

## BOOK REVIEW

# LAND USE PLANNING OVER THE LAST FORTY YEARS: FIGHTING SPRAWL THROUGH SMART GROWTH PLANNING

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*From Sprawl to Smart Growth*, by Robert H. Freilich. American Bar Association (Chicago, 1999).

*Hot Topics in Land Use Law*, edited by Patricia E. Salkin & Robert H. Freilich. American Bar Association (Chicago, 2000).

### INTRODUCTION

In the last forty years, the suburban areas around our cities have grown both rapidly and haphazardly.<sup>1</sup> In most instances, this virtually unchecked suburban sprawl has accommodated our country's population growth.<sup>2</sup> However, suburban sprawl has required local governments to expend vast amounts of financial resources on building highway systems and other needed infrastructure, has led to the deterioration of inner cities, has caused the consumption of prime

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This author had the pleasure of working with Robert Freilich's Kansas City law firm of Freilich, Leitner & Carlisle during the late 1990s. From experience, I can attest to Bob's sincere devotion to implementing land use planning schematics in metropolitan areas.

<sup>1</sup> See Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 184 (1997).

<sup>2</sup> See *id.* Metropolitan areas have also grown by leaps and bounds. For instance, "by 1990, nearly 192 million persons, 77.5% of the population, lived in metropolitan statistical areas, compared with 112 million or 63% of the population, in 1960." Shelby D. Green, *The Search For A National Land Use Policy: For The Cities' Sake*, 26 FORDHAM URB. L.J. 69, 73 (1998).

agricultural lands, and has required individuals to use more energy resources while commuting.<sup>3</sup> As a result of the problems associated with sprawl, local governmental entities have struggled with minimizing suburban growth, protecting natural resources, and revitalizing older inner city areas.<sup>4</sup>

In an effort to prevent uncontrolled sprawl, a number of metropolitan areas have adopted growth management plans.<sup>5</sup> *From Sprawl to Smart Growth*, by Robert H. Freilich, evaluates the plans adopted in these areas and explores how such plans can reduce sprawl, protect the environment, and preserve agricultural lands.<sup>6</sup> For local governmental entities that are considering adopting smart growth plans, this book provides an insightful look into how local governmental entities should utilize smart growth planning and also renders an impassioned explanation of why metropolitan areas should adopt smart growth plans. By adopting smart growth plans, local governmental entities will:

- 1) reduce "the consumption of land for roads, houses, and commercial buildings by channeling development to areas with existing infrastructure";
- 2) center the "growth around urban and older suburban areas";
- 3) "preserve green space, wetlands, and farmland"; and
- 4) help communities "reap the benefits of growth and development, such as jobs, tax revenues, and other amenities, while limiting the disasters of growth, such as degradation of the environment escalation of local taxes, and worsening traffic congestion."<sup>7</sup>

If a local governmental entity is planning to adopt a smart growth plan, then it should be mindful of numerous pressing legal issues that may affect a smart growth plan's enactment. *Hot Topics in Land Use Law*, edited by Robert H. Freilich and Patricia E. Salkin, provides a comprehensive overview of pressing legal issues in land use planning.<sup>8</sup> More importantly, this book explores the progression of the comprehensive smart growth plan from an advisory guide to its current status as binding law.<sup>9</sup>

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<sup>3</sup> See generally Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159 (1997).

<sup>4</sup> See Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 URB. LAW. 817 (1999).

<sup>5</sup> Over the years, local governmental entities have experimented with a number of different zoning and planning concepts. For instance, a number of communities have recently embraced a suburban planning technique known as neotraditional development. See Braun, *supra* note 4. Neotraditional developments are so named because these communities are designed to reflect city-planning techniques developed prior to World War II. See *id.* At this time, homes were located near clusters of retail, office, and manufacturing developments. See *id.* As such, local citizens lived near the places they worked and shopped. See *id.*

<sup>6</sup> See ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH* (1999). *FROM SPRAWL TO SMART GROWTH* will be cited in this review as FSSG.

<sup>7</sup> See FSSG at 32.

<sup>8</sup> See *HOT TOPICS IN LAND USE LAW*, Patricia E. Salkin & Robert H. Freilich eds., (2000). *HOT TOPICS IN LAND USE LAW* will be cited in this Review as HTLL.

<sup>9</sup> See HTLL at 35-47.

This review examines *From Sprawl to Smart Growth* and *Hot Topics in Land Use Law* in tandem because together these two books provide extensive information as to how local governmental entities can best effectuate smart growth plans. Part I explores the development of smart growth planning. Further, this section focuses on the need for cities, counties, and states to utilize smart growth planning. Part II discusses current topics in land use planning law that may affect cities' abilities to utilize such planning. This review concludes by advocating that governmental entities - whether local, county, or state - should adopt smart growth plans to ensure that their communities are not threatened by continuous and unwieldy suburban sprawl.

