

# TWENTY-FIRST CENTURY PLANNING AND THE CONSTITUTION

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## INTRODUCTION

The American Planning Association (APA), a nationwide organization of land use planners,<sup>1</sup> recently published the “Growing Smart<sup>2</sup> Legislative Guidebook” (hereinafter

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1. See Matt Arado, *Planning Experts to Glean Ideas from Chicago's Suburbs*, CHI. DAILY HERALD, Feb. 24, 2002, at 1, available at 2002 WL 14803675 (The APA is “a group of planning experts from big cities and small towns all over the country.”); Bob Egelko, *Property Owners Lose Key Tahoe Case*, S.F. CHRON., Apr. 24, 2002, at A1, available at 2002 WL 4018833 (describing the APA as a “nationwide organization of planning commissioners”); *Planners Urge the New Jersey Supreme Court to Defer to the State Plan*, U.S. NEWSWIRE, Nov. 26, 2001, available at 2001 WL 28754625 (describing the APA as “dedicated to advancing the art and science of urban, rural and regional planning”). The APA represents thirty-three thousand practicing planners, officials and other citizens involved with urban and rural planning issues. See American Planning Association, About APA, History, at <http://www.planning.org/APAHistory/FactSht.htm> (last visited Nov. 8, 2002). Sixty-five percent of APA members work for state and local government agencies. *Id.*

2. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (2002), available at <http://www.planning.org/guidebook/Guidebook.htm> (last updated Feb. 13, 2002) [hereinafter GUIDEBOOK]. The term “Growing Smart” apparently refers to the Guidebook's provisions encouraging “smart growth,” a set of policies designed to encourage less sprawling development by guiding new development into “denser, more compact areas, where existing public services and facilities are already located.” Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 289 (2000). It has also been noted,

Smart growth is the label for a movement most easily defined by what it opposes: suburban sprawl and its negative effects, such as increasingly congested highways, loss of wetlands and farmland, endlessly indistinguishable commuter suburbs and the deterioration of inner cities and older suburbs. Advocates of smart or managed growth generally favor redeveloping abandoned or underused sections of older urban areas, preserving open [spaces] around cities, providing public-transportation alternatives to the automobile and, where new

“Guidebook”)<sup>3</sup> containing over 1,450 pages<sup>4</sup> of model laws governing zoning and other land use-related issues. “Property rights” activists and some business groups<sup>5</sup> vigorously attack the Guidebook because of its pro-regulatory positions on a variety of issues.<sup>6</sup> For example, the libertarian Heartland Institute<sup>7</sup> describes the Guidebook as a “refutation of the American tradition of individual property rights.”<sup>8</sup> Similarly,

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development does occur, creating communities where residents can work, shop and find recreation close to their homes.

*Slow Sprawl to a Crawl, Planners Say*, THE TIMES-PICAYUNE, Mar. 13, 2001, at 1, available at 2001 WL 9389613.

The Guidebook proposes a “Smart Growth Act” that funnels state funds into already-developed cities and suburbs rather than newly developed areas. See GUIDEBOOK, *supra*, at 4-128 to 4-132 (describing smart growth legislation in detail). Although a vigorous debate exists on the wisdom of smart growth generally, much of the debate involves policy issues (such as the effect of smart growth upon housing prices) rather than the constitutional issues discussed in this article. See, e.g., Sarah Foster, *Federal Land-Use Planning in the Works? Property Rights Group Rallies Opposition to Clinton-Era Project*, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=25381](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=25381) (Nov. 19, 2001) (quoting business lobbyist’s assertion that “smart growth policies drive up the cost of housing” and “destroy property rights”); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 365–82 (2000) (asserting that anti-sprawl policies need not interfere with free market).

