

**107<sup>th</sup> Congress**  
**U.S. House of Representatives**  
**Judiciary Subcommittee on the Constitution**  
**Written Testimony of R. James Claus, Ph.D. regarding**  
**“America Planning Association’s Legislative Guidebook**  
**and Its Potential Impact on Property Rights**  
**and Small Businesses, Including Minority-Owned Businesses”**

Thursday, March 7, 2002  
10:00 am – 12:00 noon  
Rayburn House Office Building  
Room 2141

## **OVERVIEW**

The Senate Committee on Environment and Public Works has before it SB 975. The House of Representatives currently has in committee H.R. 1433. While there are slight differences between these two proposed pieces of legislation, essentially they both represent an attempt by the American Planning Association (APA) and government regulators to find a quarter of a billion dollars to distribute and implement their legislative guidebook and the state enabling statutes contained within. This guidebook is part of their “Growing Smart” campaign designed to radically alter land use planning practices on a national scale.

The APA’s legislative guidebook is an extensive and intensive effort to strengthen and expand government police powers as related to land use regulations in the United States. The guidebook has been developed entirely by regulators, and, with a few minor exceptions, has been submitted for peer review only to other regulators. While it proposes regulations that would substantially impact the personal and property civil rights of many, separately identifiable groups, almost without exception representatives of these groups have been excluded from participation in the formulation of the legislation that APA is proposing. In the few cases that non-regulators have become aware of the pending legislation or the guidebook behind it, their requests to become involved in the process of review and comment on the proposals advocated by the guidebook have been summarily rejected.

To what types of legislative proposals am I referring that will adversely impact personal and property civil rights? Primarily there are two:

1. A near-complete disregard for the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, with respect to the right of individuals to receive just compensation when their property is taken for a public purpose and to receive due process and equal treatment in regulatory procedures.

2. An onerous “criminalizing” of the land use planning process by authorizing criminal punishment, including both substantial fines and imprisonment for violation of land use zones and regulations.

To which groups of affected individuals am I referring? Primarily, there are two:

1. Owners of real property, particularly commercial property and marginal farmland adjacent to urban areas.
2. The business community, including both large and small business, with particular adverse impact on small entrepreneurial and minority business.

A third group encompasses almost everyone who depends upon a well-maintained effective highway system. In this group, of course, are those who deliver 90% of our goods and products, or who commute (because they prefer living in suburban areas) or choose to arrive at vacation destinations by car. Even more dependent upon this system is the military and emergency response teams. We often forget that the reason behind creation of the federal interstate highway system was to permit the quick and efficient movement of military and emergency vehicles in the event of both local and national disasters. The APA legislative guidelines specifically advocate the diversion of highway construction and maintenance funds to financing urban mass transit and higher urban densities around inner-city transit stops and stations.

I address the Fifth and Fourteenth Amendment concerns first.

#### FIFTH AMENDMENT

The APA legislative guidebook is a massive tome. In chapter after chapter it sets out in great detail how government agencies—state and local—can restructure urban environments without accountability to voters, or even elected officials. Certainly nowhere does it express any concern whatsoever for the financial impact on property owners or those who would like to become property owners within the subject areas. As attorneys and legal experts, I am sure the members of this Committee are concerned when the just compensation guarantees of the Fifth Amendment are dismissed as not worthy of consideration. Or when great emphasis is placed on state enabling statutes that authorize local governments to regulate for the public health, safety and welfare without an equally great emphasis on the indisputable fact that federal and state courts across the country, led by the U.S. Supreme Court, have placed myriad, constitutionally-based restrictions on the exercise of police powers. These restrictions particularly target subjective declarations that the regulations are “for the people’s own good.”

As just one example of judicial dismay with regulations designed to impose a subjective point of view or an “appropriate” lifestyle, I refer to *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).<sup>1</sup> Although a First Amendment case concerning restriction on commercial speech that advertised retail liquor prices, the Court’s admonition “...[t]he

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<sup>1</sup> *44 Liquormart*, Justice John Paul Stevens; pp 1507-1508.

First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good” is applicable to all regulatory schemes that adversely impact any Constitutional guarantee on nothing but subjective grounds.

The APA’s “Growing Smart” legislative initiative is intended to regulate how and where we live because, according to its creators, we are not intelligent enough to make such decisions for ourselves. Therefore, we must be dealt with on a national scale through regulatory agencies and massive planner-oriented bureaucracies that will direct nearly every aspect of growth and development, and the “look, feel and function” of every urban, suburban and rural area in America.

In advocating its policy of state control of local environments, the Legislative Guidebook is remarkable for its consistent failure to caution that land use planning and zoning is subject to constitutional imperatives and judicial scrutiny, particularly when it adversely impacts basic civil and property rights. Nor does it warn those local governments who might adopt its guidelines that they face substantial legal bills if their regulatory scheme is successfully challenged. Instead, the “Growing Smart” initiative advocates intensive manipulation of property and civil rights through total reliance on state enabling statutes. It too often does this without regard for either the Constitution or federal laws that place constraints on the unfettered exercise of sovereign police powers.

Before beginning analysis of the legislative guidebook’s attack on the Fifth Amendment and federal law, particularly the 1970 Rehabilitation and Removal Act, I respectfully direct your attention to the APA’s policy statement concerning “takings.” (Exhibit 1)

In April 1995, the APA Board of Directors ratified a policy guide on “takings” that had been adopted by a chapter delegate assembly convened in Toronto, Canada. After giving validation to the Fifth Amendment’s proscription against taking private property for a public purpose without “just compensation,” as in eminent domain cases, the APA concluded that the same did not hold true for a regulatory impact that adversely affected either a property right, or the value of property, or both. Allegedly relying on court cases, which are never cited, the APA posits that land use regulation is subject only to “reasonable relationship” judicial inquiry, and just compensation is due only when a landowner has been denied all economically viable use of the land. The APA then finds, without equivocation or caution, that the courts have upheld the right of local government to intervene in private activity or the use of private property to protect the public health, safety and welfare. It provides extreme examples, essentially grounded in nuisance, to support this proclamation.

The APA policy statement continues with an alarmist treatise concerning the efforts of property owners to protect their rights through legislative relief from some of the effects of intensive land-use regulation. While giving token acknowledgement that **some** legislation has been the result of **some** legitimate concerns, for the most part legislative relief is nothing but “anti-regulation clothed in the fabric of private property

rights.” We are then again treated to extreme examples of what is apt to happen if landowners are compensated for reduction in economic value resulting from government regulation. Generally, these examples focus on either bankrupting the state or creating significant federal deficits, or upon fostering a massive bureaucracy to develop economic impact statements (interestingly, the APA expresses no similar alarm that its “Growing Smart” legislation will create a massive bureaucracy). The statement continues with an apologia for zoning as a way to protect property values by, using another of its extreme examples, preventing the siting of a grocery store that also sells liquor in a residential district.

