

## The Politics of Land Use Reform in New York: Challenges and Opportunities

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# THE POLITICS OF LAND USE REFORM IN NEW YORK: CHALLENGES AND OPPORTUNITIES

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## INTRODUCTION

Approximately 1,600 units of local government and about 30,000 players (political and quasi-political)<sup>1</sup> participate in the land use planning and zoning game.<sup>2</sup> The multitude of parties participating in this land use process include: a state legislature of 211 elected legislators hailing from two major political parties,<sup>3</sup> hundreds of appointed officials and career bureaucrats in state agencies,<sup>4</sup> and staffing legislative committees<sup>5</sup> where land

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<sup>1</sup> For the purpose of this article, "political players" refers to elected and appointed officials who ran for office or sought appointment based upon their affiliation with a particular political party. "Quasi-political players" refers to members of planning boards and zoning boards who, although appointed by a political player, may not always be considered "political" in the sense of a party affiliation. However, because of the decision-making authority they possess within a confined community, they maintain a position somewhat political in nature.

<sup>2</sup> See THE NELSON A. ROCKEFELLER INST. OF GOV'T, STATE UNIV. OF NEW YORK, 1998 NEW YORK STATE STATISTICAL YEARBOOK 213 (23rd ed. 1998) (stating that there are 932 towns, 62 cities, and 554 villages in New York that possess zoning authority and New York's 62 counties are the only unit of local state government lacking such zoning authority).

<sup>3</sup> Immediately following the November 1998 elections, the New York State Senate had 35 seats held by Republicans and 15 seats held by Democrats. See Jonathan P. Hicks, *Democrats Retain Hold on Assembly in Albany*, N.Y. TIMES, Nov. 4, 1998, at B13. The New York State Assembly, in contrast, had 98 seats held by Democrats, and 52 Republican held seats. See *id.*

<sup>4</sup> By way of example: the Department of Environmental Conservation was involved in reforms made to the State Environmental Quality Review Act and the creation of the Hudson River Valley Greenway Communities Council; the Department of State oversees the Coastal Zone Management Program and provides technical assistance on planning and zoning matters to local governments across the State; the Thruway Authority has jurisdiction over the Canal Recreationway Commission, which provides for the regional planning of a significant resource; the Department of

use reform initiatives may formally and informally be reviewed. It is, therefore, no small political feat to accomplish significant land use reform. The dream of achieving even greater reforms in both state and regional land use controls has become a political reality because of the leadership demonstrated by New York in the area of land use reform in the 1990s.<sup>6</sup> This critical examination of land use reform in the state is designed to educate newcomers to the political territory and dimensions involved in achieving land use reform. Additionally, this article illustrates a path of reform, which could result in a major overhaul of statewide attitudes and regulations concerning land use planning and zoning. Finally, this article concludes by setting forth a warning of the potential consequences New York local, regional, and state governments may face, should they fail to continue the effort to reform our land use decision-making process.

## II. THE CHALLENGES

No doubt the challenge of achieving such a major reform at times may seem like an insurmountable goal, like a climb to the top of a peak with slippery slopes and rock slides standing in the way of satisfaction. In such a situation, having only one level of

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Agriculture and Markets coordinates the district's agricultural program; and the Division of Housing and Community Renewal was involved in the consideration of statewide coordination of land use in the early 1990s. See Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 PACE L. REV. 505, 518 (1993) [hereinafter *Regional Planning*] (noting that "state agencies may prepare statewide plans which contain significant regional planning recommendations or components").

<sup>5</sup> For example, most of the land use reform bills of the 1990s went through the Legislative Commission on Rural Resources and the Senate and Assembly Local Government Committees. Related legislation was also considered by the Environmental Conservation Committees, the Housing Committees, the Legislative Commission on Water Resource Needs of New York State, and the Tourism, Arts & Sports Committee. See *id.* at 518-21.

<sup>6</sup> See N.Y.S. LEGISLATIVE COMM'N ON RURAL RESOURCES AND STATE LAND USE ADVISORY COMM., KEEP NEW YORK GROWING: BALANCING WORKING LANDS, CONSERVATION AND DEV., COMMUNITY PLANNING & DEV. STATUTES RECODIFICATION PROJECT 7-11 (1998) [hereinafter KEEP NEW YORK GROWING] (detailing 31 new land use statutes enacted in New York from 1990 through 1998); Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601, 624-28 (1999) [hereinafter *Century's End*] (discussing the State Commission on the Capital Region's efforts to improve the service of local governments and to recodify New York's land-use laws throughout the 1990's). See generally James A. Coon et al., *The Land Use Recodification Project*, 13 PACE L. REV. 559 (1993) (detailing the history and development of land use reform in New York).

government to deal with would be challenge enough. But, unfortunately, the "smart growth"<sup>7</sup> type of reform New York needs requires an unprecedented level of support, communication, cooperation, and participation from local, regional, and state governments, as well as from the private and non-profit sectors.

### A. Local Level

At the local government level, land use reform faces numerous challenges. Currently, planning and zoning authority rests with the legislative bodies of cities, towns, and villages.<sup>8</sup> The authority to regulate land use is rooted in the Statute of Local Governments,<sup>9</sup> and is also found within the Municipal Home Rule Law.<sup>10</sup>

The home rule concept consists of two basic principles: 1) the state has granted to local governments the power to manage their affairs; and 2) the state is restricted from intruding upon matters that are of local, rather than state concern.<sup>11</sup> Within the concept of home rule is a limited authority on the part of local

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<sup>7</sup> "Smart Growth" is the term coined by Maryland Governor Paris Glendening in his landmark land use reform law enacted in 1997. See Peter S. Goodman, *Glendening vs. Suburban Sprawl: Governor Banks on 'Smart Growth,' but Even Supporters Have Doubts*, WASH. POST, Oct. 6, 1998, at B1, available in LEXIS, News Library, Group File, All (outlining the ambitious Smart Growth legislation set forth by Governor Glendening); Michael Abramowitz & Terry M. Neal, *'97 Assembly Session a Mixed Bag for Glendening: Tax Cut a Plus, but School Aid Victory Could Come Back to Haunt Him*, WASH. POST, Apr. 8, 1997, at D1 (noting that Glendening's landmark Smart Growth law was one of his many legislative victories in Maryland's 1997 General Assembly session); see also *Smart Growth and Neighborhood Conservation*, (visited Sept. 15, 1999) <<http://www.op.state.md.us/smartgrowth>> (Maryland's Smart Growth web-site).

This phrase has become so popular, that the Environmental Protection Agency partnered with the ICMA and the Urban Land Institute to launch the Smart Growth Network in 1998. See Mary Walsh, *New Ideas for Thinking Smart About Growth; Examples of Urban Development Strategies That Protect Communities*, NATION'S CITIES WKLY., Oct. 12, 1998, at 13, available in LEXIS, News Library, Group File, All.

<sup>8</sup> See N.Y. GEN. CITY LAW § 20 (McKinney 1989 & Supp. 1999); N.Y. TOWN LAW § 261 (McKinney 1987 & Supp. 1999); N.Y. VILLAGE LAW § 7-700 (McKinney 1996).

<sup>9</sup> See N.Y. STAT. LOCAL GOV'TS LAW §10 (McKinney 1994).

<sup>10</sup> See N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994).

<sup>11</sup> See James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 (1985) (describing the components of home rule); see also, J.D. Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect*, 15 BUFF. L. REV. 335, 337-38 (1965-1966) (indicating that one principle of the home rule "is the imposition of restrictions on state legislative interference in matters over which the municipality does have affirmative power").

governments to supercede state statutes.<sup>12</sup> Historically, the management of most land use control and decision-making was accomplished at the local government level, under the auspices of cities, towns, and villages.<sup>13</sup> However, beginning in the 1970s, New York local governments began to witness an intrusion by the State into what had traditionally been viewed as matters of local concern.<sup>14</sup> Further, by the late 1980s, and certainly in the last decade of this century, the federal government had intruded on local governments in New York and municipalities across the country.<sup>15</sup> This further eroded the concept that all land use control is local in nature.

