

# ELR

## NEWS & ANALYSIS

### Choking Slowly: Is Managing (or Smart) Growth Just Planning a Slow(er) Demise (and if It Is, Is There an Alternative)?

by Lee R. Epstein

Given the steady march of adverse environmental impacts and inimical socioeconomic and community change at the local level in many metropolitan areas—due in part to haphazard growth—this Article identifies and examines a significant concern with how we have tried to manage sprawl into the rural parts of regions. Planners' heavy reliance upon programs and policies that are time-limited or mostly serve to pace growth may merely delay an inevitable environmental and economic decline. This Article analyzes the legal possibilities of stronger, more definitive policies. It then proposes an approach that combines several mechanisms that might, acting together, help avoid the pitfalls of relying chiefly upon temporal urban containment tools.

#### Introduction

The land base of America is rapidly changing. So is our environment. Some would say all is happening for the better: (1) "the market," and the public treasury, is largely giving us the housing, commercial-industrial stock, and public infrastructure for which we are asking<sup>1</sup>; and (2) the natural environment is getting better and ever-cleaner.<sup>2</sup> Others would say we are gobbling up natural or productive open space in precisely the wrong places at alarming rates, and that overall environmental quality is declining at an ever-faster pace.<sup>3</sup>

There is probably some truth to both sets of propositions, and evidence in the form of statistics can be adduced to support either thesis. For example, due to the increasing efficiency of emissions control technologies on automobiles, factories, and power plants (the action-forcing effect of federal clean air law), urban air pollution levels were said to

have dropped in the United States between 1988 and 1997—although they still exceed federal health-based standards in many metropolitan areas, and progress may have stalled since that time.<sup>4</sup> Indeed, the weight of the evidence from unbiased scientific sources appears overall to be on the pessimistic side, given already precipitated and advancing worldwide phenomena such as global warming<sup>5</sup>; the extensive use and ultimate disposition of toxic chemicals<sup>6</sup>; widespread adverse changes to streams, rivers, estuarine, and coastal ecosystems nationwide<sup>7</sup>; and the increasing loss or conversion of both natural and working landscapes—forests, wetlands, deserts, coastal zones, and farmlands.<sup>8</sup>

Lee Epstein is Director of the Chesapeake Bay Foundation's Lands Program. He received his J.D. and M.U.R.P. from the George Washington University and his B.A. from Dickinson College. The author gratefully acknowledges the research assistance of Mike Bloomquist and Larry Roberts of Patton Boggs, L.L.P. and Steve Libbey of the Chesapeake Bay Foundation. Peter Robertson of Patton Boggs, L.L.P., Dana Beach of the South Carolina Coastal Conservation League, Edward R. Thompson Jr., of the American Farmland Trust, and Edward T. McMahon of The Conservation Fund helped by reviewing drafts of this Article.

1. See, e.g., Peter Gordon & Harry Richardson, *Are Compact Cities a Desirable Goal?*, 63 J. OF THE AM. PLAN. ASS'N 1 (1997); J. Thomas Black, *The Economics of Sprawl*, URB. LAND, Mar. 1996, at 6.
2. GREGG EASTERBROOK, *A MOMENT ON EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM* (1995); STEVEN HAYWARD & JULIE MAJERUS, *INDEX OF LEADING ENVIRONMENTAL INDICATORS* (7th ed. 2002).
3. F. KAID BENFIELD ET AL., *ONCE THERE WERE GREENFIELDS* (1999); A.A. Sorensen et al., *Farming on the Edge* (American Farmland Trust 1997) [hereinafter AFT Report]; Dana Beach, *Coastal Sprawl: The Effects of Urban Design on Aquatic Ecosystems in the United States* (Pew Oceans Commission 2002) [hereinafter Pew Oceans Report].

4. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *HABITAT II PROGRESS REPORT* (2001).
5. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *WORKING GROUP I, SUMMARY FOR POLICYMAKERS* (2001); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *WORKING GROUP II, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY* (2001); U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), *CLIMATE ACTION REPORT 2002: THE UNITED STATES OF AMERICA'S THIRD NATIONAL COMMUNICATION UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE* (June 2002).
6. U.S. EPA, *2000 TOXIC RELEASE INVENTORY (TRI), PUBLIC DATA REPORT, EXECUTIVE SUMMARY ES-8 ff* (2002). The report presents a mixed message. While overall reportable totals of toxic compounds released on- and off-site to the environment have significantly decreased since 1988, there are still 7.1 billion pounds of reportable toxins released annually into the environment. *Id.* at ES-8, 9. Off-site reportable releases increased by 7% or 27.6 million pounds over that period, *id.* at ES-12, and, over the last several years (1999 to 2000), total product-related reportable chemical wastes increased 26% to 7.7 billion pounds. *Id.* at ES-10. Further, the TRI inventory does not cover all facilities, all releases, or all compounds; it relies upon estimates by many industry groups (which have recently been found to be off by a factor of 10 for certain ethanol production-related gases); certain persistent bio-accumulative chemicals were only recently added; and the TRI does not calculate exposures or risks, i.e., with some compounds, even the most minute of amounts encountered in the environment can trigger teratogenic or carcinogenic effects. See also U.S. GEOLOGICAL SURVEY, *THE QUALITY OF OUR NATION'S WATERS: NUTRIENTS AND PESTICIDES* (Circular 1225) (1999).
7. OFFICE OF WATER, U.S. EPA, *TOTAL MAXIMUM DAILY LOAD PROGRAM, NATIONAL SECTION 303(d) LIST FACT SHEET* (2002); U.S. EPA, *NATIONAL COASTAL CONDITION REPORT* (2001); REED F. NOSS ET AL., *NATIONAL BIOLOGICAL SURVEY, U.S. DEPARTMENT OF THE INTERIOR, ENDANGERED ECOSYSTEMS OF THE UNITED STATES: A PRELIMINARY ASSESSMENT OF LOSS AND DEGRADATION* 1, 6, fig. 2 (1995).
8. U.S. EPA, *OUR BUILT AND NATURAL ENVIRONMENTS* (2001); AFT Report, *supra* note 3; NATURAL RESOURCE CONSERVATION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, *NATIONAL RESOURCES INVENTORY* (2001) [hereinafter NRI REPORT]; TRANSPORTATION RESEARCH BOARD, NATIONAL ACADEMY OF SCIENCES, *SURFACE TRANSPORTATION ENVIRONMENTAL RESEARCH: A LONG-TERM STRATEGY—SPECIAL REPORT 268* (2002); TIMOTHY BEATLY & KRISTY MANNING, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY* 6 (1997).

