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I. Introduction

Smart growth involves competing wants and conflicting needs of American institutions, groups, and concerns that represent natural resources, markets, and social welfare of urban, suburban, and rural communities. These institutions, groups, and concerns reflect change, growth, and development in one way or another. They cause, react, or address change, growth, and development in government, business, or communities. Smart growth addresses change, growth and development of urban sprawl, land development, and economic development. Some institutions, groups, and concerns want and promote the economic, social, and political benefits of change, growth, and development. However other institutions, groups, and concerns find either the rate or amount of change, growth, and development not broadly beneficial to communities and their welfare. These different responses to growth, change, and development within communities raise policy concerns and constitutional questions that must be resolved or narrowed by political debate or litigation in order to implement smart growth regulations.

Policy-making and regulation to implement smart growth programs affect numerous interests, and, thus, address and weigh conflicting needs and wants among stakeholders of communities. Urban sprawl, land development, and economic growth impact natural resources, environmental quality, public infrastructure, public facilities, social welfare, and the quality of life of communities, and, thus, raise the need for coordinated, beneficial, and suitable change, growth, and development under smart growth policies.[1] Smart growth includes economic development, environ-

1. *See, e.g.*, William A. Johnson, Jr., *Smart Growth and Regional Cooperation: A Tale of a City and County*, STATE & LOCAL LAW NEWS, at 1, 1 & 18-21. This piece is a speech that was given by The Honorable William A. Johnson, Jr., Mayor of Rochester, New York, at the "Smart Growth and Regional Cooperation" panel at the American Bar Association's Section on State and Government Law Meeting in Kansas City, on October 16, 1999. Mayor Johnson discusses policy concerns regarding the way communities grow and develop in response to urban sprawl and global markets. *Id.* Richard Stradling, *Smart-Growth Ideas Abundant*, THE NEWS-OBSERVER, January 20, 2001, at 3B (discussing smart growth recommendations made by a North Carolina Smart Growth Commission that did not give details on the impact of state revenues on smart growth goals and impact of state planning on local land use policies); Ron Terwilliger, *Smart Growth Movement a Matter of Social Responsibility*, BUSINESS FIRST-COLUMBUS, 36 at 36, June 16, 2000. Mr. Terwilliger, Chairman of the Urban Land Institute, defines smart growth. He states that smart growth policy-making needs to consider social inequity of communities and regions and must include

mental protection, natural resources conservation, land use planning, growth management, social welfare growth, and public policy-making.[2] The competing and conflicting interests of smart growth include the development of land, use of natural resources for production, the provision of jobs and housing, the preservation of open space and land, the regulation of land use, the provision of

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social justice. Terwilliger, *supra*, at 36.

State officials are recognizing that smart growth should include the preservation of rural land and quality of life. *See* Parris Glendening, *Some Lessons on Smart Growth for N.C.*, BUSINESS JOURNAL SERVING CHARLOTTE AND THE METROPOLITAN AREA, 35, at 35 (July 21, 2000). Mr. Parris Glendening is Governor of the State of Maryland. This article is comprised of his comments from an address to the National Association of Counties on July 14, 2000. Governor Glendening notes that Maryland is encouraging rural preservation by preserving agricultural land and natural resources, historical and cultural sites and shoreline on the Chesapeake Bay and Atlantic Ocean. *Id.* Maryland is also engaging in activities to preserve urban areas and neighborhoods. *See Teachers' Low-Interest Loans Promote "Smart Growth,"* STATE LEGISLATURES, 13, at 13 (Jul/Aug 2000). The Maryland legislature enacts legislation to provide low-interest loans to teachers if they buy homes in smart growth areas. *Id.*

Other state and local leaders have made observations regarding sprawl and orderly growth. *See, e.g.*, Ed. Eilert, *A Suburban City's Growth and Planning—Is It Sprawl or Rational Growth for the Region*?, STATE & LOCAL LAW NEWS, 1, 1 & 16-18 (Summer 2000). Mr. Ebert Eilert is the mayor of the City of Overland Park, Kansas, which is a suburb of Kansas City, Missouri. His comments are from a presentation he gave at the "Smart Growth and Regional Cooperation" panel at the Fall Meeting of the Section of State and Local Government Law of the American Bar Association (ABA), in Kansas City, Missouri, October 16, 1999. Mr. Eilert gives his observations on growth in Overland Park. *Id.* at 16-18.

2. *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING AND ENVIRONMENTAL SYSTEMS, 2-3 (2000). Professor Freilich discusses how to limit urban sprawl and initiate Smart Growth. *Id.*

Smart growth and other land use initiatives were on the ballot during the 2000 election. *See* ABC News, *ABC 2000: The Vote*, http://abcnews.go.com/sections /politics/2000vote/general/issues.html (Nov. 8, 2000). ABC News provides a list of returns of the 2000 election on special ballot issues. Voters defeated ballot initiatives to limit urban sprawl in Arizona and Colorado. *Id. See also* Tim Hull, *Growth Battle Heats Up*, INSIDE TUCSON BUSINESS 1, at 1-2, August 7, 2000. Mr. Hull discusses the growth management initiatives in Arizona. *Id.*

Smart growth affects local communities and their resources and facilities. Some cities and towns in North Carolina are experiencing land use and growth management problems. Donald C. Guy, *What is "Smart Growth" and How Will Legislation Affect Eastern North Carolina*, THE DAILY REFLECTOR, D8, at D8, March 12, 2000. Professor Guy discusses for a local newspaper in Greenville, North Carolina, the impact of smart growth on some N.C. counties. *See also* Jay Price, *Cary Council Leads Growth Management, Sewer Deal*, THE NEWS & OBSERVER, 4B, 1B & 4B (April 29, 2000) ("Cary leaders . . . link participation in a regional sewer–treatment plant to growth control."); Jay Price, *Apex Pauses to Rethink Growth*, THE NEWS & OBSERVER, 4B (April 29, 2000) ("[Apex] . . . plans to adopt a new, stricter set of development standards within a month . . . .").

social welfare needs, and the orderly growth of public policy.[3] The interests of institutions, groups, and concerns are often in conflict; for example, preserving prime farmland reduces the most suitable land for residential development. The interests and their conflicts are not new. But policy-making and program design regarding the implementation of more than two interests under a single program is new and, thus, the probability of broader conflict among several interests greatly increases with each new interest added to smart growth policy-making. Smart growth involves local and state policy-making that must broadly weigh and consider conflicting and competing interests of urban, suburban, and rural communities.[4] The weighing of conflicting interests raises the specter that policy debates and consensus building will generate complex policy concerns and constitutional questions. Those concerns and

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3. *See* AMERICAN PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE xxiii (September 1998) (hereinafter Legislative Guidebook). The Legislative Guidebook can be found at http://www.planning.org/plnginfo /GROWSMAR/guidebk.html, visited Jan. 30, 2000.

The smart growth project of the American Planning Association (hereinafter APA) is Growing Smart®. The aim of the project is to assist states in modernizing or updating their planning law and in managing growth and its conflicts. *See* Legislative Guidebook, *supra*, at xxii-xxiii. The APA project consists of three phases. *Id.* Each phase effects planning and its implementation at various levels of the government. AMERICAN PLANNING ASS'N, PLANNING COMMUNITIES FOR THE 21ST CENTURY i (December 1999) (hereinafter Planning Communities).

> Phase I of the project focused on state and regional planning and the relationships and responsibilities that exist between state, regional, and local planning efforts. Phase II resulted in model legislation dealing with local planning, including planning agency and planning commission structure, plan preparation, and the integration of state environmental policy acts with local planning. Phase III will provide model legislation for the implementing tools communities need to manage change.

Planning Communities, *supra*, at i. Planning Communities is a Special Report of the American Planning Association's Growing Smart® Project. *Id.* This report describes and explains the status of modernizing and updating planning law in the United States. *Id. See also* Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century–The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181 (2000). The article examines the impact of the smart growth movement on state legislative activity.

For an online examination, discussion and explanation of smart growth, see *Smart Growth Network–About Smart Growth*, http://www.smartgrowth.org /information/aboutsg.htm (Sept. 5, 2000). The discussion also includes a list of references, with descriptions and websites. The http://www.smartgrowth.org is a subset of http://www.sustainable.org that is developed and maintained by the Sustainable Communities Network (SCN). http://www.smartgrowth.org (Sept. 5, 2000).

4. Legislative Guidebook, *supra* note 3, at xxiii.

questions that are not easily resolved must be narrowed for broader policy debate or, eventually, constitutional litigation.

A. *Individual Obligations and Community Burdens Borne by Landowners*

This article addresses takings and other constitutional concerns of allocating and distributing the burdens and benefits of smart growth among the stakeholders, namely the communities, landowners, business, and government. Although smart growth provides benefits and advantages to these communities, its actual or potential public burdens and obligations may fall heavily on landowners and economic developers under comprehensive local, regional, or state plans. Smart growth includes both the *stick*[5] *and carrot*[6] *approaches* of state and local policy-making in allocating the burdens and benefits of orderly change, growth, and development. Notwithstanding the *carrot* approach and deferential norms that point to minimal conflict at the municipal and state levels, the article discusses whether smart growth regulation can further an effective balance among natural resources policies,[7] markets,[8] and the quality of life[9] under takings and other constitutional provisions. Such provisions limit government regulation to insure fundamental fairness in the obligations imposed on citizens and to insure

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5. *See infra* notes 138-152, 230-233, and accompanying text. The stick is the threat to use or the use of mandatory regulations to impose use restrictions, environmental requirements, growth management standards, and other mandates on land and private facilities. *See generally infra* notes 179-183 (discussing the use of zoning regulations that are mandatory use restrictions to implement historic preservation policies).

6. *See infra* notes 234-236 and accompanying text. The carrot is the offer of incentives and benefits to induce landowners to comply with voluntary regulations. *See generally infra* note 49 and accompanying text (discussing incentives granted by local governments to encourage economic development); s*ee generally infra* notes 162-167 and accompanying text (discussing two cases in which landowners refused to comply with conditional demands that required the transfer of their property rights to receive a government benefit); *see generally infra* notes 179-183 (discussing the use of transferable development rights (TDR)), *infra* note 182, as a mitigating benefit under a historic preservation program). Moreover, conditional demands that create a take it or leave it choice for landowners exercising their property rights can be challenged under the federal constitution. *See also infra* note 134 and accompanying text (discussing constitutional challenges to voluntary regulations, such as conditional demands). Some states are considering the use of conditional demands in smart growth programs. *See infra* note 10 and accompanying text.

7. *See infra* notes 67-70 and accompanying text.

8. *See infra* notes 63-67 and accompanying text.

9. *See infra* notes 70-74 and accompanying text. Social welfare includes issues and concerns regarding the quality of life in urban, suburban and rural areas.

reasonableness of public burdens imposed on landowners and developers. The *stick* of smart growth regulation shall raise constitutional issues, though voluntary programs are entirely safe from constitutional litigation. Regulatory mandates and conditional demands[10] include land use controls, growth management strategies, conservation programs, and development restrictions and prohibitions.[11] Smart growth programs use these mandates and demands to impose obligations and burdens on landowners and land developers. Such obligations and burdens undeniably further the public good and, thus, raise specific constitutional issues about the burden borne under and reasonableness of obligations of smart growth regulation under the Takings Clause,[12] Due Process Clause,[13] and Equal Protection

10. City of Monterey v. Del Monte Dunes of Monterey, Ltd., 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 487 U.S. 825 (1987).

One state has considered using conditional demands to offset the impact of economic development. Stradling, *supra* note 1, at 3B. North Carolina Smart Growth Commission recommends that the North Carolina General Assembly "[r]equire buyers or developers of farmland to pay a fee for every acre taken out of production." *Id.*

11. *See* FREILICH, *supra* note 2, at 46-50.

12. U.S. CONST. amend V. *See infra* notes 138-251 and accompanying text (discussing the application of regulatory takings analysis to smart growth policy). Proposed Federal property rights acts that would remove hurdles imposed by ripeness and other jurisprudential doctrine, *see infra* notes 138-162 and 252-291, may affect smart growth. *See* Linda Baker, *Growing Pains/Malling America: The Fast-Moving Fight to Stop Urban Sprawl*, THE ENVIRONMENTAL MANAGER, 26, at 31 (May/June 2000). Some commentators find that property rights act would permit federal courts to limit smart growth. *See id.* State property rights acts have been enacted and potentially may possibly slow the implementation of smart growth programs that imposed an unreasonable economic and financial hardship on some landowners. *See* Ohm, *supra* note 3, at 188; *see also* James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENVTL. L. & POL'Y 143, 166 n.94 (2000) (listing state property rights legislation and its relationship to the federal means-ends test).

Federal takings and other constitutional precedents do not impose severe limits on growth management and land use decisions that broadly affect the community as a whole. *See infra* notes 138-162, 176-192, 251-191 and accompanying text. The standard of review under the federal takings law for zoning decisions is highly deferential. *See infra* notes 138-162 and accompanying text. Other commentators and scholars have suggested that smart growth may not necessarily offend the takings clause, U.S. CONST. amend V, and other constitutional provisions, s*ee generally* James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation*, 32 URB. LAW. 211 (2000) (examining relevant constitutional and other issues facing the formulation, development and implementation of smart growth policy); Duarte J. Desideria, *Growing Too Smart–Takings Implications of Smart Growth Policies*, 13 NAT. RES. & ENVTL 330 (1998) (examining the subject of takings jurisprudence and smart

Clause[14] of the United States Constitution.[15]

The implementation of smart growth regulations will impose public burdens on private land and economic developers. The primary focus of this article is an examination of the constitutional validity of such regulations under the Takings Clause that limits exercises of eminent domain and police power.[16] It also recognizes

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growth policies and regulations); *infra* notes 138-257 and accompanying text (discussing the validity of smart growth under regulatory taking analysis). Some commentators have expressed their differences on this issue. *See* Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" Is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000). Mr. Bolick is Vice President and Director of Litigation at the Institute for Justice in Washington, D.C. and opposes smart growth. *Id. See also* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000). Mr. Dowling is Chief Counsel for the Community Rights Counsel and supports smart growth. *Id. See also* Jeffrey M. Sharp, *Digests of Selected Articles–Points/Counterpoint*, 29 REAL ESTATE L. J. 160, 161-69 (2000). Professor Sharp reviews Mssrs. Dowling and Bolick's writings on smart growth. *Id.*

13. U.S. CONST. amend XIV. For a general examination of the possible impact of the Due Process Clause, *id.*, on smart growth policies, *see infra* notes 258-268 and accompanying text.

14. U.S. CONST. amend XIV. For a brief discussion of the possible impact of the Equal Protection Clause, *id.*, on smart growth policies, *see infra* notes 269-275 and accompanying text.

15. *See infra* notes 138-275 and accompanying text.

16. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960). In *Armstrong*, the United States Supreme Court concludes that individual citizens and landowners should not bear public burdens. *Id.*

This article focuses primarily on the regulatory takings doctrine that Justice Holmes set forth in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In *Pennsylvania Coal Co.*, the Court recognizes that regulation can go "too far" or affect the purpose of eminent domain by taking property for public use. *Id.* The Takings Clause, U.S. CONST. amend V, consists of *two other elements*: *just compensation* and *public use*. *See* Berman v. Parker, 344 U.S. 26 (1954). The United States Supreme Court holds that taking land for urban renewal is a valid exercise of eminent domain power for public use. *Id.* These elements should not be ignored in examining the merits of smart growth programs under the takings clause. *See Eminent Theivery*, THE WALL ST. J., January 17, 2001, at A26 (discussing the expansion of the definition of *public use* to include public good). The editorial describes local situations and municipal conditions that raise public policy concerns regarding public use:

> Detroit is condemning the land of 30 homeowners to make way for more upscale houses and retail stores. In New York, a cabinetmaker's Manhattan plot is being condemned and will be handed over to a Home Depot. In Pittsburgh, a plan pushed by major Tom Murphy to confiscate 64 downtown buildings for the benefit of a mallbuilder was defeated only after an all out donnybrook that awakened local concerns over just the sort of issues . . . .
>
> Properties targeted by the Pittsburgh demolition crew included restaurants, flower shops, and a 144-year-old optometry business. They were to be replaced by retail wunderkinds like the Gap, Tiffany's, and a sports bar . . . . To be fair, mayors in cities like Detroit and Pittsburgh find

that *private obligations* imposed under smart growth regulation may also raise fundamental fairness and reasonableness questions under the equal protection and due process clauses that also limit

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themselves trying to kick start economies being dragged down by the death of old industry and decades of middle-class flight to the suburbs . . . .

Eminent Theivery, *supra*, at A26.

The takings and compensation components of the Takings Clause receive the most public attention. The third element receives less attention in takings jurisprudence. This element is public use. Courts give much deference to decisions of local policy-makers regarding what government activities and needs are public uses. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240-41 (1984) (taking land for redistribution to local challenges); *Berman*, 348 U.S. at 26 (1954) (taking land for urban renewal projects). In *Berman*, the Court states that:

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end . . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Berman, 348 U.S. at 33. In *Midkiff*, the Court observes that the standard of review for public use decisions under the federal takings clause is highly deferential. *See Midkiff*, 467 U.S. at 240-41. The Court states that:

> The "public use" requirement is thus coterminous with the scope of a sovereign's police powers. There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in Berman made clear that it is "an extremely narrow" one. *Berman*, 348 U.S at 32. The Court in *Berman* cited with approval the Court's decision in Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946), which emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896).

Midkiff, 467 U.S. at 240-41. A deferential standard of review makes it difficult to successfully challenge a local decision to take land for public use. *See id.* In *Berman* and *Midkiff*, the Court gives local and state policy-makers much latitude in deciding whether public needs and wants are public uses. Such a highly deferential review makes public use mostly a political question for local officials and policy-makers to address through legislative decision-making and political debate.

exercises of *eminent domain* and *police powers*.[17] But constitutional limitations on exercises of eminent domain and police powers do not imply that the Federal Constitution permits unmitigated degradation of natural resources, destruction of environmental qualities, reduction of social welfare, and unprecedented shifts in the quality of life of urban and rural communities.[18] Consequently, the article discusses whether smart growth regulation to limit urban sprawl and other counterproductive growth and land uses could impose unreasonable public burdens on landowners and developers through limiting the use and development of land while providing for public needs, such as growth management, farmland preservation, open space, environmental quality, social welfare, soil and water conservation, infrastructure and public facilities, and the quality of life. The impact of smart growth regulation raises constitutional concerns regarding fundamental fairness to landowners, reasonable exercises of property rights, reasonable effects on economic interests, and the exercise of authority by communities to regulate growth.[19]

B. *Balancing Natural Resource, Market, and Quality of Life Concerns of a Community*

Constitutional questions arise in attempts to find a balance among *economic markets, natural resources, and the quality of life*[20] in American communities. Regulation intended to create a balance among these competing interests have long been the cause of public policy debates[21] that often fuel litigation to find a better balance under particular circumstances. This article recognizes the policy plight of communities seeking such a balance. Our purpose here is to broaden these debates and to eventually narrow the issues for likely future litigation. A discussion of smart growth regulation shall advance this purpose. Moreover, this discussion will show that smart growth regulation relates to its policy justification more firmly when municipalities, developers, environmentalists, local citizens, and other parties find, through policy debates, those

17. *See infra* notes 258-275 and accompanying text.

18. *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 487 U.S. 825 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

19. *See infra* notes 138-251 and accompanying text.

20. *See infra* notes 63-76 and accompanying text.

21. *Euclid*, 272 U.S. at 365; *Pennsylvania Coal Co.*, 260 U.S. at 393.

community needs that do not lend themselves to resolution easily by local and state policy-makers and, therefore, must be litigated in federal and state courts. Part II of the article defines and discusses smart growth and identifies state legislative initiatives to enable local governments to promulgate smart growth regulatory programs. Part III discusses the reasonableness of smart growth in light of takings jurisprudence that scrutinizes the nature of government action in implementing government regulation. Part IV discusses the economic impact of smart growth and the effects of smart growth on owners' economic expectations in light of takings jurisprudence that reviews the impact of government regulation on the landowner's business or economic interests. Part V discusses policy concerns, fairness questions, and human dimensions that may further debates and, eventually, challenge the validity of local smart growth programs to affect the quality of life of urban and rural communities. It also recognizes that these concerns, questions, and dimensions create the greatest hurdle to establishing workable, effective smart growth programs. The conclusion states that smart growth policies should survive constitutional muster under federal and state constitutions, but the design of mandates and conditional demands to implement these policies will face *as-applied challenges*[22] where the outcomes of litigation are less predictable and may force municipalities to tailor smart growth programs and, thus, limit their objectives and goals.

C. Uniformity, Reticence, and Uncertainty of American Institutions

In establishing an equitable balance among markets, natural resources, and social welfare, regulations that provide *reciprocity of advantages*[23] may survive constitutional scrutiny under a facial challenge. These issues are important to American institutions and

22. *See* Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470, 474 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980). Some regulatory taking claims are facial challenges that only challenge the constitutional validity of land use regulations on their face. *See Agins*, 447 U.S. at 260-61. Facial regulatory taking claims challenge land use and other regulations that have not been applied by the local government to a specific site. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 474; *Agins*, 447 U.S. at 260. In *Agins*, the Court observes that landowners face great difficulty in trying to prove any regulation unconstitutional on its face under the takings clause. *Agins*, 477 U.S. at 260-61. As-applied taking claims challenge land use regulations that have been applied to a particular site or tract of land. *See Penn Cent. Transp. Co.*, 438 U.S. at 122.

23. *See infra* note 207 and accompanying text (discussing the doctrine of reciprocity of advantages in land use law).

people[24] and, thus, may raise other *policy challenges* directly related to federal and state constitutions. First, state and federal constitutional theories will affect the preferred balance of any community because these theories determine the nature and kinds of constitutional claims that can be raised by landowners and developers. Second, smart growth is *new planning technology* to combat urban sprawl and rural degradation. It involves human dimensions among parties with competing interests and conflicting policies that include natural resources, local markets, and social welfare.[25] The nature of human dimensions among policy-makers, developers, environmentalists, planners, and local citizens[26] will affect the length of time it takes to achieve an equitable balance among natural resources, markets, and the quality of life. The success of smart growth to implement new policies is more likely when the balance includes burdens that are equitable and obligations that are fair.

Third, federal intervention by the legislative or judicial branch remains an institutional concern of intergovernmental relations in our federalism.[27] It is well settled that growth management, land

24. *See infra* notes 292-301 and accompanying text (discussing human dimensions in land use and growth management).

25. *See id.*

26. *See id.*

27. *See* Holloway & Guy, *supra* note 12, at 52–87. The role of the federal government in smart growth should be broad policy guidance and specific funding. It should provide funding for urban development and redevelopment, environmental protection, transportation, education and crime prevention. Faisal Roble, *Who Benefits from Smart Growth?*, PLANNERS NETWORK-ONLINE, http://www.plannersnetwork.org/138/roble.htm (Nov./Dec. 1999). Intergovernmental disputes that raise federalism and states rights issues may slow the development of local public policy that addresses mostly local policy questions and concerns. *Id.* The funding of particular programs by the federal government would greatly improve the successful implementation of smart growth. *Id. See* Richard F. Laberge & Benjamin H. Syden, *State, Federal Governments Offer Economic Development Grants*, CAPITAL DISTRICT BUSINESS REVIEW, 19, at 19-20, July 7, 2000. Mssrs. Laberge and Syden note that state and federal grants are available for planning and infrastructure. These grants provide funds for urban development and revitalization and economic development and strategies. Laberge & Syden, *supra*, at 19-20. Another commentator strongly suggests that the federal government should play a role in smart growth. *See* Bruce Katz, *The Federal Role in Curbing Sprawl*, 57 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 66, 66-76 (2000). Mr. Katz is the founding Director of Brookings Center on Urban and Metropolitan Policy. He argues the federal government should play a role in curbing sprawl through the revitalization of metropolitan areas. *Id.* He suggests that the federal government play a role by providing directives and incentives to metropolitan governance, enacting policies to facilitate smart growth, and helping regions understand their challenges. Katz, *supra*, at 67. He notes that the federal government must examine policies that

contribute to urban sprawl and its degradation of the quality of life and natural qualities. *Id.* at 67 & 69. Mr. Katz recommends that the federal government change its transportation policy, rethink its housing policy, encourage collaboration, promote land use reform, promote smart growth, and disclose spatial analyses. *See id.* at 73-77.

Federal barriers to smart growth must be examined and removed or modified by federal agencies, when they undermine smart growth policies. Ann Eberhart Goode, Elizabeth Collaton, and Charles Bartsch, *Smart Growth*, http://www.nemw.org/ERsmartgrowth.htm (April 2, 2000) (hereinafter cited as Goode). As of April 1, 2001, this report was not posted to this particular URL. Other smart growth information is available at a related site. *See* http://www.nemw.org/index.html, (April 1, 2001). Ms. Goode, Ms. Collaton, and Mr. Bartsch coordinate the Northeast-Midwest Institute's Urban Environment Program. In the *Smart Growth* report, they discuss several significant topics regarding smart growth. *Id.* They discuss federal barriers to smart growth, state and local leadership, and the funding of smart growth programs. *Id.* They identify federal barriers to smart growth. *Id.* They note that smart growth can benefit from federal transportation programs that provide grants and other funds for transit spending. *See* Goode, *supra*, at 2-3. They also note that federal agencies are showing a willingness to investigate how their programs affect smart growth. *Id.*

The United States Senate has created a task force to study how the federal government might assist state and local governments in addressing growth issues and managing growth. The task force was established by Senators Jeffords and Levin in 1999:

> In January 1999, Senators Jim Jeffords, R-VT, and Carl Levin, D-MI, established the bipartisan, multi-regional Senate Smart Growth Task Force. Currently, there are 24 members. The Task Force provides Senators with a forum for education and coordination of efforts concerning sustainable growth patterns. The overall goal of the Task Force is to determine and promote ways the federal government can assist states and localities address their own growth management issues . . . .

Northeast-Midwest Institute, *Senate Smart Growth Task Force Initiatives in the 106th Congress*, http://www.nemw.org/SGsenate.htm (April 1, 2001). The 106th Congress has engaged in several smart growth activities, such as brownfield revitalization, public transportation, and open space. *Id.* The Task Force also asked the General Accounting Office (GAO) to investigate the impact of federal policies on urban sprawl and growth.

> In June 1998, Senators Jeffords and Levin requested a General Accounting Office (GAO) report on federal programs and policies affecting sprawl and urban growth. The report, *COMMUNITY DEVELOPMENT: Extent of Federal Influence on "Urban Sprawl" is Unclear*—obtainable from the Government Accounting Office (GAO)—found that while the federal government influences patterns of growth in local communities through spending, taxation, regulation, and administrative actions, further research is necessary to verify direct impacts of specific policies and programs. The report was released on April 30, 1999.

Id. The GAO conducted another investigation for Senators Jeffords and Levin and other members of Congress on how federal policies affect the management of growth and development by local and state governments. *See* General Accounting Office, *Community Development: Local Growth Issues–Federal Opportunities and Challenges*, 5, September 2000 (hereinafter GAO-Community Development). This report notes that communities are concerned about growth-related issues, but

use, and natural resource preservation are state issues.[28] A federal presence in agricultural policy, natural resource management, environmental regulation, and social welfare policy is well established.[29] Any federal regulation, including judicial precedent, tends to create uniformity that limits policy flexibility of local communities.[30] Fourth, state supreme courts establish state constitutional theories that could limit smart growth programs. State appellate courts do not always apply federal precedents as broadly as local and state policy-makers would desire. These courts may not follow a federal precedent when this precedent does not bind them.[31] Smart growth policies and regulation must survive judicial scrutiny by state courts. In short, smart growth policies and regulation must survive challenges from federal and state institutions that could easily undermine smart growth at state and local levels by imposing uniformity, unpredictability, and uncertainty in local and state policy-making.

II. Defining Smart Growth Under Present Constitutional Theory

Urban and rural land use and growth management are constantly under siege by one policy movement after another. In the 1990s, the property rights movement emerged as a new public policy force on American land.[32] Curiously, the 1950s brought urban development and renewal[33] that remains with us today as

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they are still encouraging economic development. *Id.* at 8. A copy of the report can be found at http://www.gao.gov/archive/2000/rc00178.pdf.

28. *See* Holloway & Guy, *supra* note 12, at 152 & 157 n.46 (discussing the role of state courts in interpreting the federal takings clause).

29. *See* James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions as a Means to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. ENVTL. L. & POL'Y 1, 6-8 (2000). Professors Holloway and Guy examine the impact of the United States Supreme Court's interpretation of the takings clause on the making of social welfare policy by municipal governments. *Id.* at 7-9.

As a part of land use reform and smart growth, some commentators urge the federal government to enforce environmental laws, such as the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1994) & Supp. V 1999), Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1994 & Supp. V. 1999). *See* Katz, *supra* note 27, at 74; Goode, *supra* note 27, at 3.

30. *See infra* notes 276-291 and accompanying text (discussing the role of state courts in interpreting the federal takings clause).

31. *See infra* notes 286-291 and accompanying text.

32. *See* Ohm, *supra* note 3, at 188 & nn.44-48; *supra* note 12 and accompanying text.

33. *See* ANTHONY DOWNS, URBAN PROBLEMS AND PROSPECTS, 6-25 (1970).

urban development and redevelopment.[34] In the 1980s, a new federalism emerged within the states' capitals that permitted state and local policy-makers to play a greater role in affecting state social policy-making, and it may remain with us today.[35] States explicitly demonstrated the exercise of greater control over state and local policy-making, including land use, social welfare, natural resource management, and growth management.[36] At the beginning of the 21st Century, smart growth reconciles what clearly seems obvious to us. The smart growth movement and well-settled constitutional doctrines must provide a more *inclusive* public policy to address social and other conflicting interests[37] of state and local policy debates that are needed to narrow takings and other constitutional issues for resolution by courts. The development of smart growth policy and regulation must demonstrate the tendency to be more inclusive when imposing obligations and burdens on the communities.

