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Planning Is Essential: A Reply to Bishop and Tilley

by Dwight H. Merriam

Timothy S. Bishop and Cristina C. Tilley, litigators in the Chicago office of Mayer, Brown, Rowe & Maw, offered up a Dialogue in the July 2002, issue of the *Environmental Law Reporter News & Analysis* entitled *Smart Growth or Dumb Bureaucracy?*¹ They didn't cite the Article I wrote with my law partner of 25 years, Gurdon H. (Don) Buck, *Smart Growth, Dumb Takings*, which was also published in this august periodical.² I don't think we own the form of the title beginning with "Smart" and linked to "Dumb," but it would have been nice to have been recognized. Even better, it would have been nice had they acknowledged, rather than dismissed, the efficacy of good planning inherent in the smart growth movement—even though any right-thinking (that is, correct-thinking) person will be quick to point out that smart growth has its shortcomings and is often the stalking horse for other agendas. In our Article, we discuss the smart growth movement and explain how one can have smart growth and respect private property rights at the same time.

Bishop and Tilley lay waste not to smart growth alone, but land use planning generally. If I can summarize what they had to say—it should be easy because they have but a single and simplistic premise—the city of Chicago and its suburb of Sugar Grove are both pretty nice places because they know what they want to be and they have good leadership. Chicago has done well because of its mayor, Richard M. Daley (D), and Sugar Grove has done equally well on its own, because it uses large-lot zoning to attract families who like to live in such places instead of Chicago.

Be a champion of planning and you are toast, as far as Bishop and Tilley are concerned. They demonize Maryland Gov. Parris N. Glendening (D), for example, for what they say is an "arrogant statement reflecting a critical failing of the smart growth set."³ Here's the statement they find arrogant: "Across the country people must realize that once something is paved over, there is no going back."⁴ This is hardly an "arrogant" comment and does not reflect a "critical failing." Indeed, it is a plain fact that once land is committed to a developed use, it is largely lost for other uses, such as farmland. About the worst you can say about Governor Glendening's claim is that it is patently obvious.

Bishop and Tilley fail to recognize that smart growth is largely a new spin on old planning themes.⁵ Twenty-plus years ago, planners focused on "growth management" as a new way to look at land use and development. Growth management was born with the *Golden v. Planning Board of the Town of Ramapo*⁶ decision in New York just 30 years ago this year. Bishop and Tilley cannot see the evolution of growth management into the smart growth movement and its bedrock principle that good planning and appropriate regulation are essential to protecting the public's health, safety and general welfare. They advocate instead for a "pure" market-based approach:

To our minds, this market approach to the formation and expansion of communities is the best one. It leaves administrators a critical, market-based role—to create or adopt a vision of the community and to manage growth to serve that vision. It requires developers to adapt projects to the particular community. And it provides the best test of success. Communities that appeal to a large enough segment of the population will thrive; those that do not will fail.⁷

Bishop and Tilley also have got their planning heroes and villains switched. They seem to like Jane Jacobs' vision⁸ and find distasteful the views of Le Corbusier⁹ and Lewis Mumford.¹⁰ Fact is, it is the vision of Jacobs¹¹ which drives smart growth, and Mumford didn't like Jacobs in the least. If anything, what Bishop and Tilley have done, as irritating as their polemic is, is to further advance the debate. For the first time since the end of World War II, this country is engaged in a real discussion of what our country should be and whether we have been headed off in the wrong direction for half a century. That's a good thing, even when it gets the backs up of the defenders of the status quo, like the authors,

5. Just to show that good, reasonable people can disagree, I note that their high-visibility partner, John Schmidt, is a champion of planning and regulation and headed a committee to rewrite Chicago's code. See *Zoning Rewrite to Tackle City Retail Strips*, CHI. TRIB., Apr. 28, 2002, at 1.

6. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, 2 ELR 20296 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

7. Bishop & Tilley, *supra* note 1, at 10823.

8. *Id.* (citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961)).

9. *Id.*

10. *Id.*

11. "No efficient schemes, incremental or not, are apt to prosper without two other simultaneous changes: (a) densification, probably largely by infilling our existing sprawls; and (b) an end to adding and widening highways. What is now called smart growth requires all three kinds of change." *Remark: Random Comments* [by Jane Jacobs at a symposium celebrating the 40th anniversary of the publication of her book, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES*], 28 B.C. ENVTL. AFF. L. REV. 537, 539 (2001).