This Article is about the future use and management of land. Land is rapidly changing from open space uses to settled, urbanized uses *in specific, quite valuable places*.<sup>9</sup> The latter point is important since land is not physically transferable or merely a fungible commodity such as pork bellies or gold. Just because “only x” percent of the nation’s land is currently deemed urban or “only y” percent is converting from open space uses to urban ones does not mean there is no problem as some urban economists or libertarian commentators have stated.<sup>10</sup>

For example, it matters a great deal to residents in Maricopa County, Arizona, who are concerned about water supply, desert ecosystems, infrastructure costs, air pollution, and traffic congestion that the Phoenix metropolitan area added about 97,000 people *annually* over the past 10 years.<sup>11</sup> In California’s (indeed, the nation’s) fruit and vegetable basket, the Central Valley, sprawl is gobbling up land so fast that a few years ago the American Farmland Trust predicted it would cover one million more acres well before mid-century.<sup>12</sup> The same is happening in the fertile, limestone-underlain valleys of south-central Pennsylvania and the forests of coastal and piedmont Virginia.<sup>13</sup> Similarly, as one sprawling region’s forest canopy disappears, there are important economic (as well as adverse) environmental implications, such as those evaluated by a 1999 American Forests study of the Mid-Atlantic region.<sup>14</sup> In fact, as watersheds “harden” into imperviousness beyond the generally accepted 10% danger point, and natural filters and habitats disappear, watershed-specific pollution increases and pollution’s broad health, economic, and quality of life costs spread still farther—perhaps beyond a point of no return.<sup>15</sup>

### Land Use Planning

Urban planning grew out of the building and landscape design professions and social welfare reform initiatives in the late 19th and early 20th centuries, in part to resolve dirty, crowded living and working conditions in burgeoning industrial and urban centers.<sup>16</sup> The prescription for resolving conditions of heavy, noisy, smoky industry, chock-a-block with overcrowded tenements, was deemed relatively simple: separate home from work, develop new “garden cities,”

and move the privileged classes to new streetcar (and eventually motorcar) suburbs of houses (and apartment blocks) surrounded by their own patches of green.<sup>17</sup> These utopian and other somewhat limited visions helped shape public opinion and desire, and helped justify many of the public policy changes that followed.

The sprawling suburbanization that followed World War II had many fathers. Chief among them were the public economic stimuli and public subsidies from first, depression-era, and later, post-World War II economic “pump-priming,” as well as specific public works, housing, and transportation policies.<sup>18</sup> Post-war population increases and housing needs; demographic changes; a massive government investment in (and subsidy of) mostly one form of transportation, the automobile<sup>19</sup>; and social change and race in urban centers were other core reasons for a 50-year urban diaspora outward from the centers of metropolitan areas across the United States.<sup>20</sup>

The sociopolitical response to fast-paced change and urbanization of open space, in some places, was the development of intricate land use planning and zoning regimes that unfortunately have produced just what we seemed to have asked for when these were invented in the 1920s: housing segregated from work and by economic class; and rural land carved into subdivisions, fast food restaurants, shopping centers, and office “parks.” The formula for future and continuing losses of open land was set, seemingly in concrete and asphalt.

By the 1970s, some communities facing rapid growth sought to implement a variety of policies that were deemed “growth controls” or “growth management,” the latest iteration (in the middle to late 1990s) being called “smart growth.”<sup>21</sup>

### Growth Management

Largely an articulation of existing planning theory and practice at the time, the “management” of growth was explored and instituted in the United States in a variety of ways beginning in the 1960s and early 1970s. Early attempts were largely *growth-pacing* or *timing* programs, utilizing the combination of time-phased community master plans with point systems for annually allocating new building permits.<sup>22</sup> Towns such as Petaluma, California, and Ramapo,

9. AFT Report, *supra* note 3, at 1, 5-6; NRI REPORT, *supra* note 8. The *NRI Report* is derived using a statistical sampling methodology, and is not without its critics. Still, it is the only relatively consistent set of nationwide data available over a period of at least 20 years. See also BEATLEY & MANNING, *supra* note 8, at 7.

10. J. Thomas Black, *Extending the Sprawl Debate*, URB. LAND, Sept. 1996, at 8; DANIEL SIMMONS & IAN WYATT, THE PROBLEMS WITH PLANNING: A FREE MARKET GUIDE TO SUBURBAN DEVELOPMENT AND URBAN SPRAWL 2 (1999).

11. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2002). The U.S. Census Bureau reported that Maricopa County’s population in the year 1990 was 2,122,101, and in 2001 it had reached 3,194,798—an addition of more than one million people over an 11-year period.

12. AFT Report, *supra* note 3, at 8, 9.

13. *Id.* at 9.

14. U.S. FOREST SERVICE, AMERICAN FORESTS, ECO-REGIONAL ANALYSIS OF THE MID-ATLANTIC REGION (1999).

15. Pew Oceans Report, *supra* note 3, at 7.

16. MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890 (1969); Joseph L. Arnold, *City Planning in America*, in THE URBAN EXPERIENCE: THEMES IN AMERICAN HISTORY 21-30 (Raymond A. Mohl & James F. Richardson eds., 1973); LEWIS MUMFORD, THE CITY IN HISTORY (1961).

17. See, e.g., EBENEZER HOWARD, GARDEN CITIES OF TOMORROW (1902); SCOTT, *supra* note 16, at chs. 1-4; FRANK LLOYD WRIGHT, THE DISAPPEARING CITY (1932).

18. Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?* 21 WM. & MARY ENVTL. L. & POL’Y REV. 345, 354 (1997).

19. *Id.* at 364.

20. *Id.* at 355; WORLD ALMANAC AND BOOK OF FACTS 2001, at 376 (William A. McGeeveren Jr. ed., 2000).

21. The American Planning Association began a massive, multi-year “Growing Smart” project late in 1995 (named after a modest campaign begun in Massachusetts a year or two before) to “modernize the legal and institutional systems that authorize and empower [governmental jurisdictions] to plan for and manage change.” 1 AMERICAN PLANNING ASS’N, MODERNIZING STATE PLANNING STATUTES i (1995). The first part of the state of Maryland’s legislative and administrative “Smart Growth” Program was introduced by the governor and passed by the General Assembly in the 1997 legislative session. Smart Growth Areas Act, S. Bill 289 (Md. 1997).

