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Problems and Opportunities for Progressive Comprehensive Land Use Planning in Richland County, South Carolina After McClanahan v. Richland County Council

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COMMENT: PROBLEMS AND OPPORTUNITIES FOR PROGRESSIVE COMPREHENSIVE LAND USE PLANNING IN RICHLAND COUNTY, SOUTH CAROLINA AFTER *MCCLANAHAN V. RICHLAND COUNTY COUNCIL*

I. INTRODUCTION

American cities and counties are facing a common problem: sprawl. As cities grow and people move into the suburbs, uncontrolled development leads to serious aesthetic, environmental, cultural, and economic problems.[1] This issue draws attention from federal, state, and local governments, as well as a wide range of interest groups.

To combat sprawl, communities and states have employed many tools that vary in effectiveness and levels of restriction, such as traditional zoning, market-based programs, and conditional permits. Simply stated, to avoid sprawl, communities must control development, which means restricting the uses that some landowners can make of their property.[2] Land use restrictions, typically implemented by zoning, have existed for a long time and so has landowners' opposition to government-imposed land use restrictions.

Land use is typically regulated at the local level through conventional means, such as zoning, and more recently through market-based tools controlled by a city or county agency.[3] Due to the local nature of land use, wide differences exist, even between

1. *See* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 137-38 (1999).

2. *See generally* Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U. J.L. & POL'Y 195 (2000) (detailing the history of land use law marked by cases in which government agencies have abused their authority and infringed upon landowners' rights); Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW 441, 443-46 (1998) (describing the basic conflict that exists between protecting lands and protecting individuals' property rights).

3. *See* Juergensmeyer et al., *supra* note 2, at 445; Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 567 (1992).

relatively close communities. States are becoming more involved, establishing planning criteria for communities and statewide goals.[4]

In 1994, South Carolina passed the South Carolina Local Government Comprehensive Planning Enabling Act (Act).[5] The Act does not mandate the creation of comprehensive land use plans, but it does stipulate the elements that such a plan must include and the procedure for the creation and adoption of such a plan.[6] The Act requires that each local planning commission update their existing plan every five years, so, after its enactment, current plans had to be in accordance with the requirements of the Act by May 3, 1999.[7] However, it did not mandate the creation of planning commissions.[8]

In response, the Richland County Planning Commission created the Imagine Richland 2020 Comprehensive Plan (Plan), and the Richland County Council voted it into effect on May 3, 1999.[9] Landowners concerned about the Plan's possible effects on their individual property rights contested it.[10] On July 15, 2002, in a six-page opinion, the South Carolina Supreme Court upheld the Plan as valid, finding no procedural faults in its passage and no violation of the plaintiffs' due process rights.[11]

The case demonstrated the local property owners' conviction to protect their property rights and, hopefully, the Supreme Court's willingness to uphold progressive land use plans in South Carolina. Part II of this paper will examine the history of planning and the inherent conflict with property rights. Part III examines federal takings law and prominent cases as background for the conflict in Richland County. Part IV will briefly examine state law regarding zoning and comprehensive land use. Part V examines and compares selected state programs. Part VI analyzes tools used to implement comprehensive planning on the local level. Part VII is devoted to evaluating the Imagine Richland 2020 Comprehensive Plan and the litigation and controversy surrounding its adoption. Part VIII presents an analysis of

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4. *See, e.g.*, S.C. CODE ANN. §§ 6-29-310 to -1170 (Law. Co-op. 2001) (creating statutory law on certain aspects of local land use planning).

5. *See id.*

6. *See id.*

7. S.C. CODE ANN. § 6-29-510(E) (Law. Co-op. 2001).

8. S.C. CODE ANN. §§ 6-29-320, -330 (Law Co-op. 2001) (noting that commissions "may" be created).

9. RICHLAND COUNTY, S.C., Code art. III, §§ 20-21 (1999) (adopting the Imagine Richland 2020 Comprehensive Plan); *see also* McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002) (describing the adoption of the Plan).

10. *McClanahan*, 350 S.C. at 433, 567 S.E.2d at 240. William McClanahan brought suit individually and on behalf of other Richland County landowners and taxpayers. *Id.*

11. *See id.* at 440-41, 567 S.E.2d at 243-44.

the tools discussed in Part VI in the context of Richland County. Finally, Part IX concludes the comment with a market-based suggestion for the implementation of growth management tools.

II. A BRIEF HISTORY OF LAND USE PLANNING AND PROPERTY RIGHTS

Land use control, particularly zoning, has been utilized in America for decades.[12] One scholar has suggested that the earliest ordinances affecting land use were adopted in colonial times.[13] Under traditional zoning, planners attempted to regulate land usage by implementing zoning restrictions in order to prohibit undesired uses in certain areas.[14] The practice was successful in achieving "simple [goals], such as separating incompatible land uses," but was unsuccessful in limiting or avoiding sprawl.[15] As early as 1929, following the economic and transportation boon after World War II,[16] places like New York[17] and other communities across the country experienced people moving away from city centers to live in new suburban developments for a higher quality of life and homeownership.

Several definitions of sprawl exist;[18] however, common characteristics such as low-density, single-family, residential development on the edges of cities with poor planning and commercial development, characterized by strip malls, typify the commonly accepted notions of sprawl.[19] While affluent, suburban, single-family homes are a part of the American dream, sprawl comes

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12. Kayden, *supra* note 3, at 567.

13. *See generally* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) (suggesting that land use restrictions in colonial times were the predecessors of modern zoning laws); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (offering proof of restrictive land use ordinances in early colonial times).

14. *See* Kayden, *supra* note 3, at 567.

15. *Id.*

16. JOEL S. HIRSCHHORN & PAUL SOUZA, NEW COMMUNITY DESIGN TO THE RESCUE: FULFILLING ANOTHER AMERICAN DREAM 10 (2001).

17. Burchell & Shad, *supra* note 1, at 139.

18. *See, e.g.*, Burchell & Shad, *supra* note 1, at 137 (defining sprawl as "the spread-out, skipped-over development that characterizes the non-central city metropolitan areas and non-metropolitan areas of the United States"); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. Law 183, 184-85 (1997) (giving an overview of sprawl and capturing other commentators' definitions and viewpoints).

19. *See* Burchell & Shad, *supra* note 1, at 137; Freilich & Peshoff, *supra* note 18, at 185 (citing LINCOLN INSTITUTE OF PUBLIC POLICY, ALTERNATIVES TO SPRAWL 4 (1995)).

with many costs, including concentration of poverty in urban areas, racial and economic segregation, increased costs for new infrastructure, longer commutes and resulting pollution, urban decay, loss of open space, and loss of quality of life.[20]

It has been suggested that traditional restrictive zoning is ineffective and, in some cases, even promotes sprawl.[21] In response to the failure of traditional zoning measures, municipalities, counties, and states began utilizing tools other than restrictive zoning, such as conservation easements,[22] market-based programs like incentive zoning,[23] and transferable development rights.[24] Recently, states and local governments have developed comprehensive land use plans, which serve as guides to responsible development in an area.[25] This trend away from traditional, piecemeal zoning and towards comprehensive land use is commonly known as "smart growth."[26]

Generally, smart growth is concerned with reversing the trends evident in sprawl.[27] Within that context, the smart growth movement focuses on issues such as quality of life, the environment, and transportation.[28] Very similarly, the New Urbanism[29] movement

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20. Freilich & Peshoff, *supra* note 18, at 190; HIRSCHHORN & SOUZA, *supra* note 16, at 10-12.

21. Burchell & Shad, *supra* note 1, at 137; Freilich & Peshoff, *supra* note 18, at 186.

22. *See generally* Sharon E. Richardson, *Applicability of South Carolina's Conservation Easement Legislation to Implementation of Landscape Conservation in the ACE Basin, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 209 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (examining the success of conservation easements in coastal South Carolina).

23. *See* Kayden, *supra* note 3, at 568.

24. *See generally* Juergensmeyer et al., *supra* note 2 (explaining transferable development rights and their role in takings law analysis).

25. *See, e.g.*, S.C. CODE ANN. §§ 6-29-310 to -1170 (Law. Co-op. 2001) (requiring compliance in all local plans with the enumerated goals of the South Carolina Local Government Comprehensive Planning Enabling Act).

26. The Environmental Protection Agency defines smart growth as "development that serves the economy, the community, and the environment ... chang[ing] the terms of the development debate away from the traditional growth/no growth question to 'how and where should new development be accommodated.'" U.S. Environmental Protection Agency, *About Smart Growth: What is Smart Growth?, at* http://www.epa.gov/smartgrowth/about_sg.htm (last updated Oct. 24, 2002).

27. *See id.*

28. Smart Growth Online, *Overview of Issue Areas, at* http://www.smartgrowth.org/about/issues/default.asp?res=800 (last visited Nov. 8, 2002) [hereinafter Smart Growth Online].

