Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws

James Poradek

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/1577

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Note

Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws

James Poradek*

In November 1993, more than two hundred angry residents descended on city hall in Maple Grove,1 a rapidly growing Minneapolis suburb.2 The crowd converged to protest the proposed townhouse development for low- to moderate-income residents in one of Maple Grove's affluent neighborhoods.3 The residents voiced fears that the new townhouse residents would imperil the community's safety.4 Faced with this emotional opposition, Maple Grove's city council tabled the project.5

Although after several months of intense pressure from several sources Maple Grove's city council finally voted to approve the townhouses,6 a newly released study7 showed that

* J.D. Candidate 1998, University of Minnesota Law School; B.A. 1988, Rutgers College. The author would like to thank Myron Orfield for his valuable insight.

1. Mike Kaszuba, Maple Grove Tables Low-Income Project After Angry Meeting, STAR TRIB. (Minneapolis), Nov. 18, 1993, at 1B.

2. At the time, Maple Grove was the fifth fastest growing municipality in the region. Mike Kaszuba, Maple Grove Low-Income Housing OK'd, STAR TRIB. (Minneapolis), Dec. 21, 1993, at 7B. Between 1970 and 1990 Maple Grove more than quadrupled from a population of 6,275 to 38,756. By 2010, the Metropolitan Council forecasts the city will have over 60,000 residents. METROPOLITAN COUNCIL, AMENDMENTS TO REGIONAL BLUEPRINT 75 (1996).

3. Kaszuba, supra note 1, at 1B.

4. Id. A resident police officer warned the council that such housing would attract "those people" from the region's central cities. Id.; see also Maple Grove: A Night Ruled by Fear and Prejudice, STAR TRIB. (Minneapolis), Nov. 21, 1993, at 34A [hereinafter Fear and Prejudice] (reporting that the opposition was "allegedly encouraged by a gaggle of Minneapolis cops" who persuaded residents that the development would bring the criminal element to Maple Grove).

5. Fear and Prejudice, supra note 4, at 34A.

6. Mike Kaszuba, Maple Grove Housing Project Approval, STAR TRIB. (Minneapolis), Mar. 12, 1994, at 1B. The local media condemned the uglier
the November rebellion was merely an example of Maple Grove's systematic resistance to affordable housing. In Maple Grove, a pattern of zoning and planning practices significantly raised the cost of residential development, which in turn increased housing prices and excluded low- to moderate-income families. The city's own administrator acknowledged that Maple Grove's affordable-housing performance was "embarrassing and pathetic." The resistance of suburban cities like Maple Grove to provide affordable housing is, however, more than embarrassing. Such practices create and exacerbate regional inequities—inequities for which all metropolitan residents must ultimately pay.

undercurrents flowing through this "night of fear and prejudice." Fear and Prejudice, supra note 4, at 34A. For a thorough examination of the controversy and the deep-seated hostility toward the inner city from which it arose, see Britt Robson, The Last Good Place to Live: Welcome to Maple Grove, Where They Defend the Middle-Class Dream by Any Means Necessary, CITY PAGES (Minneapolis), Mar. 8, 1994, at 8. Another factor influencing the city council was the governor's appointment of a task force to examine affordable housing in the metropolitan area. Steve Brandt, Metro Suburbs Lag in Creating Affordable Housing, Study Says, STAR TRIB. (Minneapolis), Apr. 29, 1994, at 5B.


8. Id. at 52-54. The authors identified a number of official standards that made building and buying homes in Maple Grove prohibitively expensive for many. Maple Grove's comprehensive plan heavily favored single-family detached housing. Id. The city's minimum lot size was 25% higher than that recommended by the Metropolitan Council. Id. at 18. Furthermore, despite the Council's discouragement of minimum floor area standards, Maple Grove not only employed them, but required one of the highest standards for multifamily dwellings in the region. Id. at 53.

9. Id. at 52. The Maple Grove city council's approach to the townhouse project in the immediate aftermath of the November meeting shows how zoning can be used to exclude low-income residents without showing overt hostility. In December 1993, the city council voted to approve the project. Maple Grove: Doing, and Undoing, the Right Thing, STAR TRIB. (Minneapolis), Dec. 23, 1993, at 12A. However, the Metropolitan Council conditioned its approval on a number of requirements, including two-car garages and curbs, which threatened to defeat the financial feasibility of the development. Id. Although the council eventually relented, re-approving the project without the expensive conditions, low-income developments out of the public eye seem less likely to meet with so kind a fate. In 1989, Maple Grove ranked last among the suburban cities studied in the percentage of housing stock available to low-income families. LUKERMANN & KANE, supra note 7, at 16.

10. Brandt, supra note 6, at 5B.

11. See infra notes 57-60 and accompanying text (describing the costs exclusionary zoning and sprawl impose on society).
Minnesota's regional land planning system has earned "national acclaim"12 as a mechanism for preventing exactly this kind of regional imbalance. National policymakers were especially attracted by the fact that Minnesota's Metropolitan Land Planning Act13 gives the Metropolitan Council14 uniquely powerful tools to achieve fair and efficient growth throughout the Twin Cities region.15 Locally, however, the Council has been heavily criticized for its passivity.16 When Maple Grove requested that the Council increase the developable area inside the city's boundaries soon after the townhouse controversy,17 many observers saw a felicitous opportunity for the Council to finally draw the line.18 Not only did Maple Grove's zoning techniques flout explicit Council recommendations to distribute affordable housing across the region,19 the land-intensive nature of these techniques caused Maple Grove to hungrily consume buildable space.

Despite Maple Grove's well-publicized efforts to avoid affordable housing, the Council granted the city special dispensation to continue its rapid growth.20 To the added consterna-


13. For a full discussion of the Act's provisions, see infra Part II.C.

14. The Minnesota state legislature created the Council in 1967 as a regional planning body. See infra notes 82-84 and accompanying text (discussing the Council's genesis).

15. See Lassar, supra note 12, at 20 (describing the unique implementation and enforcement powers granted to the Metropolitan Council, making the Twin Cities the "envy" of other regional governing bodies).


17. Before the deal was struck, the majority of Maple Grove's undeveloped land lay outside the boundary for regional infrastructure, so that most new residential developments in the city would receive no metropolitan sewage. LUKERMANN & KANE, supra note 7, at 52.


19. For a summary of these practices, all of which conflicted with Council guidelines, see supra note 8. See also METROPOLITAN COUNCIL, REGIONAL BLUEPRINT 56-59 (1994) (summarizing the Council's agenda to increase housing diversity in the region). Ironically, the first "action step" proposed by the Council to increase affordable housing in the suburbs would favor regional infrastructure investments for those communities with a good housing track record. Id. at 66.

20. Maple Grove: Development Expansion Plan Approved; City Promises
tion of many, it did so without securing a firm commitment from Maple Grove to alter its exclusionary zoning practices.\textsuperscript{21} Maple Grove promised to increase its supply of affordable housing,\textsuperscript{22} but critics pointed out that the agreement proposed housing that was not truly affordable to the lowest income residents.\textsuperscript{23}

Urban sprawl has become a serious national problem.\textsuperscript{24} The early promise of Minnesota's system as a model for dealing with sprawl has remained largely unfulfilled. Instead, Minnesota has become a case study in how weak official enforcement can undermine even the best laid metropolitan plan. This Note proposes, therefore, that either the legislature or the courts establish a private right of action to help control sprawl. Part I traces the troubled history of land regulation in America. Part II examines state and regional comprehensive planning laws, focusing on Oregon and Minnesota. Part III analyzes the problems that persist in Minnesota and the weaknesses in the land planning system that cause them. Finally, Part IV demonstrates the benefits of a private right of action in the context of metropolitan sprawl control, and suggests how to adopt such a right of action in Minnesota.

\footnotesize {\textit{Affordable Housing}, STAR TRIB. (Minneapolis), Jan. 31, 1995, at 7B [hereinafter Expansion Approved]. The Council permitted Maple Grove to add over 1000 acres to the metropolitan sewer service area. Id. Furthermore, the Council budgeted tens of millions of dollars for a new sewer interceptor that would accommodate even more growth in Maple Grove and other nearby cities. \textit{Metro Council OKs Elm Creek Sewer Plan}, STAR TRIB. (Minneapolis), Dec. 17, 1994, at 2B.

\textsuperscript{21} Council Stumbles, supra note 18, at 16A. At the Council's public hearing about the agreement, over 200 people, many of low income, showed up to protest its terms. Mike Kaszuba, \textit{Met Council Chair's Affordable Housing Agenda Faces First Test}, STAR TRIB. (Minneapolis), Aug. 28, 1995, at 1B.

\textsuperscript{22} Expansion Approved, supra note 20, at 7B.

