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IMPLEMENTING STATE GROWTH MANAGEMENT PROGRAMS: ALTERNATIVES AND RECOMMENDATIONS

DANIEL R. MANDELKER*

I. INTRODUCTION

State growth management programs are a major part of the Quiet Revolution in land use control.¹ States now have forty years of experience with these programs, and it is time for an assessment to see what they have accomplished. What do they cover? How are their criteria implemented? How are they enforced? These questions raise a very important problem. Statutes, plans, and policies are not enough. State land use programs must be effectively implemented if they are going to be successful.

Implementation is an important issue because tensions often arise between states and their local governments that affect program success. The reason why tensions arise is clear. Land use regulation traditionally is a local government function, but state growth management programs insert a state interest those local governments must recognize. State mandates overlay existing local government responsibilities and require a substantial change in how local governments carry out their land use planning and land use regulation mandates.

A review of these state programs finds a highly eclectic variety. There is no clear model, there is no clear or accepted

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1. I use the term "growth management program" to include all of the state-level programs adopted as part of the "Quiet Revolution" even though some of them, particularly the earlier programs, do not have growth management as an explicit program objective. On growth management generally see DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* 767-835 (8th ed. 2011).

structural pattern these programs followed when states adopted them. Each responded to land use problems the legislature and state leadership saw as requiring attention, and solutions to these problems influenced how the programs were constructed. State programs also reflect attitudes about intergovernmental division of power over land use decisions. These programs have not changed substantially in the last forty years, so the time has come to consider how they are organized, and whether change should occur. This Article examines two issues: program coverage and program criteria, and how they are applied.

II. PROGRAM COVERAGE

States can base program coverage on several alternatives. One alternative defines coverage by designating the type of development included in the state program. State legislation targeted at specific facilities, such as state programs for the siting of energy facilities, are another example of this approach.² At the federal level, requirements imposed on local zoning of telecommunications facilities by the National Telecommunications Act are another example.³ The Vermont state land use program uses this approach. Legislation created a state development permit program that defines program coverage by requiring development permits for housing projects, for commercial and industrial development over a certain size, and for all subdivisions.⁴ Applications for development are heard by District Environmental Commissions, with de novo appeal to an Environmental Court and then to the Supreme Court.⁵

A second program coverage option designates specified areas for state management and control, so they can be planned and regulated to protect state interests. Critical area programs are an example and are best known for their protection of vulnerable environmental areas. Fred Bosselman developed the critical area concept for the American Law Institute's Model Land Development Code.⁶ The Code authorizes the designation of

2. See, e.g., Michael B. Gerrard, *New York's Revived Power Plant Siting Law Preempts Local Control*, 246 N.Y. L.J. 48, 1-2 (Sept. 8, 2011), http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NewYorkLawJournal_Gerrard_9.8.11.pdf; David Pratt, *Re-Inventing New York's Power Plant Siting Law*, 6 ALB. L. ENVTL. OUTLOOK 1, 1 (2001).

3. 47 U.S.C. § 337 (2006).

4. VT. STAT. ANN. tit.10, §§ 6081(a), 6001(3) (Supp. 2011).

5. *Id.* §§ 6089, 8504 (Supp. 2011).

6. See generally Daniel R. Mandelker, *Fred Bosselman's Legacy to Land Use Reform*, 17 J. LAND USE & ENVTL. L. 11 (2002); Daniel R. Mandelker, *Critical Area Controls: A New Dimension in American Land Development Regulation*, 41 J. AM. INST. PLAN. 21, 21 (1975) (explaining critical area concept). For a model for critical area legislation see AM. PLANNING ASS'N,

critical areas by a state agency, the adoption of land use regulations for these areas by local governments, and the review of these regulations at the state level.⁷ Some states have adopted this model. The Washington State growth management program adopted a variant of this concept. It includes a requirement that counties designate and manage critical areas in compliance with statutory criteria implemented by state agency guidelines.⁸

The Oregon state land use program, which covers local plans and ordinances statewide, illustrates another alternative for program coverage.⁹ Local governments must adopt comprehensive plans and land use regulations that comply with state planning goals. A state agency reviews these plans and regulations for compliance subject to judicial review. This program takes a very different approach that moves from state coverage of designated developments or designated areas to comprehensive statewide coverage of local planning and land use regulation.

