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SMART GROWTH AND AMERICAN LAND USE LAW

RICHARD BRIFFAULT*

I. INTRODUCTION

The smart growth movement that emerged in the late 1990’s seeks to change the way Americans think about growth, development, and urban planning. From a legal perspective, smart growth directly challenges several fundamental aspects of American land use law.

Substantively, smart growth attacks two goals that have been hallmarks of American land use law for more than three-quarters of a century: (1) decongestion, that is, reducing population density and dispersing residents over wider areas; and (2) the separation of different land uses from each other. Both decongestion and separation of uses were enshrined in the Standard Zoning Enabling Act of 1922, which provides the legal basis for most zoning in the United States. These goals were validated by the Supreme Court as legitimate aims of state and local land use regulation in the landmark Village of Euclid v. Ambler Realty1 decision of 1926. Decongestion of population and separation of land uses have been critical features of American land use law ever since.

Smart growth, by contrast, would limit the dispersal of population in order to prevent the loss of open space and reduce the need for the installation of costly infrastructure in newly developed areas. Higher densities would also facilitate the use of mass transit and hold down the energy and environmental costs associated with high levels of automotive transportation. Smart growth also challenges the separation of uses and would instead promote the greater integration of commercial and residential uses and of different types of residential uses. This, too, would reduce transportation costs while promoting more socially and economically balanced communities.

To implement these goals, smart growth would change certain longstanding institutional features of American land use law. Traditionally,

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1. 272 U.S. 365 (1926).
state governments have delegated broad authority to local governments to regulate the land within their borders. In recent decades, some states have sought to exercise greater control over local discretion with respect to some aspects of land use regulation. But in most states and for most land use issues, localities dominate the field. One consequence is that land use decisions are shaped primarily by the concerns of small local jurisdictions that, typically, do not take into account the effect of their land use actions on other localities or the metropolitan area as a whole. Moreover, the delegation of zoning and subdivision power to local governments contributes to the separation of land use decision-making from other critically important concerns, such as transportation policy, economic development strategies, and environmental protection. These are issues that are handled primarily at the state or regional levels. Yet, land use policies affect and, in turn, are affected by transportation, economic development, and environmental regulation. As a result, local control over land use complicates state efforts to develop and implement comprehensive metropolitan area development plans.

Smart growth challenges both the local focus of land use decision-making and the isolation of land use regulation from other concerns. Smart growth would generally require that land use actions take regional considerations into account, and that land use regulation be more closely integrated with transportation, environmental, and economic development policy-making.

In this essay, I will attempt to sketch out the principal features of American land use law. My goal is to provide a sense of how great a departure smart growth would be from the longstanding American way of regulating land use. I will initially focus on the substantive land use policies that smart growth seeks to change, but my primary concern will be the tension between smart growth and local control over land use decision-making. Smart growth will be difficult to achieve at the local level. Most local governments contain only a small fraction of the land and population of the metropolitan areas in which they are located. Even if individual local governments are willing to adopt smart growth principles and restrict the development of undeveloped land, promote greater densities in already developed areas, or permit the integration of commercial and residential structures, the benefits of their actions may be limited if most other localities in the metropolitan area adhere to other land use values. The determinations of which areas are ripe for development, which areas should be protected from development, and what are appropriate development densities need to take regional considerations into account. So, too, smart growth seeks the greater integration of land use decision-making with transportation, water supply, waste treatment, economic development, and environmental protection policies that are regional in scope. Smart growth may be able to achieve some successes at the local level, but ultimately some regionalization of land use decision-making will be necessary if smart growth
is to succeed in creating more economically balanced communities. Yet, as I will also suggest, a combination of pragmatic and principled concerns indicate that smart growth will have to accept a considerable, continuing role for local governments in land use regulation.

II. THE SUBSTANTIVE VALUES OF AMERICAN LAND USE LAW

The substantive law of American land use regulation has been dominated by two themes—holding down densities and separating different types of uses. Not every local government pursues these policies, but these norms marked land use decision-making in most parts of the country, particularly the growing portions of metropolitan areas, for most of the twentieth century.

