

Recent Developments in Land Use, Planning and Zoning Law

Connecting Land, Water, and Growth

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“Sustainable water use seeks to achieve a balance between the capability of a system to meet social needs and its biological capacity.”¹

“Ultimately, a water ethic is about sharing—both with nature and with each other.”²

I. Introduction

UNTIL RECENTLY, cities assumed that sufficient water supplies would be available to sustain unlimited growth. The idea that growth is both inevitable and good was supported by federal and state laws. Water law gave municipalities a super-preference and allowed them to sever water from watersheds. Early examples of sustainable settlement patterns, most notably the communities supported by acequias in northern New Mexico, were marginalized in the process. Public utility law imposed a duty on water suppliers to serve all who paid and to anticipate future growth, with the net result that cities faced no pressure to integrate available water supplies into their land-use planning and regulatory programs.

Cities can no longer afford to ignore the relationship between water supply, land consumption, and growth because the competition for limited supplies is increasing. The era of large federal and state subsidized dams is over, and more attention is being focused on the importance of instream flows to restore degraded ecosystems and conserve unde-

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1. Western Water Policy Review Advisory Commission, *Final Report—Water in the West: The Challenge for the Next Century*, at <http://www.den.doi.gov/wwprac/reports/final.htm> (The Commission was chartered by the Secretary of the Interior on September 15, 1995, pursuant to the Western Water Policy Review Act of 1992, Pub. L. No. 102-575, Title XXX. The Commission has reviewed water resources problems in the nineteen Western States, existing institutional arrangements, the legal regime, and the responsibilities, authorities, and programs of federal agencies with direct water resources management responsibility.

2. SANDRA POSTEL, *LAST OASIS—FACING WATER SCARCITY* (1997).

graded ones. The resource limits have been reached. Future growth will depend on reallocating existing water supplies, demand management (conservation), and creating a smart process to live within our means.³

This report examines some of the problems (disconnects) that have evolved in our processes to manage water, land, and growth and offers some possibilities for bridging the pervasive disconnects so that we can move toward truly sustainable communities. Although much of the dialogue surrounding “smart growth” is about the future we want to create (e.g., compact, pedestrian-oriented, mixed-use development patterns, and sustainable water supplies), more attention needs to be focused on the process—how to get from here to there.

II. The Disconnects

Water supply and land-use planning are disconnected because they have historically been, and currently remain, the separate responsibility of different levels of government. Broadly speaking, the federal and state governments have been the planners and regulators of our water resources and have been primarily motivated by the goal of economic efficiency. On the other hand, with the exception of federal lands, cities and counties have been the planners and regulators of our land resources and have been motivated primarily by the goal of preventing nuisances. A very dumb process has evolved by default, not by design. Only relatively recently have we begun to rethink these goals of efficiency and nuisance-avoidance in the “smart growth” debates.⁴ Given

3. Consuelo Bokum, Vickie Gabin & Paige Morgan, *Living Within Our Means: A Water Management Policy for New Mexico in the 21st Century*, N.M. ENVTL. L. CTR., (1992). See also Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361 (2001) (explaining how provisions of the Endangered Species Act may encourage changes to state laws pertaining to land-use planning and water distribution); Adam Strachan, *Concurrency Laws: Water as a Land-Use Regulation*, 21 J. LAND RESOURCES & ENVTL. L. 435 (2001); Janet C. Neuman, *Adaptive Management: How Water Law Needs to Change*, 31 ELR 11432 (2001); A. Dan Tarlock, *Water Supply as New Growth Management Tool*, 50 LAND USE L. & ZONING DIG. (Nov. 1998); David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001); James P. Morris, *Who Controls the Waters? Incorporating Environmental and Social Values in Water Resources Planning*, 6 HASTINGS W.—N.W.J. ENVTL. & POL'Y 117 (2000); Robert W. Adler, *Watersheds and the Integration of U.S. Water Law and Policy: Bridging the Great Divides*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2000); HENRY L. DIAMOND & PATRICK F. NOONAN, *LAND-USE IN AMERICA*, (1996); UNITED NATIONS CONFERENCE FOR ENVIRONMENT AND DEVELOPMENT, *THE GLOBAL PARTNERSHIP FOR ENVIRONMENT AND DEVELOPMENT—A GUIDE TO AGENDA 21* (Post Rio Ed., United Nations: New York, 1993); Western Water Policy Review Advisory Commission, *Final Report—Water in the West: The Challenge for the Next Century*, at <http://www.den.doi.gov/wwprac/reports/final.htm>; Kevin M. O'Brien & Barbara Markham, *Tale of Two Coasts: How Two States Link Water and Land Use Planning*, 11-2 NAT. RESOURCES & ENV'T 3 (1996).