### I. THE SMART GROWTH PLAN

Robert H. Freilich first encountered smart growth planning in the 1960's when he lived in Ramapo, New York.<sup>10</sup> During this time, Ramapo was experiencing the effects of urban sprawl.<sup>11</sup> The city adopted a smart growth plan in the late 1960's, whereby it developed a system of timing and sequential controls for subdivision residential development.<sup>12</sup> Subsequently, the city hired Freilich to expand, and then implement the plan.<sup>13</sup> Under the Ramapo plan, single residential developers had to obtain a Residential Development Use permit before they could begin construction.<sup>14</sup> The Residential Development Use permit required that there be an adequate number of municipal facilities present before single residential development projects could be pursued.<sup>15</sup> To determine whether residential building could proceed, Freilich created a numeric scoring system.<sup>16</sup> Under the system, permits were issued if the proposed development scored fairly high based on the availability of "five essential public improvements and services:

- 1) sewers or an approved substitute;
- 2) drainage facilities;
- 3) parks or recreational facilities, including public school sites;
- 4) state, county or town roads improved with curbs and sidewalks; and
- 5) firehouses."<sup>17</sup>

This system allowed Ramapo to accomplish two important goals. First, the town was able to manage the residential growth rate.<sup>18</sup> Second, the town was

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<sup>10</sup> Ramapo is located in Rockland County, approximately thirty miles northeast of New York City. See FSSG at 40.

<sup>11</sup> See *id.* at 39-40.

<sup>12</sup> See *id.* at 50-51.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 51.

<sup>15</sup> See *id.* at 56.

<sup>16</sup> See *id.* at 51-52.

<sup>17</sup> *Id.* at 51.

<sup>18</sup> See *id.* at 54.

able to establish priorities for the locations of residential subdivisions.<sup>19</sup> Indeed, as Freilich explained, the point system allowed the town to have:

[c]ontrol over the rate of development. [This control] can be viewed as an extension of traditional land use planning techniques, which have always had the effect of limiting the total residential buildout or capacity of a community. The second aim of the point system - that of determining the location of residential development - set location priorities by tying development to the adequacy of public facilities. Thus priority was given to residential areas the development of which will minimize future public investments. Because future growth is tied to the provision of facilities, it was certain that the plan would lead to a more desirable fiscal position on the part of the Town and a lower tax burden than would exist under conditions of uncontrolled growth.<sup>20</sup>

As a result, the point system helped curb unchecked sprawl, and in so doing helped to decrease development costs, prevent the consumption of enormous amounts of vacant land, and protect the environment.<sup>21</sup>

Notwithstanding its success, the Ramapo plan was not immune from legal challenge. A builder who failed to receive a permit claimed, among other things, that the plan was invalid because the state had not given the town the authority to regulate the timing of the development.<sup>22</sup> The Supreme Court of Rockland County found that the state had given the town such authority.<sup>23</sup> On appeal, the appellate division, in an extremely divided opinion, held that the state had not granted the town the authority to regulate population growth through timing and sequential controls.<sup>24</sup>

Ramapo subsequently appealed, and in a now-legendary decision, the New York Court of Appeals reversed the appellate decision, holding that Ramapo had the power to enact timing and sequential controls to manage population growth and suburban sprawl.<sup>25</sup> The Court of Appeals reasoned that although

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.* at 39-54.

<sup>22</sup> *See id.* at 56-57. The builder also asserted that the plan was not comprehensive and, therefore, violated state law, that the plan violated the builder's Fifth Amendment rights because the land was taken for public use without just compensation, and that the plan was exclusionary. *See id.* at 57.

<sup>23</sup> *See id.* at 56.

<sup>24</sup> *See id.* at 57. The appellate division only reversed as to the authority of the town to enact timing and sequential controls. *See id.* The appellate division found for the town on the other three issues. *See id.* For more on the other three issues, *see supra*, note 22.