Density Control: The movement from greater to lesser density is not solely a product of law. Decongestion, in tandem with its opposite, the concentration of people and economic activity in cities, has long been a feature of American life. People began crowding into our cities in the 18th century, drawn there by economic opportunity, cultural attractions, and the relatively greater degree of personal freedom available in the anonymous city compared with small town and rural areas. Yet, urban crowding and congestion have their costs in terms of reduced living space, reduced control over one’s immediate environment, and loss of quiet, clean air, and various other environmental amenities. With improvements in transportation and communications in the 19th century, people began to be able to work in cities and thereby benefit from urban economic and cultural opportunities, while also enjoying the benefits of making their homes outside the congested urban core.

According to historian Kenneth Jackson, the commuter suburbs began with the onset of regular ferry service between lower Manhattan and the then bucolic community of Brooklyn in 1814.2 Subsequent developments in transportation technologies—railroads, street cars, trolleys—enabled more and more people to combine the economic and cultural benefits of access to the cities with the greater living space and reduced crowding of suburban life. New forms of transportation and communication also made it feasible for some industries to relocate from the costly and congested urban core to less dense suburban areas without losing access to urban markets. Although densely populated cities still dominated the urban scene in the early twentieth century, lower-density suburbs had begun to emerge as important components of many metropolitan areas.

Density control became a part of the law of land use regulation with the widespread introduction of zoning. Although a number of localities had adopted zoning ordinances before World War I, local zoning did not become a

central feature of land use regulation until the 1920’s. In 1921, the United States Department of Commerce appointed an Advisory Committee on Zoning which, in 1922, released a model law which it intended the states to use to grant local governments authority to zone. Within three years of its release, nineteen states had adopted the Standard Zoning Enabling Act (“SZEA”) in whole or part. Today zoning enabling laws exist in virtually every state.

Section one of the SZEA announces that zoning is a grant of power to, inter alia, “regulate and restrict . . . the density of population.” Moreover, dominating the “purposes in view” section of the Act are the goals of “lessen[ing] congestion in the streets,” “prevent[ing] overcrowding of land,” and “avoid[ing] undue concentration of population.”

In its notes, the Advisory Commission explained that “[t]he power to regulate density of population is comparatively new in zoning practice. It is, however, highly desirable.”

The courts quickly validated the SZEA’s commitment to enabling local governments to regulate density. The Supreme Court of Illinois, in City of Aurora v. Burns, a 1925 zoning case, held that “the constantly increasing density of our urban populations” was a legitimate basis for regulating land use and that regulation to “prevent congestion of population” was a valid exercise of the police power. One year later, the Supreme Court of the United States, in Village of Euclid v. Ambler Realty, agreed.

Density reduction, or, more accurately, density prevention, became a central feature of zoning in mid-century, particularly in the rapidly growing suburbs outside the large cities of the Northeast and Midwest. A leading supporter of suburban efforts to hold down density was the New Jersey Supreme Court. Deeply concerned by what it called the “tide of suburban development” spreading out from New York City, Newark, and Philadelphia after World War II, the New Jersey Supreme Court—later a leading critic of suburban exclusionary zoning—endorsed the repeated efforts of New Jersey’s localities to hold down densities through the adoption of steadily expanding minimum floor space, building frontage, and large lot acreage requirements—in one case as large as five acres.

In the 1952 decision of Lionshead Lake v.


4. 149 N.E. 784 (Ill. 1925).

5. Id. at 788.


Township of Wayne, the court explained that residents of zoning communities could pursue “more land, more living room, indoors and out, and more freedom of scale of living than is generally possible in the city.”

Nor was New Jersey alone in providing judicial validation for suburban zoning ordinances aimed at limiting density. Courts in states from Massachusetts to Missouri agreed that the preservation of the “quiet and beauty of rural surroundings,” the requirement of “nice homes,” and the control of local public service costs all justified land use policies aimed at holding down density, separating houses from each other and requiring the dispersal of new residents over relatively large land areas.

The courts in the postwar decades did not see these local zoning measures as raising issues of interlocal or regional significance. The interests of prospective residents, excluded by these restrictions from membership in the zoning communities, were largely ignored. Also frequently disregarded was the impact locally restrictive ordinances would have in forcing new development on other communities within the metropolitan area. Rather, the courts usually saw only a conflict between private property rights of landowners and the public interest of the local community. The courts generally deferred to the authority of local decision-makers to define and enforce a local public interest in density control.