The policy statement concludes with the fact that the APA “strongly opposes most of the proposed ‘takings’ legislation its representatives have seen,” finding that “the collective political forces that have joined in support of ‘takings’ legislation have grossly distorted both the frequency and the intensity of the occurrence of hardship caused by government regulations...[p]roperty rights advocates are waging a guerrilla war of sound-bites, misleading ‘spin-doctoring’ and power politics which have characterized governments at every level as evil empires of bad intent...[these advocates]...wrap themselves in the flag and the distorted appearance of constitutional rights.”

Thus, the APA Board and its supporters contemptuously dismiss the legitimate concerns of many people that the policies advocated by the APA are overreaching, and yes, in many cases, unconstitutional.

The Introduction to the Legislative Guidebook takes great pains to tell us that it is a research product that does not necessarily represent the policy of the APA, unless specifically identified as such in a policy guide or other action by its Board of Directors. The APA’s position on “takings” is clearly articulated in its policy guide. We are duly warned, therefore, that behind the research of the Guidebook is at least one APA policy that seeks to neutralize, perhaps even destroy, the Fifth Amendment’s “just compensation” application to regulatory actions that take away property value without a provable nexus to legitimate public interests.

The error of the APA’s reliance on a defense that a zoning regulation need only be “reasonable” to withstand legal challenge, or that, as a matter of law, land-use decisions are immune from judicial scrutiny under all circumstances, or both, was soundly pointed out to it by the U.S. Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd., et al*, 526 U.S. 687 (1999). The Court affirmed that just compensation would be due either if a regulation denied all economically viable use of the subject property **or if a regulatory act failed to substantially advance a legitimate public interest**. In specific response to the APA’s *amicus* brief filed on behalf of the City, Justice Kennedy, delivering the opinion of the Court, said:

“To the extent that the City contends the [lower courts’] judgment was based upon a jury determination of the reasonableness of its general zoning laws or land-use policies, its argument can be squared neither with the jury instructions or the theory on which the case was tried, which was confined to the question of

whether, in light of the case's history and context, the city's particular decision... **was reasonably related to the city's proffered justifications**...[t]o the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles and is rejected.

Having been defeated in *Del Monte Dunes*, and also *Dolan v. City of Tigard*, 512 U.S. 374—a case in which the Court concluded there must be at least a **rough proportionality** between the regulatory act and the state's asserted interest—the APA has increasingly touted “amortization” as a method to avoid compensating property owners adversely impacted by the land-use regulations it advocates.

Briefly, amortization in the land-use regulatory sense, is used to achieve the demise of a property use or improvement that was legal and conforming before the enactment of new rules or regulations. The APA theorizes that by granting a “grace period” during which the newly offending use or property may continue is more than sufficient payment for its eventual removal. The grace or amortization period is arbitrarily based on the “life” of the asset as calculated under depreciation schedules used for tax accounting purposes. No cash compensation for the loss of use property will be paid because, the APA reasons, the property owner or user has recovered costs, and that is all he or she is entitled to. The APA does not care that the interest or asset has economic value to its owner or user far in excess of its original costs. All the APA cares about is that it is eventually gone—and the sooner the better (most amortization periods are only 3-5 years).

Amortization in the world of planners is simply a compensation-avoidance scheme, and nothing less. It is also a scheme that has been rejected by the U.S. Congress, as evident in the 1970 Rehabilitation and Removal Act.

Although primarily directed to correcting the inequities of amortization when the Highway Beautification Act is invoked to remove outdoor advertising structures, the 1970 Act, in essence, requires cash compensation based on true economic value when removal of any property pursuant to a regulatory “takings” if federal funds are involved in the project. This fact is not only ignored by the APA in the hundreds of thousands of words contained in its Guidebook and in its unrelenting attack on outdoor advertising structures, the APA proselytizes endlessly on ways to overcome the Act and federal compensation schedules, which among other compensatory remedies permit compensation based on income generated by the subject structure. The only time the cost of a structure enters the equation is when the subject structure can actually be relocated in a similarly effective location in terms of visibility to roadway traffic—a circumstance that almost never presents itself.

By way of example, I respectfully refer the Members to the APA's “Policy Guide on Billboard Controls,” ratified by the APA Board of Directors in April 1997. (Exhibit 2)

...[M]any communities find it impossible to enforce their billboard ordinances along highly-visible transportation routes because of **special-interest provisions** in the Intermodal Surface Transportation Efficiency Act, successor to the Federal Highway Beautification Act...[u]nfortunately, in 1978 Congress adopted an amendment to the Highway Beautification Act...[b]efore the amendment...local governments in many states could require the removal of nonconforming billboards along Federal highways, offering compensation through amortization...[t]he Act now requires local governments to pay billboard owners before a nonconforming billboard can be removed...Although in many cases [local governments] can and do require the removal of **other signs** without cash compensation, they can require removal of signs along heavily-traveled federal-aid highways only if they pay compensation...In short, federal intervention intended to make highway corridors more beautiful has been **manipulated by special interests** to make it more difficult for local governments to use their own tools to accomplish the original purposes of the Highway Beautification Act.

The “policy guide” continues: The APA promotes federal legislation that restores to local governments the authority to require the removal of billboards **and other signs** through amortization, and promotes the adoption where necessary of state legislation that expressly authorizes local governments to offer amortization as compensation for a requirement to remove nonconforming billboards **and other signs** within the jurisdiction of the local government.

I emphasize the words “other signs” to emphasize the fact that on-premise business signs, which are unprotected under the federal Acts, are considered fair game for burdensome treatment and retroactive regulatory “takings” without just compensation precisely because the APA refuses to acknowledge their extreme value to the businesses they identify and advertise, or the adverse impact on business revenues that occurs when signs are downsized to the point where they are, for all intents and purposes, invisible. Especially hard-hit by restrictive sign codes that limit signage height, size, placement or illumination are small businesses that in most instances rely entirely on optimally visible and readable on-premise signage to signal their presence to those passing by.

The disdain for property owners, and the 1978 Congress which attempted to protect at least some of them, is patent in these policy statements. The disdain continues in the APA’s Legislative Guidebook. In fact, what is occurring in this partnership between HUD, an agency of the executive branch, and the APA is an effort to end run the federal checks and balances system by intentionally failing to point out that, indeed, federal law and court cases have in the past, and will in the future, “check and balance” the actions of the executive branch, particularly when the intent of the action is to **unilaterally** impact the lives and property of the general public.

Additionally, the APA-HUD program envisions \$250,000,000 in federal funds to support implementation of its Guidebook, when the Guidebook specifically authorizes amortization of non-conforming uses. Amortization is specifically disallowed in

regulatory undertakings that are in any way tied to federal funding. Therefore, I posit, the HUD-APA project directly advocates violation of federal law.

### **Fourteenth Amendment**

The Fourteenth Amendment comes into play as we try to deal with the regulatory plans set out in the Guidebook. Minimally, to pass Fourteenth Amendment “due process and equal treatment” tests, a regulation or regulatory scheme must be sufficiently clear to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited; otherwise, individuals might be punished for conduct they could not have known was illegal, or enforcement might be subjective, arbitrary or discriminatory. The need for clarity of language and objectivity in enforcement is especially important when violation may be punished as a criminal offense, subject to both fine and imprisonment.