29. New Urbanism has been defined as "essentially a re-ordering of the built environment into the form of complete cities, towns, villages, and neighborhoods—the way communities have been built for centuries around the world. New Urbanism involves fixing and infilling cities, as well as the creation of compact new towns and villages." New Urbanism.org Home Page, *at* http://www.newurbanism.org (last visited Nov. 8, 2002) [hereinafter New Urbanism.org].

focuses on many of the same elements and "promotes the creation and restoration of diverse, walkable, compact, vibrant, mixed-use communities composed of the same components as conventional development, but assembled in a more integrated fashion, in the form of complete communities."[30] In addition, a recent report by the National Governor's Association proposed the New Community Development (NCD) idea,[31] encompassing many of the ideals of previous planning movements.[32] Together, these movements share common methodologies and approaches to problems of sprawl, including infill, mixed-use development, mixed housing, densification of housing developments, and increased transportation options.[33]

Land use ordinances have not met with universal approval.[34] Landowners and interest groups oppose land use regulations because they restrict the landowners' rights to freely develop their land.[35] For example, one commentator accused smart growth planners and advocates of being "paternalistic" by insisting that they can govern the use of land better than landowners.[36] These interest groups pose serious opposition to the enactment of ordinances affecting property values and rights and have often taken their cases to court.[37]

III. FEDERAL CONSTITUTIONALITY

Zoning was originally considered in the landmark case *Euclid v. Ambler Realty, Co.*,[38] in which the United States Supreme Court upheld a zoning ordinance as a valid exercise of a state's police power when it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[39] A second test was added to the takings calculus of zoning

30. *Id.*

31. *See* HIRSCHORN & SOUZA, *supra* note 16.

32. *Id.* at 9.

33. *Id.*; Smart Growth Online, *supra* note 28; New Urbanism.org, *supra* note 29.

34. *See* Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000); Alliance for America, *Issues and Information*, *at* http://www.allianceforamerica.org/Position%20Papers%202001.htm (last update for this page was Nov. 1, 2001) [hereinafter Alliance for America]; American Land Rights Association home page, *at* http://www.landrights.org (last visited Nov. 8, 2002) [hereinafter American Land Rights Association].

35. *See, e.g.*, Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. Rev. 419, 422 (2002) (stating that agricultural zoning prevents landowners from being able to freely convey their property).

36. Bolick, *supra* note 34, at 867.

37. *See infra* Part III.

38. 272 U.S. 365 (1926).

39. *Id.* at 395.

ordinances in *Penn Central Transportation Co. v. New York City*.[40] After deciding that the challenged ordinance met the *Euclid* "substantial relation" requirement, the Court added that the ordinance could not diminish the owner's "distinct investment backed expectations" or it would constitute a taking.[41]

South Carolina provided the next milestone case involving zoning and regulatory takings. In *Lucas v. South Carolina Coastal Council*[42] the Supreme Court established an exception—a taking occurs when all viable economic use is permanently taken so that the state must pay compensation, unless the regulation simply duplicates the result that would have been reached had the state's nuisance law been applied.[43]

Communities have sought other ways to control land uses, and in *Nollan v. California Coastal Commision*[44] the Court held that, for a conditional building permit to be valid, an "essential nexus" must exist between the condition placed upon the permit and the valid public purpose sought by the condition.[45] More recently, the Court returned to this issue of conditional permits in *Dolan v. City of Tigard*.[46] In *Dolan* the Court had no problem finding the essential nexus between the condition and the public purpose involved in the case;[47] however, a taking was found based on the conclusion that the exactions placed on the landowner did not bear a "rough proportionality" to the impact of the proposed development on the public.[48]

In *Palazzolo v. Rhode Island*[49] the Court expressly stated, for the first time, that a takings claim may exist even if the landowner has acquired the property after the given regulation is effective.[50] In *Palazzolo* the landowner claimed that a restriction on development on or near wetlands passed prior to his purchase of the land effected a taking under the *Lucas* per se exception for the permanent deprivation of all economically viable use of the land.[51] However, no taking was found because, unlike in *Lucas*, the land retained some developmental value despite the restriction.[52]

In 2002, the Court refused to apply the categorical rule established in *Lucas* that any permanent regulation depriving a landowner of all

40. 438 U.S. 104 (1978).
41. *Id.* at 124.
42. 505 U.S. 1003 (1992).
43. *Id.* at 1029.
44. 483 U.S. 825 (1987).
45. *Id.* at 837.
46. 512 U.S. 374 (1994).
47. *Id.* at 387.
48. *Id.* at 391, 395.
49. 533 U.S. 606 (2001).
50. *Id.* at 632.
51. *Id.* at 615-16.
52. *Id.* at 616.

economically viable use constitutes a taking.[53] In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Tahoe Regional Planning Agency enacted two moratoria effecting a thirty-two-month ban on development in order to allow time for the study and creation of a comprehensive land use plan.[54] Instead, the Court applied the *Penn Central Transportation Co. v. New York City* analysis[55] and upheld the moratoria because the group challenging them failed to make a claim that they were unconstitutional under the *Penn Central* test.[56]

IV. STATE AND LOCAL ZONING AND PLANNING LAW

State courts also have had many opportunities to address takings issues in regards to zoning and land use law. In the courts, zoning ordinances are almost uniformly presumed to be valid exercises of the police power.[57] Procedural protections are in place in most states, requiring notice and an opportunity to be heard for the stakeholders.[58]

To have standing to challenge an ordinance, one must show the requisite injury-in-fact caused by the challenged zoning.[59] He must also show that he has exhausted all possible administrative remedies or that such attempts were futile.[60] Standing has been denied in cases

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53. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002).

54. *Id.* at 1489.

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

56. *Tahoe-Sierra Pres. Council, Inc.*, 122 S. Ct. at 1489.

57. *See, e.g.*, Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965) (holding that the city's refusal to rezone property was not unreasonable); Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963) (upholding the city council's decision to rezone the property in question as reasonable); Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987) (upholding a zoning ordinance which denied the landowner the right to develop a fast-food restaurant as reasonable), *cert. dismissed*, 296 S.C. 72, 370 S.E. 2d 714 (1988); *see also* 83 AM. JUR. 2D *Zoning and Planning* § 48 (1992) (citing cases from other states where zoning ordinances have been presumed valid); 5B SHEPARD'S ORDINANCE LAW ANNOTATIONS § 148 (John L. Craig et al. eds. 1990) (same); 101A C.J.S. *Zoning and Land Planning* § 18 (1979) (same).

58. *See, e.g*, S.C. CODE ANN. §§ 6-29-520 to -530 (Law. Co-op. 2001) (setting forth procedures for enacting plans); *see generally* 83 AM. JUR. 2D *Zoning and Planning* § 20 (1992) (stating that procedural safeguards must be adhered to if they exist); 5B SHEPARD'S ORDINANCE LAW ANNOTATIONS, *supra* note 57, at § 8 (citing cases in other states holding that procedural safeguards are requisites of valid planning).

59. *See, e.g.*, McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002) (upholding summary judgment against the plaintiffs when the plaintiffs failed to allege injury in fact); 5B SHEPARD'S ORDINANCE LAW ANNOTATIONS, *supra* note 57, at § 128 (citing cases holding that an aggrieved party must show injury in fact to have standing).

60. 5B SHEPARD'S ORDINANCE LAW ANNOTATIONS, *supra* note 57, at §§ 69, 128.

where no present deprivation of rights or deflation of property values existed, even though future enforcement created the possibility of injury to property rights or values.[61]

Many states have established the requirement that, in order to be valid, an ordinance must comply with a comprehensive plan.[62] Comprehensive plans are often statutorily created, but have been inferred from a city's existing zoning ordinances, schemes, and maps.[63] The elements of comprehensive plans are often enumerated by statute,[64] but a general definition seems to be that it is a scheme of zoning and regulation implemented to provide for the general welfare of a given area.[65] It should be noted that zoning is an element of planning, and, while the two are often confused, they differ in that zoning affects the present use of land while planning controls future uses and growth in the area.[66]

Comprehensive plans are also presumed to be a valid exercise of the police power, serving only as a guide to the zoning process.[67] Several states have enacted some form of a comprehensive land use statute.[68] The statutes range widely in the amount and the severity of mandates placed upon municipalities and regions to comply with the state scheme.[69]

V. ANALYSIS OF SELECTED STATE LAND USE PLANNING PROGRAMS

A. Overview

Seven states (Alabama, Arizona, Florida, Georgia, Kentucky, Maryland, and Oregon) in addition to South Carolina were picked for discussion of their respective land use planning statutes and programs. These states were selected in an effort to represent the spectrum of programs in place across the country with particular emphasis on

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61. *Id.* at § 128.

62. *Id.* at § 155; 101A C.J.S. *Zoning and Land Planning* § 39 (1979).