Judicial attitudes in several states—New York, California, Pennsylvania, and most famously New Jersey—began to change in the 1970’s. In a series of cases involving local large lot requirements or exclusions of apartment buildings, courts acknowledged that local density controls often operated as a form of social and economic exclusion. The value of density control per se was never challenged by the courts. But in a number of cases where courts found that local measures resulted in the exclusion of low and moderate income families from the zoning communities, and

1952) (minimum floor space requirements for residential dwellings); Vickers, 181 A.2d at 138-40 (ban on mobile homes).
10. Id. at 697.
12. Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 776 (Mo. 1952).
indirectly led to higher housing costs in the region as a whole, the courts invalidated those restrictions. Communities were required to address the impact of low densities on regional housing opportunities, and the New Jersey Supreme Court directed developing suburbs to accept their “fair share” of regional low and moderate income housing. However, once a community accepted its fair share it could continue to restrict densities. A number of state legislatures—Connecticut, Massachusetts, and, under judicial prodding, New Jersey—also adopted laws designed to ameliorate local exclusionary zoning. But as with the state courts, the state legislative goal was primarily the local acceptance of a fair share of regional affordable housing needs not an attack on the value of density control.

It is not clear how much success these state legislative and judicial challenges to local exclusionary zoning have had, and in many states there have been neither legislative nor judicial efforts to curtail local exclusionary measures. Thus, although the critique of exclusionary zoning did have some effect in limiting in some states the more extreme versions of density controls—such as very large lot requirements—density limitation still remains an important zoning goal in most states.

**Separation of Uses**

If decongestion began as a social goal, facilitated by transportation and communications technologies and then reinforced by law, the *separation of land uses* is more clearly a product of legal action. Traditionally, in American cities multiple land uses—residential, commercial, and industrial—were close together, cheek by jowl. The emergence of the residential suburb began to change this, but even in many of these communities, residences of various types coexisted with multiple, albeit small-scale, commercial activities. In the early twentieth century, all-residential communities began to emerge through private agreements between developers and buyers. These restrictive covenants limited the use of land subject to the covenants to residences, and, often, to single-family homes. The role of restrictive covenants suggests some public support for the separation of residences, especially single-family homes, from other forms of land uses. But private agreements could bind only the lots initially controlled by a single landowner or developer, and not other lots within the locality. As a result, the legal separation of residential activity from all other activity—and the exclusion of multi-family dwellings from single-family home neighborhoods—did not really come into its own until after the widespread adoption of zoning.

A central goal of the SZEActon was to provide for the creation of separate districts “for trade, industry, residence, or other purposes.”

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refined distinctions between related land uses. The ordinance before the Supreme Court in *Euclid* was enacted in 1922 by a community with a population, estimated by the Court, at just 5,000 to 10,000.\(^\text{19}\) Yet the Euclid ordinance provided for six separate use districts—and these districts separated schools and public libraries from banks and offices, while further separating hardware, drug, and grocery stores from laundries and dry cleaners. Most strikingly, the ordinance placed one-family homes in a separate district from two-family homes; two-family homes, in turn, were in a different district from apartment houses.\(^\text{20}\)

The Supreme Court held that these fine distinctions were appropriate exercises of the police power. The Court drew on the common law of nuisance, noting that uses could be separated to prevent one legitimate use from impinging on another. But the zoning in *Euclid* went well beyond what was necessary for nuisance prevention.\(^\text{21}\) The Village of Euclid was not trying to separate homes from brick kilns and slaughterhouses;\(^\text{22}\) rather, it was separating homes from grocery stores and single-family homes from other types of residences.

The separation of differing land uses remains a hallmark of local zoning to this day. Over time it has become more arcane and byzantine, with many communities having dozens of zones and subzones containing more and more narrowly homogeneous uses. To some extent the separation of uses reflects a desire for predictability and investment security. With finely articulated zoning, you can know exactly how the parcels in the vicinity of your land will be used. This is valuable to landowners, as well as to the banks, mortgage lenders and insurers that finance the purchase of land. The separation of uses may also provide a means of dealing with economic and social conflict; one way to enable different, potentially conflicting groups to coexist in a community is to separate them from each other. Certainly, the most refined zoning systems reflect the high-modernist hubris—to use the term coined by political scientist James Scott—that the separation of uses would rationalize community form and provide both a scientific and an aesthetic improvement over the disorderly mix of residential, commercial, and industrial activities that marked traditional communities.\(^\text{23}\)