Chapter 9 of the Guidebook (“Special and Environmental Land Development Regulation and Land-Use Incentives”) is particularly troubling because it raises the possibility of criminal conduct for engaging in the customary use and enjoyment of one’s property, particularly agricultural properties. While purporting to be concerned with balancing the need to protect the public and environment with the rights of property owners, the thrust of the chapter focuses on ways to tip the balance in favor of the environment at the expense of property owners.

For example, in agricultural areas it is often the case that farmers may “alter land form” or, as the Guidebook puts it, by human act “change the existing topography of the land” in the ordinary course of their agricultural operation, and may do this without intention to disrupt something the planning authorities have called a “critical and sensitive area.” Perhaps it is a generational farm with a “wet spot” that has been plowed for decades; perhaps the farmer has a general idea that “wetlands” are protected but doesn’t think of his wet spot as falling into that category.

When the environmental or planning authorities come to investigate, does the farmer’s “no trespassing sign” apply to them? No. Because his land is in plain view, the thinking espoused by the APA is that investigators can enter at will because no right of privacy attaches to open areas. Will the farmer’s obviously intentional act of plowing and his general knowledge that wetlands are protected satisfy the APA’s criteria of “intentional and knowing” violation that leads to criminal charges? Under the Guidebook’s proposals, the likely answer to this question is “yes.”

Please do not think that I exaggerate in this example. The scenario, or something very similar, will occur. As a result, farmers and ranchers across the country are in serious jeopardy under the APA Guidebook.

Chapter 9 also deals extensively with historic districts and landmarks, subjecting buildings that may fall into the designations to extensive, and very subjective, controls that may extend beyond the exterior to the interior. Additionally, where an individual property may have historic preservation potential, the regulatory format suggested by the

Guidebook specifically authorizes a construction or development moratoria of up to 180 days to permit a local government to complete a designation process that will include the subject property. The only recourse from the moratoria by the affected landowner is mediation—a time consuming process that will almost certainly extend beyond the 180-day period, thereby negating its usefulness in providing an avenue of relief. Finally, the Guidebook authorizes a code enforcement agency to order an owner to correct perceived defects in the owner’s compliance with the required “look” of his or her building, either its exterior or interior. If the owner fails to maintain the property as required by the regulation, as a “generally-available remedy” in the model code, the code enforcement agency may enter the premises to repair the “defect” and impose a lien against the property for expenses incurred. The reason for a failure to maintain, such as an economic downturn that has reduced funds available for maintenance, is apparently irrelevant—the property can be entered, repaired or “fixed up,” and liened, with no limit on costs.

Another troubling aspect is the Guidebook’s “due process” models—both substantive and procedural. In almost every instance, they are overly cumbersome and extremely time-consuming, necessarily imposing delays that will increase development costs, and possibly adversely affect the development’s market value before construction is finally complete. Further, the Guidebook adds several levels of appeals of a denial of an application before administrative proceedings are sufficiently “exhausted” at the local level to permit removal to the state court system.

The Guidebook also suggests that one “remedy” for denial is a requirement that the applicant resubmit the application under another theory, such as variance or conditional use. In this scenario, the applicant is not considered to have exhausted local remedies until he has submitted at least one other application that either meets the conditions enjoining approval of the first application or comes before the permitting authority with a request for exemption from the regulation. Since the Guidebook also discourages variances and conditional uses, it is very unlikely that an applicant will gain approval of such requests. The result of this “two or more” applications procedure unfairly entangles the applicant in local land-use procedures (in direct contravention of *Monterey v. Del Monte Dunes (supra)*, and such a requirement was rejected by the U.S. Supreme Court in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). In this case, the Court said that it was not necessary for an applicant to submit more than one completed application for a case to “ripen” for adjudication.

The lack of certainty in the highly subjective and time consuming regulatory process advocated throughout the Guidebook will ultimately have a very chilling effect on investor or bank willingness to commit development or redevelopment funds. A lack of funds ultimately will also have a chilling effect on the “growing smart” programs—an effect, I believe, the Guidebook authors and supporters have overlooked.

Exhibit 3, a letter to the APA hierarchy from the National Association of Industrial and Office Properties, National Multi-Housing Council, Self Storage Association, and American Road & Transportation Builders Association, addresses many of the concerns I have expressed. Exhibit 4, a letter to the mayor of Las Vegas from John

E. Scott, SBA District Director for Nevada, describes SBA apprehensions regarding regulations that may dry up commercial lending support because of increased risks to businesses. Mr. Scott's letter was prompted by the city's efforts to enact an APA-model sign code that placed severe restrictions on sign size, height, illumination and placement and favored non-compensatory regulatory "takings" under an amortization clause. He is particularly concerned that the on-premise business sign regulations consistently proposed by planning consultants with close APA ties essentially render business signage invisible, thereby severely compromising the ability of businesses, small businesses in particular, to effectively communicate with potential customers.

Simply, the due process models advocated in the Guidebook are incapable of satisfying the Fourteenth Amendment requirements that regulations be clear, concise, capable of objective enforcement, and provide for timely appeal. Further, and in spite of U.S. Supreme Court decision after decision, and the decisions of many lower federal courts, the Guidebook insists that local governments can regulate or adversely impact a basic civil right, such as the right to display commercial speech *via* signage, for "aesthetic or appearance" purposes without any qualifying language whatsoever that such regulation is impermissible in the absence of proof, by the government, that (1) there is a **substantial** government interest which justifies the regulation, (2) the regulation **directly advances** that interest, and (3) the regulation is **narrowly tailored and no more extensive than necessary** to achieve that interest. In the case of commercial speech, as protected by the First Amendment, an additional requirement the government must prove is that the regulation **leaves open ample alternative avenues of communication**. And, if the commercial speech regulation is based on either the content of the message or the identity of the messenger, the government must prove that the interest served by the regulation is **compelling**.

Under either the Fourteenth Amendment or the First Amendment, in the context of land use regulatory schemes, regulations based on unfettered subjective or discretionary determinations by the governing or permitting authority of what is beautiful and or "appropriate" are immediately suspect as unconstitutional and subject to intensified judicial scrutiny. Certainly, more than a "rational relationship" between the government act and its effect on a basic civil right is required when a fundamental interest is at stake.

### **Foreclosure from the Debate by Those Most Affected**

The Legislative Guidebook offers "model statutes" that are driven by executive orders or institutional authorities. The Guidebook is written without concern for voter opinion or preferences or the legal and economic consequences of its scheme. Further, it was written without opportunity for those most affected to participate in its formulation. The Guidebook authors themselves, in recognition that opposition to their agenda may be encountered, urge those who support the APA program to consider that "[p]rivate coalition building or consensus building is appropriate when there is little support among legislators or governors for planning law reform or when reform has not been perceived as a statewide issue."

The exclusion practiced by the APA in its formulation of a legislative initiative replete with incalculable risks and hardships for many citizens should it be enacted and funded, is not only unconscionable, it undermines the fundamental democratic principles upon which our nation is founded.