4. Smart growth is the planning, designing, developing, and revitalizing commu-

the complexities of both, it is not sufficient to simply merge the water and land-use regimes as they exist today. The new paradigm and new-shared goal must be tied to a smarter process than we have had thus far in order to connect water allocation and land use policy. The current disconnects include:

Outcomes not connected to plans. There are a multitude of plans and studies that acknowledge the serious constraints and limitations of the earth's water resources and advocate sustainable goals. But there are thousands of incremental and disconnected decisions made at every level of government and by every water user today that accomplish exactly the opposite. Eric Damian Kelly describes this disconnect by noting that planning in a democracy often leads to unimplemented or unimplementable plans because

planning is carried out by capable professional planners who are far removed from the real power of government and not endowed with their own powers of implementation . . . while the zoning ordinances and other laws that can be used to implement a plan are, in contrast, controlled by elected officials who are truly representative of the body politic.⁵

Development regulations (such as zoning, subdivision, impact fees, and many others) not connected to the plan. There are a number of reasons offered to explain this disconnect, but none of them are logical as we enter the twenty-first century. Many communities never prepared a plan and simply adopted regulations in the absence of a plan because they "knew" what they wanted to accomplish and how. Other communities adopted a plan but the plan itself did not provide enough clarity or specificity, merely restating the "feel good" desires of the community in wishy-washy goals and policies that provided very little guidance when it came time to write the regulations.

Development decisions and budget expenditures inconsistent with the plan. Development decisions and public expenditures are often uncoordinated but they need to be linked to the plan. If the link is not made, development decisions most likely reflect the short-term expedient response rather than the long-term public interest.

Conflicting plans and regulations within the same jurisdiction. The age-old problem of "the left hand doesn't know what the right hand is doing." Particularly prevalent in the larger metropolitan areas, planning and regulatory functions are so compartmentalized that the planning

nities to promote a sense of place, preserve natural and cultural resources, and equitably distribute the costs and benefits of development. American Planning Ass'n, *Draft Policy Guide on Smart Growth* (Feb. 2002).

5. Eric Damian Kelly, *Planning vs. Democracy*, LAND USE L. & ZONING DIG. (July 1986).

department might be preparing the comprehensive plan and the downtown revitalization plan, while the economic development department is preparing the economic development plan and the utility division is preparing the water utility extension plan. One plan advocates infill and limiting sprawl on the edge of the community while the other anticipates where the new water and sewer lines will be extended to accommodate growth in the next five to ten years. More often than not, none of these plans are connected.

Gaps and conflicts between jurisdictions. There are gaps between different layers of government—federal, state, and local—or “vertical disconnects,” as well as gaps between different communities within the same region—or “horizontal disconnects.” One example of a vertical disconnect is the situation in which a state agency persists in issuing domestic well permits to owners of substandard-sized lots over the objections of the local government attempting to prevent development of these antiquated parcels.⁶ A horizontal disconnect is often noticeable in regions where local development decisions have tremendous regional impacts that cannot be addressed at the local level. Keane Callahan notes the harm that often occurs when we impose artificial boundaries over “natural systems that are a community of interdependent life and dynamic biological interaction.”⁷ A multiplicity of local governments that regulate their piece of the land-use pie with their brand of land-use regulation cannot possibly prevent the harms that Callahan speaks of, much less promote sustainable development practices.