Separation of uses, along with reduction of densities, valorized the single-family home, by separating it, and thereby protecting it, from all other uses

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19. 272 U.S. at 379.
20. Id. at 380-83.
21. Id. at 387 (law of nuisances not “controlling” in determining validity of zoning).
23. See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (Yale Univ. Press 1998).
including, in Justice Sutherland’s *Euclid* opinion, that most insidious use, the apartment house. Although technically a residence, the apartment house, Sutherland explained, was “a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”24 Apartment buildings, by their height and bulk, interfere with light and air, and result in increased traffic and noise so that “the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.”25

In the decades following *Euclid*, courts regularly upheld local zoning ordinances that required larger and larger homes, larger and larger lots, and the exclusion of nonresidential activities and apartment buildings from one-family home areas. As Justice William O. Douglas asserted 50 years later in *Village of Belle Terre v. Boraas*, urban zoning may legitimately embrace a pastoral vision that separates the home from all other activity: “The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”26

Even more than decongestion, the separation of uses has remained an unquestioned feature of land use law. The attack on exclusionary zoning called into question the legitimacy of the complete exclusion of apartment buildings and multifamily residences from whole communities. In effect, the courts and legislatures concerned about the impact of local zoning on housing opportunities were pointing out what should have been obvious—that apartments are residences, too. (The notion that apartments are not really residential remains deeply entrenched in state property tax systems which usually provide the lowest assessment rates for residential property, but typically classify apartments as commercial and not residential). Until the arrival of the New Urbanism movement in the 1990’s, however, the separation of residential from retail and office uses was a widespread and virtually unchallenged aspect of land use law. Even the limited judicial and legislative insistence on the inclusion of some multifamily dwellings in some communities did not question the physical separation within a community of those dwellings from single-family homes.

### III. LOCAL CONTROL

Linked to the substance of American land use law is its institutional focus on local governments. Local governments have been preeminent in land use regulation as they have been in no other area of American law. Local

25. *Id*.
governments play the major role in providing most public services, like education and public order. But in those areas, local governments are often limited to implementing the decisions of higher level governments. States may promulgate the curricula that local teachers teach, and states adopt the criminal laws that local police enforce. In land use, however, local governments frequently both make the laws and carry them out.

To be sure, local governments do not act alone in the land use arena. Federal and state tax, transportation, infrastructure assistance, and environmental policies have long had an impact on land use. Government mortgage subsidies and intergovernmental grants for new highways, water supply systems, and wastewater treatment and removal facilitated suburban growth. At the heart of zoning, the Standard Zoning Enabling Act nicely reflects the interpenetration of federal, state and local governments. The Act was drafted and publicized by a committee appointed by the United States Secretary of Commerce—Herbert Hoover. It was enacted by state legislatures, whose imprimatur was legally necessary for local action. The focus of federal and state governments, however, was on delegating zoning authority to local governments. Once they were empowered with zoning authority in the 1920’s, local governments have dominated the land use field.

Local control of zoning was directly questioned and affirmed in Euclid. The parties seeking to invalidate Euclid’s ordinance, in an argument foreshadowing the contemporary regionalist critique of local zoning, stressed that Euclid was “a mere suburb of the city of Cleveland” and thus, not really a freestanding community. They argued that industrial development shunted from the Euclid district zoned residential would simply be diverted to other sites in the Cleveland metropolitan area. The Supreme Court, however, rejected the implied claim that Euclid was too small a piece of the Cleveland region to be allowed to zone autonomously. “The village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions.”

Later cases also addressed the legal legitimacy of zoning undertaken by a suburb that was only a small piece of a larger metropolitan area. Rather than question the propriety of local zoning, some courts actually relied on the small size of suburbs relative to their metropolitan area to expand local zoning authority. The theory of zoning is that it separates uses within a jurisdiction, not that it completely excludes lawful activities. But some suburbs sought to zone themselves as exclusively residential communities. In one leading case, the New Jersey Supreme Court upheld a locality’s total exclusion of heavy

27. Vill. of Euclid, 272 U.S. at 389.
28. Id.
industry by treating the town as a mere residential fragment. The Court would not rely on what it called “the adventitious location of municipal boundaries” to bar the borough of Cresskill from excluding industry since the region’s industrial needs could still be satisfied with an all-residential Cresskill if factories were located elsewhere in the region. In effect, Cresskill could rely on its small size to turn itself into a residential zone within a larger region.