In a self-serving policy “guideline,” designed to assuage the very real concerns of many that the Guidebook is intended to impose land-use regulations without citizen accountability, the Guidebook asserts that one ingredient of a successful reform effort is to “hold public hearings and invite widespread participation” (Ch. 1-7). Another important ingredient is to make sure “a study commission is comprised of individuals, elected or not, with varying perspectives” (Ch. 1-10). Obviously, these ingredients are nothing but window dressing, as evidenced by the APA’s failure to invite either widespread participation or varying perspectives during its development of the Guidebook. In fact, it summarily refused entrance to its “reform” efforts to not only the individuals who are meeting with the members today, but to many others, as evidenced by the documents you have been given.

We do know who did participate, however, in page after page of “acknowledgements.” A review of these acknowledgements reveals planners, land use planning professors, attorneys who have only litigated on behalf of government, and national associations of governors, towns, cities, counties and regions. A further review reveals no representatives from real property broker associations, property appraiser associations, chambers of commerce, commercial developers, agricultural or farm groups, or trade associations, with two exceptions: the Home Builders Association—a group that simply passes its added costs on to the beleaguered home buyer, and the Self Storage Association. This latter association, however, has withdrawn its support for the Guidebook. One reason for this withdrawal is that the Directorate in charge of the project reopened discussions for input by several “environmental” groups, who changed much of the original product. (I respectfully refer you again to Exhibit 3, which clearly, competently and concisely articulates the problems with the Guidebook and its development.) The Committee members will note there are self-proclaimed defenders of wildlife actively participating, but no defenders of property rights, who have been labeled by the APA as “special interest groups,” in seeming unawareness that wildlife defenders are very much representative of special interest groups. And while personnel from such agencies as the EPA and FTA are very much in evidence as “participants,” representatives from the Small Business Administration are nowhere to be found.

There is even a special acknowledgement reserved for HUD personnel. I quote from the final draft (please note that much of this text was removed in the published version to hide the Federal government’s involvement):

*“We especially thank current HUD Secretary Mel Martinez for his support in seeing the project through to its completion; former HUD Secretary Henry G. Cisneros for his backing when the project was launched in 1994; former HUD Secretary Andrew Cuomo, for his staff’s support during the project’s interim period; current HUD General*

*Assistant Deputy Assistant Secretary Lawrence Thompson; former HUD Assistant Secretary for Policy Development Michael A. Stegman, AICP; HUD Deputy Assistant Secretary for Research Evaluation and Monitoring Xavier de Sousa Briggs; and former Deputy Assistant Secretary for Research, Evaluation, and Monitoring Margery Austin Turner for their continuing support and their vision of the potential of statutory reform.*

*“ James E. Hoben, AICP, supervising community planner in HUD’s Office of Policy Development and Research (PDR), was the initial project officer for Growing Smart and provided APA with challenging, insightful, enthusiastic, and stimulating reviews of all work products and, as a consequence, greatly influenced the course of the project. ...*

*“HUD was particularly helpful in bringing together other federal agency staff in Washington, D.C. who lent their expertise to the preparation of the model statutes and commentary ... ”*

Clearly, HUD staff directly participated in this project. The acknowledgements imply that HUD staff edited it. In spite of the disclaimer that HUD does not endorse the Legislative Guidebook, it is impossible to think otherwise.

## **DISCUSSION**

The purpose of the Guidebook is to set forth a legislative "blueprint" for zoning and land use planning. With federal funding as an incentive, states are to adopt this blueprint that will mandate "an integrated state-regional-local planning system that is both vertically and horizontally consistent" (p. 2-27). Regional and local plans are to be vertically consistent with state plans and vice versa. The plans of local communities are to be horizontally consistent with each other. This inevitably creates a system steeped in bureaucracy with rigid control over local issues. Moreover, the constitutional notion of local "laboratories of experimentation" is destroyed.

The scope of the Guidebook moves far beyond the regulation of land use planning and mandates a broader reach of governmental planning that expressly deals with a wide range of social and economic issues (p. xvii). Model statutes create ancillary departments and programs only tangentially related to land regulation (such as traffic reduction - 9-201). The social and economic policies that are mandated reflect the APA's narrow view of how all communities should look and function. For example, suggested model zoning ordinances require development of "traditional neighborhoods" (8-201(5)). No alternative views of community development are represented.

Simply, the Guidebook strongly evidences an effort to ignore 75 years of federal judicial and congressional restraints, policies and procedures implemented to protect the rights of the American people while creating the most diverse and prosperous society in the history of the world. This federal system has successfully integrated market based activities, consumer preferences and interests, and citizens' civil and property rights, while building a livable and sustainable modern society. But the APA and its supporters at the federal level (HUD, FTA, FEMA, EPA) are attempting to turn back the clock to the

1930s—a time before the federal courts and Congress began to correct land-use planning abuses and to assure a regulatory framework that stays within the general bounds of common law and U.S. Constitutional constraints.

The Guidebook consistently underrates, and in some cases completely ignores, the constraints the federal judiciary has put on the use of police powers to enforce the regulation of normal civil behavior or employ criminal procedure and punishment to civil violations (in fact, the Legislative Guidebook introduces extreme sanctions that I doubt any federal court would find constitutional). Instead, the APA and its partners at HUD have presented land use planning as if it is a process that is constitutional *per se*, rather than portraying how the process of land use planning decision-making by all state and local governments has been limited or modified by the federal court cases. Additionally, the Legislative Guidebook offers no suggestion of how these court decisions have shifted the evidentiary burden of proof to the government as well as increased the level of judicial scrutiny in certain land use planning cases. In other words, the document fails to explain that in some cases, if the government is going to intervene in the lives of Americans, it must be able to prove more than a rational relationship between the act and the effect, and that its intrusion will achieve a substantial benefit without going any further than necessary to obtain that benefit.

In one example, the Legislative Guidebook's presentation of *Dolan v. City of Tigard* [512 U.S. 374 (1994)], an Oregon case, is a complete misrepresentation of the significance of the case, and possibly of the law that has flowed from it. Prior to 1994, Oregon municipalities had been successfully avoiding compensation for taking tracts of land for ill-defined "public purposes" by tying approval of development applications to dedications of property to the city. These dedications were demanded even if the public was neither harmed by the proposed development nor particularly benefited by the "public purpose" the dedication was supposed to serve.

In *Dolan*, the plaintiff's project would have had no adverse impact whatsoever on the public, and the public benefit of the "dedication" was essentially nonexistent. In spite of the Supreme Court's ruling that a dedication must be "related both in nature and extent to the impact of the proposed development" (*Dolan, supra*, p. 391), the implication in the Guidebook is that *Dolan* is an aberration, not once "revisited" by the Supreme Court. Therefore, according to the Guidebook, it is still acceptable for a local government to demand dedications or fee exactions on little more than a "reasonable relationship" to the proposed development. In fact, and contrary to the Guidebook's implication, the rule of proportionality was invoked by the Supreme Court in *Ehrlich v. Culver City*, 512 U.S. 1231 (1994). In this case, the Court vacated a California Supreme Court ruling upholding an impact fee, and remanded "for further consideration in light of *Dolan*." On remand, the California Supreme Court held that *Dolan* is applicable to fees attached as conditions to a project [911 P.2d 429 (Cal. 1996)]. Neither the *Ehrlich* case, nor any other of the numerous lower state and federal court cases upholding the "essential nexus and rough proportionality" tests of *Dolan*, are cited in the Guidebook.

