Land Use and Climate Change: Is it Time for a National Land Use Policy?

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The immediate and short answer to the question in the title is no. It will never be time for an articulated federal land use policy; the tradition of local control of land use is simply too strong. But consider, for a moment, what this local control policy has produced: a legacy of massive, auto-dependent suburban sprawl nationwide. When we consider that more than one-third of greenhouse gas emissions in the United States come from transportation[1] and that land use patterns perpetuate auto-dependency,[2] we may find that it is time to raise the question: might there be value in a federal land use policy, set by Congress, to attempt to turn the tide of sprawl? The idea deserves consideration.

The phenomenon of urban sprawl is much studied and variously defined, but all definitions focus on widespread, low-density, automobile-dependent development.[3] "Sprawling urban forms typically are car dependent and include dispersed single family homes and substantial distances between residential, business, and retail areas and alternative transportation options."[4] The contribution of sprawl to conventional air pollution from automobiles has been recognized for decades, the Los Angeles area being perhaps the best-known example.[5]

Why do we have sprawl? To some extent, we have sprawl because we live in a big country where land and gasoline have been cheap. As a result, families have long found that the outskirts of town offer ample space for single family homes with a bit of yard at lower cost than properties closer to town. This

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1. REID EWING ET AL., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 2 (Urban Land Institute 2008).

2. *Id.*

3. *See* DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 753 (7th ed. 2008).

4. William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 Wake Forest L. Rev. 509, 510 (2000).

5. *See also* Michael P. Johnson, *Environmental Impacts of Urban Sprawl: a Survey of the Literature and Proposed Research Agenda*, 33 Env't & Plan. 717 (2001); Mandelker *supra* note 3, at 754 (for description of auto-dependency as a product of sprawl).

pattern of development is far from universal worldwide. I once hosted a Japanese visitor for a few days and drove her around various areas of northeast Ohio. As she viewed low-lying light industrial buildings (many vacant), vast car dealerships, and miles of suburban houses, she was appalled at the waste of precious land. Why do we sprawl? Historically, because we could.

Traditional land use policies and practices have shaped the suburbanization process. Euclidean zoning separates housing from other land uses, ensuring that suburban residents need to use their vehicles for any errand. This dispersion has fed into cultural shifts that promote automobile use even for chores that, for those of us who are old enough to remember, previously involved walking, biking or taking public transportation.

Land use regulation is in the hands of individual local governments. A single metropolitan area usually is divided into scores of smaller communities, each with its own land use powers and no legal obligation to coordinate with the others. Thus, there is no overriding land use design for a metropolitan area; there is no way to contain the sprawl. The American Planning Association has argued that the division of metropolitan areas into individual autonomous regulatory kingdoms defeats rational planning and leads to land misuse, sprawl, traffic congestion, and environmental degradation.[6]

Over the years, efforts to pry land use power from the hands of local governments have met with little success. A few states, such as Oregon, Vermont and Washington, have some form of statewide land use control. But the effort heralded in the 1970s as "the quiet revolution"[7] has remained extremely quiet with very little revolution. Oregon's path-breaking statewide land use regulatory regime suffered a setback in 2004 with Measure 37, a voter-adopted initiative that promised compensation or a waiver of restrictions to Oregonians whose property lost value as a result of land use regulation. The reverberations of Measure 37 continue in the wake of another ballot measure to adjust its scope, Measure 49, adopted in November 2007.

To the extent that the federal government has played a role at all, it has contributed to sprawl; it has taken no direct measures to contain it. One major, if perhaps unintentional, result of the interstate highway system has been to provide urban areas with a web of high-speed routes to the suburbs. Early efforts to subject private land use decision-making to federal control in the 1970s came to nothing; indeed, Congress amended the Clean Air Act to prevent the federal government from requiring land use controls as part of state implementation plans to achieve ambient air quality standards.[8] A few federal environmental laws seek to influence land use in the protection of some aspect

6. This view pervades the Association's massive Growing Smart Legislative Guidebook, published in 2002. *See, e.g.*, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, Preface at xxv-xxvi (Stuart Meck & FAICP eds., 2002).

7. FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 1 (1971).

8. 42 U.S.C. § 7410(a)(5),(c) (2006).

of the environment, such as water resources.[9] Additionally, the federal government has attempted to encourage mass transportation systems and to discourage additional highways that would have adverse environmental effects.[10] Unfortunately, these specialized measures do not set a general federal land use policy.

The release of the American Planning Association's Growing Smart Legislative Guidebook – intended to prompt state governments to update land use planning laws that mostly date from the 1920s – was accompanied by a short-lived effort in Congress to provide federal funding for land use planning. The Community Character Act, introduced in the Senate by Sen. Chafee and in the House by Rep. Blumenauer, never made much progress.[11] Although it was a relatively modest proposal and included no specific policy prescriptions, it was nonetheless strongly opposed by the Bush Administration as a "dangerous precedent."[12]

That was then, however; this is now. Even in the short time between 2002 and today, our understanding of climate change has evolved, as has the political dialogue. Today we are confronted with the need either to make dramatic technological progress in developing and harnessing new forms of energy, or make dramatic changes in the way we live – and perhaps both. An auto-dependent way of life needs to move to a new form of automobile – an effort that has been in the works for decades and has not yet produced a viable zero-emission product for widespread use[13] – or to encourage new patterns of daily living that do not require automobile use. The best results probably would come from a combination of the two.