Connecting land, water and growth in the twenty-first century requires:

- thinking outside-the-box,⁸ creatively, holistically, and realistically;
- connecting federal, state, sovereign tribal governments, local governments, indigenous groups (such as the acequias), farmers, and a multitude of others in a new way so they work in a mutually supportive fashion;
- connecting plans, regulations, development decisions and actions as well as financial resources so we can think long-term but act responsibly in the short-term.

6. Cf. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 43 P.3d 4 (Wash. 2002) (stating that state law domestic well exception does not apply to 20 lot subdivision).

7. Keane Callahan, *Bioregionalism: Wiser Planning for the Environment*, LAND USE L. & ZONING DIG. (Aug. 1993).

8. See David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001).

The disconnects will be closed in stages. The first stage is for communities to recognize that they are part of a watershed that may control the amount of water available to support development. The second stage is to incorporate water supply availability projections into local land-use plans. This will force many cities to factor in conditions from short-term, severe droughts to the possibility of global climate change. The third stage is to subordinate development approvals to demonstrated water supply availability.

Many cities are incorporating water supply availability, including demand management options, into new plans. Western states are the leaders in linking water to development.⁹ Most recently in October 2001, California signed into law two bills requiring cities and counties to consider the availability of water supplies when making certain land-use decisions. SB 221 (Kuehl) prohibits approval of tentative subdivision maps, parcel maps, or development agreements for a subdivision of more than 500 units unless there is a “sufficient water supply” and, arguably, has more “teeth” than its predecessor SB 901 (enacted in 1995). SB 610 (Costa) requires cities and counties to review detailed “water supply assessment reports” as part of the environmental review process for various types of large development projects. It is too soon to tell what impact these two measures will have, but one must wonder why a developer would propose 500 units, rather than 499, if the restrictions of SB 221 posed an impediment to development.

III. A Smart Process—Recommendations to Link Water, Land, and Growth

Although there are many positive signs that reforms are occurring that will lead to a smarter process, it must be much more than merely amending the environmental and land use laws on the books today. What is required is a complete paradigm shift, on the order of magnitude as great as the hundredth monkey learning how to wash its sweet potatoes.¹⁰ It can no longer be tolerable for this generation to live off the resources that belong to future generations and put them at risk. The shift will occur in state houses, in the halls of Congress, in the

9. For example, Arizona requires that comprehensive plans be developed to conserve natural resources; Ariz. Stat. § 11-806(B)(2002); and to consider the availability of water supplies when reviewing subdivision applications; Ariz. Stat. § 9-463.01(C)(4) & § 11-806.01(B) (2002). Arizona has long required developers to demonstrate a 100-year water supply. In 1995, counties in New Mexico were authorized to require subdividers to prove that sufficient water supplies exist to serve the new subdivision. N.M. STAT. ANN. § 47-6-11.2 (2002).

10. KEN KEYES, JR., *THE HUNDRETH MONKEY* (1981).

offices of bureaucrats, in city council chambers, and in living rooms. The disconnects will be mended incrementally, one disconnect at a time, by establishing a smart process for smart growth.