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1. Timothy S. Bishop & Cristina C. Tilley, *Smart Growth or Dumb Bureaucracy?*, 32 ELR 10822 (July 2002).

2. Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 ELR 10746 (Dec. 1999).

3. Bishop & Tilley, *supra* note 1, at 10823.

4. *Id.*

who invoke Robert Ellickson,¹² Peter Gordon,¹³ and Harry Richardson.¹⁴

At the heart of the smart growth movement is the concentration of populations in areas with sufficient infrastructure to serve them, densities high enough and the mix of uses sufficient to reduce the dependency on the automobile, development sustainable for future generations, and critical natural resource areas preserved for the benefit of those who come after us.

The smart growth movement resonates from the discomfort that many, if not most, Americans feel with the sameness of the suburbs and the intractable problems of aging central cities. Many things aren't right with the way we live. We may not be able to pin a label on the source of our discomfort, but we just know we can do better. That's the basis for the smart growth debate.

The big problem with the laissez-faire approach so uncritically embraced by Bishop and Tilley (the mark of a great litigator is, perhaps, irrepressible single-mindedness) is that the market sometimes simply fails to recognize the public good. The greatest failure, and the most important point of intervention planning, is when the private market and great community leaders (Mayor Daley and the Sugar Grove public officials supporting large-lot zoning) fail to comprehend the needs of future generations.

A few examples spring to mind. Where are the private market mechanisms to address global warming? Would Bishop and Tilley have us believe that private land developers are really going to identify and protect aquifers for public water supplies needed not this year or next but 50 and 100 years hence? Will "private markets" restrict ridge-top clearing for trophy homes so everyone else's view from the valley below will be preserved? Of course, the answer to these questions and every other one like them is "no," because the private market could care less about future generations.¹⁵

And laissez-faire land use may have the unintended consequence (or worse still, the intended consequence) of economic and racial exclusion. Can schoolteachers and firefighters find affordable housing in Sugar Grove? Is a community without diversity a "good" place to live? The latest U.S. Census tells us that Sugar Grove is 95.9% white. There is one Chinese person and one American Indian resident there.¹⁶ Compare those statistics with Chicago, with its 42.0% white population.¹⁷

A few months ago, our downstairs delicatessen here in Hartford, Connecticut, imposed a 25-cent surcharge on its sandwiches because of the failure of the lettuce crop in California. Some day, places such as Connecticut might not

want to be dependent on California lettuce for its sandwiches, yet without the preservation of farmland for the production of vegetables in various parts of the country we will be totally dependent on industrial agriculture and on shipping produce 3,000 miles. The "market approach" doesn't do a thing to preserve agricultural production capacity close to centers of population so that our grandchildren will have at least the option of locally grown vegetables.

This summer, my wife, two youngest children, and I hiked in the White Mountain National Forest in New Hampshire and stayed at one of the Appalachian Mountain Club huts on an alpine lake. Laissez-faire private market developers didn't provide us with an opportunity to experience the wilderness a four-hour drive from our home in urbanized southern New England. Over 100 years ago the mountains had grand resorts juxtaposed with uncontrolled logging. When it was realized that what was most attractive would be lost to the free market's intensive use, state and federal governments acquired these lands.¹⁸ The private market would not have saved these mountains for me and my children—it would have destroyed them. I can see it now—Mount Disney or Six Flags Mount Washington, the longest fake fiberglass log ride in the world, etc.

Bishop and Tilley cite a recent article by Bernard Siegan, the country's leading detractor of zoning,¹⁹ and say some nice things about Houston, Texas.²⁰ I had the pleasure of learning all about Houston and bidding to write its first zoning ordinance, but I was fortunately beaten out by another team which went through the frustrating experience of developing an ordinance only to have it defeated. Houston, I assure you, is not better off in the absence of good planning and land use regulation.

