

REAL ESTATE & TITLE TRENDS

PERSPECTIVE

Private Property Rights Should Be Respected In the Smart Growth Agenda

BY R. RANDY LEE

AL GORE'S CAMPAIGN platform in his bid for the Presidency includes a "Livability Agenda," the purpose of which is to enable people to live closer to where they work, reduce their commutes and enjoy more quality time with their families. As part of the sustainable development movement's program against suburban sprawl, the Sierra Club has filed a lawsuit in federal court in Atlanta to stop construction of planned highways that allegedly violate the Clean Air Act.

Environmentalists have promised more litigation of this sort throughout the country, making the anti-sprawl campaign their top priority. A recent statement by Richard Moe, president of the National Trust for Historical Preservation, is instructive on this point: "There is scarcely a single national problem that is not exacerbated by sprawl or that would not be alleviated if sprawl were better contained." Meanwhile, the Clinton Administration has also announced an

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initiative to direct production of market-rate housing into the inner cities, in the hope that the middle class will return to the urban core where jobs and amenities are within walking distance.

Last fall, 31 states had more than 200 sprawl-curbing/open-space-pre-

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serving proposals on state and local ballots. Voters approved the great majority of them.

These ballot initiatives are motivated by a road rage of sorts, or more precisely, the policy makers' rage against roads. Under the guise of "Smart Growth," they intend to stop construction of highways and other infrastructure, thereby halting new residential and commercial development in the suburbs.

Smart Growth concepts are the latest vogue among land use planners, who call for stricter regulation of suburban development beyond the zoning and subdivision ordinances that have

become commonplace since the 1950s. The Smart Growth agenda typically includes ideas such as "urban growth boundaries," outside of which no development can occur, and the perpetual preservation of farmland and open space. A fine line indeed separates Smart Growth from no growth.

The Smart Growth message may play well politically in the midst of a raging bull market, but what will happen when, inevitably, Wall Street's boom turns into a bust? When the economy slows, unemployment rises, and property values drop, as they have in the past, will the suburban public endorse policies designed to freeze economic development and further depress prices in its neighborhoods? A Smart Growth-induced moratorium on suburban development would not only signal economic disaster, but would likely be unconstitutional as well.

The Fifth Amendment to the U.S. Constitution provides that government officials cannot "take" private property through land use regulation unless they pay "just compensation" to the affected landowner. It is basic that when government goes too far in regulating the uses of private property, a taking occurs and the landowner must be compensated. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). As the Supreme Court has stated, "the right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'government benefit.'" *Nollan v. California*

Continued on page S9, column 1

Property Rights and Smart Growth Agenda

Continued from page S3, column 3

Coastal Comm'n, 483 U.S. 825, 834 (1987).

Land use officials must bear these principles in mind. They cannot pursue Smart Growth regulation at the expense of property rights protected by the Takings Clause. As Justice William Brennan recognized, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n. 26 (1981) (Brennan, J., dissenting).

On the issue of going too far, Vice President Gore's 1992 book, *Earth in Balance*, provides insight into his state of mind in this area: "Every time I pause to consider whether I have gone too far out on a limb, I look at new facts ... and conclude that I have not gone nearly far enough."

Procedural Reform

A growing body of literature already exists regarding the substantive reforms that Smart Growth proposals should adopt. Equally important, however, is the need for procedural reform in the land use approval process. If local land use officials want to limit or stop development in the suburbs, they should institute fair processes so that citizens are afforded a reasonable opportunity to vindicate property rights when they are infringed by Smart Growth regulations.

Inspiration for these procedural reforms can be found in several bills that were before the last Congress, and which will likely be reintroduced this session. H.R. 1534, the Private Property Rights Implementation Act, would have clarified the procedural obstacles that property owners must presently hurdle just to get a federal court to hear their claims. H.R. 1534 passed the House of Representatives in a bipartisan, 248-178 vote on Oct. 22, 1997. On July 13, 1998, the Senate companion bill, S. 2271, fell only eight votes short to allow a floor vote.

Before analyzing the measures contained in H.R. 1534 and S. 2271 (the Bills), however, what is the case for procedural reform? The quick answer is that Takings claimants, unlike the holders of other constitutional rights, suffer from an abysmal track record in getting the merits of their cases heard in federal court.

The National Association of Home Builders (NAHB) undertook a survey of cases brought in federal court between 1990-1998 in which property owners alleged that their land was unconstitutionally taken by excessive regulation. This survey shows that 83 percent of Takings cases with an opinion reported by a U.S. district court were dismissed on procedural grounds.