Similarly, a federal court of appeals upheld the total exclusion of industry from the residential town of Valley View, Ohio. “Traditional concepts of zoning,” wrote then appeals court judge and future Supreme Court Justice Potter Stewart, “envision a municipality as a self-contained community with its own residential, business, and industrial areas. It is obvious that Valley View, Ohio, on the periphery of a large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and social whole.” Yet, that did not undermine the legitimacy of Valley View’s zoning ordinance. Rather, given that the business and industrial needs of its inhabitants could be “supplied by other accessible areas in the community at large,” as the Court presumed—Valley View could zone itself exclusively residential.

The local role in land use regulation takes a specific form. It consists primarily of the power to say no. A local government cannot force a particular development to occur within the locality. It cannot actually require a high-tech incubator office park, a shopping mall, or a high-end residential developer to invest within its borders. The locality can take actions that make it an attractive place to outsiders, but it cannot compel outsiders to relocate there. Moreover, many localities, particularly smaller communities, have relatively limited tools for drawing new development. Market forces and federal and state actions affecting the location and cost of transportation, air quality, water supply, or environmental protection play a major role in affecting where attractive development will occur.

But local governments, deploying subdivision controls and zoning, generally have the power to veto unwanted developments. This fits well with the substantive goals of land use regulation, since local governments can use their veto power to block development deemed excessively dense, or development that inappropriately combines residential and commercial activity or single-family homes with multi-family residences.

31. Id.
The power to veto is, of course, of differential value to different local governments. It is of limited value for cities and communities that desire new development and the jobs and tax base that economic development can bring. For central cities and declining older suburbs, the development veto is relatively useless since they want to encourage development not to block it. However, for more affluent suburbs, communities satisfied with their current level of development and fearful of more growth, or localities that want to exclude more than they want to include, the local veto is extremely valuable, indeed. Of course, given the small size of local governments and the fragmentation of metropolitan areas, an exclusionary locality may be adjacent to a poorer one that is willing to accept some of the development its more affluent neighbor would reject. As a result, even for affluent suburbs the benefits of the local veto may be undermined by lack of control over developments in nearby areas. Still, the local veto enables affluent suburbs to create at least some distance between themselves and land uses they deem undesirable.

Local control of land use is deeply intertwined with two other features of American local government law—local responsibility for raising the revenues necessary to fund local services and the incorporation and boundary rules that make it easy for new local governments to form but difficult for existing local governments to expand.

Fiscally, American local governments, unlike local governments in many other Western countries, raise from their own resources most of the money for the services they provide. Roughly two-thirds of local budgets consist of own-source revenues; only the remaining one-third reflects assistance from the state and federal governments. Fiscal factors, thus, have a strong influence over how local governments exercise their land use powers. Local governments have an incentive to permit only those land uses that generate more in taxes than they cost in local services. This reinforces the attraction of large lots and single-family home requirements since these hold down population and the demand for costly services, while increasing property values and, thus, property tax revenues—the major source of local own-source funds. Conversely, there is a fiscal incentive to exclude apartment houses and homes

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33. In 1996-97, the last year for which data is available, local governments (including counties, municipalities, townships, school districts, and special districts) raised $887 billion, of which $47 billion came from the federal government and $267 billion from the states. Local governments raised $573 billion of local revenue (including $41 billion transferred from some local governments to others, primarily from general purpose local governments to school and special districts). The locally-raised share of total local revenues is, thus, approximately 65%. See 1997 CENSUS OF GOVERNMENT, VOL. I, GOVERNMENT FINANCES (2000). The relative mix of local own-source revenues and intergovernmental assistance varies significantly from state to state and among localities within a particular state.
affordable by low and moderate income people since these may produce less in new revenue than they cost in locally-funded expenditures. In states where local governments can levy a sales tax—or piggyback a local increment on a state sales tax—localities have an incentive to promote retail activities such as shopping malls as those uses generate sales tax revenues.

Fiscal pressures are playing a growing role in local land use decision making. The tax revolt sparked and symbolized by California’s Proposition 13 in 1978 and Massachusetts’ Proposition 2 ½ in 1980 led to the adoption of new caps on property tax yields and/or on the rate of increase in property tax revenues in many states. With many localities unable to fully realize the benefits of increased property development, they may be even less interested in permitting new growth. More generally, local governments have become more skeptical about the fiscal benefits of new growth and more attentive to the costs of providing the new infrastructure—highways, water supply, wastewater treatment and removal, and schools—that new development frequently requires.