To compound its lack of candor regarding the legal constraints applied by the courts to over-zealous land use planning, the APA's public relations programs include a statement on its website that gives a resounding endorsement of its "Amicus Curiae Committee" and the briefs filed by said committee "in cases of importance to the planning profession and the public interest." Apparently of especial pride is the fact that four of these briefs were filed in the U.S. Supreme Court. Several cases are listed. I am familiar with three of them—*Lorillard Tobacco Co., et al v. Reilly*, 121 S.Ct. 2404 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). (Please see Exhibit 5.)

*Palazzolo* and *Monterey* have already been touched on briefly. In *Monterey v. Del Monte*, the Supreme Court rejected the APA's position that prior cases decided by the Court did not require that a regulation substantially advance legitimate public interests. Specifically, the Court said, "Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents" (referring to, *inter alia*, *Dolan*, *Lucas v. South Caroline Coastal Council*, *Yee v. Escondido*, *Agins v. City of Tiburon*). After the city imposed more rigorous demands each of the five times it rejected applications (over a five year period) to develop a parcel of land, the land owner, Del Monte Dunes, successfully brought the case under 42 U.S.C., section 1983, alleging that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy for the loss. In finding for plaintiff on this issue, the jury in the lower court awarded the plaintiff \$1.45 million in damages, even though the plaintiff had realized some economic benefit from the property by selling it, during the course of litigation, to the State of California for approximately \$800,000. The Supreme Court let the award stand, thereby defeating another favorite APA legal position that compensation is due only when a plaintiff has been denied all economically viable use of the property.

In *Palazzolo* the Supreme Court rejected the APA's argument, in keeping with an earlier case in which the APA's "amicus" team also intervened—*Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)—holding that there is never a requirement that more than one application be submitted and denied for a case to ripen, unless the applicant makes an "exceedingly grandiose" proposal, which the Court found not to be the case in *Palazzolo*. It is interesting to note that the APA in its *Palazzolo* amicus brief disavowed its amicus brief in *Suitum*—a brief relied on by the National Association of Home Builders in its amicus brief filed on behalf of the plaintiff. In repudiating its former brief, the APA stated that the *Suitum* brief did not accurately represent its views, whereas the instant brief did. In the end it did not matter, because the Supreme Court found the APA's position unpersuasive in either case, finding in *Palazzolo* that a compensatory regulatory takings had occurred, and remanding the case to determine the award (or damages) amount.

*Lorillard Tobacco* was a First Amendment case. Here, the Court struck down a Massachusetts law that imposed severe location restrictions on signs advertising tobacco products. The state, and the APA, argued that such restrictions were necessary to discourage tobacco use by minors. Although the Court acknowledged that the state had a

substantial, possibly even compelling interest in preventing children from using tobacco, because the regulation impacted speech, based on the content of the speech, the regulation failed constitutional requirements that it be narrowly tailored and no more extensive than necessary to advance the interest. The Court further found that the state's effort to discourage underage tobacco use unduly impinged on advertisers' "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." (@ 2427.) Additionally, the Court noted that "in some geographical areas, these regulations would constitute nearly a total ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. (@ 2425.)

The clear implication of the APA "amicus curiae" press release is that the APA's briefs resulted in government wins in all the cases listed, when such implication is, in fact, untrue. Further, I believe it can be reasonably argued that the APA's incredible expansion of moratorium powers as a tool to delay, even ban development while a local government figures out how to stop or severely restrict development under a new "growing smart" statute is a deliberate effort to sidestep the ruling in *Monterey v. Del Monte Dunes* (Chapter 8, Model Statute 8-604). Monterey got into trouble because it had to continuously invent reasons not present in the code to stop development it didn't want. The Guidebook's moratorium statute now legitimizes delay while reasons for denial are worked out.

As for *Lorillard*, throughout its whole discussion of signage regulation (either on-premise or off-premise), the Guidebook does not once mention that the First Amendment protects the display of commercial speech on signs, nor does it caution local governments that great care must be taken when regulating such speech, particularly since violation of First Amendment rights may subject the local government to extensive monetary damages under 42 U.S.C., section 1983.

Thus, while the Legislative Guidebook patently recommends government censorship, noncompensatory takings, and exactions, dedications, and moratoriums almost at will, and a type of criminalized process for civil infractions or violations, it is at the same time inexcusably silent regarding the series of landmark federal cases that have made it clear that the U.S. Constitution – and thus, federal law, oversight and sometimes preemption – applies to and places constraints on local land use planning. For me, this is the most serious of all the Guidebook's errors and omissions. From *Gitlow v. New York* [268 U.S. 652 (1925)], to *Monterey v. Del Monte Dunes* (*supra*), *Palazzolo* (*supra*), and *Lorillard* (*supra*), American courts have crafted a complex set of judicial precedents that expand and protect civil rights, and thereby ensure the health, safety and welfare of our society as a whole. However, it is apparently the intent of APA to ignore the past 75 years of case law in one swift stroke.

### **The High Cost of Legislative Guidebook Policies and Principles on our Consumer Based Economy**

The Legislative Guidebook simplistically asserts that integrating planning through a true master plan and putting A.P.A. members in charge will result in a host of wonderful benefits. However, at no point in this document are the costs presented, even though a cost as well as a benefit analysis is always necessary when proposing regulations that will profoundly affect the ordinary course of human events.

Land use patterns are a reflection of our culture. Individuals and institutions interact with an intricate cultural mix constantly controlled by legal mandates. Hence, land use planning in the United States is, or should be, responsive to our pluralistic, consumer-oriented and mobile society, which is the most productive society in the world. This elaborate interactive model of decision making is the only reliable method for modifying our society's land use guidelines. Responsible land use planning is a complex process that has, over the years and in concert with other responsible social and economic programs, fostered development of a live-together/work-together society that cannot be rivaled. Part of this achievement is reflected in the fact that we have the most sustainable and livable retail and housing environment in the world. No other country has it.

The Legislative Guidebook seems intent upon wiping away the incredible changes in lifestyle that have occurred over the last century. One such change is the decline of the traditional stand alone, central business district department store in terms of retail dollars generated. Consumers have increasingly turned away from these forms of retailing as inconvenient and time consuming. Malls, on the other hand, have advanced by bringing many different shops together for a one-stop shopping trip, combined with entertainment and a stimulating visual experience. Is our society saving or losing money with today's shopping patterns? The APA discounts the cost of delays or loss of convenient retailing that takes advantage of economies of scale. But the inefficiencies that APA seeks to build into the system exact a considerable cost. In Europe and Japan those inefficiencies manifest themselves in a 15% to 50% higher retail cost. In the United States, retail efficiencies have dramatically increased the standard of living across the board.

In addition to certain economic impacts, there may be an enormous cost involved in building the infrastructure needed to support the dense development called for in the document. We have experienced this problem in Oregon, where whole neighborhoods have rebelled over zoning density increases in areas where streets were too narrow, sidewalks and water management systems nonexistent, and sewer capacity, public safety, parks and schools inadequate to handle the increased population. In Portland, the "Smart Growth" philosophy, which ignores consumer preferences entirely, has resulted in misallocation of public resources on a grand scale. For example, as much as 70% of transportation dollars available in the city have been spent on a public transit system that serves 3% of the population, while congested city streets remain in disrepair.