3. I note that each of the Guidebook’s chapters is a separate link on the Guidebook’s web page. See GUIDEBOOK, *supra* note 2. I have chosen to cite the overall Guidebook web site once (rather than to cite each chapter as a separate web page) because I trust that readers know how to scroll down on the Guidebook web page and find the chapter they wish to read. For example, to find Chapter 4, a reader should go to the above-cited web page, scroll down to the “Chapter 4” link, and click on the link to read that chapter.

4. See Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, LAND USE L. & ZONING DIG., Mar. 2002, at 3 (Guidebook contains “more than 1,450 pages.”).

5. See *infra* notes 8–9.

6. See *infra* notes 68–74, 142–43, 152, 159–63, 172, 191, 214–19, 230–33, 248, 261–63, 304, 323, 335–36 and accompanying text (briefly describing some of the Guidebook’s more controversial model statutes).

7. See Robert Nelson, *Land of The Unfree*, Financial Times, July 24, 2002, at P1, available at 2002 WL 23850512 (describing Heartland as a “libertarian think tank”).

8. James M. Taylor, *Smart-Growth Group Pushes Tough New Land-Use Controls*, at <http://www.heartland.org/Article.cfm?artID=479> (May 1, 2002); see also Foster, *supra* note 2 (quoting business lobbyist’s assertion that Guidebook would “replace free market-style growth with Soviet-style planning”). Business groups such as the National Association of Homebuilders (NAHB) also criticize the Guidebook, but mostly on narrower grounds related to zoning procedures. See GUIDEBOOK, *supra* note 2, at A-8 to A-27 (dissent authored by member of Guidebook’s “Directorate” of persons who guided the project and joined by NAHB, National Association of Industrial and Office Properties, National Association of Realtors, International Council of Shopping Centers, Self Storage Association,

twenty-one members of Congress wrote Housing and Urban Development (HUD) Secretary Mel Martinez urging him to attack the Guidebook on the grounds that it “would trample the rights of private property owners by seizing their land without the just compensation that our Constitution requires.”<sup>9</sup> The most detailed criticisms of the Guidebook come from a group known as Defenders of Property Rights (DPR),<sup>10</sup> a conservative public interest legal foundation that represents landowners in disputes with government agencies.<sup>11</sup> DPR suggests that the Guidebook violates the First, Fourth, Fifth,

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National Multi Housing Council/National Apartment Association, and American Road and Transportation Builders Association, focusing on the Guidebook’s recommendations on procedural issues such as standing and exhaustion of remedies.); *id.* at xxxiv (describing Directorate’s role). Despite its criticisms, the NAHB-endorsed dissent stated that on balance the Guidebook is “impressive and very useful.” *Id.* at A-26; *cf. id.* at A-2 to A-7 (dissent by Environmental Law Institute program director criticizing the Guidebook as insufficiently pro-regulation). Because other commentators have addressed the Guidebook’s procedural provisions, I decline to do so in this article. See Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 472–83 (2002).

9. See Press Release, House Western Caucus, *Pombo, Peterson Lead Call for Secretary Martinez to Reject Clinton Era Land Use Regulations*, Nov. 20, 2001, at [http://www.house.gov/apps/list/press/pa05\\_peterson/pr011120HUDGuidelines.html](http://www.house.gov/apps/list/press/pa05_peterson/pr011120HUDGuidelines.html) [hereinafter *Pombo/Peterson Letter*] (press release quoting letter). Martinez declined to either endorse or criticize the Guidebook, but pointed out that the Guidebook never purported to state the opinion of HUD. See Defenders of Property Rights, *Quick Facts on the HUD/APA Legislative Guidebook*, at <http://www.yourpropertyrights.org/issues/guidebook/faqs.htm> (last visited Nov. 8, 2002) [hereinafter *DPR Quick Facts*], quoting Martinez statement that the Guidebook,

does not have an imprimatur of the federal government, it does not have any sort of guidelines and there’ll be no coercion for state or localities to adopt it, it doesn’t even have our endorsement. It’s simply a project that has been out there for a long, long time and many people urged me to kill it. *Frankly*, I didn’t have that option. (emphasis added).