Of those property owners who could afford to bring an appeal, 64 percent still faced dismissal on jurisdictional grounds. The small number of Takings plaintiffs who received a determination that their claims could be decided on the merits waited 9.6 years for that conclusion. As Smart Growth policies sweep more property, under more circumstances, into the regulatory net, the regulated community is concerned that these statistics will only worsen.

Whether Smart Growth policies

succeed over the long term rests heavily on the commitment of the regulated community. Federal, state and local officials will go a long way in gaining the trust of property owners if they adopt the procedural reforms espoused by the Bills. Meaningful assurances that property owners will be treated fairly in the development approval process will help prevent Smart Growth from becoming the next regulatory flavor of the month.

In particular, the Bills addressed the

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two-part test from *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which set the standard for a "ripe" Takings claim. The first prong of *Williamson County* holds that such a claim is ripe after land use officials have arrived at a final, definitive position on a development application.

Unfortunately, getting such a final decision typically requires a byzantine process that land use officials control at their whim. Numerous cases describe scenarios of property owners spending years submitting and re-submitting multiple applications that land use officials hesitate or simply refuse to take action on.

The Bills would clarify the steps necessary to obtain a final decision from regulators in order to ripen a federal Takings claim. Under the Bills, property owners would be required to submit one meaningful development application. If that application was denied, the applicant would be required to pursue a variance. If the variance was denied, the property owner would then be compelled to pursue any available administrative appeal (such as to a local board of zoning appeals). Only after denials occurred at these stages — initial application, variance and administrative appeal — would a Takings claim ripen.

Furthermore, the Bills require an additional application if land use officials deny an initial development plan but indicate in writing the types of land uses that will be approved. Drafters of Smart Growth policies would be best advised to incorporate these clean and objective procedures into their own initiatives, so that landowners and officials know what actions become final for purposes of redressing constitutional violations.

The Bills also addressed the second ripening element from *Williamson County*, which requires Takings

claimants to exhaust state compensation remedies. This rule mandates that property owners first pay for Takings litigation in state court and then fund another suit in federal court.

Compelling citizens to go "two rounds" in the litigation ring — first in state court, then in federal court — surely has a chilling effect on an individual's ability to vindicate constitutionally protected property rights. Indeed, forcing citizens to first litigate Takings claims and issues in state court effectively precludes federal adjudication under the doctrines of res judicata and collateral estoppel.

Simply, these doctrines prevent relitigation of claims and issues in a subsequent court that an earlier tribunal already decided. As one of the country's foremost land use scholars remarked when he testified before Congress to support H.R. 1534, "the ironic effect of the synergy between ripeness and res judicata" is that property owners are forced to litigate federal Takings claims in state court. See Testimony of Daniel R. Mandelker on H.R. 1534 at page 27, Hearing Before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property (Sept. 23, 1997).

Aside from the Takings Clause, no other guarantee in the Bill of Rights is subject to initial state court litigation. For example, cases involving the First Amendment's speech and religious rights are freely and immediately allowed to be litigated in the federal courts. Where landowners assert only federal claims arising under the Constitution, the Bills would permit federal court litigation unhampered by an initial round before state judges.

Opponents of the Bills mischaracterize these reforms as "federalizing" local land use law. This is an interestingly disingenuous argument, since the Administration's Smart Growth plan announced on January 11, when taken together with its budget proposals, clearly represents a great leap forward towards federal land use planning and zoning of localities.

Of course, the Bills do not ask federal judges to write permits or decide zoning issues like height, set-back and density requirements. However, it is the obligation of federal judges to test the constitutionality of final land use decisions made by local government officials. See *International College of Surgeons v. City of Chicago*, 118 S.Ct. 523 (1997), on remand, 153 F.3d 536 (7th Cir. 1998). The Bills simply confirm this basic proposition.

Using and re-using existing infrastructure makes sense and should be a common agenda that both the development and regulating communities share. But Smart Growth should not be pursued at the expense of halting all growth in the suburbs, in the dubious expectation that those inclined to move out of the city will now find the urban scene newly attractive.

Nor should property owners be subjected to a ramshackle and arbitrary approval process, ultimately leading to massive unconstitutional takings of private property. Smart Growth regulators can go a long way towards addressing their rage against roads, curbing sprawl and simultaneously protecting property rights if they support the common sense procedural reforms contained in H.R. 1534 and S. 2271.