22. MANAGEMENT AND CONTROL OF GROWTH (Randall Scott ed., 1975) [hereinafter Scott].

New York, became poster children and test cases for the new processes, which were largely upheld by the respective appeals courts as valid exercises of local police power authority to systematically plan and zone for the future.<sup>23</sup>

Other communities merely decided that large-lot zoning would take care of their growth problems, giving rise to a proliferation of 2-, 3-, 5-, and even 10-acre single-family home lots. Sometimes these regimes were approved by the courts,<sup>24</sup> sometimes not.<sup>25</sup> In fact, however, many such schemes yielded little actual growth management, often leading instead to the very worst examples of sprawl and its transportation, environmental, and social impacts: spread-out housing and commercial land uses scattered here and there across the landscape.<sup>26</sup>

Over the course of 30 years, other growth management tools have emerged. "Adequate public facility ordinances" are used, to various effect, to ensure that the public infrastructure exists before, or at least concurrent with, new development.<sup>27</sup> A very few places, such as the Minneapolis/St. Paul, Minnesota, and Portland, Oregon, metropolitan areas, have developed metropolitan regional governance structures that may include revenue/tax base sharing (Minneapolis/St. Paul),<sup>28</sup> or (in Oregon) coordinated land use and transportation planning.<sup>29</sup> Lexington-Fayette County, Kentucky, has a joint city-county governance structure and was an early growth management practitioner.<sup>30</sup>

A number of communities in California, Colorado, Maryland, Oregon, Pennsylvania, and Washington, for example, now use some form of urban containment such as urban growth boundaries, urban limit lines, urban service areas, and priority funding areas within which new growth is encouraged or provided strong governmental incentives, and outside of which it is strongly discouraged through the application of public policies such as extremely low-density conservation or agricultural/forest use zoning, or simply through the refusal to fund or extend new public infrastructure.<sup>31</sup> Austin, Texas, uses an extensive point system to reward with governmental approvals or expedited processes growth that is deemed to be in the "right" places and that is well designed.<sup>32</sup> More than 20 states and a number of local jurisdictions have successfully implemented programs to purchase development rights from places they wish to keep open or to exchange development rights and "send" them to places they wish to see further developed, so-called purchase of development rights programs<sup>33</sup> or transferable development rights (TDR) programs, respectively.<sup>34</sup>

The state of Maryland has pioneered other tools as part of its 1997 Smart Growth package, including helping employers provide "live near your work" financial incentives<sup>35</sup> and

23. *Id.* at v.II, 1-119, 121-210; *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 4 ELR 20454 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897, 5 ELR 20519 (9th Cir. 1975); *Golden v. Planning Bd. of the Town of Ramapo*, 334 N.Y.S.2d 138, 2 ELR 20296 (N.Y. 1972).

24. *Norbeck Village Joint Venture v. Montgomery County Council*, 254 A.2d 700 (Md. 1969); *County Comm'rs of Queen Anne's County v. Miles*, 228 A.2d 450 (Md. 1967).

25. *National Land & Inv. Co. v. Kohn*, 215 A.2d 597, 610 (Pa. 1965). The Pennsylvania Supreme Court held that Easttown Township's four-acre minimum lot-size requirement was unconstitutional under the state's constitution. Note especially the court's comment: "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *Id.*

26. For example, the zoning proposal at issue in the Easttown Township decision, *supra*, was to require large-lot (4-acre) minimum-lot sizes; for 500 new homes, a minimum of 2,000 acres of land would have been converted to suburban use, not counting the additional (approximate) 1,000 acres necessary for roads and driveways. Contrast this with a 500-home subdivision of, say, 1/4-acre lots that would utilize just 125 acres of land for homes, and perhaps an additional 70 acres of land for roads and driveways: 3,000 acres of open land converted, versus 195 acres. Further, the more compact development would be much more compatible with small-scale commercial land uses that could locate nearby—reducing the land consumptiveness of what could otherwise be massive, auto-oriented "strip commercial" land uses.

27. *See* MONTGOMERY COUNTY, MD., ADEQUATE PUBLIC FACILITIES, ch. 50 (1994).

28. MINN. STAT. ANN. chs. 276A, 473F (West Supp. 1997); Steve Keefe, *Twin Cities Federalism: The Politics of Metropolitan Governance*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT (Douglas R. Porter ed., 1992).

29. Metropolitan Service District Act of 1969, OR. REV. STAT. ch. 268 (1995). In several states, some combination of state and regional review or permitting of development projects that may have larger than local or regional impact has been used. Examples include: Vermont: Act 250 (1970); Florida: Rules of Procedure and Practice Pertaining to Developments of Regional Impact, FLA. STAT. ANN. §380.06 (West 1997); FLA. ADMIN. CODE ANN. r. 9J-2 (1996); and as referenced in the MODEL LAND DEV. CODE §§7-301-305 (1975).

30. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CHARTER, §1.01 et seq. (1974); EDWARD T. McMAHON, BETTER MODELS FOR DEVELOPMENT IN VIRGINIA 37 (2001).

31. Smart Growth and Neighborhood Conservation Act, S. Bill 389 (Md. 1997), amending various articles, MD. CODE ANN. (1997); Pennsylvania Municipalities Planning Code, Act of July 31, 1968, Pub. L. No. 805, as reenacted and amended, 53 PA. CODE §§10101-11202 (1999). Douglas R. Porter, *San Diego's Growth Management Program: "A" for Effort, "C" for Accomplishment*, URB. LAND, May 1989, at 21. Concerning Boulder, Colorado, *see* GROWTH MANAGEMENT: KEEPING ON TARGET? (Douglas R. Porter ed., 1986); Rolf Pendall et al., *Holding the Line: Urban Containment in the United States* (Brookings Discussion Paper Series, Aug. 2002). Pendall and his colleagues have studied "urban containment" in practice. There are various urban containment methodologies in use today, some more effective, over a longer term, than others. Most are temporally constrained, providing for a certain number of years' supply of developable land that, over time, will necessarily be revisited and altered. Examples include Oregon's famous "urban growth boundaries" that (while somewhat elastic) have not been overly extended with too much regularity. *Id.* at 21, 22. In contrast, the Twin Cities' metropolitan urban service area (MUSA), administered by the Metropolitan Council, seemed to have served as a totally ineffective mechanism of even temporal constraint, given a long history of amendment and relaxation. *Id.* at 26, 27. The only containment system that has been less of a timed or paced one has been in place in Boulder, Colorado, for more than 30 years. There, the city set urban limits and then went about buying the open space for a greenbelt, later in cooperation with the surrounding county. Some believe that the system has had an adverse impact upon housing affordability in the city and, because of a general lack of extraterritorial cooperation with most other local governments, i.e., a regionally adopted vision and actions, has served merely to push sprawl beyond the greenbelt's edges. *Id.* at 18, 19. Empirical study has not been done, however.

32. PLANNING, ENVTL. & CONSERVATION SERVICES DEP'T, CITY OF AUSTIN, SMART GROWTH CRITERIA MATRIX (2000).

33. *See, e.g., Barancik v. County of Marin*, 892 F.2d 834 (9th Cir. 1988) (Marin County established its development rights transfer program in 1979 to preserve open land and program held lawful); Telephone Interview with Edward T. McMahon, Director, "American Greenways Program." The Conservation Fund (Aug. 14, 2002). *See also* LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE §6.46 (2001).

