlet core area, densities of up to ten dwelling units per acre are allowed along with more extensive commercial uses. In the core, residential subdivision is limited to multifamily housing purposes. In the rest of the hamlet district, subdivision of land is encouraged, as is mixed residential development that gradually decreases density from the hamlet core areas outward to the district's edge. Expressed in performance terms, parcels in core areas of hamlets are limited to a maximum of 12,000 gross square feet, ten dwelling units, twenty employment units, and 5,480 daily vehicle trips per acre.

126. *See id.*

127. *Id.*

128. *See id.* In the core of the town center, performance maximums are 32,000 gross square feet, twenty-four dwelling units, fifty employment units, and 10,970 daily vehicle trips per acre. Non-residential uses in the core are encouraged that serve the needs of local residents and the tourist trade the plan aspires to support. In this district, only multifamily residential development is allowed. Open space standards are aimed at creating a public realm—parks, commons, and plazas that serve as public and private sector gathering points and amenities. All development is to be pedestrian friendly and designed to incorporate landscaping and building separations that diminish the visual dominance of automobiles and stark paved spaces.

129. *See* <http://www.hydeparkny.us/masterplan.shtml>. All subdivision of land must be consistent with a comprehensive plan and vision for the roughly 1,000 acre district, clustering of development is required to create small centers of development, and no more than 50% of the gross floor area of all development may consist of residences. Together, the town center and Bellefield PDD promise sensitively sited economic development to serve the economic needs of the residents and build a significant tax base for the community.

130. *Id.*

The zoning map that accompanies the zoning proposals depicts the size and location of all these districts.¹³¹ It appears that approximately 70 percent of the land area of the town is located in the greenbelt and waterfront districts.¹³² A species of relief is offered to landowners in these low density districts, as well as the other districts, should they wish to exceed the scale, density, and intensity standards.¹³³ The zoning draft contains a special exception permit provision.¹³⁴ Applications for this permit must demonstrate how the proposed development conforms to the four strategic objectives of the ordinance.¹³⁵ Approval authority for this special use permit is given to the Zoning Board of Appeals.¹³⁶

Proposed subdivision regulations accompany the zoning proposal.¹³⁷ These regulations authorize the town planning board to use design standards created by Dutchess County under the Hudson River Greenway compact program,¹³⁸ directed by the Hudson River Valley Greenway Communities Council, a state agency. These standards are contained in an extensive document called *Greenway Connections*.¹³⁹ The document is full of site-specific design standards regarding landscaping, signs, parking, and lighting.¹⁴⁰ The draft regulations empower the planning

131. Available at <http://www.hydeparkny.us/masterplan.shtml>.

132. *Id.* In these two districts, the performance standards allow a maximum density of one dwelling unit per four acres, a relatively low-density development pattern that assures a rural context for the well-defined districts and cores.

133. Available at <http://www.hydeparkny.us>

134. *Id.*

135. *Id.*

136. *Id.*

137. See HYDE PARK, N.Y. CODE ch. §§ 96.2(B) through 96.8(D) draft, July 22, 2002, available at <http://www.hydeparkny.us/forms/SubdivisionLawDraft02/028.html>. The subdivision regulations strongly recommend that all land subdivision in the Greenbelt and Waterfront districts be clustered to maintain the rural appearance and environmental resources of the town. The objective of these cluster provisions is to leave "substantial portions" of subdivided land undeveloped. The planning board is authorized to mandate clustering for any particular subdivision that may have a significant adverse impact on the community's rural landscape or its natural resources. Interestingly, mixed uses are permitted, including nonresidential development. A net acreage method of determining maximum allowable density on a particular parcel is provided that avoids the time-consuming process of analyzing how many units would be permitted under a conventional subdivision. The open space to be preserved must have a conservation value that ensures that preserved land will serve specific ecological, recreational, or agricultural purposes. To the extent that these provisions exceed the authority localities have to permit and require clustering, the draft regulations express intent to supersede the Town Law provisions, using authority to supersede generally applicable state law under Section 10 of the Municipal Home Rule Law. See *infra* note 295.

138. See *infra* note 295.

139. DUTCHESS COUNTY DEPARTMENT OF PLANNING AND DEVELOPMENT, GREENWAY CONNECTIONS: GREENWAY COMPACT PROGRAM AND GUIDES FOR DUTCHESS COUNTY COMMUNITIES (2000), available at <http://www.dutchessny.gov>.

140. *Id.*, Greenway Guides §§ E(1)–(4).

board to require that the standards in the *Greenway Connections* document be followed in any proposed subdivision.

The zoning and subdivision regulations are a blend of conventional and performance zoning techniques. They demonstrate that performance zoning may be viable in communities accustomed to approving development proposals under New York's flexible environmental review requirements. Further, these proposals demonstrate a new method of packaging the environmental standards that are appearing with increasing frequency in local land use regulations.¹⁴¹

The extensive performance provisions in these regulations can be understood as environmental impact mitigation features writ large: transferring mixed-use higher density development rights to defined cores comprising approximately one-third of the community and greatly restricting development in designated environmental areas. The use of detailed site plan standards and of three impact factors (density, intensity, and scale) serve the same purpose as project-by-project environmental reviews: they mitigate the environmental impact of specific developments. They accomplish much more, however, by allowing developers in designated districts and their cores great flexibility to mix uses, achieve multifamily housing development, and build at greater densities. These proposals are a contemporary example of local innovation in land use management that rival in our time what the authors of the Ramapo growth management provisions achieved thirty years ago.

B. *Growth Control in Warwick*

Another New York community whose level of invention rivals that of Ramapo and Hyde Park is the Town of Warwick, in Orange County, which is Rockland's neighbor to the northwest. In the 1990s, continuing metropolitan area population pressures made Orange County the fastest growing county in New York. Until then, Warwick had been beyond the pale of sprawl and spared the task of reworking its traditional zoning ordinance. The Town of Warwick is characterized by significant open space: highly productive farming on rich black dirt in its lowland areas, associated dairy and other agricultural activity on its adjacent uplands, and significant biodiversity along the Wallkill River watershed that it occupies and regulates. A decade ago, this landscape began to be dotted by large lot subdivisions, threatening the town's rural character and the vitality of its agricultural economy. During that ten-year period, local

141. Nolon, *supra* note 108, at 386-411.

leaders have been searching for methods of controlling growth, as Ramapo did in the late 1960s.

In a process that is still ongoing,¹⁴² the town and its centrally located village, also called Warwick, are taking the following steps: adopting compatible amendments of their comprehensive plans, approving a town bond issue in the amount of \$9.5 million for the purchase of development rights on open land, adopting smart growth zoning amendments that arrange development on the land in a graduated and balanced fashion, and entering into an intermunicipal agreement implementing a joint annexation and zoning policy.¹⁴³ This compact between the municipalities is designed to incorporate town lands into the Village of Warwick through annexation. It provides for preliminary site plan review prior to annexation, the use of floating zoning, incentive zoning, and annexation credits to govern the award of higher densities to town land that is incorporated into the village and its water and sewer districts.¹⁴⁴ The agreement also establishes a trust fund into which developers of annexed land will deposit payments for the additional density afforded their lands.¹⁴⁵ These funds will be shared by the village and the town to carry out their comprehensive planning objectives.¹⁴⁶ Here is how each of these techniques work:

Comprehensive Plans: Although encouraged by state law to do so,¹⁴⁷ local governments seldom refer to neighboring communities' comprehensive plans or land use policies in drafting their own. In August 1999, the town adopted *The Town of Warwick Comprehensive Plan* establishing a goal of protecting agriculture and open space and adopting a strategic principle of steering new development toward the Village of Warwick through a "density transfer program."¹⁴⁸ The plan notes that this program accommodates both preservation and development interests and is designed to maintain value in lands designated for protection while promoting development that is compact, orderly, and efficient.¹⁴⁹

142. The intermunicipal agreement referred to in this section, for example, was signed on December 19, 2002, as this article was being edited.

143. Anna L. Georgiou, *The Importance of Local Invention Villiage and Town of Warwick, Orange County, New York*, presentation at the November Ramapo Conference (Nov. 9, 2002) [hereinafter Georgiou Presentation].

144. *Id.*

145. *Id.*

146. *Id.*

147. Georgiou Presentation, *supra* note 143; see N.Y. TOWN LAW § 272-a (McKinney 2002), which states that the "town comprehensive plan may include . . . consideration of regional needs and the official plans of other government units and agencies within the region."; see also N.Y. VILLAGE LAW § 7-722 (b) (McKinney 2002).

148. *Id.*

149. Georgiou Presentation, *supra* note 143.

This policy is guided, in other words, by smart growth principles. The village, in turn, prepared a draft comprehensive plan that supports the town's policy of open space and agricultural land preservation and pledges its cooperation with the town's density transfer program.¹⁵⁰ An interesting fact contained in the town's plan is that operating farms in Warwick require from 25 to 61 cents in municipal services for each dollar of taxes they pay; in contrast residential subdivisions require from \$1.05 to \$1.08 in services for each tax dollar they generate.¹⁵¹

Purchase of Development Rights: The town's comprehensive plan also recommends that a Purchase of Development Rights (PDR) program be instituted in the town as soon as possible.¹⁵² Based on a study prepared by the Land Use Law Center, the town board began a campaign to float a bond issue in the amount of \$9.5 million for the purchase of development rights on open land, principally agricultural parcels.¹⁵³ In November 2000, the voters of the town and its three constituent villages narrowly approved the issuance of bonds in this amount for the purpose of purchasing development rights on agricultural lands in the town and the acquisition of open space resources in the villages. A dispute that erupted over this referendum and the importance of its resolution is discussed below.

Smart Growth Zoning Amendments: In January 2002, the town board unanimously adopted a sweeping change of local zoning to achieve the objectives of its comprehensive plan.¹⁵⁴ These zoning amendments create several zoning districts, including floating and overlay zones, and adopt other techniques that provide for the arrangement of development on the land in a graduated and balanced fashion. The amendments include a traditional neighborhood overlay district designed to promote higher density, mixed use development in the town's hamlets, very low density and clustering in a rural district, medium density in a suburban residential district.¹⁵⁵ The amendments also created a senior housing floating district and several discrete environmental protection provisions, including a conservation district to protect designated environmentally sensitive areas, a ridgeline overlay district, a land conservation district, and two agricultural land protection districts.¹⁵⁶

150. *Id.*

151. *Cost of Community Services*, Cornell University's Local Government Program.

152. Town of Warwick, N.Y., Comprehensive Plan, at 45 (Aug. 19, 1999), available at <http://warwick.hvnet.com/pdP/Chapt3.pdf>.

153. Jeff LeJava, *Open Lands Acquisition: Local Financing Techniques Under New York State Law*, Technical Paper Series, No. 2 (M.C.A. March, 2000.)

154. Georgiou Presentation, *supra* note 143 (WARWICK, N.Y., TOWN CODE art. III, § 164-30).

155. *Id.* (WARWICK, N.Y., ZONING LAW art. IV).

