

FORFEITING THE AMERICAN DREAM: THE HUD-FUNDED SMART GROWTH GUIDEBOOK'S ATTACK ON HOMEOWNERSHIP

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If, in public policy, silence implies consent, then the Bush Administration may forever be held responsible for some of the most egregious assaults on property rights in history. Though it did not formally approve the federal funding for the 2002 edition of the American Planning Association (APA)'s *Growing Smart Legislative Guidebook*,¹ neither has it taken steps to distance itself from the massive book. It should, however: The *Guidebook* blatantly recommends model "takings" legislation that would subvert property rights and help states and localities "improve" land use and design "better" communities.

Based on so-called smart growth principles, the *Guidebook's* proposals seek to counter urban sprawl by forcing residential development into denser communities and by restricting land use and housing styles. But the APA legislative guide goes further than other "smart growth" public policies; it recommends a broader application of the principle of "amortization of non-conforming uses" to force

homeowners to change their property in ways that fit the new schemes. Those who do not comply must forfeit their property without compensation.

Such proposals are an affront to basic property rights and the freedom of choice and opportunity that Americans treasure, to the President's highly touted goal of increasing homeownership,² and to the American dream itself. Ironically, the APA also had to release a *Growing Smart User Manual* just so "those interested in statutory reform" could "navigate through" the many "options" in the unwieldy 1,500-page *Guidebook*.³

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1. The entire 1,500-page *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* is available at <http://www.planning.org/growingsmart/>.
2. See U.S. Department of Housing and Urban Development Web site, at <http://www.hud.gov>.
3. See <http://www.planning.org/growingsmart/>.

Surprisingly, this assault on homeownership was funded largely by the Department of Housing and Urban Development (HUD) and other federal agencies.⁴ What is most troubling is that the Bush Administration—particularly HUD Secretary Mel Martinez—has not yet roundly and publicly denounced the *Guidebook* or its unconstitutional proposals.

LOSING THE FREEDOM TO CHOOSE HOW WE LIVE

Advocates of the smart growth principles underlying the *Guidebook* claim that its proposals will result in less traffic congestion and air pollution and lower housing and public service costs. Yet by making communities denser, by forcing more people into fixed areas, smart growth policies accomplish exactly the opposite.⁵ The *Guidebook's* land-rationing schemes also raise the cost of housing,⁶ which acts to deny homeownership to lower-income households, which are disproportionately African-American and Hispanic. Research by Dr. Matthew Kahn of Tufts University has found that African-American homeownership is higher where there is *more* sprawl, not less.⁷

Critics of suburban development claim that the nation's amount of open space is threatened by urbanization, but this is hardly the case. More than 400 years after the first European settlement here, urbanization covers just 2.6 percent of U.S. land area. Moreover, in the past 50 years, 1.5 acres of rural parks have been created for each new acre of land dedicated to urbanization.⁸

But this evidence of the trivial impact of centuries of development does not deter smart growth advocates, whose intense devotion to their own architectural tastes and lifestyle choices compels

them to force their preferences on future generations. Inasmuch as most measures of fashion and good taste are fleeting and ephemeral (avocado refrigerators in the 1960s and pink-and-black-tiled bathrooms in the 1940s, for example), a community's laws and regulations ought to be the last place that the desires of artistic designers should be codified for all time.

“Amortization of Non-Conforming Uses”

Perhaps the greatest source of concern in the *Guidebook* is the use of “amortization of non-conforming uses.” Adopting this “option” would amount to an unprecedented violation of property rights by states and localities that would create levels of uncertainty undermining the economic future of the nation. It is a deceptively vague euphemism that is being used to describe a way to force people out of their homes and off property that no longer complies with planners' new housing preferences.

Up until now, application of the concept of amortization has been limited largely to highway advertising signs, which when legally banned are still allowed some grace period—or amortization—before they must be removed. APA planners want to treat people's homes in the same way in response to their changing tastes and styles.