\textsuperscript{23} Kaszuba, supra note 2, at 7B. The agreement sets targets for rental and owner-occupied housing through the next 16 years, heavily emphasizing the latter: 630 new rental units affordable to a family earning over $25,000 a year, and 3,726 owner-occupied units affordable to a family earning over $41,000. Kaszuba, supra note 21, at 1B.

\textsuperscript{24} See, e.g., Timothy Egan, \textit{Becoming Los Angeles: Urban Sprawl Strains Western States}, N.Y. TIMES, Dec. 29, 1996, at A1 ("[Urban growth] was not supposed to be this way, this early."). One commentator argues that "unexpected growth-related dilemmas... threaten the long-run viability of American society, something the American public and most leaders have yet to realize." ANTHONY DOWNS, \textit{NEW VISIONS FOR METROPOLITAN AMERICA} 3 (1994). See generally JAMES HOWARD KUNSTLER, \textit{GEOGRAPHY OF NOWHERE} (1993) (observing the overwhelming cultural damage caused by urban sprawl in America).}
I. HISTORY OF LAND REGULATION

A. THE BIRTH OF GOVERNMENT REGULATION

Land regulation springs from a basic social tension: the use of private property frequently conflicts with the interests of those who do not own the property.\(^{25}\) Until the end of the nineteenth century, the government largely stayed out of these conflicts.\(^{26}\) Private citizens could obtain judicial relief by bringing a nuisance action\(^ {27}\) or by claiming a breach of restrictive covenant.\(^{28}\) Eventually, however, when populations of urban industrial centers rapidly concentrated, government efforts to control land began to develop. Initially, local governments narrowly asserted their police power through the mechanism of building ordinances.\(^ {29}\) After the First World War, zoning quickly became the dominant mode of municipal land control.\(^ {30}\) In 1926, the Department of Commerce promulgated the Standard State Zoning Enabling Act,\(^ {31}\) providing the model that guided almost every state legislature to delegate zoning power to local governmental entities.\(^ {32}\)

25. ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 1.02 (2d ed. 1976).
26. Id. § 3.03.
27. Id. Nuisances are uses of private property that are extremely incompatible with the surrounding land. Id.
28. Id. § 3.04. Such covenants restricted the owner of a parcel of land from using the land in certain ways. This device allowed developers to guarantee interested purchasers of property that neighboring land would not be put to undesirable use. Id.
29. Id. § 3.06.
32. ANDERSON, supra note 25, § 2.21. The Act derived its legal authority from the doctrine of local police power. Local governments could zone for “the purpose of promoting health, safety, morals, or the general welfare of the community.” SZEA, supra note 31, at 34. This emphasis on the local police power meant the delegation of zoning within each state to the most localized, rather than to the most expansive, governmental entity. ANDERSON, supra note 25, § 2.29. The success of the Act as a model for virtually every state effectively meant that each state zoning regime had been defined by a fragmentation of power. Id.
B. PROBLEMS WITH LOCAL LAND REGULATION

State zoning enabling acts empowered local governmental entities to shape development within their jurisdictions.\(^{33}\) As a model of land control, however, zoning inadequately addressed the new land-use problems that emerged after World War II, when both people and industry began migrating in vast numbers to the suburbs.\(^{34}\) The explosive post-war business and population growth posed logistical challenges that the insular land control approach of zoning simply could not meet.\(^{35}\) Because only local governments have the power to zone,\(^{36}\) attempts to address the larger problems of growth were fragmented and uncoordinated.\(^{37}\) Furthermore, to the extent that zoning influenced the geographical course of post-war suburbanization in America, it had a demonstrably detrimental effect on rational urban growth.\(^{38}\) By emphasizing low-density development\(^{39}\) and a wide separation of uses, suburban zoning


\(^{36}\) See supra note 32 (explaining how state enabling statutes delegate zoning to local governments under the auspices of local police power).

\(^{37}\) Freilich & Ragsdale, supra note 35, at 1013.


\(^{39}\) See Lawrence O. Houstoun, Jr., Market Trends Reveal Housing Choices for the 1980s, in LAND USE ISSUES OF THE 1980S 30, 30 (James H. Carr & Edward E. Duensing eds., 1983) (analyzing the changing housing preferences of Americans since the 1950s). Between 1950 and 1970, urban densities in America "dropped like a rock" from five persons per acre to two and a half. Id.
rejected schemes of compact, integrated development and encouraged sprawling development.\textsuperscript{40}

The effect of suburban expansion on infrastructure, taxes, and the environment became increasingly apparent in the 1960s and 1970s.\textsuperscript{41} High demand, low land costs, and the absence of developmental oversight by local governments encouraged developers to build at the periphery of cities.\textsuperscript{42} While the real estate market flourished, however, many of the costs of growth actually fell on the public sector. Private development quickly outpaced infrastructure, so that many suburban communities received inadequate water, sewage, and utility service.\textsuperscript{43} The scattered placement of homes, jobs, and schools made suburban residents dependent on the automobile, yet the new highways and ad hoc secondary roads could not handle the traffic created by the sprawling development.\textsuperscript{44} Moreover, diffusion of residential and industrial development caused mass transit to become an increasingly nonviable solution to the congestion problem.\textsuperscript{45} Rapid and thoughtless consumption of open space caused extensive damage to the natural environment.\textsuperscript{46} It also made the urban environment increasingly ugly.\textsuperscript{47} Finally, facing vast new

---

\textsuperscript{40} See BARNETT, supra note 38, at 47-48. Suburban zoning is in fact an “artifact,” projecting a “1920s real estate pattern,” designed for high-density urban environment, onto a completely different landscape than it was intended to regulate. \textit{Id.} When the lots are thousands of acres in size, lot-by-lot zoning is “the recipe for urban sprawl.” \textit{Id.} at 48.

\textsuperscript{41} \textit{Id.} at 34-42.

\textsuperscript{42} See Freilich & Ragsdale, supra note 35, at 1013 (calling for a “comprehensive approach,” including “sufficient regional power,” to implement changes necessary to correct the problems associated with suburban growth).

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} See American Planning Association, \textit{Solving Traffic Woes by Balancing Jobs and Housing}, in BALANCED GROWTH 42 (John DeGrove ed., 1991) (identifying the spatial mismatch between workplace and residence as the major cause of rush-hour congestion).

\textsuperscript{45} See DOWNS, supra note 24, at 8 (explaining the transportation problem).

\textsuperscript{46} Freilich & Ragsdale, supra note 35, at 1013. \textit{But cf.} BARNETT, supra note 38, at 47 (criticizing the delay between societal changes and corresponding changes in zoning). “It takes years of meticulous engineering and months of public hearings and approvals before a hillside can be bulldozed into a parking lot . . . .” \textit{Id.}

\textsuperscript{47} “We drive up and down the gruesome, tragic suburban boulevards of commerce, and we’re overwhelmed at the fantastic, awesome, stupefying ugliness of absolutely everything in sight.” James Howard Kunstler, \textit{Home from Nowhere}, ATLANTIC MONTHLY, Sept. 1996, at 43.
infrastructural needs, local governments imposed soaring property tax rates.\textsuperscript{48}

C. RESPONSE TO THE PROBLEMS—COMPREHENSIVE PLANNING

For many suburbanites, the quality-of-life problems that caused them to settle outside cities were now reoccurring in their new neighborhoods.\textsuperscript{49} For politicians at both the local and state level, the urban sprawl phenomenon became more than an infrastructural, fiscal, or environmental problem—it became a political problem.\textsuperscript{50} Confronted with inefficient, chaotic growth, many local governments developed comprehensive land-use plans.\textsuperscript{51} Previously, municipalities had largely confined their efforts to creating zoning codes, which simplistically connect use and land.\textsuperscript{52} In contrast, comprehensive plans anticipate a dynamic range of developmental possibilities.\textsuperscript{53} By integrating land-use control with other issues of governance, comprehensive planning provides an efficient and legal\textsuperscript{54} method for municipalities to coordinate their needs and resources.

Despite the advantages of comprehensive land planning, the planning power remained local, thereby curtailing the “compre-

\textsuperscript{48} Freilich & Ragsdale, supra note 35, at 1013.

\textsuperscript{49} See BARNETT, supra note 38, at 4-7 (describing nuisances residents experience as their suburbs become more urbanized); see also ARTHUR NAFTALIN, MAKING ONE COMMUNITY OUT OF MANY 14-16 (1986) (discussing how these concerns mounted in the Twin Cities area during the 1960s).

\textsuperscript{50} See NAFTALIN, supra note 49, at 17-18 (describing various political issues and legislative responses connected with urban sprawl).

\textsuperscript{51} Perhaps most notably, California passed a law requiring each local government to adopt a comprehensive plan. CAL. GOV'T CODE § 65300 (West 1986).

\textsuperscript{52} SZEA provided that zoning must be “in accordance with a comprehensive plan,” SZEA, supra note 31, at 34, but most local governments and state courts circumvented this requirement. See, e.g., Kozesnik v. Township of Montgomery, 131 A.2d 1, 8 (N.J. 1957) (noting that “[a] plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by statute”).