156. *Id.*

Intermunicipal Agreement Regarding Annexation and Zoning Policy: The town and the village have drafted an intermunicipal agreement designed to incorporate town lands into the Village of Warwick and its water and sewer districts in a way that provides financial resources to the village and town to accomplish their comprehensive plan objectives. In recent years, the village has annexed lands under General Municipal Law, Article 17.¹⁵⁷ Each time it did, it automatically provided that the annexed lands would be zoned to permit three units of housing per annexed acre, increasing allowable density ninefold over the three-acre minimum lot size provided under town zoning. This provided annexed landowners and developers a windfall density increase. Under the intermunicipal agreement, the village will annex land in cooperation with the town and zone annexed land at the same density provided under the applicable town zoning.¹⁵⁸ In much of the area around the village, town zoning allows the construction of single-family homes on three-acre lots.

Using a combination of floating and incentive zoning, the village will create an Annexation District Zone that allows its planning board to approve up to three units per annexed acre—a significant density bonus.¹⁵⁹ To qualify, the annexed owner must submit a preliminary

157. See § 703, which states the intention of the legislature to allow annexation of territory from one local government to another and establishes as prerequisites to annexation the consent of the people in the land annexed and the consent of the local government whose land is to be annexed upon the basis of its determination that the annexation is in the over-all public interest. This section provides, where this consent is withheld, for adjudication in the Supreme Court of the issue of whether the annexation is in the overall public interest. See *Trustees of Village of Warwick v. Bd. of Town of Warwick*, 56 A.D.2d 928 (N.Y. App. Div. 1977), where an owner of a 144-acre parcel who could not develop multifamily housing in the Town of Warwick because of the lack of required water and sewer systems requested that his land be annexed into the village, which had both. The village proposed the annexation, the town failed to consent, and the Supreme Court referee recommended it. The Second Department affirmed the referee's report holding that the proposed annexation was in the overall public interest. The court noted that the test was "whether or not the annexing local government and the territory to be annexed have the requisite unity of purpose and facilities to constitute a community. The court concluded the proposed annexation met that standard. See also *Trustees of Village of Warwick v. Bd. of Town of Warwick*, 244 A.D.2d 332 (N.Y. App. Div. 1997), in which the village sought to annex a parcel of land from the town that was to be developed as a shopping center for the purpose of enhancing the village's tax base. The Supreme Court referee's report concluded that annexation was in the overall public interest. The court affirmed the report by weighing the benefit against the detriment to the annexing municipality, to the territory proposed to be annexed, and to the governmental units from which the territory would be taken. The court observed that the town lacked plans to develop the property and could not provide the needed services if such a proposal existed. Further, the village would benefit from the revenue generated and jobs created.

158. Georgiou Presentation, *supra* note 143.

159. *Id.* (N.Y. GEN. CITY LAW § 20-g(1) (McKinney 2000))("By the enactment of

proposal for the higher density development to the village's planning board, prior to annexation, and have it approved conceptually.¹⁶⁰ The agreement provides for both the town board and the village council to approve the annexation before it occurs.¹⁶¹ Following annexation, the floating incentive zone can be affixed to the annexed land by an amendment of the zoning map, allowing the landowner to develop up to three units per acre.¹⁶²

Using average figures, under the town's zoning as adopted by the village, a 100-acre parcel annexed by the village might yield 25 building lots, with deductions for roads and infrastructure and environmental mitigation conditions. After the application of the village's floating incentive zone to the land, the same 100-acre parcel might yield 150 lots, accounting for the same deductions and a planning board decision to allow half-acre, rather than one-third acre, lots to protect the adjacent areas. This new zoning increases the parcel's yield by 125 lots (150–25). Under New York's incentive zoning law, the developer can be required to pay a fee for this density bonus with the funds deposited into a trust fund for specific public benefits that will be secured by the incentive awarded.¹⁶³ If this fee is established at \$50,000 per unit, a fairly modest cost for land in the area, the trust fund contribution by the developer of this 100-acre parcel would be \$6,250,000. The agreement provides that all of the fund proceeds will be dedicated to the purchase of development rights on lands in the town.

*C. Mediation of Land Use Disputes*¹⁶⁴

This creative compact between the village and town and the town's Purchase of Development Rights (PDR) program were threatened by a dispute that occurred shortly after the voters approved the bond issue to raise \$9.5 million for open space development rights acquisition. The Town of Warwick has three villages within its borders: Greenwood

[§20-g] the legislature seeks to promote intergovernmental cooperation that could result in increased coordination and effectiveness of comprehensive planning and land use regulation. . ."); N.Y. VILLAGE LAW § 7-741(1)(McKinney 1996)).

160. Georgiou Presentation, *supra* note 143.

161. *Id.*

162. *Id.*

163. *Id.* (N.Y. Town Law §261-b (McKinney 2000)).

164. The material in this section is based on a report by Sean F. Nolon, director of mediation for the Land Use Law Center, who mediated the dispute between the Town of Warwick and its three villages described here, and on his presentation on the matter at the November *Ramapo* conference (on file at the Land Use Law Center). The consensus reached by representatives of the four municipalities, through this mediation, is described in the GREENWOOD LAKE AND WEST MILFORD NEWS, July 18, 2001, Vol. 40, No. 10, at 1 (on file at Land Use Law Center).

Lake, Florida, and Warwick. Citizens of the villages campaigned actively against the PDR bond proposition and threatened litigation to stop it after the referendum passed. The Anti-PDR Coalition was formed prior to the November referendum and led a vigorous assault against the proposition.

Before the November 2000 election, the town stressed that the PDR program would prevent sprawling development and reduce taxes in the long run. Its campaign literature explained that every time a new home is built within the town, the addition of students into the school system causes a deficit in the school budget.¹⁶⁵ By reducing the number of new homes through the PDR program, the town argued that PDR would prevent an increase in school taxes. The campaign material also explained the virtues of retaining the town's rural character and sense of openness.

The villages responded with their concerns. Greenwood Lake, for example, observed that it is not in the Town of Warwick's school district and would not benefit from the purported school tax savings achieved by PDR. In addition, since it is physically separated from the town by Tuxedo Mountain, its citizens reap few of the scenic and character enhancing rewards of preserving open lands in the town. All of the villages complained that the amount of funds to be spent in the villages themselves was significantly less than the sums to be derived from village taxpayers. The villages also claimed that the PDR program would cause a shift in development to the villages, which would stress their budgets and cause more traffic congestion. The local newspaper in the Village of Greenwood Lake published lead editorials urging the public to vote against the bond resolution; a local website was established as a clearinghouse for those opposed.¹⁶⁶

After the passage of the bond act, the villages of Greenwood Lake and Florida consulted with the state attorney general and state comptroller to see if they could opt out of the PDR program. In addition, the villages began campaigning against the entire agricultural preservation effort. They encouraged opposition to town preservation plans, voiced objections at town meetings, and urged county and state officials not to support the town's efforts. After the unsuccessful attempt by the town to negotiate a deal with Greenwood Lake for the purchase of village property, a regional mediation program was invited to help resolve the dispute.¹⁶⁷

165. See *supra* note 149 (supporting facts contained in the comprehensive plan).

166. <http://warwick.hvnet.com/anti-pdr/index.htm>.

167. The Land Use Law Center, supported with funds from the Hewlett Foundation, created a process for the assessment and resolution of land use disputes. The mediation

For five months, the mediators worked with a group of seventeen representatives from the town and the three villages to seek a mutually acceptable outcome. An agreement was reached that met the interests of the villages through a formula that returns a pro-rata portion of the land acquisition funds to those jurisdictions. In return for this agreement, the villages pledged to support fully the town's agricultural preservation initiative and to assist efforts to raise funds from county, state, and federal sources. The settlement also contained an agreement to work toward the consolidation of school districts.

The Warwick example builds on another legacy of the local officials and professionals responsible for the Ramapo growth control ordinance. One of their critical objectives was to build widespread community support for the novel approach to smart growth by taking time to involve the public, hear all sides, flesh out all interests, and incorporate them in the final ordinance.¹⁶⁸ This approach to citizen participation and stakeholder involvement in land use decision-making has also been endorsed by New York's highest court. The New York Court of Appeals sanctioned informal multi-party negotiations during the early stages of the local development review and approval process in *Merson v. McNally*.¹⁶⁹ The issue in that case was whether a project that, as originally proposed, involved several potentially large environmental impacts, could be mitigated through project changes negotiated in the early environmental review process mandated by the state Environmental Quality Review Act (SEQRA) process.¹⁷⁰

The agency involved in the *Merson* case was the planning board in the Town of Philipstown.¹⁷¹ The owner of a mining site submitted a

program identifies and trains local leaders from other communities who have experience in local land use matters, and assigns them to work with Center staff in the resolution of disputes of this type.

168. This strategy was forcefully summarized by both Supervisor McAlevey and Professor Freilich, special counsel, in their presentations at the November *Ramapo* Conference.

169. *Merson v. McNally*, 688 N.E.2d 479 (N.Y. 1997).

170. *See Merson*, 688 N.E.2d at 481; *see also* N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (2002).

171. *Merson*, 688 N.E.2d at 483. Mediation has been gaining popularity for resolution of land use disputes for some time. *See* SUSAN L. CARPENTER & W. J. D. KENNEDY, *MANAGING PUBLIC DISPUTES* (Jossey-Bass Publishers 1988). Private parties are free to resolve a dispute as they wish (within the law), but such freedom is not clearly applicable to public entities, which may only act within their statutory authority. Perhaps this explains the growing number of statutes that expressly authorize mediation of land use disputes. At least twelve states offer some type of mediation or dispute resolution services (as opposed to merely authorizing mediation) in the land use context: Colorado, Delaware, Georgia, Maine, Minnesota, New Jersey, Oregon, Pennsylvania, Utah, Vermont, and Washington.

full environmental assessment form as required by SEQRA along with its application to the board for a special permit to conduct expanded mining operations.¹⁷² In an unusual move, the planning board conducted a series of open meetings with the project sponsor, other involved agencies, and the public.¹⁷³ As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts.¹⁷⁴ The planning board then issued a negative declaration, finding that the project, as now configured, would not negatively affect the environment.¹⁷⁵ This avoided months of delay and many thousands of dollars in further project reviews for the applicant.

The court of appeals found that the planning board had conducted an “open and deliberative process” characterized by significant “give and take.”¹⁷⁶ It described the planning board’s actions as “an open process that also involved other interested agencies and the public” rather than “a bilateral negotiation between a developer and lead agency.”¹⁷⁷ It found that the changes made in the proposal were not the result of conditions imposed by the planning board but were, instead, “adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies. . . .”¹⁷⁸ In short, the planning board had created an effective multi-party negotiating process that met due process requirements.¹⁷⁹

172. *Merson*, 688 N.E.2d at 482; see CARPENTER & KENNEDY, *supra* note 171. When a landowner submits an application for a development permit to a local land use agency, an extended process of negotiation is initiated. The parties to this negotiation are the owner, the members of the local administrative agency with approval authority, other involved public agencies, and those affected by the proposed project: neighbors, taxpayers, and citizens of the community. Unlike commercial and personal negotiations, this process is not viewed by most of its participants as a negotiation in the traditional sense. Local zoning ordinances give the landowner property rights that must be respected. State and local statutes prescribe standards and procedures that the agency members must follow. Affected neighbors and citizens receive notice of their right to attend and speak at one or more public hearings. This process is not organized, in most localities, as it could be, as a structured negotiation in which the parties meet face-to-face, follow a self-determined process of decision-making, and arrive at a mutually acceptable agreement based on facts gathered in the process and give-and-take on all sides. The significance of the *Merson* case is that it endorses the use of effective negotiating strategies by the parties appearing before a land use review agency to achieve the kind of much touted, win-win results available in private negotiations. It also demonstrates the creative way that review board chairs can initiate and effectively use this type of negotiating strategy.

