

## **SMART GROWTH LEGISLATION: COMING TO A STATE NEAR YOU**

Many people and businesses are alarmed and energized over the November 2000 ballot initiatives in Arizona and Colorado to restrict planned growth by adopting state-wide laws that would severely limit land supply for economic and housing expansion. These ballot initiatives are being pressed by the Sierra Club and allied organizations. Their goal is to halt infrastructure expansion – roads, water, sewer, schools – and make any future growth area subject not to a deliberative process but to voter approval. But these self-proclaimed “smart growth” laws in Arizona and Colorado are just the tip of a looming iceberg. That iceberg is composed of model planning, or “smart growth,” laws for all 50 states and their localities.

For the past several years, the American Planning Association (APA) has been drafting model state land use legislation, the drafting of which will come to a close in 2001. This effort, called **Growing Smart Legislation**, is heavily funded (largely by the federal government) and is guided by a “directorate,” which is made up of every major state and local governmental association in the U.S. The fundamental danger is that this model legislation can be easily used or misused by no-growth forces in the legislative arena of any state.

### **Stricter Land Use Controls**

The model “smart growth” legislation covers not only planning, zoning and subdivision but also every new land use technique dreamed up over the past 30 years – for example, urban growth boundaries, development impact fees, and land planning moratoria. Most alarming are certain themes running through the massive model code. These include such proposals as: requiring that every land use action, no matter how minor, rigidly conform to a local comprehensive plan; requiring strict environmental protection for virtually every local land use action; requiring state plans that local plans must conform to; expressly inviting federal environmental agencies into local land use decision-making.

The 15 chapters of the model code tell the story. They are titled as follows:

Chapter 1 – Initiating Planning Statute Reform

Chapter 2 – Purposes and Grant of Power

Chapter 3 – Definitions

Chapter 4 – State Planning

Chapter 5 – State Land Use Control

Chapter 6 – Regional Planning

Chapter 7 – Local Planning

Chapter 8 – Local Development Regulation

Chapter 9 – Special Environmental and Development Controls for Local Regulation

Chapter 10 – Administrative and Judicial Review of Land Use Actions

Chapter 11 – Enforcement

Chapter 12 – Integrating State Environmental Policy Acts with Local Planning

Chapter 13 – Financing Required Planning and Infrastructure

Chapter 14 – Tax Equity Devices and Tax Relief Programs

Chapter 15 – Record Keeping; Unified Geographic Information Systems

The goal is nothing less than replacing the model planning and zoning enabling acts written in the 1920's by the U.S. Department of Commerce, thereby revamping wholesale the land use laws of the United States. The model acts of the 1920's formed the bases for the planning, zoning and subdivision statutes adopted by the various states, enabling their localities, in turn, to adopt planning, zoning and subdivision ordinances. Modern concepts such as local growth control, transferable development rights and development impact fees come from state enabling statutes.

### **Governmental Buy-In**

This APA legislative project is no academic exercise. Its impact will likely be large and lasting. It is guided by a directorate, whose role is to comment upon the legislation and commentary drafted by APA staff. The directorate, an advisory group, is composed of individuals representing the following:

- American Planning Association
- Council of State Community Development Agencies
- National Conference of State Legislatures
- National Association of Counties
- National Association of Regional Councils
- National Association of Towns and Townships
- National Governors Association
- National League of Cities
- U.S. Conference of Mayors
- Member-at-Large for Local Government Law
- Member-at-Large for the Natural Environment
- Member-at-Large for the Built Environment

Though the regulated community has only one seat at the table (and it was a struggle to gain that seat), its representative, a well-respected housing developer from Colorado, has been effective on a number of fronts. Until he was finally seated, economic reality was getting short shrift in the proceedings.

As its name implies, the Growing Smart project aims to capture the smart growth movement by offering model legislation on every conceivable land use concept (as well as environmental issues) for transmittal to every state government. Legislators and Governors as well as their civic, planning and environmental constituents will then be able to choose from a Chinese menu of highly detailed model legislation in order to deal with the perceived or contrived problems of “sprawl” development.

