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John R. Nolon

Elisabeth Haub School of Law at Pace University

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Paradigms of Positive Change: Reordering the Nation's Land Use System

John R. Nolon¹

Chapter 1

Planning Reform in the New Century

Daniel R. Mandelker, Editor

Introduction

The general perception of the American land use system is that it is disorganized, disorderly, and inefficient. The nation's landscape is coherent, but when dissected by the jurisdictions of federal, state, and local governments, its physical development becomes woefully fragmented. Imagine, for example, trying to implement a cogent plan for flood prevention in the Mississippi watershed. Following the great Mississippi floods of 1993, in the Upper Mississippi Basin alone there were six federal agencies, 23 state agencies in five states, and 233 local governments involved in concocting a recipe for mitigating damage caused by flooding. Nationally, there are now up to 40,000 local governments that have some legal authority to control private land use, 50 states adopting laws and spawning agencies with significant influence on the land, and countless federal laws and regulations administered by dozens of federal agencies directing their attention to how the land is used.

All of these influences are legitimate—each level of government has serious interests that must be protected and advanced. The defect in the system is its lack of coherence. In examining how the system should be reformed and assessing particular examples of land use law reform, attention must be paid to how greater coordination can be achieved.

¹ The author is Professor of Law at Pace University School of Law, Counsel to its Land Use Law Center, and Visiting Professor at the Yale School of Forestry & Environmental Studies.

This article begins with a brief look at the system's familiar dysfunctions, continues with a lengthier examination of positive examples of reform, emphasizes the importance of coalition building in the reform process, and ends with the observation that reform efforts should be organized by the task of creating essential connections among the governments involved.

Lessons in Dysfunction and Disconnection

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

At the local level, the NIMBY reaction is so pervasive that it has become a household word: the acronym speaks for itself. The land use decision-making process somehow encourages neighbors to oppose developments nearby. This is usually an automatic, rather than thoughtful, reaction. The unintended consequence of this serious discontinuity is to shift development pressures elsewhere, often to the countryside. Comprehensive land use plans cannot be implemented without developers who build in conformance with the community's vision. Developers and their financiers, however, are pushed away by NIMBYism, rather than drawn into partnerships with local plans and planners.

State tax policies that rely heavily on local property taxes to fund education and pay municipal service costs create fierce competition among municipalities, all of whom seek industrial and commercial projects that promise higher assessed values and fewer schoolchildren. This state policy also leads to local land use laws that zone out affordable types of housing, causing alarming housing price spirals in many metropolitan areas and denying housing opportunities to workers needed by the businesses that are

zoned in. Fiscal zoning causes both municipal border wars and housing discrimination; it is as ubiquitous and dysfunctional as NIMBYism, if not as well understood.

Federal interstate highway funding and low-cost mortgage programs famously fueled the forces of sprawl in the 1950s and 1960s that are with us still.² There is little evidence that these federal projects and programs had any relationship with, or even considered, state and local policies regarding environmental protection, farmland preservation, or housing development. To justify his proposed National Land Use Planning Act in the early 1970s, Senator Henry Jackson pointed to the conflicts and confusion concerning critical economic and environmental programs at the national, state, and local level. One example, of many he cited, involved three agencies of the federal government working at cross purposes in the Florida Everglades. One of them was preserving the area as a park, another was altering the landscape for flood control, the third was funding airport construction. One of these was responding to the request of a local government in Florida, another to a county, and the third to the state. None knew what the others were planning or doing.³

Encouraged by the federal Coastal Zone Management Act, the South Carolina legislature adopted its Beachfront Management Act, which resulted in regulations prohibiting all development on David Lucas's barrier island beachfront lots in the Isle of Palms, whose zoning permitted single-family homes. This led to the seminal holding of the U.S. Supreme Court that a land use regulation that denies any economic use of the land is a per se taking.⁴ The purchase of homes built close to the beach on barrier islands would not be possible for most homebuyers without mortgage financing, which is dependent on casualty insurance. Private casualty companies refuse to insure property

² See Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 329-30 (1993).

³ See John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson's 1970 Policy Act*, LAND USE LAW & ZONING DIGEST, Vol. 48, No. 5, May, 1996, at 4.