173. *Merson*, 688 N.E.2d at 482.

174. *Id.*

175. *Id.*

176. *Id.* at 485; CARPENTER & KENNEDY, *supra* note 171, at 753.

177. *Id.*

178. *Id.* at 486.

179. *See id.*

D. *Aquifer Protection in Dover*

A bruising conflict between the Town of Dover, in Dutchess County, in the northern New York metropolitan area, the state Department of Environmental Conservation, and the mining and solid waste disposal industry illustrates a more focused use of the legacy of *Golden v. Ramapo*.¹⁸⁰ Dover is located to the north of the vast New York City watershed, which was subject to prohibitive regulations imposed by the city's Department of Environmental Protection, operating as the delegate of the state Department of Health under New York law. These regulations were designed to protect the city's water and to avoid an EPA order to filter its water at a cost of billions of dollars.¹⁸¹ The direct effect of these regulations was to drive heavy industries, mining, and deposition businesses to seek facilities just beyond the city's watershed. The inadvertent result was a spate of applications to the Town of Dover for such activities. This all took place during the period between the adoption of the comprehensive plan and of the implementing regulations discussed here. Given the DEC's relative indifference to the occurrence, the town was forced to take action on its own.

In April 1999, an eight year old confrontation ended with amendments of Dover's traditional zoning ordinance to create four overlay districts. They were: (1) a Floodplain Overlay District covering FEMA-defined 100-year floodplains in streams and rivers; (2) a Stream Corridor Overlay District covering land within 150 feet of the mean high-water line of the Ten Mile River, Swamp River, and other streams; (3) an Aquifer Overlay District covering Dover's valley bottom aquifer system as well as the upland aquifer system; and (4) a Mixed Use Institutional Conversion Overlay District covering the former Harlem Valley Psychiatric Center.¹⁸² The amendments also prohibited a variety of nuisance-type activities, several of which were specifically permitted by state regulations and endorsed by the DEC. These include heavy industry, soil mining, underground mining, asphalt plants, blasting and rock crushing facilities, hazardous waste and radioactive material disposal facilities, all classes of solid waste management facilities not

180. See Jayne E. Daly, *What's Really Needed to Effectuate Resource Protection in Communities*, PACE ENVTL. L. REV. (forthcoming 2003), and her presentation at the November *Ramapo* Conference.

181. These regulations became effective on May 1, 1997. They were issued by the city under N.Y. PUB. HEALTH LAW § 1100(1) (McKinney 1997). As a direct result, New York City has complied with the 1986 Safe Drinking Water Act, 42 U.S.C. § 300(f)-(j)(26) (1997), and the 1989 Surface Water Treatment Rule, 40 C.F.R. § 141.71 (1997).

182. Daly, *supra* note 180.

owned or operated by the Town of Dover, and the use of certain reclamation material. The adoption of this highly sophisticated suite of provisions is significant because it was done by local officials in a relatively remote part of the metropolitan area, indicating that inventions like Ramapo's are diffusing into areas not known for their sophistication in land use affairs.

Dover's effort began in 1991 with the formation of its master plan committee, a broadly representative group including members of local boards and citizen interest groups.¹⁸³ Studies for the plan, which was adopted in 1993, documented the need to protect defined natural resources and detailed the dangers created by mining, quarrying, and heavy industries, particularly over the town's sole-source drinking water aquifer.¹⁸⁴ The plan called for the use of thoughtful and innovative planning strategies including clustering, performance standards, storm water infiltration policies, aquifer protection zones, conservation easements, erosion control plans, and development density limits based on groundwater features.¹⁸⁵ Shortly after the plan's adoption, a developer proposed using a 100-acre existing mine for the deposition of up to 27,000 tons of construction and demolition (C&D) debris.¹⁸⁶ The parcel, located in a medium-density residential district, contained an existing mine, which was a preexisting nonconforming use under local zoning.¹⁸⁷

Under New York law, C&D deposition operations are regulated by state standards; operators are required to obtain a permit from the DEC.¹⁸⁸ The mining company submitted an application to the DEC in 1993.¹⁸⁹ The DEC, in turn, assumed the lead role under New York's aggressive environmental review statute, leaving the town in the less powerful position of an involved agency. In an unusual move, the applicant received a letter from the local Zoning Board of Appeals stating that its members believed that no local approval was needed under local zoning because the uses proposed were accessory to nonconforming uses.¹⁹⁰ Letters of this kind, issued at the behest of a private party, are

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Daly, *supra* note 180.

188. *Id.*

189. *Id.*

190. *Id.*

not only unusual but most likely beyond the authority of the zoning board. In response, the chief elected official of the town sent a letter to the DEC stating that the town board disagreed with the ZBA on this interpretation.¹⁹¹ The DEC determined that the site was not located over a principal or sole source aquifer, a conclusion hotly contested by the town.¹⁹² The experience convinced the town that it was ill prepared to protect itself from the adverse environmental and economic effects of this and similar proposals and that the DEC was not charged with protecting the same interests as those delegated to the town under its zoning and land use authority.

In May 1998, the town began preparation of a new zoning code to implement the proposals in the master plan.¹⁹³ It also determined that the C&D operation needed several local approvals under existing regulations.¹⁹⁴ When the DEC determined in 1998 that the project required a new permit under its own regulations, the operator initiated applications for town and DEC approvals.¹⁹⁵ During required hearings on these matters, the town adopted its new zoning, which prohibited the proposed uses.¹⁹⁶ In *Danny Fortune Co. v. Town of Dover*,¹⁹⁷ Dover's zoning amendments were upheld against the applicant's claim that they were adopted in violation of state environmental review requirements and because of representations made by the ZBA and others, the town was prevented from denying its use under the doctrine of equitable estoppel.

Today, the town's aquifer is protected by its own zoning overlay district and prohibitions of uses previously permitted by the DEC. The Dover story is an interesting example of local government wresting control of the development permitting process from a state agency and substituting local standards for state standards, in the interest of protecting an environmental asset of great importance to the locality and its citizens. This struggle between one town and one state agency illuminates the larger conceptual battle between advocates of state versus local control of land use regulation.

191. *Id.*

192. Daly, *supra* note 180.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Danny Fortune Co. v. Town of Dover*, No. 99-4052 (N.Y. Sup. Ct. 2000).

E. *Rescue of Contaminated Property in Sleepy Hollow*¹⁹⁸

In a remarkable display of legal creativity, the village council of Sleepy Hollow, in Westchester County, across the Hudson River from Ramapo, adopted the Abandoned Industrial Property Reclamation Law.¹⁹⁹ The purpose of the law is to prevent the creation of nuisance conditions, hazards to public safety, and industrial blight, and to assure that large industrial properties are evaluated for environmental degradation and that environmental contamination is remediated prior to a significant change in use of an industrial facility.²⁰⁰ This local environmental law applied to any industrial property owner with more than 50,000 square feet of manufacturing space seeking to terminate onsite operations.²⁰¹ It required the owner to demolish all structures and to clean up the site within eighteen months of termination of operations.²⁰²

In fact, the law was designed to give the tiny village on the Hudson leverage against a corporate giant, General Motors, at a time when it announced plans to abandon a century-old automobile manufacturing plant on a prime riverfront site.²⁰³ A survey of abandoned industrial plants done by the village disclosed that few were redeveloped, some were Superfund sites, and that it took years to achieve redevelopment of the few that were successes. The prognosis for the GM site, like most similar sites, was decades of waste and disuse causing a blight on the riverfront, a drain on the village tax base, and a brake on the community's vision.

In 1996, GM announced the closing of its Sleepy Hollow plant.²⁰⁴ It then filed suit against the village in federal district court claiming that

198. See generally Donald W. Stever, *From Assembly Line to Sidewalk Café: Turning an Automobile Assembly Plant into a New Town in Sleepy Hollow, New York*, PACE ENVTL. L. REV. (forthcoming 2003), and his panel presentation at the November Ramapo Conference.

199. SLEEPY HOLLOW, N.Y., CODE ch. 17A: Environmental Protection and Abandoned Industrial Property Reclamation (1993). In *Firemen's Fund Ins. Co. v. City of Lodi*, the court held that a local environmental clean-up law was not preempted by CERCLA or a comparable California state statute. 41 F. Supp. 2d 1100, 1104 (E.D. Cal. 1999).

200. *Firemen's Fund*, 271 F.3d at n.11.

201. SLEEPY HOLLOW, N.Y. CODE ch. 17A.

202. *Id.*

203. Car production began in Sleepy Hollow before the turn of the last century. The Maxwell-Briscoe Motor Car Company had its headquarters there and established operations on a floodplain below a bluff just north of Beekman Avenue, the main commercial street in the village. From the site, one has a westerly view across the Hudson of the scenic Palisades, which are just to the east of Ramapo. The automobile company was subsequently bought by the Chevrolet Motor Car Company, which was later acquired by General Motors.

204. See Stever, *supra* note 198.

the Abandoned Industrial Property Law violated its constitutional rights.²⁰⁵ The parties immediately entered into negotiations in settlement.²⁰⁶ They were successful in achieving an agreement that committed GM to remediation, demolition, the design of a master plan for the redevelopment of the site, steps for its implementation, the donation of a significant waterfront parcel to the village, a schedule for all these activities, and the grant of an option to purchase to the village if the schedule is not followed.²⁰⁷

The adoption of the abandoned property law was part of a *Ramapo*-type, multi-step planning and land use program for the village of the type created in Ramapo:

- Its Conservation Advisory Council, beginning in 1990, developed a Local Waterfront Revitalization Plan, with funding and technical assistance from the New York Department of State, under its version of the Coastal Zone Management Program.²⁰⁸
- In 1997, the village council adopted the Local Waterfront Revitalization Plan (LWRP).²⁰⁹ It required that the GM site development be designed to conform to its plans for the Beekmen Avenue Corridor.²¹⁰
- The LWRP called for a Riverfront Development zoning district to be established.²¹¹ The village council, in turn, adopted the RD zone that required redevelopment of the property as a planned unit, carefully fitted into a traditional riverfront village with mixed commercial and residential uses.²¹²
- In 1998, GM began demolition, which was completed in eighteen months.²¹³
- In 1999 through the present, countless workshops and open public meetings have been held with local boards and residents on the design and reuse of the site.
- In 2001, GM, in consultation with the village, chose the Roseland Property Corporation as the redeveloper.²¹⁴

205. *Id.*

206. *Id.*

207. See *supra* note 84 regarding the use of negotiation and mediation in land use disputes.

208. Optional Local Government Waterfront Revitalization Program for Coastal Areas and Inland Waterways, N.Y. EXEC. LAW § 915 (McKinney 1982 & Supp. 1996). Sleepy Hollow is on the Hudson River, a tidal estuary, and this shoreline is considered to be coastal, qualifying Sleepy Hollow for assistance in developing an LWRP.