While this recognition of the infrastructure costs of growth resonates with concerns voiced by the smart growth movement, it remains to be seen whether local infrastructure cost pressures will lead localities to promote denser, mixed use developments or, instead, seek to maintain existing land use patterns by placing more of the cost of development on newcomers through the use of development impact fees. For now, at least, many local governments appear to favor the latter approach. As a result, local resistance to growth and local fees intended to make growth pay for itself may simply force new development further to the urban fringe where land costs are lower, landowners are eager to reap the benefits of selling to developers, or there is sufficient excess capacity in local roads, schools, or water systems to accommodate new development. The increased salience of local fiscal concerns could, thus, reinforce both the affordability problem produced by zoning restrictions that drive up housing costs and the sprawling pattern of metropolitan regional development.

The other feature of local government formation that is critical for assessing local land use controls is the sheer multiplicity of local governments. “In 1987, the typical metropolitan area had 113 local governments, including forty-seven general purpose governments, such as a county or a municipality.” The profusion of governments is even greater in larger metropolitan areas. There are over 1250 local governments in the Chicago

area, including 6 counties and more than 100 municipalities; more than 300 local governments in greater Seattle, including 3 counties and 65 cities and towns; and approximately 350 local governments, including 168 cities and towns, in metropolitan Boston. Even in the Sunbelt, which tends to have fewer localities per metropolitan area, the Phoenix area has 138 governments, including 21 municipalities.\textsuperscript{37}

The large number of local governments is a product of laws in many states that make it easy for people in unincorporated areas to form new governments, and that make it difficult for existing local governments to annex unincorporated areas or to consolidate with other localities. Moreover, because the power to zone has been broadly extended to most incorporated localities it provides an incentive to community incorporation, much as loss of local control over zoning leads localities to resist consolidation into larger units.\textsuperscript{38}

The large number of relatively small local governments in close proximity to each other affects the nature of local land use decision-making in metropolitan areas. Many of these localities are composed of economically and ethnically homogeneous homeowners, and local zoning politics is dominated by homeowner interests. This tends to privatize zoning, to focus it on the immediate interests of local homeowners, with the consequences for the broader and more economically and ethnically diverse region frequently ignored in the process. If local homeowners would be better off with a development restriction then the restriction is likely to be adopted, even if the region as a whole would benefit from a less restrictive decision.

With metropolitan areas composed of large numbers of small abutting governments, local decisions frequently generate effects beyond their borders. This undermines both the efficiency of local decision-making, since external effects will only rarely be taken into account by localities, and the democratic nature of local decision-making, since people beyond local boundaries who are affected by these decisions are unrepresented in the local decision-making process.

Land use decisions affect concerns that by their very nature transcend local borders—air and water pollution, water supply, open space and habitat conservation, transportation systems that need to connect people throughout a region. These often cannot be solved by the unilateral actions of individual local governments. Moreover, the multiplicity of small local governments with many different and often conflicting interests make it difficult for local governments to reach cooperative solutions. The states have responded to some of these questions by shifting decision-making in these areas to state or

\textsuperscript{37} Id.

regional bodies—regional water or solid waste authorities, transportation authorities, and environmental regulators. But that creates new problems for coordinating regional decisions concerning physical infrastructure with local decisions affecting land use. For example, local decisions that result in dispersed settlement tend to undermine the ability of regional transportation authorities to promote public transit.

Local land use decision-making also tends to reflect and reinforce the physical and jurisdictional separation of rich and poor, and of black and white. To be sure, market forces alone would make it difficult for many low and moderate income people to live in more affluent suburban towns. But local land use regulations frequently aggravate the problem by imposing development fees and zoning requirements that drive up local housing costs.