A. The Definitions of Smart Growth

Smart growth includes *a modernization of land use policy* that can affect land use, growth management, public infrastructure and facilities, social welfare, natural resources, environment quality, and the quality of life.[38] The *modernization* of land use policy means smart growth has newly declared state and local interests that reflect changes in land use, growth management, natural resources, and social welfare.[39] Presently, smart growth policies show a slow development of land use and development controls and tools,[40] and, thus, must rely on old regulatory controls and tools to implement

34. *See* Legislative Guidebook, *supra* note 3, at x-xi.

35. *See also* Holloway & Guy, *supra* note 12, at 239-40 (arguing that state courts will construe the Court's interpretations of the takings clause to further state policies). Yet some commentators argue that the Court dampens the spirit of federalism by limiting the exercise of police power authority by local governments. *Id.* at 157 n.46.

36. *See* Ohm, *supra* note 3, at 189-96. *See also* James E. Holloway, *ERISA, Preemption and Comprehensive Federal Health Care: A Call For "Cooperative Federalism" to Preserve The States' Roles in Formulating Health Care Policy*, 16 CAMPBELL L. REV. 405 (1994) (discussing the need for states to play a greater role in creating health care policies).

37. *See supra* notes 1-2 and accompanying text.

38. *See, e.g.,* Planning Communities, *supra* note 3, at 5-6; FREILICH, *supra* note 2, at 15-16.

39. *See* Planning Communities, *supra* note 3, at 5-6; Legislative Guidebook, *supra* note 3, at ix-x. *See also supra* notes 1-2 and accompanying text (discussing the changes in urban and rural areas).

40. *See* Legislative Guidebook, *supra* note 3, at xii.

new policies.[41] However, new smart growth technology[42] that is the basis of new regulation must overcome constitutional and public policy challenges that confronted old regulations, such as zoning.[43] Old regulatory tools include land use controls,[44] zoning,[45] impact exactions,[46] development moratoria,[47] soil and water conservation

41. *See id.* Phases I and II of the APA's Smart Growth Program do not offer land use tools that can be implemented to control local development, land use, and change. These phases address planning, legislative, and policy issues. *Id.* Phase III will include tools, such as multipurpose controls to manage development and change. *See id.*

42. Smart growth occurs concurrently with new urbanism and livable communities. *See* Ohm, *supra* note 3, at 181. The concept of urban revitalization promotes livable neighborhoods that are "considered as the nucleus and basic building block in revitalizing our cities." Roble, *supra* note 27, at 1. The neighborhood also has an identifiable boundary that is consistent with the urban boundary limits of smart growth programs. *See id.* Goode, Collaton, and Bartsch note that:

> New urbanist planning firms have shown how communities have stifled criticism of density by combining design features with public amenities like open space and parks in order to create diverse neighborhoods. In the best of development projects, high-end, single-family homes co-exist peacefully with tastefully-designed, multi-family housing. Dallas, for instance, is cycling many of its commercial buildings into residential use, and its officials see downtown housing as the means to becoming a more livable community.

See Goode, *supra* note 27, at 4. Consequently, smart growth includes concepts of new urbanism and livable communities. *See id.* at 4; Ohm, *supra* note 3, at 183-84. *See also* Planning Communities, *supra* note 3, at 16-20 (discussing planning elements and requirements in modernizing land use planning and law.). Smart growth is a form of new urbanism to some commentators. *See* Baker, *supra* note 12, at 29-30. Baker states that:

> Less than two decades old, the design strategy known as new urbanism is already a classic example of smart growth principles. The brainchild of architects Andres Duany and Peter Calthorpe, these neo-traditional communities consist of mixed–use residential, office and retail developments organized around clear public centers: parks, libraries, and town squares. Because new urbanism seeks to recreate the feel of classic American neighborhoods, home in these communities are usually located on narrow tree-lined streets and feature people-friendly front porches, hidden garages, and craftsman-style or row-house architecture. Many developments are also built around mass transit station, giving residents easy access to buses or light rail.

Id. at 29. New Urbanism resurrects the neighborhood and makes it the core or nucleus of the community. *Id.* at 29-30.

43. *See Penn Cent. Transp. Co.*, 438 U.S. at 104; *Euclid*, 272 U.S. at 365.

44. *Penn Cent. Transp. Co.*, 438 U.S. at 109. *See also infra* notes 176-197 and accompanying text (discussing the impact of *Dolan* on the use of development impact exactions for social welfare policy-making).

45. *Euclid*, 272 U.S. at 397. *See also infra* notes 138-152 and accompanying text (discussing the impact of *Dolan* on the use of development impact exactions for social welfare policy-making).

46. *Dolan*, 512 U.S. at 380; *Nollan*, 483 U.S. at 827. *See also infra* notes 153-175 and accompanying text (discussing the impact of *Dolan* on the use of

regulations,[48] development incentives,[49] development agreements,[50] environmental requirements,[51] and farmland preservation programs.[52]

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development impact exactions for social welfare policy-making).

47. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 216 F.3d 764, *reh'g denied*, 228 F.2d 998 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3505 (June 29, 2001). In *Tahoe-Sierra Preservation Council, Inc.*, the Tahoe-Sierra Preservation Council, Inc. (T-S Preservation Council) that represents a group of landowners in the Lake Tahoe Basin challenged interim development regulations enacted in the 1980's by the Tahoe Regional Planning Agency (TRPA). *Id.* T-S Preservation Council alleged that these regulations "constituted a "taking" of ... [their] property under the Fifth and Fourteenth Amendments." *Tahoe-Sierra Preservation Council, Inc.*, 216 F.3d at 766. "The principal question ... is whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land-use plan was being devised, effected a taking of each plaintiff's property under the standard set forth in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)...." *Tahoe-Sierra Preservation Council, Inc.*, 216 F.3d at 766. The United States Court of Appeals for the Ninth Circuit flatly refused to accept the theory of a conceptual severance of property interests and, thus, rejected the argument that the interim development regulation constituted a taking by interfering with temporal interests in the land. *See id.* at 779. The Ninth Circuit found that "[t]he moratorium was temporary—it was designed to and did dissolve upon the adoption of a new regional plan. Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of the future developmental use of the property." *Id.* at 781. The Ninth Circuit held that the interim development regulations are not a temporary taking of private property for public use under the federal takings clause. *See id.* at 785. The Court will review the Ninth Circuit's decision in the October 2001 Term.

48. Woodbury County Soil and Water Conservation Dist. v. Ortner, 295 N.W.2d 276 (Iowa 1979). The Supreme Court of Iowa held that mandatory soil and water conservation regulations that impose some financial hardships are not a taking of private property for public use. *See also infra* note 51 and accompanying text (discussing the need to coordinate land use, natural resources, environmental, and production policies and programs on agricultural land); *see also* James E. Holloway & Donald C. Guy, *Policy Coordination and The Takings Clause: The Coordination of Natural Resource Programs Imposing Multiple Burdens on Farmers and Landowners,* 8 J. LAND USE & ENVTL. L. 175 (1992). Professors Holloway and Guy examine whether policy coordination programs that require cross compliance among interdependent natural resources, environmental qualities, farmland preservation, and farm policies violate the Takings Clause by placing an unreasonable burden on the property rights of farmers who use and manage erodible agricultural land to produce food and fiber. *See* Holloway & Guy, *supra*, at 178-79. They conclude that policy coordination programs do not create an unreasonable burden under many circumstances and, thus, should easily withstand a facial challenge under the Takings Clause. *Id.* at 233.

49. *See* Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97 (2000); Susan Mead, *Incentives for Downtown Revitalization: Tax Increment Financing Districts, Chapter 380, and Other Tools*, 32 URB. LAW. 1013 (2000). Some commentators argue that economic development incentives offered by municipalities are not always effective to improve local economies. *See* Mead, *supra*, at 98 (*citing* TIMOTHY BARTEL, WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? (1991); ROGER WILSON, STATE BUSINESS INCENTIVES

AND ECONOMIC GROWTH: ARE THEY EFFECTIVE? A REVIEW OF THE LITERATURE (1989)). However, planners and policy-makers still use economic development incentives to attract and retain corporations. Weber, *supra*, at 98. Weber concludes that the failure of economic development incentives can be attributed to political and financial shortcomings of incentive packages as well as the nature of the American corporate enterprise. *Id.*

50. *See* Judith W. Wegner, *Moving Towards the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987). Development agreements may become an important tool to protect development rights when owners cannot rely on vested rights in the face of smart growth and other land use and growth management movements. *See* Daniel J. Curtin, Jr., *Vested Property–Property Development Agreements in an Era of Smart Growth Legislation*, STATE AND LOCAL LAW NEWS, 1, at 1 (Fall 2000). Several states have enacted laws permitting local governments to enter into enforceable development agreements between a municipality and a developer. Curtin, *supra*, at 1-2. Such states include, among others, California, Arizona, Colorado, Hawaii, and Florida. *Id.* at 14-15. Development agreements permit developers to develop and contract long-term development projects without concern about local municipalities changing land use regulations and requirements. *See id.* at 15. The development agreement in California and perhaps other states is a legislative act or decision of the local governing body. *See id.* at 15-16. Several state legislatures and courts do not conclude that development agreements contract away the police power authority of municipal and county governments. *See id.* at 16; Shelly Ross Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales and the United States*, 32 URB. LAW. 21, 60-65 (2000); Wegner, *supra*, at 992.

For commentary on vested rights and development agreements, see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental Proprietary Maze*, 75 IOWA L. REV. 277 (1990); Patricia G. Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119 (1993); David Hartman, (Note), *Risky Business: Vested Real Property Development Rights–The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law*, 30 TEX. TECH. L. REV. 297 (1999); Thomas G. Pelham, Adani U. Lindgren & Lisa D. Weil, *What Do You Mean I Can't Build!?, A Comparative Analysis of When Property Rights Vest*, 31 URB. LAW 901 (Fall 1999).

51. *See* James E. Holloway & Donald C. Guy, *Rethinking Local and State Agricultural Land Use and Natural Resource Policies: Coordinating Programs to Address the Interdependency and Combined Losses of Farms, Soils, and Farmland*, 5 J. LAND USE & ENVTL. L. 379 (1990). Professors Holloway and Guy examine the interdependency of soil and water conservation, farmland preservation, and farm policies of federal, state, and local governments. Holloway & Guy, *supra*, at 381. They argued that policy coordination among interdependent natural resources, environmental qualities, farmland preservation, and farm policies is necessary to protect erodible agricultural land. *Id.* Later in another article, they also argued that coordinating these policies under one or more programs should not violate the takings clause. *See* Holloway & Guy, *supra* note 48, at 178-79.

52. Holloway & Guy, *supra* note 51, at 379. *See also supra* notes 48, 51 and accompanying text (examining the application of takings law to regulatory schemes to coordinate land use, natural resources, environmental, and production policies on agricultural land).

In the smart growth movement, environmentalists and land preservationists are also protecting open space and agricultural land on the edge of inner cities and

More importantly, local fiscal impact analysis is now a viable part of municipal policy-making in maintaining and expanding infrastructure and public facilities.[53] In addition, smart growth promotes comprehensive state, regional, and local planning that has yet to be adopted or even addressed in a majority of states.[54] Consequently, smart growth includes new technology, public policy, old land use, and resource movements that directly resulted in many single-purpose regulatory tools and that ineffectively advanced many conflicting state interests. Municipalities may have to implement some smart growth policies under old single-purpose tools that in some circumstances have proven to be less effective.[55] Zoning, financial impact analysis and farmland preservation measures are old regulatory tools and do not necessarily make smart growth programs ineffective or unlawful means under the federal constitution to implement land use, growth management, and other urban policies. The important policy concern is not technology, regulation, or movement; it is the change in public policy regarding the public need for an effective balance among markets, natural resources, and social welfare.[56] The definition of smart growth includes public policy for change[57] to effect the direction of the community.[58] The public policy of smart growth includes three broad public interests: markets, natural resources, and social welfare. These interests often conflict or compete in

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suburbs. *See* Baker, *supra* note 12, at 32-33. Many states are enacting legislation and raising revenues to purchase open space and farmland. *Id.* at 32. According to Baker, the United States loses approximately 400,000 acres of farmland per year and much of the land is the best farmland. *See id.* In addition, large tracts of farmland are often sold by heirs to pay estate and gift taxes and, thus, land preservationists must act to preserve this land. *See id.* Such losses of agricultural land threaten farming in many areas and, thus, require a broader strategy to preserve farmland and farming. The Purchase of Development Rights (PDR) and conservation easements can be used to acquire development rights. *See id.*

53. Holloway & Guy, *supra* note 29, at 12-13 n.16 & 14-16 n.19. *See generally* John J. Forrer, CALCULATION GROWTH: SOFTWARE USED FOR FINANCIAL ANALYSIS IN ECONOMIC DEVELOPMENT, 5, July 1990 (identifying software used in financial analysis of economic development); James S. McCullough & James F. Hicks, Jr., MUNICIPAL FINANCIAL ANALYSIS HANDBOOK, 1, December 1984 (assistance to local government officials regarding fiscal matters).

54. Planning Communities, *supra* note 3, at 3-4.

55. *See supra* notes 40-41 and accompanying text.

56. *See supra* notes 1-3 and accompanying text. *See also* Ohm, *supra* note 3, at 189 & n.53 (citing William Hudnut, *Question: What is Smart Growth Not? at* http://www.uli.org/Pub/Pages/a_issues?A_UrL4_SeHu.htm (July 1999) (discuss-ing the definition of smart growth).

57. *See* Ohm, *supra* note 3, at 189; *see also* Kushner, *supra* note 12, at 228-30; FREILICH, *supra* note 2, at 32. *See infra* note 129 and accompanying text (discussing the pros and cons of the impact of residential development on the community).

58. *See supra* notes 1-3 and accompanying text.

local and state policy-making where local and state policy-makers establish public policies that are then furthered with land use, growth management, natural resources, and other regulation.[59]

No one public interest plays the pivotal policy-making role in determining the direction of state and local public policy regarding smart growth. The public policy of smart growth includes markets, natural resources, and social welfare. State policy-makers must choose among these interests based on the *state, nature, and availability of natural resources, fiscal resources, social resources, and other resources*. Congress and other federal policy-makers also should play a role, but a federal smart growth act that mandates broad local and state uniformity in public policy regulation under the Commerce Clause[60] is unnecessary. Broad sweeping federal policy would prove harmful because natural differences, fiscal differences, social differences, and other differences are too diverse among communities to make one paradigm fit all. Such federal involvement would be difficult to implement among totally diverse communities, would create a source of constitutional confusion, and would create unnecessary delays in reforming state and local policy.[61] Federal involvement should include an investigation of the impact of federal natural resource management, agricultural, transportation, and other policies on state and local smart growth programs.[62]

The public policy of smart growth requires an equitable balance among these interests. First, regulating growth, change, and development affects economic or business markets of the state and community.[63] Smart growth will affect land, capital, and labor markets of urban and rural communities.[64] The demand for

59. *See* Ohm, *supra* note 3, at 200-03; Kushner, *supra* note 12, at 237.