We might argue that the rapidly rising price of gasoline will bring about the desired results without the intervention of the federal government. Consumer choice patterns will adjust to the high cost of gasoline by boosting the appeal of inner ring suburbs, where driving distances are shorter. I am not qualified to evaluate empirically either the gasoline price level that will have this result or the amount of time it would take for such a shift to occur. It does seem, though, that the real estate market has a tendency to boom and bust, leaving a permanently-altered landscape in its wake. Real estate developers

9. For example, the Clean Water Act offers grants to states that develop plans to protect surface waters from nonpoint sources of pollution (polluted runoff) including land use planning. 33 U.S.C. § 1329 (2006). Likewise, the Coastal Zone Management Act encourages the development of land use management practices that will protect coastal waters. 16 U.S.C. § 1451-1466 (2006).

10. *See* Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, 49 U.S.C. § 5501 (2006).

11. 147 Cong. Rec. S5707 (107th Cong. 1st Sess. May 25, 2001) (Senator Chafee introducing S. 975); 147 Cong. Reg. E571 (107th Cong. 1st Sess. April 5, 2001) (Rep. Blumenauer introducing H.R. 1433) (extension of remarks).

12. 148 Cong. Rec. H1494 (107th Cong. 2nd Sess. April 23, 2002) (Rep. Blumenauer describing objections of HUD Secretary Martinez to the legislation).

13. Even the California Air Resources Board has scaled back its ambition. It recently reduced by 70 percent the number of zero-emissions vehicles automakers must produce under the state's air law. *Air Board Trims Zero-Emission Vehicle Goal, Establishes First-Time Target for Plug-Ins*, 39 BNA Env't Rep. 675 (April 4, 2008).

respond to what they perceive will sell; the market cannot be relied upon to produce climate-friendly land use patterns, if prevailing market conditions support more suburbia.[14]

If the smart growth movement has a point at all, it is even more compelling now than it was six years ago: higher density mixed use development reduces energy usage and thus can contribute to the effort to reduce greenhouse gas emissions. Indeed, the tide may already be turning. In recent months, states such as California and Florida have made progress on state land use planning to combat climate change.[15]

If that is so, doesn't it make sense to provide incentives and even mandates to encourage smart growth nationwide? The Clean Air Act provides a possible model. Under the federal Clean Air Act, the federal government sets the standards to be achieved: the National Ambient Air Quality Standards, or NAAQS. The states are then responsible for preparing a State Implementation Plan, or SIP, using state government regulatory authority and responding to particular state conditions, in order to achieve the NAAQS. The SIP process has been ugly; it is not an inspiring example of lean, streamlined, transparent decision-making. But it does leave considerable discretion in state hands to respond to state conditions, while still compelling progress towards air quality improvement nationwide.

Congress could prepare a National Land Use Policy Act that sets overall goals, or perhaps even standards and guidelines for smart growth programs nationwide, and offers federal funding for states that choose to abide by these prescriptions. In preparing this statute, Congress can benefit from the considerable work of the American Planning Association, municipalities that have adopted the smart growth concept, and states with land use programs already in place.[16]

Is this potentially radical shift in land use power inherently un-American? In order to save the planet, are we betraying essential American values of individual autonomy and private property rights? I would suggest not. Property rights have never been separate from the legal structure in which they are given meaning. Initial reactions to zoning in the 1920s were outraged,[17] yet we all are accustomed to it now. At this point the land use regulatory system is pervasive

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14. Indeed, for the millions of people already entrenched in the outlying suburbs, there are significant psychological and financial barriers to selling out and moving closer in. Thus some form of new automobile energy source seems to be necessary in any event.

15. Florida recently approved a law offering incentives to local governments to address climate change in their comprehensive plans, among other requirements. 2008 Fla. Laws 191, http://laws.flrules.org/files/
Ch_2008-191.pdf. In August 2008, California lawmakers adopted Senate Bill 375, requiring cities and counties to curb sprawl and improve public transportation. S.B. 375, 2008 S., 248th Reg. Sess. (Cal. 2008).

16. For a review – and rejection – of possible constitutional issues with the Growing Smart Guidebook approach, *see* Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. Colo. L. Rev. 651 (2003).

17. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

and imposes detailed controls on every aspect of land use. This proposal does not involve a higher degree of land use control than individuals bear already; it simply endorses a nationwide policy regime to guide land use decisions.

Already, the planning community urges that, particularly in large fractured metropolitan areas, regional government offers the only way solution to sprawl. Moreover, many communities nationwide – though by no means all – are committed to the use of their local authority to combat climate change.[18] If we are serious about reducing greenhouse gas emissions, we need to change how we live from the ground up and that includes land use. Let's get the discussion started by putting this proposal on the table.[19]

18. *See* Catherine LaCroix, *SEPAs, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, Case W. Res. L. Rev. (forthcoming), *available at* http://ssrn.com/abstract=1105881.

19. For a more general discussion of the relative roles of federal and state governments, *see* STAFF OF H. COMM. ON ENERGY AND COMMERCE, 110TH CONG., CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: APPROPRIATE ROLES FOR DIFFERENT LEVELS OF GOVERNMENT (Comm. Print 2008) (identifying improvements in building codes to minimize greenhouse gases at pages 18 & 21); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 Den. U. L. Rev. 791 (2008), *available at* http://ssrn.com/abstract=1125127.