⁴ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

losses in such locations. Curiously, such insurance is available under federal flood insurance programs and a state-created shared-risk insurance pool in South Carolina: programs made available by the two governments whose legislation led to the regulation of which Lucas complained.⁵ Today, the frustrated efforts of the Environmental Protection Agency under the all-important Clean Water Act to require local land use authorities to respect pollution standards for federally impaired waters and to manage stormwater runoff are contemporary manifestations of this same disconnect.⁶

It is clear that there is confusion over the role that each level of government should play regarding land use planning and regulation. In addressing the subject of law reform in this area, a critical issue is to clarify what the role of each level of government should be and how these roles should be coordinated. The Sustainable Use of the Land Project conducted by the Lincoln Institute of Land Policy resulted in a book that is perhaps the last significant review of land use control in America.⁷ The study concluded with the presentation of a land use agenda that provides guidance for the future of land use policy.⁸ According to its reform agenda, local governments must take the lead role in securing good land use, state governments must establish the ground rules on matters that affect more than one locality, and federal policies and actions must be coordinated to properly influence the direction and pace of development permitted by the land use machinery of state and local governments. This agenda recognizes the validity of top-down and bottom-up influences in the system, ratifies the centuries' old tradition of local planning and project approval, endorses the need for clear policy direction and local

⁵ See John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 1, 10 n. 58 (1992).

⁶ See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. REV. 365, 366-372 (2002).

⁷ See HENRY L. DIAMOND & PATRICK F. NOONAN, *LAND USE IN AMERICA* (1996).

⁸ *Id.* at 100.

capacity-building at the state level, and acknowledges the need to protect national interests in the process.

Case Studies in Competence and Connectivity

This section examines several examples of land use law reform that demonstrate clear roles for each level of government and how these roles can be coordinated to create a more integrated approach to land use planning and regulation. They may help frame the discussion about an agenda for reforming land use in America in general and suggest a strategic direction for that agenda to follow.

Federal Action

A positive example of coordinating federal, state, and local influences is the Coastal Zone Management Act (CZMA), adopted by Congress in 1972. Congress recognized that state and local institutional arrangements for planning and regulating land and water uses in coastal areas were inadequate and adopted an integrated approach that encouraged responsible economic, cultural, and recreational growth in coastal zones.⁹

Drafters of the CZMA realized that in order for a coastal management program to be successful, administration needed to take place at a local rather than a national level aided by a strong state role. Since many of the problems surrounding coastal areas are geographically specific, drafters reasoned that state and local governments should control coastal policy, consistent with national objectives. Thus, the CZMA did not create a centralized federal agency to dictate coastal zone management but, rather, articulated national policies and then established a process for the development of state coastal zone management programs.¹⁰ Instead of mandating state involvement, the

⁹ See 16 U.S.C.A. § 1451(b), (h) (2004).

¹⁰ See 16 U.S.C.A. § 1452(2) (2004).

CZMA provided incentives to encourage state participation. It offered states that meet consistency requirements effective regulatory control of their coastal areas, provided federal funds for coastal planning, projects, and program administration, and promised that federal actions would respect state and local coastal plans and policies. This approach of articulating national policies, encouraging and supporting state action, and recognizing the important role of local governments not only was important to the program's success but was probably the reason it was adopted by a Congress sensitive to state prerogatives in the land use area.

This connected national strategy, under the CZMA, operates effectively at the grassroots level in New York, where the Department of State, through its Division of Coastal Resources and Waterfront Revitalization, provides grants to coastal communities to prepare Local Waterfront Revitalization Plans and encourages intermunicipal land use agreements among localities that share coastal resources such as harbors, bays, and riverfronts. The Division's combination of funding resources, technical assistance, and emphasis on intermunicipal approaches to coastal resource protection has been a catalyzing force in creating intermunicipal agreements regarding the protection of the Long Island Sound, the Hudson River, Mahasset Bay, and the Oyster Bay-Cold Spring Harbor.¹¹

In Florida, the Waterfronts Florida Partnerships Program works with communities to develop plans for local waterfront revitalization and offers an initial grant to make a visible improvement in the waterfront, which the community must match with a 20 percent contribution.¹² In Michigan, the Department of Environmental Quality allocates grants to municipalities through the Michigan Waterfront Redevelopment Grant

¹¹ See John R. Nolon, *Grassroots Regionalism Through Intermunicipal Compacts*, 73 ST. JOHN'S L. REV. 1011, 1034 (1999).

¹² *Waterfronts Florida Partnership Program*, Florida Department of Community Affairs Division of Community Planning, at <http://www.dca.state.fl.us/fdcp/dcp/waterfronts/waterfront.htm> (last visited Oct. 21, 2004).

Program.¹³ A requirement of this grant program is that the project must increase public access to the waterfront. Washington State's Coastal Zone Management Program was initiated under the CZMA in 1976—the first such program in the country. The state's Shorelands and Environmental Assistance Program is administered by the state Department of Ecology which in 2004-2005 awarded grants to 11 cities and counties for comprehensive shoreline master program updates and inventories.¹⁴

State Action

There is abundant evidence that state legislatures and agencies are adopting laws and taking actions to connect with local land use decision-makers and to build local capacity and encourage or require local actions compatible with state policy objectives. The following examples provide a sampling of recent initiatives of state legislatures that integrate state and local land use policy.