\textsuperscript{53} See Charles M. Haar, The Master Plan: An Impermanent Constitution, 20 LAW & CONTEMP. PROBS. 353, 354-61 (1955) (outlining the concepts behind comprehensive plans). In these plans, municipalities may consider local land use as it relates to issues such as public finance, public works capacity, economic development, and population change. Id.

\textsuperscript{54} See, e.g., Golden v. Planning Bd. of the Town of Ramapo, 285 N.E.2d 291, 304-05 (N.Y. 1972) (upholding a town’s comprehensive plan to coordinate development with the expansion of infrastructure capacity).
hensiveness" of land-use control. Familiar structural problems remained. The jurisdictional limitations of the political body that implemented each plan limited the reach of the plan itself. Comprehensive plans expanded a municipality's local land-control powers, ultimately giving local governments greater power to exclude undesirable classes of people or activities. Such efforts are undeniably rational from the perspective of the regulating municipality, but when a municipality successfully shifts costs, other communities in the region almost always bear them. As each municipality took the same "beggar-thy-neighbor" approach, significant costs accumulated for which no one took responsibility.

55. See Houstoun, supra note 39, at 35 (pointing out the logistical difficulties of coordinating planning in a country with 80,000 governmental entities).

56. See supra text accompanying note 37 (noting the inevitable tension between the land control efforts of neighboring municipalities).

57. See RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 3 (1966) (arguing that local planning provides a tool for "protecting the homogenous, single family suburb from the city"). In the early 1990s, HUD Secretary Jack Kemp commissioned a study to examine official barriers to affordable housing in America. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 1 (1991). The study found a number of land-use mechanisms that turn suburban communities into "homogenous enclaves." Id. at 4-5. Comprehensive plans often contain strict growth control, thereby limiting the number of outsiders who can enter the community. Id. at 3-4. Factors including large lot sizes, single-family home requirements, and excessive development fees effectively screen out all but the privileged. Id. at 4-7.

58. See DOWNS, supra note 24, at 3-4 (describing the economic reasons local jurisdictions strive to control the pace and direction of their growth).

59. See id. at 41 (stating that a successful attempt to limit growth in one suburb merely shifts the problem to another). The result has been a modern "tragedy of the commons." See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1244 (1968) (declaring that "[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons").

60. See DOWNS, supra note 24, at 41. Of course, these "costs" involve more than just dollar amounts. A recent Twin Cities study shows how remarkably inefficient public investment in the developing suburbs is compared to public investment in the core cities and inner-ring suburbs. See Lyle Wray, Sprawl Steals More Than Urban Residents; It Undermines Business and Regional Health, FEDGAZETTE, Jan. 1996, at 14, 15 (declaring that unrestrained growth and investment in suburban areas are only wise business decisions "in a very narrow, short-term context"). Investment in the private-sector of developed cities returned two-and-a-half times more than investment in the outer-ring suburbs. Id.
II. STATE AND REGIONAL COMPREHENSIVE LAND-USE PLANS—INTEGRATION OF CONTROL

A. THE QUIET REVOLUTION

Perhaps encouraged by federal efforts to promote regional planning, many states enacted statutes that shifted comprehensive land planning responsibility from local government to state or regional entities. This attempt to integrate land control power at a broad jurisdictional level, known as the “Quiet Revolution,” took place nationally in two waves during the 1970s and 1980s. Generally, the state statutes of the Quiet Revolution's most direct endorsement of regional urban planning came when it delegated review of certain federal grant applications to state-derived regional agencies. See Lassar, supra note 12, at 23 (noting that the 1976 Metropolitan Significance Act granted to the Met Council the power to “delay approval of projects deemed to be of metropolitan significance”).


63. See FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 1 (1972) (announcing the beginning of the end of “the feudal system” under which parochial governments control land development).

64. See DeGrove & Metzger, supra note 62, at 5 (describing differences in the growth management systems in the 1970s as compared to those of the 1980s and 1990s). In fact, when massive development threatened Hawaii’s island beauty, Hawaii pioneered the state land-use system in 1961, a decade before other “first wave” regimes. See JOHN DEGROVE, LAND, GROWTH, AND POLITICS 9-11 (1984). Vermont, Florida, Colorado, and Oregon followed suit in the early 1970s. See generally id. (documenting the genesis and implementation of these and other statewide plans). These first-wave states, each endowed with natural resources, shared a common concern: the deleterious impact of growth on the environment. See John DeGrove, Growth Management and Governance, in UNDERSTANDING GROWTH MANAGEMENT: CRITICAL ISSUES AND A RESEARCH AGENDA 22, 23 (David J. Brower et al. eds., 1989).

The second wave began in the mid-1980s. A number of legislatures started to enact or study statewide plans. See generally JOHN DEGROVE, THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES (1992) (analyzing this new generation of state land planning schemes). Behind this new generation of plans lay broader “quality of life” concerns including issues of environment, infrastructure, and particularly transportation and affordable housing. DeGrove, Growth Management and Governance, in UNDERSTANDING GROWTH MANAGEMENT: CRITICAL ISSUES AND A RESEARCH AGENDA, supra, at 32.

Revolution create new agencies authorized to develop state-wide or regional planning policies. These agencies have the power to implement planning policies, usually by reviewing local plans for their conformity to the state or regional policies. Different statutory regimes provide the agencies with varying enforcement mechanisms to use against recalcitrant municipalities, but all allow court action.

B. OREGON'S PROGRAM—A MODEL OF SUCCESS

Oregon's comprehensive land-use planning program has been credited with more success than any other's, causing passed in the aftermath of the landmark Mount Laurel cases, in which the New Jersey Supreme Court invalidated municipal zoning standards that excluded affordable housing. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 734 (N.J. 1975) (Mt. Laurel I); Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983) (Mt. Laurel II). For an examination of these decisions and their impact on state growth management, see Peter A. Buchsbaum, No Wrong Without Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning, in GROWTH MANAGEMENT: KEEPING ON TARGET? 193, 193-213 (Douglas R. Porter ed., 1986). In Mount Laurel II, the court tried to fix the official evasion of Mt. Laurel I by creating a “builder’s remedy,” whereby a builder who successfully challenges a municipality's zoning ordinance obtains the right to build her project. 456 A.2d at 452-53. This remedy gives private developers “the whip hand” in dealing with municipalities not complying with the inclusionary zoning standards developed in Mt. Laurel II. Buchsbaum, supra, at 205.

65. See DeGrove & Metzger, supra note 62, at 9-15 (outlining the second wave of state comprehensive planning programs).
66. See id. at 10-11 (describing the purpose for a state’s review agency).
67. See id. at 7-15 (illustrating different state approaches).
68. See Robert L. Liberty, Oregon’s Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States, 22 ENVTL. L. REP. 10,367, 10,368-73 (1992) (giving an overview of Oregon’s land-use planning system). The Land Conservation and Development Commission (LCDC) oversees the program. OR. REV. STAT. ANN. § 197.030 (Butterworth 1991 & Supp. 1996). The LCDC adopted 14 statewide planning goals in 1974 after considering a legislatively derived list of topics and conducting open hearings around the state. Liberty, supra, at 10,369. “Citizen involvement” became the first goal, followed by specific environmental and urban land-use goals. Id. at 10,369 n.17. All cities and counties in Oregon were then required to formulate comprehensive land-use plans consistent with the goals. § 197.175. After the local governments adopted comprehensive plans, they submitted them to the LCDC for “acknowledgment” and then the LCDC approved or denied their implementation. §§ 197.040(2)(d), .251(1)(2), .251(4)-(6).

69. See 5 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW § 160.16 (1985) (calling the Oregon planning law “by far the most advanced in the country”); see also DeGrove & Metzger, supra note 62, at 7 (praising Oregon’s success at controlling urban sprawl).
many of the second-wave states to model their plans after it. Its success springs primarily from procedural mechanisms that allow private citizens expansive opportunity to appeal state and local land-use planning decisions in Oregon courts. In 1973, the same year the initial planning statute was introduced, the Oregon Supreme Court handed down a landmark decision, *Fasano v. Board of County Commissioners of Washington County*, which by itself changed the legal landscape in Oregon. Finding that comprehensive plans supersede zoning criteria, the *Fasano* court held that zoning decisions are quasi-judicial in nature, and therefore no longer entitled to presumptive validity. *Fasano* shifted the evidentiary burden in land-use hearings and appeals, requiring the local entity to justify its land-use decisions against its comprehensive plan. Furthermore, *Fasano* established land-use hearing requirements to facilitate public participation and appellate review.

70. See DeGrove & Metzger, *supra* note 62, at 6-10 (describing Oregon's pioneering approaches, which were later used by other states). Minnesota has also looked toward Oregon when contemplating a statewide land planning statute. *Sprawl Control: Oregon Law Might Work for Minnesota Too*, STAR TRIB. (Minneapolis), Mar. 5, 1994, at 14A.