60. U.S. CONST. art. I, cl. 8.

61. *See* Holloway & Guy, *supra* note 12, at 157-61.

62. *See supra* note 27 and accompanying text.

63. *See* National Ass'n of Home Builders, SMART GROWTH REPORT: BUILDING BETTER PLACES TO LIVE, WORK AND PLAY, 4-7 *at* http://www.nahb.com/main_features/smartpdf.htm (May 2000). The National Association of Home Builders (NAHB) is a trade organization that represents businesses providing residential and light commercial construction. *Id.* at 21.

64. *See* FREILICH, *supra* note 2, at 30 (discussing the concepts applied to land use and development under the Ramapo Plan). Capital markets and government funds will provide the financing for smart growth programs. However, infill development and mixed-use projects will be more difficult to finance. Goode, *supra* note 27, at 6-7. Real Estate Investment Trusts (REITS) provide an "efficient and liquid form of real estate investment . . . and can significantly improve local capital markets." *Id.* at 6. REITS can overcome some of the risks of redevelopment, including infill development. *Id.* Dallas and other cities have successfully used REITS. *Id.* Moreover, there are public financing mechanisms

housing, commercial space, institutional expansion, and industrial operations requires land, usually the most productive farmland.[65] The pattern of urban sprawl results from economic development that causes the movement of persons, commerce, and institutions within and between communities.[66] The need for residential and commercial space and economic development will not decline, but their negative impact on natural resources and social welfare calls for the modernization of American land use regulation, according to many commentators.[67]

Second, natural resources and the environment must be protected. The degradation of natural resources and the environment cannot continue unabated as communities satisfy the demands for housing and other land development.[68] Soil, water, land, and air are nonrenewable resources and their destruction harms wildlife, plants, and other life.[69] The depletion of these resources places a greater strain on remaining natural resources and environmental qualities that must provide local and state needs for farming, open space, and parks, and that also must support drainage and water needs.[70]

Third, social welfare needs must grow with change, growth, and development within communities. The need for education, hospitals, job training, childcare, recreation, housing, transportation, water and sewer, and other welfare needs change with economic development.[71] The fiscal impact of development is most

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available to cities that must engage in environmental assessments and cleanups in site preparation. Many private investors will not cover these site preparation costs. *Id.* at 7. Public financing includes loan guarantees, subsidized loans, and cash grants. *Id.* Tax increment financing (TIF) is available in many states. "The TIF process uses the anticipated growth in property taxes generated by a development in a specific area to finance public-sector investment in this zone." Goode, *supra* note 27, at 7. TIF relies on the future value accruing to the municipal tax base. *Id.* TIF bonds can finance many public facilities and infrastructure. *Id.* However, if development fails, TIF bonds are difficult to retire. *Id.* Consequently, TIF bonds are not popular for infill development. *Id.*

65. *See* FREILICH, *supra* note 2, at 28-29. *See also supra* notes 1-3 and accompanying text (discussing the causes for and needs of smart growth programs).

66. *See* FREILICH, *supra* note 2, at 15-16.

67. *See id.* at 3-6 (discussing the ineffectiveness of traditional land use and other tools to combat urban sprawl).

68. *See id.* at 279-80.

69. Holloway & Guy, *supra* note 51, at 379-81.

70. *See* FREILICH, *supra* note 2, at 279-80.

71. *See* James E. Holloway & Donald C. Guy, *Land Dedications and Beyond the Essential Nexus: Determining Reasonably Related "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH L. REV. 73, 90-92 (1996).

evident when tax revenues cannot completely finance the construction of new facilities and the addition of supplementary services.[72] Uncontrolled economic development that results in urban sprawl and rural degradation creates social needs that local and state policy-makers must accommodate through providing public services and facilities.[73] Yet policy-makers do not normally plan for changes in social welfare needs and, thus, they are left to find revenues to pay for new public services, infrastructure, and facilities.[74] Often local property taxes and state and federal subsidies are not enough to provide new roads, parks, water plants, sewerage treatment facilities, drainage facilities, job training, hospital expansion, and other types of infrastructure.[75] The emergence of fiscal impact analysis shows the impact of economic development on social welfare needs, including public facilities and infrastructure of communities.[76] Obviously, smart growth must seek a planned balance among markets, natural resources, and social welfare.

B. Smart Growth and the Need to Modernize Planning Law

Smart Growth currently exists under state and local regulation.[77] The American Planning Association (APA) is a major proponent of smart growth.[78] It refers to its smart growth project as *Growing Smart.*[79] The APA notes that six states "have . . . taken major initiatives in reforming their planning legislation and working with local governments to ensure plan implementation . . . ."[80] Most importantly, states do not generally implement new legislative initiatives at the same time because they must contend with unique policy issues of urban and rural communities.[81]Smart growth is also

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72. *See* Holloway & Guy, *supra* note 29, at 27-29.
73. *Id.* at 45-48.
74. *See id.*
75. *See id.* at 89-102.
76. *See supra* note 53 and accompanying text.
77. *See infra* notes 110-127 and accompanying text.
78. *See, e.g.,* Legislative Guidebook, *supra* note 3, at xxii; Planning Communities, *supra* note 3, at 1-2.
79. *See* Planning Communities, *supra* note 3, at 1.
80. *Id.* at 4.
81. *Id.* Change and growth affect counties, towns, and communities. *See, e.g, supra* note 1 and accompanying text (discussing the impact of change on social environments and municipalities); *Loudoun's Dense at Smart Growth*, WASHINGTON BUSINESS JOURNAL, 66, at 66 June 30, 2000 (criticizing Loudoun County's consideration of 10 acres per house to slow residential growth that is occurring faster than the County can provide services and facilities); Katz, *supra* note 27, at 68-69 (discussing the impact of growth in the suburbs of Loudoun

a reform of land use and planning regulation in America.[82] Most states do not have modern land use and planning laws,[83] but the most modern planning laws exist in the most urbanized states,[84] and these states also require local comprehensive planning.[85] Yet the majority of states do not mandate local comprehensive planning.[86] Approximately 37 states have made an effort to modernize their land use and planning statutes.[87] Modernizing land use regulation includes three areas of land use and planning reform: "[A] recodification and lightening up of existing, land use laws and regulatory procedures; authorization for innovative and flexible land use and control; and significant overhauls in the framework of land use regulation to reform the "business-as-usual" processes that have delivered undesirable results."[88] Yet these initiatives will not succeed unless various interests are given an equitable balance within communities and states.[89] More importantly, smart growth is public policy and, thus, various interest groups and general citizenry[90] must support it.[91]

The APA identifies thirteen reasons to update state planning legislation.[92] These reasons include physical livability and development, improvement in planning, new lessons on land use planning, state planning to improve economic vitality, and the need to update

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County on public facilities, infrastructure, and social welfare); Baker, *supra* note 12, at 26-33 (discussing the benefits and advantages of smart growth).

82. Planning Communities, *supra* note 3, at 4.

83. *Id. at 1.* Oregon has the most comprehensive land use and growth management act. *Id.*; *see* Katz, *supra* note 27, at 71. One commentator suggests that all is not well under Oregon's planning and growth management law. *See* Kevin Adams, *Oregon: Where's the Growth Control?*, PLANNERS NETWORK-ONLINE, http://www.plannersnetwork.org/138/adams.htm (Nov./Dec. 1999) (excerpted from the *Oregon Planners Journal,* an APA newsletter, which reprinted it from the August 30 issue of *Ashland Tidings.*).

84. Planning Communities, *supra* note 3, at 1.

85. *Id.* at 1-2.

86. *Id.* at 1.

87. *Id.* at 3.

88. *Id.*

89. *See* Planning Communities, *supra* note 3, at 4. The APA recognizes that: [b]ringing as many stakeholders and interests groups into the process of meeting with policymakers, discussing approaches to reform, drafting legislation, and creating new laws are essential steps to secure effective changes and lasting solutions to the growth management issues facing the country's rural, suburban, and urban communities. *Id. See also* Ohm, *supra* note 3, at 200-03 (discussing consensus building in the development of smart growth and other growth management legislation).

90. *See* Planning Communities, *supra* note 3, at 4.

91. *Id.*

92. *Id.* at 15.

1920's planning law.[93] The forms and contents of state planning law are necessary to guide local policy-makers and planners in developing effective, comprehensive plans.[94] States adopt planning law consistent with their public policy and public interest.[95] Modern state planning law must include traditional and nontraditional elements.[96] The traditional planning elements include land use, transportation,[97] community facilities,[98] and agricultural or open space.[99] Other elements of the planning process that must be considered in modernizing planning legislation are "policy, visioning/public participation, local coordination, implementations, and monitor/bench-marking."[100] In addition, state-planning law should consider housing needs,[101] redevelop-ment,[102] urban growth limits,[103] and critical and sensitive areas.[104]

Making and implementing state land use policies raise other policy concerns and political considerations. Voluntary local planning laws may not be effective to implement modernized state land use planning.[105] State planning laws are not self-executed and, thus, states may need to mandate local planning.[106] State policy-

93. *Id.* In the late 1920s, the United States Department of Commerce promulgated and issued model planning and zoning legislation that was eventually adopted by many state legislatures. *Id.* at 7-8. The Court decided *Euclid* in 1926 and held that zoning regulations that impose use restrictions on residential, commercial, and industrial land were valid government actions under the Federal Constitution. *Euclid*, 272 U.S. at 365; *see infra* notes 140-145 and accompanying text. Zoning and land use laws that rely on *Euclid* and 1920's federal model zoning laws can be referred to as *post-Euclidean* zoning laws. *See* Planning Communities, *supra* note 3, at 7-8.

94. Planning Communities, *supra* note 3, at 16.

95. *Id.* at 4 & 16.

96. *Id.* at 16-18; *see also* Ohm, *supra* note 3, at 207-10.

97. *See* Planning Communities, *supra* note 3, at 16.

98. *Id.* at 16.

99. *Id.*, *citing* Larry Duket, Vivian Marsh & Rupert Friday, PREPARING A COMPREHENSIVE PLAN, MANAGING MARYLAND'S GROWTH MODELS AND GUIDELINES SERIES, Maryland Office of Planning, Publication No. 98-02, (Baltimore, Maryland, January 1996, p. 41).

100. Planning Communities, *supra* note 3, at 17. *See also* Ohm, *supra* note 3, at 207-10.

101. Planning Communities, *supra* note 3, at 18.

102. *Id.* at 18.

103. *Id.*

104. *Id. See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (concluding that historic preservation regulations are not a takings of private property for public use).

105. Planning Communities, *supra* note 3, at 19-20. Several states have enacted unconditionally mandated local planning laws that do not impose conditions on local government plans. *Id.*

106. *Id.* at 20.

makers must take a strong role[107] if state planning is to be effective. State policy-makers must urge stakeholders and interest groups to weigh carefully the benefits and advantages of planning for economic development, natural resource conservation, and the quality of life.[108] Modernizing state planning is not a simple task as municipalities move beyond post-Euclidean zoning[109] to include markets, natural resource management, and quality of life in the design of smart growth programs.

C. State Planning and Smart Growth Initiatives

Planning initiatives include state regulation,[110] local policies, and plans.[111] Several states have enacted smart growth initiatives that include regulation and policy to provide open space, to control land development, and to regulate land use.[112] PLANNING COMMUNITIES FOR THE 21ST CENTURY[113] profiles state planning initiatives of six states: Maryland, New Jersey, Oregon, Rhode Island, Tennessee, and Washington.[114] State planning initiatives include local comprehensive planning, coordinating environmental protection, farmland and open space protection, historic and cultural preservation, economic development, transportation planning, and affordable housing.[115] These initiatives update state land use planning law and implement newly adopted smart growth programs.[116] In 1998-99, smart growth legislation was enacted by four states: Tennessee, New York, Utah and Wisconsin.[117] Executive Orders were issued by governors of four states: Maryland, North Carolina, Massachusetts and Pennsylvania.[118] Active smart growth legislative proposals were introduced in the following states: Colorado, Illinois, Massachusetts, New York, and Pennsylvania.[119] The smart growth legislation, executive orders, and

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107. *Id.*
108. *Id.*
109. *See supra* note 93 and accompanying text (explaining post-Euclidean zoning).
110. Planning Communities, *supra* note 3, at 7-10.
111. *Id.* at 9-10.
112. *Id.* at 8-12.
113. *Id.* at i.
114. *Id.* at 25-81.
115. Planning Communities, *supra* note 3, at 87-91. S*ee supra* notes 96-104 and accompanying text.
116. Planning Communities, *supra* note 3, at 15-24.
117. *Id.* at 87.
118. *Id.* at 97.
119. *Id.* at 91.

proposals promote land use, growth management, natural resource management, and social welfare policy of those states.

Pennsylvania and several others states have considered, proposed, or enacted smart growth programs.[120] In particular, *the efforts to modernize* Pennsylvania land use planning and institute smart growth began in early 1990.[121] Committees were established in Pennsylvania to study land use problems[122] and issue recommendations on the planning process.[123] In 1997, Governor Tom Ridge issued an Executive Order that formed the 21st Century Environmental Commission to investigate land use and growth management.[124] The Commission's report includes recommendations on state, regional and local planning, fiscal matters, and other planning elements.[125] At the beginning of 1999, Governor Ridge issued another Executive Order to address land use, growth management, environmental, and social welfare concerns.[126] In June 2000, the Pennsylvania legislature enacted legislation to reform state and local land use planning and growth management laws and, thus, implemented smart growth in the state of Pennsylvania.[127] Pennsylvania and other states have considered,

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120. Planning Communities, *supra* note 3, at 87-91.

121. *Id.* at 97.

122. *Id.*

123. *Id.* at 97.

124. Exec. Order No. 1997-4, The 21st Century Environment Commission, Governors Office, Commonwealth of Pennsylvania (July 1, 1997) (hereinafter Exec. Order No. 1997-4).

125. *Id. See also* Planning Communities, *supra* note 3, at 97 (discussing the modernization of land use planning law in Pennsylvania and other states).

126. Exec. Order No. 1999-1, Land Use Planning, Governors Office, Commonwealth of Pennsylvania (Jan. 7, 1999) (hereinafter Exec. Order No. 1999-1). *See also* Planning Communities, *supra* note 3, at 97 (discussing the modernization of land use planning law in Pennsylvania and other states).