34. *See, e.g.,* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, THE TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM FOR THE PRESERVATION OF AGRICULTURE AND OPEN SPACE, STATUS REPORT (1992) (Montgomery County, Maryland, implemented its successful TDR program in 1981). *See also* TOM DANIELS, WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE (1999); W.J.F. Realty Corp. v. New York, 672 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1998).

35. MD. REGS. CODE, tit. V, §05.03.07 (2001).

an extensive state-level competitive program for funds to purchase open space easements (the so-called Rural Legacy Program).<sup>36</sup> Add to these state programs that promote and provide incentives for the use of “brownfields”<sup>37</sup> and urban redevelopment (in Maryland, the so-called Community Legacy Program),<sup>38</sup> provide tax credits for the rehabilitation of historic properties,<sup>39</sup> allow some building code leeway for urban revitalization projects,<sup>40</sup> or permit the use of certain “New Urban” or “traditional neighborhood design” techniques,<sup>41</sup> and one gets a sense of the plethora of sometimes blunt, sometimes effective, and sometimes terribly ineffective policy tools in use today toward the goal of “smart” or managed growth.

Of course, such tools are not without their persistent critics: “conservatives” or libertarians who essentially and inherently distrust their coerciveness.<sup>42</sup> And in many localities around the country, the reality is that *none* of these tools has yet to appear in the toolbox of local governments, which may still be struggling to understand the problem of sprawl or their role in curbing it, may not have mustered the political will to do so, or may not have enough delegated authority to do so regardless of desire. For them, the discussion of an enhancement, such as that described in the solution proposed below, may well be premature.

### Growth Management and Smart Growth in the Courts

Over time, many of these tools and others have been ratified—or modified—in the courts. As noted previously, specific tools such as TDRs have received favorable mention in state courts of appeal and even in the U.S. Supreme Court.<sup>43</sup> Density limitations and annual allotment systems have been affirmed.<sup>44</sup> In one recent case, even an exercise of extraterritorial power over land uses of a certain size and potential impact adjacent to but outside of a town has been held to be within the town’s general police power—and not violative of the Due Process Clause and Equal Protection Clause of

the U.S. Constitution nor a per se violation of the U.S. Commerce Clause as necessarily impeding its free flow.<sup>45</sup>

“Takings” cases are legion, and takings law as it relates to real property has been articulated over some 85 years—though certainly not in anything resembling a “straight” line of reasoning—with the result being that well-articulated, carefully studied, and justified planning and zoning that does not work to relieve the property owner of all reasonable economic use and her investment-backed expectations, advances legitimate state interests, and that reasonably connects means with ends is at least most of the way “home.”<sup>46</sup>

### Growth, Planning, and Time

The bottom line, however, is that many of these current land use controls and growth management techniques are, by their legal nature, time-limited.<sup>47</sup> Local land use control, working within the limitations of the art and science of predicting change, revolves around locally adopted 10- to 20-year comprehensive or master plans. These plans set out the generally desired physical (and sometimes social) outcomes for the community over the time period. The plans show where roads, transit, and trails should go, where parks and schools should be located or expanded, where it is best to place new housing and commercial space, and at what intensities. Community plans may explain urban design parameters in some places, desired rehabilitation policies in others. These comprehensive plans recognize reality just as the best of them also provide inspiration. Additionally, the best of the plans are adequately implemented through zoning, subdivision, and related ordinances.

But comprehensive plans change. That is the way they are supposed to work, and it is both their strength and their weakness. Community master plans are inherently iterative, and the ordinances that implement them are subject to the latest political fashion or the strongest political muscle, as well as the reality of on-the-ground change due to extensive variances from, or exceptions to, the master plan and zoning. Comprehensive plans are also subject to macroeconomic trends. Since even the best predictive capacity ends perhaps 10 years out, from a technical perspective it is not likely that planning and zoning for accommodating whatever is expected or desired can, per se, extend much beyond that.

36. MD. CODE ANN., NAT. RES. I. tit. V, subtit. 9A (1997).

37. MD. CODE ANN., ENVIR. §§7-501 et seq. (2001).

38. MD. CODE ANN., art. 83B, §§4-801 et seq. (2001).

39. MD. CODE ANN., TAX-PROP., §§7-214 et seq. (2001), *id.* §§9-204, 308, 312, 323 (2001).

40. New Jersey Rehabilitation Subcode, N.J. ADMIN. CODE subch. 6, §5:23-6.1-33 (1998); Maryland Building Rehabilitation Code Program, S. Bill 207 (Md. 2000).

41. Connecticut Village District Act, CONN. GEN. STAT. §8-2j (2001); 1999 Wisconsin Act 9.

42. Clint Bolick, *Subverting the American Dream: Government-Dictated “Smart Growth” Is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2001); Randall O’Toole, *The Folly of “Smart Growth,”* REG., Fall 2001, at 20; RANDALL O’TOOLE, *THE VANISHING AUTOMOBILE AND OTHER URBAN MYTHS: HOW SMART GROWTH WILL HARM AMERICAN CITIES* (2000); Steven Hayward, *Legends of the Sprawl*, 91 POL’Y REV. 26 (Sept./Oct. 1998), available at <http://www.policyreview.org/sept98/sprawl.html> (last visited Feb. 3, 2003).

43. See *supra* note 33; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978). Justice Antonin Scalia opined in *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 1659, 27 ELR 21064 (1997), that a TDR may be considered “the entirety . . . of the full compensation accorded a landowner when his property is taken,” and then adjudged as to sufficiency. *Tahoe*, 117 S. Ct. at 1672, 27 ELR at 21068 (emphasis in original).

44. Schenck v. City of Hudson, 997 F. Supp. 902 (N.D. Ohio 1998).

45. *City of New Rochelle v. City of Mamaroneck*, 111 F. Supp. 2d 353 (S.D.N.Y. 2000).

46. It is not within the scope of this Article to exhaustively examine the law of takings. See *infra* notes 60-62 for a modest discussion of takings case law.

47. Of course, not all growth management techniques are per se time-limited—at least not once they are fully implemented. For example, once smart growth planning and zoning are actually realized with mixed use development *on the ground*, and new communities or neighborhood additions are *in place*, the relative permanence of the development has a positive effect upon future growth-shaping in the community for a long time to come. Depending upon the kind of urban development it is, e.g., roads, commercial/industrial, it is perhaps as near to perpetuity as we can now imagine a “tool” to be. When open land is regulated for growth management, environmental, and other public welfare purposes, that prescribed use can always change at some time in the future to a currently proscribed use (thus the need for the kind of permanent conservation actions additionally recommended below). On the other hand, when land to be urbanized is given its full set of allowable developed uses, and these public wishes are carried out, the die is cast for a very long time to come; if that is done in the right place and with a good design, smart growth objectives can be met.