63. 83 AM. JUR. 2D *Zoning and Planning* § 17 (1992).

64. *See, e.g.*, S.C. CODE ANN. § 6-29-510(D) (Law. Co-op. 2001) (giving the required elements for local plans in South Carolina).

65. 101A C.J.S *Zoning and Land Planning* § 5 (1979).

66. *Id.*

67. *Id.*; *see also* McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002) (upholding the validity of the Imagine Richland 2020 Comprehensive Plan).

68. *See infra* Part V; S.C. CODE ANN. §§ 6-29-310 to -1170 (Law. Co-op. 2001) (South Carolina Local Government Comprehensive Planning Enabling Act).

69. *Compare* OR. REV. STAT. § 197.175(2)(a) (2001) (mandating the creation of a comprehensive plan by each city and county), *with* S.C. CODE ANN. § 6-29-320 (Law Co-op. 2001) (authorizing but not mandating the creation of planning commissions), *and* S.C. CODE ANN. § 6-29-510(A) (Law. Co-op. 2001) (requiring planning commissions to create comprehensive plans).

states within South Carolina's region and those that have notable programs and problems.[70] Of the eight states considered here, Arizona, Oregon, and Florida have implemented a state-controlled comprehensive land use plan that mandates the creation of comprehensive plans by all local authorities in compliance with a statewide plan.[71] Other states have enumerated elements to be included in local plans or have mandated that plans from local commissions comply with a state standard, but either do not require the creation of local planning commissions or do not require the creation of a plan.[72] Only Florida and Oregon have state agencies or administrators appointed to review local plans and ensure they comply with the state standard.[73] In 2001, both Kentucky[74] and Maryland[75] established task forces on smart growth within the governor's office in order to aid and inform local decision-makers on the policies and tools necessary for responsible land use development.

B. Arizona, Florida, and Oregon: The Mandatory States

Examining the statutes of these eight states, there are many differences in requirements, policies, and powers granted to the local authorities. Oregon's program has consistently been lauded as one of the most effective and comprehensive schemes in the country.[76] Along with mandated comprehensive planning at the city and county level, Oregon has a statutory program authorizing and regulating the creation of "wildlife habitat conservation and management plans."[77] The state's Fish and Wildlife Commission administers the program for areas zoned for agriculture, forestland, or mixed forest and farmland

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70. According to the Sierra Club's rating of the fifty states in various aspects of sprawl, the states selected represent a fair cross-section of state programs. *See Solving Sprawl: The Sierra Club Rates the States*, *at* http://www.sierraclub.org/sprawl/report99/ (last visited Nov. 8, 2002) [hereinafter *Solving Sprawl*].

71. ARIZ. REV. STAT. ANN. § 11-802 (West 2001); FLA. STAT. ANN. §§ 186.504, 186.508 (West 2000); OR. REV. STAT. § 197.175(2)(a) (2001).

72. *See* ALA. CODE § 11-85-4 (1994); GA. CODE ANN. § 36-70-3 (2000); KY. REV. STAT. ANN. § 147.610 (Michie 2001); MD. ANN. CODE art. 66B §§ 3.01, 3.05 (2002).

73. FLA. STAT. ANN. § 186.006(8) (West 2000) (mandating that the Executive Office of the Governor oversee local and regional planning); OR. REV. STAT. § 197.040(2)(d) (2001) (mandating that the Land Conservation and Development Commission "[r]eview comprehensive plans for compliance with goals").

74. Exec. Order No. 2001-628 (May 17, 2001), *at* http://smartgrowth.state.ky.us/taskforce.

75. MD. CODE ANN., ENVIR. § 9-1403 (1996).

76. *See Solving Sprawl*, *supra* note 70.

77. OR. REV. STAT. §§ 215.802-808 (2001).

use and encourages these areas to remain as areas of lower-level land use in exchange for tax incentives.[78]

Florida law mandates the creation of a state comprehensive land use plan to be established by the Governor's Office.[79] A Regional Planning Council oversees the program to create a comprehensive plan that must be submitted to the Governor's Office for compliance analysis.[80] Similarly, Arizona requires that each county government establish a planning and zoning commission and mandates that they prepare comprehensive plans for the approval of the county government.[81]

C. Alabama, Georgia, Kentucky, and Maryland: The Permissive States

Maryland authorizes the creation of planning commissions for "local jurisdictions," but there is no mandate for their creation.[82] Alabama, Georgia, and Kentucky have similar statutes that establish state comprehensive plans, but either do not require the creation of local planning authorities or do not require the creation of local plans.[83]

Alabama's statute carries no mandate to comply with a state comprehensive plan and gives the least guidance in that it has no detailed, enumerated elements that are required in a local plan.[84] However, the state did create the "Forever Wild Land Trust" program by constitutional amendment in order to acquire important natural resources and habitat.[85] Similarly, in Kentucky, planning commissions are directed to adopt comprehensive plans in accordance with statutory requirements, but there is no requirement to establish planning units.[86]

In Georgia, the Georgia Department of Community Affairs is delegated the responsibility of being the advisory agency for local planning authorities, but it has no power to mandate the creation or alteration of any plans.[87] An eligible county can submit plans that protect at least twenty percent of the county's area to the Georgia Greenspace Commission in order to obtain funding for conservation

78. *Id.*
79. FLA. STAT. ANN. § 186.007(1) (West 2000).
80. *Id.* § 186.508.
81. ARIZ. REV. STAT. ANN. §§ 11-802, -806 (West 2001).
82. MD. ANN. CODE art. 66B, § 3.01 (2002).
83. *See supra* note 72 and accompanying text.
84. *See* ALA. CODE 1975 § 11-85-4 (1994).
85. ALA. CONST. amend. 543.
86. KY. REV. STAT. ANN. § 147.610 (Michie 2001).
87. *See* GA. CODE ANN. §§ 50-8-2(9), 50-8-7 (2002).

easements.[88] The funds come from a trust fund administered by the commission and from state and federal funding.[89] In addition, statutory authority was granted to municipal and county governments in order to create transfer development rights programs "in order to conserve and promote the public health, safety, and general welfare."[90]

D. South Carolina's Local Government Comprehensive Planning Enabling Enabling Act

In 1994, in response to growth throughout the state and the increased movement toward comprehensive planning across the country, South Carolina enacted the South Carolina Local Government Comprehensive Planning Enabling Act.[91] The Act requires every planning commission (municipal, county, or joint) to establish a comprehensive plan in accordance with certain enumerated elements.[92] The Act places requirements on the creation and organization of planning commissions,[93] but the creation of planning commissions is not mandated.[94] Planning commissions were given extensive duties in creating and implementing plans,[95] and zoning ordinances promulgated by them are required to be in accord with the comprehensive plan.[96] The Act contains several procedural safeguards to ensure that agencies and stakeholders affected by the plans are given notice and the opportunity to be heard.[97]

Seven enumerated planning elements are required to be included in all comprehensive plans.[98] For each element, planning commissions are required to include an "inventory of existing conditions," "a statement of needs and goals," and "implementation strategies with time frames."[99] Comprehensive plans are required to be reviewed at least once every five years to ensure compliance with the requirements

88. GA. CODE ANN. §§ 36-22-6 to -8 (2000).
89. *Id.* § 36-22-4.
90. *Id.* § 36-66A-2.
91. S.C. CODE ANN. § 6-29-310 *et seq.* (Law. Co-op. 2001).
92. *Id.* § 6-29-510.
93. *Id.* §§ 6-29-330 to -380.
94. *Id.* § 6-29-320. "The city council . . . [,] governing body of a consolidated government . . . [,or] [a]ny combination of municipal councils and a county council or any combination of municipal councils *may create* a [] planning commission." *Id.* (emphasis added).
95. *Id.* § 6-29-340(B).
96. S.C. CODE ANN. § 6-29-720(B) (Law. Co-op. 2001).
97. *See id.* § 6-29-760.
98. *Id.* § 6-29-510(D) (requiring a population element, an economic development element, a natural resources element, a cultural resources element, a community facilities element, an housing element, and a land use element).
99. *Id.* § 6-29-510(C).

created by the statute.[100] They must also be updated at least every ten years.[101] Thus, when the Act took effect on May 3, 1995, planning commissions had five years, until May 3, 1999, to create and adopt proper comprehensive plans. No state agency was created nor was an existing agency designated to review the local plans.

E. How South Carolina Compares with the Selected States

South Carolina's efforts to regulate land use planning statewide fall in the middle of the spectrum of plans in place among the seven other states examined in this Comment. The lack of a planning mandate in the Act and the lack of a state-level or regional-level agency to oversee planning and development place South Carolina below Oregon, Arizona, and Florida in terms of governmental authority and coordination. However, the seven enumerated elements in the Act that are required of every comprehensive plan ensure that planning commissions will consider transportation, population, environmental effects, and other important factors when developing their plans and permitting and enforcing under them.[102] These enumerated elements and the requirement that a plan be revisited every five years for compliance and updated every ten years guarantee planning flexibility. All things considered, South Carolina's planning legislation compares favorably to Alabama and closely parallels the plans of Georgia, Kentucky, and Maryland in terms of governmental authority to coordinate and create uniform planning.