In 1999, the state of Wisconsin adopted smart growth legislation that directs every city to enact a comprehensive smart growth plan by 2010.¹⁵ Each plan must incorporate specific smart growth elements, including agricultural, natural resource, intergovernmental cooperation, and land use plan elements. Traditional neighborhood developments, or TNDs, are encouraged. The TND ordinance adopted by the City of River Falls, Wisconsin, exemplifies a local government's successful implementation of this state smart growth initiative.¹⁶

¹³ *Waterfront Redevelopment*, Michigan Department of Environmental Quality, at http://www.michigan.gov/deq/0,1607,7-135-3311_4110_4229-11504--,00.html (last visited Oct. 21, 2004).

¹⁴ See Washington State Department of Ecology at <http://www.ecy.wa.gov/programs/sea/grants/czm/index.html>

¹⁵ WIS. STAT. § 66.1027 (2004).

¹⁶ RIVER FALLS, WI MUNICIPAL CODE §117.112.

Michigan mandates the adoption of local land use regulations to combat erosion.¹⁷ A state commission adopts recommendations, guidelines, and specifications for erosion control. Local governments then pass ordinances based on the commission's program and have primary responsibility for the administration and enforcement of plan and permit procedures for land-disturbing activities.¹⁸ Iowa's state-mandated erosion control program is locally designed and enforced.¹⁹ The state gives conservation districts broad guidelines for adopting erosion control ordinances. Adopted regulations are subject to approval by a state committee. In Connecticut, the zoning enabling law stipulates that local zoning ordinances "shall provide that proper provision be made for soil erosion and sediment control."²⁰

The Illinois legislature adopted the Local Planning and Technical Assistance Act in 2002. The law's purpose is to provide technical assistance to local governments for the development of land use ordinances, to promote and encourage comprehensive planning, to promote the use of model ordinances, and to support planning efforts in communities with limited funds.²¹ The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to be used by local governmental units to "develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations...that promote and encourage the principles of comprehensive planning."²²

In Massachusetts, the legislature adopted a statute that directs its Department of Housing and Community Development to provide assistance to communities in solving

¹⁷ See PART 91, SOIL EROSION AND SEDIMENTATION CONTROL, NATURAL RESOURCE AND ENVIRONMENTAL PROTECTION ACT, 1994 PA 451, as amended.

¹⁸ See e.g. ANN ARBOR, MICH., TITLE V ZONING AND PLANNING, Ch. 63 STORMWATER MANAGEMENT AND SOIL EROSION AND SEDIMENTATION CONTROL § 5.650.

¹⁹ IOWA CODE § 161A.1 *et seq.* (2003).

²⁰ CONN. GEN. STAT. §8-2(a) (2003).

²¹ 20 ILL. COMP. STAT. ANN. 662/ 5 (2004).

²² *Id.* 662/15.

local land use, housing, and development problems both individually and intermunicipally. The Department is directed to help with data, studies, coordination with other state agencies, and training for local land use decision-makers.²³ The state has established the Citizen Planning Training Collaborative, which provides land use training by professionals on a regular basis throughout the state.²⁴

Washington State has been at the forefront of developing local protection for fish and wildlife habitats. The state's Growth Management Act of 1990²⁵ implements what the Washington Department of Fish and Wildlife (WDFW) calls a “bottom-up” approach to land use planning.²⁶ It requires all counties, cities, and towns in the state to classify and designate resource lands and critical areas, including fish and wildlife habitats, and to adopt development regulations for them.²⁷ The WDFW has created detailed checklists to assess the wildlife potential of urban areas and to aid local governments in reviewing elements of their development regulations and comprehensive plans.

In 1997, the Envision Utah Public/Private Partnership was established to guide the state in creating a quality growth strategy. The organization conducted a series of studies, forums, and media events over the next five years involving thousands of residents and hundreds of stakeholder groups. In addition to supporting state smart growth legislation, Envision Utah has helped to unify the planning goals of the citizenry and constituent local governments and to provide local officials with “quality growth efficiency tools” to help them determine the consequences of current zoning and land use patterns and the legal strategies available to adjust them to the evolving planning

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

²⁴ Massachusetts Citizen Planner Training Collaborative, at <http://www.umass.edu/masscptc/about.html> (last visited Oct. 21, 2004).

²⁵ WASH. REV. CODE § 36.70A (2004).

²⁶ See Washington State Department of Fish and Wildlife, *Fish and Wildlife and the Growth Management Act*, <http://wdfw.wa.gov/hab/gma-phis.pdf>.