10. See *infra* notes 68–74, 142–43, 152, 159–63, 172, 191, 214–19, 230–33, 248, 261–63, 304, 323, 335–36 and accompanying text (briefly describing some of Guidebook’s more controversial model statutes).

11. See Carol Dawson, *Bush Announces “Intent to Nominate” Former New Mexico Attorney General Harold Stratton as CPSC Chairman*, CPSC MONITOR, Oct. 1, 2001, at 1, available at 2001 WL 33578341 (DPR “is a national public interest legal foundation that works with individuals whose property has been taken through regulation, legislation or other government action.”); Cyrus T. Zaneski & Gia Fenoglio, *Interior Department*, 33 NAT’L J. 1959, 1959 (June 23, 2001), available at 2001 WL 7182328 (describing DPR as “a Washington group that represents landowners in disputes with government agencies” and noting that Interior Secretary Gale Norton has served on its board); *Recruiting from Industry*, 34 NAT’L J. 537, 538 (Feb. 23, 2002), available at 2002 WL 7094737 (describing DPR as a “conservative property-rights group[]”).

Tenth, and Fourteenth Amendments<sup>12</sup> and its executive director recently called the Guidebook a “federal zoning code.”<sup>13</sup>

This Article focuses on the question of whether the Guidebook’s model statutes, if enacted by a state legislature, would violate the federal Constitution under existing case law.<sup>14</sup> Part I of this Article discusses the history of the Guidebook, explaining why and how it was drafted. Part II analyzes the Guidebook’s constitutionality under the First, Fourth, Fifth, Tenth, and Fourteenth Amendments and concludes that no part of the Guidebook is unconstitutional on its face under existing case law. The Article concludes that as a general matter, the Guidebook’s most controversial provisions (and thus state laws patterned on those provisions) are constitutional on their face if correctly interpreted.

## I. BACKGROUND: THE HISTORY OF MODEL LAND USE LAWS

The Guidebook is not the first attempt to standardize state zoning laws. To date, the most ambitious and successful attempts<sup>15</sup> to standardize land use regulation consist of two

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12. See *infra* notes 68–74.

13. See David Sokol, *Don’t Tread on My Sprawl*, ARCHITECTURE, June 1, 2002, at 31, available at 2002 WL 18658051.

14. Thus, the wisdom of the Guidebook’s proposals, as opposed to their constitutionality, is by and large beyond the scope of this article. Similarly, the status of the Guidebook under various state constitutions is best left for articles focusing more closely on the laws of individual states.

15. In addition, several other attorneys, academics, and government agencies sought to draft model zoning statutes over the past seventy-five years. However, most of these model statutes either sought to change the law of one state, addressed narrow topics (such as rural zoning, impact fees, affordable housing, or zoning procedure) or merely described state legislation favored by the authors. See GUIDEBOOK, *supra* note 2, at 8-5 to 8-14. In addition, numerous federal commissions have criticized state zoning legislation in the course of reports that focused on other housing-related issues. *Id.* at 8-14 to 8-17 (describing numerous studies); *id.* at 8-14 n.40, 8-15 n.43, 8-16 n.44 (specifically noting that three federal reports’ zoning-related recommendations encompassed just a few pages within reports covering hundreds of pages). Finally, in 1976, the American Law Institute (ALI), an organization of lawyers, judges and law teachers, sought to modernize land use law by enacting the Model Land Use Development Code. See American Law Institute, About the American Law Institute, at <http://www.ali.org/ali/thisali.htm> (last visited Nov. 8, 2002) (describing the ALI); Sullivan & Richter, *supra* note 8, at 455–58 (describing Model Code). The primary goal of the Model Code was to give states power over land use decisions of regional significance. See Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land-Use Legislation*, 28 URB. LAW. 7, 20 (1996) (“The central thesis of the Model Code was

model planning and zoning statutes drafted in the 1920s, the Standard State Zoning Enabling Act (SZE<sup>16</sup>) and the Standard City Planning Enabling Act (SPEA).<sup>17</sup> These statutes continue to dominate most states' land use laws<sup>18</sup> and the Guidebook seeks to cure their defects.<sup>19</sup>