The question is, from a legal perspective, could it ever *attempt* to do so? Are planners, lawyers, and local political leaders bound only to consider their policies in the relatively short run of 10 to 20 years? Is planning or “managing” growth for only the next 15 or 20 years (for example, putting in place a “mere” 15- or 20-year “growth boundary”) simply *delaying* the inevitable growth beyond that point in time and merely *accepting* foreseeable or inevitable environmental decline that will come when that area is filled and the line must be expanded still further? Do we somehow have a legal obligation to completely overwhelm our natural surroundings and, indeed, ultimately endanger our own future well-being as a society? Architect and designer William McDonough pointedly asks why we should be satisfied with simply *slowing down* our ultimate demise (of course in the growth management context, we can legitimately ask whether that is really all we are doing) as he envisions a new industrial revolution without any waste and pollution and a different way of life.<sup>48</sup>

Is there any way for a community to survey its physical structure and its place vis-à-vis the natural landscape or the “green infrastructure”<sup>49</sup> of its geophysical setting *now*, determine its *ultimate* carrying capacity, and declare that, once attained, its doors will close to more growth (at least until a future city or county council decides another major change is necessary)?<sup>50</sup> Indeed, it may not be so much a question of whether a community can set a firm “line” or boundary on the ground—it probably can—so long as the population, jobs, and densities within that line are not also firmly and finally constrained. But what about such absolute constraints?

What are the legal ramifications of a community’s setting *definite and ultimate* growth boundaries? Would the Constitution prevent a community from undertaking or a state from enabling the setting of *final* limitations to growth, including population, jobs, and intensity of development? Can a community ever close its doors or pull up the drawbridge, even prospectively in the future, saying “that many, and no more?”<sup>51</sup> If not, are there alternative approaches

that might assist a community in reaching ultimately sustainable ends that balance growth with resource and environmental conservation?

Such a concept is obviously not without controversy. These are questions that perhaps go to the heart of our Constitution, as well as engage the essence of our multiple (and sometimes conflicting) visions for the future of the American landscape, the future of American communities, and the freedom of the American social economy: “There go those environmentalists, wanting to stop growth outright.” Such questions are also fraught with the uncomfortable weight and ugly history of many communities having wanted or acted in the recent past (and perhaps even now) to keep “those people” out—different cultures, different races, the poor, “others.” So it is a dilemma of conscience and public policy as well as a dilemma of law—or is it?

### Constitutional and Other Limits of Power

Americans are an extraordinarily free people, but we are not totally so. One’s lawful ability to wildly swing one’s arms around ceases when one’s arms connect with his or her neighbor’s nose. Our freedoms and responsibilities exist on a continuum.

The freedoms and civil rights guaranteed by the Constitution have been litigated, pronounced, and interpreted for more than 200 years. Some, such as the “freedom of speech,” are directly denoted in the Bill of Rights.<sup>52</sup> Others, such as the “right to privacy,” have been defined by the courts as emanating directly from—and locating within—the “penumbra” of those clearly articulated rights.<sup>53</sup>

By the same token, the law of real property comes to us in a nearly straight line from British common law and the commentaries of William Blackstone and others—themselves deriving from the philosophical traditions of John Locke and like 17th and 18th century thinkers.<sup>54</sup> Ownership of property was a supreme privilege, reserved (initially) to the successors of feudal lords. Locke contributed and elaborated the theory of “usufruct”: if a man (and at that time it was, of course, men only) tamed the landscape and made it by his labor economically useful in bearing fruit, then that real property was acceptable to be taken and held by him as his in perpetuity with proper legal documentation.<sup>55</sup> The ownership of the fee interest in real property represented the highest level of ownership and control over the bundle of rights that marked the ownership of property, and in America, the common translation became “a man’s home is his castle.”

1990s to begin to do just that, with public purchases of commercially zoned land and selected rezonings. Fodor writes that a number of communities have indeed established limits to their ultimate size by establishing a “railing” rather than a “fence” around themselves. *Id.* at 48, 49. Establishing high standards for growth, but not *preventing* the coming and going of populations, is one idea put forward. Minimum densities and maximum lot sizes are other concepts that might ultimately have such an effect.

48. WILLIAM McDONOUGH & MICHAEL BRAUNGART, *CRADLE TO GRAVE: REMAKING THE WAY WE MAKE THINGS* (2002).

49. MARK A. BENEDICT & EDWARD T. McMAHON, *GREEN INFRASTRUCTURE* (The Conservation Fund 2002); JAMES R. MARSHALL, *BUILDING GREEN INFRASTRUCTURE* (Trust for Public Land 1999).

50. This is not just a theoretical question; at least one local community has done just that, apparently successfully. Sanibel Island, Florida, undertook a study in the early 1970s, and as a result, in 1974 set a finite limit to the number of dwellings the island could hold. The cap has held to date, and its planning and zoning reflect those limits. Personal communication from Hon. Nola Theiss, Mayor, Sanibel, Florida (Aug. 30, 2002). That Sanibel is an island is important, but the question remains whether localities can (or somehow legally must) be forced to literally overwhelm all natural limitations, from water supply to air quality, to the less quantifiable quality of life attributes of a community that accrue just from the fact of having accessible open space and productive, working landscapes nearby. An argument could be constructed, using *Village of Belle Terre v. Boras*, 416 U.S. 1, 4 ELR 20302 (1974), as a touchstone that regardless of the strictures discussed below, perhaps they may not be so forced—but the law is certainly unsettled, as is discussed *infra*.

51. Indeed, apropos of the previous footnote, some planning commentators think the answer is “yes.” Eben Fodor, in *BETTER, NOT BIGGER: HOW TO TAKE CONTROL OF URBAN GROWTH AND IMPROVE YOUR COMMUNITY* (1999), convincingly argues that such is precisely what Boulder, Colorado, has done, using both its greenbelt and the density limits in its zoning ordinance and map to cap ultimate residential build-out. The same limits were not originally applied, however, to commercial development, although the city did take action in the late

52. U.S. CONST. amend. I.

53. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

54. *See, e.g.*, 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* (1765) (W.D. Lewis ed., 1897); 2 JOHN LOCKE, *TWO TREATISES ON CIVIL GOVERNMENT* §§25, 27-28, 30-41, 45-51 (G. Routledge ed., 2d ed. 1887).