For advocates of local control in the area of land use decision-making, it is critical to understand the historical devolution of the concept of "matters of local concern" in the last twenty-five years.<sup>16</sup> Courts now begin to assess cases according to the premise that only land control issues of "purely local concern" should be governed at the municipal level. Through the application of this premise, courts have found that more and more situations, which might have been viewed as "local concerns" in the past, are

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<sup>12</sup> See James D. Cole, *Local Authority to Supersede State Statutes*, 63 N.Y. ST. B.J. 34 (1991) (noting that several state statutes, including Article IX of the State Constitution and section 10 of the Municipal Home Rule Law, grant local government entities the power to supersede state statutes in limited areas).

<sup>13</sup> See John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 506-07 (1993).

<sup>14</sup> See *id.* at 497-98, 515-21 (discussing how state statutes and court decisions began to attack the power of local governments).

<sup>15</sup> See Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 107-10 (1998) (noting examples of federal intrusion such as: the Coastal Zone Management Act, 16 U.S.C. § 1451 (1998), which regulates planning and control of the coastal zone; the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6501 (1983), which requires review of applications for federal grants dealing with land use planning projects; and the 701 Program of "Urban Planning Assistance" implemented under the Housing Act of 1954, 40 U.S.C. §§ 460-62 (1986), which imposed an overview of urban housing and planning); see also Part V (discussing federal legislation that intrudes on local land use planning).

<sup>16</sup> This article presupposes a knowledge of earlier historical developments, such as the watershed decision set forth in *Adler v. Deegan*, 167 N.E. 705 (N.Y. 1929).

In *Adler*, the New York Court of Appeals first introduced the concept that there could be matters of "state concern" which do not fall within the scope of the "property, affairs or government," of a municipality. This concept was one of the first limitations placed on the concept of the home rule. In this particular case, the Court determined that the state-enacted Multiple Dwelling Law did not intrude into local affairs. The Court determined that the law had the purpose and effect of a health measure, designed to protect the health, safety, and welfare of the residents of the entire state, not just the residents of the City of New York. See *id.*

now in fact matters of regional and/or statewide concern. State concerns have been found to exist in many significant land use cases.<sup>17</sup> These cases involved various important land use control issues, such as the future of the forests in the Adirondack region,<sup>18</sup> affordable housing needs in the town of New Castle,<sup>19</sup> and the need to protect the drinking water supply in the town of Islip.<sup>20</sup> In fact, since impacts of local land use decision-making have proven to spread beyond the arbitrarily drawn municipal boundary lines, it has become clear that decision-making with respect to land use control is a regional, if not a statewide concern. This is particularly true for such issues as air and water quality control, natural resource protection, economic health, housing, quality of life, and transportation.<sup>21</sup>

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<sup>17</sup> See Nolon, *supra* note 13, at 498–501 (agreeing with the urgings of the judicial branch that such matters affect the people of the entire state, and are, therefore, matters which would be better handled by state, as opposed to local government).

<sup>18</sup> See *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 582 (N.Y. 1977) (“To categorize as a matter of purely local concern the future of the forests, open spaces, and natural resources of the vast Adirondack Park region would doubtless offend aesthetic, ecological, and conservational principles.”).

<sup>19</sup> See *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (“Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board’s territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality.”).

<sup>20</sup> See *Town of Islip v. Cuomo*, 473 N.E.2d 756, 757 (N.Y. 1984) (finding the statute’s main “purpose is the protection of the sole source aquifer for Nassau, Suffolk and part of Queens from pollution, a matter of State concern”).

<sup>21</sup> See John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 373–74 (1993). In this article, Professor Nolon documents how over the last two decades New York courts have expressed “[t]hat meeting the needs of the people of the state generally must be an objective of local land use regulation; the welfare of the landowners and citizens within the geographical boundaries of the community is not the sole end of land use regulation.” *Id.* (citing *Berenson*, 341 N.E.2d at 242–43).

Nolon states “local governments are not competent, by themselves, to measure regional needs and decide how to accommodate them.” *Id.* (citing *Golden v. Town of Ramapo*, 285 N.E.2d 291, 300 (N.Y. 1972)). In addition, “state and regional agencies should articulate such needs and explain to local governments the extent to which they must meet such needs.” *Id.* (citing *Long Island Pine Barrens v. Planning Board of the Town of Brookhaven*, 606 N.E.2d 1373, 1380 (N.Y. 1992)).

See *Berenson*, 341 N.E.2d at 243; *Golden*, 285 N.E.2d at 300 (providing examples of cases that emphasize the need of the state interests to govern the actions of local governments when dealing with land use issues).

### B. Regional Level

There are many examples of regional planning in New York.<sup>22</sup> The State's greatest shortcoming, however, is that although there are numerous examples of quality regional planning efforts, these initiatives lack any clear coordination between each other and to the State as a whole.<sup>23</sup> For example, historically the State will fund a regional study initiative, but fail to provide any back-up or technical assistance.<sup>24</sup> This clear lack of support or front-end buy-in can spell doom for the regional planning effort. Furthermore, New York State has failed to provide a mechanism for the formal exchange of the information gained and lessons learned from the diverse regional planning programs and experiments in operation.

#### 1. State Commission on the Capital Region

The State Commission on the Capital Region offers an interesting case study in regional politics. In June 1996, the Commission released their report, "Growing Together Within the Capital Region."<sup>25</sup> Created and funded by the state legislature in 1994 (but staffed and operated totally independently from state government), the Commission set out to assess ways to improve the delivery of local government services through regional approaches.<sup>26</sup> When the Commission was getting started, it facilitated public hearings in each of the participating counties for the purpose of identifying five discrete substantive areas where it

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<sup>22</sup> See *Regional Planning*, *supra* note 4, at 526 ("Examples of special purpose regional planning schemes in New York include regional or multi-jurisdictional comprehensive planning as authorized by statute for solid waste management plans, transportation, environmental protection, and water resources.").

<sup>23</sup> See *id.* at 506.

<sup>24</sup> See *id.* at 554-55 ("The New York State Department of State is now statutorily charged with providing information and technical assistance to municipalities on land use planning issues, but due to budget cuts over the decades, this agency is left only with the capacity to react to and answer inquiries from municipal officials."). Recently, the Department has begun to increase staff and provide some enhanced levels of technical assistance to local governments.

<sup>25</sup> THE NELSON A. ROCKEFELLER INST. OF GOV'T, STATE UNIV. OF NEW YORK, GROWING TOGETHER WITHIN THE CAPITAL REGION, THE REPORT OF THE STATE COMM'N ON THE CAPITAL REGION (June 1996) [hereinafter GROWING TOGETHER].

<sup>26</sup> See *id.* at 1 ("Recognizing the common public interest in the future of this region, the New York State Legislature created the State Commission on the Capital Region . . . to study the delivery of local government services and [provide] ways for improving them.").

would focus its attention for eighteen months.<sup>27</sup> From a choice of almost two dozen possible subject areas, land use planning ended up on the "top five list" at every public hearing.<sup>28</sup>

The Commission created a Land Use Advisory Committee comprised of thirty-two people to make recommendations to the Commission.<sup>29</sup> Representatives from the public, private, and non-profit sectors participated, and, after many heated meetings, delivered a consensus report with nearly unanimous support for each recommendation.<sup>30</sup> The Commission adopted most of the recommendations. However, in several instances, Commission members altered the approaches and then integrated them with recommendations from the economic development and transportation arenas.<sup>31</sup> The deal-breaker for regional planning came with the recommendation of tax base sharing, one not proposed by the Land Use Advisory Committee, but an idea pushed through by Commission members.<sup>32</sup> Although tax base sharing has been successful in some regions of the country,<sup>33</sup> it is a concept which should be considered only after a regional plan has been established. Part of establishing a successful regional plan includes a buy-in from all participating municipalities, with formulas developed based upon projected shifts in revenue due to

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<sup>27</sup> See *id.* at 14–15 (listing the following five priority service areas; transportation, solid waste, land use, general administration, and economic development).

<sup>28</sup> The great irony was that as the Commission was getting started, none of the "political players" wanted to touch this author's suggestion of land use as a topic since it was viewed as important but "way too political," and "controversial."