This sort of outcome means that the benefit cost analysis, particularly where certain codes are concerned, will not be able to stand up in court. Because the Legislative Guidebook ignores Congress and the federal courts on land use planning, encourages violation of federal law, ignores federal regulations that demand compensation for

takings, and introduces extremely serious questions about the 14<sup>th</sup> Amendment guarantees of due process and equal treatment, municipalities that implement its suggestions will face very high legal costs when challenged in court for violating people's civil rights. All this adds an additional cost – litigation expenses municipalities will be forced to pay when their codes get turned over. And as Americans become more and more fed up with people interfering with their civil rights, you can anticipate more lawsuits. Clearly, American lawyers have demonstrated a willingness to go that direction, and if punitives are added to cases brought and won under Title 42, USC section 1983, I think the ensuing litigation may rival that of the asbestos trials—the only difference being that the defendants will be local governments and not large corporations.

For an example close to home, after Tigard was forced to pay the Dolans \$1.5 million for a bike path the City could have purchased initially for \$14,000, but tried to “take” instead, shortly thereafter the City of Eugene, Oregon was forced to pay a settlement to Plaintiff Michael Kelley in the approximate amount of \$4 million for a similar uncompensated regulatory “takings” in violation of the Constitution. Following the Kelley case, Plaintiff Joe Willis filed a class action suit against the City of Eugene on behalf of the many other people who suffered from similar “takings;” and the City of Tigard is facing a new challenge, *Rogers Machinery v. City of Tigard*.

### **The A.P.A. Agenda: Control of Growth to Achieve No Growth**

The APA, like all trade associations, has as its purpose to advance the interests of its members: in other words, where you sit is where you stand. You will hear much argument that this document represents good land use planning. But the Guidebook has very little to do with land use planning, and a great deal to do with employing and empowering planners.

If the codes proposed in this document are implemented, the result will be a seizure of American real estate assets, if you will, putting them into the hands of an elite bureaucracy. This bureaucracy will have private attorney general rights, and in the extreme case be able to prosecute you and send you to jail for violating a zoning ordinance.

Land use planning in Oregon is extolled in various places in the Legislative Guidebook, but the actual story of Oregon is not told there. Let me tell you about the response of Oregonians to Smart Growth.

- When the City of Milwaukie decided to follow Smart Growth, the entire City Council was recalled. The citizens simply rejected it.
- As Portland has attempted to implement Smart Growth one area at a time, sector after sector of the city has rebelled and in some cases forced a complete overhaul of the City's plans in struggles that have lasted for years and cost the City millions of dollars.

- In Hillsboro, a mixed use transit-oriented development has sat unfinished – a huge, empty metal skeleton – for two years because no financing can be found to complete the project, despite large taxpayer investments in it.
- Small towns on the outskirts of the Portland metropolitan area have exploded in size because families can no longer afford the high housing costs inside the city’s tightly restricted urban growth boundary and are fleeing to the suburbs. Nearby Sherwood has seen a fivefold increase in population in a handful of years, and in February actually put its foot down on any more growth until it can figure out how to provide infrastructure for all the new people.
- The Portland Public School District, which is funded on a per-student basis, is seeing decreasing enrollment as families move to the suburbs, leaving the district in serious financial trouble.
- In December 2001, the Oregon Supreme Court concluded that property taxes in Portland diverted from other government uses and dedicated to urban renewal projects were collected in violation of Oregon’s tax limitation law. Failing a reversal, pursuant to a request for reconsideration by Portland, its county (Multnomah) and the Oregon Department of Revenue, the potential refund to property owners may be as high as \$30 million. The urban renewal projects that were funded by these tax diversions were for the most part “Smart Growth” programs, including plans to construct an interstate light-rail line (connecting Vancouver WA with downtown Portland) at a cost of \$35 million, although public support for such construction was tepid at best.
- After the Portland Development Commission and the Association for Portland Progress launched a study in December 2001 to come up with ways to strengthen and attract retail businesses in the city’s downtown Transit Mall, consultants have just recommended reconstruction of the Mall to reinstate curbside parking. This would involve narrowing sidewalks from 30 feet to less than 12 feet in order to revive stagnant and in some cases failing businesses within the Mall proper. Portland architect George Crandall, who presented the proposal said, “It’s very difficult for businesses to be healthy, if there isn’t some opportunity for parking on the streets they face.” The Transit Mall, constructed in 1978, reflects “Smart Growth” policies that encourage public transportation and expansive pedestrian sidewalks at the expense of automobile traffic. Today, even the city realizes that something must be done to shore up the downtown retail climate, and the proposal is now headed for full public airing. (See Exhibit 7—article in the 02/28/02 issue of *The Oregonian*. Also referenced in the article is the rejection by voters of an extension of light-rail in the Mall area.)

The infringement on Oregonians’ constitutional rights under Smart Growth has become so common, that in 2000, Oregonians passed Ballot Measure 7, requiring all state and local governments to pay just compensation when government actions reduced the value of private property. Currently the measure is under review by the state Supreme Court on technical grounds. Given the activist history of the Court, it will undoubtedly find some reason why the measure violates the law. Metro, Portland’s regional planning agency, also finds Measure 7 unpalatable. Soon after its enactment, Metro director, Mike Burton, urged in a speech to the Portland City Club (2/16/2001) that an amendment to the

Oregon Constitution was necessary to assure that land-use planners could regulate all land uses without fear that those begin regulated could demand compensation. Planning should be a constitutional right, says Burton, because "uncoordinated land use threatens orderly development, the environment and the welfare of the people."

Despite the discomfiture of Oregon's planning community with Measure 7, lawmakers have been working on enactment of revised versions of the measure. It is my belief that, sooner or later, the state and its local governments may well find themselves in the position of having to pay just compensation for the diminution in land values created by Smart Growth legislation.

In Exhibit 6, the unfortunate impacts of "Growing Smart" programs in Oregon are further outlined in a letter from the counsel for the Associated Equipment Distributors trade organization.

The failure of Smart Growth in Oregon does not stop at the artificial urban growth boundary encapsulating Portland's metropolitan area. In the years since Governor Tom McCall implemented statewide planning, dramatically limiting private property rights in order to preserve farm and forest land, productive farm land has actually decreased, both in terms of significance and actual size. Under Smart Grown policies, farmers have not been able to change their practices and crops to take advantage of world markets and changing consumer tastes, and many have lost the ability to use their land altogether. Forest industries have been hit extremely hard, and reductions in logging have decimated the economies of entire towns. The state tax and land use policies have kept industries out of Oregon to the point where Oregon is suffering from an 8% unemployment rate at a time when the rest of the nation is panicked over an unemployment rate of 4-5%.