209. See Stever, *supra* note 198.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. See Stever, *supra* note 198.

- In January 2002, GM, the village, and Roseland held a public meeting in village hall to announce the plans for the redevelopment of the site including the creation of a park linked to adjacent parks and green space to create a significant environmental buffer to the site.²¹⁵

F. State Laws that Enable Local Land Use Inventions

Local governments derive their authority to enact laws that promote smart growth from state-adopted land use enabling statutes, home rule laws, and laws that promote a variety of special state and local interests.²¹⁶ The understanding that emerges from this review is that many states have empowered local governments to adopt flexible laws to balance land use patterns and protect their natural resources from the adverse impacts of land use. These illustrate how, from state to state, localities like Ramapo, Hyde Park, Warwick, Dover, and Sleepy Hollow are empowered to create innovative smart growth strategies.

In most states, it is understood that municipalities have no inherent powers, but can exercise only that authority expressly granted or necessarily implied from, or incident to, the powers expressly granted by the state. Unless the language delegating the power is unambiguous or the legislature's intent to delegate certain powers is clear, doubts are generally resolved against the municipality.²¹⁷ Courts vary from state to state as to how strictly they construe express delegations of power to municipalities. Some find a broader range of implied or incidental powers within the express language used; others do not.

215. These plans are supported by Historic Hudson Valley and Scenic Hudson, regional nonprofits charged with guarding the Hudson River's cultural and environmental assets. Both organizations were involved in and shaped the village's plans and redevelopment notions.

216. This range of authority is illustrated here by references to statutes in North Carolina, Georgia, South Carolina, Colorado, and New York. Constitutional provisions and court decisions from California, Illinois, New York, South Dakota, and Utah are also cited.

217. The classic statement of this view, adopted by the courts of many states, is found in JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872):

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in, or incident to*, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . All acts beyond the scope of the powers granted are void.

Id. at 101–02. This rule is commonly known as Dillon's Rule.

In North Carolina, the state legislature adopted a legislative rule of broad construction of powers delegated to local governments.²¹⁸ Prior to that time, the courts had applied Dillon's Rule, strictly construing specific grants of authority to local governments.²¹⁹ A Raleigh, North Carolina requirement that a developer creates open space in a subdivision and conveys title to it to a private homeowners' association was upheld using the legislative rule of broad construction.²²⁰ The reach of this rule was evident in *Homebuilders Ass'n v. City of Charlotte*,²²¹ in which the power to impose user fees on applicants for rezoning, special use permits, plat approvals, and building inspections was upheld in the absence of expressly delegated authority. How far the North Carolina courts will go in upholding local land use inventions under this rule is not known. It has been argued, however, that the state's zoning enabling statute, which allows localities "to regulate 'the percentage of lots that may be occupied, the size of yards, courts and other open spaces[,]'" provides authority to require buffers along waterways, to protect important natural areas, and to set requirements that authorize or even mandate clustered development schemes."²²²

Georgia follows Dillon's Rule. It is regarded as a strict constructionist state where local governments have only those powers expressly granted and any reasonable doubt about their authority is resolved in the negative.²²³ The delegation of comprehensive planning authority to local governments in Georgia is broad, however, since it is tied to the state's interest in protecting and preserving "the natural resources, [the] environment, and [the] vital areas of the state."²²⁴ Certain elements are required to appear in local comprehensive plans, including plans for the protection of natural and historic resources.²²⁵ Under the rules of the Office of Coordinated Planning in Georgia, local land use planning is required to strike a balance between the protection of vulnerable

218. N.C. GEN. STAT. § 160A-4 (1999) (stating that "[i]t is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . .").

219. See *supra* note 217.

220. *River Birch Ass'n v. City of Raleigh*, 388 S.E.2d 538, 542-44 (N.C. 1990).

221. *Homebuilders Ass'n v. City of Charlotte*, 442 S.E.2d 45 (N.C. 1994).

222. David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 701 (2000) (quoting N.C. GEN. STAT. §§ 153A-340(a), 160A-381 (1999)).

223. *Kirkland v. Johnson*, 76 S.E.2d 396, 398 (Ga. 1953).

224. GA. CODE ANN. § 36-70-1 (2000).

225. GA. COMP. R. & REGS. r. 110-12-1-.04(5) (1997).

natural and historic resources and respect for individual property rights, a classic formulation of smart growth policy.²²⁶ Again, this is a strong commitment to enabling localities to achieve smart growth through local lawmaking.

In South Carolina, the state constitution authorizes the legislature to provide for “[t]he structure and organization, powers, duties, functions and responsibilities of the municipalities . . . by general law.”²²⁷ The Constitution also expressly abolishes Dillon’s Rule, providing that, “[t]he provisions of [the] Constitution and all laws concerning local government shall be liberally construed in their favor,” and that any powers granted to local government by the constitution and laws “shall include those fairly implied and not prohibited by [the] Constitution.”²²⁸ Local governments in South Carolina derive their express zoning and planning powers from the South Carolina Local Government Planning Comprehensive Enabling Act. Adopted in 1994, the Act consolidates the local planning and zoning statutes in a comprehensive law and recognizes new planning and zoning powers.²²⁹ The zoning and planning act also authorizes specific zoning techniques such as cluster development, floating zones, and planned development districts.²³⁰ However, the Act makes clear that any other planning and zoning techniques may be used.

In Colorado, the Local Government Land Use Control Enabling Act of 1974²³¹ (“Land Use Enabling Act”) and the Colorado Land Use Act²³² provide local governments with broad authority to adopt smart growth laws.²³³ The Colorado Land Use Act was enacted in part “to encourage uses of land and other natural resources that are in accordance with their character and adaptability [and] to conserve soil, water, and forest resources.”²³⁴ To meet these objectives, the Colorado legislature established the Colorado Land Use Commission to develop a land use planning program that “may include but need not be limited to an environmental matrix.”²³⁵ The Commission is required to recognize that “the decision-making authority as to the character and use of

226. *Id.* r. 110-12-1-.04(5)(f)(1).

227. S.C. CONST. art. VIII, § 9.

228. *Id.* § 17.

229. 1994 S.C. Acts 355.

230. S.C. CODE § 6-29-720 (C)(1), (2), (4) (2002).

231. COLO. REV. STAT. §§ 29-20-101 to 29-20-107 (2001).

232. *Id.* §§ 24-65-101 to 24-65.1-502.

233. *See id.* §§ 29-20-101 to 29-20-105 (Local Government Land Use Enabling Act of 1974); *id.* §§ 24-65-101 to 24-65-106 (Colorado Land Use Act).

234. COLO. REV. STAT. § 24-16-102 (2001).

235. *Id.* § 29-65-104(1)(a).

land shall be at the lowest level of government possible.”²³⁶ The purpose of the Land Use Enabling Act is to achieve “planned and orderly development within [the state]” and to maintain a balance between “basic human needs” and “legitimate environmental concerns.”²³⁷

In New York, the express authority delegated to local governments to adopt zoning regulations is contained in what is loosely called the Zoning Enabling Act.²³⁸ The New York statute is similar to those found in the majority of states, since most derived their approaches from the standard zoning enabling act promulgated by a federal commission in the 1920s.²³⁹ The express words of the enabling act empower town, village, and city legislatures to regulate the height and size of buildings, the percentage of the lot to be occupied, the size of yards, the density of population, and the location and use of buildings. For these purposes, local legislatures are empowered to divide the community into districts that are best suited to carry out the purposes of the enabling act. These purposes include lessening congestion, promoting the general welfare, preventing overcrowding, avoiding undue concentrations of population, and facilitating the provision of supportive infrastructure. These regulations, according to the enabling act, shall be designed to encourage the most “appropriate use of the land throughout [the] municipality.”²⁴⁰ In a sweeping endorsement of local innovation in the land use field, New York’s highest court upheld a village’s use of floating zoning over a vigorous dissent arguing that authority for the invention of such a technique was singularly absent from the enabling act.²⁴¹ The majority, perhaps speaking to inventive local officials such as those in Ramapo nearly twenty years later, encouraged local creativity with these words:

236. *Id.* § 24–65–104(1)(b) (2001).

237. *Id.* § 29–20–102.

238. N.Y. GEN. CITY LAW §§ 19–24 (McKinney); N.Y. VILLAGE LAW §§ 7–700, 742 (McKinney); N.Y. TOWN LAW §§ 261–285 (McKinney).

239. An advisory commission appointed by Secretary of Commerce Herbert Hoover promulgated the Standard State Zoning Enabling Act, and this model act served as the basis for most of the state statutes enacted to delegate the authority to adopt zoning regulations to local governments. *See* STANDARD STATE ZONING ENABLING ACT (U.S. Dep’t of Commerce 1926), *reprinted in* 5 EDWARD H. ZIEGLER, JR., RATHKOFF’S THE LAW OF ZONING AND PLANNING App. A (2001). New York’s zoning enabling law is a near *verbatim* replica of this model enabling act. Parallel provisions regarding the authority of New York’s municipalities to adopt zoning and other land use regulations are contained in the Town, Village, and General City Laws. *See* N.Y. TOWN LAW §§ 261–263 (McKinney 1987 & Supp. 2001); N.Y. VILLAGE LAW §§ 7–700, 7–702, 7–704 (McKinney 1996); N.Y. GEN. CITY LAW §§ 20(24)–20(25) (McKinney Supp. 2001).

240. *See* N.Y. TOWN LAW § 263 (McKinney 1994); N.Y. VILLAGE LAW § 7–704 (McKinney 1996).

241. *Rodgers v. City of Tarrytown*, 96 N.E.2d 731 (N.Y. 1951).

“The village’s zoning aim being clear, the choice of methods to accomplish it lay with the [legislative] board.”²⁴²

Other state-delegated authority to control land use in New York is contained in parallel provisions of the Town, Village, and General City Laws that empower local legislatures to adopt subdivision and site plan regulations and provide for local administrative boards to review and approve applications to develop subdivided land or individual sites.²⁴³ The state legislative purpose for granting subdivision authority to local governments is to provide for the future growth and development of the community, the provision of adequate infrastructure, and the “comfort, convenience, safety, health and welfare of its population.”²⁴⁴ Before local administrative bodies approve subdivisions, they “shall require that the land . . . be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or to the public health, safety and welfare.”²⁴⁵ It was this authority that was relied on by the *Ramapo* court:

To this end, subdivision control purports to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents. It reflects in essence, a legislative judgment that the development of unimproved areas be accompanied by provision of essential facilities.²⁴⁶

The breadth of power delegated to local governments by these New York statutes can also be inferred from those sections of state law that authorize local governments to adopt comprehensive plans, to which the law stated all local land use regulations must conform. These provisions, loosely known as the Planning Enabling Act, define a land use regulation as a “local law enacted by the [municipality] for the regulation of any aspect of land use and community resource protection and includes any zoning, subdivision, special use permit or site plan regulation *or* any other regulation which prescribes the appropriate use of property or the scale, location and intensity of development.”²⁴⁷

242. *Rodgers*, 96 N.E.2d at 734.

243. N.Y. GEN. CITY LAW § 276; N.Y. VILLAGE LAW § 7-728; N.Y. TOWN LAW § 32.

244. N.Y. TOWN LAW § 276(1) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-728(1) (McKinney Supp. 2001); N.Y. GEN. CITY LAW § 32(1) (McKinney Supp. 2001).