<sup>25</sup> *See id.* at 57-58. The dissenting opinion "expresses the view that timing and sequential controls are not authorized by enabling legislation that delegates the power to regulate subdivision development to the Town." *Id.* at 63. Additionally, the dissenting judge asserted that "without specific legislative language authorizing such restrictions, communities may utilize controlled growth techniques as means of excluding low- and moderate-income families from these communities and thus have a negative impact upon regional growth patterns." *Id.*

Critics of smart growth typically cite to the dissenting opinion. *See, e.g.,* Peter A. Buchsbaum, *Timed Growth Ordinances Rejected in New Jersey*, 31 URB. LAW. 823 (1999).

the state statute did not specifically give town the ability to enact timing and sequential controls, it did so implicitly.<sup>26</sup> As such, this decision affirmed the ability of towns to use timing and sequential controls to combat unwieldy sprawl.<sup>27</sup>

After the New York Court of Appeals upheld Ramapo's smart growth plan, Freilich has created and implemented smart growth plans in numerous metropolitan areas across the nation. Freilich has developed smart growth plans for: Minneapolis-St. Paul, Minnesota; San Diego, California; Lexington-Fayette County, Kentucky; Baltimore, Howard, and Montgomery Counties, Maryland; Central Puget Sound Metropolitan Area, Washington; Portland, Oregon; Reno-Washoe County, Nevada; Park City and Summit County, Utah; Palm Beach County, Florida; Boulder, Colorado and Grand Junction and Mesa County, Colorado; Riverside, California; and Simi Valley-Ventura County, California.<sup>28</sup>

In each instance, Freilich tailored the plan to fit both the growth patterns and the political needs of local governmental communities. For example, when Freilich developed the plan for Minneapolis-St. Paul, the governing entities wanted to thwart uncontrolled sprawl developing around the metropolitan area.<sup>29</sup> The sprawl was rapidly expanding in increasingly scattered patterns.<sup>30</sup>

Further, when legalities are set aside, critics of smart growth plan generally argue:

The more sophisticated programs, such as Ramapo's, which involved long-term adherence for twenty or more years to growth control schemes based on infrastructure development, required a degree of municipal fidelity to consistent planning that is frequently at odds with the vicissitudes of local electioneering. For that reason, four dimensional zoning, which involves temporal as well as height, width, and depth regulations, may not survive over the long run. Such a fate apparently befell the Ramapo system which appears to have been abandoned several years ago, possibly through a change in electoral direction. *Id.*

<sup>26</sup> See FSSG at 59. The two state provisions at issue were sections 261 and 263 of New York Town Law. "Section 261 states:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of the building and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. ...

Section 263 reads:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements .... (Emphasis supplied)." *See id.* at 58.

<sup>27</sup> The New York Court of Appeals also ruled in Ramapo's favor on the other three issues. *See id.* at 59-63; *supra*, note 22. As to the takings issue, the court noted that this plan did not result in a taking because: 1) under the plan all residential property had to be subdivided within an eighteen year time period; 2) the developer could accelerate the date when her land would be developed by providing, at her expense, the facilities and services required to obtain a special permit; and 3) any diminution of property value was offset by the future financial benefit from the orderly development of the township. *See FSSG* at 61.

<sup>28</sup> For more on these smart growth plans, *see FSSG* at 108-202.

<sup>29</sup> *See id.* at 108-10.

Many government officials feared that if this scattered pattern of development continued, then public and private facilities would be more costly, capital investment in built-up areas would not be used efficiently, valuable open space would be lost, substantial surface and groundwater pollution would occur, and tax rates increase.<sup>31</sup> To prevent this from occurring, Freilich developed a five-tiered framework, whereby development would be managed through timing and sequential controls and local government involvement would be incorporated in the decision making process.<sup>32</sup> The five separate tiers included:

- 1) Area I which encompassed the downtown areas of Minneapolis and St. Paul;
- 2) Area II which encompassed older suburban existing built up areas;
- 3) Area III which encompassed areas of active urbanization;
- 4) Area IV which encompassed agricultural, open space, environmental, or rural areas; and
- 5) Area V which encompassed freestanding new towns and cities within Area IV.<sup>33</sup>

The Council established clear policy directives to be employed within each tier.<sup>34</sup> Specifically, the Council's policy provided:

- 1) that Area I would encourage a broader socio-economic mix, as well as the operation of financial institutions, specialized retail functions, office space users, and metropolitan cultural and entertainment complexes;
- 2) that Area II would emphasize "the maintenance of structures and neighborhoods in generally sound condition, the redevelopment or rehabilitation of deteriorating neighborhoods, the construction of new houses in types and densities consistent with the market preferences of the population at large, the removing of uncertainties about future of older neighborhoods and the reduction of concentrations of minorities and low-income families[;]"
- 3) that Area III would "be reserved for limited growth around existing freestanding rural towns in which development of a purely local economic base for growth would be emphasized[;]" and
- 4) that Area IV and V "would remain primarily rural, with provisions for the optional development of freestanding new towns and expansion of existing farm town communities."<sup>35</sup>

Each smart growth plan that Freilich has developed attempts to regulate

<sup>30</sup> See *id.* at 109.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 110-11.