### A. *In the Beginning: SZE and SPEA*

Model zoning statutes are almost as old as zoning itself. Los Angeles enacted the first American zoning ordinance in 1909.<sup>20</sup> Just a dozen years later, the federal Commerce Department created an advisory committee on zoning and drafted the first version of the SZE.<sup>21</sup> In 1926, the Commerce Department drafted a revised version of the SZE.<sup>22</sup> Adopted in some form by all fifty states,<sup>23</sup> this revised SZE, in modified

that if a land use decision affected more than one municipality, the state should exercise jurisdiction over that decision.”); Daniel R. Mandelker, *Fred Bosselman's Legacy to Land Use Reform*, 17 J. LAND USE & ENVTL. L. 11, 14 (2001) (At the time Model Code was prepared, land use issues that “transcend local concerns . . . arguably demanded some kind of state intervention to correct local decisions that did not take the larger public interest into account.”). However, the Model Code met with little support: only two states, Florida and Colorado, have “adopted and used major portions of the ALI Code.” GUIDEBOOK, *supra* note 2, at 5-48. Five other states (Minnesota, Oregon, Georgia, Nevada, and Wyoming) and some local governments relied to a lesser extent on the ALI Code. See Sullivan & Richter, *supra* note 8, at 457; GUIDEBOOK, *supra* note 2, at 5-27 & n.44, 5-48.

16. See STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce 1926) [hereinafter SZE], *quoted in* 5 ALAN C. WEINSTEIN, ANDERSON'S AMERICAN LAW OF ZONING § 32.01, at 4 (4th ed. 1997).

17. STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce 1928) [hereinafter SPEA], *quoted in* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 2.8, at 24 (1998) (quoting key provisions of statute).

18. See notes 23–24 *infra* and accompanying text.

19. See notes 57–62 *infra* and accompanying text (describing the Guidebook authors' concerns about 1920s statutes).

20. See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 87 (2d ed. 2000).

21. See Lewyn, *supra* note 2, at 330. The SZE was not the first attempt to draft a model zoning statute, but it was the first model act to be either influential or comprehensive. See GUIDEBOOK, *supra* note 2, at 8-4 to 8-5 (noting that in 1913, the Fifth National Conference on City Planning published model statutes establishing a city planning department, empowering cities to create from one to four zoning districts, reserving land for public use, and authorizing the establishment of building lines on street—but not mentioning any evidence that states adopted these statutes).

22. See SZE, *quoted in* WEINSTEIN, *supra* note 16; Lewyn, *supra* note 2, at 330.

23. See GUIDEBOOK, *supra* note 2, at 8-6; JUERGENSMEYER & ROBERTS,

form, is still in effect in forty-seven states.<sup>24</sup> The Commerce Department's interest in zoning arose from Secretary of Commerce Herbert Hoover's concerns that without zoning, cities would lack adequate public infrastructure to serve their growing populations and that property values in residential neighborhoods would be threatened by the growth of incompatible uses.<sup>25</sup>

The SZEAL included provisions granting local governments power to enact zoning ordinances dividing cities into districts, as well as language setting forth procedures for establishing, enforcing, and amending zoning laws, and for granting variances from those laws.<sup>26</sup> After states enacted SZEAL-type laws authorizing municipal zoning, local governments began to enact SZEAL-inspired zoning ordinances that courts generally upheld.<sup>27</sup> Today, Houston is the only large city without zoning.<sup>28</sup>

In 1928, the Department of Commerce drafted SPEAL, a statute intended to complement the SZEAL.<sup>29</sup> This model statute authorized local governments to appoint a planning commission<sup>30</sup> and required the commission to create a master plan that includes, among other things, the recommended locations and character of public improvements such as streets, playgrounds, and open spaces.<sup>31</sup> SPEAL proved to be far less

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*supra* note 17 § 3.6, at 46; DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION: CASES AND MATERIALS 64 (1999) (citation omitted)..