Limiting program coverage to designated areas and developments has the advantage of focusing the state interest on planning, regulation, and development in these areas. Local input is an option and usually occurs in critical area programs. Local governments can adopt plans and regulations that meet local development problems in a way that achieves statutory program objectives. Yet programs of this type adopt a piecemeal and fragmented approach that has limited objectives. By comparison, coverage of local plans and ordinances throughout a state is a comprehensive strategy which, in theory at least, should work better but needs effective state review and monitoring. Recent regressive changes in the Florida state growth management program illustrate the political risks.¹⁰

III. PROGRAM CRITERIA AND HOW THEY ARE APPLIED

Next in importance are the criteria these programs adopt and how they are applied. The substantive policies and standards

GROWING SMART LEGISLATIVE GUIDEBOOK 7-134 to -142 (Stuart Meck ed., 2002).

7. AM. LAW INST., MODEL LAND DEV. CODE § 7-301 (1976).

8. WASH. REV. CODE §§ 36.70A.010, 36.70A.060(2) (2011). See *Swinomish Indian Tribal Cmty. v. Western Wash. Growth Mgmt. Hearings Bd.*, 166 P.3d 1198 (Wash. 2007) (finding “no harm” standard to preserve existing conditions satisfies statutory duty to “protect” critical areas).

9. PETER A. WALKER & PATRICK T. HURLEY, *PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON* (2011); JOHN DEGROVE, *PLANNING POLICY AND POLITICS* 9-42 (2005); Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357 (2012).

10. Nancy Stroud, *A History and New Turns in Florida's Growth Management Reform*, 45 J. MARSHALL L. REV. 397 (2012).

these programs contain are not the problem that gets attention here. The problem is how these policies and standards are provided in the state programs, and how they are implemented. These elements in program structure have an important influence on program effectiveness. There is, again, a considerable variation with no clear pattern. The state systems are highly eclectic and do not follow a guiding model. The small state systems where the Quiet Revolution started—in Hawaii and in Vermont—adopted state development controls, state development permits in Vermont, and what Professor Callies calls state zoning in Hawaii.¹¹ This kind of micromanaging cannot be applied in a state that is geographically much larger and more diverse.

Program standards function to shape compliance by local governments or, as in Vermont, as the basis for decision that review applications for covered development. They are necessarily qualitative and require interpretation. The problem is to decide how best to present these standards so they can implement program goals while minimizing problems of interpretation that can create uncertainty and may frustrate program objectives. An important issue is whether to authorize administrative regulation that can interpret statutory requirements.

Vermont's state land use program puts its program criteria in the statute and lets the statute do the work. The statute has a set of criteria that district Environmental Commissions apply in the review of applications for development permits, and the next step is review by an Environmental Court and then judicial review in the Supreme Court.¹² The statutory criteria are fairly detailed but require interpretation.

A statutory criterion that includes growth management elements is an example:

In considering an application, the district commission shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved.¹³

11. See generally DAVID L. CALLIES, *SAVING PARADISE* (2d ed. 2010); David L. Callies, *It All Began in Hawai'i*, 45 *J. MARSHALL L. REV.* 317 (2012) (discussing Hawaii State zoning).

12. *E.g.*, *In re Rinkers, Inc.*, 27 A.3d 334 (Vt. 2011) (upholding lower court's decision that telecommunications tower would not have an undue effect on aesthetics under the aesthetics criterion).

13. VT. STAT. ANN. tit. 10, § 6086(a)(9)(A) (Supp. 2011). The statute then provides:

In *re Wal-Mart Stores, Inc.*¹⁴ upheld a decision by the then Environmental Board invalidating a permit for a store because it conflicted with this policy. The court upheld the Board's consideration of market competition as an appropriate factor under the statute, because it required the Board to consider the "financial capacity" of the town and the region to accommodate growth.¹⁵ The Wal-Mart store's impact on existing retail stores would negatively affect appraised property values. This is an example of how a court can extend a statutory requirement to include factors not explicitly identified by the statute.