<sup>29</sup> The author served as a consultant to the Land Use Advisory Committee.

<sup>30</sup> See *GROWING TOGETHER*, *supra* note 25, for a summary of the Committee's report. A full copy of the Committee Report is available from the author.

<sup>31</sup> Part II of the State Commission on the Capital Region's report, entitled "Managing and Investing in the Region's Assets: For a Stronger Economy, for a Better Quality of Life," suggests strategies for integrating land use, economic development, and transportation planning. See *id.* at 73–96.

<sup>32</sup> Of the counties involved, Saratoga was the only one experiencing significant economic growth. The local officials from Saratoga County refused to cooperate in any tax base sharing scheme since it meant that they would be transferring revenues to other counties who, at the time, were less economically successful. Recommendation #8 called for state legislation to establish a region wide tax base pooling system to be known as the "Capital Region Economic Development Fund." *Id.* at 43–44.

<sup>33</sup> See Myron Orfield, *Metropolitics: Coalitions for Regional Reform*, 15 BROOKINGS REV. 6, 8 (1997) (detailing how sweeping improvements have been made in recent years to area of Minneapolis-St. Paul, partially through the use of tax base sharing).



the strategic decisions made in the planning process. Moreover, it should be implemented looking forward, not looking back.

The media honed in almost exclusively on the tax-base sharing debate. Therefore, it came as no surprise that the Commission was unsuccessful in its efforts to secure state funding to continue its work. In June 1997, an invitational forum on regional planning was held, targeting all chief elected municipal officials, key business and regional leaders, real estate specialists, and others for a day long working session to determine whether there was any interest in moving forward with regional planning.<sup>34</sup> Although there was interest in cooperation and collaboration, it was clear that efforts were going to be slow and incremental. Some of the ideas have come to fruition, including the closer geographic proximity of two key regional planning entities, who are now located in the same office building.

## 2. The Words Need Actions

New York State has authorized an array of permissive regional planning techniques. For example, a county may establish a county planning board,<sup>35</sup> and the legislative bodies of two or more municipalities may collaborate to form a regional planning council.<sup>36</sup> To promote inter-community planning, federations may be formed between county and regional planning entities.<sup>37</sup> Furthermore, two or more units of local government may collaborate to achieve cooperative planning and land use regulation.<sup>38</sup> Although the statutory language provides for the production of inter-jurisdictional planning models worthy of national and even international recognition, the words lack carrots (i.e., any incentive) to move the mere suggestion into implementation.<sup>39</sup> The

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<sup>34</sup> The Forum was hosted by the Government Law Center of Albany Law School.

<sup>35</sup> See N.Y. GEN. MUN. LAW § 239-c(2) (McKinney 1999).

<sup>36</sup> See *id.* § 239-h(3).

<sup>37</sup> See *id.* § 239-g(1).

<sup>38</sup> See N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1999); N.Y. GEN. MUN. LAW §§ 119-m, 119-n, 119-o (McKinney 1999); N.Y. TOWN LAW § 284 (McKinney 1987 & Supp. 1999); N.Y. VILLAGE LAW § 7-741 (McKinney 1996). In fact, the enabling acts specifically authorize municipalities to undertake joint, cooperative agreements to: create a consolidated planning board; create a consolidated zoning board of appeals; create a comprehensive plan; create a consolidated land use administration and enforcement program; and create an intermunicipal overlay district.

<sup>39</sup> See Patricia E. Salkin, *Land Use in the 21<sup>st</sup> Century: Political Challenges and Opportunities*, LAND USE L. & ZONING DIG., May 1999, at 3, 5 [hereinafter *21<sup>st</sup> Century*].

permissive language in these enabling acts also implies that these efforts can be destroyed as quickly as they are created. Thus, collaborative planning bodies are always subject to the political whim of the moment, a reality which often fails to provide a healthy environment for a thriving regional perspective.

For example, regional planning councils are funded by and exist at the discretion of the collaborating municipalities,<sup>40</sup> and members appointed to these regional councils may be removed by the appointing municipality "for cause."<sup>41</sup> The mere possibility that a municipality may choose to cease funding the regional planning council for any number of reasons, including the fact that they may not be pleased with a plan, recommendation, or decision that may not be in the particular locality's best interests, can be a significant barrier to substantive and critical regional land use decision-making in New York. This could cause regional planning councils to take on fairly non-controversial projects where there is already consensus, while avoiding issues that truly need to be addressed regionally. It is uncontested that regional planning councils have been a major source of data collection and dissemination for participating municipalities, including offering excellent geographic information system support. In reality, however, the regional council model still falls short of using information to the best of its ability and suggesting the best regional practices. Finally, the threat of politicization of the regional planning council model is further demonstrated through the potential removal of members "for cause."<sup>42</sup> The enabling legislation for membership on regional planning councils indicates that members may be removed for cause, but the phrase "for cause" is not defined in statute.<sup>43</sup> This vague standard

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<sup>40</sup> See N.Y. GEN. MUN. LAW §239-h(3)(h) (McKinney 1999) ("Collaborating legislative bodies may, in their discretion, appropriate and raise by taxation, money for the expenses of the regional planning council. . .").

<sup>41</sup> See *id.* §239-h(3)(f) (authorizing the legislative body of each collaborating municipality to remove any member it has appointed "for cause," and, in addition, "may provide by resolution for removal of any such regional planning council member for non-compliance with minimum requirements relating to meeting attendance and training as established by the collaborating legislative bodies by resolution").

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* The language used in this section is almost identical to the provisions governing members of town, city, village, and county planning and zoning boards. See N.Y. GEN. CITY LAW §§ 27(9), 81(8) (McKinney 1989 & Supp. 1999); N.Y. GEN. MUN. LAW § 239-c(2)(f) (McKinney 1999); N.Y. TOWN LAW §§ 267(9), 271(9) (McKinney 1987 & Supp. 1999); N.Y. VILLAGE LAW §§ 7-712(9), 7-718(9) (McKinney 1996).

leaves open the possibility that it could be interpreted to support a removal for decisions and representation not in keeping with the provincial "best interests" of the appointing locality.<sup>44</sup> This looming threat also serves as an unstated deterrent to regional decision-making that may challenge the balance between matters of purely local concern and matters of regional concern.

The challenge is to structurally move New York's local governments into meaningful regional partnerships while avoiding political "hot buttons" such as a direct affront to the notion of local home rule control.<sup>45</sup> In addition to regional programs that exist at the state level, it mandates the State to create and fund regional planning programs at the local level.

### 3. The Models at Century's End

Although New York is noted in the planning literature for the somewhat heavy-handed Adirondack Park Agency model,<sup>46</sup> this type of state operated, regionally based regulatory agency will not likely be replicated in the state.<sup>47</sup> Two regional planning

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The removal provisions were added to these sections during the land use recodification effort in the 1990s. See Coon et al., *supra* note 6, at 590, 594. There is neither legislative history nor a definition as to what constitutes "for cause" as used in these enabling acts.

<sup>44</sup> The author participated in meetings of the Land Use Advisory Committee where the language was developed. There was no clear consensus as to the appropriate standard to be applied to the phrase "for cause." In all likelihood, it does not refer to a poor attendance record, since removal for this reason is specifically authorized in the same section of law. The argument could be made that it refers to unethical conduct, however, local government ethics issues should be decided in accordance with the provisions of Article 18 of the New York General Municipal Law and any relevant locally adopted ethics laws. See N.Y. GEN. MUN. LAW §§ 800-13 (McKinney 1999). Short of an illegal act made by a council member in the performance of their duties (or where the member is no longer able to serve), a major unanswered question looms: may a member be removed "for cause" when the local legislative body does not like the performance of the appointed member?

<sup>45</sup> See Patricia E. Salkin, *Political Strategies for Modernizing State Land-Use Statutes*, LAND USE L. & ZONING DIG., Aug. 1992, at 3, 5 [hereinafter *Political Strategies*].

<sup>46</sup> See N.Y. EXEC. LAW §§ 801-20 (McKinney 1996 & Supp. 1999). For a more detailed discussion of the Adirondack Park Agency, see *Regional Planning*, *supra* note 4, at 530-33 (describing the history of the establishment and the current and future roles of the Adirondack Park Agency).