127. 2000 Pa. Laws 67 (Pa. House Bill 14 (June 22, 2000)), *amending and reenacting in part*, The Pennsylvania Municipalities Planning Code, 53 PA. CONS. STAT. §§ 10101 *et seq.* (1997); 2000 Pa. Laws 68 (Pa. Senate Bill 300 (June 22, 2000)), *amending and reenacting in part*, The Pennsylvania Municipalities Planning Code, 53 PA. CONS. STAT. §§ 10101 *et seq.* (1997).

Senate Bill No. 300 (June 13, 2000) amended and reenacted the Municipalities Planning Code by:

> adding certain definitions; further providing for various matters relating to the comprehensive plan and for compliance by counties; providing for funding for municipal planning and for neighboring municipalities; further providing for certain ordinances; adding provisions relating to projects of regional impact; providing for traditional neighborhood development; further providing for grant of power; for contents of subdivision and land development ordinance, for approval of plats and for recording of plats and deeds; and for providing for municipal authorities and water companies and for transferable development rights.

weighed, or enacted smart growth initiatives to address natural resource management concerns, market concerns, and social welfare concerns.

III. Smart Growth as Regulation of Local Markets and Landowners

The nature of smart growth regulation is still developing in many communities across America, and it is too early to know the full effects of this regulation on the protection of natural resources and social welfare and on the growth and development of communities. Smart growth affects the use of urban and other land, management of natural resources, quality of the environment, quality of social welfare, and the rate of economic development.[128] The potential for broad restrictions and controls affect the utility, marketability, and availability of residential, institutional, commercial, and institutional space or land within urban, suburban, and rural communities.[129] Rural and suburban communities may

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2000 Pa. Laws 68 (Pa. Senate Bill 300 (June 22, 2000)), *amending and reenacting in part*, 53 PA. CONS. STAT. §§ 10101 *et seq.* (1999). House Bill No. 14 amended and reenacted the Municipalities Planning Code by ". . . adding definitions: providing for intergovernmental cooperative planning and implementation agreements: further providing for repeals; and making an editorial change." 2000 Pa. Laws 67 (Pa. House Bill 14 (June 22, 2000)), *amending and reenacting in part*, 53 PA. CONS. STAT. §§ 10101 *et seq.* (1997).

The Pennsylvania legislature also enacted in 1999 The Watershed Protection and Environmental Stewardship Act (hereinafter WPESA). 1999 Pa. Laws 68 (Pa. House Bill 868 (December 15, 1999)), *codified at*, 27 PA. CONS. STAT. §§ 6101 *et seq.* (1999). *See also* Katz, *supra* note 27, at 72 (discussing the land acquisition by state to protect natural resources). The WPESA is a part of Pennsylvania Govenor Tom Ridge's Growing Greener Initiative project. WPESA provides funds to preserve open space and protect farmland. *See* 1999 Pa. Laws 68; Katz, *supra* note 27, at 72.

Smart growth is occurring throughout regions of the United States. *See* Robert D. Yaro & Raymond R. Janairo, *State Planning in the Northeast*, LANDLINES: NEWSLETTER OF THE LINCOLN INSTITUTE OF LAND POLICY, 1, at 1-3 (July 2000) (discussing state and regional planning initiatives and smart growth programs in the Northeastern United States); Queena Sook Kim, *Southeast leads the way in 'Smart Growth' Projects*, WALL ST. J., S2, July 12, 2000 (discussing state and regional planning initiatives and smart growth programs in the Southeastern United States). Ms. Kin notes that "[t]hese states are returning to traditional neighborhood development that includes mixed-use and mixed-income projects." *Id.* Small and large towns, such as Charleston, South Carolina and Savannah, Georgia, are embracing these projects. *Id. See generally* William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509 (2000); Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563 (2000).

128. *See supra* notes 63-76 and accompanying text.

129. *See* NAHB, *supra* note 63, at 8-9. *See also* Bob Hawksley, *Growth Control*

have less of a particular space or land for expansion and growth, thus converting farmland and open space to new land uses.[130] Urban communities will have some space or land available, but the land's quality and location may affect its use and development, such as brownfields and infill development.[131]

More importantly, both new and old mechanisms[132] will impose restrictions and controls on land use and economic development.[133] Ultimately, the burden imposed on landowners under mandatory or voluntary[134] regulation is at the heart of the takings issue under the *nature of government action.*[135] The uncertainty of the development of smart growth, diversity of states' public policy, and disparity among community resources point to smart growth regulation as having an undetermined course, but a definite purpose.[136] Against this uncertain nature of government action, smart growth presently

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Off Target with Complaints, BUSINESS COURIER: SERVING THE CINCINNATI-NORTHERN KENTUCKY REGION, July 7, 2000, 70, at 70. Mr. Hawksley responds to a letter written by Catherine Hartman on June 2, 2000, arguing for smart growth. *Id.* Mr. Hawksley argues that government subsidizes development, that developers operate in a free market, and that mass transit is not always good for a community. Hawksley, *supra*, at 70.

130. FREILICH, *supra* note 2, at 279-82 (recognizing the need to preserve farmland and open space in the face of urban sprawl); *but see* NAHB, *supra* note 63, at 8-9 (finding fears about losing farmland unfounded).

State, municipalities, and environmental groups support the preservation of farmland and open space. *See* Will Pinkston, *Anti-Sprawl Mandates Put Pressure on Budget Plans*, THE WALL ST. J., Nov. 15, 2000 at S3, S3-S4 (finding that the escalating prices of private land threatens to limit the effectiveness of buying land with public funds); Roble, *supra* note 27, at 2 (noting that the Sierra Club and American Farmland Trust (AFT) support smart growth that reduces low-density development to preserve agricultural land and open space).

131. *See generally* NAHB, *supra* note 63, at 12-13. This report discusses, in part, how municipalities can encourage the use of infill development, such as residential development. *Id.* at 12.

132. *See* Legislative Guidebook, *supra* note 3, at ix. The *Introduction* to PLANNING COMMUNITIES FOR THE 21ST CENTURY states that Phase III of the APA's smart growth project will provide planning and land use tools and controls to implement smart growth programs and manage change. Planning Communities, *supra* note 3, at i.

133. *See* Legislative Guidebook, *supra* note 3, at xi-xiii.

134. Voluntary regulation is subject to constitutional challenge under the unconstitutional conditions doctrine that prohibits government from imposing unreasonable conditions on the exercise of constitutionally protected rights. *See* Holloway & Guy, *supra* note 29, at 61-75 nn.286-366. *See also* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989). Professor Sullivan thoroughly examines the unconstitutional conditions doctrine and its treatment by the Court.

135. *See Armstrong*, 364 U.S. at 49; *Dolan*, 512 U.S. at 390-91.

136. *See* Legislative Guidebook, *supra* note 3, at xxiii. The APA recognizes that one size will not fit all communities throughout America where these communities routinely have different needs, resources, and opportunities. *See id.*

includes an uncharted constitutional course in allocating the burdens and benefits of post-Euclidean land use regulation, and, therefore, courts must establish limits that government should not exceed in allocating public burdens that could be borne primarily by owners, users, and developers of residential, commercial, institutional, and residential space or land.[137]

A. *Reasonableness of Protecting Health, Safety, and Welfare Under Zoning Law*

Smart growth begins where 1920's planning law fails to limit urban sprawl and rural degradation.[138] *Euclidean* zoning laws are valid under the Takings Clause of the Fifth Amendment[139] of the Federal Constitution.[140] In *Euclid v. Ambler Realty*,[141] the United States Supreme Court held that use restrictions or limits on land use were permissible under the Due Process Clause[142] and Takings Clause.[143] The City of Euclid imposed use restrictions on commercial land to protect the health, welfare, and safety of the community under the police power.[144] *Euclid* stands for the constitutional principle that state and local governments can exercise police power authority to engage in land use planning and to make zoning and other land use regulations.[145]

In *Pennsylvania Coal Co. v. Mahon*,[146] the Court established the regulatory takings doctrine and, thus, concluded that land use regulations can be too burdensome under some circumstances, notwithstanding the regulatory objectives of promoting public

137. *See generally*, Planning Communities, *supra* note 3, at 1-4. Local and state governments can design smart growth programs to address land use planning and growth management problems. *Id.* Another view from the cathedral sees the situation entirely different. *See* NAHB, *supra* note 63, at 1-4. Local and state governments can design smart growth programs to address housing needs and demands. *Id.* Smart growth must include everyone, both poor and middle-class. Smart growth must be community-wide and not only apply to isolated development, such as development projects, jogging paths, and transit systems. *See* Roble, *supra* note 27, at 2; Terwilliger, *supra* note 1, at 36.

138. Planning Communities, *supra* note 3, at 15.

139. U.S. CONST. amend. V.

140. *See Euclid*, 272 U.S. at 375.

141. *Id.*

142. U.S. CONST. amend. XIV.

143. *See Euclid*, 272 U.S. at 396-97.

144. *Id.* at 397.

145. *Id.* at 396-97.

146. *Pennsylvania Coal Co.*, 260 U.S. at 393. For a discussion of the direction of takings jurisprudence after *Dolan*, *see* Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327 (1998).

health, safety, and welfare.[147] In a short 60 years, the Court concluded in *Keystone Bituminous Coal Ass'n v. Debendictus,*[148] that a similar regulation under similar circumstances and interests protected the public health, safety, and welfare under an exercise of police power authority.[149] More importantly, the Court recognized that changes in public circumstances justify new legitimate state interests[150] that support exercises of police power authority to make new policies and legislation.[151]

Smart growth recognizes new public circumstances that require regulation to protect the public health, safety, and welfare and that require changes to *Euclidean* planning and zoning laws.[152] Generally, smart growth programs that fit the particular needs of community, either urban or rural, should survive scrutiny under *Euclid, Pennsylvania Coal*, and *Keystone*.

B. *The Reasonableness of Shifting the Burden to Private Landowners*

Smart growth occurs as municipalities and local governments recognize that economic development does not pay for itself with proportional increases in tax revenues that offset the costs of increases in social welfare needs, such as public facilities, infrastructure, education, recreation, and social programs.[153] Consequently, municipalities and local governments must find new sources of revenues and other means of providing for social welfare.[154] These sources and means shift public obligations to the private sector. Thus, landowners and developers must share a heavier *burden that could even be equitable* in exercising their property rights to develop, use, or own land.[155]

The United States Supreme Court concludes that shifting these kinds of burdens to the private sector can be constitutionally valid under the nature of some exactions that are governmental actions.[156]

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147. *Id.* at 413-14.
148. Keystone Bituminous Coal Ass'n v. Debendictis, 480 U.S. 470 (1987).
149. *Id.* at 470-74.
150. *See id.* at 488. *See also* Holloway & Guy, *supra* note 71, at 90-92 (discussing the impact of social, economic and other changes on the need to expand legitimate state interests to meet new circumstances and change).
151. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 486.
152. *See* Planning Communities, *supra* note 3, at 1-4.
153. *See* Holloway & Guy, *supra* note 29, at 28-30 nn.75-83.
154. *See id.* at 27-28 nn.67-74.
155. *See id.* at 154-67.
156. *See Dolan,* 512 U.S. at 394-95; *Nollan*, 483 U.S. at 839. *Dolan* has raised constitutional questions that courts have addressed in resolving local disputes. *See*

The two seminal Court decisions involve land dedication conditions that were imposed on building permits by government to acquire a public right-of-way across private property.[157] Land dedication conditions and other demands require landowners to transfer rights in land or pay impact fees for the issuance of a rezoning,[158] building,[159] or construction permit.[160] These fees and lands offset the impact of development on public facilities, infrastructure, and social welfare programs, thus disallowing land developers to affect the fiscal priorities of municipal governments.[161]

Smart growth will not relieve landowners and developers of public responsibility and will not permit municipal governments to escape growth and other problems that create needs for social welfare, public facilities, and infrastructure. In *Nollan v. California Coastal Commission*,[162] the Court holds that an essential nexus must exist between a conditional demand and its purpose and, thus, requires this demand to advance the legitimate state interest as set forth in the purpose of the demand or exaction.[163] The Court concludes that a land dedication condition to permit public movement along the beach does not necessarily provide access to the beach or oceanfront.[164] The *Nollan* Court requires the least fundamental connection between a land dedication condition and the purpose declared under a legitimate state interest.[165] Another more fundamental connection does exist in the means-ends relationship under the Takings Clause.

Holloway & Guy, *supra* note 29, at 8 n.12. *Dolan* has resulted in much legal commentary. *Id.*

157. *See Dolan*, 512 U.S. at 379; *Nollan*, 483 U.S. at 828.

158. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 434-35 (Cal. 1996).

159. *Nollan*, 483 U.S. at 839.

160. *Dolan*, 512 U.S. at 394-95. For a definition of the various types of development impact exactions, *see* Holloway & Guy, *supra* note 29, at 33-34 n.106.

161. Holloway & Guy, *supra* note 29, at 20-23.

162. 483 U.S. 825 (1987). In Nollan v. California Coastal Comm'n, 438 U.S. 825 (1987), the Court holds that the first prong of the standard of review for a land dedication condition is an essential nexus that requires a recognizable relationship between this condition and the purpose advanced by the condition. *Nollan*, 483 U.S. at 834-35.

163. *See id.* at 836-37.

164. *See id.* at 837.

165. *See id.* at 834-35.

In *Dolan v. City of Tigard*,[166] the Court concludes that the relationship between some conditional demands and legitimate state interests must be more direct to withstand scrutiny under the Takings Clause.[167] Specifically, the Court concludes that land dedication conditions that offset the social, fiscal, and other effects of residential and other economic development must have a rough proportionality to the impact of a particular development on the community.[168] The *Dolan* Court requires that the social impacts, fiscal impacts, and other impacts of development should be policy justifications for imposing land dedication conditions and perhaps other exactions and conditional demands.[169]

Nollan and *Dolan* establish a closer means-ends fit or direct relationship between land dedication conditions and their public purposes and policy justifications under exercises of policy power authority.[170] Such a link may limit the use of those dedication conditions that are imposed by municipalities to implement social and other programs that are either unrelated to a particular development or difficult to justify under the incremental effects of a particular development.[171] *Nollan* and *Dolan* do not apply to zoning and other land use decisions, [172] but the Court remains silent on whether *Nollan* and *Dolan* apply broadly to other exactions and conditional demands.[173] *Nollan* and *Dolan* will affect the use of land dedication conditions and perhaps other conditional demands of any smart growth program.[174] Consequently, smart growth programs that use impact exactions and other conditional demands may need to be site-specific or development-specific rather than

166. Dolan v. City of Tigard, 512 U.S. 374 (1994). In *Dolan*, the Court holds that the second prong of the standard of review for a challenge to a land dedication condition is a rough proportionality that requires a justifiable connection between this condition and the impact of development on the community. *Dolan*, 512 U.S. at 391.

167. *See id.*

168. *See id.*

169. *See id.* at 391.

170. *Dolan,* 512 U.S. at 391; *Nollan*, 483 U.S. at 834-35.

171. *See Dolan,* 512 U.S. at 391; *Nollan*, 483 U.S. at 834-35. *See* also Holloway & Guy, *supra* note 71, at 134-36 (discussing the implications of *Dolan* for land use policy-making).