VI. ANALYSIS OF LAND USE TOOLS

Local land use plans are where the rubber truly meets the road in terms of implementation. Local authorities are the bodies responsible for enacting ordinances necessary to implement comprehensive plans. These plans must be crafted to fit the community, so great disparity exists among local plans, just as disparity exists among communities.

A. Tax Incentives

All states and municipalities have the power to levy taxes and, therefore, can create tax incentives for farmers and other landowners

100. *Id.* § 6-29-510(E).
101. *Id.*
102. *See* S.C. CODE ANN. § 6-29-510(D) (Law. Co-op. 2001).

who choose to maintain their land as greenspace.[103] These incentives typically work by "taxing land on its use in farming rather than on market value."[104] This lowers the property tax because the land would typically be worth more on the market when viewed as a site for more intense development.[105] The majority of states with these incentives require farmers who decide that the incentive is insufficient and decide to sell their land for development to pay back a portion of the incentives they received.[106] Because compliance with these incentive programs is voluntary, they may be less effective than land use regulations.[107] However, they impose significantly less restriction on a landowner's property rights.

B. Zoning

Traditional zoning is still used to combat sprawl, especially to protect open space that is outside the more developed areas, by restrictively zoning areas to agricultural use or by imposing minimum lot-size restrictions.[108] For example, the statute at issue in *Lucas v. South Carolina Coastal Council*[109] was passed to require a permit before one could begin development on certain coastal property.[110] It sought to benefit the public welfare by protecting important coastal resources.[111] The philosophy behind using such restrictive zoning to protect greenspace is to restrict use to the furthest extent possible without effecting a taking that would require just compensation.[112]

Many commentors believe that zoning, by itself, is ineffective in combating sprawl,[113] and some believe historical zoning practices are

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103. *See, e.g.*, OR. REV. STAT. § 215.808 (2001) (providing tax incentives for eligible land owners through the wildlife habitat conservation and management plan program).

104. Lawrence W. Libby, *Farmland Protection for Illinois: The Planning and Legal Issues*, 17 N. ILL. U. L. REV. 425, 430 (1997).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 431. ("[E]xclusive agricultural zoning has protection of farmland as a stated purpose on behalf of the general welfare of local citizens, while [large minimum lot-size requirements are] directed more at reducing the cost of urban sprawl.").

109. 505 U.S. 1003 (1992).

110. *Id.* at 1007-08.

111. *Id.*

112. Juergensmeyer et al., *supra* note 2, at 468.

113. *See, e.g.*, Candida M. Ruesga, Comment, *The Great Wall of Phoenix?: Urban Growth Boundaries and Arizona's Affordable Housing Market*, 32 ARIZ. ST. L.J. 1063, 1070 (2000) (commenting that traditional methods of land use control do not slow or stop sprawl) (citation omitted).

the cause of the problem.[114] Other problems include exclusionary zoning, such as large minimum lot-size requirements and single-family residential restrictions which may increase housing prices.[115] Such exclusionary zoning is conceivably invalid as it is "contrary to the general welfare because of its effect [of higher housing prices that exclude lower incomes], rather than its intent."[116] Exclusionary ordinances denying housing opportunities to lower income households invite due process and equal protection challenges.[117]

C. Urban Growth Boundaries

In a few cities, urban growth boundaries (UGBs) have been established, "essentially draw[ing] a line around urban centers, beyond which development is severely curtailed . . . [by] prohibit[ing] a municipality from re-zoning any land outside of the line to a higher density or intensity of development."[118] Implementation of an UGB requires the identification and designation of land in the area, such as the "urban, urbanizable or rural land" classifications in Portland.[119] "Urbanizable land must be contiguous to urban land" in order to be included within the UGB, and the boundary can only be established after it has been determined that the proposed boundary contains adequate land to "'accommodate long-range urban population growth'" and the location has been evaluated.[120] Within the UGB, development is focused on urban lands.[121]

UGBs have some takings implications because of the restrictions on development outside of the boundary and the artificially created differences in land values within and outside of the boundary.[122] In one study of proposed growth management plans for Phoenix, Arizona, it was suggested that a UGB might effect a taking because "the desert terrain [outside of the UGB] has little economic value absent development opportunities."[123]

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114. *See, e.g.*, HIRSCHORN AND SOUZA, *supra* note 16, at 5, 9 (blaming zoning laws enacted in favor of single-use developments for the increase of sprawl); Juergensmeyer et al., *supra* note 2, at 444-45 (advocating the use of transferable development rights in place of zoning).

115. *See* Terry D. Morgan, *Exclusionary Zoning: Remedies Under Oregon's Land Use Planning Program*, 14 ENVTL. L. 779, 783 (1984); Ruesga, *supra* note 113, at 1066.

116. Morgan, *supra* note 115, at 792 (citation omitted).

117. *Id.*

118. Ruesga, *supra* note 113, at 1074.

119. Morgan, *supra* note 115, at 798.

120. *Id.* (citations omitted).

121. *Id.*

122. Ruesga, *supra* note 113, at 1082.

123. *Id.*

D. Service Area Boundaries

Service area boundaries (SABs) are slightly less intensive restrictions on development than are UGBs. SABs are similar to UGBs in that they designate an area for continued urban development within a boundary and discourage development outside of the boundary by using ordinances.[124] SABs discourage growth by denying or conditioning municipal funding for infrastructure development outside of the boundary, essentially imposing this cost on developers.[125]

These costs force developers to either curb development outside of the boundary, and thus lower the supply of housing, or pass this added cost to home-buyers.[126] Either situation would increase housing costs.[127] However, infill incentives and minimum lot-size requirements may help to alleviate the housing opportunity issues by creating more affordable, multi-family housing.[128] Further criticism aimed at SABs claims that authorizing statutes grant no further authority to municipalities than was previously exercisable under simple exactions placed on development under the state's police power.[129] On the other hand, it has been suggested that SABs pose a lesser takings threat than UGBs because, rather than placing restrictions on development, SABs merely "make certain land less desirable for development via the added expense of providing infrastructure and services."[130]

E. Infill Incentives, Minimum Lot-Size, and Mixed-Use Requirements

Equal housing opportunity is a substantial concern among planners and commentators addressing land use issues.[131] As discussed earlier, UGBs, SABs, and other ordinances restricting developable lands can raise housing prices.[132] To combat this effect, municipalities can offer incentives for infill of existing vacant or developable urban

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124. *See id.* at 1076.
125. *See id.*
126. *See id.*
127. *Id.*
128. Ruesga, *supra* note 113, at 1078.
129. *Id.* at 1072.
130. *Id.* at 1082.
131. *See, e.g.*, Morgan, *supra* note 115 (examining the ill effects on the affordability of housing caused by Oregon's UGB program); Ruesga, *supra* note 113 (detailing the increase of housing affordability caused by UGBs and SABs); New Urbanism.org, *supra* note 29 (listing "a range of types, sizes and prices" as a housing goal); Smart Growth Online, *supra* note 28 (listing housing opportunities as a key issue to smart growth).
132. *See supra* notes 115-17, 125-28 and accompanying text.

land[133] and can require lower minimum lot-sizes and mixed-use developments.[134] Smaller lots command lower market values, and infill and mixed-use programs promote the creation of affordable multi-family housing within the municipality.[135]

F. Market-Based Tools: Incentive Zoning, Transferable Development Rights, and Impact Fees

This group of regulatory tools, including SABs and infill incentives,[136] controls development by "caus[ing] developers to bear and internalize[] the costs of providing certain benefits to that development,"[137] or by "disregard[ing] otherwise applicable zoning restrictions [on a development] in return for providing environmental amenities such as public parks."[138] Incentive zoning allows for continued development with even fewer restrictions than traditional zoning, but it achieves goals of smart growth and comprehensive planning by creating sought-after benefits within a municipality.[139] The biggest challenges to fair and successful incentive zoning stem from the difficulty in setting the price necessary for the applicable zoning to be disregarded.[140] Challenges also stem from deciding as to procedurally safeguarding the permitting process in order to ensure that municipal officials do not allow too many projects in return for benefits and they equally distribute those benefits.[141] If the price for permitting is too high then developers will not participate; if the price is too low, then the cities will not benefit.[142] Procedures for the adoption of developments in such a program must provide opportunities for public participation in order to ensure that the interests of all communities within a municipality are represented in the distribution of benefits.[143] Likewise, the procedure must allow for some review of zoning allowances in order to ensure that permits and allowances are not easily given simply to gain benefits.[144]