A related statutory policy requires consideration of whether the additional costs of public services and facilities caused by "scattered development" outweigh tax revenue and other public benefits of the development, including increased employment opportunities.¹⁶ A development permit for a large retail development outside the City of Burlington was disapproved by an Environmental Commission under this policy because of the effect it would have had on the Burlington downtown, a reason for disapproval that again is not explicitly identified in the statute.¹⁷ Vermont has now supplemented the statutory development permit criteria by authorizing state designation of growth centers in downtowns, villages, and new towns to encourage growth in these centers through economic and regulatory incentives.¹⁸

Washington State's Growth Management Act contains criteria that provide guidance for local government compliance. Counties, for example, must designate urban growth boundaries that contain urban growth. Within these boundaries they must designate "areas and densities sufficient to permit the urban

After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision.

Id.

14. *In re Wal-Mart Stores, Inc.*, 702 A.2d 397 (Vt. 1997); see generally Sherry Keymer Dreisewerd, *Staving off the Pillage of the Village: Does In re Wal-Mart Stores, Inc. Offer Hope to Small Merchants Struggling for Economic Survival Against Box Retailers?*, 54 WASH. U.J. URB. & CONTEMP. L. 323 (1998) (discussing case).

15. *In re Wal-Mart Stores, Inc.*, 792 A.2d at 402.

16. VT. STAT. ANN. tit. 10, § 6086(a)(9)(H) (Supp. 2011).

17. See *In re Pyramid Mall Co.*, Vt. Dist. Envtl. Comm'n No. 4, No 4C0281 (Oct. 1978), *appeal dismissed*, *In re Pyramid Co.*, 449 A.2d 915 (Vt. 1982) (mall case). See generally Richard Brooks, *Fiscal Impact Analysis and the Pyramid Mall Case*, 12 POLY STUD. J. 511 (1984) (discussing economic implication of the mall cases).

18. VT. STAT. ANN. tit. 24, §§ 2790-2795 (Supp. 2011).

growth that is projected to occur in the county or city for the succeeding twenty-year period,” and “may include a reasonable land market supply factor and shall permit a range of urban densities and uses.”¹⁹ Judicial interpretation has been necessary to resolve ambiguities, and remands in some of these cases may indicate a lack of clarity in what is expected.²⁰

An alternative unique to Oregon is the administrative adoption of state planning goals that provide direction for the state land use program.²¹ The state Land Conservation and Development Commission (LCDC) adopted state planning goals in 1973. The goals provide a limited level of detail for local planning, and for most goals the Commission has adopted binding administrative rules to provide a greater level of detail for goal compliance.²² The Commission decides whether local comprehensive plans and regulations comply with the state planning goals. LCDC decisions on compliance of local plans and land use regulations with the goals are directly appealable to the Oregon Court of Appeals.²³

Goal 14, the important state Urbanization goal, controls the adoption and expansion of urban growth boundaries.²⁴ As in Washington State, an urban growth boundary marks the outer limits of the area in which urban-scale development can occur. Development on the other side of the boundary is restricted.

19. WASH. REV. CODE § 36.70A.110(2) (2011). Administrative guidance for the statutory requirements is minimal. WASH. ADMIN. CODE § 365-196-310 (2)(e) (2011) (“In determining this market factor, counties and cities may consider local circumstances.”); *Id.* § 365-196-310 (2)(d) (“Counties and cities may provide the office of financial management with information they deem relevant to prepare the population projections.”).

20. See *Thurston Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 190 P.3d 38, 50 (Wash. 2008) (remanding to see if market factor correctly applied); *Diehl v. Mason Cnty.*, 972 P.2d 543, 548-49 (Wash. Ct. App. 1999) (finding not enough land included in urban growth boundary for projected growth).

21. DEGROVE, *supra* note 9, at 11-15.

22. See, e.g., OR. ADMIN. R. ch. 660 (2011), divs. 006 (forest lands), 012 (transportation) and 033 (agricultural lands) (2011).

23. OR. REV. STAT. § 197.650 (West 2009 & Supp. 2011). For the most part, these Commission decisions relate to the periodic review of local plans and land use regulations. However, § 197.626 also gives the Commission jurisdiction over urban growth boundary changes of one hundred acres or more for the Portland Metro Region, and fifty acres or more for other cities. The Commission is seen as a friendlier forum for local governments than the court-like Land Use Board of Appeals (LUBA), which has jurisdiction over review of land use decisions not otherwise assigned to the Commission. LUBA’s decisions are subject to review by the Oregon Court of Appeals under § 197.850.