172. *Del Monte Dunes*, 526 U.S. at 703. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court concludes that *Nollan* and *Dolan* do not apply to a zoning decision that denies approval of a site for residential development. *Id.* at 703. Moreover, *Del Monte Dunes* provides a jury trial for takings claims brought under section 1983, 42 U.S.C. § 1983 (1994 and Supp. V. 1999). *Del Monte Dunes*, 526 U.S. at 724.

173. *See id.* at 703.

174. *See supra* notes 153-175 and accompanying text.

generally applying single-purpose or multiple-purpose mechanisms to the entire community and, thus, only allocate the financial and other benefits of an exaction to that part of community directly impacted by a particular development. Smart growth programs that ascertain the fiscal, social, and environmental impact of incremental development on a community's resources should survive heightened scrutiny under the Takings Clause.[175]

C. The Reasonableness of Limiting Economic and Market Interests

Smart growth regulation affects economic interests of landowners and developers by limiting the use and development of residential and commercial land, and by requiring governments to consider the impact of land development and use on natural resource management, social welfare, and other public needs.[176] Landowners and developers may challenge *elements* of a smart growth program as an economic invasion that interferes with the use and development of land under the Takings Clause.[177] Such claims are generally subject to deferential review, either by a rational basis or reasonably related test.[178] In *Penn Central Transportation Co. v. City of New York*,[179] the Court concludes that use restrictions imposed under historic preservation regulations of the City of New York were reasonably related to a legitimate state interest to preserve a historic site, namely the Grand Central Station.[180] Although historic preservation regulations greatly reduced the economic benefits of this site, the Court still finds that these regulations were valid under the Takings Clause and, thus,

175. *See* Kushner, *supra* note 12, at 220.

176. *See* Planning Communities, *supra* note 3, at 15-20.

177. *See Penn Cent. Transp. Co.*, 438 U.S. at 138. The Court has addressed economic invasion or interference claims raised by the application of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (1994 & Supp. V 1999) (hereinafter ERISA), to the conduct of employers in management of employee benefits plans. *See* Eastern Enterprises v. Apfel, Comm'r of Social Security, 118 S. Ct 2131 (1998); Connolly v. Pension benefit Guaranty Corporation, 475 U.S. 211 (1986); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993).

178. *See Penn Cent. Transp. Co.*, 438 U.S. at 134-37. In *Eastern Enterprises* and *Concrete Pipe*, the Court applies a rational basis test, referred to as a proportionality analysis. The proportionality analysis links liability that was imposed by government to the Company's experience or operations that existed before or at government intervention. *Eastern Enterprises*, 118 S. Ct. at 2153; *Concrete Pipe & Products*, 508 U.S. at 645.

179. 438 U.S. 104 (1978).

180. *Id.* at 138.

not a regulatory taking of private property for public benefit or use.[181] Moreover, in *Penn Central Transportation Co.*, the Court also recognizes that transferable development rights (TDRs), which are created under the state property law, are valid to mitigate compensation for a taking of private property.[182] The Court concludes in *Penn Central Transportation Co.* that historic preservation programs to restrict use of historic sites are not normally a taking of private property[183] and that TDRs are an effective incentive to avoid the taking of private property for public benefits or use.[184]

The Court recently reaffirmed that *Penn Central Transportation Co.* remains good takings law to determine reasonableness of zoning law[185] and to determine the validity of incentives, namely TDRs, to reduce the incidence of regulatory takings.[186] In

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181. *Id.*

182. *Id.* at 137-38. Transferable development rights programs permit landowners to transfer development rights (usually a percentage of the square footage) from one site (sending site) to another site (receiving site) that may be developed more intensively. *See* Julian Conrad Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 446 (Spring 1988). TDRs are widely used in local and state land use, environmental programs, and natural resource programs throughout America. Juergensmeyer, Nicholas & Leebrick, , 30 URB. LAW. at 446-54. "TDR programs separate the development potential of a parcel from the land itself and create a market where that development potential can be sold." *Id.* at 446. The Court has addressed the validity of TDRs and noted that TDRs may be used mitigate the economic impact of land use regulations imposed in a historic district. *Penn Cent. Transp. Co.*, 438 U.S. at 137. *See also infra* note 186 and accompanying text (discussing confusion as to whether TDRs mitigate compensation or reduce liability under the Takings Clause).

183. *Penn Cent. Transp. Co.*, 438 U.S. at 138.

184. *See id.* at 137.

185. *See Del Monte Dunes*, 526 U.S. at 703.

186. *See* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 741 (1997). The Court concludes that a regulatory takings claim that involves the sale of transferable development rights (TDRs) is ripe for review even though claimant-landowner has yet to sell the TDRs. *See Suitum*, 520 U.S. 741. *See also Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985). The United States Supreme Court concludes that federal courts can only review final decisions of state and local governments in determining whether a taking occurs under the Federal Constitution. *Williamson County*, 473 U.S. at 191. *See also* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986). The Court concludes that municipalities can impose multiple applications for permits in regulatory schemes. *MacDonald*, 477 U.S. at 348.

Suitum raises another question affecting smart growth programs that more likely will include incentives such as TDRs. *Suitum* raises but does not resolve the role of the TDRs in the takings equation under the federal takings clause. *Suitum*, 520 U.S. at 750 (Scalia, J., concurring). The broader use of TDRs and other benefits or mitigations will more likely raise this question in state and federal courts, eventually forcing resolution by the Court. *See supra* note 49 and

City of Monterey v. Del Monte Dunes, Ltd.,[187] the Court concluded that challenges to zoning decisions under the Takings Clause are subject to a reasonably related test that is a deferential judicial review.[188] *Del Monte Dunes* involved delays by the City of Monterey in approving the development of an ocean-side site that was eventually purchased by the state of California as a park.[189] Moreover, the Court concluded that a jury could decide[190] some takings questions brought under Section 1983.[191] On the issue of the validity of incentives, such as TDRs, the Court in *Suitum v. Tahoe Regional Planning Agency*[192] observed that TDRs are valid economic incentives to encourage participation and to accompany mandates imposing obligations on landowners and developers in land use, environmental, and natural resource programs.[193]

However, the Court has yet to address the exact role of TDRs and perhaps other incentives in the takings equation that has both a liability side and compensation side.[194] In *Suitum*, three justices urge the Court to limit the use of TDRs as incentives to encourage participation by permitting TDRs to affect only the compensation side of the takings equation and not the liability side that determines whether a regulatory taking occurs under land use and other regulations.[195] Smart growth programs will depend on zoning decisions and regulatory incentives, both *stick* and *carrot*.[196] Although these decisions and incentives of smart growth programs will invade or interfere with economic and market interests,[197] these programs that are most likely reasonable economic invasions and interferences with these interests will generally survive scrutiny under *Penn Central Transportation Co.* and *Suitum*.

IV. Smart Growth and Its Economic Effects Under Takings Clause

Smart growth will include use restrictions, environmental requirements, economic incentives, conditional demands, and

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accompanying text (discussing incentives under smart growth policies).

187. *Del Monte Dunes*, 526 U.S. at 687.
188. *Id.* at 703.
189. 42 U.S.C. § 1983 (1994 & Supp. V 1999).
190. *Del Monte Dunes*, 526 U.S. at 698.
191. *See id.* at 724.
192. *Suitum*, 520 U.S. 725 (1997).
193. *Id.* at 747.
194. *See id.* at 750 (Scalia, J., concurring).
195. *Id.*
196. *See supra* notes 5-6 and accompanying text.
197. *See supra* notes 63-67 and accompanying text.

regulatory mechanisms to secure participation by landowners and developers in combating urban sprawl, controlling rural development, and improving the quality of life in communities.[198] Mandatory requirements and restrictions will have economic effects, including increases in development costs[199] and other burdens,[200] by controlling,[201] limiting,[202] or prohibiting[203] the production of commercial, residential, and industrial space in particular areas of cities, counties, and states.[204] Smart growth programs will offer incentives and benefits to offset some of the economic effects[205] and to encourage economic development.[206] The design of incentive programs, such as TDRs, is to reduce business costs, increase returns on investments, or increase use of alternative community space for development.[207]

Developers and landowners may still lose access to developable land and new markets for space and may also encounter higher land development costs of marginal lands.[208] They may face lower expected profits and fewer government investments in infrastructure and public facilities where local and state government do not wish to encourage or subsidize land and other economic development in urban, suburban, and rural areas.[209] Yet, the economic effects will occur most often in local and state markets because real estate agencies and other land development companies are local businesses that usually operate in a local area

198. *See supra* notes 44-54 and accompanying text.
199. *See infra* notes 230-251 and accompanying text.
200. *See supra* notes 176-197 and accompanying text.
201. *See supra* notes 179-184 and accompanying text.
202. *See supra* notes 187-189 and accompanying text
203. *See infra* notes 226-229 and accompanying text.
204. *See generally* Planning Communities, *supra* note 3, at 15-25.
205. *See supra* note 49 and accompanying text.
206. *See id.*
207. *See id.* The United States Supreme Court recognizes that advantages and benefits can flow to the community and landowners under land use decisions. Agins v. City of Tiburon, 447 U.S. 255, 262 (1980). *Agins* supports the doctrine of reciprocity of advantages under zoning ordinances that give advantages or benefits to landowners and community in establishing orderly growth and change. *Agins*, 477 U.S. at 262. For discussion of the development of the reciprocity of advantages doctrine in federal constitutional jurisprudence, see Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantages" Rule in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489-1522 (1987).
208. *See supra* note 2 and accompanying text.
209. *See* FREILICH, *supra* note 2, at 262-70 (discussing the impact of transportation programs and policies policy on urban sprawl and development). *See also* Goode, *supra* note 27, at 2-3 (noting that smart growth can benefit from federal transportation programs that provide federal funds for building transit systems).

or state.[210] Consequently, local challenges to some smart growth packages that impose zoning and other mandates should be expected in municipalities where developers and landowners believe that economic interferences with reasonable investment-backed expectations are too burdensome.[211]

A. The Denial of All Economically Viable Use or Beneficial Use

Smart growth programs impose mandates and grant incentives under comprehensive land use planning[212] and, thus, affect the beneficial or economic use of land by diminishing value, limiting use, and reducing profits.[213] The question that will often arise is whether a smart growth package "den[ies] all economically viable use of the land"[214] under the restrictive interim planning regulations and moratia[215] or restrictive zoning or controls[216] that include incentive-based programs, such as TDRs.[217]

In *Lucas v. South Carolina Coastal Council*,[218] the Court concludes that an absolute prohibition on construction on a residential site that is situated on a coastal beach "den[ies] all economically viable use of the land."[219] The *Lucas* Court concludes

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210. *See* Holloway & Guy, *supra* note 29, at 26 n.65, *citing*, David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1297 n.177 (1997).

211. *See supra* notes 238-251 and accompanying text. *See also* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 437-446 (Winter 2000). Professor Eagle gives an explanation of the development of the principle of *reasonable interference with investment-backed expectations. Id.*

212. *See* Planning Communities, *supra* note 3, at 9-10 (discussing the use of local planning under state land use planning laws).

213. *See* NAHB, *supra* note 63, at 6-8.

214. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

215. *See* FREILICH, *supra* note 3, at 46-50. *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 216 F.3d 764, *reh'g denied*, 228 F.2d 998 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3505 (June 29, 2001). Landowner brings an unsuccessful taking claim to challenge an interim development regulation. *Id.* The Court granted certiorari to the United States Court of Appeals for the Ninth Circuit and will decide whether a temporary moratium is a regulatory taking.).

216. *See Suitum*, 520 U.S. at 729. *See also Palazzolo v. Rhode Island,* 121 S. Ct. 2448 (2001). Landowner filed a takings claim to challenge severe use restrictions imposed on the development of coastal wetlands. *Id.* The Court concluded that the takings claims must be decided under *Penn Central Transportation Co. Id.*

217. *See Suitum*, 520 U.S. at 732.

218. Lucas v. South Carolina Coastal Council, 502 U.S. 1003 (1992). In *Lucas*, the Court concludes that regulation can deny all economically viable use by prohibiting the right to develop, which commits a taking of private property for public use. *Lucas*, 505 U.S. at 1019.

219. *Id.*

that a legitimate state interest to protect coastal resources, residents, and population would not justify an absolute prohibition or ban that could not exist under common law as a restriction on the title of the property.[220] Nevertheless *Lucas* is a rare instance where coastal zone management, land use or environmental regulation did not leave some beneficial use or economic value in the land.[221] *Lucas* did not include incentives[222] and, for all practical

220. *See* Kushner, *supra* note 12, at 218, *citing*, Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the Takings Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81 (1995). Professor Kushner notes that Archer and Stone find *Lucas* no threat to environmental legislation that protects coastal lands, beaches, and wetlands. *See id.* Professor Kushner concludes that *Lucas* actually validates most land use regulations, except the most aggressive regulations under a smart growth program. *Id. But see infra* note 221 (validating environmental regulation to protect wetlands, but broadly scrutinizing its economic effects on development under *Penn Central Transportation Co.*).

221. *But see Palazzolo*, 121 S. Ct. at 2464-65. In *Palazzolo*, the petitioner who had applied for three different permits to develop 18 acres of wetlands filed a regulatory takings claim for a denial of all economically viable use of his land that was caused by wetland regulations greatly diminishing the economic value and severely restricting development of the wetland acres. *Palazzolo*, 121 S. Ct. at 2456. Although the petitioner had owned an interest in the property, he acquired complete ownership after the state enacted legislation giving the Division of Natural Resources the authority to fill the land. *Id.* at 2456. Later, the legislatures established the Coastal Resources Management Council (CRMC) and gave it authority to regulate coastal wetlands. *Id.* Petitioner's land consisted of twenty acres, *id.* at 2455, including approximately eighteen acres of wetlands, *id.* at 2458, and two acres of upland. *See id.* at 2458. The CRMC denied petitioner's applications for a permit to fill the wetlands for recreational and residential developments. *Id.* at 2456. The petitioner refused to file an application for permission to use a lesser number of acres of land, including the upland. *Id.* at. 2457-58. The supreme court of Rhode Island held that petitioner's regulatory taking claim was not ripe for judicial review. *Id.* at 2457. The supreme court found that petitioner had never filed an application for lesser use of any the land and had never filed a completed application of development of a subdivision. *Id.* at 2458. In fact, the supreme court concluded that petitioner had never made it clear what he intended to do with the land. *Id.* Therefore, the supreme court concluded that petitioner had not received a final decision regarding his application for permission to fill the wetlands for development. *Id.* at 2458-59. Petitioner requested the United States Supreme Court to review the decision of the supreme court of Rhode Island. *See* Palazzolo v. Rhode Island, 121 S. Ct. 296 (2000). The Court granted a writ of certiorari to the supreme court of Rhode Island and agreed to review three issues. *See Palazzolo*, 121 S. Ct. at 2457. The Court agreed to review the ripeness issue. *Id.* at 2457. It also agreed to review whether the petitioner could bring a regulatory takings claim if the regulation predated his ownership of the property and the prior owner did not file a taking claim to challenge the regulation. *Id.* Finally, it agreed to determine whether the regulation was denial of all economically viable use of the property if the petitioner still had economic value remaining in his property, or whether economically viable use includes the remaining economic value of the property. *Id.* The Court concluded that the takings claim was ripe, that transfer of land by operation of law does not terminate a takings claim, and that remaining economic value prevents a denial of all

purposes, the restrictions were permanent and not temporary.[223] *Lucas* will affect smart growth programs that must balance natural, social, and economic concerns, and will trigger the design of single-purpose and multipurpose mechanisms[224] to protect natural resources, control growth, and restrict land use by temporarily and permanently limiting development and productivity of space. Such effects may not rise to the level of regulatory takings based on a denial of an economically viable use or a beneficial use[225] by smart growth regulation.