Transferable development rights (TDRs) also use market influence. TDRs require that developers who want to redevelop or further develop urban land or who want to develop less

133. Ruesga, *supra* note 113, at 1078.
134. Morgan, *supra* note 115, at 796, 804.
135. *Id.*
136. *See supra* notes 124-35 and accompanying text.
137. Juergensmeyer et al., *supra* note 2, at 468.
138. Kayden, *supra* note 3, at 568.
139. *See id.*
140. *Id.* at 571.
141. *Id.* at 571-73.
142. *Id.* at 571.
143. *See id.* at 573.
144. Kayden, *supra* note 3, at 572.

environmentally sensitive land to purchase the development rights from the landowners of the protected, environmentally sensitive lands.[145] The practice works on the theory that development rights are separable from the landowner's bundle of property rights.[146] In TDR programs, an area to be protected is designated as a "sending district,"[147] and the development rights to the land within that area are transferable to other properties, "receiving districts," where development is allowed.[148] These programs allow for owners in the sending district to sell their rights to individual developers, other owners, or to "an entity, usually a government agency or nonprofit organization, . . . [that] banks them for later sale to third parties."[149] For example, in South Carolina, non-profit groups have successfully cooperated with government agencies to acquire banks of rights from environmentally sensitive areas.[150] Landowners within the sending district are "required to record a covenant running with the land permanently removing certain development rights."[151]

For a TDR program to be successful, there must be a market for development rights.[152] Cities must carefully select sending and receiving districts to maximize effectiveness and must structure rezoning procedures in order to ensure that it is preferable for developers to purchase TDRs rather than simply apply for a rezoning.[153] Additionally, as originally stated in *Penn Central Transportation Co. v. New York City*,[154] TDRs may be used to decide whether a taking has occurred or whether just compensation was given.[155]

Finally, impact fees assessed on developments serve to internalize the cost of new developments by charging developers in order to recoup some of the cost of providing services and infrastructure to the development.[156] One study suggests "an environmental mitigation impact fee, used to fund a land acquisition program or a TDR bank" should be imposed on new developments as an effective market-based

145. *Id.* at 575.

146. *Id.*

147. Juergensmeyer et al., *supra* note 2, at 446; Kayden, *supra* note 3, at 575.

148. Kayden, *supra* note 3, at 575.

149. *Id.* at 572.

150. *See, e.g.*, UPSTATE FOREVER, LAND TRUST PROGRAM 9-12 (2002)(describing six projects protecting almost 2,000 acres of upstate South Carolina); Richardson, *supra* note 22 (detailing the acquisition of development rights to over 80,000 acres in coastal South Carolina by the state government and local and national non-profit groups).

151. Juergensmeyer et al., *supra* note 2, at 447.

152. *See id.*; Kayden, *supra* note 3, at 577.

153. *See* Juergensmeyer et al., *supra* note 2, at 447-48.

154. 438 U.S. 104 (1978).

155. *Id.* at 137.

156. Juergensmeyer et al., *supra* note 2, at 468.

program, instead of using restrictive zoning.[157] Challenges to impact fee programs are based on the *Dolan v. City of Tigard*[158] requirement of an essential nexus between the fee and the purpose of the comprehensive plan.[159] If there is no essential nexus, then the fee may violate the Equal Protection Clause.[160]

VII. IMAGINE RICHLAND 2020 COMPREHENSIVE PLAN AND *MCLANAHAN V. RICHLAND COUNTY COUNCIL*

A. Imagine Richland 2020 Comprehensive Plan

In accordance with the South Carolina Local Government Comprehensive Planning Enabling Act, the Richland County Planning Commission (Commission) created and Richland County Council (Council) adopted the Imagine Richland 2020 Comprehensive Plan by the May 3, 1999 deadline. Richland County Councilwoman Kit Smith, a proponent of the Plan, identified Irmo and Blythewood, suburban areas in Northwest and Northeast Richland County, respectively, as areas experiencing sprawl at the time of the passage of the Plan.[161] Members on the Council who represented these areas supported the Plan as a way to slow the rapid growth in their areas.[162] The majority of the opposition against the Plan came from builders and developers who favored maintaining the status quo of little or no government control and, in other words, allowing the market to control itself.[163] These interests were well represented on the Council and gained support from private landowners in Lower Richland County who wanted to see development extend to their predominantly rural area.[164] This coalition of landowners and developers brought suit to block enforcement of the Plan.[165]

The Plan included the seven required elements enumerated in the Act and included an additional element called the Imagine Richland Vision Plan (Vision) detailing the growth management plan for the

157. *Id.*

158. 512 U.S. 374 (1994).

159. *Id.* at 469-70.

160. *Id.* at 471 (commenting that, viewed as a tax, the fee would violate the Equal Protection Clause because it only applies to new developments that would be forced to pay for improvements for the entire municipality).

161. Interview with Kit Smith, Councilwoman, Richland County Council, in Columbia, S.C. (Jan. 10, 2003).

162. *Id.*

163. *Id.*

164. *Id.*

165. McClanahan v. Richland County Council, 350 S.C. 433, 435-36, 567 S.E.2d 240, 241 (2002).

County.[166] The Commission's recommendation and the Council's adoption reads :

> On March 29, 1999, the Richland County Planning Commission . . . voted by a 4-3 vote to recommend approval of the Plan, with the exception of the Vision portion, to the Richland County Council.
>
> On April 5, 1999, the Commission voted by a 4-2 vote to send the "Land Development Regulations forward with the recommendation of approval and to defer action on the Vision Plan until it is determined how to incorporate it." Subsequently, during the same Commission meeting, a second vote was taken and the motion carried 5-0 "to submit and read the . . . Plan as a resolution."
>
> On April 6th, . . . the Council gave first reading to the Plan. . . . A draft of the plan had been made available for public inspection on April 2nd.
>
> On April 26th, the Council [reviewed proposed amendments and heard public comment and] . . . then approved the Plan for second reading and incorporated amendments to the Plan.
>
> On May 3rd, the Commission . . . recommended the Plan, this time including the Vision portion of the Plan, to the Council by a 5-4 vote.
>
> The Council met at 7:00 p.m. on the same date . . . . [T]he Council unanimously passed the resolution adopting the Plan and incorporating the amendments.[167]

The portions of the Plan corresponding to the enumerated elements of the Act provide data on existing conditions and trends on which the Vision was based.[168] The county was divided into planning areas based on "natural physical barriers, perceived neighborhood boundaries, homogeneous communities, common shopping and trade

166. Richland County, S.C., Imagine Richland 2020 Comprehensive Plan (May 3, 1999) (on file with the author) [hereinafter 2020 Comprehensive Plan].

167. *McClanahan*, 350 S.C. at 436-37, 567 S.E.2d at 241-42. The procedures are given here in detail because of their significance in the challenge to the validity of the Plan in *McClanahan*.

168. *See* 2020 Comprehensive Plan, *supra* note 166.

areas, and commuter routes."[169] An interim implementation ordinance was passed "clarifying the legal effect of the [Plan and the Vision]."[170]

Research for the Plan was performed by a consultant, and the resulting report was used as the basis for growth projections, although the recommendations were not followed.[171] An alternative to relying largely on consultants would be to educate the Council and the Commission through workshops and partnerships with academic researchers so that they can make more informed decisions.[172] Because some members of the Council or Commission are not professionally involved in planning or development, it is important that they are introduced to terminology, methodology, and ideology widely used among the planners and consultants with whom they will work to make decisions.[173] One example of such a program is the Nonpoint Education for Municipal Officials (NEMO) program, which is run jointly by the Institute for Public Service and Policy Research at the University of South Carolina[174] and the South Carolina Sea Grant Consortium.[175] The program educates municipal officials about the dangers of non-point source pollution through a series of workshops and educational partnerships.[176]

In developing the Vision, the Commission examined three alternatives for a growth management plan: "Trends Extended" or no plan, "Urban Service Boundary Approach," and the "Town and Country Model."[177] The Commission determined a plan was necessary, and the Urban Service Boundary Approach was eliminated due to concern that, while that approach would contain growth within

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169. *Id.* at 2-1.

170. *Id.* at 4-22. The ordinance stated that "[t]he [Plan and Vision] will not trigger any zoning changes." *Id.* It also required that "[d]evelopment reviews, involving the subdivision of land and site plans for uses allowed under existing zoning will apply principles of the Vision *with respect to infrastructure construction*, but only to the extent practical and economically feasible . . . and will not be applied in a way that increases development costs for any project that is allowed by the existing zoning." *Id.* (emphasis added). Proposed developments consistent with the Vision were exempted from all existing zoning ordinances and granted a streamlined review process, while "all other applications for rezoning will be required to show some consideration of the principles of the [Vision]." *Id.*

171. 2020 Comprehensive Plan, *supra* note 166, app. A at 8-9.