<sup>47</sup> Although the Adirondack Park Agency continues to actively exercise its jurisdiction, it is constantly criticized by landowners and is a target for groups including the property rights activists. Even an effort to study the Agency and the Park in 1990 triggered significant opposition. See THE COMMISSION ON THE ADIRONDACKS IN THE TWENTY-FIRST CENTURY, THE ADIRONDACK PARK IN THE TWENTY-FIRST

programs established by the state legislature in the last decade, however, offer the promise of a redefined, politically correct, and effective regional planning model. The Hudson River Valley Greenway Communities Council and the Central Pine Barrens Joint Planning and Policy Commission provide working case studies in progress.<sup>48</sup> One central theme in both the Greenway and Pine Barrens approaches is the notion of "compact planning."<sup>49</sup> A "compact" is a voluntary agreement entered into by participating municipalities whereby a comprehensive area wide plan is developed by participants, and municipalities may elect to become a "participating community" in plan implementation. In exchange for participation in the compact, local governments are offered an array of incentives.<sup>50</sup>

#### 4. The Hudson River Greenway Communities Council

The Hudson River Greenway Communities Council offers a "study in progress" on the compact planning approach. Pursuant to its enabling legislation, the Greenway Communities Council is charged with guiding and supporting a cooperative planning process for an eleven county region.<sup>51</sup> The Council is directed to "guide and support a cooperative planning process to establish a voluntary regional compact among the counties, cities, towns and

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CENTURY 3 (1990) (noting that while people agree that the Adirondack park should be preserved, there is great disagreement over how it should be accomplished); see also *Regional Planning*, *supra* note 4, at 532-33 (stating that the Adirondack Park Agency has been criticized by local residents "who do not want any government regulation over their land").

<sup>48</sup> The Hudson River Valley Greenway Act was enacted in 1991 to create a process for regional decision-making in an 11 county area comprising the Hudson River Valley. See ch. 748, 1991 N.Y. Sess. Laws 1451 (McKinney 1992) (sections 4-10 are codified at N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 0121 (McKinney 1997)). The Central Pine Barrens Joint Planning and Policy Commission was created as part of the 1993 Long Island Pine Barrens Protection Act. See ch. 262, 1993 N.Y. Sess. Laws 733 (McKinney 1994); ch. 263, 1993 N.Y. Sess. Laws 755 (McKinney 1994).

<sup>49</sup> Paul M. Bray & Patricia E. Salkin, *Planning by Compact: A New Regional Approach*, LAND USE L. & ZONING DIG., Mar. 1996, at 3 (discussing the need, elements, examples and guidelines for the future of the regional approach of planning by compact).

<sup>50</sup> See *id.* (indicating eligibility for state assistance in the form of grants is an incentive for participating communities).

<sup>51</sup> See N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 0121 (McKinney 1997 & Supp. 1999).

villages of the Greenway.”<sup>52</sup> To develop the compact, the Council offers technical assistance to municipalities for the development of comprehensive plans and implementation of zoning and land use laws.<sup>53</sup> By working with chief elected officials in the local governments, regional plans are to be developed for each of the Council’s designated subregions, and together these subregional plans become the overall Greenway plan or the compact.<sup>54</sup> Finally, “[u]pon approval by the council of a regional plan, each county, city, town or village within the district for which the plan was prepared and which adopted the plan by its local legislative body shall become a participating community in the Greenway compact by adopting the regional plan as provided in such plan.”<sup>55</sup>

Once the compact is in place, the incentives for towns, cities, and villages to voluntarily join are numerous. For example, state agencies in implementing a ranking system may provide for a preference of up to five percent for the allocation of funds for infrastructure and land acquisition or park projects.<sup>56</sup> Furthermore, state agencies are required, “to the fullest extent practicable” to coordinate their activities with compact communities and to conduct their activities in a manner consistent with the Greenway Compact.<sup>57</sup> One potentially major incentive is that participating communities are entitled to indemnification from the state “in the event of legal actions brought against the community or its agents that may result from the community’s acquisition of land consistent with its regional plan or the adoption or implementation of any land use control including, but not limited to, a zoning law or ordinance.”<sup>58</sup> Other incentives include:

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<sup>52</sup> N.Y. ENVTL. CONSERV. LAW § 44-0119(1) (McKinney 1997). The compact process is designed to “further the recommended criteria of natural and cultural resource protection, conservation and management of renewable natural resources, regional planning, economic development, public access and heritage education.” *Id.*

<sup>53</sup> *See id.* § 44-0119(2).

<sup>54</sup> *See id.* § 44-0119(3).

<sup>55</sup> *See id.* § 44-0119(4).

<sup>56</sup> *See id.* § 44-0119(6).

<sup>57</sup> *Id.* § 44-0115(3).

<sup>58</sup> N.Y. ENVTL. CONSERV. LAW § 44-0119(7) (McKinney 1997 & Supp. 1999). The indemnification section originally expired on Dec. 31, 1997, but was extended until Dec. 31, 2002. *See* Environmental Conservation—Hudson River Valley Greenway Act, ch. 342, 1997 N.Y. Sess. Laws 539 (McKinney 1998).

technical and financial assistance for community planning,<sup>59</sup> the ability to regulate the location and construction of boathouses, moorings and docks within fifteen hundred feet of the shoreline,<sup>60</sup> the ability to offer a streamlined environmental review process for projects consistent with the Greenway plan,<sup>61</sup> and the fact that the compact is to be made part of reviews pursuant to the State Environmental Quality Review Act ("SEQRA") and the Historic Preservation Act.<sup>62</sup> A hotel surcharge, known as the "Hudson River Valley Greenway fee" (0.2% tax on hotel rooms in the eleven county region) to help fund these programs was repealed by the Legislature in 1994.<sup>63</sup> But to date, funding has not been a problem.

The "case study in progress" is precisely how the political and policy aspects of compact planning under the enabling legislation will work out. Specifically, in 1999, the first draft county greenway plan was offered for review.<sup>64</sup> In deciding whether localities within the county might formally adopt the principles set forth in the county plan, questions to be asked include: what level of review, if any, the state should give to local plans before

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<sup>59</sup> See N.Y. ENVTL. CONSERV. LAW § 44-0119(2) (McKinney 1997) (providing, in part, that the Greenway Council "shall offer technical assistance . . . in attaining the goal of establishing and having maximum effective implementation of local planning and zoning" and that the council and conservancy may provide matching grants of up to 50% of the project cost, "to conduct natural and cultural resources inventories, prepare or update a master plan, a zoning ordinance, a transfer of development rights ordinance, a local government waterfront revitalization program, an urban cultural park feasibility study or management plan or a tourism development feasibility study or plan").

<sup>60</sup> See N.Y. NAV. LAW § 46-a(5) (McKinney 1989 & Supp. 1999).

<sup>61</sup> See N.Y. ENVTL. CONSERV. LAW § 44-0119(5) (McKinney 1997) (stating that when a regional plan is prepared in accordance with SEQRA, "the preparation and contents of an environmental impact statement shall be considered a generic environmental impact statement. Actions proposed in conformance with the conditions and thresholds established in such regional plan will require no further compliance with. . ." SEQRA).

<sup>62</sup> See *id.* § 44-0115(3).

<sup>63</sup> See N.Y. ENVTL. CONSERV. LAW § 44-0101 commentary at 222 (McKinney 1997); see also Comprehensive Omnibus Revision of Taxes, Fees and Other Requirements Impacting 1994-95 State Fiscal Plan, ch. 170, §172, 1994 N.Y. SESS. LAWS 467, 538 (McKinney 1995) (repealing the relevant provision in the tax law).

<sup>64</sup> See THE DUTCHESS COUNTY PLANNING DEPARTMENT, GREENWAY CONNECTIONS: COMPACT PROGRAM AND GUIDE FOR DUTCHESS COUNTY COMMUNITIES—DRAFT: FOR DISCUSSION ONLY (April 1999). This guide builds upon the County's 1987 comprehensive plan. See THE DUTCHESS COUNTY PLANNING DEPARTMENT, DIRECTIONS: THE PLAN FOR DUTCHESS COUNTY (1987).

they are eligible for the statutory incentives; and whether and how there may be assurances of real local conformity to the county compact plan, as opposed to a resolution indicating intent to participate.