71. See Liberty, *supra* note 68, at 10,388 (suggesting, based on Oregon's experience, that "private enforcement may be the only effective way to enforce land use laws").

72. 507 P.2d 23 (Or. 1973) (en banc).

73. MITCH ROHSE, LAND-USE PLANNING IN OREGON: A NO-NONSENSER HANDBOOK IN PLAIN ENGLISH 100 (1987).

74. See id. at 99 (explaining *Fasano's* holding that zone changes must conform to comprehensive plans). The court made this determination through its construction of Oregon's zoning enabling statute. *Fasano*, 507 P.2d at 27-28.

75. *Fasano*, 507 P.2d at 28. The majority of state courts consider zoning decisions to be legislative and use a substantive due process analysis when reviewing zoning decisions. Under this rational basis standard, these courts rarely invalidate zoning decisions. See Edward J. Sullivan, *The Legal Evolution of the Oregon Planning System*, in *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION* 49, 51 (Carl Abbott et al. eds., 1994); see infra note 105 (summarizing Minnesota's zoning doctrine, which follows the majority of states).

76. *Fasano*, 507 P.2d at 28. Local comprehensive plans in Oregon helped to ensure that established local planning policies were no longer vulnerable to radical deviations in ad hoc zoning proceedings. Sullivan, *supra* note 75, at 51.

77. *Fasano*, 507 P.2d at 30. The court stated that parties are entitled to trial-like procedures, which serve to preserve the record for appeal. *Id.* Because of the subsequent increase in private access to the courts, Oregon's legislature created a specialized land court in 1979. The Land Use Board of Appeals (LUBA) reviews all city, county, or regional land-use decisions that have
Oregon courts have also broadly construed standing, so that any party who participated in the local proceeding—including concerned citizens, developers, and nonprofit organizations—may appeal an adverse decision. In Oregon, private parties can now use the courts to enforce the sweeping sprawl control policy developed by the state legislature. Practically speaking, the procedural features of Oregon’s land-use planning law, derived from statute and case law, have added a citizen’s suit provision to the state’s growth management program.

C. MINNESOTA’S PROGRAM

Structurally, Minnesota’s regional land-use program strongly resembles Oregon’s program. In 1967, Minnesota’s legislature created the Metropolitan Council to administer “a com-
A constellation of problems related to sprawling, low-density growth motivated the legislature to act. The statute required the Council to prepare and adopt a Metropolitan Development Guide for the seven-county Twin Cities area. During several years of studies and public hearings the Council developed the Guide, which became a collection of policy statements, goals, and maps addressing the present and projected needs of the region.

In 1976, the state legislature delegated to the Council the power to implement its plans in the Metropolitan Land Planning Act, which the media termed a "controversial antisprawl bill." The Act pronounced the legislature's findings that the fate of each community is intertwined with others in the region, and that rapid regional growth poses a number of dangers which must be addressed in a coordinated manner.

82. MINN. STAT. § 473.145 (1996).
83. See NAFTALIN, supra note 49, at 15-16. "The flat land radiating from the Twin Cities invited low-density development.... Most builders, homeowners and municipal officials were caught up in the expansion fever and seemed oblivious to the problems of rapid and uncoordinated development." Id. Simultaneously, the "suburban explosion" and its emphasis on the automobile taxed the highway system and threatened to doom mass transit. Id.
84. MINN. STAT. § 473.145.
86. MINN. STAT. § 473.145.
87. 1976 Minn. Laws ch. 127 (now codified at MINN. STAT. §§ 473.175, 473.851 (1996)).
89. The findings portion of the preamble declares that "the local governmental units within the metropolitan area are interdependent." MINN. STAT. § 473.851 (1996). It continues:

Since problems of urbanization and development transcend local governmental boundaries, there is need for the adoption of coordinated plans, programs and controls by all local governmental units... to protect the health, safety and welfare of the residents of the metropolitan area and to ensure coordinated, orderly and economic development.

Id.

Representative Berg, one of the bill's sponsors, introduced it on the House floor with the observation that "we are eating up land at a... tremendous rate." Audio Tape of the Minnesota Legislature's House Debate on H.F. 1530 (Feb. 3, 1976) (on file at Minnesota History Center) [hereinafter House De-
then stated two broad purposes. One stressed a commanding role for the Council to "establish requirements and procedures to accomplish comprehensive local planning with land-use controls consistent with planned, orderly and staged development."90 The second emphasized cooperation: "to provide assistance to local governmental units...for the preparation of plans and controls."91

The Act mandates that all local governments in the metropolitan area provide comprehensive plans92 within the framework of "metropolitan system plans" that the Council derived from the Metropolitan Development Guide.93 Like Oregon's state planning agency, the Council then must review various local plans to measure their compatibility with the Council's metropolitan system plan.94 If the local plan has a "substantial impact on or contain[s] a substantial departure from" the system plan,95 the Council "may require a local governmental unit" to make appropriate modifications.96

If the Council approves the local plan, then the municipality must adopt zoning controls consistent with the comprehensive plan.97 This provision is the result of much post-enactment wrangling. The requirement that local zoning controls conform with comprehensive plans reflected the original intent of the Act to require that local governments use zoning to carry out the policies of their comprehensive plans.98 In 1985, however, the legislature amended the Act to provide that zoning ordinances should supersede comprehensive plans when the two are in conflict.99 Finally, in 1995, the legislature reversed this priority: "If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be

---

90. MINN. STAT. § 473.851.
91. Id.
92. Id. Comprehensive plans must include, among other things, a land-use plan and a public-facilities plan. Id. § 473.859.
93. Id. § 473.851.
94. Id. § 473.175.
95. Id. (emphasis added).
96. Id.
97. Id. § 473.858.
98. METROPOLITAN COUNCIL, supra note 19, at 74.
brought into conformance with the plan by local government units . . . ."100

Unlike the Oregon program, the Council's implementation of the Minnesota program never faced a legal challenge.101 Moreover, the Act has not played a significant role in private land-use litigation.102 The absence of such private challenges is no mystery. The Act only vaguely provides for any party other than the Council or local governmental entities to participate in the process.103 Until now, Minnesota has simply lacked the official encouragement104 and favorable case law105 that makes private litigation such an important part of the Oregon system. If Minnesota courts are to allow private enforcement of the Act as it now stands, they will have to imply a private right of action, something they generally resist.106

100. MINN. STAT. § 473.858.

101. The Act provides for local government appeals at two points in the process: when the Council first submits a system statement to a jurisdiction, and when the Council requires a modification of a comprehensive plan because it substantially impacts or departs from a system statement. Id. §§ 473.857, 473.866. The municipality must first appeal to an “advisory metropolitan land use committee.” Id. § 473.853. Only after the aggrieved government has exhausted this route may it appeal to an administrative law judge, and then to a state appellate court. Id. §§ 473.857, 473.866. No appeal has gone to court thus far.

102. The Act is only cited in three Minnesota cases and does not play an important role in any of them.

103. If a local government decides to challenge the contents of the Council's system plan to which it must substantially conform, the Act allows “all interested persons” to participate in the subsequent hearing. MINN. STAT. § 473.857. Only the local government, however, may appeal in the first place.

104. See supra notes 68-80 and accompanying text (describing how Oregon's land planning agency prioritized "citizen involvement," and how its legislature endorsed broad private standing).

105. See supra notes 72-79 and accompanying text (explaining the role Fasano played in opening up Oregon courts to local land-use challenges). Contrary to Fasano, Minnesota courts have long held that zoning trumps planning. They follow the majority of states in viewing local land-use decisions as legislative rather than judicial. See State ex rel. Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888 (Minn. 1978) (holding that “[w]hen municipality adopts or amends a zoning ordinance, it acts in a legislative capacity under its delegated police powers... [and] a zoning or rezoning classification must be upheld unless opponents prove that the classification is unsupported by any rational basis”). In Minnesota's scheme, the comprehensive plan is "generally viewed as advisory." Amcon Corp. v. City of Eagan, 348 N.W.2d 66, 74 (Minn. 1984).