55. LOCKE, *supra* note 54.

Of course, such common interpretation is only partly true. The American/British legal construct, as interpreted first by commentators and then by the states' high courts as well as U.S. courts of appeal and the Court, was to addend to the guaranteed rights of all citizens the concomitant responsibilities of all citizens to each other.<sup>56</sup> The other major idea was to recognize the necessary role of government as ultimate protector and guarantor of these sometimes conflicting ends.<sup>57</sup> In the area of property law, constitutional protections have always been balanced by the necessity for government to act for the greater good—the public health, safety, and general welfare foundation for the so-called police power. This is the power that state (and, by express delegation, local) governments hold to improve our collective lives and to protect us from our meaner, more selfish, or at least individual proclivities<sup>58</sup>—that is, when our figuratively swinging arms come into contact with our neighbor's nose.

The Takings Clause of the Constitution,<sup>59</sup> which prohibits the government from taking private property without just compensation, has been held to apply to overly burdensome (or unjustified) regulations as much as to physical occupations.<sup>60</sup> Thus, the government is permitted to regulate the use of property as long as it does so equitably among its citizens, for justifiable means, within a recognized process, and fairly treats the property owner both economically and procedurally.<sup>61</sup> In the context of the questions asked in the previous section, however, it is unlikely that a person could contend that a *prospective* real property right has been taken say, 20 years in the future, so as to assert these kinds of constitutional claims merely upon enactment or adoption of an ordinance or plan that contains an ultimate and final restriction.

Just as the well-recognized constitutional limitations of equal protection, due process, and takings may relate to the application of public policy with respect to land use plan-

ning, zoning, and growth management, other protections may also apply. For example, in strong language the Court has repeatedly expressed a fundamental constitutional right of *interstate* travel, which has been translated as the right to settle wherever one wishes within a state.<sup>62</sup> There is as yet no Court-articulated, corresponding right of *intrastate* travel, although two federal appeals courts have proclaimed and protected the personal right to migrate and settle wherever a citizen wishes *within* states.<sup>63</sup> It is not expected that the equitable use of the police power to plan and zone in a community would normally invoke this fundamental right—at least not as such power has been nominally exercised to date; indeed, there are no federal cases that have successfully elevated the use of such a claim (though we know lawyers are a creative bunch). On the other hand, given the history of the right as articulated in case law to date, it is entirely possible that, should a community somehow seek to close its doors, even prospectively in a stated future decade, such a claim for interference with a right to travel could lie—at least when applied at that future time.

### A Creative Solution

From the foregoing analysis, it is quite clear that there are limitations inherent in best planning practice, given that such practice even today is mostly a way of *pacing* future growth. While tools such as growth boundaries and other urban containment policies, regional coordination, more progressive planning and zoning ordinances, better integrated transportation and land use planning, improved local tax and subsidy regimes,<sup>64</sup> and government incentives and disincentives for new development location and form<sup>65</sup> can vastly improve current planning and growth management in many places around the country, it is equally clear that any more aggressive attempts to control *ultimate* community sizes and populations are fraught with certainly serious and possibly fatal legal infirmities.

### Impact Fees and Mitigation Banks

We may not be without a remedy, however, and that remedy is one that has been used on a much smaller scale, and for more limited purposes, in recent years. Impact fees have

56. *Thornburgh v. American College of Obstetricians & Gynecologists*, 976 U.S. 747 n.11 (1986) (the origins of the American heritage of freedom—"the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable").
57. *Stone v. Powell*, 428 U.S. 465, 524 (1976) ("every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty").
58. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 17 ELR 20440 (1987) (upholding application of the Subsidence Act and finding no taking where the state acts to protect landowners from underground subsidence).
59. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").
60. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical occupation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (comment on regulations); *Agins v. City of Tiburon*, 447 U.S. 255, 10 ELR 20361 (1980) (regulation held lawful, no taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992) (regulations can lead to taking finding if property owner deprived of all value on entire parcel). *But see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 32 ELR 20627 (2002) (two and one-half years of moratoria, suspending building permits pending completion of plan, not a taking on the facts; regulation of property can be quite severe, and taking not categorical).
61. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656-57, 11 ELR 20345, 20355 (1981) ("If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking', it is only fair that the public bear the cost of benefits received . . .") (Brennan, J., dissenting).

62. This fundamental right was stated early in U.S. history in the U.S. Articles of Confederation, which guaranteed the people of each state "free ingress and regress to and from any other state," ARTS. OF CONFEDERATION IV and in early case law in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) and *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871). In *Edwards v. California*, 314 U.S. 160 (1941), the Court struck down a state criminal penalty that restricted nonresident indigents from being brought into the state. The right to travel has often been discussed in modern case law in the context of residency requirements to obtain certain benefits. It was affirmed and explained in *United States v. Guest*, 383 U.S. 745 (1966) (restrictions on utilization of public facilities in Athens, Georgia, held unlawful); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (resident/waiting period requirements for welfare benefits held unlawful); *Memorial Hosp. v. Maricopa County*, 94 S. Ct. 1076 (1974) (durational residency prerequisite to free non-emergency medical care at county's expense held unconstitutional); and most recently in *Saenz v. Roe*, 526 U.S. 489 (1999) (California statute limiting welfare benefits available to newly arrived citizens struck down).
63. *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971).
64. *See Epstein, supra* note 18, at 369-77.
65. *See Maryland Smart Growth Program* described in the Growth Management section, *supra*.

been used by communities to relate specific increased community costs that accrue as a result of new development to such development occurring in particular places. For example, a community might charge the developer of a new large subdivision certain fees that reflect the added incremental cost of specifically improving the roads or adding school rooms to accommodate the new project.<sup>66</sup> Contra Costa, California, recently enacted impact fees, which can range as high as \$8,000 per new house, to be paid into an affordable housing trust fund that would help provide such housing.<sup>67</sup> At the same time, the Tri-Valley Transportation Council in the same part of California was considering up to a \$3,080 fee per single-family home to support transportation improvements necessary to serve the new development.<sup>68</sup> In fact, other California communities have pioneered impact fees for housing that are related directly to the *location* of development. For example, in the city of Lancaster, the farther outside the city core, the higher the fee; in Fresno, the farther from existing developed areas, the higher the tax or charge.<sup>69</sup> In 1974, the city of Fairfield agreed with the Solano County Irrigation District that it would pay a penalty whenever water service was extended to the Suisun Valley, and as a result, no such requests have been made.<sup>70</sup>

Legally, like any exaction, impact fees upon development must be very closely linked to the specific impact that the particular development is causing.<sup>71</sup> By the same token, the

idea of mitigation banks has been used to provide financial resources (or, in the case of wetlands mitigation banks, land resources) to preserve or attempt to re-create environmental features that are lost due to particular development or infrastructure projects.<sup>72</sup> The proposed solution to the problem of time posed in this Article would combine these two ideas, as follows.