### C. State Level

The role of state government is critical in achieving comprehensive and coordinated land use reform in New York.<sup>65</sup> Although New York, unlike other states, lacks a cabinet level office dedicated specifically to local, regional, and state land use issues,<sup>66</sup> Governor George Pataki and Secretary of State Alexander Treadwell have committed renewed resources to rebuild the Office of Local Government Services at the Department of State to provide enhanced technical assistance to municipalities on planning and zoning matters.<sup>67</sup> New York, however, can, and must, do more to serve as a conduit for more efficient and effective regional planning.

#### 1. Raising the Importance of the Issue

The state can play a significant role in raising the importance of the issue in any number of ways. The Legislature can create special study commissions or advisory committees, such as the Land Use Advisory Committee discussed below.<sup>68</sup> The Gov-

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<sup>65</sup> See *21st Century*, *supra* note 39, at 5 (discussing the role of state government in community planning).

<sup>66</sup> The establishment of a state level office for planning is a critical element if the state is going to offer meaningful support to regional and statewide planning efforts. See *id.* A state level office typically does much more than provide technical assistance to local governments on local planning issues. It advises the governor on key planning issues facing the state, it serves as a facilitator of an interagency effort to catalogue and monitor state agency actions that affect local, regional and statewide land use interests, and it plays an important role as a clearinghouse of information. See *id.*

<sup>67</sup> The website for the Department of State contains an impressive array of valuable information about local land use planning, including a guide to enabling acts, opinions of department counsel, and a listing of department publications providing technical assistance. See *NYS Department of State, Division of Local Government: Publications* (visited Sept. 17, 1999) <<http://www.dos.state.ny.us/lgss/list9.html>>.

<sup>68</sup> The Smart Growth and Economic Competitiveness Act of 1999, a bill introduced by Senator Rath (R-Erie) and Assemblyman Hoyt (D-Buffalo) offers one type of legislative approach to accomplish this. See S. 1367-A/A. 1999-A, 222nd Leg., 1999-2000 Reg. Sess. (N.Y. 1999) (unenacted). The bill calls upon the governor to create a task force on smart growth, consisting of representatives of various agen-

ernor could convene an inter-agency task force or create an office of state planning. Together, both branches of government could provide necessary funding to create the incentives that will foster collaborative and cooperative land use planning and decision-making. Absent new funding, the State could consider a program of no-cost incentives, including the addition of a fixed number of points on competitive grant programs in recognition of regional approaches. Grant programs that already exist in the areas of economic development, housing, community development, and environmental protection and preservation are well suited for this type of incentive-based system.<sup>69</sup> New York must, however, recognize and articulate the relationship between sound land use planning and controls with the environment, economic competitiveness, housing, public infrastructure, and quality of life.<sup>70</sup>

## 2. Can State Politics Produce Reform?

The short answer is that New York can produce meaningful reform. It happens all the time. The more realistic answer is that reform is a long and winding road, which must be navigated well. One former insider suggests that the activist New York system is so leadership-oriented<sup>71</sup> that it "is anything but democratic."<sup>72</sup> Whether or not the system allows for a choke-hold by

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cies, in order to inventory state programs that impact land use decision-making. *See id.* It also directs a smart growth task force to examine the issues and opportunities for smart growth in the state and suggests the establishment of regional economic competitiveness grants. *See id.*

<sup>69</sup> *See, e.g.,* N.Y. ENVTL. CONSERV. LAW § 44-0119(9) (McKinney 1997) (listing types of projects eligible for funding under the Greenway compact).

<sup>70</sup> These themes must be highlighted in the Governor's Annual Messages to the Legislature, Agency Annual Reports, and in the public purpose sections of appropriate legislative initiatives. *See, e.g.,* S. 1367-A/A. 1969-A, 222nd Leg., 1999-2000 Reg. Sess. (N.Y. 1999) (unenacted) (calling for preservation that will result in efficient growth and improved quality of life); *see also* Governor George E. Pataki, State of the State Address 25-27 (Jan. 6, 1999) (transcript available in the St. John's University School of Law Library) (noting the importance of preserving open spaces while protecting jobs and fostering economic growth).

<sup>71</sup> "Leadership" refers to the Majority Leader and President of the Senate, and to the Speaker of the Assembly. It must also include the Governor since, although the two legislative houses may negotiate a strategy, the Governor's support is still needed to enact the bills into law. *See* Eric Lane, *Albany's Travesty of Democracy*, CITY J., Spring 1997, at 49, available in LEXIS, News Library, City Journal File.

<sup>72</sup> *Id.* (noting that while individual legislators are elected directly, most policy decisions are made by the leadership, with little opportunity for individual legislators to add their ideas).



the leadership, there is still an opportunity to accomplish reform if the right case is made to the right leaders. Meaningful land use reform at the state level requires bipartisan leadership in the legislature, and the active support and engagement of the Governor.<sup>73</sup>

### III. THE CAT IS OUT OF THE BAG: A QUIET REVOLUTION IN NEW YORK LAND USE HAS OCCURRED

The last two decades have witnessed sweeping land use reforms in New York. Perhaps this success is attributable to the rather quiet, low-keyed approach of the reformers. After what could be described as disastrous fallout from a push for regional planning in the 1970s,<sup>74</sup> New York slowly began to refocus its attention on reforming land use planning and control.<sup>75</sup> The successes have largely been small and incremental, but taken as a whole there is no doubt that New York has undergone a major land use reform revolution in 1990s.<sup>76</sup>

#### *Land Use Advisory Committee*

The Land Use Advisory Committee was established in 1989 to guide the Legislative Commission on Rural Resources in an effort to clarify, modernize and improve the state's land use statutes.<sup>77</sup> Prior to this project, these statutes remained largely unmodified in the sixty years since they were first enacted. By the end of 1998, the Legislative Commission on Rural Resources, with the assistance of the Land Use Advisory Committee, was directly responsible for thirty-one new laws relating to planning and zoning.<sup>78</sup> Among them are laws for intermunicipal cooperation in land use planning,<sup>79</sup> a measure to clarify the county's role

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<sup>73</sup> See generally *Political Strategies*, *supra* note 45, (indicating that among the most important strategies for realizing land use reform is the presence of leadership).

<sup>74</sup> See *Regional Planning*, *supra* note 4, at 510-19 (discussing planning activities in New York during the 1960s and 1970s).

<sup>75</sup> See *id.* at 517-19 (noting reform efforts undertaken during the last 20 years).

<sup>76</sup> See *KEEP NEW YORK GROWING*, *supra* note 6, at 7-11 (listing legislative achievements and enacted laws in New York during the 1990s).

<sup>77</sup> See *id.* at 2 (listing the responsibilities and importance of the Land Use Advisory Committee in decision-making process).

<sup>78</sup> See *id.*

<sup>79</sup> See *Towns, Villages and Cities—Cooperative Action for Comprehensive Planning and Land Use Regulation*, ch. 724, 1992 N.Y. Sess. Laws 1952 (McKinney 1993)

in cooperative planning and zoning ventures,<sup>80</sup> and a recodification of county board and regional planning council enabling acts.<sup>81</sup> Had the reform fever of the 1990s stopped with the Legislative Commission on Rural Resources, it would have alone produced a significant reform of our antiquated planning and zoning system. In other parts of government, state agencies and legislators were enacting other regional initiatives including the Hudson River Greenway Communities Council,<sup>82</sup> the Long Island Pine Barrens Maritime Reserve Council,<sup>83</sup> and the New York State Canal Recreationway Commission.<sup>84</sup> Additionally, the Department of Environmental Conservation ("DEC") adopted an updated set of implementing regulations for the SEQRA.<sup>85</sup> Fur-

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(providing a framework for joint planning and land use regulatory activities, and introducing the "overlay district" concept for the protection of community resources which are located in more than one jurisdiction); see also KEEP NEW YORK GROWING, *supra* note 6, at 8.