Federal and state courts will decide whether *Lucas* applies to temporary or permanent moratia.[226] The United States Court of

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economic use. *Palazzolo*, 121 S. Ct. at 2465. The Court concluded that the Supreme Court of Rhode Island must apply the three-prong test of *Penn Central Transportation Co.* to determine whether the wetland regulations affect a regulatory taking on the facts and circumstances of this case. *See id.* at 2465. Justices O'Connor and Scalia disagreed on the application of the principle of *reasonable investment-backed expectations* to the facts of *Palazzolo*. *See id.* at 2465-68. Specifically, they disagreed on the time and circumstances that should be considered in determining whether the landowner had sufficient investment-backed expectations to justify protection under the Takings Clause. *See id.* This question will most likely arise again when smart growth regulation totally prohibits or severely limits the development of land that a landowner has retained for many years for eventual residential or other development.

222. For a discussion of the impact of an economic incentive, namely TDRs, on *Lucas*, see James E. Holloway & Donald C. Guy, Suitum v. Tahoe Regional Planning Agency*: Its Impact on the Final Decision Requirement and Its Potential Implications for Lucas' Per Se Rule and The Role of TDRs in Taking Analysis*, ZONING AND PLANNING LAW REPORT, at 65, 70-71 (October 1997).

223. *See Lucas*, 502 U.S. at 1003. *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 216 F.3d 764, *reh'g denied*, 228 F.2d 998 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3505 (June 29, 2001). Landowner brings an unsuccessful takings claim to challenge an interim development regulation. *Id.*

224. For discussion of multipurpose mechanisms that could be used to coordinate production, environmental, natural resources, and land use policies on farmland, *see* Holloway & Guy, *supra* note 51, at 443-44. *See also* Legislative Guidebook, *supra* note 3, at xxiii. Phase III of the APA's smart growth program may include some multipurpose mechanisms or controls to implement smart growth policies. *Id.*

225. *See Palazzolo,* 121 S. Ct. at 2448. In *Palazzolo*, the Court concluded that the presence of economic value on a tract of land where economic development has been prohibited is not denial of all economically viable use under *Lucas*. *See Palazzolo*, 121 S. Ct. at 2465.

226. *See also Tahoe-Sierra Preservation Council, Inc.*, 216 F.3d at 764. The Ninth Circuit concluded that an interim development control was not a denial of all economically viable use because it imposed a temporarily prohibition on the development of private land. *Id. See also Palazzolo*,121 S. Ct. at 2448 (concluding that the denial of a permit to fill wetlands under state wetland regulations is not a denial of all economically viable use of the property because it severely restricts the use of the land and its future development. *Id.* at 2465).

Appeals for the Ninth Circuit answers this question in the negative in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority.*[227] The Ninth Circuit concludes that *Lucas* does not apply to a temporary moratorium or interim zoning regulation to restrict or prohibit temporary development pending the exercise of local or municipal authority to review, enact, and implement local land use or other regulation.[228] Such a prohibition or ban on development to maintain the status quo until municipalities can update land use regulations, growth management strategies, or planning should not greatly offend the Takings Clause if the delay caused by the prohibition or ban is reasonable.[229]

B. The Economic Impact of Land Use and Other Regulation

Smart growth may not permit the preferred development of tracts or sites by landowners and developers within municipalities.[230] But the Court concludes that owners and developers do not have the right to the highest and best use of their land.[231] In *Penn Central Transportation Co.*, the Court concludes that historic preservation zoning is not an unconstitutional taking of private property, even though the owner of the Grand Central Terminal could not develop the property to its highest and best use.[232] Even before the Court decided *Penn Central Transportation Co.*, the Court had permitted a diminution in value through zoning regulations that offered no economic incentives, such as TDRs and financing, to alleviate hardships or encourage development or redevelopment.[233]

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227. 216 F.3d 764, *reh'g denied*, 228 F.2d 998 (9th Cir. 2000), *cert. filed*, 69 U.S.L.W. 3505 (June 29, 2001).

228. *Id.* at 782.

229. *See id.*; FREILICH, *supra* note 2, at 46-50.

230. *See supra* note 221 and accompanying text. Some municipalities encourage infill housing developments to limit leapfrogging by developers. *See* NAHB, *supra* note 63, at 13; Katie Kuehner-Hebert, *Small Banks: Smart Growth Issue*, AM. BANKER, 5, at 5, July 7, 2000. Mrs. Kuehner-Hebert finds that small community banks support smart growth through infill development in urban and suburban neighborhoods that helps to reduce traffic congestion. She observes that the banks are helping to rebuild communities by providing financial services for residential and economic development. *See* Kuehner-Hebert, *supra*, at 5. The banks also know their neighborhoods and can reduce costs of larger banks wanting to help rebuild the city. *See id.*

231. *See Penn Cent. Transp. Co.*, 438 U.S. at 125, *citing* Goldblat v. Hempstead, 369 U.S. at 592-93, 82 S. Ct. at 998-89; *see also Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976).

232. *Id.* at 131.

233. *Id.* at 131, *citing* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (stating that there is a 75 per cent diminution in value under a zoning ordinance); Hadacheck v. Sebastian, 229 U.S. 394 (1915) (stating that there is a 87.5 per cent

Many smart growth programs will offer economic incentives to landowners and land developers who participate in growth management and economic development programs to revitalize neighborhoods and inner cities.[234] These incentives are transferable development rights, tax incentives, publicly assisted financing, and exceptions and variances to local regulations.[235] These incentives and benefits can encourage development and mitigate the economic impact of land use, environmental, and growth management regulations,[236] thus making it less likely that taking challenges will succeed under the Court's economic impact analysis of takings law.[237]

C. *Interference with Reasonable Investment-Backed Expectations*

Smart growth will interfere with economic expectations that landowners and developers desire from capital invested in use of land for residential, commercial, and industrial development and the purchase of land for speculation.[238] Smart growth may raise thorny questions regarding whether land use and other smart growth regulation that makes a particular development less profitable greatly interferes with owners' or developers' reasonable investment-backed expectations.[239] In *Penn Central Transportation Co.*, the Court concludes that denying the owners of the Grand

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diminution in value under an ordinance prohibiting a manufacturing facility).

234. *See* Mead, *supra* note 49, at 1013-38. *See also* Weber, *supra* note 32, at 97-99 (discussing whether economic development incentives have a sufficient employment impact).

235. *See supra* note 49 and accompanying text.

236. *Id.*

237. *See Suitum*, 520 U.S. at 725 (the use of TDRs to offset the economic impact of environmental regulations); *Penn Cent. Transp. Co.*, 438 U.S. at 104 (the use of TDRs to mitigate the economic impact of historic preservation regulations).

238. *See generally* NAHB, *supra* note 63, at 4-6 & 8-9. NAHB recognizes that the use of agricultural land to meet housing demand indicates investments in land to meet present and future residential and other needs. *See id.* at 8-9. Land developers may not be able to realize an expected return if municipalities limit development on particular lands by stopping growth. *Id.*

239. For a discussion of the development of reasonable investment-backed expectations by the Court, *see, e.g.*, Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437 (2000); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. LAW. 215 (1995); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987). *See also supra* note 221 (discussing *Palazzolo* that included an investment-backed expectation issue that must be decided on remand under *Penn Central Transportation Co*).

Central Terminal (Terminal) the right to expansion that would generate greater profits did not interfere with the owner's reasonable investment-backed expectations in the Terminal.[240] The Court concludes that taking jurisprudence would not permit the severance of air rights from the parcel of land on which the Terminal is located.[241] The Court reaches this conclusion of law even though the owners of the Terminal had anticipated future expansion when it initially constructed the Terminal by building a foundation to support a twenty-story structure.[242] Later, in *Ruckelshaus v. Monsanto Co.*,[243] the Court concludes that Monsanto Corporation did not have a reasonable investment-backed expectation in its trade secrets of its pesticide if it knew that the Environmental Protection Agency (EPA) required disclosure of its formula for approval of this pesticide.[244] The Court has yet to conclude that a government regulation unconstitutionally interferes with reasonable investment-backed expectations, but the design of smart growth policies and regulations may effectively preclude or greatly limit these claims.[245]

Generally, smart growth programs should withstand scrutiny under the principle of reasonable interference with investment-backed expectations of regulatory takings analysis. Although landowners and developers have expectations of greater profits from land investments, smart growth regulation may be a political risk that developers and landowners should expect in owning or acquiring property for development.[246] The impact of this risk on profits or returns from development is the result of a political event-the making of land use regulations.[247] Such an event is an interference with investments in land that is already subject to use restrictions and other requirements. Still, these interferences do not mean that smart growth programs that interfere with expected

240. *Penn Cent. Transp. Co.*, 438 U.S. at 136.

241. *Id.* at 130. In *Tahoe-Sierra Preservation Council, Inc.*, the Court may finally address the protection accorded lesser estates and rights, which are severed from the land or personal property, under the Takings Clause. *See Tahoe-Sierra Preservation Council, Inc.*, 69 U.S.L.W. at 3505.

242. *Penn Cent. Transp. Co.*, 438 U.S. at 115 n.15.

243. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

244. *Id.* at 1006.

245. *See supra* note 49 and accompanying text (discussing financial and other incentives that can be granted by municipalities under smart growth programs).

246. In *Concrete Pipe & Products*, Justice Souter, writing for the majority, states that "'legislation readjusting rights and burdens is not unlawful solely . . . because it upsets otherwise settled expectations'." *Concrete Pipe & Products*, 508 U.S. at 646 (*citing* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976).

247. *See supra* note 246 and accompanying text.

returns on investments in real estate will violate the Takings Clause. Smart growth programs that are merely the modernization of outdated Euclidean zoning law and other programs will affect expectations or profitability of development projects because developers and landowners may have to comply with new planning elements and details in some states.[248] The elements and details are changes to zoning, growth management, and other regulation, and they further public interests by providing orderly growth and development, conserving natural resources, and improving the quality of life.[249] It would be impossible to protect or achieve these public interests if there could be no economic effects on economic expectations and business profits of landowners and land developers.[250] Such economic effects can be somewhat offset with TDRs, financing arrangements, and other incentives.[251]

V. Constitutional and Judicial Uncertainty Facing Smart Growth

Smart growth programs that include a modernization of Euclidean zoning law and growth management strategies will face scrutiny under the fundamental fairness principle of the Equal Protection Clause,[252] face judicial review by state courts operating under different state constitutional theories,[253] and face development under public policy for the need to consider human dimensions (people problems) of post-Euclidean zoning.[254] Smart growth programs broadly affect economic, social, legal, and political aspects of communities in establishing better controls over growth, development, and quality of life.[255] These effects will

248. *See* Planning Communities, *supra* note 3, at 16-20. *See supra* notes 96-104 and accompanying text (discussing the planning elements that state policy-makers should consider inserting in state and local comprehensive land use plans).

249. *See* Planning Communities, *supra* note 3, at 5-6.

250. *See Penn Cent. Transp. Co.*, 438 U.S. at 130. *See also Palazzolo,* 121 S. Ct. at 2465. The Court reviews a regulatory takings challenge to wetland regulations that severely limit, if not entirely prohibit, development of coastal wetlands. *Id.*

251. *See supra* note 49 and accompanying text.

252. U. S. CONST. amend XIV. *See also* Village of Willowbrook v. Olech, 528 U.S. 562 (2000). The Court applies the equal protection clause to a land use dispute where a landowner alleges discriminatory treatment in a demand by the municipality for a 33-foot easement. *Id. See also infra* notes 258-275 and accompanying text (discussing issues that could arise under the equal protection clause).

253. *See* Holloway & Guy, *supra* note 12, at 163-66.

254. *See What is Human Dimensions?*, (March 12, 1999), *at* http://www.cnr.colostate.edu/NRRT/hdnr/whatishd.htm (hereinafter Human Dimensions) (a collection of research by Colorado State University on the human dimensions of natural resources); *infra* notes 292-301 and accompanying text.

255. *See* Planning Communities, *supra* note 3, at 5-6 & 16-20 (discussing

depend on local and state public policies and judicial theories for growth management, land development, and social welfare under present precedents and laws that may not include or weigh, if they include, new human dimensions in land use, natural resource management, and quality of life.[256] "Questions regarding the economic and social impacts, historical and cultural concerns, public acceptance and education, and the political ramifications of a decision illustrate the nature of human dimensions inquiries."[257]

A. Other Constitutional Challenge to the Reasonableness of Regulation

Smart growth programs affect state and local communities under state land use planning statutes that mandate local comprehensive planning for counties and municipalities.[258] As local governments encourage smart growth developments through negotiating smart growth tools and controls, such as planned development units, cluster development, and redevelopment projects with developers,[259] they must not overlook the impact of regulation on economic interests and property interests of landowners and their neighbors.[260] Economic and property interests and rights receive protection under state and federal Due Process Clauses,[261] which provide both procedural[262] and substantive[263] protection.[264] The new use of single-purpose mechanisms and addition of multipurpose mechanisms may affect property and economic interests in ways that had not been encountered under

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changes in communities and planning elements and details in state and local planning law).

256. Human Dimensions, *supra* note 254, at 1.

257. *Id.*

258. *See* Planning Communities, *supra* note 3, at 5-6 & 16-20. *See also supra* notes 110-127 and accompanying text (discussing state initiatives to consider and implement smart growth programs).

259. *See* NAHB, *supra* note 63, at 2 & 10-11 (discussing efficient land use techniques).

260. *See supra* notes 176-197 and accompanying text.

261. U.S. CONST. amend. XIV.

262. *See* Holloway & Guy, *supra* note 51, at 440-42 (discussing the need for due process to prevent arbitrary and capricious government regulations or decisions in regulating agricultural land under multipurpose mechanisms).

263. *See Eastern Enterprises v. Apfel, Comm'r of Social Security*, 524 U.S. 498, 539 (Kennedy, J., concurring in judgment and dissenting in part) & 555 (Breyer, J., dissenting) (1998). Justices Breyer and Kennedy examine the need for fundamental fairness in government regulation of some employment relations. *Id. See also* Holloway & Guy, *supra* note 29, at 437-60 (discussing the use of substantive due process in resolving taking disputes).