In many ways, local control over land use seems to be increasingly at odds with the regional character of metropolitan life. Metropolitan area residents do not concentrate their activities within their home towns, nor do metropolitan area businesses typically draw most of their workers or customers from the particular city or town in which they are situated. Regions increasingly operate as economic units in competition with other regional units around the country and around the world for new investment. Regional competitiveness is affected by the availability of land for economic development, housing costs, transportation systems, and access to open space. Local control, however, means that land use decisions which affect regional competitiveness and regional well-being are being made at the local level, by local decision-makers who lack the incentives or even the information necessary to make decisions that take regional interests into account.39

Despite the increasingly uncertain fit between local control over land use and the regional scale of metropolitan life, local control remains a durable feature of American land use decision-making. Its persistence is particularly striking given the formal legal inferiority of cities and counties in our government hierarchy. Local governments have no inherent powers. Local governments wield their authority over zoning, subdivision approvals, and development fees due to grants of power from their states—grants which the states could take back at any time. Although most states provide many of their local governments with home rule, home rule rarely provides local governments with legal protections from state legislation generally reducing local powers, as opposed to state laws aimed at individual local governments. Home rule’s principal legal effect has been to increase local power to adopt new measures and engage in local law-making without first obtaining specific state authorization. In other words, it is more a sword than a shield. When the state chooses to preempt or displace local authority, home rule generally

39. See, e.g., Briffault, supra note 36, at 1132-44.
provides little protection. In the few states where home rule does protect
localities from state intervention or restriction, the home rule shield applies to
purely local matters only. Matters of state concern can be regulated by the
state even if state action also affects local interests. Given the external effects
of local land use regulation, as well as the state’s interest in promoting regional
development, the states would have little legal difficulty in taking over land
use regulation or displacing local land use autonomy should they choose to do
so.

The 1970’s witnessed a partial reexamination of local control over land
use. In New York, New Jersey, Pennsylvania, and California local
exclusionary zoning was attacked in state courts on the grounds that these local
regulations limited housing opportunities and unfairly forced unwanted
development on other localities.40 Courts in these states acknowledged the
regional consequences of local zoning actions, condemned local parochialism,
and required local governments to take regional housing needs into account
when regulating land use.41 But these cases had only a limited effect on land
use regulation. Only in New Jersey did the courts engage in a sustained attack
on local exclusionary zoning, and even in New Jersey the state supreme court
indicated that its ultimate goal was local acceptance of a share of regional
housing needs rather than a broader displacement of local zoning autonomy.
In the other states, the courts occasionally invalidated the most egregious
instances of local actions intended to drive up the cost of new housing, but
generally did not disturb local control over land use regulation.42

The 1970’s and 1980’s were also marked by the so-called “quiet
revolution” in land use control, with states from Vermont to Florida to Hawaii
becoming more involved in land use decision-making. A number of states
provided for greater state administrative involvement in standard-setting,
oversight mechanisms, and even substantive requirements for local regulators.
These, however, proved compatible with the preservation of considerable local
decision-making authority. States might require state or regional review of
large project proposals that would have impacts in the region well beyond the
zoning locality, and mandate the protection of environmentally sensitive areas
from development. These initiatives tended to curb local power, but they were
often consistent with the broader suburban residential interest in limiting
densities and restricting growth. In most states, the pattern of state activity

40. See, e.g., Richard Briffault, Our Localism: Part I-The Structure of Local Government
41. See, e.g., Associated Home Builders Etc., Inc. v. City of Livermore, 557 P.2d 473, 487-
88 (Cal. 1976); Berenson v. Town of New Castle, 341 N.E.2d 236, 242-43 (N.Y. 1975); Surrick
42. See Briffault, supra note 40, at 42-56.
involved targeted interventions, not a general retraction of the broad local power to act. Moreover, many of these measures were aimed at limiting development and therefore were consistent with the growth control concerns of many suburban localities. In short, although the trend in many states in the closing decades of the 20th century was in the direction of a greater state role, in most states local governments continued to dominate the land use field. Oregon, a state celebrated by smart growth advocates for its efforts to control local control over land use and to check sprawl, is the rare exception from the general pattern.

Local control’s grip on land use is political, not legal or constitutional. Local control remains the dominant force in land use decision-making not so much because the law requires it as because most people want it that way. Why is local control so popular?

First, local control provides a powerful means for enabling grass-roots participation in land-use decision-making, for assuring that elected and appointed decision-makers are accountable to the public, and for facilitating regulation that is responsive to a wide variety of differing local needs, circumstances, and conditions. The regionalization of metropolitan life, by expanding the circle of those affected by local actions without expanding the circle of participation, has undermined the democratic nature of local control. But decision-making by small-scale communities still provides an important means of enabling the people most directly affected by land use actions to have their voices heard and their views taken into account.