24. For a description of this program see Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 801, 806-07 (1999).

Boundary expansion is now the dominant issue. Courts consider boundary expansions on a case-by-case basis in appeals from the Land Conservation and Development Commission or the Land Use Board of Appeals, and decide whether a proposed expansion is justified under the goal.²⁵

Judicial interpretation of the Urbanization goal created problems, especially when the Court of Appeals upset a controversial boundary expansion in the Portland area.²⁶ Later the Land Conservation and Development Commission revised the goal, which now has the following “land need” factor:²⁷

Establishment and change of urban growth boundaries shall be based on the following:

- (1) Demonstrated need to accommodate long range urban population, consistent with a 20-year populations forecast coordinated with affected local governments, and
- (2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space or any combination of the need categories in this subsection (2).

Local governments must also “demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary,” while the boundary locational factors of the Urbanization goal require consideration of alternate boundary locations. Conflicts in the interpretation of the goal have required judicial attention.²⁸ Recent legislation has provided for an “urban

25. See, e.g., *Hildebrand v. City of Adair Village*, 177 P.3d 40, 47 (2007) (reversing and affirming, in part, a decision on a boundary expansion).

If the urban growth boundary (UGB) expansion is part of periodic review, it goes to the Land Conservation and Development Commission (LCDC). There is also a special statute, see footnote 23, *supra*, which sends other UGB changes to LCDC. Decisions by LCDC in either case are final and subject to appellate court review. Otherwise the change goes to the Land Use Board of Appeal (LUBA) and then the appellate courts.

E-mail from Edward J. Sullivan, Owner-Shareholder, Garvey Schubert Barer and Adjunct Professor, Portland State University’s Toulan School of Urban Studies & Planning, to author (Nov. 24, 2011, 10:34 PM CST) (on file with author).

26. See generally *D.S. Parklane Dev., Inc. v. Metro*, 994 P.2d 1205 (Or. Ct. App. 2000) (illustrating judicial decision that frustrated urbanization).

27. OR. ADMIN. R. 660-015-0000(14) (2011). To view the goal, see Oregon Department of Land Conservation and Development, *Statewide Planning Goals*, OREGON.GOV, http://www.lcd.state.or.us/LCD/goals.shtml#Statewide_Planning_Goals (last updated Nov. 24, 2010).

28. See, e.g., *1000 Friends of Or. v. Land Conserv. & Dev. Comm’n*, 259 P.3d 1021 (Or. Ct. App. 2011); *Hildebrand*, 177 P.3d at 47 (remanding for boundary expansion).

reserve” system for the Portland Metropolitan Region by which lands needed for growth, but not for at least twenty years, are designated and given first priority for additions to the Metro urban growth boundary.²⁹

Washington State’s Growth Management Act³⁰ adopted the administrative model in its critical area program. Counties must designate critical areas, and in doing so must consider guidelines for designation adopted by a state agency.³¹ Courts apply the statute and agency guidelines when deciding whether critical area designations comply with the Act. In one case, for example, the court applied the statute and its interpretive rules to hold a county did not consider the “best available science” when designating a critical area and did not consider all critical habitats, as the statute required.³²

Washington did not adopt the top-down Oregon approach by creating a state agency to review county compliance with the statute. Instead, they created a state appeal board that hears appeals on county compliance.³³ Appeal from board decisions is to the courts, which can correct board interpretations of statutory requirements.³⁴ As observers have noted, however, this method of review is not entirely successful, and creates compliance problems

29. OR. REV. STAT. §§ 195.137-195.145 (West 2009 & Supp. 2011).

30. See generally DEGROVE, *supra* note 9, at 281-320; Symposium, *Guidance for Growth: A Symposium on Washington’s Growth Management Act*, 16 U. PUGET SOUND L. REV. 863 (1993); Richard L. Settle, *Revisiting the Growth Management Act: Washington’s Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5 (1999) (discussing the Growth Management Act).