245. N.Y. TOWN LAW § 277(1) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-730(1) (McKinney Supp. 2001); N.Y. GEN. CITY LAW § 33(1) (McKinney Supp. 2001).

246. *Ramapo*, 285 N.E.2d at 298.

247. N.Y. GEN. CITY LAW § 28-a (3)(b) (McKinney Supp. 2001); N.Y. TOWN LAW § 272-a (2)(b) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-722 (2)(b) (McKinney Supp. 2001).

In New York, municipalities have been delegated direct authority to protect the environment under the state's home rule law. The home rule provisions of Article IX of the New York Constitution and legislation passed pursuant to it give local governments broad home rule powers.²⁴⁸ The state legislature implemented Article IX with the enactment of the Municipal Home Rule Law (MHRL), the provisions of which are to be "liberally construed."²⁴⁹ Under the MHRL, localities are given the authority to adopt laws relating to their "property, affairs or government,"²⁵⁰ to "[t]he protection and enhancement of [their] physical and visual environment,"²⁵¹ and to the matters delegated to them under the statute of local governments.²⁵² The statute of local governments delegates to municipalities the power "to adopt, amend and repeal zoning regulations" and to "perform comprehensive or other planning work relating to its jurisdiction."²⁵³

State legislatures in a number of states have granted local governments home rule authority. Grants of home rule power provide varying authority to municipalities to operate broadly regarding local affairs, instead of having to rely on various express grants of authority for particular purposes. The South Dakota Constitution, for example, provides that "[a] chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state. . . . Powers and functions of home rule units shall be construed liberally."²⁵⁴

State legislatures can provide broad "police power" authority to their municipalities. The California Constitution, for example, provides that a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."²⁵⁵ The Utah legislature conferred upon cities the authority to enact all ordinances and regulations "necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and [the] inhabitants [thereof], and for the protection of prop-

248. See N.Y. CONST. art. IX.

249. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1994).

250. *Id.* § 10(1)(i).

251. *Id.* § 10(1)(ii)(a)(11).

252. *Id.* § 10(1).

253. *Id.* §§ 10(6), (7) (McKinney 1994).

254. S.D. CONST. art. IX, § 2; see also ILL. CONST. art. 7, § 6 (stating that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare").

255. CAL. CONST. art. 11, § 7.

erty in the city.”²⁵⁶ In interpreting this statute, the Utah Supreme Court has discarded a strict application of Dillon’s Rule, stating, “If there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal.”²⁵⁷ In several other states, the general grant of the police power authority to local governments has been construed by courts to convey power beyond that granted by specific statutory acts.²⁵⁸

What should be made of these state laws that respect local prerogatives in land use regulation and smart growth? What are the dangers and limitations of localism? Again, the Ramapo story is instructive.

V. The Logic of Localism—The Ramapo Invention that Failed

The local officials in Ramapo responsible for the town’s growth control laws knew they were vulnerable. If small groups of residents in discrete parts of town grew discontented with the town’s land use laws, they had the power to form their own villages, adopt their own land use laws, and abandon the carefully sculpted town-wide approach.²⁵⁹ At the time the growth control law was adopted, there were six independent villages within the town and their growth and zoning were carefully incorporated into the town’s proposals.²⁶⁰ In 1967, the town board adopted another invention, a local law that limited the creation of villages under this expansive state law allowing village secession from

256. UTAH CODE ANN. § 10–8–84 (1999 & Supp. 2001).

257. *State v. Hutchinson*, 624 P.2d 1116, 1120 (Utah 1980).

258. *See, e.g., Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976) (allowing rent-control initiative); *Leavenworth Club Owners Ass’n v. Atchison*, 492 P.2d 183 (Kan. 1971) (allowing ordinance restricting sale of liquor); *City of Duluth v. Cervený*, 16 N.W.2d 779 (Minn. 1944) (allowing liquor seizure ordinance); *Lehrhaupt v. Flynn*, 356 A.2d 35 (N.J. Super. Ct. 1976) (allowing financial disclosure ordinance); *City of Hobbs v. Biswell*, 473 P.2d 917 (N.M. Ct. App. 1970) (allowing regulation of pawnbrokers); *Krolick v. Lowery*, 302 N.Y.S.2d 109 (App. Div. 1969) (upholding regulation requiring blood tests from firemen); *Adams v. City of New Kensington*, 55 A.2d 392 (Pa. 1947) (allowing license fees for jukeboxes); *City of Pasco v. Dixon*, 503 P.2d 76 (Wash. 1972) (allowing ordinance that prohibited disturbing and indecent behavior in public).

259. Village Law, Article II, allows territories containing 500 or more residents to create their own villages. The process is begun by a petition by 20% of the residents qualified to vote or by the owners of 50% or more of the assessed value of real property in the area. This law contains only procedural requirements; no substantive findings are required such as that the incorporation is in the best interest of the territory and the town. The petition of incorporation requires simply “an allegation of the basis on which the petition is signed.” RAMAPO VILLAGE LAW § 2–202 (1)(b)(1).

260. These six villages were: Suffern, Spring Valley, Hillburn, Sloatsburg, New Square, and Pomona.

towns.²⁶¹ This law provided that every petition for the incorporation of additional villages within town boundaries should comply with all the requirements of the applicable provisions of the state's village incorporation law and "contain allegations that the proposed incorporation is in the overall public interest" of the proposed village, the rest of the town, and any school or fire district affected by the incorporation.²⁶²

The constitutionality of this law was challenged, ten years later, in *Marcus v. Baron*.²⁶³ The petitioners claimed that the law was inconsistent with the state-adopted village incorporation law.²⁶⁴ The Supreme Court agreed and invalidated Ramapo's village incorporation law, holding that the town's authority was preempted by state law on the subject.²⁶⁵ The Appellate Division reversed, reasoning that "[a] local law may cover the same subject matter embraced in state legislation by supplementing the general law with additional reasonable requirements."²⁶⁶ This intermediate court noted, "If local governments are to function effectively in metropolitan areas, they must have sufficient size and authority to plan, administer and provide significant financial support for solutions to area-wide problems."²⁶⁷ The New York Court of Appeals reversed, finding nothing in state law to sustain town authority to govern village secession: no express or implied authority, no legislative intent, and no evidence of this authority in the constitution or other municipal statute.²⁶⁸ The result was the invalidation of the controlled secession law. Since the *Marcus v. Baron* decision, another six villages have been formed.²⁶⁹ In the last two months of 2002, residents within another three areas in the town initiated petitions to incorporate.²⁷⁰ As a result, there is today very little contiguous land left in

261. RAMAPO, N.Y., LOCAL LAW 3 (1967).

262. *Id.* §45-3(B).

263. *Marcus v. Baron*, 442 N.E.2d 437 (N.Y. 1982).

264. *Id.*

265. *Id.*

266. *Marcus v. Baron*, 445 N.Y.S.2d 587 (App. Div. 1981) (citing *Robin v. Inc. Vill. of Hempstead*, 30 N.Y.2d 347 (N.Y. 1972)).

267. *Baron*, 445 N.Y.S.2d at 595, 598. The Appellate Division relied in part on a recent amendment of the Municipal Home Rule of New York giving local governments the power to supersede the provisions of generally applicable state law. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 2002).

268. *Id.* at 590 (no express or implied authority), 598 (no legislative intent), 597 (no constitutional authority).

269. These include New Hempstead, Chestnut Ridge, Airmont, Montebello, Wesley Hills, and Kasar.

270. THE JOURNAL NEWS, Nov. 26, 2002 at 3B. The proposed villages are Orchard Ridge, Highview Heights, and Forshay Hills, with a population of 585 persons. In addition, approximately 30% of the surface area of the town is located within the Palisades Interstate Park, which cannot be built upon and which is governed by a state agency, the Palisades Interstate Park Agency. William Gould, former chair of the Ram-

Ramapo for the town's comprehensive plan and inventive zoning controls to regulate.

VI. The Negative Legacy of Localism—Exclusion

How area-wide or regional problems can be addressed by the uncoordinated workings of nearly 1,600 local governments in New York is one of the continuing vexations of the *Ramapo* decision and of its affirmation of local sovereignty and invention. Perhaps the most visible and negative legacy of localism in New York, and many states, is the exclusionary effect of local land use control: the rejection of locally unwanted land uses, including affordable housing, which is the subject of this section. While New York courts have been moderately aggressive in prohibiting exclusionary zoning, their efforts have been fundamentally frustrated by the lack of state or regional definitions of housing needs. This is ironic, since New York courts have imposed an obligation on municipalities to consider regional housing needs in their zoning ordinances. The operative principle here is that, since the zoning power is a delegation of the state's police power, it cannot be used to exclude low- and moderate-income households, an important segment of the state's population.

The landmark case of *Berenson v. Town of New Castle*²⁷¹ and an associated line of cases establish the legal rules used by courts to decide whether municipal zoning unconstitutionally excludes affordable types of housing.²⁷² These cases establish standards that urge localities to adopt inclusionary zoning provisions, while urging the state, in turn, to provide for regional and statewide planning in these matters.²⁷³

apo Planning Board, in office in the late 1960s, noted in a letter dated Sept. 6, 2002, "... since zoning was not enforced in much of the town, multiple villages were formed in the 1980s, each designed to control zoning the way its residents preferred it. In summary, Ramapo has become a Balkanized mess, in terms of a master plan." Letter from William Gould, Sept. 6, 2002 (on file with the author). In the author's opinion, much of this incorporation activity was fueled by land use issues other than the build-out of the 18-year growth management strategy.

271. *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975).

272. See, e.g., *Robert E. Kurzius, Inc. v. Vill. of Upper Brookville*, 414 N.E.2d 680, 683–85 (N.Y. 1980) (Arguably adding a third factor to the *Berenson* test, holding that if the ordinance was enacted with an exclusionary purpose it would fail constitutional examination. The court found that the village ordinance passed all three prongs of the test and upheld the five-acre lot zoning at issue); *Allen v. Town of North Hempstead*, 478 N.Y.S.2d 919, 922 (App. Div. 1984) (A durational residency requirement imposed as a precondition to qualifying for residence in a Golden Age Residence District was found to violate *Berenson's* standards and was therefore unconstitutional. The court wrote that "[t]he durational residence requirement at bar has a more direct exclusionary effect on nonresidents like plaintiffs than the almost total exclusion of multi-family housing held to be unconstitutional by this court [in *Berenson*]").

273. "Zoning ... is essentially a legislative act. Thus, it is quite anomalous that a

Having established a jurisprudential basis for inclusionary zoning, the New York courts have gone no further. The state legislature has failed to respond to the court of appeals' urging to create standards to guide local efforts to include affordable types of housing in their zoning regulations. As a result, affordable housing market regions have not been identified, regional needs have not been calculated, and local fair share allocations have not been made, nor can they be easily divined. In this standardless environment, those who challenge exclusionary zoning find it very difficult to prove that current zoning violates the *Berenson* tests. In the absence of more specific guidance from the courts or the legislature, local governments in New York have been slow to adopt inclusionary zoning provisions.