<sup>80</sup> See Towns, Villages and Cities—Participation by Counties in Intermunicipal Planning and Zoning Agreements, ch. 242, 1993 N.Y. Sess. Laws 645 (McKinney 1994) (authorizing cities, towns and villages to contract with counties to provide planning and zoning administration and enforcement services). This law was necessary because the existing language in the General Municipal Law only permitted municipalities to enter into cooperative agreements when they each possessed the separate authority to contract for the specific item or service. Since counties in New York do not possess zoning authority, this was seen as a potential barrier to county involvement. See KEEP NEW YORK GROWING, *supra* note 6, at 8.

<sup>81</sup> See Municipalities—Planning Boards—Subdivision Plat Recordings, ch. 451, 1997 N.Y. Sess. Laws 1365 (McKinney 1998) (providing a new statutory framework for county planning boards and regional planning councils); Municipalities—Zoning and Planning, ch. 459, 1997 N.Y. Sess. Laws 1394 (McKinney 1998) (making technical amendments to the General Municipal Law to provide for consistent references to county planning boards and regional planning councils); see also KEEP NEW YORK GROWING, *supra* note 6, at 10.

<sup>82</sup> See Hudson River Valley Greenway Act, ch. 748, 1991 N.Y. Sess. Laws 1451 (McKinney 1992) (creating a process for regional decision-making in the Hudson River Valley).

<sup>83</sup> See Long Island Pine Barrens Maritime Reserve Act, ch. 814, 1990 N.Y. Sess. Laws 1645 (McKinney 1991) (providing protection for the Pine Barrens-Peconic Bay System in eastern Long Island). This law was followed by the Long Island Pine Barrens Protection Act, which was enacted to provide a mechanism for the state and affected local governments (and federal agencies) involved in the management of the pine barrens reserve. See ch. 262, 1993 N.Y. Sess. Laws 733 (McKinney 1994).

<sup>84</sup> See New York State Canal System—Jurisdiction to Thruway Authority, ch. 766, 1992 N.Y. Sess. Laws 2081 (McKinney 1993) (providing a systematic plan for the preservation and development of the canal system and the lands adjacent thereto to promote economic development and tourism).

thermore, the Tug Hill Commission, a regional municipal effort in upstate New York, was granted permanent status after carrying the tag of "Temporary" before its name for twenty years.<sup>86</sup> These illustrations paint a much larger canvas of the magnitude of the quiet revolution in New York.

In conversation, some land use reform advocates attribute the outstanding success partly to the fact that a large number of people were involved in many of the reform pieces, all of which received consideration independently of one another, with different legislative sponsors and different agendas. This was the secret for success—lack of coordination, communication and overall vision. The exact antithesis of the sound planning we seek through education, public participation, and intergovernmental collaboration. Perhaps, though, instead of bemoaning the reasons for success and posturing about the politics of the reform, New York should seize the opportunity at the turn of the century to inventory our elaborate and impressive web of land use reforms, consider the caselaw, and devise an intelligent and strategic plan to guide the economic, environmental, and social health of our regions and of our state.

#### IV. OPPORTUNITIES FOR MOVING THE AGENDA AHEAD: A "CAN DO" APPROACH

The case for "smart growth" type reform has been made over and over in New York.<sup>87</sup> This article documents several of the recent reform initiatives. At the time of writing, the stakeholders are not questioning whether reform is necessary, but rather how the necessary reforms will take place, who will be in charge of implementation and of oversight, and how the initiatives will be

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<sup>85</sup> See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1 (Supp. 1999) (requiring all state and local agencies to consider "environmental factors into the existing planning, review and decision-making process[]").

<sup>86</sup> See Tug Hill—Commission, ch. 561, 1992 N.Y. Sess. Laws 1570 (McKinney 1993) (providing technical assistance through a Cooperative Tug Hill Planning Board to a four county region that includes forty-one towns); see also Benjamin P. Coe, *Tug Hill, New York Progress Through Cooperation in a Rural Region*, 81 NAT'L CIVIC REV. 449, 449 (1992) (detailing the history of the Tug Hill Commission, which was originally designed to last only two to three years, and deal only with local concerns regarding forests and headwaters).

<sup>87</sup> See S. 1367-A/A. 1969-A, 222nd Leg., 1999–2000 Reg. Sess. (N.Y. 1999) (un-enacted) (defining "smart growth" as "a collaborative community based effort to arrive at a workable plan for growth generated by the community and which responds to the needs of the community").

funded. Politics, however, may once again block needed reform in this area. Smart growth has risen to the national agenda, having become a platform for the administration in Washington D.C. and having been on the minds of governors and legislators in more than half of the states.<sup>88</sup> New York legislators have also taken a great interest in the issue by proposing their own versions of smart growth legislation at the end of the legislative session.<sup>89</sup> In addition, it was disclosed at a recent policymakers forum that perhaps Governor Pataki is considering his own approach to smart growth in the form of an executive order.<sup>90</sup>

### A. Building Trust

To move forward with meaningful land use reform in the areas of regional planning and interjurisdictional cooperation, New York political officials need to develop a level of trust and comfort with one another, especially at the local government level. This is, of course, easier said than done. After all, the planning and zoning enabling acts are replete with authority for cooperation and regionalism when it comes to land use decision-making, yet the case studies of success seem too few and too often not heard. Professor Nolon's article in this symposium contains a good inventory of examples, but these are too few considering the large number of municipalities in the State.<sup>91</sup>

There are many ways to establish trust and comfort over time. But, it appears none are being applied at this time. At a recent statewide gathering of planning and zoning officials, the

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<sup>88</sup> See generally *Century's End*, *supra* note 6 (discussing the current federal and state smart growth initiatives).

<sup>89</sup> See, e.g., Smart Growth for the New Century Act, A. 8386-B, 222nd Leg., 1999-2000 Reg. Sess. (N.Y. 1999) (introduced by Assemblyman DiNapoli); A. 130-A, 222nd Leg., 1999-2000 Reg. Sess. (N.Y. 1999) (introduced by Assemblyman Brodsky "to amend the general municipal law, the public health law and the environmental conservation law, in relation to enacting the 'New York state smart growth compact act' "). Both members signed on to A. 8387, an act to establish a smart growth task force and local assistance office. See A. 8387, 222nd Leg., 1999-2000 Reg. Sess. (N.Y. 1999). These actions are significant from a political perspective as both legislators chair the Committees in the Assembly to which these bills have been assigned, signaling the power and importance of leadership. A slew of other Smart Growth bills were also introduced at the end of the first half of the session.

<sup>90</sup> DEC Commissioner John Cahill, Response to Questions at the Rockefeller Institute of Government (May 6, 1999).

<sup>91</sup> See John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN'S L.REV. 1011 (1999).

following question was posed, "By a show of hands, how many of you would recognize the face and name of a member of a planning or zoning board in a neighboring jurisdiction?"<sup>92</sup> One or two hands went up. A somewhat distressing revelation. How can we expect our local officials to care about the impacts of land use decisions on abutting localities, agree to cooperate and share municipal planning resources, develop a joint vision for mutually beneficial long range planning goals, and think and act regionally when they do not even know the local officials with whom they are expected to work? While this presents a formidable barrier to reforming our land use decision-making process, it challenges us to suggest viable solutions.

One solution is for the county planning board to take a greater role in the training and education of members of the local planning and zoning boards.<sup>93</sup> There are examples of this happening across the state, but more is needed. Perhaps the most effective way to conduct the training and serve the underlying goal of developing familiarity and recognition of each other and each other's local needs is to hold bi-monthly education sessions on different topics of interest to planning and zoning boards, and to rotate the municipality hosting the session each time it is offered. This will require visits to neighboring municipalities, and perhaps allow the host locality to provide a brief overview of trends or issues in their jurisdiction. The intangible benefits of such an inter-jurisdictional dialogue and educational program could help to lay a foundation for awareness and trust that could promote long term collaboration.

Other possible methods of building trust include: the circulation of a county-wide or regional newsletter that, among other things, highlights different local board members and recent decisions. The development of a county-wide or regional web site can be established where planning and zoning information could be posted (including the dates, times, and location of board meetings), and more importantly, where a member-only list-serve

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<sup>92</sup> This author posed the question to a group of approximately 100 people at a meeting of the New York Planning Federation.