Second, land use regulation affects the home—the most important economic asset most families possess and the physical setting for family life. People have a powerful stake in controlling the political process that bears most directly on the economic value and social well-being of their homes. In that sense, local control is a form of personal autonomy. Indeed, the smaller the community, the greater the sense of the community as an extension of one’s self. Although the benefits of local control have varied directly with the affluence and attractiveness of local communities, even residents of the poorest communities want the measure of control over their immediate environment that local land-use decision-making represents.

Third, local control is the status quo. People have invested in land under a certain institutional framework which they have come to know and understand. Even developers who chafe under current restrictions feel they know how the system works, who the players are, and what they need to do to succeed in their businesses. With so much at stake, any change is unsettling, even a change which might ultimately improve the local quality of life or facilitate development.

Local control, thus, brings together parochial self-interest, democratic and community values, and institutional inertia. Challenging local control will be
difficult, and the values advanced by local control indicate that some continued local role in land use decision-making will be appropriate.

IV. SMART GROWTH AND LOCAL CONTROL

Smart growth and local control are in tension, but they may not be necessarily at odds. Some of the goals of smart growth—the promotion of mixed use development, the combination of higher densities in settled areas with the preservation of currently undeveloped farmland or open space—could be achieved by revising the substance of zoning regulation at the local level. Indeed, many localities have begun to promote denser nodes of urban development while protecting open space from further growth. So, too, some localities have entered into interlocal agreements with their neighbors to promote greater land use consistency within their regions.43

Conversely, a state takeover of land use regulation would not necessarily be marked by laws promoting mixed uses and high densities. After all, it is state law—the SZEA—which initially provided that low-density development and the separation of land uses are legitimate local land use policies. State subsidies for new water supply and sewage systems in rapidly growing areas on the metropolitan fringe and state policies in areas like transportation—where most states have consistently favored highways over mass transit—have often been inconsistent with the goals of smart growth.

Yet, it will be difficult to achieve smart growth if the existing local domination of land use decision-making is left undisturbed. Sprawl results when developed localities try to limit new growth while localities on the urban fringe seek to attract new growth. Each municipality may be acting rationally with respect to its own self-interest. For the already developed municipality, new growth may mean greater density, more traffic, and higher public service costs, while for the less developed municipality, new growth could mean an increase in the value of local land and an enhancement of the local tax base. Each has a local incentive to pursue the policies that produce sprawl. Some greater state or regional involvement in, or oversight of, land use decisions is necessary to check the self-interested local policies that may produce sprawl.

More generally, most local governments constitute only tiny fragments of broader metropolitan areas. Even if an individual local government were to permit greater densities, or the integration of commercial and residential uses—or the combination of apartments and single-family homes in a single zone—this would have only a limited impact on transportation patterns or environmental concerns in the region as a whole. Smart growth requires a regional vision, and regional institutions and policy-making processes, in order

to more effectively integrate transportation policies, affordable housing policies, environmental protection, and land use regulation across metropolitan areas.

Yet, smart growth is not necessarily hostile to local control. Indeed, smart growth reflects a local as well as a regional vision. Much of the power of the smart growth movement emerges from the sense that today’s suburbs lack the feeling of community found in older localities. Greater density and a better mix of shops and homes, and of different types of homes, is intended not just to reduce commutation times and protect wetlands from development, but to restore the traditional urban patterns that are thought to facilitate the creation of public spaces and community centers within economically mixed communities.

Smart growth, thus, needs to find a place for a continued local role in land use decision-making. This is partly a matter of pragmatic politics. Local control is deeply-rooted in our system and will not be easily dislodged. States as well as local governments have long supported a strong role for local governments in land use regulation.

But the reconciliation of a regional vision and a local role is also a matter of wise governance. Local control is not only a political fact; it reflects important democratic values of participation, accountability, and responsiveness to public opinion. Local control may no longer be congruent with the regional scope of planning and problems in contemporary metropolitan areas. But a local voice in land use decision-making still remains a critical means for people to participate in decisions that affect their homes and neighborhoods. Smart growth, thus, must develop institutional mechanisms for combining its regional and local visions, for coordinating the development of the region as a whole with providing a continuing role for people at the local level to participate in a significant way in the land use regulatory process.