VII. The Continuing Enigma

In *Golden v. Ramapo*, the New York Court of Appeals, while upholding the town's growth management programs, called on the state legislature to adopt a system of "[s]tate-wide or regional control of [land use] planning" to "insure that interests broader than that of the municipality underlie various land use policies."²⁷⁴ New York's highest court minced no words in 1972. It stated that New York's zoning enabling legislation "is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government. . . ." ²⁷⁵ Under this system of local control of land use, "questions of broader public interest have commonly been ignored."²⁷⁶ The court referenced criticisms of community autonomy finding that local land use control suffers from "pronounced insularism"²⁷⁷ and produces "distortions in metropolitan growth patterns."²⁷⁸ It noted that local control had the effect of "crippling efforts toward regional and State-

court should be required to perform the tasks of a regional planner. To that end, we look to the [l]egislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." *Berenson*, 341 N.E.2d at 243. This echoes *Ramapo*: "Of course, these problems (of growth) cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, [s]tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies." *Ramapo*, 285 N.E.2d at 300 (1972). For further discussion about affordable housing and the legacy of *Ramapo*, see Stuart R. Shamberg & Adam L. Wekstein's *The Local and Regional Need for Housing and the Ramapo Plan*, appearing in this edition of *The Urban Lawyer* beginning at page 165.

274. *Ramapo*, 285 N.E.2d at 300.

275. *Id.* at 299.

276. *Id.*

277. *Id.*

278. *Id.*

wide problem solving, be it pollution, decent housing, or public transportation.”²⁷⁹

In 1972 when *Ramapo* was decided, there was some reason to believe that the state legislature was listening. In the early 1970s, the legislature enacted the Adirondack Park Agency Act (the APA Act), preempting local land use authority over significant land use matters throughout an immense geographical region, encompassing 20 percent of the state’s land area and 20 percent of its counties.²⁸⁰ Under the Act, the Adirondack Park Agency (APA) was given jurisdiction to review and approve projects with definable regional impacts.²⁸¹ The APA also has jurisdiction to review and approve other regional projects in any area not governed by an approved and validly adopted local land use program.²⁸²

The APA Act was attacked in 1977 as an unconstitutional interference with the authority of local government to zone and control land use.²⁸³ The court of appeals framed the issue before it in terms of whether the “future of a cherished regional park is a matter of state concern.”²⁸⁴ If so identified, the matter would fall into the area reserved to the state by the state constitution and the Statute of Local Governments.²⁸⁵ The court of appeals held that the future of the regional park is a matter of state concern and that, therefore, the APA Act does not violate the home rule provisions of the state constitution reserving control over local matters to local governments.²⁸⁶ It reasoned that to use home rule principles to allow local control of land use in the Adirondack Park region would mean that local interests would be promoted at the expense of state interests.

Of course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule but because the motive is to serve a supervening state concern transcending local interests.²⁸⁷

Stiff resistance to further efforts at regionalism or local preemption

279. *Id.*

280. N.Y. EXEC. LAW § 801–819 (McKinney 2002). *See generally* William H. Kissel, *The Adirondack Park: Two Decades of Innovative Land Use Planning*, 1992 N.Y.S.B.A. SEC. REAL PROP. L. SEC. NEWSL. 20, at 39.

281. N.Y. EXEC. LAW § 808–810 (McKinney 2002).

282. *Id.* § 809.

283. *Wambat Realty Corp. v. State*, 362 N.E.2d 581 (N.Y. 1977).

284. *Id.* at 582.

285. *See* N.Y. CONST. art. IX, § 3; *see also* N.Y. STAT. OF LOC. GOV. § 11 (4) (McKinney 2002).

286. *Wambat*, 362 N.E.2d at 583.

287. *Id.* at 584.

set in during the early 1970s. Among the reasons that explain subsequent aversion to change in New York is the bitter recollection of two far-reaching proposals that were buried in an avalanche of public opposition.²⁸⁸ The first was Senate Bill 9028 (S. 9028), the Land Use and Development Law,²⁸⁹ proposed in 1970; the second was the Urban Development Corporation's 1972 proposal to construct low- and moderate-income housing in several affluent suburban communities in Westchester County.

Senate Bill 9028 called for a statewide comprehensive land use plan, regional plans, and county plans, all compatible and consistent with one another.²⁹⁰ County plans were to direct development into high-density areas and away from agricultural and rural lands.²⁹¹ Local governments were to exercise their land use authority in conformance with the county plans.²⁹² By these means, an integrated statewide planning system was to be created that coordinated the land use initiatives of each level of government. The reaction to S. 9028 was severe. Not only did the bill fail to reach the full senate,²⁹³ but the state agency that proposed it was disbanded by the legislature shortly thereafter.²⁹⁴ Two years later, the state Urban Development Corporation (UDC) was stripped of its zoning override powers after pursuing its proposal to build subsidized housing in nine Westchester villages and towns.²⁹⁵

VIII. Grassroots Regionalism—Coherence through Networks

It was not until 1991 that another regionalist proposal passed the state legislature. In that year, the legislature created the Hudson River Greenway Communities Council.²⁹⁶ The legislation affects both sides of the Hudson River extending from north of Albany to New York City, including nearly 250 municipalities in twelve counties. In the Adiron-

288. See JOHN R. NOLON, *WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH*, 3 ELI (2001).

289. S. 9028, 193d Ann. Legis. Sess. (1970).

290. S.9028, §§ 3-106(2), 3-104, 4-101, & 4-102(1)(c).

291. *Id.* § 3-301.

292. *Id.* § 3-106(2).

293. S. 9028 died in committee. See 1970 N.Y. Legis. Rec. & Index S.677.

294. 1971 Consol. Law § 11 (eliminated the New York Office of Planning Coordination).

295. N.Y. UNCONSOL. LAWS § 6265(5) (signed into law on June 5, 1973) (McKinney 1979) The bill prevented the UDC from undertaking a residential development in a town or village if the local legislative body filed a formal written objection to such project.

296. N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 44-0201 (McKinney 2002).

dacks example, a regional plan was adopted by the legislature and its implementation entrusted to an agency with land use authority.²⁹⁷ Local land use authority was significantly affected in the interests of achieving carefully articulated state objectives. In stark contrast, the Hudson River Greenway Communities Council is a regional state agency without any authority to override local land use prerogatives.²⁹⁸ Instead, a regional greenway compact, or plan, is expected to emerge through the collaboration of the council and participating municipalities in its twelve-county jurisdiction. Subregional plans are to be developed collaboratively as well.²⁹⁹ Localities are under no obligation to join the compact.³⁰⁰ Their failure to participate makes them ineligible for a variety of incentives, however. These include technical assistance and direct grants for planning and programs from the Greenway, bonus points in applying for discretionary grants from other state agencies, and indemnity from liability should the participating community be sued for complying with a compact provision.³⁰¹ The Greenway, as a state agency, is also obligated to negotiate on behalf of participating communities with other state agencies when those localities believe that a proposed state agency project or program does not comply with their Greenway compact objectives.³⁰² In drafting the legislation, attempts were made to give the Greenway the power to review and shape local development decisions to ensure that regional concerns are properly reflected. That provision did not survive final drafting. In the end, the Greenway Council was given no legal authority to achieve the ends of the legislation and local land use control is affected only through voluntary actions of the constituent municipalities.³⁰³

The Hudson River Greenway Communities Council initiative exhibits a number of distinct characteristics. These include the fact that it:

297. N.Y. EXEC. LAW § 800–820 (McKinney 2002).

298. N.Y. ENVTL. CONSERV. LAW § 44–0107 (McKinney 2002).

299. *Id.* § 44–0119(3): “If the local officials in any [subregion] fail to produce a regional plan for their district or submit such plan which the council cannot approve, the council may prepare or cause to be prepared a district plan which cities, towns and villages in such district may voluntarily adopt by local law to become participating communities.”

300. *See id.* § 44–0119, “The council shall guide and support a cooperative planning process to establish a voluntary regional compact amongst the counties, cities, towns and villages of the greenway to further the recommended criteria of natural and cultural resource protection, regional planning, economic development, public access and heritage education. . . .”

301. *Id.* § 44–0119 (9).

302. Dover joined the Greenway for the purpose of obtaining the Greenway’s help, as a state agency, in getting the state Department of Environmental Conservation to work with, rather than against it, in aquifer protection. *See supra* notes 179–81.

303. N.Y. ENVTL. CONSERV. LAW § 44–0107 (McKinney 2002).

- espouses the importance of regionalism and municipal interdependence;
- creates a structure for regional planning—from the bottom up;
- is voluntary and does not alienate local officials by threatening their independence;
- offers a variety of incentives such as planning and program funding, immunity from liability, and a priority for securing discretionary state grants;
- provides technical assistance and guides local innovations;
- engages county governments to develop adjunct regulations desired by some of the communities,³⁰⁴ and
- encourages state agencies to conform their plans to those of local communities fully participating with the Greenway.

A hierarchical nesting of levels of government and regulation is achieved by this legislative approach delivered in a politically sensitive manner. It, conceptually, achieves an integration of local, county, and state agency activity of the type envisioned in a more direct manner by S. 9028³⁰⁵ and the authors of *The Quiet Revolution*.³⁰⁶ This is the signature approach in New York: encourage local governments to behave in productive ways, give them the tools to do so, provide incentives, and let them choose freely their own strategic path.

The Greenway approach, in fact, builds on a long history of encouraging intermunicipal cooperation in New York. Since 1960, state statutes have authorized local governments to enter into compacts to design compatible land use plans and enact compatible land use regulations with the enactment of Article 5-G of the General Municipal Law.³⁰⁷ The provisions of these 1960 amendments to the General Municipal Law were broad enough to allow municipalities to cooperate regarding land use planning, regulation, and administration. Although few com-

304. See *supra* note 139 and accompanying text regarding the use of Greenway Connections by the Town of Hyde Park.

305. See *supra* notes 289–93 and accompanying text.

306. See BOSSELMAN & CALLIES, *supra* note 3 and accompanying text.

307. See N.Y. GEN. MUN. LAW § 119-m. How these techniques can be used intermunicipally to achieve broader conservation and economic development objectives is discussed in John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN'S L. REV. 1011 (1999). For a sober reflection as to how aggressively municipalities might use their authority to collaborate across boundaries, see FREILICH, *supra* note 4 at 3. (“Local governments have been particularly unable to deal effectively with the problems that urban sprawl created. In large part, this is a product of a system that allows each community to attempt to solve its own problems without regard to the general needs and wants of the region of which the community is a part.”).

munities used the amendments' authority for that purpose, the state legislature in the early 1990s thought that it was necessary to make this intermunicipal land use authority more explicit.³⁰⁸ In 1992, the legislature enacted additional legislation to further encourage intergovernmental cooperation concerning comprehensive planning and land use regulation.³⁰⁹ These statutes made it clear that local governments have the authority to create intermunicipal planning boards, zoning boards of appeals, comprehensive plans, land use regulations, intermunicipal overlay districts, and programs for land use administration and enforcement.

Further improvements followed in 1993 when the state legislature enabled county governments to assist constituent localities in land use matters.³¹⁰ These amendments allow cities, towns, and villages to enter into intermunicipal agreements with counties to receive professional planning services from county planning agencies. In this way, 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 planning and regulatory functions. Pursuant to these amendments, a county planning agency can 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.