106. The Minnesota Supreme Court hesitates to imply private rights of action. Hoppe ex rel. Dykema v. Kandiyohi County, 543 N.W.2d 635, 638 (Minn. 1996); see also Bruegger v. Faribault County Sheriff's Dep't, 497 N.W.2d 260, 262 (Minn. 1993) (explaining that principles of judicial restraint
III. THE METROPOLITAN LAND PLANNING ACT'S FAILED PROMISE

A. MINNESOTA'S PLAN HAS BARELY ABATED SPRAWL

Any superficial resemblance between the comprehensive planning programs of Oregon and Minnesota breaks down when comparing their relative effectiveness at controlling urban sprawl. Urban sprawl in Portland has remained virtually static over the last twenty years. Over a five-year period in the 1980s, the growth boundary around Portland expanded by only 2,515 acres. By contrast, during a five-year period in Minnesota, the Council amended its Metropolitan Urban Services Area (MUSA) to add over 18,000 new acres, even though the metropolitan region remained one of the least densely populated in the country. Portland's population density has risen dramatically while the Twin Cities' density has continued to plummet. The Council recently approved a plan to phase in over 200,000 acres to MUSA starting in the year 2000. This will vastly increase the amount of developable

limit the implication of statutory rights). The court, however, has not foreclosed the possibility. See Counties of Blue Earth v. Minnesota Dept. of Labor and Indus., 489 N.W.2d 265, 268 (Minn. Ct. App. 1992) (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

107. Similar growth dynamics are at work in Portland and the Twin Cities. Both areas expect population growths of 650,000 in the next 25 years. Lynda McDonnell, The Sprawl Stops Here, PIONEER PRESS (St. Paul), Nov. 22, 1996, at 1A. Both have strong economies and are highly rated as places to live. Id.


109. In creating MUSA, the Council mapped out a line across which urban services could not extend, thereby creating great disincentives to develop outside the boundary. Lassar, supra note 12, at 21.


111. See Dane Smith, Legislature to Get Proposals to Mend Disparities, STAR TRIB. (Minneapolis), Dec. 11, 1992, at 26A (stating that the Twin Cities region is "second only to Kansas City" in terms of low density among the 25 most populated metropolitan regions). Even a Council member admits the densities in the area are "unreal." Mike Kaszuba, Met Council's New Strategy: A Slow Stretch, STAR TRIB. (Minneapolis), Oct. 3, 1996, at 1B.

112. See McDonnell, supra note 107, at 1A ("The average new suburban lot is 7,500 square feet in Portland, while 20,000-square-foot lots are standard in developing [Twin Cities] suburbs."). Defying dire predictions, Portland's era of growth control has ushered in jobs, higher home values, and, indeed, more people. Timothy Egan, Drawing the Hard Line Against Urban Sprawl, N.Y. TIMES, Dec. 30, 1996, at A1.
land in the metropolitan region. The Council claims that it will focus anew on achieving progress in policy areas like affordable housing as it decides how to direct development in this vast new supply of land. However, the Council’s persistent reputation as “an easy mark” for developers and suburbs, reinforced by its recent performance in Maple Grove, raises sincere doubts about the likelihood of it achieving these goals.

B. AN UNSUCCESSFUL DELEGATION: AMBIGUOUS LANGUAGE, AMBIVALENT AGENCY

Two central elements of the Act have contributed to the failure of its promise: the ambiguity of the statutory enabling language, and the delegation of metropolitan land planning authority to the Council. Given the authority to interpret its powers, the Council has adopted a conservative interpretation of the statutory enabling language, failing to enforce its own plans.

1. Fuzzy Language and Mixed Legislative Motives

Although sponsors of the Act promoted it as an essential mechanism to protect the integrity of metropolitan systems, the statute remained oddly unassertive. The Act sends mixed signals in its stated purpose. A strong mandate to control growth is immediately mitigated by an admonition to assist municipalities in their planning. This tension between command and cooperation in the statutory text also appeared in the House debate, where floor sponsors alternately defended and downplayed the Council’s enforcement power.

113. Metro Growth: What Counts Is on the Ground, Not the Map, STAR TRIB. (Minneapolis), Oct. 9, 1996, at 18A [hereinafter Metro Growth]. Compare how Oregon’s history of growth restriction has altered the discourse in Portland: “While Portland’s Metro Council debates whether 18,000 acres is too much land to hold 650,000 new people, the Twin Cities’ Metropolitan Council wonders if 130,000 acres is too little for the same number.” McDonnell, supra note 107, at 1A.

114. See METROPOLITAN COUNCIL, supra note 2, at 46-48 (stating the Council’s goal to expand housing opportunities in the region).

115. Sprawl Control, supra note 108, at 14A.

116. See supra notes 20-23 and accompanying text (describing the Council’s conservative approach toward confronting Maple Grove’s policy of exclusionary zoning).


118. MINN. STAT. § 473.851 (1996).

119. Representative Casserly, the bill’s floor manager, explained that it was “absolutely essential that we allow the Council to protect these systems.”
The language of the Act empowering the Council to enforce its metropolitan policies suffers from several ambiguities. First, the Act does not clearly define "metropolitan system plans," the fulcrum of the Council's planning power. The statute defines them as "the policy plans" for metropolitan sewers, transportation, open space, and airports. At first glance, this might seem to restrict the system plans to matters dealing specifically with the four major infrastructural systems. Another statutory provision requires, however, that any specific policy plan "must substantially conform" to all the other Council policies. Under this definition, system plans might take into account, for example, the Council's housing policy plans. Although the Council could conceivably adopt a broad reading of "system plan," it currently construes its authority as limited only to local plans that directly impact the four infrastructural systems.

A second ambiguity stems from the question of what constitutes a "substantial impact on" or "substantial departure from" a system plan, triggering the Council's authority to require modification. This definitional problem is not clarified by the statutory language. In practice, the Council currently interprets the term "substantial" very narrowly, curtailing the situations in which it can exercise its power. The Council will look only to whether a local plan threatens "system capacity." The statutory language, however, does not require such a limited interpretation. The term "substantial" has powerful pro-discretionary connotations in the context of an agency's exercise of its delegated power. Its use in defining the scope of

House Debate, supra note 89. However, Casserly also several times assured wary legislators that the Council's main task is to "supply information," and that the review for consistency would not be "an adversary procedure." Id.

100. Id., supra note 85., at 379-80.

120. Id., supra note 85., at 381-82.

122. Brian Ohm, who worked on the legal staff of the Council in the 1980s, endorses this expansive interpretation of the statute. See Ohm, supra note 85, at 379-80.

123. OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, METROPOLITAN COUNCIL 27 (1985) [hereinafter AUDITOR'S REPORT].

124. Id., supra note 85., at 381-82.

125. Id., supra note 85., at 379-80.

127. Under Minnesota's Administrative Procedure Act (APA) the term "substantial" signals that the legislature means to unfetter agency discretion, not restrict it. For example, the APA's "substantial evidence" standard, MINN. STAT. § 14.69(e) (1996), entitles an agency's exercise of judgment to a signifi-
agency discretion sends a cautionary message to courts that would second-guess the Council's assertion of its power. Unfortunately, rather than reading the phrase as a liberating one, the Council chooses to interpret it prohibitively.

A final problem with the Act is that it delegates enforcement decisions entirely to the Council. The legislature's word choice—that the Council "may require a local government unit to modify" local plans—is conspicuously permissive. In the two preceding sentences, the statutory directive is mandatory, stating that the Council "shall review" local comprehensive plans. The most heated discussion during the House floor debate arose over whether the Council's enforcement power should be discretionary. One representative attempted to amend the "may" to "shall," arguing that if the purpose of the Act was to ensure good planning, the Council should have no power to permit bad planning. Nonetheless, this amendment failed.

The practical result of the Act's unclear directive has been a restrictive Council interpretation of its own authority: the Council will consider modifying a municipal comprehensive plan only if that plan has a direct and radical effect on any of the four basic infrastructural systems. In fact, the Council so narrowly construes its authority that it has not brought an enforcement action in court against a municipality in twenty years. Municipal planners regard the implementation aspects of the Act as a teaching device.

---

128. MINN. STAT. § 473.175 (emphasis added).
129. Id. (emphasis added).
130. House Debate, supra note 89. Representative Schreiber, a bill sponsor, responded that the permissive language of this "central provision" had been carefully considered in subcommittee hearings. Id. The language, he said, was intentionally left "a little bit discretionary." Id. However, Casserly also assured the lawmakers that the language "didn't make all that much of a difference." Id.
131. Id.
132. See supra Part III.A (summarizing the Council's inauspicious sprawl control record).
133. See supra notes 101-102 (noting the lack of case law on the Act).
134. See AUDITOR'S REPORT, supra note 123, at 26.
dermines the Council's ability to curb the problems associated with urban sprawl. In fact, the Council's self-imposed requirement of a major trigger mechanism contradicts the rationale of interjurisdictional planning explicitly voiced in the Act's finding that "the problems of urbanization and development transcend local government boundaries." Self-interested local land-use decisions, while not individually crippling to the region, take a heavy toll when aggregated.\footnote{135}

2. The Metropolitan Council: A Double Agent?

The Council frequently pleads lack of power when controlling land use in the metropolitan region.\footnote{136} An honest examination of the Council's poor track record must, however, recognize the Council's lack of will. If the Act leaves a great deal of wiggle room, the Council ultimately does the wiggling. Although the stated purpose, specific language, and legislative history of the statute are admittedly ambiguous, the Act establishes a system structure that deprives local municipalities of any discretion in their interaction with the Council. This clearly leaves the balance of power in the Council's hands. Furthermore, the broad purpose of the Act and the delegation of enforcement power to the Council strongly suggest that the Council has an affirmative duty to utilize its authority. Unfortunately, the Council has permitted its structural power to atrophy. In the end, the Council has largely abdicated its baseline responsibility.\footnote{137}

\footnote{135. The Council completely overlooks the dynamic behind the "tragedy of the commons," at the heart of the urban growth problem. See supra notes 57-60 and accompanying text (explaining how municipal actors perform this tragedy).