<sup>33</sup> See *id.* at 111.

<sup>34</sup> In 1967 the Minnesota legislature passed the Metropolitan Council Act, commonly referred to as the "Council." See *id.* at 109.

<sup>35</sup> See *id.* at 111-13. To help in aiding this plan, the Council would use, among other things, tax incentives, tax increment financing, infrastructure grants, CDBG funds, and redevelopment assistance. See *id.* at 111.

and control unwieldy sprawl.<sup>36</sup> These plans have always focused on protecting undeveloped areas while concomitantly ensuring that deteriorating developed areas are redeveloped. Cities and counties should adopt smart growth plans to promote agricultural and rural preservation,<sup>37</sup> to allow for urban renewal,<sup>38</sup> and to manage suburban growth. States should also adopt smart growth plans. Currently, Hawaii, Colorado, and Vermont have adopted timed and sequenced growth schematics in an effort to curtail suburban sprawl. Likewise, Maine, Florida, and New Jersey have also attempted to control suburban sprawl by adopting comprehensive state plans.<sup>39</sup>

## II. CURRENT LAND USE TOPICS

Most recently, in its *City of Monterey v. Del Monte Dunes* decision, the United States Supreme Court reiterated that courts should evaluate the zoning powers of local governmental entities under a rational basis test.<sup>40</sup> The Court overruled a Ninth Circuit decision that would have required courts to apply a heightened level of scrutiny to an inverse condemnation claim involving an

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<sup>36</sup> For instance, in the early 1990s, Reno-Washoe County, Nevada adopted a smart growth plan similar to the Minneapolis-St. Paul plan. *See id.* at 176. In 1989, the Nevada State legislature adopted a measure that required cities and counties to develop master and area plans. *See id.* at 168. If they did not, then the state would develop its own plan under the mandatory legislation. *See id.* In designing a plan for Reno-Washoe County, Freilich had to please five different competing interest groups. *See id.* at 171. Therefore, Freilich developed five different smart growth plans for the region. *See id.* at 168-76. The various factions adopted a tiered growth concept similar to the Ramapo and Minneapolis-St. Paul plans. *See id.* at 176. The proposed Washoe County tiers included: 1) a core section; 2) an urban section; 3) an urbanizing section; 4) a future urbanizing section; 5) an urban reserve section; and 6) a permanent rural/open space section. *See id.* at 176. The key policies of the tiered system included: "1) designation of areas within the region that are to be treated similarly in terms of urbanization; and 2) creation or preservation of community identities as part of that urbanization." *Id.*

<sup>37</sup> There are a number of ways to protect rural lands. *See id.* at 279-96. For instance, cities and counties can zone land specifically for agricultural use. *See id.* at 283-84. Additionally, cities and counties can reduce taxation rates on farmers so they are not forced to sell their land due to rising taxation rates. *See id.* at 286-87.

<sup>38</sup> Cities can promote urban redevelopment through statutes that preserve historic districts; can redevelop run down sections by providing bonus, incentive, or enterprise zoning; and can revitalize other sections by providing tax abatements and tax increment financing. *See id.* at 253-70. Some cities may also be able to revitalize deteriorating urban areas by utilizing federal government initiatives that are designed specifically for urban revitalization. *See id.* at 303-12.

<sup>39</sup> *See id.* at 209-52. Several other states, which include Washington, Oregon, California, Georgia, Arizona, Maryland, Iowa, Tennessee, and South Carolina, have adopted partial smart growth plans. *See id.*

<sup>40</sup> *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-703 (1999). This author had the privilege of co-authoring a United States amicus brief with Bob Freilich on behalf of Monterey, California. We drafted the brief at the behest of the American Planning Association. For more on this decision, see Richard J. Ansson, Jr., *Dolan v. Tigard's Rough Proportionality Standard: Why This Standard Should Not Be Applied to An Inverse Condemnation Claim Based Upon Regulatory Denial*, 10 SETON HALL CONST. L.J. 417 (2000).

economic taking.<sup>41</sup> Prior to the Ninth Circuit decision, courts had only applied a heightened level of scrutiny to inverse condemnation claims involving title takings or exactions in lieu of dedication.<sup>42</sup>

Had the Supreme Court affirmed the Ninth Circuit decision and imposed a heightened scrutiny standard to economic regulations that merely diminish value, then the Court would have effectively authorized courts to adjudge almost all land use regulations under a heightened standard.<sup>43</sup> Indeed, a decision like this would have:

- 1) "revive[d] *Lochner*-type substantive due process and empower[ed] the federal courts to sit as superlegislatures;
- 2) as a practical matter, shift[ed] the presumption in land use cases from validity to invalidity;
- 3) cause[d] more litigation in the already overburdened federal court system; and
- 4) jeopardize[d] the validity of all land use regulations and the community welfare that they protect[ed]."<sup>44</sup>

Furthermore, a decision like this "would have yielded an outright assault on a governmental entity's ability to effectuate land-use policies. Such a standard would have undermined a governmental entity's ability to effectively engage in land use planning and would have jeopardized the health, safety, morals, and general welfare of the community."<sup>45</sup>

Fortunately, the Supreme Court did not apply a heightened level of scrutiny to economic regulations that merely diminish value. As a result, local governmental entities still have the power to use planning to enact comprehensive plans that "reduce congestion and sprawl, save historic districts, foster affordable housing, promote economic development, protect the environment, reduce infrastructure deficiencies, and save agricultural land."<sup>46</sup>

Over the years, courts have typically upheld a local governmental entity's ability to enact comprehensive plans that regulate the development of lands.<sup>47</sup> For example, in *Lake City Corp. v. City of Mequon*, the city of Mequon amended its master plan to increase the minimum size of lots within a particu-

<sup>41</sup> See *Del Monte Dunes*, 526 U.S. at 701-703.

<sup>42</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>43</sup> See HTLL at 20.

<sup>44</sup> HTLL at 20-21.

<sup>45</sup> *Ansson*, *supra* note 40 at 425. The Supreme Court recognized that these powers belong to local governmental entities as early as 1922 in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Court noted that: "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413.

<sup>46</sup> HTLL at 21.

<sup>47</sup> See *id.* at 35-47. Please note for research purposes that Chapter 12 in HOT TOPICS IN LAND USE LAW specifically discusses internet research sites. See *id.* at 172-95.

lar residential zone.<sup>48</sup> The City subsequently denied a builder's plat request because it violated this newly adopted amendment.<sup>49</sup> The builder challenged the denial.<sup>50</sup> The district court held in favor of the city, and the court of appeals reversed.<sup>51</sup> The Wisconsin Supreme Court held in favor of the city, finding that the planning commission had the authority to deny a builder's plat request solely on the ground that it conflicted with the newly revised master plan.<sup>52</sup>

Similarly, courts have typically validated comprehensive plans where the local governmental regulation has sought to revitalize depreciated areas through programs that exclusively focus on spurring cultural and commercial activity.<sup>53</sup> Today, numerous cities are attempting to revitalize inner city areas and make them centers of economic viability.<sup>54</sup> Indeed, New York City has revitalized 42<sup>nd</sup> Street, Baltimore a harbor area, and Cleveland its waterfront.<sup>55</sup> In the future, as more and more metropolitan areas enact comprehensive smart growth management plans, local governmental entities will enact plans designed to revitalize decaying urban areas.

#### CONCLUSION

Local governmental entities should adopt smart growth plans to prevent unnecessary suburban sprawl. Uncontrolled sprawl usually costs governing entities hundreds of millions of dollars in infrastructure costs, leads to the deterioration of inner cities, causes citizens in suburbia to spend more monies on fuel, and changes valuable agricultural land into newly formed subdivisions. Whenever local governmental entities adopt smart growth plans, the plan generally:

- 1) enhances a sense of community;
- 2) protects investment in existing neighborhoods;
- 3) provides a greater certainty in the development process;
- 4) protects environmental quality;
- 5) rewards developers with profitable products, financing, and flexibility;

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<sup>48</sup> See *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 102-103 (Wis. 1997).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 108.

<sup>53</sup> See, e.g., HTLL at 142-51; *Berman v. Parker*, 348 U.S. 26 (1954); *Boraas v. Village of Belle Terre*, 416 U.S. 1 (1974). Courts have also allowed governmental entities to enact ordinances designed to create historic preservation districts. See, e.g., HTLL at 81-94, 112-15; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). See also *City of Boerne v. P. F. Flores*, 521 U.S. 507 (1997). See generally Faith L. Kalman, *Preserving the Past: Historic Preservation Regulations and the Taking Clause*, 34 JOURNAL OF URBAN AND CONTEMPORARY LAW 297 (1988).

<sup>54</sup> See HTLL at 141.

<sup>55</sup> See *id.*

- 6) decreases congestion by providing alternative modes of transportation; and
- 7) makes efficient use of public money.<sup>56</sup>

As a result of all of these advantages, local governmental entities would be foolish not to adopt smart growth plans for their communities.

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<sup>56</sup> FSSG at 32.