These state laws allow localities to confront the serious problems caused by their own parochialism. The principal limit to the reach of local land use control is jurisdictional: this authority ends at the municipal border. As a matter of law and practice, local zoning and comprehensive planning are introspective in nature, operating within "our" community for the benefit of "our" citizens. As a result, this power has not been used on a regular basis as the legal vehicle for protecting intermunicipal environmental resources, harnessing the influences of regional markets, or influencing the land use decisions of municipal neighborhoods that have certain external impacts.³¹¹ Effective control

308. See *Legislative Commission on Rural Resources, Memorandum*, May 27, 1992, at 1.

309. See N.Y. GEN. CITY LAW § 20-g (McKinney 2002); N.Y. TOWN LAW § 284 (McKinney 2002); N.Y. VILLAGE LAW § 7-741 (McKinney 2002).

310. The 1993 amendments modified N.Y. GEN. MUN. LAW. §§ 119-u and 239-d, as well as N.Y. GEN. CITY LAW § 20-g, TOWN LAW § 284 and N.Y. VILLAGE LAW § 7-741.

311. The impotence experienced when one municipality objects to the external impacts of another's land use decision is evident in *Bedford v. Mount Kisco*, 306 N.E.2d 155 (N.Y. 1973). There, the Village of Mount Kisco rezoned a 7.68-acre parcel from single-family residential to multifamily. The property was isolated from the village, but bounded on three sides by the Town of Bedford by land exclusively zoned for single-family residential uses, and accessible only by Bedford roads. The town challenged the rezoning of land based on the negative impacts it would suffer and the

over these intermunicipal, or regional, matters depends on the ability of local governments to plan and act in concert with one another. Over time, the need to exercise some extraterritorial control has increased and questions are now being asked about how neighboring localities can protect "our" watershed or stimulate "our" economic future. Another limitation of exercising land use authority in isolation is that the municipal scale of operation may be less than optimal. It may, in some cases, be insufficient for the tasks needed to be undertaken. By joining with nearby communities with similar land use challenges, municipalities may share the cost of comprehensive plan preparation and of drafting zoning, wetlands, and floodplain laws; aquifer protection, watershed enhancement, and corridor development plans; and historic preservation, cultural resource protection, erosion control, and visual buffering programs. They may achieve operational efficiencies as well through the formation of joint planning, zoning, historic preservation, or conservation advisory boards, and by entering into compacts to share the cost of enforcing regulations and monitoring compliance.

Local leaders have learned, for example, that economic development activities in one community cannot reverse negative trends in the larger economic market area. Parallel action among localities in the entire market area may be required to achieve any noticeable effect. One community cannot create enough supply to meet the regional demand for affordable housing. Efforts in one community to protect natural resource areas that are shared with adjacent municipalities cannot succeed without compatible efforts in all the communities with land use jurisdiction affecting the resource. Economic development, housing demand, and resource protection are but three examples of issues that require joint action to be effective.

Given this understanding and strategic assistance, local leaders will act effectively to form intermunicipal land use alliances. Within the jurisdiction of the Hudson River Greenway Communities Council, for example, eight intermunicipal land use councils have been formed within the past few years.³¹² These councils have developed as result

failure of the village to take those impacts into consideration in its rezoning decision. The court of appeals upheld the rezoning pointing to findings made by the village board indicating that the rezoning complied with village comprehensive planning objectives. Nothing in the opinion indicates that the village considered, measured, or was influenced by the alleged negative impacts on the town. The court noted that "the [village] Board of Trustees considered the welfare and economic stability of Mount Kisco as its *first concern*. . . . Bedford understandably differed from the conclusion reached, but that difference must be regarded as the necessary result of conflicting zoning policies that are confronted at the edge of every municipality" *Id.* at 189 (emphasis added).

312. See Land Use Law Center Pace University School of Law, *A Report from the Intermunicipal Land Use Councils in the Hudson River Region*, sponsored and distrib-

of New York's liberal intermunicipal cooperation law, a region-wide leadership training program that emphasizes the practical benefits of such councils,³¹³ and the emergence of a variety of problems incapable of local solution: eutrophication of water bodies, pollution of drinking water aquifers and reservoirs, strip development along highways, destruction of scenic viewsheds, and the deterioration of shared wetland areas. Working together in these councils by itself has led local leaders to the gradual realization that these issues can best be addressed by coordinated efforts.³¹⁴

At the November *Ramapo* Conference, the mayor of Haverstraw discussed his involvement in the formation of the Rockland Riverfront Communities Council.³¹⁵ This council was organized between May 2001, when leaders from the eleven municipalities that share land use jurisdiction over the viewshed and watershed of the Hudson River in Rockland County entered a four-day training program,³¹⁶ and January 2002, when the council was officially created following the adoption of supporting resolutions by the legislative bodies of all eleven communities. Between these two dates, community leaders from Rockland's riverfront communities were encouraged by a state grant,³¹⁷ technical assistance,³¹⁸ and their mutual needs and interests.

uted by the Hudson River Valley Greenway Communities Council (July 2002) (on file with the author).

313. See *infra* note 314 and text.

314. This observation is not new. As early as 1971 studies of intergovernmental councils documented that voluntary regional networks themselves sharpen local leaders' focus on intermunicipal independence and the need for regional solutions. See MELVIN B. MOGULOF, GOVERNING METROPOLITAN AREAS: A CRITICAL REVIEW OF COUNCILS OF GOVERNMENTS AND THE FEDERAL ROLE 74 (The Urban Institute 1971).

315. Letter from Mayor Francis J. Wassmer presented at November *Ramapo* Conference.

316. Community leaders from each Rockland river town and village attended the Greenway Community Leadership Alliance Training Program in the spring of 2001. Each representative received a \$1,500 scholarship from the Hudson River Valley Greenway Communities Council to cover the costs of the program, which teaches local leaders how to use land use law, conflict resolution, and community decision-making techniques to accomplish sustainable community development. This round of training was one of twelve conducted by the Land Use Law Center that has graduated over 400 local leaders from Hudson River communities. Three rounds of training have been sponsored by the Greenway.

317. Council leaders credit the formation of their group in part to a \$150,000 Quality Communities grant from the New York State Department of State. Rockland County, Westchester County, and Pace University Land Use Law Center received the grant to encourage inter-municipal partnerships among riverfront communities by funding collaborative activities in the land use area.

318. Town and village representatives attended a series of workshops, facilitated by the Land Use Law Center and staffed by the Rockland County Planning Department, at which they discussed various waterfront projects and met with state and nongovernmental organizations to discuss the competitive advantages of forming a sub-regional land use council.

The Rockland Riverfront Communities Council (RRCC) 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. The council is organized under an inter-municipal 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. 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 economic development that is sustainable.

The council has a five-member executive committee and is governed by delegates and their alternates selected by the legislative bodies of the participating communities. Communities may withdraw from the council at any time, upon sixty-day written notice.³¹⁹

The incentive funding provided to the Rockland Riverfront Communities Council was part of an experimental funding program initiated by the State of New York. 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 for demonstration grant funds. Over 180 applications were received, totaling over \$17 million in requests, and over 80 percent of the applications were intermunicipal in nature.³²⁰ This type of intermunicipal cooperation is unprecedented in New York and is attributed largely to the state's decision to make funding available on a priority basis to intermunicipal smart growth projects.

IX. Conclusion and Recommendations

The Town of Ramapo blazed a bright trail of invention in the late 1960s. The *Ramapo* court sustained the town's power to do so and, for thirty years, local governments have been ever bolder in developing smart growth solutions to their unique land use problems. They are adopting novel local environmental laws, transferring development rights from one part of town to another and from one community to another, pro-

319. Organizational documents are on file with the author.

320. Telephone Interview with Carmella Mantello, Assistant Secretary of State (May 2, 2000).

viding zoning incentives to developers, creating overlay zones to protect watersheds and provide for traditional neighborhood development, adopting performance-based zoning ordinances, floating bonds to acquire funds for the purchase of development rights, and creating a number of impressive intermunicipal land use councils to achieve sub-regional coherence. This trend toward local invention owes much to the Town of Ramapo, including its local officials, Professor Robert H. Freilich, and the New York Court of Appeals.

While criticizing local control and calling for the legislature to accommodate regional needs in some fashion, the *Ramapo* court empowered local governments, in the absence of a better approach, to deal aggressively with a number of land use issues that have become all the more pressing since its decision in 1972. Despite much criticism of localism, effective strategies to preempt or direct local land use decisions have been slow to materialize: fifteen years of regulatory takings cases have not defined clearly the constitutional limits of local regulatory authority, New Jersey's aggressive, state-mandated fair share housing policy has been emulated timidly in just a few states, regional and statewide land use planning has not emerged in most states to effectively constrain or guide local land use planning, and a series of reform movements (growth management, sustainable development, and smart growth) have failed to dictate the outcomes of local land use disputes in most states.

The top-down reform, command-and-control approach suffers its own shortcomings. State governments experience political and practical inhibitions that frustrate their preemption of local authority, and there are judicial doubts about the existence of federal jurisdiction to preempt local land use authority.³²¹ Further, federal or state enforcement of land use standards at the local level where conditions are highly diverse is prohibitively costly and of doubtful efficacy. Federal and state lawmakers and agency personnel have neither the time, resources, nor in-

321. Early attempts by the EPA to reduce air pollution by intervening in local development matters were recognized as a threat to the power of the states to control land use, secured by the Tenth Amendment. U.S. CONST. amend. X. Such concerns led to 1977 amendments to the Clean Air Act, which stated that "[n]othing in this Act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use." 42 U.S.C. § 7431 (1994). More recently, the efforts of the Army Corps of Engineers to prevent the construction of a landfill by a consortium of municipalities in the Chicago area were struck down by the U.S. Supreme Court. In *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, the Court held that the Army Corps lacked jurisdiction under the Clean Water Act to regulate development in intrastate, nonnavigable waters solely on the basis of the presence of migratory birds. 531 U.S. 159, 171 (2001).

formation to micromanage the development of individual parcels, establish plans and visions for individual neighbors and communities, or to monitor water, soil, and other conditions in all places over time. Local citizens, their lawmakers, and land use agencies have the most immediate stake in these matters and have a legitimate role to play in protecting their quality of life. Local officials in Dover, New York, for example, used Ramapo-like inventions to take control away from a state agency whose policies were not synchronized with critical local environmental interests.³²²

Although incremental strategies such as those at play in New York have not been popular with regional activists and many scholars,³²³ there is evidence of new curiosity among academics and practitioners about the effectiveness of voluntary networks as means of achieving regional coherence. There is considerable interest in other regions in this grassroots approach. Envision Utah, for example, is a network of interest groups working at the regional level along a 100-mile corridor running north and south of Salt Lake City. It comprises eighty-eight local governments and 80 percent of the state's population. Assisted by state grants, Envision Utah is a nongovernmental alliance with significant private funding. Envision Utah conducted extensive opinion surveys of residents who demonstrated a strong preference for walkable, transit-oriented development, infill strategies, and redevelopment of urbanized portions of the region. Based on grassroots-derived implementation strategies, the state legislature passed the Quality Growth Act in 1999, established a commission, and charged it with assisting local governments with grants and technical assistance. The commission is also responsible for coordinating the work of six state agencies. Envision Utah developed a toolbox of techniques that can be used by local governments and intermunicipal councils to create their own visions and implement the regional vision.³²⁴

Peter Calthorpe and William Fulton conclude that the Envision Utah experience "demonstrates that a regional plan is often more a process than a set of policies or a map. It is research, discovery, and education

322. See *supra* notes 179 & 180.

323. See David E. Booher & Judith E. Innes, *Network Power in Collaborative Planning*, 21 J. PLANNING EDUC. & RES. 221, 225 (2002): "While new kinds of collaboration have emerged in the private sector. . . , this arena has lagged behind in the public sector in developing the potential of networked relationships. Moreover, there remains much less scholarly documentation or analysis of these efforts than there is of business management."