²⁷ WASH. REV. CODE § 36.70A.045 (2004).

vision.²⁸ In 1999, Utah adopted the Quality Growth Act, which established a state Quality Growth Commission to advise the legislature on smart growth issues, provide planning assistance to local governments, and administer a state program for the preservation of open space and farmland.²⁹

Several states have adopted statutes that create urban growth areas. These statutes aim to achieve the essential goal of smart growth: to contain growth in defined and serviceable districts. They are guided by various objectives, including the creation of cost-effective centers, the preservation of agricultural districts, the promotion of affordable housing, the protection of significant landscapes containing critical environmental assets, and the preservation of open lands for the future. Not all of these state growth management statutes are regional in nature. Maine requires local land use plans to identify areas suitable for absorbing growth and other areas for open space protection. Minnesota authorizes, but does not require, localities to designate urban growth areas in local and county comprehensive plans.

The Oregon growth management statute, adopted in 1973, is the most directive of its kind.³⁰ It creates a state agency known as the Land Conservation and Development Commission, articulates a number of state-wide land use planning goals, requires local governments to adopt comprehensive plans consistent with state designated urban growth boundaries, and requires local plans to be approved by the Commission. The statute also created the Metropolitan Service District to supervise the intermunicipal urban growth boundary in the greater Portland area. In 1979, the statute was amended to create the Land Use Board of Appeals to review local land use decisions. Litigation under this regime has not attacked its legality, but mainly has challenged the validity of

²⁸ See <http://www.envisionutah.org.html> (last visited Nov. 1, 2004).

²⁹ UTAH CODE ANN. § 11-38-101 et seq. (2004).

³⁰ OR. REV. STAT. §§ 197.005 (2003); see also Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 338-41 (1993).

particular planning decisions that affect individual parcels. Strong public support and an enduring coalition of growth management advocates have blocked several attempts to repeal or significantly modify this initiative.

Regional and Intermunicipal Action

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

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

With few exceptions, these regional bodies have stopped far short of preemptive land use planning and regulation. They have become, however, effective vehicles for communication, education, collaboration, and networking. An early study of the positive effects of voluntary regional councils of governments found that "the most significant contribution of councils is that they have furthered the concept and interests of regionalism."³¹ Among their most significant contributions is the effect they have of educating local land use officials. In these regional bodies, they learn about the

³¹ NELSON WIKSTROM, COUNCILS OF GOVERNMENTS, 1977, at 130-131.

common problems and mutual dependence of localities that share the same economic or housing market area or that have regulatory power over river basins and watersheds that cannot be protected without intermunicipal cooperation.

Under New York's Town, Village, and General City Law, local governments are specifically authorized to enter into intermunicipal agreements to adopt compatible comprehensive plans and zoning laws as well as other land use regulations.³² Local governments also may agree to establish joint planning, zoning, historic preservation, and conservation advisory boards and to hire joint inspection and enforcement officers. Several dozen intermunicipal land use councils have been created under this authority.

State statutes in New York also enable county governments to assist constituent localities in land use matters.³³ Cities, towns, and villages may 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. Counties in New York are now signatories on several intermunicipal land use agreements involving local governments in watershed, riverfront, harbor, and other land use partnerships.

Using this broad legal authority in New York, the Rockland Riverfront Communities Council (RRCC) was created in 2002. It comprises the towns of

³² See N.Y. GEN. CITY LAW § 20-g N.Y. TOWN LAW § 284 ; N.Y. VILLAGE LAW §7-741 (McKinney.2004).

³³ Amendments in 1993 modified N.Y.GEN. MUN. LAW §§ 119-u and 239-d as well as N.Y. GEN. CITY LAW § 20-g, N.Y. TOWN LAW § 284, and N.Y. VILLAGE LAW § 7-741 (McKinney 2004).

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 Rockland County. The council is organized under an intermunicipal agreement and is charged with exploring ways to obtain funding and carry out programs for conservation, development, and other land use and water-related activities along the Hudson River. 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 incentive funding provided to the Rockland Riverfront Communities Council was part of an experimental funding program initiated by the State of New York. In 2001, the state created the Quality Communities Demonstration Grant Program offering \$1.15 million on a competitive basis to local governments for their quality community, or smart growth, projects. The Department of State, which administers the program, made it clear that localities were more likely to receive grants if they joined with neighboring communities in developing smart growth strategies. Over 180 applications were received, totaling over \$17 million in requests, and over 80 percent of the applications were intermunicipal in nature.³⁴ 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.

Local Action

³⁴ Telephone interview with Carmella Mantello, Assistant Secretary of State, (May 2, 2000).