To understand the threat posed by such a vehicle, it is important to understand the concepts involved. Specifically:

- The term “non-conforming use” refers to a structure, such as a house or commercial building, that *no longer* conforms to revised zoning ordinances or new plans for a particular geographical area in the community. Traditionally, structures rendered non-conforming uses by zoning law revisions are “grandfathered in,”

4. The other financial backers include private foundations, the American Planning Association's membership, and the Siemens Corporation, one of the world's leading manufacturers of light rail commuter cars.

5. See also Wendell Cox, “Smart Growth and Housing Affordability,” paper commissioned by the Millennial Housing Commission, March 2002, at <http://www.mhc.gov/papers/coxsg.doc>.

6. See, for example, Wendell Cox, “American Dream Boundaries,” Georgia Public Policy Foundation, June 2001, at http://www.gppf.org/pubs/analyses/2001/american_dream_boundaries.htm.

7. Matthew E. Kahn, “Does Sprawl Reduce the Black/White Housing Consumption Gap?” *Housing Policy Debate*, Vol. 12, No. 1 (2001). See also Wendell Cox and Ronald D. Utt, Ph.D., “Smart Growth, Housing Costs, and Homeownership,” Heritage Foundation *Backgrounder* No. 1426, April 6, 2001.

8. See also Ronald D. Utt, Ph.D., “Will Sprawl Gobble Up America's Land? Federal Data Reveal Development's Trivial Impact,” Heritage Foundation *Backgrounder* No. 1556, May 30, 2002.

meaning that changes in the regulation do not apply to already constructed homes or buildings, and the right to continue to use one's property freely is preserved. Thus, a family owning a detached house in an area that is rezoned for multi-family dwellings may stay and later sell the property to another family, whose use of the property would continue to be protected by the "grandfathering."

Even Portland, Oregon, which has enacted the strongest anti-property rights land use regulations in the country, does not go as far as the *Guidebook* recommends. In Portland, a non-conforming house that burns down or is otherwise destroyed would, in some neighborhoods, have to be rebuilt as a multi-family unit if changed zoning patterns required it; but so long as the house remains intact, the former legal use of it is "grandfathered."

- The term "amortization" means that the owner has a certain period of time to bring the structure into compliance. Most people are more familiar with this as it applies in home mortgages, where it refers to the steady extinguishment of the debt over a period of time (such as a 30-year mortgage). In addition, "amortization" is used in law and accounting to define a period during which the value of the property is recovered by the owner.

But for homeowners who live in a community that adopts the *Guidebook's* vision, the APA amortization proposal means the extinguishing over time of their right to occupy their houses, and without just compensation for loss of that property. How long they have before they must forfeit their homes would be completely up to the local government.

The APA proposal also requires non-conforming uses to be brought into conformance at amortization, which also would be a matter of arbitrary government policy not necessarily related to the asset's economic life, mortgage

loan term, or any other such standard of measure. The APA would leave the time period completely up to local government.

According to the *Guidebook*:

A local government's zoning ordinance may state a period of time after which nonconforming land uses, structures, and/or signs, or designated classes of nonconforming land uses, structures, and/or signs, must terminate....⁹

Once that "period of time" is met, the house would have to be demolished, converted to multi-family use, or abandoned.

By encouraging communities to adopt the concept of amortization of non-conforming uses, the *Guidebook* offers bureaucrats another public policy weapon in their planning arsenal: the forfeiture of property without compensation. It indeed is troubling that Secretary Martinez, whose department primarily funded the project, has not yet roundly rejected such a proposal, which would have been virtually unthinkable in the not-too-distant past. Indeed, even the *Guidebook* forthrightly acknowledges that its proposals may present some problems, one of which is the potential to violate the Constitution.¹⁰

Specifically, the *Growing Smart Guidebook* admits that an amortization could be ruled a "taking"—a legal term to describe government confiscation of property or of the value thereof as a result of some regulatory or other action, such as invoking the powers of eminent domain. The Takings Clause of the Fifth Amendment to the U.S. Constitution states: "nor shall private property be taken for public use without just compensation." But the courts have not always upheld a strict interpretation of the Takings Clause, and it thus would be a mistake to wait for this unthinkable provision (amortization of non-conforming uses) to be overruled by the U.S. Supreme Court.