136. See AUDITOR'S REPORT, supra note 123, at 27; see also METROPOLITAN COUNCIL, supra note 19, at 74-75 (outlining the Council's proposals for amending the Act to make the Council role more effective).

137. Consider Maple Grove, Minnesota, whose exclusionary zoning practices substantially lowered the density of housing within its borders. See supra notes 8-11 and accompanying text (detailing the city's exclusionary efforts). Without the city's request to build a new sewer interceptor, there are strong arguments that these practices directly impact metropolitan systems. For example, shifting low-income people out of a thriving community increases the spatial mismatch between homes and jobs, a leading cause of traffic congestion. See supra note 44 and accompanying text (noting this phenomenon). With the city's request for a new sewer interceptor, however, the Council's authority to require the city to modify its land-use practices seems apparent. Maple Grove's proposal directly impacted sewage system capacity, thus implicating one of the four major systems. Given even the most favorable circumstances, the Council failed to act.}
Several factors might explain the Council's passivity. First, the Council suffers from an institutional history marked by confusion and waning support from the legislature, one that spent the 1980s in a "decadelong slide toward insignificance." The Legislative Auditor found that the Council began aggressively implementing its powers under the Act, but backed down when it met initial resistance. In the early 1980s, the leadership of the Council began to change frequently, leaving the agency without a clear direction. At the turn of the decade, many speculated whether the Council had become obsolete. In fact, the legislature discussed abolishing the Council altogether.

Yet even after a legislative vote of confidence in 1994 that resulted in the consolidation of all regional power into the Council, special interests may have captured the agency. Over the years, the presence of the real estate development industry on the Council has greatly expanded. This interest group has the most to lose from tight restrictions on urban growth. Currently, one-third of the Council members have strong ties to real estate development. Moreover, all sitting members owe their appointments to Governor Carlson, whose base of support lies in the developing suburbs of the metropolitan region, the constituency most opposed to controlling growth. Although in the past the current Council chair was

138. Kaszuba & Blake, supra note 12, at 1A; see also AUDITOR'S REPORT, supra note 123, at 29 (noting the major criticisms of the Council).
139. AUDITOR'S REPORT, supra note 123, at 26.
140. Kaszuba & Blake, supra note 12, at 1A.
141. Id.
142. Id.
143. See Metropolitan Reorganization Act of 1994, 1994 Minn. Laws ch. 628 (merging all metropolitan administrative powers into the Metropolitan Council).
144. See THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92-93, 112 (2d ed. 1979) (describing the tendency of the regulators and the regulated to become "part of one big policymaking family").
145. See Mike Kaszuba, A "Delicate Balance" for Met Council Members, STAR TRIB. (Minneapolis), June 30, 1996, at 1A.
146. Id.
147. Id. A recent episode demonstrates the influence of the governor and his primary constituency. In 1996, Carlson told several Council members that "he didn't want their efforts to restrain sprawl to anger suburban legislators," which they saw as a "clear signal to tread gently on the delicate subject of land use." Lynda McDonnell, Can We Live with the Limits?, PIONEER PRESS (St. Paul), Nov. 23, 1996, at 1A.
an articulate proponent of balanced growth, he has recently opposed aggressive regional planning in the Twin Cities area.

Perhaps it should be no surprise that the Council has been ineffective in implementing the Act. It has fallen prey to the same phenomenon that threatens many regulating agencies. One influential school of political science, interest group theory, posits that lawmakers often "pass the buck" to agencies when they want to avoid the bad consequences legislation might have on their electability. This is especially true where the target of the legislation represents a cohesive and powerful interest group and the beneficiaries represent a broad class of individuals. The incentives are very high for the targeted interests to exert pressure on the legislature to defeat adverse legislation, or at least vaguely to delegate authority. Because the stakes on the other side are much more diffuse, there is no focused incentive for a countervailing lobby. Once authority has been delegated, the regulated interest continues to enjoy a comparative advantage because of its proximity to the regulating body. As the relationship develops over time, the regulator becomes almost an agent of the regulated.

The implementation of the Act neatly follows this pattern. Pressing regional problems of unfettered urban growth caused the state legislature to adopt remedial legislation. However, heavy pressure from the developing suburban municipalities—

148. See Mike Kaszuba, Met Council Chair's Affordable Housing Agenda Faces First Test, STAR TRIB. (Minneapolis), Aug. 28, 1995, at 1B (describing the chair, Curt Johnson, as a "budding expert on aggressive solutions to fix urban America").

149. See id. ("Johnson and the Met Council are again preaching moderation."). Johnson administered the agreement with Maple Grove; moreover, he previously worked as the governor's chief-of-staff. Id.


151. See id. at 23 (discussing the theory that small groups tend to dominate political activity because of their organizational advantage).

152. See LOWI, supra note 144, at 92-93 (identifying the problem of broad delegation).

153. See FARBER & FRICKEY, supra note 150, at 23 (explaining that collective action theories suggest "that it should be nearly impossible to organize large groups of individuals to seek broadly dispersed goods").

154. See LOWI, supra note 144, at 107-09 (portraying the kind of regulatory "bargaining" that avoids the creation of strong regulation).

155. Id. at 112.

156. See supra note 83 (describing the regional problems besetting the metropolitan area).
the interests that would most heavily feel the sting of the Act—caused the bill's authors to dilute the statutory enabling language. The resulting legislation left the Council with a great deal of latitude to interpret its power, which has deteriorated under municipal resistance and inadequate support from the legislature. The Council now seems to have conceded to the expansionist vision of the interest groups it once regulated.

IV. FINDING A PRIVATE RIGHT OF ACTION TO ENFORCE THE METROPOLITAN LAND PLANNING ACT

A. THE BENEFITS OF A PRIVATE RIGHT OF ACTION

A close look at Minnesota's failure to adequately control growth shows that the road to sprawl is often paved with good legislative intentions. Nevertheless, Minnesota's difficulties provide a valuable lesson for other states: without external legal avenues into growth control plans, their benefits might never be realized. The most notable structural difference between the successful Oregon and unsuccessful Minnesota schemes is Oregon's private party access to the courts. A private citizen's right of action would aid in curing deficiencies in any agency-driven state antisprawl program, including Minnesota's program.

A private right of action would provide several advantages for most actors in the growth management process. Most obviously, it would rehabilitate the Act by filling in the enforcement gap created by the Council's passivity. By removing the power to enforce the Act from the sole possession of the Council, a private right of action would supplement official ac-

157. During the floor debate in February 1976, Representative Casserly spoke repeatedly of the extensive compromise on which the bill was founded. House Debate, supra note 89. Casserly claimed that 115 amendments had been made to the bill, after 15 to 20 committee and subcommittee meetings. Id.

158. See supra notes 139-144 and accompanying text (outlining the institutional history of the Council).

159. See supra notes 113-116 and accompanying text (demonstrating the Council's emphasis on growth over control).

160. See supra notes 72-80 and accompanying text (describing the legal access Oregon's land-use system provides private parties).

161. See supra Part III.B.1 (describing ambiguities in the language of the Act and the Council's restrictive interpretation of its own authority).
tion.\(^{162}\) It would, in fact, provide the only realistic enforcement mechanism, official or not.\(^ {163}\) In a fundamental way, then, a private right of action would create the judicial teeth the legislature intended.

The effect of private actions on the Council's behavior would be manifold. First, private suits would police both the contents of the Council's metropolitan system plans and the Council's reluctance to force compliance when local governments ignore the system plans. Private actions would keep the Council honest and encourage it to more aggressively pursue its planning agenda. In the long run, private litigation might complement rather than clash with the Council's current conciliatory approach to working out disagreements with municipalities.\(^ {164}\) It would conserve substantial financial and political resources for the Council,\(^ {165}\) allowing the agency to focus more closely on the planning aspects of its mission. In addition, the threat of an externally imposed land-use plan or control in the form of a privately obtained court injunction, might improve the Council's bargaining position.

Most importantly, private actions provide a vital opportunity for citizens to become directly involved in a matter of intimate concern to them: the fair and balanced growth of the region in which they live. Citizens are the ones who ultimately

---

\(^{162}\) See supra note 80 (outlining the rationales behind citizen suit provisions).