Communities have a number of mechanisms they can use to connect the participants in land use decision-making. Case studies of citizen participation in local planning in the New York communities of Dover and Warwick which are presented below are examples of effective public involvement in formulating comprehensive plans and land use regulations. New York's planning enabling act stresses the importance of citizen participation in comprehensive planning in all cases and provides a special mechanism to ensure that all stakeholder groups may be involved in plan creation. It provides for the formation of a special board to prepare the plan, involving one member of the local planning board, to which representatives of interest groups may be appointed, and requires the board to have meetings with the public at large.

Even with respect to controversial development projects, effective communication processes can be created between developers and those who will support and oppose their projects during the land use review process. These techniques provide an opportunity for those involved to negotiate solutions face-to-face, rather than simply appear as adversaries before the local adjudicative body. In our work in the Hudson Valley, trained local land use leaders have helped developers form concept committees involving the developer and community stakeholders. Local land use laws have been amended to provide for a pre-application submission and process that does not trigger the time periods required by state or local law for the review and approval of the proposal so that the applicant can negotiate productively with interested parties.

The idea of a pre-application process was hotly resisted by developers, their counsel, and likely project opponents, the so-called NIMBYs. Over time, however, developers learned that they are not required to abandon their "as-of-right" development option by entering into the process and neighbors learned that results might be achieved that are better than the likely outcome of a disputed administrative proceeding. Several

successful case studies are now available to demonstrate the benefits of this consensus-based approach.

In the case of *Santa Margarita Area Residents Together v. San Luis Obispo County*, all principal stakeholders affected by a proposal to develop the Santa Margarita Ranch participated in a pre-application mediation about the development.³⁵ The mediation arrived at a consensus regarding the number and location of housing units, the preservation of agricultural land, and open space conservation easements. This became the basis for a development agreement between the developer and the county. The court upheld the agreement as valid, finding that the agreement retained the county's authority to exercise its discretion in approving the developer's application under existing zoning rules. In *Medeiros v. Hawaii County Planning Commission*, the court enthusiastically endorsed mediation of a land use dispute with these words: "[S]ince it allows the interested parties the opportunity to meet with the developers on a one-to-one basis and to attempt to resolve their differences, mediation may, as a practical matter, provide the residents and property owners with greater impact on the decision than a contested case."³⁶

Coalition Building and Political Reform

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

³⁵ 100 Cal. Rptr.2d 740 (Cal. App., 2 Dist., 2000).

³⁶ 8 Haw. App. 183, 797 P.2d 59 (1990).

Dover, New York

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

With reasonable housing costs in a tight housing market, Dover has received an impressive number of applications for large residential subdivisions. The town is located to the north of, and just beyond, the New York City drinking water watershed where industrial land uses and facilities are strictly regulated by New York City's Department of Environmental Protection to protect the city's drinking water. This, coupled with its considerable sand and gravel resources, attracted many heavy industries, including mining and deposition businesses, to the town. These potential new land uses are perturbations: they pose a great threat to the community's aquifers and create traffic, produce school children and particulate contamination, and cause other impacts that are inconsistent with the town's rural and residential character.

These circumstances were anticipated by local leaders over a decade ago. In 1991, a committee with members from several stakeholder groups was appointed to revise the community's ancient comprehensive plan. At this early stage Dutchess County's Planning Department encouraged town leaders to act, as did the staff of a county-wide land trust. Physical studies were done and a survey of town residents completed and the results incorporated into the amended plan, adopted in 1993. A critical hydro-geological study completed by the town was funded by the Hudson Valley Greenway Communities Council, a state agency charged with voluntary regional planning activities in the valley. In the new plan, the town committed itself to take a variety of actions to protect its natural resources and community character.

Because of continued intensive development pressures, the town board adopted a moratorium in 1997 drafted by land use students working through a law school externship program and defended the moratorium with help provided by a law school litigation clinic. In 1999, Dover adopted its new zoning and further amended its comprehensive plan to provide for greater protection of natural resources. The new zoning ordinance included provisions for cluster development and resource conservation zones to preserve open space and discourage building where it would be incompatible with the landscape. Additionally, the new code created the following four overlay districts: a Floodplain Overlay District, a Stream Corridor Overlay District, a Mixed Use Institutional Conversion Overlay District, and an Aquifer Overlay District.³⁷ The Aquifer Overlay District ultimately provided the solution that defeated a highly controversial proposed landfill proposal for a C&D operation. A series of legal challenges against the town ensued, but in each case Dover's actions, which were defended by the law school clinic, were validated by the courts.