324. See <http://www.envisionutah.org>; see also Steve Osborne, *Utah Has a Change of Heart: Regional Planning Finds an Unexpected Home*, APA PLANNING MAG., at 20-22 (May 2001).

combined. The process itself can fundamentally reframe the issues of growth and community and create a new vision of the region's economic and environmental future."³²⁵ Robert Fishman observes that "American planning today is most effective and comprehensive precisely when it eschews all-embracing powers and works instead within the limits of pluralistic systems . . . that actually define America-built environments."³²⁶

The Ramapo story, its emanations, and the recent national experience suggest a number of practical recommendations for the adjustment of the typical state-created land use control system. These recommendations fall short of a systemic fix that will lead to the provision of affordable housing for all in need, the proper balance of land uses, and the appropriate location of regionally significant projects. They have more modest aspirations, drawing only on the story told in the preceding pages and suggesting a unifying strategic path:

First, Allow Annexation: In Warwick, the town and village after a few hostile encounters, learned how to cooperate and mutually benefit from village annexation of town land. New York law provides for adjudication of whether annexation is in the overall best interests of those involved. The law should be amended to permit and provide for mediation of proposed annexations as an organized means of conducting the public debate over the matter, and of identifying and aligning the multiple interests associated with the task.³²⁷

Second, Discourage Municipal Secession: Even with New York's aggressive intermunicipal cooperation legislation, one doubts that Ramapo can effectively be put back together again. With twelve, perhaps soon to be fifteen, villages within the town, land use controls are chaotically divided among a dizzying number of jurisdictions, each governing a relatively small territory. The state village incorporation law should be amended to require a finding that secession is in the overall public interest, or allow a court to block secession when opponents of incorporation can show that the public interest is not served. The factors to be considered in determining whether the public interest is met could

325. See PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 126 (Island Press, 2001).

326. ROBERT FISHMAN, *THE DEATH AND LIFE OF AMERICAN REGIONAL PLANNING*, at 119.

327. This could be part of a regional mediation mechanism set up to resolve a variety of intermunicipal land use issues. Such devices are beginning to appear in state legislation. Mediation of regional planning disputes is provided for under state law in Colorado, Delaware, Florida, Georgia, Minnesota, Oregon, and Tennessee.

include the cost-effectiveness of the proposed government,³²⁸ the size of the proposed territory and its population, the unique circumstances that require its incorporation, identification of the public interests served by incorporation, and the negative impact on the town within which the new village would be formed. Municipal formation can have regional consequences and is another matter that can be handled well by referral to a regional mediation mechanism established by state law.

Third, Empower Local Governments to Invent: State law should allow local governments ample authority to solve their own smart growth problems. Consider the stories of Dover and Sleepy Hollow and how keenly felt local interests were met through effective local action.³²⁹ Envision Utah understands the need to equip local governments with effective tools and urge them to use these tools in concert with their neighboring jurisdictions. Ramapo and Warwick, illustrate how local officials can combine techniques to create locally appropriate land use strategies. In a state like New York, with nearly 1,600 local governments flung across a diverse landscape, the need for unique local solutions is patent. Such diversity exists as well in smaller states, like Connecticut, with 169 jurisdictions whose needs vary from fighting extreme poverty and urban congestion to protecting largely unsettled and environmentally fragile territories.

Fourth, Encourage Localities to Cooperate: New York's forty-year commitment to intermunicipal cooperation is a model for other states to follow. The emerging interest in, and the success of, voluntary regional and subregional networks, such as Envision Utah, the Rockland Riverfront Communities Council, and seven other intermunicipal land use councils in the Hudson River Valley region, demonstrate the good use to which intermunicipal agreements can be put: compatible land use plans and regulations, joint boards, shared enforcement officers, watershed protection regimes, and strategies to meet regional housing needs.

Fifth, Provide Data and Information: The basic building blocks of local smart growth plans are the identification of critical environmental

328. See *supra* note 269 (discussing attempts to form three new villages in Ramapo, including Forshay Hills, proposed population 585).

329. At the *Local Environmental Law* symposium held in April 2002 by the Land Use Law Center on the advent of local environmental law, scholars considered the possibility that, in an integrated federal system, local governments could fill significant gaps in existing federal environmental law. Governments could gain some control, for example, of water pollution caused by nonpoint source pollution, and air pollution caused by increased vehicle miles traveled. See NEW GROUND, THE ADVENT OF LOCAL ENVIRONMENTAL LAW (John R. Nolon ed. ELI, 2002).

areas and appropriate growth districts.³³⁰ This is the foundation on which implementation strategies must be based. Area designation must precede the adoption of local environmental regulations and the targeting of strategies to support growth and development. The costs of collecting and evaluating the data needed to identify conservation and development areas are considerably higher if done by 1,600 local governments separately. One of the reasons that local comprehensive plans are not done, or are not updated, is the high cost of information gathering. These costs can be much lower, data availability assured, and the regional needs identified, if information is gathered, evaluated, and disseminated by a coordinated effort among regional, state, and federal agencies. Consider the dilemma of the *Berenson* affordable housing cases: How can communities zone for sufficient affordable housing, of the proper type and costs, without having some idea of their roughly proportionate share of the regional need? Local governments establishing intermunicipal programs to protect watershed resources have the same difficulty: How should the watershed area be delineated? What are its exact boundaries? What are the critical environmental conditions within that area? Where are they located?

Sixth, Provide Training and Technical Assistance: The formation of eight intermunicipal councils in the Hudson River region, and the success of Dover, Hyde Park, Sleepy Hollow, and Warwick were all assisted, if not catalyzed, by training provided to key local leaders, and technical assistance provided by outside entities focused on issues of immediate concern. States should establish effective educational and technical assistance programs to ensure that local policymakers and planners know about, and how to use, the land use authority they have been delegated. Technical assistance should include educational materials such as practical guidebooks, best practice manuals, and model laws and ordinances, as well as training on land use strategies and effective community problem solving.

Seventh, Provide Start-Up Grants: Warwick, Hyde Park, Dover, Sleepy Hollow, and the Rockland Riverfront Communities Council all received cash from state agencies including the Hudson River Greenway Communities Council, the Department of Transportation, the Quality Communities Program of the Department of State, and a variety of nongovernmental agencies, to jump start their programs. These monies allowed the communities to hire program and technical staff, con-

330. See John R. Nolon, *Local Land Use Controls That Achieve Smart Growth*, 31 ENVTL. L. REP. 11025 (2001).

duct studies, hire technical advisers, and formulate plans that were essential to their progress. Unfortunately, the state does not have a discrete program for this purpose; the funds were obtained from a variety of special purpose or intermittent sources. As a result, there is no sustained effort to induce local governments to become involved in smart growth strategies and intermunicipal land use councils. The remarkable success of the few governments benefited by start-up grants strongly argues for the creation of a permanent and adequate program by the states.

Eighth, Target Funds for Smart Growth Districts: State and federal discretionary funding for development and conservation projects should be made available, on a priority basis, to local governments that adopt smart growth policies, designate growth and conservation areas, and need funding to implement their strategies. State and federal agencies can provide powerful incentives for local, intermunicipal, and regional smart growth planning and implementation.³³¹ To do this, these agencies need to make it clear that infrastructure funding will be spent in designated growth areas and that open space acquisition funds will be allocated to designated areas that contain significant natural resources or fertile agricultural lands. Such funds can be used, for example, to purchase the development rights of critical environmental lands, to cover the costs of local environmental enforcement, to pay for needed infrastructure in growth districts, or to pay for programs of intermunicipal partnerships formed to promote affordable housing, economic development, or to protect watersheds, biodiversity, or coastal regions. An even higher priority in the distribution of state and federal program funds should be given to those local governments that have entered into intermunicipal land use compacts or are working with their county or regional agencies on area-wide smart growth strategies.

Ninth, Encourage Mediation: Mediation set the stage for a dramatic intermunicipal smart growth program in Warwick. It was used in the final stages of drafting Hyde Park's performance zoning ordinance to incorporate the interests of affected landowners and secure their support. According to a study by the Consensus Building Institute and the Lincoln Institute of Land Policy, the participants in mediated land use disputes

331. This is the aim of Maryland's Smart Growth Program. See MD. CODE ANN., STATE FIN. & PROC. § 5-7B-01 (1995 & Supp. 2000) (encouraging local smart growth strategies by concentrating state infrastructure and development project funding in "priority funding areas" to ensure that growth occurs in and around existing and carefully planned growth areas. This is balanced by the Rural Legacy Program, MD. CODE ANN. NAT. RES. § 5-9A-01 (2000), which directs other state resources to protect agricultural, forest, and natural resource lands).

throughout the United States report an 84 percent satisfaction rate with their experience.³³² States have established mediation mechanisms for special types of disputes, for resolving regional planning issues, to assist with intermunicipal and intergovernmental watershed planning efforts, and to address land use disputes between private individuals and government bodies.³³³ This trend should continue and mediation mechanisms be made available to resolve more productively the issues raised by secession, annexation, intermunicipal impacts of local land use actions, regional impact projects, and other land use disputes.

Tenth, Work Toward an Integrated and Intentional Policy: Perhaps the central lesson learned from the Ramapo, and post-Ramapo, experiences discussed in this article is that there is a need for integrating the functions of various levels of government aimed at managing growth and conserving environmental assets. Each level of government has a major contribution to make in insuring the proper use and conservation of the land, and in adopting and enforcing laws that limit the enjoyment of private property. All levels of government have legitimate interests in the proper location of jobs, the adequacy of affordable housing, and the protection of air, water, and other natural resources. No level of government has all the competence, authority, and resources needed to solve modern environmental and development problems on its own.

Our legal system has evolved piecemeal. Separate and uncoordinated regimes at the federal, state, and local levels have been created. The tensions among them abound and beg for mediation. The inefficiencies apparent in the current patchwork quilt of regulatory influences are being observed where people live, at the local level, and are being responded to by the adoption of an impressive, if not yet pervasive, body of local law and practice.

As they set out to implement these modest recommendations, states can intentionally work to reduce the fragmentation of efforts and to experiment with integration strategies. The most effective method of responding to the complex and rapid changes caused by the nation's sprawling development pattern is to create a coordinated and integrated response. This requires, initially, a commitment to cooperation and to learning how to assign to each level of government its most appropriate role.

332. LAWRENCE SUSSKIND ET AL., *MEDIATING LAND USE DISPUTES: PROS AND CONS* 17 (Lincoln Institute of Land Policy 2000).

333. Unpublished study conducted by the Land Use Law Center (on file with author).