Bishop and Tilley, as free market folklorists, perpetuate the old myth that private covenants and restrictions can take the place of good public planning and regulation. Take a trip to Hilton Head, South Carolina, for example, and you will find yourself trapped in gridlock on the main drag which feeds gated communities accessible one to the other only by coming out onto that single main highway. This isolationism and transportation inefficiency is the evil twin of the sanitary covenanted gated community, so popular in areas with weak or nonexistent planning and regulation.

There is a wonderful middle ground we should all embrace. Public planning and regulation is essential to protecting critical natural resources for future generation and ensuring that our development is sustainable. The private market needs to be accommodated by more flexible land use regulatory approaches, including floating zones, mixed-use

12. Bishop & Tilley, *supra* note 1, at 10823 n.25 (citing Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973)).

13. *Id.* at 10825 n.56 (citing Peter Gordon & Harry Richardson, *Are Compact Cities a Desirable Planning Goal?*, 36 AM. PLAN. ASS'N 95 (1997)).

14. *Id.*

15. I am talking about the market, not necessarily individual developers, many of whom are committed to the best forms of land development. My comments, by the way, in this Article are my own and not those of my law firm or its clients. I also apologize to Bishop and Tilley if I seem a little uncivil or acerbic, but they hit a vein—another mark of really good litigators. I commend them for advancing the debate.

16. See http://factfinder.census.gov/bf_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=16000US1773391.html.

17. See <http://censtats.census.gov/data/IL/1601714000.pdf>.

18. See http://www.fs.fed.us/r9/white/about_us/index.html:

The White Mountain National Forest was established in 1911 after public outcry forced passage of the Weeks Act, allowing the federal government to purchase private land east of the Mississippi River. Before establishment of the National Forest, the land had been ravaged by uncontrolled logging and the fires which raged across the denuded landscape. From the first 7,000 acres of land purchased in Benton, New Hampshire, the Forest has grown to almost 800,000 acres in New Hampshire and western Maine.

19. Bishop & Tilley, *supra* note 1, at 10823 n.21 (citing Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 734 (2001)).

20. *Id.* Professor Siegan, you may recall, was denied a seat on the U.S. Court of Appeals for the Ninth Circuit because of his extreme views. *USD Professor Rejected in Senate for Federal Bench*, L.A. TIMES, July 15, 1988, at A1.

districts, and the next generation of planned unit developments. Development agreements permit true public-private dealmaking.²¹

We must remember that planning and regulation are quite different, though inextricably linked. Regulations should be consistent with plans and plans should lead all regulatory programs and decisionmaking.

Even more important than land use regulation in determining the use of land, however, is how government spends its money, particularly for infrastructure. Transportation infrastructure is of greatest interest. One thing we have come to know is that most roads will almost instantly fill to capacity and beyond when they are opened. Instead of roads alone, we need to designate high-density transportation corridors over a considerable distance and then execute the necessary planning and regulation to create high-density development adjacent to the transportation centers and nearby.

Equally important as roads is another element of infrastructure. I say, only half jokingly, that whenever I have dinner with my planner friends and we talk about development issues, we always wind up talking about sewers. Once the sewers are in place, to a lesser extent public water, all bets are off in terms of density. The density will follow this infrastructure because the capacity for development is almost unlimited if the main lines are sufficiently sized.

21. For discussions of these methods, see JOHN R. NOLON, *WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH* (Env'tl. L. Inst. 2001).

We must have a vision with a distant horizon—a century or more, and appropriate regulation and public expenditure decisions, including land acquisition, if we are to have sustainable development for our grandchildren and their children and generations beyond.

If we leave all of the decisionmaking to the private market and a few enlightened political leaders who regrettably are forced to think about reelection every two or four years, I know what future generations will say:

You squandered and wasted the resources which should have allowed us to live comfortably and efficiently. You traded short-term economic and political gain for the long-term preservation of our environment. You should have encouraged better and more intensive private development where there was sufficient carrying capacity and saved areas of essential natural resources from development, including wetlands, aquifers, and scenic landscapes. You had a chance to be smart about development, orchestrating sound long-term planning with targeted public regulation and governmental spending policies, but instead you let the private market with its inherent shortsightedness decide what would go where and when.

I don't want my distant progeny to say that about our generation and I'm certain that Bishop and Tilley must feel the same way. We just have different ways of getting there.