A smart process to connect water, land, and growth must include, at a minimum, the following four elements:

- *Integrated Planning Systems*—Pulling together substantive areas (such as land use, transportation, water and natural resources, economic development, etc.) as well as each level of government so that everyone is marching to the tune of the same drummer but supporting creative solutions. Planning should be a mandatory responsibility of each level of government and should precede regulatory authority. If a community is unable or unwilling to plan, its land-use regulatory authority should be withheld.
- *Inclusive and Participatory Processes*—Restoring the public's confidence in the planning and regulatory processes as well as ensuring that those in the community that have not been included in the past, will be indispensable in the future.
- *Informed Decision-Making Consistent with the Plan(s)*—Adopting plans that are comprehensible and capable of implementation, with zero tolerance for subsequent regulations, decisions, or government actions that are inconsistent with the plan. If circumstances change and the plan becomes outdated, the plan should be amended through an informed public process before making irreversible and ill-informed decisions. Informed decision-making requires clear and complete information that, especially in the land-use/water arena, is often lacking or distorted. Since many development decisions have irreversible impacts, decision-makers should err on the side of caution and conservatism.
- *A Feedback Loop and Mitigation Monitoring*—Today's decisions must be objectively measured, both individually and cumulatively, so that future plans and future decision-making can learn from today's lessons.

Each level of government has a role in a smart process. The federal government must show leadership in developing the new ethic, adopting a sustainability agenda as a national goal and setting the stage for the new ethic to evolve. A constitutional amendment, signaling our nation's commitment to future generations and their right to inherit a sustainable environment, might establish the organizing principle that is necessary to develop a smart process.¹¹

11. Lynton K. Caldwell, *A Constitutional Law for the Environment*, LAND USE L.

The federal government also needs to get its own house in order by identifying the conflicts in federal laws, rules, and regulations that actually subsidize or promote unsustainable development practices.¹² Finally, the federal government should pull the Douglas Commission's report¹³ and Senator Jackson's proposal¹⁴ off the shelf and revisit those recommendations. Perhaps they were ahead of their time, or the American public needed another thirty years to fully appreciate their significance.

The most critical steps for mending the disconnects must be taken at the state level, but clearly within a partnership role between the federal and local governments. States must establish a clear planning statutory framework, within which state and regional agencies and local governments will function. Although a number of states have begun to reform their planning laws and planning processes to connect land, water, and growth,¹⁵ the vast majority of communities in the country are operating in a vacuum, with little guidance or assistance from the states. States need to articulate the public interest by adopting statewide goals (consistent with the new constitutional amendment for the environment). Furthermore, states need to clearly set forth the "who, what, when, where and how" of planning.¹⁶ Changing the status quo—

& ZONING DIG. (May 1990). Lynton K. Caldwell suggests that a constitutional amendment for the environment might show a stronger commitment to implementation of NEPA's intent and foster more serious implementation. *Id.*

12. James M. McElfish, Jr. & J. William Futrell, *Sustainable Development Law: More than a Planning Goal*, in MODERNIZING STATE PLANNING STATUTES—THE GROWING SMARTSM WORKING PAPERS, Vol. 1, Planning Advisory Service Report No. 462-463, 63-66 (Am. Planning Ass'n, March 1996).

13. The Douglas Commission report, issued in 1968, included some radical recommendations for its time, and perhaps for 2002. For example, only local governments of sufficient size and fiscal capacity, and within an established and clear state policy framework, should be given land use decision-making authority. If a local government prepared a plan that's consistent with state standards and criteria, then state agencies must be consistent with the local plan when carrying out agency activities in that local government's area. See Fred Bosselman, *The Douglas Commission Remembered*, LAND USE L. & ZONING DIG. (Mar. 1994).

14. The father of the National Environmental Policy Act, Senator Jackson, also envisioned a National Land Use Policy Act (S. 3354) at the same time. Both Acts were intended to work together, but the National Land Use Policy Act failed to pass the House of Representatives. It would have established a network of data to help states and local communities plan efficiently, with the promise that federal actions of all types would conform to state plans after they were adopted and accepted by a national agency. See John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson's 1970 Policy Act*, LAND USE L. & ZONING DIG. (May 1996).

15. Kevin M. O'Brien & Barbara Markham, *Tale of Two Coasts: How Two States Link Water and Land Use Planning*, 11-2 NAT. RESOURCES & ENV'T 3 (1996).

