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The Future of Our Land: Presidential Leadership

John R. Nolon

Dear President:

In just 35 years from the date of your inauguration, the nation's population will have grown by 100 million people, an increase of 33 percent. The private sector will produce for these new Americans over 70 million homes and over 100 billion square feet of offices, stores, factories, institutions, hotels, and resorts. Researchers predict that two-thirds of the structures in existence in 2050 will be built between now and then.

This growth cannot be allowed to proceed randomly—not without great cost to our economy, environment, and public health. This is neither an

ideological nor a political issue. The consequences of haphazard development are not popular with the vast majority of Americans. They complain about the results of current growth patterns: an increase of asthma and obesity among the young, traffic congestion that stalls commuters, insufficient housing for the workforce and the elderly, the decline of cities as economic and cultural centers, threats to drinking water quality and quantity, reduced habitats and wetlands, higher incidences of flooding, rampant fossil fuel consumption, and an ever-larger carbon footprint.

Today, state and federal land use policy comprises a hodgepodge of initiatives, each crafted earnestly for a moment in time but that together fail to achieve coherence and consensus. The nation's projected growth creates an unparalleled opportunity for your administration to demonstrate critically needed leadership; this is an opportunity because we are all finally paying attention to the use of the land. Population and development trends require new policies and strategies that build on the powerful role of the private sector and efficiently integrate the roles and resources of all levels of government.

John R. Nolon is professor of law at Pace University School of Law, counsel to its Land Use Law Center, and visiting professor at Yale's School of Forestry and Environmental Studies, where he teaches local environmental law and land use planning. Nolon received a Fulbright Scholarship to work on sustainable land use policies in Argentina and proposed legal reforms that have been adopted at the provincial and national level. He prepared two books for Cambridge University Press on land use laws for sustainable development and four books for the Environmental Law Institute on local environmental law, land use law, and the mitigation of natural disasters through land use law reform. Nolon served on the transition teams of both Governor Pataki and Governor Spitzer in New York State and as an advisor to President Carter's Council on Development Choices for the 1980s and President Clinton's Council on Sustainable Development. He serves on the Executive Committee of the New York State Bar Association's Real Property Section and its Task Force on Eminent Domain Reform.

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The development called for by the next 100 million Americans will largely be reviewed and approved by local officials applying locally adopted land use standards. Our historical approach to influencing human settlement patterns and the use and conservation of the land has been to rely on private-sector forces and to delegate the principal authority to regulate those forces to the local level of government through the adoption of land use plans and regulations.

This reliance on local officials is wise because of the great diversity of local land use conditions in the 50 states and the intimate knowledge of those conditions that exists at the local level. Relying on local governments alone is insufficient, however, because local governments may lack resources, capacity, or understanding of the larger regional interests that are affected by their decisions.

The need to correct the results of local decision making has consumed and puzzled state and federal policy makers for decades and has drawn judges into disputes they are ill-suited to settle. Our animated debates over federalism and states rights and over eminent domain and property rights are confounded by the fact that we have failed to develop a comprehensive approach to land use. Following the Great Depression and the Second World War, land policy has struggled to keep up with our growing population and healthy economy. State and federal regulations and spending programs have been created to fill gaps, largely in reaction to emergencies: toxic spills, contaminated sites, water and air pollution, flooding and other natural disasters, obsolete infrastructure, and housing crises, to name a few.

We watched local, state, and federal officials argue about who was at fault for the utter collapse of the emergency response system during Hurricane Katrina. We see state and federal regulators tangle over their responsibilities for stormwater management, transportation planning, and the control of greenhouse gas emissions, while local officials struggle to react to forces that transcend their legal jurisdiction. Courts provide indistinct guidance regarding which wetlands are within federal control, what state and local actions are prohibited by the Interstate Commerce Clause, and what public interests support the taking of private property.

We are perplexed by state and federal insurance programs that encourage development on barrier islands and other fragile coastal lands while other state and federal agency regulations discourage or prevent it. We learn that pollution limitations that the EPA is mandated to establish under the Clean Water Act are not enforceable against nonpoint polluters, such as residential developers who apply to local land use agencies to build in the drainage basins of federally impaired waters.

Although the governmental forces directed at land development and conservation are fragmentary, they nevertheless constitute a legal "system." This system is not up to the challenges of guiding the settlement and movement of our next 100 million Americans. It is not the solid foundation needed for governing. Presidential leadership can bring stakeholders from all sectors and every level of government together to create an integrated framework of laws and resources devoted to proper

land use, one that clarifies roles and responsibilities according to the competencies of each level of government.

At the dawn of the last century, investors and residents in unregulated neighborhoods and business districts were deeply worried about inconsistent land uses that threatened their investment, safety, and health. A federal commission responded by promulgating a model zoning enabling act to be adopted by the states at their discretion. Over the next few years, hundreds of local governments adopted comprehensive zoning laws that gave home owners and investors some security about nearby development. This nation faced a serious crisis in the mid-1960s when cities erupted in violence. Then the crisis was graphic and immediate; there was rioting in the streets and neighborhoods burned. President Johnson reacted by creating the National Commission on Urban Problems (Douglas Commission), whose report, *Building the American City*, spawned a host of local, state, and federal initiatives. Today's crisis, although perhaps less visible on the evening news, carries grave and widespread consequences. It is threatening to all Americans, having serious implications for rural, suburban, and urban areas as well as for our global community.

So many of the critical issues that your administration will confront are linked to the private use of land and how the public influences such uses. There are many leaders at every level of government and in all sectors who stand ready, if called, to take a fresh look at how to create a partnership of resources and imagination under your leadership. We look forward to January 20, 2009.

During your presidency, you must ensure that sustainable land development policies are part of all appropriate international treaties and that the United States leads by example.

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