<sup>93</sup> Although local planning and zoning officials are not required by state law to attend training sessions, recent amendments to the planning and zoning enabling statutes specifically authorize local legislative bodies to require such participation if they desire. See N.Y. GEN. CITY LAW § 27(1) (McKinney Supp. 1999); N.Y. GEN. CITY LAW § 81(1) (McKinney 1989); N.Y. TOWN LAW § 267(2) (McKinney 1987); N.Y. VILLAGE LAW §§ 7-712(2), 7-718(1) (McKinney 1996).

could be offered so that local officials could post and discuss common issues with each other. Finally, a planning federation could also be organized pursuant to the General Municipal Law<sup>94</sup> for the purpose of accomplishing many of these tasks.

### *B. State as an Enabler*

Although local government advocates may be quick to remind regional entities and the state government that land use control is, in their opinion, a local issue and not one in which the state should meddle, New York can effectively promote sounder and wiser local decision-making by empowering directed action. Specifically, the State can and should serve as an enabler by offering specially designed grant programs to foster pilot programs in inter-municipal cooperation in land use planning.<sup>95</sup> The results of the funded programs should be posted on web sites and be widely disseminated through workshops, newsletters, manuals and other outlets. In years where fiscal restraints prohibit the funding of new or pilot programs, the state can still prove to be an enabler by restructuring economic development, housing, and other local grant programs to award greater points in circumstances where two or more units of local government are promising to work together. The Governor can also take on a greater role in recognizing inter-municipal cooperation in planning, through the establishment of an annual award program which would draw statewide attention to those municipalities who have voluntarily achieved a broader vision for local and regional planning.<sup>96</sup>

### *C. Stakeholder Circle needs to be Widened*

Until 1999, the growing momentum and the number of advocates for some form of "smart growth" in New York seemed few and far between. But for a series of law review articles in the 1990s, the establishment of the Governor's Blue Ribbon Commission on Consolidation of Local Governments, and discrete new

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<sup>94</sup> See N.Y. GEN. MUN. LAW § 239-h (McKinney Supp. 1999).

<sup>95</sup> Although the Department of State did offer a program to promote the study of consolidation of services and intermunicipal cooperation in the mid-1990s, the program is not presently funded.

<sup>96</sup> A similar initiative was implemented by Colorado Governor Romer. See *Century's End*, *supra* note 6, at 608 (noting that Governor Romer's program will award \$1 million to certain entities "that provide innovative solutions for regional growth").

regional planning efforts focused in one small area and around one significant resource, people and organizations have not been speaking out for land use reform in any significant number. With thousands of bills introduced each year in the Legislature, and over 900 registered lobbyists attempting to grab the attention of individual members and larger delegations, it is no wonder that state and regional land use reform issues have failed to percolate to the top of the political agenda. After all, the natural constituency for planning and zoning matters are the local officials themselves, and there is no incentive for them to lobby for and promote a system which would change the status quo by removing some of their authority and power. For this reason, the stakeholder circle must be broadened to accomplish meaningful reform.

This expansion is beginning to take place around the issue of urban sprawl. In March 1999, almost two dozen organizations joined together in sponsorship of a statewide smart growth conference at the Empire State Plaza in the Capital.<sup>97</sup> When the public, private and non-profit sectors join together to examine the complex issues of land use reform, it brings a different level of interest to state government and certainly raises the visibility and seriousness of the issues. From this gathering, a number of organizations have formed an *ad hoc* Smart Growth Committee, meeting regularly to discuss the issues and options for reform.<sup>98</sup>

#### *D. Sustained Leadership*

The problem experienced in New York and in other states, however, is that we fail to sustain momentum and leadership in the area. Legislative reform takes time. It takes time to study

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<sup>97</sup> The lead sponsors of the program were the National Audubon Society of New York, the New York Conference of Mayors, the Government Law Center of Albany Law School, and the New York Planning Federation. Other sponsors included the New York State Home Builders Association, the Association of Towns of the State of New York, and Environmental Advocates.

<sup>98</sup> This group is not officially appointed nor sanctioned by a governmental entity. Its first meeting was suggested by the National Audubon Society of New York following the March 1999 conference. The New York Planning Federation has been hosting the meetings. The following stakeholder groups have also participated in this activity: Committee for Sustainable Long Island, the New York Conference of Mayors, the Association of Towns of the State of New York, the New York State Home Builders Association, Scenic Hudson, Environmental Advocates, and the New York Farm Bureau.

the issues, hear from affected constituencies, and develop and test alternative policies before deciding on the most appropriate one for the state. Time can mean anywhere from one year to seven years. When issues drag beyond a single legislative session, it is often a challenge to sustain the stakeholder's interest, which may be on other issues, or who may figure that the legislature is simply not interested in reform. The time needed to accomplish reform can be a drain on fiscal resources, especially when the legislature is trying to "pick and choose" the battles for the next legislative session. New York missed the early wave of land use reform which attracted national attention and research dollars from private foundations, and therefore the ability to sustain leadership has meant a demonstration of commitment and conviction.

There are, however, effective ways in which to develop new leadership and re-energize the existing leadership. For example, many states are home to groups known as the "1000 Friends."<sup>99</sup> These non-profit organizations are typically created and funded through the private and non-profit sectors for the purpose of promoting sound statewide and regional land use planning decision-making. New York lacks such an organization.<sup>100</sup> In Wisconsin, the realtors have established a group called "On Common Ground."<sup>101</sup> This group, although originating from the private sector, is an effective advocacy organization consisting of representatives from all sectors who are interested in promoting reform in land use decision-making. Other groups recently formed around the country include: Ohioians for Smart Growth,<sup>102</sup> Cali-

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<sup>99</sup> Websites to these groups include: *About 1000 Friends of Oregon* (visited Aug. 27, 1999) <<http://www.friends.org/about.html>>; *Albuquerque Transportation & Neighborhoods Project* (visited Aug. 27, 1999) <<http://www.1000friendsnm.org/trans.html>>; *1000 Friends of Minnesota* (visited Aug. 27, 1999) <<http://www.1000fom.org/>>.

<sup>100</sup> The Regional Plan Association of New York-New Jersey ("RPA") created a program entitled "New York Futures" in the early 1990s. This was a program of RPA and was a stand-alone, independently run organization similar to the "1000 Friends" groups. The program was staffed by a single person and never solicited membership, unlike other similar organizations.

<sup>101</sup> See *On Common Ground* (visited Oct. 15, 1999) <<http://www.oncommon-ground.org/>>.

<sup>102</sup> See *Ohioans For Smart Growth Mission Statement* (visited Oct. 15, 1999) <<http://uac.rdp.utoledo.edu/UAC/OhioansWeb/mission.htm>>.



fornia Futures,<sup>103</sup> 1000 Friends of Washington<sup>104</sup> and the Smart Growth Network.<sup>105</sup>

#### IV. WITHOUT REFORM WE FACE CONTINUED LOSS OF LOCAL CONTROL

If local governments continue to fail to exercise responsible land use decision-making, they will likely forfeit the control and authority they currently possess to a higher level of government. Scholars have called not just for a statewide policy on land use control, but for a federal land use policy, usurping greater control.<sup>106</sup> Reading the 1991 Kemp Commission Report,<sup>107</sup> local officials could sense the frustration of the private sector and the housing advocates when it comes to land use decision-making.<sup>108</sup> Although this report generated a great deal of interest and action, the real proof that the federal government is beginning to intrude on traditional local land use decision-making is evidenced through recent legislation and regulations such as: the Fair Housing Amendments Act of 1988,<sup>109</sup> which addresses, among other things, the siting of group homes; the Americans with Disabilities Act;<sup>110</sup> the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA),<sup>111</sup> which clearly mandated delegation

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<sup>103</sup> See *California Futures Network* (visited Oct. 15, 1999) <<http://www.cal-futures.org/main.html>>.

<sup>104</sup> See *1000 Friends of Washington* (visited Oct. 15, 1999) <<http://www.1000friends.org/>>.