\(^{163}\) For example, in New Jersey, the State Supreme Court, impatient with official foot-dragging, created a builder's remedy to enforce the court's mandatory inclusionary zoning decisions. See supra note 64 (describing New Jersey's unique private land-use action). Professor Charles Haar writes that by "harness[ing] the personal profit seeking and affirmative commitment of the private market" this remedy has become the linchpin in the court's effort to introduce affordable housing into the suburbs. CHARLES HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 146 (1996); see also Arthur C. Nelson, Comparative Judicial Land-Use Appeals Processes, 27 URB. LAW. 251, 258 (1995) (claiming that the builder's remedy has become the state's most effective enforcement measure). Given that the builder's remedy empowers only self-interested private parties, one commentator argues that the remedy is a mixed blessing, "skew[ing] the system" by providing builders with an incentive to sue but providing other private parties nothing. John M. Payne, Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts, 20 VT. L. REV. 665, 677-78 (1996).

\(^{164}\) See supra Part III.A-B (describing the Council's currently passive approach toward municipalities).

\(^{165}\) This is a common justification for citizen suits. See supra note 80 (sketching the rationales).
bear the costs of inefficient and unfair land-use decisions.166 The legislature passed the Act in the interest of the "health, safety, and welfare of the residents of the metropolitan area."167 A private action would allow public participation in a land planning process that to this point has been open only to an unelected Council, largely insulated from public pressure but vulnerable to special interests, and the local planning bodies, who are expected to act in the best interests of only their community.168 Foreclosing private third parties from these decisions seems undemocratic. Also, the substantive result of the negotiations between the Council and municipalities will likely suffer.169

The ultimate purpose behind the Act is to promote good development through smarter planning.170 As the Oregon experience amply demonstrates, private actions make state and region-wide comprehensive planning legislation more effective by creating a factual context in which the laws can develop and

---

166. "[W]e all bear the costs of [unbalanced growth]: of idle land where obsolete industry has closed, of communities isolated from the broader social and economic network, of inefficient transit, and of deterioration in neighborhoods no longer attracting the residential investment dollars necessary for adequate maintenance." Dave McDonnell, Council's Plan Is a Good Start, PIONEER PRESS (St. Paul), Nov. 24, 1996, at 16A. "Experts estimate existing large lots around the Twin Cities have pushed future infrastructure costs up by $650 million." McDonnell, supra note 147, at 1A; see also supra Parts I.B-C (discussing the costs of ineffective land-use controls on the larger community).


168. See supra notes 57-58 and accompanying text (discussing the rational choices made by local governments).

169. The recent public hearings on the planned MUSA expansion are demonstrative. While the Council paid heed to the well-funded builder's study that suggested 500,000 acres of new land were necessary for urban growth, it also learned for the first time that 78% of focus group participants believed that outward growth had not been good for the core cities. Kaszuba, supra note 111, at 1B.

In Maple Grove, a private action would have directly introduced into the planning process both the ideas of private developers, who desired to build high-density housing in the affluent suburbs, and private citizens, who have an interest in obtaining or promoting lower income housing in that community. Adding these perspectives to the legal pressure of a potential private action would have improved the chances for a more satisfactory resolution of the Maple Grove affair. See supra notes 20-23 and accompanying text (describing the compromise, which disappointed many).

170. See supra notes 83-91 and accompanying text (describing the purpose behind the Act).
adapt.\textsuperscript{171} Private actions would help clarify the ambiguous terms of the Act, such as “metropolitan system statement” and the “substantial departure” of local plans therefrom.\textsuperscript{172} With these terms clearly and practically defined through case law, the planning regime envisioned by the Act could develop in an orderly yet flexible way. Localities themselves would benefit from such a process: they could turn to a body of legal authority separate from the Council, with its inevitably shifting political and policy directions, to obtain a reliable sense of how to plan for growth in their jurisdictions. In this sense, a private action would help fulfill the Act’s goal to “provide assistance to local governmental units.”\textsuperscript{173}

B. CREATING AN EXPRESS PRIVATE RIGHT OF ACTION

The legislature could amend the Act to provide for a private action. This amendment would allow suits in district court against both the Council and any local government whose land-use decisions conflict with the metropolitan system plans, whether those decisions are made in zoning or planning contexts. Standing to bring suit should be broadly granted to “any person” in the metropolitan region—such wording encourages the access-limiting doctrine of legal injury\textsuperscript{174} to be applied as

\textsuperscript{171} See supra notes 68-80 and accompanying text (describing Oregon’s legal regime).

\textsuperscript{172} See supra Part III.B.1 (analyzing the debilitating ambiguity of key statutory terms).

\textsuperscript{173} MINN. STAT. § 473.851 (1996).

\textsuperscript{174} “[I]njury in fact is the test for standing in [Minnesota], absent discernible legislative intent to the contrary in a given case.” Snyder’s Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy, 221 N.W. 2d 162, 165 (Minn. 1974). Although Snyder’s Drug apparently meant to establish “injury-in-fact” as both the default and the minimum for plaintiff standing, Minnesota courts have allowed very attenuated injuries to satisfy the test. The most striking example appears in the Minnesota Environmental Rights Act (MERA), where the state legislature created a private right for “[a]ny person residing within the state” to sue if damage that could have been avoided occurs to intrastate environment. MINN. STAT. § 116B.03; see Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club, 257 N.W. 2d 762, 771 n.6 (Minn. 1977) (endorsing MERA’s broad standing provision).

Under a proposed amendment to the Minnesota sprawl control statute, a private action clause would echo MERA, expressly extending to all residents of the metropolitan area a right to a healthy urban environment. Because each resident suffers from inefficient sprawl, an injury would come when a municipality deviates substantially from the metropolitan plan. Private plaintiffs would at a minimum, however, have to assert a substantial deviation in their pleadings (and survive a motion to dismiss) in order to meet the standing requirement. This pleading threshold would allow wide private ac-
liberally as possible, ensuring maximum participation by private citizens.\textsuperscript{175} Legislation providing citizens with a right of action in an area already regulated by agency is not unprecedented in Minnesota.\textsuperscript{176} Nonetheless, two recent attempts to explicitly encourage private involvement in land-use planning have failed.\textsuperscript{177}

C. IMPLYING AN CAUSE OF ACTION

An argument can be made that a private cause of action is already permitted by the Act. Although generally hesitant to imply private rights of action, Minnesota courts use a three-part test derived from the United States Supreme Court decision in \textit{Cort v. Ash} to determine whether one exists. The \textit{Cort} test evaluates: 1) whether the plaintiff belongs to the class of statutory beneficiaries; 2) whether the legislature intended to create a private action; and 3) whether a private action comports with the purpose of the act.\textsuperscript{178}

In the context of Minnesota’s Metropolitan Land Planning Act, the first prong of the \textit{Cort} test seems to be met: private citizens residing in the metropolitan region are members of the class which the Act intended to protect.\textsuperscript{179} Minnesota courts
have declined to grant private actions to litigants who benefit only indirectly from statutes purporting to broadly serve the public interest.\textsuperscript{180} Unlike many statutes, however, the Act does not purport to benefit the public as a whole,\textsuperscript{181} but instead purports specifically to protect the "residents" of the region.\textsuperscript{182} Residents who can plead that their personal health, safety, or welfare has been compromised should squarely fall within the statutory class of intended beneficiaries.\textsuperscript{183}

The second \textit{Cort} prong, which searches for an indication that the legislature intended to create or deny a private action, presents a more difficult problem. The Act itself\textsuperscript{184} and its legislative history\textsuperscript{185} are silent as to whether private citizens should be involved in enforcing the Act. Legislative silence itself, however, does not counsel courts to imply causes of action; in fact, as one Minnesota court states, implying from silence is