During the course of this process of citizen involvement, comprehensive plan revision, and zoning amendment, eleven of the community's leaders – elected and appointed board members and citizens - attended and graduated from the Land Use Leadership Alliance Training Program, an intensive four day experience. The program, conducted by law school staff attorneys and funded in part by the Hudson Valley Greenway Communities Council - a state agency, instructs participants on how to use the dozens of innovative land use strategies authorized by state law. It also trains them in the process of community decision-making, methods of bringing the community to consensus on how to resolve complex land use issues and the tensions they inspire.

Warwick, New York

³⁷ CODE OF THE TOWN OF DOVER , NY, CH. 145 ZONING, adopted April 28, 1999.

Warwick is located at the western edge of the New York Metropolitan area, defined by rich farm land and rural vistas. The Ramapo Mountain range to its east served, until recently, as a barrier to sprawl. Historically, most of the settlers in the area resided in three incorporated villages within the town, with most of the land within the town's land use jurisdiction devoted to farming or forests. The town's 1999 comprehensive plan states that, despite its rural past, its population is projected to increase by almost 30% between 1990 and 2005.³⁸

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

The local legislature responded by appointing a 17 member Master Plan Review Coordinating Committee in July of 1994 to study the current plan and make recommendations for its revision. This was not done casually. Community 2000 hosted a series of public forums and town-wide meetings to engage the greater public in exercises designed to create a vision for the future of Warwick. Over 500 residents were involved by the citizens group and agreed, generally, that they wanted the town to retain its rural character, agricultural lands, and scenic beauty. Twenty-two leaders who emerged during this process were appointed to serve on the Coordinating Committee, charged with making recommendations regarding a new land use plan.

³⁸ See §1.1 and §1.2 of TOWN OF WARWICK, NY COMPREHENSIVE PLAN, adopted August 19, 1999.

In 1995, the committee submitted its report to the town board recommending actions to preserve the town's rural character and natural resources. Additional public hearings were held and in 1997 the town formed a special Comprehensive Plan Board to begin preparing the new Comprehensive Plan. This board continued to involve the public and reached outside the community for help. It hosted regular public meetings and interviewed local, county, and state officials.

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

Beginning in 1997, leaders involved in the town's land use planning were accepted as participants in the Land Use Leadership Alliance Training Program, exposing them to available legal strategies and community decision-making processes. By 2002, over a dozen local leaders from Warwick had graduated from this four-day program, including members of the town board, zoning board of appeals, comprehensive plan committee, conservation advisory board, planning board, local developers, and citizen leaders.

In 1999, the town board adopted a new comprehensive plan. The plan clearly anticipated future land use changes, described their detrimental impacts, and called for the adoption of a number of innovative land use laws and strategies available to the town board. These included the adoption of a purchase of development rights program and a density transfer system, both aimed at preserving agricultural lands. A month

later, the town board appointed a Citizen Code Revision Committee to draft regulations recommended by the plan.

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

In 2000, the town board placed an open space bond referendum on the town ballot. This followed an extensive study conducted by a law school land use research team on the legal authority of municipalities in New York to use their financial authority to issue bonds for open space preservation purposes. The referendum was controversial in two of the three villages, whose residents wondered whether the benefits in the town were worth the tax increase within their villages which were somewhat isolated from the agricultural lands to be preserved. The ballot passed, but by a very slim margin as a result of strong village opposition.

Following the election, village leaders threatened to challenge the ballot's legality, oppose applications for state grants, and in other ways derail the bond issue and open space plan. A law school mediator was engaged to resolve the dispute and by mid-2001 the town and its three villages reach a mutually acceptable agreement on the bond issue. The town agreed to allocate bond money ratably for village open space protection and the village leaders agreed to support farm land protection in the town.

The town board assumed control of the zoning review in early 2001, enacted a moratorium on subdivision review, received a \$75,000 quality community grant from the Department of State, conducted a build-out analysis of the current zoning, secured the pro-bono legal assistance of a senior staff attorney from the Department of State, and,

by December, adopted new zoning designed to effectuate the comprehensive plan's objectives. The new zoning contained several new districts, including a land conservation district, an agricultural protection overlay district, a ridgeline overlay district, a traditional neighborhood overlay district, and a senior housing floating zoning district. It also prescribed low density or clustered development in rural areas and allowed for mixed-uses in the town's hamlets.

In 2002, the town received an Outstanding Planning Project Honorable Mention from the American Planning Association in September 2002 and a Quality Communities Award for Excellence from New York Governor George Pataki. In that same year, the town and village of Warwick signed an intermunicipal agreement regarding annexation. Assisted by a law school technical assistance program, village and town leaders agreed to adopt a floating zoning and incentive zoning system which would allow annexation and provide developers in the annexed territory additional development density on the annexed land in exchange for a significant cash payment. These funds were dedicated to additional land acquisition in the town that serve the village's watershed and viewshed areas.