172. Interview with Liv Brakewood, Professor, University of South Carolina College of Engineering, in Columbia, S.C. (Dec. 20, 2002).

173. *Id.*

174. *See* Institute for Public Service and Policy Research, *Environmental Research and Service: Project NEMO, at* http://www.iopa.sc.edu/ers/nemo.asp (last visited Jan. 12, 2003).

175. *See* South Carolina Sea Grant Consortium, *About SCNEMO, at* http://www.seagrant.org/scnemo/about.html (last visited Jan. 12, 2003).

176. *Id.*

177. 2020 Comprehensive Plan, *supra* note 166, app. A at 10.

the urban area, "it does not necessarily mean that growth inside the boundary will happen in a good way."[178] Therefore, the Commission adopted the Town and Country Plan.

The Town and Country Plan is based on a "balance of future land development and open space conservation."[179] The plan purports to have an environmental basis and proposes to conserve open space by discouraging development along riparian corridors, which are typically undeveloped or underdeveloped low ground difficult to develop.[180] Such conservation would create an interconnected system of greenspace.[181]

The "Transportation Basis" and the "Neighborhood Concept" are the other growth principles within the Town and Country Plan.[182] The transportation component calls for a network of two-lane streets to alleviate traffic congestion and lower the number of local trips on main thoroughfares.[183] The system is designed to promote "efficient vehicular flow," to "increase route choices," focus development at intersections, increase mode choices, and improve "trip quality."[184] Under the Town and Country Plan, the planning building block would be the neighborhood, focusing on small neighborhoods with well-defined edges, a network of small streets "with an identifiable center that is animated by a lively mix of activities and a well-defined public environment."[185] Furthermore, neighborhoods would be designed to be walkable with interspersed public facilities, retail stores and services, and open space.[186]

Growth strategies under the Town and Country Plan were developed for urban, suburban, and rural areas.[187] The urban strategy focused on infill, housing "densification,"[188] and the creation of a "public space system"[189] in the area designated as the "historic core" of the city.[190] A similar strategy was suggested for nearby neighborhoods, with infill consisting of "housing . . . of the same type

178. *Id.*

179. *Id.* app. A at 11.

180. *Id.* app. A. at 16.

181. *Id.* app. A at 11 (defining as "land that remains undeveloped or minimally developed," which would include "a farm, a field, woods, or a swamp").

182. *Id.* app. A, at 19-21.

183. 2020 Comprehensive Plan, *supra* note 166, app. A at 19-20.

184. *Id.* app. A at 20.

185. *Id.* app. A at 21.

186. *Id.*

187. *Id.* app. A at 23-60.

188. 2020 Comprehensive Plan, *supra* note 166, app. A at 24 (constructing multi-family housing and second-floor apartments above retail shops).

189. Pedestrian friendly streetscapes, parks, and open space. *Id.*

190. *Id.* app. A at 23.

and character as existing development . . . , [such as] single family detached homes on lots."[191]

The suburban strategy was likewise split into two smaller divisions—"suburban village centers" and "areas outside suburban village centers."[192] The strategy for suburban village centers focused on locating village centers, correcting traffic congestion, and aesthetic regulations.[193] Planning strategies for areas outside suburban village centers focused on linking those areas to village centers, coordinating and limiting new public facilities to "village catchment areas" in an effort to "insure that these facilities are not sited in areas that will induce sprawl," and addressing the introduction of mixed housing types and the preservation of riparian forests.[194]

Strategies for rural areas were broken into three components—"revitalizing existing villages," "new, employment-based villages," and new "non-employment-based villages."[195] Development in all three of the components is to be focused toward the village center in order to protect the rural nature, using ordinances very similar to those implemented in the urban and suburban strategies.[196] To build new villages, an applicant would have to submit a proposal to identify the location as a center.[197] An approved application would state that the location meets certain criteria "based upon the vision principles" for the three components, "describe the benefits to residents of the proposed center and to the County in general," and include a plan for the realization of the center with an emphasis on establishing public facilities.[198]

B. McLanahan v. Richland County Council *and the Conflict Between the County Planning Commission and the Property Rights Interest Groups*

As often seen with land use plans and regulations, the Plan engendered strong opposition from local landowners concerned about the present and future effects of the Plan on private property rights. The Plan was challenged in a case brought by a landowner in Lower Richland County, alleging that the Plan was invalid on grounds that its passage did not follow proper procedure under § 6-29-520(B) of the South Carolina Code and that it violated the state's due process

191. *Id.* app. A at 25.
192. *Id.* at 27-33.
193. *See id.* at 27-30.
194. 2020 Comprehensive Plan, *supra* note 166, app. A at 32-33.
195. *Id.* at 40-41.
196. *See id.* at 41-44.
197. *Id.* at 40.
198. *Id.*

clause by depriving him of his property without due process of law.[199] In a six-page opinion, the South Carolina Supreme Court upheld the trial court's summary judgment in favor of the County and validity of the Plan.[200] The court found that the procedure used to adopt the Plan[201] complied with the requirement of § 6-29-510(E) of the South Carolina Code, which required that the Commission recommend a plan before the Council approves it.[202] The court upheld the trial court's finding that there was no due process violation because "the Plan is only a guideline and that there had not been an impairment of appellant's rights," and McClanahan "was not deprived of his property due to the adoption of the Plan."[203] Therefore, because there was no deprivation, "[McLanahan's] claim . . . is not justiciable because it is not ripe for review."[204]

Perhaps more important than the court's reasoning is the intensity with which the landowner[205] challenged the Plan on a questionable procedural claim and against a well-established doctrine that comprehensive plans are presumably valid and are only guides for development so that they inflict no injury-in-fact to affected property owners.[206] The claims in *McClanahan* are representative of the sentiments among landowners and interest groups who strongly oppose growth management plans that restrict their property rights, especially development rights.[207]

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199. McClanahan v. Richland County Council, 350 S.C. 433, 435-36, 567 S.E.2d 240, 241 (2002).

200. *Id.* at 440, 567 S.E.2d at 243.

201. *See supra* note 167 and accompanying text.

202. *McClanahan*, 350 S.C. at 438-40, 567 S.E.2d at 242-43. The court explained that the statutory language of § 6-29-510(E) means that "the Plan *must* include the enumerated planning elements and the planning elements *must* be an expression of the Commission's recommendations to the Council." *Id.* at 438-39, 567 S.E.2d at 242 (emphasis in original). The Commission successfully recommended the Plan, including the Vision, before the Council voted to approve it, even though the Council first read the Plan prior to the Commission's recommendation of the Vision. *Id.* at 439-40, 567 S.E.2d at 242-43.

203. *Id.* at 441, 567 S.E.2d at 243-44.

204. *Id.* at 441, 567 S.E.2d at 244 (citation omitted). The court also dismissed a procedural claim based on a lack of time to conduct discovery before the summary judgment hearing. *Id.*

205. The author made attempts to contact William and Kay McClanahan for comment, but to no avail.

206. *See supra* note 67 and accompanying text.

207. *See* American Civil Liberties Union of South Carolina, *ACLUSC Current Issues, at* http://www.aclusc.org/Pages/currentissues.html (last visited Nov. 8, 2002) [hereinafter ACLU of S.C.]; John Berlau, *"Smart Growth" Is More Than A Slogan; It's a Threat to Landowners' Rights*, INVESTOR BUSINESS DAILY, *at* http://www.paragonpowerhouse.org/smart_growth.htm (June 30, 2000); John K. Carlisle, *Is Smart Growth Anti-Poor and Anti-Black?*, THE HEARTLAND INSTITUTE, *at* http://www.heartland.org/ (Mar. 1, 2001); Judson Drennan, The Carolina Reporter,

The impact on Richland County landowners' rights attracted regional and even national attention. In addition to local landowners, opposition came from a wide variety of groups, such as the American Civil Liberties Union, the National Center for Policy Analysis, the South Carolina Libertarian Party, and the National Center for Public Policy.[208] There was concern about the alleged discrimination against poorer landowners that land use laws, like the Plan, cause.[209] These concerns are based on the theory that land use laws, enacted by local authorities consisting of mostly wealthy, white urbanites, take away the development rights of poor, rural, mostly African-American dwellers by zoning rural land as greenspace and, therefore, reducing the market value of the property.[210] According to this opposition, the affected rural landowners are not able to protect themselves from such laws because they are not represented on the governing bodies and, therefore, are outvoted by urbanites.[211] In response, to effectively reach rural African-Americans, proponents of the Plan sought to emphasize the tendency of sprawl to create upscale, gentrified suburbs, which do little to improve the conditions for lower-income, rural landowners.[212]

Opponents also claim that the decrease in market value of rural farmland would reduce the landowner's ability to procure a loan because of the reduced collateral value of the land, which is based on market value.[213] Additional complaints stemmed from farmers' concerns that, under the Plan, they may have to grant easements to the County for public access. Farmers were also concerned that the Plan's provisions calling for the protection of mature forests would prevent

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Citizens Oppose New Land-Use Bill, THE CAROLINA REPORTER, *at* http://carolinareporter.sc.edu/archive%209-9-99/stories/landuse.htm (Sept. 9, 1999); Timothy Moultrie, *One Shining Silver Bullet for Sprawl, Urban Renewal and Loss of Green Space*, SOUTH CAROLINA LIBERTARIAN PARTY, *at* http://www.awod.com/sclp/writings/silverbullet.html (last visited Nov. 8, 2002); National Center for Policy Analysis, *State and Local Issues: The Hidden Agenda Behind "Smart Growth"*, *at* http://www.ncpa.org/pd/state/pd063000a.html (last visited Nov. 8, 2002).