\begin{itemize}
\item 180. See, \textit{e.g.}, \textit{Flour Exch. Bldg. Co. v. Minnesota, 524 N.W.2d 496, 499 (Minn. Ct. App. 1994)} (noting that the owner of a historic building does not fall within the class meant to be benefited by a historic preservation statute); \textit{Counties of Blue Earth v. Minnesota Dep't of Labor & Indus., 489 N.W.2d 265, 268 (Minn. Ct. App. 1992)} (noting that although counties enjoy an indirect benefit from the Prevailing Wage Statute, they are not members of the class to be benefited).
\item 181. In \textit{Blue Earth}, the Prevailing Wage Statute stated that it is "in the public interest" that public buildings be constructed by workers making the prevailing wage. \textit{MINN. STAT. § 177.41 (1990)}. In \textit{Flour Exchange}, the historic preservation statute at issue mentions no specific beneficiary other than historic structures. \textit{MINN. STAT. § 16B.24, subd. 6(c) (1994)}. The court added the "public" class by inference, stating that the statute was designed to "benefit the state as a whole by encouraging the use of historically significant buildings." \textit{Flour Exch. Bldg. Co., 524 N.W.2d at 499}.\textsuperscript{182}
\item 182. \textit{MINN. STAT. § 475.851 (1996)}. The \textit{Blue Earth} court indicated that, unlike counties, public workers might be considered a benefited class because they were specifically mentioned in the statute. 489 N.W.2d at 268.
\item 183. Residency, in fact, provides the only class criterion in the citizen-suit provision of MERA. \textit{See supra} note 174 (describing MERA).
\item 184. At one point, the Act opens the process to "all interested persons." \textit{MINN. STAT. 473.857 (1996)}. Under the principle of \textit{expressio unius}, Minnesota courts have stated that the legislature's identification of one channel of private legal access demonstrates an intent to foreclose other ones. \textit{See e.g.}, \textit{Haage v. Steies, 555 N.W.2d 7, 9 (Minn. Ct. App. 1996)}. This provision of the Act, however, provides the private party with only a very narrow opportunity to be heard before the agency, and no express power to appeal to a court. \textit{See supra} note 103 (detailing the provision).
\item 185. As legislators debated the bill's language and provisions, they focused intently on the nature of the relationship between the Council and the local municipalities. \textit{House Debate, supra} note 89. Opponents voiced concern about creating a "supergovernment." Aron Kahn, "Sprawl" Curbs Passed, \textit{PIONEER PRESS} (St. Paul), Mar. 26, 1976, at 1. That is, they worried about top-down enforcement, not bottom-up.
\end{itemize}
"a hazardous enterprise, at best." The Act's preamble does not specifically identify the Council as the only agent who might pursue the goals of the Act. Nevertheless, the legislature's express delegation of enforcement discretion to the Council indicates it intended to leave the matter in the Council's hands.

The 1995 amendment to the Act, however, suggests a role for private enforcement by stating, "If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan by local government units ...." Reversing the historical priority of local zoning decisions over comprehensive plans, the amendment creates a consistency requirement between zoning controls and local comprehensive plans. Because local plans must now conform with metropolitan plans, zoning decisions, in effect, are subordinate to metropolitan plans. This new zoning criterion has important implications for the issue of private statutory enforcement. Surprisingly, even though the amendment creates a new obligation for municipalities, the legislature placed it outside the provision giving the Council discretion to require modification of local comprehensive plans. The standard is set out, moreover, using the strong mandatory term "shall." This new language suggests neither express delegation to the Council nor optional enforcement. That is, the legislature no longer textually bars the possibility of private enforcement.

187. MINN. STAT. § 473.851 (1996). As an alternative to adding an express private cause of action, the legislature might add language to the preamble suggesting the possibility of private enforcement. Minnesota courts have found statements of purpose to be valid indicators of legislative intent. See, e.g., Hovet v. City of Bagley, 325 N.W.2d 813, 815 (Minn. 1982) (considering the statement of purpose in the Minnesota Recreational Use Statute in determining it did not apply to cities).
188. See supra notes 95-96, 129-130 (discussing the enforcement language of the Act).
189. See supra note 105 (identifying Minnesota's comprehensive planning doctrine prior to the 1995 amendment).
190. See supra notes 99-100 (describing the amendment and its background).
192. Moreover, while the old requirement language fell within the Metropolitan Council's subchapter, § 473.175, the new language appears in the general Metropolitan Land Use Planning subchapter, § 473.858.
193. MINN. STAT. § 473.858.
Furthermore, the 1995 amendment potentially paves the way for a major change in Minnesota's substantive land-use law.\textsuperscript{194} Until now, Minnesota courts have presumed the validity of local zoning decisions.\textsuperscript{195} By statutorily prioritizing planning over zoning, however, the new amendment operates like the holding of \textit{Fasano}, the Oregon decision that opened up that state's planning process to private litigants.\textsuperscript{196} If local zoning must conform to a Council-approved comprehensive plan, a local government must interpret the plan in order to zone. Because interpretation is a judicial function, not a legislative one,\textsuperscript{197} the rationale behind judicial deference no longer applies. Under the Minnesota Supreme Court's own reasoning, therefore, zoning decisions should now be construed strictly against the local government and in favor of the private challenger.\textsuperscript{198} At the very least, Minnesota courts should recognize the legislature's strong signal of intent to encourage private litigation under the Act.

Whether or not the new amendment alters prior land-use doctrine, it inarguably changes the kind of situations where a municipality might violate the Act. Under the established system of comprehensive plan review, local governments submit plans to the Council, which approves or disapproves them.\textsuperscript{199} Policing zoning decisions, however, does not lend itself to such administrative formality. Between the Council and a private party, the latter is more likely to notice a local decision deviating from the approved plan.\textsuperscript{200} In short, the Act's previously narrow and highly formalized legal framework now seems to

\textsuperscript{194} Specifically, the change would take place in the seven counties covered by the Act.

\textsuperscript{195} See supra note 105 (highlighting Minnesota's land-use case law).

\textsuperscript{196} See supra notes 72-79 and accompanying text (describing the impact of \textit{Fasano}).

\textsuperscript{197} See \textit{Amcon Corp. v. City of Eagan}, 348 N.W.2d 66, 72 (Minn. 1984).

\textsuperscript{198} Id. Even in \textit{Amcon}, where the court stated that comprehensive plans are "generally viewed as advisory," \textit{id.} at 74, the court found a local government's failure to explain its deviation from a comprehensive plan to be evidence of arbitrariness. \textit{Id.} at 75. Now that such plans are much more than advisory, logic dictates that the court will demand much more government justification when the government plan fails to conform to its zoning decisions.

\textsuperscript{199} See supra notes 94-96 (describing the plan review process).

\textsuperscript{200} Consider who was on the front line in Maple Grove—the developer and the townhouse buyers. See supra notes 1-10 (detailing the events in Maple Grove).
invite, or even require, private participation. This tacit invitation might fairly be construed as intent, thus satisfying the second Cort prong.

The final Cort factor examines the propriety of implying a private action as a matter of policy. Policy considerations point unequivocally toward implying a private action. Not only would private enforcement be consistent with the underlying purposes of the Act, but without it the entire regional land planning enterprise is imperiled. As a matter of stark reality, private citizens may now be the only parties with the will to require municipal bad actors like Maple Grove to conform their land-use practices to the metropolitan plan. All factors considered, deriving a private cause of action from the Act appears not only prudent, but wholly faithful to the original legislative intent to control urban sprawl.

CONCLUSION

As the problem of urban sprawl spreads across America, states search for an effective model of land-use planning. Zoning ordinances and comprehensive plans bring some rationality to local land use, but increased local control allows communities to reap the benefits of growth for themselves while shifting the costs to neighboring communities. Because this approach leads to unfairness and more sprawl, many lawmakers have come to realize that the pathologies of growth cannot be cured within local boundaries. As a result, several states have created official mechanisms to police local government planning by requiring conformity to state or regional policies.

201. The legislative history of the 1995 amendment strongly supports these inferences. In contrast to the debate over the original Act, the debate over the amendment frequently involved the role of private parties. For example, one legislator forcefully argued for the amendment because under the current regime "citizens may be adversely affected" by relying on Council-approved comprehensive plans that cities can ignore. Audio Tape of Minnesota Legislature's House Floor Debate Regarding H.F. No. 833 (Mar. 22, 1995) (on file at State Office Building) (statement of Rep. Carruthers). Opponents of the bill recognized the amendment's potential for private legal action, arguing that the new legislation would be "very expensive" because it exposes the city to more legally viable private lawsuits. Id. (statement of Rep. McElroy).

202. See supra Part IV.A (arguing that private enforcement facilitates both compliance and good planning).

203. See supra Parts III.A-C (demonstrating the Council's chronic inability to vigorously enforce its metropolitan plan).
Minnesota took an early lead in this approach. The Metropolitan Land Planning Act, which gave the Metropolitan Council potentially strong powers to bring municipalities into line, held out great promise as a model for growth management. As the Minnesota experience demonstrates, however, the urban sprawl is often the unfortunate result of good intentions. Saddled with ambiguous statutory language and institutionally vulnerable to special interests, the Council has adopted a passive role in regulating growth. Without an entity to rigorously police local planning, urban sprawl in the Twin Cities proceeds almost unchecked.

Oregon's success in reigning in urban sprawl stands in stark contrast to the situation in Minnesota. Although structurally quite similar to Minnesota's system, the Oregon statutory scheme has been supplemented by court decisions that dramatically increase private citizens' access to the local land-use process. Private enforcement of Oregon's growth control policies has virtually halted sprawl in the thriving metropolitan area of Portland.

Drawing lessons from both states, this Note proposed a private right of action to fill the enforcement gaps left by official management of sprawl control. Private enforcement relieves state and regional planning agencies of substantial regulatory burdens, while permitting them to devote more resources to good planning. Moreover, it involves private parties in the planning process, guaranteeing better planning. In Minnesota, either the legislature or the courts should add a private enforcement mechanism to the Metropolitan Land Planning Act. With this mechanism, Minnesota can once again become an example of how to solve urban sprawl.