9. *Growing Smart Legislative Guidebook*, p. 8-123.

10. *Ibid.*, p. 8-110.

Economic Impact

Zoning decisions that lend themselves to the use of amortization and forfeiture have drastic consequences. A family living in a newly designated *Guidebook* community, for example, who had bought their home for \$50,000 in 1980, might well be confronted with the amortization requirement to abandon, convert, or demolish the house by 2005 as a consequence of the rezoning of the land on which it sits. By 2005, the family might find their asset (the house and land), which recent market transactions had led them to believe had appreciated in value to \$150,000, worth substantially less.

Because the net worth in a home is the major source of wealth for most Americans, such *Guidebook*-encouraged forfeitures could strike a very serious blow to the well-being of families for no other purpose than to tidy up a community's "look" to make it more attractive to planners, architects, environmentalists, and the financially well-off who may dislike vinyl siding, split-foyer colonials, or economy cars parked in the driveways.

WHY THERE IS LITTLE PUBLIC OUTCRY

It is troubling that no mention of this specific use of forfeiture—a direct assault on the American dream of homeownership and wealth accumulation—is to be found in any of the APA's publicity about the *Growing Smart Guidebook* or highlighted in the federal government's comments about it. Given the large number of legal and technical details covered in the book, the forfeiture provision has been largely missed by the media and the public policy community.

Doubtless, the authors of the *Growing Smart* book and their financial backers at HUD would argue that this is because the book lists only options, not requirements. A December 6, 2001, letter from HUD to a skeptical constituent contends as much.¹¹ But this distorted set of options hardly represents all of the legitimate land use choices a community actually has available to it. They are confined largely to those that limit property rights; none expand them; and all assume that government planners know more than ordinary citizens, landowners, developers, or the market process.

No matter what the purpose or slant, the option of property forfeiture is simply inconsistent with American values and with the fundamental principle of economic progress. APA's forfeiture option has no place in a document funded by the federal government, and federal officials should be eager not only to distance themselves from the *Growing Smart Guidebook*, but to condemn it as well.

Some might suppose that it would be politically impossible for a local community to adopt a provision that requires people to forfeit their houses, but *Growing Smart* cleverly avoids this problem as well, shifting responsibility for the decisions higher up the bureaucracy. The book includes an option to require that local land use plans be consistent with regional and state plans, taking critical and unpopular decisions away from local officials.

To encourage such actions and the enactment of such provisions, the state or federal government could condition funding on a community's consistency with state or federal land use dictates. The Community Character Act of 2001 (S. 975/H.R. 1433), currently being considered by Congress, would provide federal funds for this purpose. Bureaucrats in Salem, Harrisburg, Nashville, Atlanta, or Washington could require a certain portion of a community's land area to be zoned for multi-family dwellings. The local elected officials could then tell homeowners with a straight face that it was not their fault as they enact and enforce provisions that would have been impossible to adopt if the decision-making had remained local.

How could such a destructive proposal evolve from a tax-funded project overseen by HUD, whose mission is to expand homeownership, not destroy it? The answer lies in the fact that the broader urban planning community is led by special interests who fancy themselves not so much public servants as evangelists on a mission to convert everyone to a particular taste (or ideology) in urban design.

This is not the first time that urban planning has been captured by fleeting, fashionable ideas. During the 1950s and 1960s, urban planners enthusiastically embraced the concepts of urban renewal and the construction of European-style public

11. Letter from Lawrence L. Thompson, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, to Nancie G. Marzulla, Defenders of Property Rights, December 6, 2001.

housing projects, which have destroyed residential communities in central cities and sent minorities to more remote sections of town.

CONCLUSION

Today, the stakes are high. Much of the productivity of the American economy is tied to the security and free use of real property and its role in creating wealth. The APA forfeiture proposal not only would help bureaucrats take people's homes away, but also would undermine the wealth-creating engine that has made America the most prosperous nation in the world.

The *Growing Smart Guidebook* is thus a legislative guide for increased poverty, not prosperity. The Bush Administration must not only expose the unconstitutional provisions in this massive book, but publicly distance itself from it in no uncertain terms.

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