New York State

In both Dover and Warwick, it was essential that local leaders understood the legal authority that they possessed to adopt effective land use strategies to react to change. This sheds light on the role of the New York state legislature which, between 1990 and 2004, responded to this local need by adopting dozens of land use law amendments that carefully organized, significantly clarified, and considerably expanded local land use authority.

These changes in state land use enabling laws were made incrementally, beginning with needed organizational changes and then moving on to more innovative matters. They were based on the input of citizens, local leaders, developers, and others

affected by land use decisions gleaned from numerous regional roundtables conducted by the legislature. Widespread concern regarding local land use problems was instrumental in convincing reluctant legislators to take land use law reform seriously.

Specific amendments were crafted by a carefully selected group of stakeholders, state agency representatives, practitioners, academics, local government representatives, and other land use experts, assembled as the state Land Use Advisory Committee. The process was led by the Legislative Commission on Rural Resources headed by a leading member of both the New York Senate and Assembly and staffed by an executive director skilled at consensus building. All bills were submitted to both houses at the same time on behalf of the bi-partisan Commission.

The first law recommended by the Commission and adopted by the legislature clarified provisions regarding the adoption of a town or village's first zoning law.³⁹ This was adopted in 1990. Four bills were passed in 1991. They concerned procedures for adopting land use laws, the appointment and functioning of zoning boards of appeals, the standardization of criteria for the issuance of variances, joint appointments to local and county planning boards, and allowing developers zoning incentives in exchange for public benefits.

Twenty additional bills were enacted between 1992 and 1996 touching on the mundane and the exceptional. They included provisions that assist planning boards to properly calculate density when approving clustered subdivisions, guidance on the appointment of planning board members, and clarifications of the procedures and standards for site plan approval. During this time, amendments were added that encourage highly innovative intermunicipal land use planning, regulation, and enforcement, that allow planning boards to require developers to cluster lots in

³⁹ NYS Legislative Commission on Rural Resources, Senator Patricia K. McGee, Chair, Community Planning & Land Development Laws Enacted 1990-2003.

subdivision, and that clearly explain the importance of comprehensive plans, their components, and the participation of the public in their creation.

Over a dozen new laws were adopted between 1997 and 2004, including provisions that clarify the authority of localities to adopt planned unit development ordinances, the formation of county planning boards and regional councils, and the formation of agricultural districts and their coordination with local zoning laws. Bills pending for consideration in the current legislative session deal with intermunicipal tax sharing, mediation of land use disputes, required training for local planning and zoning board members, and provisions that encourage inclusionary zoning.

Wisconsin⁴⁰

Response to land use crises, anticipation of future problems, and strategic coalition building are all evident in Wisconsin leading up to the adoption of its smart growth legislation in 1999.⁴¹ The law requires Wisconsin municipalities that engage in actions that affect land use to adopt comprehensive plans by 2010. The law requires these local plans to contain nine enumerated elements. Grants are authorized to local governments to prepare and implement their land use plans, but eligibility for grants is limited to communities whose plans evidence intergovernmental cooperation, identify smart growth areas, contain implementation plans, and address 14 planning goals articulated by the state. Interesting, the law engages the University of Wisconsin to develop model laws for local adoption.

This bill is traceable to events that began in the mid-1990s and involved a citizens group, two industry groups, the influence of judicial decisions, an academic institution, and the governor, as well as the state legislature. Armed with traditional land

⁴⁰ See, Brian Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 206 (2000).

⁴¹ WIS. STAT. § 66.1001 (West 2004).

⁴¹ See note 15, *supra*.

use authority, local governments in Wisconsin were unprepared for the economic boom and increased development pressures in the early and mid-1990s. In some cases, their actions were exclusionary, rejecting affordable housing and mixed-use development decisions. Based on state law at the time, two controversial decisions of this type were sustained by the courts.⁴²

These decisions alerted the Wisconsin Builders Association and the Wisconsin Realtors Association to the need for need for improved planning legislation and motivated them to work with more traditional advocates for land use reform. 1000 Friends of Wisconsin, an environmental advocacy group, got involved because of increasing citizen complaints about local land use decisions from local citizens. Republican Governor Tommy Thompson responded in 1994 by issuing an Executive Order that created the State Interagency Land Use Council.⁴³ The Council's charge was to develop a renewed vision for land use in Wisconsin, recommend consistent land use policy objectives for state agencies, and establish a framework for state agency participation in land use decision-making. The Council created the Wisconsin Strategic Growth Task Force and the Governor appointed a former head of the Wisconsin Realtors Association as its chair, a leader who had strong personal interest in land use issues and saw the task force as a mechanism to address land use decision-making broadly. Also appointed to the Council were homebuilders, environmentalists, real estate professionals, academics, land use experts, and state and local government officials.