### **Project Funding and Marketing**

Funding for this multi-year legislative project comes largely from the U.S. Department of Housing and Urban Development (HUD). (HUD officials were very supportive in the effort to have a developer named to the directorate.) Additional funding comes from four other federal agencies (notably the Environmental Protection Agency (EPA) and Department of Transportation (DOT)) as well as the APA, Henry M. Jackson Foundation of Seattle, Annie E. Casey Foundation of Baltimore, and Siemens Corp. of Washington, D.C. Once the APA completes its work by 2001, it will seek the endorsement of its directorate members, officially promulgate the model legislation, and advocate its adoption by the states.

Indeed, a few states have already taken drafts of the APA code, made revisions, and then enacted legislation accordingly. For example, Tennessee (not a state with runaway growth) adopted urban growth area requirements in 1998. APA staff is marketing the draft legislation nationwide, and its state and regional chapters are also advocating “smart growth” legislative fixes. All of this is being done in the name of better land use planning. Some of it is helpful. Some of it is not. But all of it proposes more, and more detailed, governmental regulation of the development process. Equally important, the draft code, once finalized, will offer a ready platform for no-growth forces who wish to take its concepts to the extreme.

### **Authoritative Model Code**

The Growing Smart Legislative Guidebook is a massive document. Already it stands at over 1,100 pages of code and commentary, with a few chapters yet to be released for the directorate's review. Some of the model legislation is written in alternative versions, so that legislatures can have the benefit of seeing more than one version of a concept. But mostly, the draft code is all of a piece. The likelihood of any legislative body adopting all the concepts and provisions encompassed by the book ultimately to be released is, of course, virtually nil. Plus, its extraordinary detail and length works against it. No state today has in its land use enabling legislation all the concepts and techniques covered by the APA model code. Yet, almost everything in the model code appears conceptually in the law somewhere in the U.S., even if in just a few jurisdictions.

APA's goal, then, is to update, under the rubric of smart growth, the states' planning and zoning statutes to specifically enable localities to regulate growth and development through new, often controversial, techniques developed over the past 30 years. Given the organizations that sit on the directorate and the governmental funds supporting this effort, it is clear that the model legislation, once finalized, will have a major impact on state houses as well as county seats and city halls. Interest groups will use it as an authoritative resource for the drafting of legislative proposals. Controversial tools, such as urban growth boundaries, development impact fees and planning moratoria, which often exist in only a few places, are accorded broad legitimacy by appearing in the model code.

### **Some Pluses and Minuses**

Importantly, the code's commentary sometimes raises the policy implications of such techniques, pointing out how they can be abused or used unconstitutionally. But if a political or

legislative group gets past countervailing policy arguments (which typically concern social or economic or equity impacts, such as exclusionary housing or loss of jobs), the model legislation shows how to write the laws under the seductive banner of “smart growth.”

To be sure, there is much in the model legislation to be admired. For example, as a running theme, it emphasizes due process for development applicants and tries to de-politicize (as much as anyone could) planning and zoning actions. It offers a favorable definition of vested development rights. The community’s “comprehensive plan” is given enormous weight in terms of implementing ordinances and regulations, which is especially crucial when a developer is facing targeted NIMBY attacks on a specific development proposal that conforms with the goals and recommendations of the comprehensive plan. But the flip side to this emphasis on the weight of the comprehensive plan is that it can be used as a strait jacket to reduce needed flexibility in the development process as conditions change or make themselves apparent.

Another major theme evident in the various code chapters is the elevation of environmental control, historically a bailiwick of the federal and state governments, into the local land use arena. In particular, stricter protection is to be accorded to places deemed “critical and sensitive areas,” which are defined so broadly as to encompass arguably any natural feature, large or small, appearing on the landscape.

### **Environmental Reaction**

Yet several national environmental groups have in recent days communicated to APA their opposition to how a number of issues are currently covered by the draft legislation – for example, vested development rights (too liberal) and legal standing to challenge a development approval in court (too restrictive) – and they are, at this late date, suddenly organizing to pressure for last minute changes in the draft code even as APA is completing the project. So far, APA’s position has been to defend its product (after all, the environmental community has had a seat on the directorate and cannot justifiably claim surprise).

## **Conclusion**

One thing is certain – the model code covers so much ground and in such detail that once it enters the political and legislative process of a state, the debates about the roles of land planning and regulation will be fundamental and hard fought. The development community must be prepared.