16. Lora Lucero, *Sustainable Communities Act—A Proposal for Reforming New Mexico's Planning and Land Use Laws* (Aug. 2000), prepared for 1000 Friends of New Mexico.

even a dysfunctional status quo—is never easy, but most states, and consequently most local governments, are planning, regulating, and building communities under model planning enabling laws written in the 1920s!¹⁷

The consistency doctrine is the linchpin to connect land, water, and growth.¹⁸ “Merging intentions and actions, the consistency doctrine is the expression of the idea that plans are documents that describe public policies that the community intends to implement and not simply a rhetorical expression of the community’s desires.”¹⁹ A number of states have incorporated consistency provisions into their planning statutes, including Arizona, California, Delaware, Florida, Kentucky, Maine, Nebraska, New Jersey, Rhode Island, Oregon, Washington, and Wisconsin,²⁰ but the time has come for the doctrine to evolve. In the context of land and water resources, consider the following questions.

1. Is the state agency’s water resources plan consistent with the adopted state goals?
2. Are the regional water plans consistent with the state agency’s water resources plan?
3. Is the water resources (or conservation) element in the local comprehensive plan consistent with the regional and state water plans? Is that element consistent with the growth projections and land-use assumptions in other parts of the same plan?
4. Do private utilities and water companies have plans that are consistent with the local, regional, and state plans?
5. Are the regulatory tools adopted at the state, regional, and local levels consistent with the plans adopted at those levels?
6. Are the state and local budgets consistent with the applicable plans?
7. Are the state and local infrastructure investment decisions consistent with the applicable plans?

17. The APA’s *Growing Smart*SM Legislative Guidebook, released February 2002, provides a menu of options for states to consider when reforming their land use and planning laws.

18. Robert Lincoln, AICP, *Implementing the Consistency Doctrine*, in 1 MODERNIZING STATE PLANNING STATUTES—THE GROWING SMARTSM WORKING PAPERS, Planning Advisory Service Report No. 462/63 (Am. Planning Ass’n, Mar. 1996); Joseph F. DiMento, *The Consistency Doctrine in its Adolescence: More Questions about the Role of Comprehensive Plans*, 5 ZONING & PLANNING L. REP. 49 (July–Aug. 1982).

19. Lincoln, *supra* note 18, at 89.

20. Stuart Meck, FAICP, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295 (2000).

8. Are the state, regional, and local development decisions consistent with the applicable regulatory tools and plans?

The state must put its resources (financial, infrastructure, and other) where they will support the state's plan and local plans; a commonsense approach that the public most likely takes for granted, but is often not the case. In the context of land, water, and growth, many of the state's investment decisions influence where and how quickly these resources will be consumed. If such decisions are not connected to the plans, they undermine the plans. The state must get its own house in order by re-examining how it does business and questioning the assumptions of why certain institutional processes exist. Every state agency wants to protect its own turf, so change is extremely difficult. But if the examination, and the report card mentioned above, illuminate the disconnects and show where the processes are inefficient and archaic, the state must take a leadership role in the reform.

In a smart process, planning should come from the bottom-up, but occur within the planning framework established by the state. In other words, the state should provide (1) clear goals and policy direction on matters of statewide importance (i.e., sustainable water supplies), (2) guidance about what elements are required in a comprehensive plan (i.e., a land use element and natural resources element), and (3) data or information to support the planning process (i.e., resource constraints). However, local governments, with the involvement of the residents of the community, must make the tough decisions about how, where, and when to grow.

Finally, even if no agreement can be found to establish a smarter process for smart growth, and if water is priced closer to its real cost, individuals and government will begin to make smarter decisions in the absence of, or despite, any plans that might be adopted.²¹

21. See United Nations, *Agenda 21: The United Nations Program of Action from Rio* (New York: U.N. Publications: 1992); World Bank, *Water Resources Management: A World Bank Policy Paper* (1993).