208. *See* ACLU of S.C., *supra* note 207, Berlau, *supra* note 207, Carlisle, *supra* note 207, Drennan, *supra* note 207, Moultrie, *supra* note 207, National Center for Policy Analysis, *supra* note 207.

209. *See* ACLU of S.C., *supra* note 207; Berlau, *supra* note 207; Carlisle, *supra* note 207; National Center for Policy Analysis, *supra* note 207.

210. *See* ACLU of S.C., *supra* note 207; Berlau, *supra* note 207; Carlisle, *supra* note 207; National Center for Policy Analysis, *supra* note 207.

211. *See* ACLU of S.C., *supra* note 207; Berlau, *supra* note 207; Carlisle, *supra* note 207; National Center for Policy Analysis, *supra* note 207.

212. Interview with Kit Smith, Councilwoman, Richland County Council, in Columbia, S.C. (Jan. 10, 2003).

213. Berlau, *supra* note 207.

them from clearing more land for farming.[214] Rural landowners were also concerned that the Plan's language, which calls for "'gradually decommissioning' business sites outside the proposed villages by rezoning adjacent parcels for open space," might mean the deprivation of new infrastructure in their areas.[215]

Timothy Moultrie, writing for the South Carolina Libertarian Party, pointed to the provisions in the Plan for the development of new roads as "directly subsidiz[ing] sprawl," analogizing that "like ducks following a trail of bread crumbs, developers follow new roads and sewers into the countryside . . . because [they] don't have to build profit eating infrastructure."[216] Moultrie's solution was for the government to "quit building new roads and sewers," and he suggested that this would result in urban infill rather than continued sprawl.[217]

Additionally, legislation affecting property rights has stirred controversy from both conservation and property rights groups. The South Carolina Conservation Bank Act, which was enacted on April 10, 2002,[218] had its progress stalled by the addition of more than seventy amendments to the bill.[219] Furthermore, funding for the program does not begin until July 1, 2004.[220] Similarly, property rights reform acts have been proposed in South Carolina in recent years, but opposition from planners and conservation groups has been sufficient to stop their adoption.[221]

VIII. ANALYSIS OF TOOLS FOR IMPLEMENTATION OF THE PLAN AND THE VISION

Knowing the concerns of landowners and interest groups, it is possible to evaluate the management tools discussed in Part II of this Comment as possibilities for implementing the strategies and goals of

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214. *Id.*

215. *Id.*

216. Moultrie, *supra* note 207.

217. *Id.* This approach is similar to the SAB programs discussed earlier. *See supra* notes 124-30 and accompanying text.

218. Audobon: Francis Biedler Forest, *South Carolina Conservation Bank, at* http://www.audubon.org/local/sanctuary/beidler/campsen.html (last visited Nov. 8, 2002).

219. Upstate Forever, *Conservation Bank Act Stalls in Legislature, at* http://www.upstateforever.org/Newsletters/August%20'01%20Newsletter/Bankact8_01.htm (last visited Nov. 8, 2002).

220. Sammy Fretwell, *Law Gives S.C. Dollars to Save Special Places*, THE STATE (Columbia, S.C.), April 19, 2002, at B3.

221. F. Patrick Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C. L. REV. 93, 121-35 (1998) (detailing bills introduced in the 1995-96 and 1997-98 sessions of the South Carolina State Legislature and the interest groups that supported or opposed them).

the Plan and Vision. This Section will seek to assess the practicality and effectiveness of those tools.

A. *Zoning*

For the County, zoning is perhaps the easiest solution to the problem of enforcing the Plan's goals. Restrictive ordinances cost nothing to enact and are the tools most familiar to administrators. However, traditional zoning ordinances are also the most familiar to landowners and are most likely what landowners associate with unfair government land use regulation. In addition, the use of restrictive zoning to implement the Town and Country Plan's edict of focusing development in suburban and rural areas of the county may have the greatest chance of effecting a taking by the state, thereby frustrating the Plan's goals by causing ordinances to be invalidated. For every ordinance declared invalid, public support and acceptance is likely to diminish and opposition is likely to increase. Zoning to implement the Vision would be similar to agricultural zoning that is used to maintain the rural nature of lands outside of a development boundary. However, this practice has been attacked for being ineffective, unfair, and disfavored in comparison with market-based solutions such as TDRs.[222]

With the amount of opposition to the adoption of the Plan,[223] it can be assumed that landowners and property rights interest groups will raise their voices against the adoption of restrictive zoning ordinances, possibly tying up the County's resources and delaying the enforcement of ordinances with costly litigation. By itself, zoning would be effective in establishing the areas to be developed as village centers, as outlined in the Vision, and to separate incompatible uses within those centers. However, other measures should be implemented or implemented in concert with zoning in order to protect open space and greenspace in rural Richland County.

In addition to the effectiveness problems, agricultural zoning also creates exclusionary problems attributed to higher prices for and lack of available housing.[224] Prohibiting development outside of urban land and town centers decreases housing development, which means that demand exceeds supply and results in increased prices. Numerous minimum lot-size requirements in rural and suburban areas also inflate housing prices. To have fair housing opportunities and restrictive rural

222. *See* Cordes, *supra* note 35, at 422; Juergensmeyer et al., *supra* note 2, at 444; Kayden, *supra* note 3, at 567.

223. *See supra* note 207 and accompanying text.

224. *See supra* notes 131-35 and accompanying text.

zoning, some incentive or requirement for infill and multi-family housing must be enacted.

B. Tax Incentives

One way to partially alleviate landowners' concerns about market values that are lowered by agricultural zoning is to create tax incentives for landowners in rural zones.[225] If adequate, these voluntary incentives may appease aggrieved landowners and may also be considered in the takings calculus by adding value to the retained agricultural use or as constituting part of just compensation. However, because these incentives are voluntary, landowners could opt to develop or sell their land at any time.[226] Without some penalty in place, the landowner could choose to forego the incentive and develop the land when the incentive is worth less to the landowner than the profit from developing or selling his land.[227]

C. Urban Growth Boundary

The Vision correctly dismissed the option of an urban growth boundary in Richland County.[228] In addition to the reasons given in the Vision, the rate of population growth in Richland County and the City of Columbia simply do not necessitate establishment of a UGB.[229] From the period of 1970 to 1990, Richland County experienced slightly over twenty percent growth, ranking only fourth in the state.[230] Growth rates in the County have been lower than those for the entire state between 1970 and 1980 and between 1980 and 1990.[231] Between 1980 and 1990, growth rates were below the nationwide level.[232] In 1990, the County's population was 285,720, with over fifty percent of the population living in unincorporated communities.[233] Projections showed that the percentage of the population living in unincorporated

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225. *See* Libby, *supra* note 104, at 430.

226. *See id.*

227. *See id.*

228. *See* 2020 Comprehensive Plan, *supra* note 166, app. A at 10 (concluding that, while a UGB might be effective in limiting growth to within the boundary, it could not ensure that development within the boundary would be beneficial).

229. 2020 Comprehensive Plan, *supra* note 166, at 3B-4 (based on U.S. Department of Commerce, Bureau of the Census data from 1970, 1980, and 1990). Recent census data shows the trend has continued. *See* U.S. Census Bureau, *State & Country QuickFacts: Richland County*, *at* http://quickfacts.census.gov/qfd/states/45/45079.html (last revised Sept. 24, 2002).

230. 2020 Comprehensive Plan, *supra* note 166, at 3B-2.

231. *Id.* at 3B-4.

232. *Id.*

233. *Id.* at 3B-1.

communities would continue with a slight increase.[234] In other words, the data do not show the rapid urban growth that exists in the cities and surrounding areas of Portland or Phoenix, which implemented UGBs.[235] This is not to say that UGBs are only appropriate in large cities, but there is no immediate threat of sprawl in Richland County at the level necessitating such an intense program in the face of such steep opposition.