#### "Greens" Fees

A self-limiting, self-executing process is envisioned. It would begin with a community's (or even better, a metropolitan or multicounty region's) undertaking of a detailed environmental and growth study to determine what environmental, open space, and working landscape resources it wishes to conserve in perpetuity. That is, what is the nature, form, and extent of the community's necessary "green infrastructure"? Once accomplished, a community would develop its long-range or comprehensive plan and zoning ordinance to reflect those priorities, and could further incorporate best growth management techniques such as those detailed above.<sup>73</sup>

Using a set fee schedule based, in part, upon (1) the local cost-to-purchase fee and easement interests in open space or resource land, and (2) the desire to capture back an amount of open space equivalent to that being lost over time, the community or region could charge land mitigation impact fees for each and every new residential and commercial land development project on so-called greenfields or open land. Such per unit fees could be graduated based on the sizes of residential lots (the largest lots would be charged the highest—and quite significant—fees), the amount of square feet of commercial space that covers the land, or some percentage of per unit value. The very high fees on large-lot development would act as a disincentive for such development

66. Two Court cases have dealt specifically with conditions or exactions placed upon property owners when development was proposed. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 17 ELR 20918 (1987), the commission conditioned the expansion of a beach bungalow on the owners' providing public access over their property to the public beach. The Court acknowledged the legitimacy of governmental conditions as long as a clear "nexus" could be shown between the exaction and the government's legitimate objective. In *Nollan*, however, such a connection was not proved and a taking was found. *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994) concerned a hardware store's requested expansion, and the city's conditioning the permit on the dedication of several pathways. The Court reversed the Oregon Supreme Court's affirmation of this action and sent the case back to be subjected to a new two-part exaction test: a demonstration by the government of a very close nexus between the exaction and the legitimate governmental interest, and "rough proportionality" between the exaction and the nature and extent of the project's purported impact.

67. Linda Davis, *Housing Fees at Tassajara Set Precedent*, CONTRA COSTA TIMES, June 27, 2002, at A3.

68. Bonita Brewer, *80% Traffic Impact Fee Hike on Table*, CONTRA COSTA TIMES, July 23, 2002, at A3.

69. EDWARD T. McMAHON ET AL., MODELS FOR DEVELOPMENT IN CALIFORNIA 39 (2002); John D. Landis, *Land Regulation and the Price of New Housing*, 54 J. OF THE AM. PLAN. ASS'N 9 (1986).

70. McMAHON ET AL., *supra* note 69.

71. *Associated Home Builders of Greater Eastbay, Inc. v. City of Walnut Creek*, 484 P.2d 606, 1 ELR 20223 (Cal. 1971). Also note that numerous studies have been undertaken over the years—some better than others—demonstrating the relatively high public cost of providing services to urban and suburban land uses, versus the relatively lower cost to a community to support farm, timber, and other open land uses. While some of these studies have not examined with equal attention the *income* that particular forms of development provide to communities, others have done so—demonstrating both the impacts that accrue to localities due to uncontrolled sprawl and the cost efficiency and high benefit-to-cost ratio of well-managed growth. Examples of these studies and related analyses include: TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, COSTS OF SPRAWL—2000 (2001); GROW SMART RHODE ISLAND/H.C. PLANNING CONSULTANTS, INC., THE COSTS OF SUBURBAN SPRAWL AND URBAN DECAY IN RHODE ISLAND (1999); AMERICAN FARM-LAND TRUST, COST OF COMMUNITY SERVICES STUDIES (various reports 1988 to 1997); ROBERT W. BURCHELL & DAVID LISTOKEN,

LAND, INFRASTRUCTURE, HOUSING COSTS, AND FISCAL IMPACTS ASSOCIATED WITH GROWTH: THE LITERATURE ON THE IMPACTS OF SPRAWL VERSUS MANAGED GROWTH (1995). It would be essential for a locality or region considering the use of the tool recommended for consideration here to clearly and specifically articulate the direct costs to the locality or region due to urban development in the green infrastructure, which had been comprehensively studied and for which a conservation or protection plan had been created. A nexus should be shown between the need for the impact/mitigation fee and the community's legitimate objectives in, and even fiscal or property value benefits of, protecting various components of the interconnected open space system (the *benefits* side of the equation). Presumably the "rough proportionality" relationship between the fee charged and its use could be demonstrated with solid reference to cost/impact factors noted above together with an analysis of the local cost-to-purchase of fee and easement interests in land and the pace of local land conversion.

72. Charles H. Ratner, *Should Preservation Be Used as Mitigation in Wetland Mitigation Banking Programs?: A Florida Perspective*, 48 U. MIAMI L. REV. 1133 (1994) (discussion of the use of financial incentives to preserve and recreate wetlands).

73. One recent commentary has made a reasoned and logical appeal for much stronger linkages between smart growth planning for development and the kind of smart conservation actions that can only derive from equal foresight on the green infrastructure side of the ledger. JAMES M. McELFISH JR. ET AL., SMART LINKS: TURNING CONSERVATION DOLLARS INTO SMART GROWTH OPPORTUNITIES (ENVTL. L. Inst. 2002). In their analysis, McElfish and his colleagues at the Environmental Law Institute argue that the best way to spend the substantial federal, state, and local funding now being directed to land conservation is to directly link it to solid conservation plans, and perhaps condition it to solid smart growth development techniques. The tool suggested in the instant Article would effectively tie conservation acquisitions to the former.

and directly reflect the relatively high land utilization or open land conversion that sprawl entails.<sup>74</sup>

The fees would be directed into a mitigation bank of sorts, to be used solely to purchase open space within the already prioritized green infrastructure of the community. Once purchased, the fee interests or easements would be placed within the control of a community (public, private, or quasi-governmental) land trust for stewardship in perpetuity.<sup>75</sup> According to carefully and publicly articulated community desires, fee-owned properties could be open to full or partial public use. Easements so purchased would be subject to a clear articulation of desires as between the public/land trust and the seller that would determine future use—continued farming or timbering, for example—with little or no direct public access in those particular instances. Thus, a mechanism would be created that would slowly and effectively enclose (and integrate within) a community fully protected open space while allowing that community to continue to build out according to the market and the community's best growth management plans and ordinances.