Given the obvious adverse impact of Smart Growth programs and policies, one has to wonder why Smart Growth proponents push onward. To understand this, one must analyze their underlying motives. This is not too difficult if you are an Oregonian. The motives, in Oregon, are grounded not in smart growth, but in no growth. This mindset traces its roots to Oregon Governor Tom McCall. Governor McCall made national headlines in 1971 after telling a CBS News interviewer what later became the unofficial state motto: "Come and visit us again and again. This is a state of excitement. But, for heaven's sake, don't come here to live" (often shortened to the simple statement, "please visit, but don't stay"). Twenty-seven years later, this sentiment was echoed by Oregon's Governor John Kitzhaber when he told *The Oregonian*, "If I had the power, I'd turn off the spigot and keep Oregon as it is today."

Thus, the Oregon model is intended to and does limit growth, regardless of consumer preferences or citizens' desires. For example, Metro recently began advocating initiatives that are designed to stop regional government spending on highway and other built-environment construction. Its stated reason: Such initiatives are necessary to stop "sprawl." Its real reason: Such initiatives are necessary to stop growth. These no-growth initiatives advance earlier efforts by Metro Director, Mike Burton, to require all residents and businesses in the Portland area to pay a "transportation utility fee." Such a fee, according to Mr. Burton, "recognizes that transportation is truly a public utility like

water, sewer, telephone and electricity." The difference, of course, is that people pay for the water, sewer, telephone, and electricity they actually use, while Metro wants the transportation fees for light-rail lines that few use and that have been repeatedly rejected by voters.

Measure 7 is a direct result of a grassroots rebellion against the excesses of Smart Growth policies as practiced in Oregon. I predict that within two years, possibly less, Oregon will no longer be the poster child of "Smart Growth" truths; instead, it will be the poster child of "Smart Growth" fictions.

And Oregon is not the only state adversely impacted by implementation of Smart Growth policies and programs. Exhibit 8 discloses the concern of many members of the House of Representatives of the state of Washington. These concerns echo those of a majority of Oregonians: 1) increased congestion in urban areas, 2) increased housing costs in urban areas, 3) decreased economic development in rural area, and 4) an ever increasing intrusion by state and local governments into the everyday lives of ordinary citizens seeking to use and enjoy their property.

Several Congressional members have expressed their grave concerns over the Legislative Guidebook's apparent focus on avoiding the "just compensation" requirements of the Fifth Amendment. The adverse impact of the proposed regulations on small businesses and the lack of broad-based participation in the development of the Guidebook are also mentioned as areas of concern. (Please see Exhibit 9—a letter to Secretary Mel Martinez signed by 21 Congressmen.)

### **Solution**

The costs to the American public if the policies advocated in the Legislative Guidebook are implemented will be enormous, in terms of economic decline, litigation, and impact on civil rights. Further, many key stakeholders were left out of the process, and the document has been carefully ideologically crafted in such a way that no professional or academic authority who disagreed with it, and/or even stated a different viewpoint, was cited.

To correct the bias and redress the imbalance evident in the Legislative Guidebook, I believe it essential that further funding be enjoined and the Community Character Act be tabled until there has been an opportunity for additional public hearings at which opposing viewpoints and concerns may be presented for discussion and inclusion in the final product. I urge this Committee to take such action before state and local governments begin to believe that the silence of Congress means the blessing of Congress.

If the fast track the project is now on is not blocked, literally millions of dollars in actual costs may be inflicted on the American public at a time when we can ill afford it.

Respectfully submitted by:

R. James Claus, Ph.D.

(A *Vitae* is appended.)

## APPENDIX I

Following is a brief summary of constitutional infirmities of the Guidebook.

The Guidebook is a collection of model statutes designed to completely overhaul existing land use planning laws, replacing local control over economic and land use planning with federally crafted and state mandated standards. The Guidebook represents an effort to impose upon all 50 states land use regulations developed at the federal level. Under the Guidebook,

- Model statutes are presented for states to adopt - these model statutes often direct state action. For example, model statute 9-201 states that the state Department of Transportation shall adopt and implement a transportation demand management program. The model statute then provides specific details of what shall be mandated under such a program. By adopting the model statutes, a state is subjecting itself to the mandates and policies of the federal government.
- Uniform national standards have been devised that include technical specifications even for such traditionally local issues as parking and landscaping. (8-101)
- The state planning agency must coordinate state programs with the federal government. (4-102(2))
- The practices of a small minority of states are recommended for adoption by all states - for example, the Guidebook recommends and authorizes amortization of non-conforming uses while currently only eight states authorize even a limited form of what the Guidebook recommends. (8-502)

### Expansion of regulatory power

The regulatory power of state governments over local governments, as well as the regulatory power of local governments over individuals and businesses, is greatly expanded. Model statutes, drafted to micro-manage and control small businesses, developers and individual homeowners, have the potential to impose serious financial hardships. Under the Guidebook,

- No local comprehensive plan or significant amendment thereto can be adopted by a local government unless it has been reviewed by the state. (7-402.2)
- Model statutes confer broad regulatory power in "local governments" - local governments being broadly defined as "any county, municipality, village, town, township, borough, city or other general purpose political subdivision." (3-101) This means, for example, that New York County, New York City and the Borough of Manhattan could all regulate land use in Times Square.
- Additional layers of bureaucracy are created - for example, allowing local control of wetlands in addition to the state and federal controls. (9-101(2))

- A single state planning agency is created and has the responsibility for creating a comprehensive plan addressing the economic, social and physical development of every community in a state. (4-102)
- A State Futures Commission is created in order to formulate a "Strategic Futures Plan" to present to the state legislature - a discussion of and recommendations concerning economic, demographic, sociological, educational, technological and related issues affecting the state and each local community. (4-201(7))
- State agencies are given approval authority over local government regulatory plans - this could violate state constitutions, like Georgia's, that give zoning authority directly to counties and municipalities. (7-402.2)
- State legislatures must require local governments to draft ordinances to mandate that virtually all employers adopt and implement a commute trip reduction program which must include, among other things, designation of a transportation coordinator, annual reporting to local authorities and implementation of transportation measures, such as providing subsidies for transit fares and permitting the use of the employer's vehicles for carpooling. (9-201)
- Local governments can to require a site plan - an often expensive, detailed scaled drawing depicting development or use - prior to approval of any and all development permits. (8-302(1))
- Local governments are encouraged to adopt zoning ordinances that promote the use of transfers and purchases of development rights, with the goal of frustrating efficient private growth. (p. 9-56 - 57; p. 9-64)

#### Unconstitutionality of Guidebook policies and model statutes

Many of the model statutes are constitutionally questionable - indeed, the Guidebook offers several warnings of possible constitutional challenges and offers tips on drafting model statutes in order to skirt potential litigation. (e.g., p. 8-178) The following are just some examples of the Guidebook's trampling of constitutional protections.

#### First Amendment:

- Local governments are given sweeping power to regulate individual businesses. Among other powers, model statutes expressly authorize local governments to regulate the "location, period of display, size, height, spacing, movement and aesthetic features of signs, including the locations at which signs may and may not be placed." (8-201(2)(h)) This allows local governments virtually unlimited control over the ability of a businessperson to advertise in his or her place of business. The local government has the ability to control even the content of the sign.