D. Service Area Boundaries

The Vision promotes the institution of a modified form of SAB, limiting new infrastructure and services to village centers.[236] This strategy is based on the belief that forcing developers to internalize the cost of installing new roads and sewers will discourage development in rural areas that do not have sufficient existing facilities.[237] It is also this strategy that has drawn the most fire from opponents.[238] Landowners fear that their land's market value will decrease due to the discouragement of development.[239] Along with the decrease in rural land value, the shortage of housing caused by lack of new development would likely increase housing prices within the SAB.[240] Similar to the situation with zoning, some kind of requirement or incentive to establish multi-family housing within infill projects must be undertaken to ensure fair housing opportunities.

E. Infill Incentives, Lot-Size, and Mixed-Use Requirements

These three tools all serve to promote the development of vacant or underdeveloped urban and suburban land, thereby increasing housing density, which is one of the goals for growth management in the historic core of the urban area.[241] While probably most often used in urban areas, these incentives and requirements may be effective in promoting the desired development in village centers.[242] Incentives to redevelop existing village centers or to create new centers with dense housing may encourage development that is focused on centers in suburban and urban areas. However, these incentives will only be

234. *Id.* at 3B-3.

235. *See* Morgan, *supra* note 115, at 780-84; Ruesga, *supra* note 113, at 1063, 1070-75.

236. 2020 Comprehensive Plan, *supra* note 166, app. A at 32, 52, 56 (1999).

237. *See* Ruesga, *supra* note 113, at 1076.

238. *See supra* note 207.

239. *See supra* note 215 and accompanying text.

240. *See* Ruesga, *supra* note 113, at 1078.

241. *See supra* notes 179-81, 187-91 and accompanying text.

242. *See supra* notes 184-86 and accompanying text.

effective for Richland County if a market exists for such development and if the incentives of locating developments in village centers away from the City of Columbia outweigh the advantages of continuing strip development along transportation corridors that stem from the city. Smaller lot-size requirements and multi-family housing requirements are unattractive to developers, compared to traditional developments, because developments with smaller lots and mixed-uses with commercial multi-family and single-family components are harder to market and, thus, pose larger risks.[243] Despite these issues, infill incentives, minimum lot-size requirements, and mixed-use requirements may be most effective for the County by complementing the restrictions on rural development and making sure fair housing opportunities exist within the urban areas of the County.

F. Market-Based Tools: Transferable Development Rights, Incentive Zoning, and Impact Fees

Being market-based tools, TDRs, incentive zoning, and impact fees are only effective if a market exists and allows for them.[244] TDRs require the establishment of sending and receiving zones and government administration of how rights are transferred.[245] Once an appropriate sending zone is established, TDRs might serve as a more welcomed alternative to restrictive zoning or SABs. To begin with, owners in the sending zone would be able to negotiate directly with developers, thus avoiding the sentiment that the County is taking away their right to manage their land. Restrictive covenants that accompany the TDR transfers would be less welcomed, but, as long as a market exists, owners might feel as if they are getting their money's worth.

Suggestions for sending zones would include rural and suburban areas outside of existing town centers. However, restrictive zoning would have to be implemented in order to limit development beyond the present state, and landowners have expressed their opinions against such measures. Possible receiving areas would include the historic core—a target for densification—and existing and proposed village centers in suburban and rural areas—the focal points for development outside of the urban area.

Very similarly, conservation easements purchased through trust funds developed under government and non-profit cooperations could effectively keep greenspace in rural areas. Although South Carolina is currently in a budget crisis which makes purchasing TDRs difficult,

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243. *See* Mike Ramsey, *"Smart Growth" Developments: A Hard Sell In Midlands*, THE STATE (Columbia, S.C.), Feb. 11, 2002, at B1.

244. Juergensmeyer et al., *supra* note 2, at 447; Kayden, *supra* note 3, at 577;

245. *See supra* notes 145-51 and accompanying text.

coordination between government and non-profit organizations and trust funds has effectively worked in other areas of South Carolina. There is no reason that they could not work in Richland County as well.

When zoning for village centers, incentives that would allow developers to violate otherwise applicable zoning ordinances in return for public benefits, such as parks, may provide an alternative that would attract growth and create the desired open space and facilities. An independent review board should be established for the County to monitor the extent of permissive violations, as well as the price attached in order to effectively implement the strategy. If not too highly priced, incentive zoning coupled with infill incentives for abandoned or underdeveloped existing village centers may entice developers to build in the desired areas.

Impact fees could be used to defer the costs of new infrastructure for developments in rural and suburban areas and to establish a mitigation bank for the purchase of land or TDRs. Again, the fees must be reasonable and must have a nexus between the fee and the fee's purpose, as described in the comprehensive plan, in order to avoid violating the Equal Protection Clause.[246]

IX. A MARKET-BASED SUGGESTION

A. General Conclusions

To implement the Town and Country Plan of the Vision, Richland County would do best to avoid only using traditional zoning and should abandon using urban growth boundaries. Service area boundaries are not much better than urban growth boundaries, but the modified system suggested in the Vision may effectively limit new infrastructure to village centers. However, this idea has already engendered significant opposition from property rights groups and landowners. Agricultural zoning invites litigation, but coordination with tax incentives and TDRs may alleviate the diminution of rural landowners' property values.

Market-based tools could be very effective, but it is questionable whether a sufficient market would exist to support these programs. Transferable development rights and conservation easements, if properly administered by the County and with the cooperation of non-profit organizations, could enjoy the same success in protecting rural lands in Richland County as they have in other areas of South Carolina. Impact fees, if reasonably related to their intended benefit, could be used to generate funds for a mitigation bank to offset the

246. Juergensmeyer et al., *supra* note 2, at 471.

costs of new infrastructure and environmental impact. Lot-size and mixed-use requirements are strongly opposed by builders, but they do offer a way to alleviate escalating housing prices created by other management tools and may promote development in the desired areas, such as the historic core and village centers. Incentive zoning and infill incentives may best be used to attract development toward existing but struggling village centers throughout the County.

As mentioned above, education on issues and technical expertise is vital in making planning decisions.[247] Furthermore, educating the public on the benefits and disadvantages of planning decisions may help to frame the issues in a more favorable light for planners. By portraying the ordinances as prohibiting neighboring landowners from radically changing the use of their property, such as from agricultural to industrial, the County officials could lessen the apparent harshness of the ordinances.

B. Specific Market-Based Suggestions

A comprehensive system of market-based measures could effectively achieve many of the goals of the Town and Country Plan while avoiding many of the problems inherent in traditional zoning. One possible solution would be centered around a TDR system. Sending zones could be established in traditionally rural or underdeveloped areas away from existing or developing town centers. Receiving zones could be established in the historic urban core or the town centers in suburban or rural areas. This tactic would not only focus growth toward town centers; the establishment of receiving zones in suburban and rural town centers would allow landowners in sending zones near those areas to transfer their rights to nearby land. This possibility may help to alleviate the apprehension rural and suburban landowners have toward selling their development rights to unfamiliar developers in the city.

Within the historic urban core and suburban and rural town centers, infill incentives could help to promote higher-density development. Higher-density development in these areas could help to reduce any increases in housing prices caused by limiting growth. Incentive zoning could provide some of the desired components of the neighborhood concept by offering developers zoning variances in exchange for contributing toward benefits such as parks or community centers. Not only would this method partially provide benefits, but, by allowing variances, it could reduce some anxiety on the part of developers.

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247. *See supra* notes 172-76 and accompanying text.

To limit or avoid sprawl, growth must be limited or avoided in certain areas. If landowners in an area are denied the opportunity to develop their land, something should be done to develop land use options for rural landowners. A task force that studies sustainable development alternatives could give landowners in designated sending zones the opportunity to maximize the value of their land while still maintaining minimal development. Examples of alternatives could include hunting or sporting reserves, bed and breakfast establishments, and alternative crops. The program could be based on existing information and could follow the example of the United Nations' program for sustainable development.[248]

To be most effective, this suggestion, as well as any other suggestion, should be applied comprehensively. A combination of tools is required to offset any unwanted effects of a single method, like increased housing costs. The more holistic a plan is, the less likely it will be that large-scale adjustments are needed to correct ill effects. Adjustments could be made to one measure within the plan to offset an unwanted impact of another measure, without the need to perform expensive new studies and to pass additional new ordinances. Comprehensive ordinance packages would further advance planning away from unwanted piecemeal zoning.

X. CONCLUSION

In light of the opposition to the Plan, as evidenced by *McClanahan*, Richland County should implement a comprehensive package of market-based solutions to promote smart growth. Such a package would better avoid takings controversies by allowing landowners to actively participate in the negotiations over their development rights. By enacting a holistic system of ordinances, the County could avoid the danger of having to sequentially pass ordinances to correct for shortcomings in previous regulations. Moving away from traditional restrictive zoning would not only help to alleviate these problems, but also provide the County with more options to address specific issues in the community.

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248. *See* United Nations Sustainable Development, Home Page, *at* http://www.un.org/esa/sustdev/.