To see whether such a regime could work, an actively developing community in Maryland was analyzed. Montgomery County, Maryland, was chosen because of its development profile as well as the ready availability of data. Using information about residential development and commercial construction in the county in the year 2000, a variety of fee

structures was tested. Table 1 contains a summary of that analysis. It appears that using various combinations of the fee structure variants noted, and posing an estimated per acre average open land purchase cost of \$3,500, enough fees would be captured to enable purchase of between 2,600 to 5,000 acres of land per year. Obviously, the fee structures could be internally adjusted and mixed differently or assigned in a more graduated manner, in order to either better attain the local goal or better reflect local concerns about impact upon people and businesses. It should be noted that local impact fees are not universally legally permissible, and in such cases, state legislation would be needed to provide the local authority necessary.<sup>76</sup>

## Conclusion

The conversion of open land to sprawling development is continuing to affect communities across America. It is enervating them economically, creating instead of helping to resolve traffic congestion problems, and adversely affecting the natural environment that is so important to their identities and ultimate quality of life.<sup>77</sup> The use of currently available best growth management techniques can improve the situation substantially, but in the end (and over time), the effect of many of these techniques is mainly to slow the consumption of vital parts of the natural and working landscape.

While it appears that setting ultimate growth *and population* "boundaries" could potentially face a significant constitutional challenge, even if they are based upon scientific analysis of carrying capacity or environmental and natural resource needs, there may be a technique that can combine good planning with the ongoing land development market to automatically conserve land over time and save the green infrastructure so essential to communities' futures. The technique outlined here combines the familiar tools of impact fees and mitigation banks to help overcome the inherent limitations of some of today's growth management regimes. Without it or some other legal device that actually helps directly save land as growth proceeds, we might not be able to avoid thoroughly undesirable, irreversible, and possibly inevitable environmental and community impacts in the future.

74. There is always the possibility that a disparity of the fees as between different sized lots, e.g., one-quarter-acre versus five-acre lots, or different uses, i.e., residential versus commercial, could face a constitutional equal protection challenge. If a rational relationship exists to explain such a differential (and it does), if all similar uses or all similarly sized lots are treated equally, and if the fee as applied does not appear to affect in particular a protected class or be based upon some inherently suspect discrimination, however, legal acceptability is more likely than not. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Dunn v. Blumstein*, 405 U.S. 330 (1972). In the case where differential classification involves a fundamental constitutional right, such as the right to travel, a compelling governmental interest must be shown. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986). Again, with the detailed and exacting study noted above, it is likely that the local or regional government could demonstrate the compelling interest in orderly, well-defined and constrained growth—and *concomitant land conservation*—that adequately and systematically protects a community's valuable green infrastructure as it allows growth to proceed.

75. It should be noted that the "perpetuity" matter is not entirely settled, even for solidly written conservation easements or fee ownership by public park entities. Properties so protected are, for example, conveyed or condemned out of their conservation status with a bit too much regularity according to one commentator. Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592 (2001). Levin argues convincingly for the development under state law of a purposefully cumbersome process for permitting any condemnation or conversion of permanently conserved property.

76. For example, the Iowa Supreme Court recently held that Des Moines did not have the authority to set such fees. *Home Builders Ass'n of Greater Des Moines v. City of W. Des Moines*, 644 N.W. 339 (Iowa 2002).

77. See generally BENFIELD ET AL., *supra* note 3; ANTHONY DOWNS, *NEW VISIONS FOR A METROPOLITAN AMERICA* 8-9 (1994); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 69-70, 72-75 (1999).

Table 1: Year 2000 Montgomery County, Maryland Housing & Commercial Activity With Representative Land Bank Contributions

Housing Type	# Units	Avg. Lot Size (sq. ft.)	Variant A \$/unit fee ***	Total \$ for Variant A	Variant B \$/unit fee	Total \$ for Variant B	Variant C ** avg. val. per unit (\$)	0.75% x avg. val. per unit	Total \$ for Variant C	Variant D \$/sq. ft. (w/ exceptions)	Average per unit fee	Total \$ for Variant D
Multi-family 3/more family units	899	N/A	\$200	\$179,800	\$100	\$89,900	90,000	675	\$606,825	\$200/unit (exception)	\$200	\$179,800
Townhouse/Condo <4,000 sq. ft.	1332	2,025	500	666,000	300	399,600	115,000	863	1,149,516	\$0.1/sq. ft.	203	270,396
Sing. Fam./Condo 4,000 sq. ft.-1/4 acre	1146	7,435	1,500	1,719,000	800	916,800	175,000	1,313	1,504,698	0.1/sq. ft.	744	852,624
Sing. Fam. 1/4 - 1 acre	881	20,733	5,000	4,405,000	3,000	2,643,000	280,000	2,100	1,850,100	0.1/sq. ft.	2,073	1,826,313
Sing. Fam. Rural 1 - 5 acres	379	85,133	15,000	5,685,000	12,000	4,548,000	1,500,000	11,250	4,263,750	0.1/sq. ft.	8,513	3,226,427
Sing. Fam. Rural/Ag. 5-10 acres	32	245,828	25,000	800,000	20,000	640,000	3,000,000	22,500	720,000	0.1/sq. ft.	24,583	786,656
Sing. Fam. Rural/Ag. >10 acres	21	584,430	200	4,200	200	4,200	200,000	1,500	31,500	\$200/unit (exception)	200	4,200
<b>Total units</b>	<b>4,690*</b>											
<b>Land Bank Funds Available From Housing</b>				13,459,000		9,241,500			10,126,389			7,146,416
<b>Commercial Starts</b>	<b>Total Value</b>	<b>Total Sq. Feet</b>	<b>\$/sq. ft. *****</b>	<b>Total</b>	<b>\$/sq. ft.</b>	<b>Total</b>	<b>0.5% of Value</b>					
	\$797,838,277	7,717,025	0.5	\$3,858,512	0.3	\$2,315,107	\$3,989,190					
<b>Land Bank Funds Available From Commercial</b>				\$3,585,512		\$2,135,107	\$3,989,190					
<b>Total Land Bank Funds*****</b>				\$17,317,512		\$11,556,607	\$14,115,579					

\* The numbers in this column were assembled from various data sources, including Maryland-National Capital Park and Planning Commission-Montgomery County, U.S. Census, and Metropolitan Washington Council of Governments. This accounts for some double counting that occurred, probably between multi-family and townhouse/condo categories. The actual residential total unit number is likely closer to 4,200 units.

\*\* Average value/unit is estimated based on size of lot, e.g., the average value of units in the 1-5 acre category is estimated at approximately \$1.5M/unit.

\*\*\* Per unit fee is an average for all types within category, then multiplied times the number of units to obtain totals for Variants A and B.

\*\*\*\* These totals assume the mix shown. Obviously, various commercial and residential formulae/variants could be mixed and matched. Or, more income could be generated from commercial activity, with residential reduced. Also note that the Variant C example provides for a "flatter," slightly more regressive impact fee approach.

\*\*\*\*\* These calculations are based upon total square footage; it would be possible, of course, to base the calculations upon "footprint" or impervious surface coverage.