264. *See supra* notes 261-262 and accompanying text.

Euclidean zoning that many agree provides adequate fundamental fairness and reasonableness in advancing legitimate state interests.[265] Smart programs that do not affect the incidence of local regulation on use and development of land should raise only a few questions under due process of law where such questions that involve the validity of old regulatory controls are well-settled under present land use programs.[266] Smart growth regulation that increases the incidence of mandates (namely prohibitions and restrictions on development) must include local administrative processes that permit landowners to challenge unreasonable regulatory tools and their effects on a particular development or site within a community.[267] Such programs may require special administrative hearings or processes to address economic hardships and interferences that landowners believe are arbitrary and capricious or fundamentally unreasonable.[268]

Smart growth may raise constitutional issues other than due process and takings questions. Smart growth programs will need to affect landowners, land developers, and other business entities differently,[269] and, thus, may need to classify individuals and entities to change their uses of land and its resources. Such classifications may raise questions regarding fundamental fairness under the Equal Protection Clause. Landowners may decide to challenge a classificatory regulatory scheme as lacking a sufficient relationship to the declared legitimate state interest by proving that the regulatory scheme cannot further such interest.[270]

In *Village of Willowbrook v. Olech*,[271] the Court concludes that a group or an individual can challenge a municipal land use decision that imposes an obligation on a landowner in return for a government benefit not required of other landowners who are similarly situated in the community.[272] Potentially, *Olech* could increase challenges to zoning and other regulations of smart growth programs that do not have an appearance of fundamental fairness

265. *See, e.g., Penn Cent. Transp. Co.*, 438 U.S. at 104; *Euclid*, 272 U.S. at 365; *Pennsylvania Coal Co.*, 260 U.S. at 393.

266. *See supra* notes 44-59 and accompanying text.

267. *See supra* notes 54-59 and accompanying text.

268. *See supra* notes 77-108 and accompanying text.

269. *See id.*

270. *See* Village of Willowbrook v. Olech, 526 U.S. 562 (2000).

271. 526 U.S. 562 (2000). In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Court concludes that a classification based on the number of feet of an easement under a land dedication condition raises a claim under the equal protection clause. *Olech*, 528 U.S. at 565.

272. *Olech*, 528 U.S. at 565.

because these regulations must classify landowners and land developers to impose conditional demands, assurances, and other obligations.[273] Such challenges were primarily takings and due process issues[274] until the Court decided *Olech*, and, thus, new claims may challenge the fairness of land use regulations that treat one group of landowners differently from another group of landowners where both groups appear similarly situated in the community.[275]

B. Smart Growth and State Judicial Review

Smart growth programs are state public policy and legislation that are subject to judicial review by state courts under state constitutions.[276] The federal Constitution establishes minimum standards,[277] and states that supreme courts are free to impose stricter standards in interpreting state constitutional provisions such as the Takings Clause.[278] Moreover, the Court's ripeness doctrine under the Takings Clause purposely limits federal judicial involvement in local matters until local governments have made a final administrative decision on the application of local land use and other regulations.[279] State courts can and often decide takings issues under federal and state constitutions.[280] The development of smart growth programs will depend, in part, on how these state courts decide takings and other issues under state constitutional theories that do not require the same interpretation between parallel federal and state takings provisions.[281]

State supreme courts do not apply uniform standards of review in reviewing takings and other claims arising under state and federal constitutions. Illinois and several other state courts apply heightened scrutiny to challenges to development impact exactions and thus subject one mandate or conditional demand of a multiple-purpose mechanism to heightened judicial review to ascertain

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273. *See* Kushner, *supra* note 12, at 235.
274. *See supra* notes 144-152, 262-263 and accompanying text.
275. *See Olech*, 526 U.S. at 564-65. *See also* Kushner, *supra* note 12, at 235-36 (stating that *Olech* could be become as well-known as *Nollan* and *Dolan*).
276. *See* Ohm, *supra* note 3, at 196-200. Professor Ohm discusses the affects of state judicial decisions on the legislative reform of state planning law. *Id.*
277. Holloway & Guy, *supra* note 12, at 161-62 & nn.64-72.
278. *See id.* at 162.
279. *See supra* note 186 and accompanying text (discussing an essential principle of the ripeness doctrine under the Takings Clause).
280. *See* Holloway & Guy, *supra* note 12, at 146-47 & 147 n.8.
281. *See* Ohm, *supra* note 3, at 196-200.

policy justifications.[282] Moreover, when stricter judicial review is required under the federal Takings Clause,[283] state courts should not ignore federal takings law for a lesser state standard.[284] Those states that apply a deferential standard to impact exactions[285] must now apply the stringent federal standard and, thus, some impact exactions may be invalidated by federal law.[286] More stringent federal standards require state courts to deviate from precedents and doctrines that gave lesser protection than federal constitutional provisions.[287] However, some state supreme courts have shown a tendency to narrowly construe interpretations[288] that the Court gives to the federal Takings Clause, causing the Court to revisit its earlier interpretations.[289] Such an effect of state courts in applying state and federal constitutional laws could create judicial uncertainty in the development and implementation of smart growth programs.[290] The validity and effectiveness of smart growth policies will not be determined until state courts decide how they will apply federal law and interpret state law under state constitutional theories.[291]

C. The Human Dimensions of Smart Growth

Smart growth is about people, communities, and their problems.[292] The effectiveness of smart growth depends on a

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282. Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961).

283. *See Dolan*, 512 U.S. at 374; *Nollan*, 487 U.S. at 825.

284. *See* Holloway & Guy, *supra* note 12, at 162 & n.71.

285. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966); Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), *appeal dismissed*, 404 U.S. 868 (1971); Ayres v. City Council of City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). *See also* Holloway & Guy, *supra* note 12, at 143 (discussing the impact of interpretations of the federal takings clause on interpretations of state takings provisions).

286. *See* Holloway & Guy, *supra* note 12, at 191-225.

287. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996); Dolan v. City of Tigard, 854 P.2d 437, 438 (Or. 1993), *rev'd*, 512 U.S. 374, 396 (1994), *remanded*, 877 P.2d 1201 (1994).

288. *See Ehrlich*, 911 P.2d at 219-20; Group v. Clackamas County, 922 P.2d 1227, 1231 (Or. Ct. App. 1996); J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 363 (Or. Ct. App. 1994).

289. *See Dolan*, 512 U.S. at 386. In *Dolan*, the Court revisits an issue it left undecided in *Nollan*. *Id.*

290. *See* Ohm, *supra* note 3, at 196-200 (discussing the impact of state court decisions on smart growth in Wisconsin).

291. *See id.*

292. *See* FREILICH, *supra* note 2, at 1-3; Planning Communities, *supra* note 3, at 5-6; NAHB, *supra* note 98, at 4-6. Conflicting and competing interests are at the

willingness of stakeholders with competing needs and conflicting interests to seek compromise in finding policy-solutions and market-based solutions to urban sprawl, natural resources degradation, and destruction of the quality of life.[293] Smart growth involves people-problems that involve economic conditions, social impacts, political ramifications, and other concerns.[294] Environmentalists, local citizens, and policy-makers who cannot find a compromise or agreement may limit the effectiveness of smart growth to address or correct social and environmental concerns.[295]

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heart of modern land use and growth management disputes. *See* Goode, *supra* note 27, at 4. Goode, Collaton, and Bartsch describe the relationship among natural resources, markets, and social welfare under smart growth that must avoid gridlock in designing and implementing new programs. *See id.* They state that:

> Yet sophisticated design tools must be complemented by participation and buy-in by community members. Such public involvement often is the most controversial and elusive element of urban revitalization strategies. 'Too much' community participation can seem burdensome to developers, 'not enough' can perpetuate the often adversarial roles adopted community groups and local officials, gridlocking progress.

Id. This description by Goode, Collaton, and Bartsch is evidence of the human dimensions of smart growth. *See infra* notes 293-301 and accompanying text. *See also* Baker, *supra* note 12, at 26-33 (Baker discusses social, ecological, political, and economic interests in establishing a smart growth policy.).

293. *See generally* Planning Communities, *supra* note 3, at 4 & 13 (discussing local and state roles in modernizing land use law); NAHB, *supra* note 63, at 2-3 (discussing the role of housing industry).

294. *See* Human Dimensions, *supra* note 254, at 1.

295. *Compare* FREILICH, *supra* note 2, at 279-82, *with*, NAHB, *supra* note 63, at 8-9. Is there a loss of prime farmland? The answer calls for a *compromise* of some sort. *See also* Judith W. Wegner, *Moving Towards the Bargaining Table: Contract Zoning, Development Agreements and the Theoretical Foundation of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987) (discussing the use of contract zoning and other land use tools and decisions as parts of a market-based solution to land use problems).

Cities and suburbs need to work together to curb sprawl. *See* Linda Baker & Jim Motavalli, *Myron Orfield: Politics of Growth*, THE ENVTL. MANAGER, 33, at 33 (May/June 2000). In their short article, Baker and Motavalli interview Mr. Mryon Orfield, an authority on urban growth. Mr. Orfield states that cities and suburbs are working together in Minnesota, Oregon, Washington, and Maryland. Baker & Motavalli, *supra*, at 33. He also notes that suburbs have stopped growing, have grown too fast, or have become congested. *Id.* He describes the relationship between cities and suburbs in this manner:

> So one suburban type is very similar to the city in its orientation and interests; the others have growth-related problems and are pretty hostile to the status quo development pattern. The only people in the suburbs who like what's happening are the developers who are getting rich, and the city councils, which are mostly in the developers' pockets . . . .

Id. at 33. Mr. Orfield strongly suggests that cities and suburbs can and will work together because they share common interests resulting from growth or the lack of it. *Id.*

Smart growth is not one group deciding the interests of a community.

Human dimensions involve the willingness of individuals and entities to find a balance among markets, natural resource management, and social welfare in balancing competing and conflicting interests among land development, growth management, natural resource management, and social welfare policies. Often, markets, natural resource management, and social welfare clash. Housing, financial, and job markets respond to supply and demand and, thus, provide products and services demanded by consumers and users.[296] Markets permit land developers and landowners to maximize wealth, but do not necessarily prohibit solutions to growth management and land use.[297] Social welfare programs that distribute and redistribute wealth of government need to consider their effects on markets and productivity.[298] Moreover, farmland preservation and soil and water conservation programs must coexist with land production, namely residential and commercial development[299] and, thus, market-based solutions need to be established to preserve fragile land and open space that communities cannot afford purchase.[300] Addressing human dimensions through the spirit of cooperation, compromise, and civility will more likely narrow the policy concerns, legal issues, and constitutional debate.[301]

VI. Conclusion

Smart growth will survive constitutional muster under the Takings Clause and other provisions of federal and state constitutions. Constitutional issues will arise as local and state governments exercise police power authority to establish smart growth programs that broadly address natural resource management, business interests, and social welfare. Takings and other constitutional decisions will establish only part of the calculus that stakeholders must accept to establish a more equitable balance

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296. NAHB, *supra* note 63, at 2-3.

297. *But see id.* at 2-3. The housing industry finds that smart growth is part of the solution to the housing demand. *See id.* Yet, it does not readily recognize that residential and commercial developments may permanently take too much prime farmland. *Id.* at 8-9.

298. *See supra* notes 10-19 and accompanying text.

299. NAHB, *supra* note 63, at 2-3.

300. *See id.* at 10-13.

301. *See* William C. Smith, *The Brawl Over Sprawl*, AM. BAR ASSN J., 48, at 48-52 (Dec. 2000). Mr. Smith discusses causes and effects of smart growth and concludes that it will cause litigation. *Id.*

among markets, natural resource management, and social welfare. State and federal constitutional theories, analyses, and laws determine takings and other challenges to smart growth regulation and greatly affect the nature of public policy or political debates.

The design of smart growth programs under state land-use enabling statutes within a municipality or county will determine whether smart growth ordinances and orders survive policy debates and litigation under federal and state constitutions. One conclusion is certain: The design of one smart growth program will not fit all rural and urban communities in America.[302] Effective smart growth policies may turn less on limits imposed by constitutional provisions than on an ability to forge compromises among markets, natural resource management, and the welfare of communities.[303] Smart growth is new *planning concepts and technology* to combat urban sprawl and rural degradation.[304] However, smart growth cannot ignore new human dimensions in urban, rural, and suburban land use, social welfare, and natural resource management.[305] The development of the human dimensions among policy-makers, developers, environmentalists, planners, and local citizens will determine the nature and timing of public-private compromises that establish an equitable balance among natural resources, markets, and the quality of life. These policy compromises among diverse parties with conflicting interests can survive constitutional muster where the public burdens that are borne by the landowners are equitable,[306] and the obligations imposed on all citizens are fundamentally fair.[307] Inclusively, these policy compromises can narrow constitutional issues of litigation, assuming all interests and constituents participate.

State and federal judiciaries may impose some limits on smart growth regulations and such limits can reduce the public benefits that are unfair and burdensome. Policy compromises that narrow

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302. *See* Legislative Guidebook, *supra* note 3, at xxiii.

303. *See supra* notes 292-301 and accompanying text (discussing the human dimensions of smart growth programs seeking to create a balance among natural resources, markets, and social welfare).

304. *See, e.g.*, FREILICH, *supra* note 2, at 15-33; Planning Communities, *supra* note 3, at 1-6; NAHB, *supra* note 63, at 10-13.

305. *See supra* notes 292-301 and accompanying text.

306. *See supra* notes 128-251 and accompanying text (discussing the constitutional challenges to smart growth under the Takings Clause, U.S. CONST. amend. V).

307. *See supra* notes 258-275 and accompanying text (discussing the challenges to smart growth under the Equal Protection Clause, U.S. CONST. amend. XIV, and Due Process Clause, U.S. CONST. amend. XIV).

constitutional issues may not save some policies of smart growth programs. Why? Federal intervention and state judicial reticence limit the use of particular regulation, such as land dedication conditions and total prohibitions on use, to address social, environmental, and other changes caused by land and other economic development. Growth management, land use, and natural resources preservation are state issues. During the last four decades, the federal government's role in agricultural and environmental regulations increased annually. The federal role affects land use, growth management, and social welfare, and, thus, any federal regulation, including judicial precedents, may unnecessarily create uniformity and limit the political flexibility of diverse communities. Equally devastating, judicial reticent by state courts to reconsider established state constitutional theories could limit smart growth programs. State supreme courts and other appellate courts may not closely follow some federal takings decisions and other precedents as precisely as some land developers, municipalities, and state governments would prefer. These courts may even decide not to follow federal takings decisions and other precedents that are binding on them.[308] Consequently, smart growth policies and regulation that are state legislation and local ordinances must survive the scrutiny by federal and state courts and withstand the give-and-take of the human dimension.

308. *See* Holloway & Guy, *supra* note 12, at 183-219 (examining state taking standards that appear less stringent than the federal standard).