<sup>105</sup> See *Smart Growth Network* (visited Oct. 15, 1999) <<http://www.smart-growth.org/>>.

<sup>106</sup> See Green, *supra* note 15, at 71 (pointing out that, "[m]any academics and scientists have argued that control of the negative effects of unguided land use can best be accomplished through policy set at the national level").

<sup>107</sup> ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, 102ND CONG., NOT IN MY BACK YARD: REMOVING BARRIERS TO AFFORDABLE HOUSING 190 (Comm. Print 1991).

<sup>108</sup> See Patricia E. Salkin, *Barriers to Affordable Housing: Are Land-Use Controls the Scapegoat?*, LAND USE L. & ZONING DIG., Apr. 1993, at 3, 4.

<sup>109</sup> Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3601).

<sup>110</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101-213). Although the language of the Americans with Disabilities Act left it unclear as to whether it was intended to pre-empt local land use control, the Second Circuit found such intent in 1997, finally ending the debate in New York. See *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-46 (2d Cir. 1997) (analyzing legislative intent and finding the ADA trumped local land use laws).

<sup>111</sup> Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified at 49 U.S.C. § 101 and scattered sections of 23 U.S.C.).

of transportation planning for areas with a population over 50,000 to the metropolitan planning organizations, and its successor legislation, TEA-21; and the Telecommunications Act of 1996,<sup>112</sup> which restricts local decision-making on the siting of cellular towers.

The notion of a federal land use policy is not far-fetched. In the early 1970s Congress came very close to the passage of the Land Use Policy and Planning Assistance Act, a measure that would have tied federal funds to more active state involvement in local land use decision-making.<sup>113</sup> The current smart growth or anti-sprawl movement motivated two members of Congress to request in 1998 that the General Accounting Office conduct a study of the impacts of federal legislation and regulation on urban sprawl,<sup>114</sup> and earlier this year, the White House, under the leadership of Vice President Gore, released its agenda for livable communities.<sup>115</sup> Washington is getting closer to home and taking greater interest in our communities and in our neighborhoods.

The federal government is not alone in this trend. New York State has, at times, initiated legislative approaches that cause local land use concerns to be trumped by greater statewide concerns. One example of this is the Padavan Law governing the siting of group homes for the mentally ill.<sup>116</sup> Although there is an

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<sup>112</sup> 47 U.S.C. § 332(c)(7) (1994 & Supp. 1999).

<sup>113</sup> See Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and the National Land-Use Legislation*, 28 URB. LAW. 7 (1996) (discussing Senator Jackson's attempt for a national land use framework in the 1970s).

<sup>114</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE REPORTS AND TESTIMONY, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR (1999). The study, released in April 1999, reported that the analysis as to the impact of federal programs on suburban sprawl was inconclusive.

<sup>115</sup> See *Remarks as Prepared for Delivery by Vice President Al Gore: Livability Announcement* (visited Nov. 3, 1999) <<http://www.pub.whitehouse.gov/urires/I2R?urn:pdi://oma.eop.gov.us/1999/1/12/6.text.2>>.

<sup>116</sup> See N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1996). Named after its lead legislative sponsor, The Padavan Law provides an elaborate scheme whereby the sponsoring agency of a residential facility for the disabled notifies a municipality of their desire to locate a facility in the jurisdiction. See *id.* § 41.34(c). A municipality may approve the site, suggest an alternate site, or object to the facility. See *id.* In the event the municipality and the sponsoring agency fail to reach an agreement, the Commissioner or a hearing officer may hear and resolve the issue. See *id.* § 41.34(d). The Commissioner may sustain the municipal objection, "if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility." *Id.* § 41.34 (c)(5).

opportunity for local input, the bottom line is that the Padavan Law and the courts interpreting its applicability to local governments, have recognized that public policy dictates the main streaming of individuals with certain disabilities into the community, regardless of whether the community is ready, willing and able to meet these individuals with open arms.<sup>117</sup> The Attorney General recently reiterated that, in fact, the Legislature has withdrawn localities' authority to use zoning to regulate some defined types of human services.<sup>118</sup>

The trend of federal and state involvement and preemption in what has traditionally been local land use concerns, leads one to question why this is happening. In this author's opinion, the answer is simple. When local governments fail to take reasonable decisive actions, which may be politically unpopular due to

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<sup>117</sup> For a detailed discussion on this subject, see Anna L. Georgiou, *NIMBY'S Legacy: A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209 (1999) available in LEXIS, Law Review & Journal Library, Individual Law Reviews & Journals File, Fordham Urban Law Journal. The fact that the implementation of the Padavan Law continues to haunt local communities today is best exemplified by the number of recent cases challenging state preemption. See, e.g., *Jennings v. Office of Mental Health*, 682 N.E.2d 953, 960 (N.Y. 1997) (finding the Commissioner need only consider facilities which are licensed by a State Agency or which house former patients of OMH/OMRDD in assessing the overconcentration or substantial alteration of a certain area with the addition of a new facility); *Meyers v. Maul*, 671 N.Y.S.2d 848, 849 (App. Div. 3rd Dep't 1998) (holding that the decision to overrule objections to the establishment of a residential community for the disabled would not be vacated despite the Commissioner's failure to render a decision within the statutory time period to do so); *Town of Oyster Bay v. Maul*, 669 N.Y.S.2d 304, 305 (App. Div. 2nd Dep't 1998) (permitting the establishment of a community residential facility for the disabled where there was a need for such facility, and not an overconcentration of like facilities in the area); *Town of Gates v. Commissioner*, 667 N.Y.S.2d 568, 569 (App. Div. 4th Dep't 1997) (holding that in assessing the necessity for a residential facility for the disabled, the Commissioner may review the needs of the county and is not required to look to the need of the town or specific area alone).

<sup>118</sup> See Op. N.Y. Att'y Gen. No. 97-F6 (Aug. 25, 1997) (pointing out that section 41.34 of the N.Y. Mental Hygiene Law pre-empts local authority regarding the siting of community residential facilities for the mentally disabled and that sections 390(12)(a) and (b) of the New York Social Services Law provide that municipalities may not prohibit specified dwellings for group family day care when the Department has issued a permit for such use). The Opinion points out that in certain circumstances, state oversight over local land uses may co-exist with municipal regulation, such as in the area of the location and operation of substance abuse treatment facilities. See *id.* But see *Nyack v. Daytop Village, Inc.*, 583 N.E.2d 928, 928 (N.Y. 1991) (concluding that "State oversight of the location and operation of substance abuse facilities pursuant to the Mental Hygiene Law does not preempt the operation of local zoning laws").

the "not in my back yard" ("NIMBY") syndrome, the private sector and non-profit advocacy organizations eventually plead to a higher level of government. In the case of the private sector, they can score bigger and better policies at the national level with a much smaller budget for lobbying and campaign contributions than if they had to mount the same effort in each of the states. The stakes are high, and when local governments are repeatedly told by courts that their zoning decisions violate constitutional, statutory and regulatory laws, and where they show callous disregard for change due purely to local politics, then the barrier to local land use decision-making has become so strong that Congress or the state has no choice but to act.

Many local land use decisions are difficult. Millions of dollars may be at risk, as well as real or perceived public health and welfare issues. It is understandably uncomfortable for zoning board members and local legislators to listen to their constituents, neighbors, and friends oppose proposed projects for what may amount to NIMBY and fail to support constituent desires. Although local officials could debate the differences between representative and delegate theories of governance, the bottom line is that progress is delayed, economic development is stalled, and needed housing alternatives to accommodate all members of the community are prohibited. When this happens, it naturally begs the point that, "There must be a better way."

### CONCLUSION

Local control of land use decision-making is at the very heart of neighborhood and community governance. Our local governments, however, must put politics on the back burner when it comes to these critical decisions so that they may continue to enjoy local control. As we enter the next Century, serious attention is likely to focus again on issues of local, regional and state roles in planning and zoning New York. The present is an opportunity for local governments to meet the challenge of choosing sound, forward thinking, community-based land use decision-making ahead of politics. Although some may view the political dynamics as a barrier to change, local leaders have the unique opportunity now to redefine the intermunicipal and interjurisdictional dynamics of land use control.