The task force issued a final report on July 1, 1996.⁴⁴ It concluded that primary responsibility for land use should remain at the local level, but that the state needed to encourage and guide local land use planning. It recommended that the state create a

⁴² See *Lake Bluff Housing Partners v. City of South Milwaukee*, 540 N.W.2d 189 (Wis. 1995); *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100 (Wis. 1997).

⁴³ State of Wisconsin, Office of the Governor, Exec. Order No. 236 (Sept. 15, 1994).

⁴⁴ State of Wisconsin, State Interagency Land Use Council, *Planning Wisconsin: Report of the Interagency Land Use Council to Governor Tommy Thompson*, July 1, 1996.

multi-level land use framework to produce comprehensive plans and implementation programs including intergovernmental cooperation, required adoption of comprehensive plans, and mandatory compliance of land use laws with land use plans. The Council also recommended that the University of Wisconsin should be involved in accomplishing these land use objectives.

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

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

The result of this collaboration between the coalition and members of the legislature resulted in the passage of Wisconsin's smart growth legislation. Since its adoption, approximately 100 municipalities have completed work on their comprehensive plans and another 600 communities are in the process of formulating and adopting

theirs. The state has awarded nearly one million dollars in planning grants to support these activities.⁴⁵

Opposition to the legislation has come from property rights groups and some municipalities. Bills submitted to the legislature to repeal the law have been blocked, and legitimate local concerns have been responded to through legislative amendments. The result of the coalition's process and consensus has been to convert land use reform opponents to supporters of land use planning, while remaining responsive to legitimate concerns and difficulties that communities have experienced.

Conclusions: What Direction for Land Use Law Reform?

These stories from the local, state, and federal level depict stakeholders in the land use system organizing themselves in the process of law reform. This was the case in Dover's aquifer protection overlay zone, the Warwicks' annexation zoning, Wisconsin's smart growth legislation, New York's recodification effort, Utah's regional planning process, and the federal Coastal Zone Management Act—paradigms of positive change. In all cases, the ethic of local control persists, as a dominant force and an anchoring concept. When our federal republic was formed there was no evidence of national or state land use control—only local control, based on an ancient tradition derived from the medieval municipal corporation. In our colonial, pre-industrial, industrial, and modern eras, the legacy of localism prevailed. This strongly suggests that reformers redouble their efforts to provide broad authority to local governments, build the capacity of local officials to develop, adopt, and implement strategies appropriate to their circumstances, and guide local energies so that state and federal interests are realized.

In Wisconsin, we observe realtors, developers, local officials, and environmentalists working to understand what is needed in the 21st century given the

⁴⁵ State of Wisconsin, Department of Administration, Office of Land Information Services, *available at* <http://doa.wi.gov/> (last visited Oct. 26, 2004).

state's historical reliance on local control. They engaged in a serious and protracted process of inquiring whether their individual group's self interest could be promoted, while accommodating those of the other stakeholders. In the end, they not only found an answer—a change in the system that reformed it in a positive way—but they built a continuing coalition that is tending to the reform and adjusting it to meet coalition members' interests in the implementation stage. Reform efforts need to be patient in this way, include all stakeholders, encourage them to seek mutually beneficial solutions, and, in the process of deliberating, seek solutions that would not be possible without the resources and commitment of them all.

Obvious parallels to the Wisconsin story are seen in the Land Use Advisory Council in New York, the powerful grassroots coalitions within the towns of Dover and Warwick, and among the communities cooperating in the Rockland Riverfront Communities Council. Additional connected networks of leaders are gradually organizing within other municipalities and among adjacent communities in New York's Hudson River Valley, where they have been encouraged to collaborate by being trained together and provided incentives for such positive behavior under grant programs of two state agencies, the Department of State and the Hudson River Greenway Communities Council.

Productive connections are being created between state and local governments in a host of ways as state policies and local authority are clarified and local governments assisted in addressing local problems, like soil erosion in Michigan, Iowa, and Connecticut, and habitat protection in Washington. In states such as Maine, Wisconsin, Minnesota, and Oregon, local governments are either encouraged or required to define urban growth boundaries and support proper land uses there, changing the historical pattern of land development spawned by Euclidian zoning. In Illinois, Massachusetts, and New York, local land use leaders are being trained and provided technical

assistance under programs established or funded by state agencies. State and federal agencies and universities are helping by distributing best management practices and exemplary ordinances to local leaders committed to positive changes in local land use law. Through reforms like these that test and settle proper roles, build vertical and horizontal connections, and increase the rate of effective communication, we are learning slowly how to knit together our national land use system through law reform.