- A business can be found criminally liable for violation of an ordinance regulating the aesthetic content of its sign. (11-302; 8-201(3)(m))

#### Fourth Amendment:

- Administrative warrants can be issued to search private property if the search is consistent with a valid administrative scheme, such as housing safety - probable cause is not required. Inspection warrants issued pursuant to an administrative scheme can be easier to get than criminal search warrants. (11-104(4); see also *Camara v. Municipal Court*, 387 U.S. 523 (1987) and *See v. City of Seattle*, 387 U.S. 541 (1987))
- Local governments are authorized to obtain inspection warrants for suspected land violations without first notifying the owner of the property that the property is the subject of an investigation. (11-101(4) - (7))
- Local governments may obtain an inspection warrant based upon any allegation that someone is in violation of land regulations - such an allegation may be made by anyone, such as neighbors, nearby businesses or other "interested citizens." (11-101(6))
- Local officials and police are exempted from common law and statutory trespass when they are on owner's property to inspect possible land use violations. Property owners lose the right to exclude others from their property. (11-101(5))
- Inspection warrants can be sought for any land use violation - local officials could rezone high crime residential areas enabling code enforcement officers (accompanied by the police) to search every building in the rezoned area for suspected violations. (11-101(4))
- While the local police are not authorized to participate per se in the inspection of property for land use violations, the model statute does allow them to accompany local code enforcement personnel and enter and inspect the property without such entrance into the property being considered a search by the police. (11-101(5)) This could allow the police to surreptitiously gather evidence for possible criminal charges against a property owner.

#### Fifth Amendment:

- The use of moratoria is encouraged - providing local governments with a tool to ban development for a specified period of time, depriving property owners of the right to develop their property. (p. 8-183) However, moratoria are not permitted in communities adopting a "traditional neighborhood" smart growth plan. (p. 8-184)
- There is no meaningful time limit for moratoria when the local government still perceives that a need for moratoria persists. (8-604(8)(b))
- The designation of any area as a "Design Review District," is allowed - these areas are

then subject to mandated interior and exterior standards of design. (9-301)

- A "Certificate of Appropriateness" is required before a business owner in a Design Review District can make any changes to the interior or exterior of his or her business - a process involving layers of bureaucracy and subject to the personal opinions of government officials on design, taste and appropriateness. (9-301(7))
- Local governments are empowered to designate undeveloped private land as an Historic Landmark that has archeological or cultural interest and require a Certificate of Appropriateness before the land can be developed. (9-301(1)(g))
- Local governments can define any "lands and/or water bodies" that "provide protection to or habitat for natural resources, living or non-living" as Critical and Sensitive Areas and can regulate and prohibit land use in these areas without limitation. (9-101(3)(c); 9-101(5)(f); p. 9-9)
- The Guidebook authorizes zoning of land uses and structures within the local jurisdiction without regard for current uses. (8-201(3))
- Current subdivisions or resubdivisions of land that have not been approved by the local government pursuant to the Guidebook's recommendations are considered void. (8-301(4)(b)) Subdivision includes any land that is divided into two or more parcels for development or use. (8-101)
- Local governments are permitted to halt all profitable uses on a land without just compensation. (9-402(1)) The Guidebook authorizes compensating the owner for the "use" only, not for the value of the land. (9-402(5)(b))
- Local governments can prevent development or use of land by forcing the owner to accept development rights on another parcel of land (9-401). This violates the federal and state constitutions that demand that just compensation be paid in money. (p. 9-43)
- The Guidebook criminalizes and allows imprisonment for anyone who intentionally or knowingly violates any land development regulation, including, for example, the failure to conform to design standards set for a Design Review District or the failure to establish a commute trip reduction program. (11-302; p. 11-37)
- Local governments can demand dedications in exchange for the issuance of a building permit without proper justification. The model statute only requires that a dedication be in "reasonable proportion" to the demand for such improvements that are "reasonably attributed" to the proposed development. (8-601(4)) The Supreme Court, however, explicitly rejected such a reasonable relationship test, stating that, "[W]e do not adopt [the reasonable relationship test] as such . . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in

nature and extent to the impact of the proposed development." (*Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994))

- The Guidebook promotes the amortization of non-conforming uses, structures and signs over time. Essentially, the local government can pass an ordinance making certain current uses of property illegal - thus rendering the current uses "non-conforming" with new regulations. The local government then sets a timeframe for the phase-out or "amortization" of the non-conforming uses. (p. 8-109) This allows local governments to get rid of unwanted uses and/or property owners without having to provide any compensation. The Guidebook specifically names signs as easy targets for amortization (8-502(4)). Such amortization provisions violate several state constitutional and statutes. (p. 8-119)

Tenth Amendment:

- The model statutes in the Guidebook are directives for state action - for example, Section 4-203 states that the state planning office shall prepare a state comprehensive plan and directs the state to undertake supporting studies in 16 different areas in its preparation of its comprehensive plan. (4-203(3)) By adopting the model statutes, a state is subjecting itself to the mandates of the federal government.
- Uniform national standards hinder the ability of developers to work with local governments to plan and build developments. For example, even if a developer achieves local approval on a project, the developer will be subject to possibly prohibitive uniform national standards that are predetermined on the federal and state level, having little or no relevance in the developer's community. (8-101)

Fourteenth Amendment:

- The model statute on historic and design review districts provides for local governments to arbitrarily designate any area as a "Design Review Districts" and subject property owners in just those areas to mandatory standards on the design and aesthetics of the interior and exterior of their property. (9-301) This amounts to an intentional difference in treatment and a lack of rational basis for that different treatment.

## APPENDIX II

In a letter to Senator Chafee, the APA is telling the Senate, and by extension, the House, that 78% of persons participating in an APA-sponsored survey believe “it is important for the 107<sup>th</sup> Congress to help communities solve problems associated with urban growth.” Moreover, according to the APA letter, “three-quarters of voters also support providing incentives to help promote smart growth and improve planning.” In making these statements, the APA is relying on a survey conducted by Belden Russonello & Stewart of Washington, D.C., presumably at APA’s behest. A copy of this survey is attached as Exhibit 10.

Even a cursory review of this survey reveals it is “cooked” (leading questions that everyone would answer “correctly”; gross underrepresentation of minorities; overrepresentation in the high income and low income brackets; no disclosure of the costs of the policies labeled as “smart growth” in survey question 14), with the consequent “cooking” of the data in order to support APA’s predetermined outcome.

For example, the survey in no way supports the statement that “78% believe it is important for the 107<sup>th</sup> Congress to help communities solve problems associated with urban growth.” The survey does not even mention the 107<sup>th</sup> Congress. In fact, the only section that addresses federal government intervention is the one that asks, “how much confidence do you have in each of the following to make the best decision on land use issues affecting your area?” Those expressing “a great deal of” or “some” confidence in city government represented 61% of those surveyed. County government also received a “great deal-some” confidence level from 61% of the survey group, while state government did even better—62%. The entity receiving the most “confidence” votes was neighborhood associations and civic groups—67%. On the other hand, the federal government received only 46% of the “great deal-some” confidence choices. This figure is considerably less than the 78% claimed by the APA. In fact, 52% of those surveyed responded they had “not very much” (21%) or “very little” (31%) confidence in the federal government’s ability to make the best land use decisions.