31. WASH. REV. CODE § 36.70A.170(1)(d) & (2) (2011) (designation requirement); *Id.* § 36.70A.050 (state agency to adopt guidelines). For the guidelines see WASH. ADMIN. CODE § 365-190-080 (2011).

32. *Stevens Cnty. v. Futurewise*, 192 P.3d 1, 12 (Wash. Ct. App. 2008).

33. See generally Henry W. McGee, Jr. & Brock W. Howell, *Washington’s Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*, 31 SEATTLE U. L. REV. 549 (2008) (arguing for better delineation of proof burdens and standards of judicial review); Henry W. McGee, Jr., *Washington’s Way: Dispersed Enforcement of Growth Management Controls and the Crucial Roles of NGOs*, 31 SEATTLE U. L. REV. 1 (2007) (discussing the roles of nongovernmental organizations in Washington land-use planning).

34. See, e.g., *Thurston Cnty.*, 190 P.3d 38 (holding that appeal boards may not create bright line rule to determine market supply in urban growth boundary, which is to be upheld unless clearly erroneous); Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning under the Washington State Growth Management Act*, 36 GONZ. L. REV. 73, 138 (2001) (discussing the inconsistencies in judicial guidance provided throughout different Washington counties).

because it relies on citizen enforcement.³⁵

IV. CONCLUSION AND RECOMMENDATIONS

This review of how state land use programs are structured and applied has found eclectic variety. No single program model is optimal. Statutes and state planning goals do not always provide detailed direction, and piecemeal and uncertain application occurs when judicial review is available without state agency participation. A state program can be substantially improved when a state agency is part of the process with the authority to adopt administrative regulations that interpret the statute. The agency can bring its expertise into the program and elaborate what the statute requires on a statewide basis that provides guidance in its implementation. With experience, regulations can be changed and improved. State agency regulations also add an administrative, interpretive level that provides consistency, uniformity, and certainty across the entire state. They should receive deference in court under conventional principles of administrative law when applied in individual cases.

State administrative guidance is not a panacea. State agencies may not perform well, as happened in New Jersey's state affordable housing program where the court struck down a major program regulation.³⁶ A hostile state administration can also produce regulations that are unsympathetic to the program. Neither may state agency regulations avoid remands for lack of compliance, as the Washington State experience indicates. Nevertheless, if the state agency does its job well and is politically supported, it can produce a statewide interpretive layer that very much assists the way in which the program is carried out.

How should a state program be implemented? Providing consistent and workable administrative guidance at the state level, together with a system in which the review of local land use plans and regulations is mandatory and does not depend on voluntary appeals in specific cases, should work best. Mandatory state review of local plans and ordinances for compliance with

35. See generally McGee & Howell, *supra* note 33 (arguing for better delineation of proof burdens and standards of judicial review).

36. See *In re Adoption of N.J.A.C. 5:96 & 5:97*, 6 A.3d 445, 493-95 (N.J. Super. Ct. App. Div. 2010) (invalidating state agency's rule for complying with fair share housing mandate); see also Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 853-55 (2011) (arguing that the New Jersey Appellate Court's decision to strike down part of the rule was a step backwards); see generally John M. Payne, *The Paradox of Progress: Three Decades of the Mount Laurel Doctrine*, 5 J. PLAN. HIST. 126 (2006) (discussing the fair housing doctrine in the *Mount Laurel* cases).

state planning goals, as in Oregon, eliminates the problem of episodic litigation. This type of program structure may not find many takers in today's political environment, however. Washington State's adoption of an appeal board system shows there can be resistance to mandatory state administrative review.

What is sometimes forgotten is that programs must change over time and respond to new problems and policies. Unfortunately, politics is never easy, and program review is not always successful.³⁷ Change may still be possible through a redefinition of statutory goals and criteria, as happened in the revision of criteria for urban growth boundary expansion in the Portland, Oregon area.³⁸ The Quiet Revolution is an experiment, and the experiment continues.

37. A program review by a state-appointed task force in Oregon was not helpful. *See* OR. TASK FORCE ON LAND USE PLANNING, FINAL REPORT (Jan. 2009), available at <http://library.state.or.us/repository/2009/200901230940315/>.

38. OR. REV. STAT. §§ 195.137-195.145 (West 2009 & Supp. 2011).