24. See GUIDEBOOK, *supra* note 2, at 8-6.

25. *Id.* at 8-5.

26. *Id.* at 8-6.

27. See Douglas R. Roach, *Zoning by Initiative in Arizona: A Matter of Judicial Philosophy*, 32 ARIZ. L. REV. 1003, 1027 (1990) ("[C]ourts have upheld comprehensive zoning ordinances [adopted] under Zoning Enabling Acts as constitutionally permissible . . ."). For example, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-95 (1926), the Supreme Court upheld a municipality's right to use zoning to separate single-family homes from industry and from apartments. See also David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 676 n.21 (2000) (In *Euclid*, the Supreme Court "upheld the basic constitutionality of the zoning concept.").

28. See ELLICKSON & BEEN, *supra* note 20, at 89; Roy Appleton, *Who Knows What's Best for the Land?*, DALLAS MORNING NEWS, June 9, 2002, at 1J, available at LEXIS, News Library, DALNWS File ("With Houston among the few exceptions, most cities of any size . . . have zoning.").

29. See GUIDEBOOK, *supra* note 2, at 8-6.

30. *Id.*

31. See SPEAL § 6, quoted in JUERGENSMEYER & ROBERTS, *supra* note 17, § 2.8, at 24; John L. Horwich, *Environmental Planning: Lessons from New South*

influential than SZEAL,<sup>32</sup> however, because the SPEA did not give planning commissions the power to ensure that zoning laws conformed to the master plan.<sup>33</sup> In fact, the SPEA limits municipal power over private land use by implying that a master plan is to be taken into account by the municipality only to the extent that it governs the construction of public facilities.<sup>34</sup>

### *B. History of the Guidebook*

The call for a new model land use code originated from two sources at about the same time.<sup>35</sup> In 1991, a HUD advisory commission on barriers to affordable housing recommended that HUD “work with government and private-industry groups, such as the American Bar Association, the American Planning Association . . . and others to develop consensus-based model codes and statutes for use by State and local governments.”<sup>36</sup> Specifically, the commission recommended, *inter alia*, a new model state zoning enabling act.<sup>37</sup> Also in 1991, the APA decided to create a task force to draft new model planning and zoning enabling legislation based on the group’s “concern[] about the number of bills to [reform] planning and land development control being introduced in state legislatures without an overall body of evaluative research to offer

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*Wales, Australia in the Integration of Land-Use Planning and Environmental Protection*, 17 VA. ENVTL. L.J. 267, 334 (1998)..

32. See SELMI & KUSHNER, *supra* note 23, at 215 (describing SPEA as “not nearly as influential as the model act for zoning”).

33. See James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 501 (1994).

34. See SPEA § 6, *quoted in* JUERGENSMEYER & ROBERTS, *supra* note 17, § 2.8, at 24 (Master plan shows municipal recommendations for “general location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways.”); Horwich, *supra* note 31, at 334.

35. See HUD’s ‘Legislative Guidebook’ and Its Potential Impact on Property Rights and Small Businesses, Including Minority-Owned Businesses: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong. 86 (2002), available at 2002 WL 25099882 (statement of Robert Manley, Partner, Manley, Burke, Fischer & Lipton, on behalf of the American Planning Association).

36. *Id.*; see also GUIDEBOOK, *supra* note 2, at 8-16 to 8-17 (describing advisory commission’s report in more detail); Meck, *supra* note 4, at 5 (citation omitted).

37. Manley, *supra* note 35, at 86.

guidance.”<sup>38</sup> The task force decided to draft a model code setting forth alternative approaches to land use regulation rather than mandating a one-size-fits-all code for all states.<sup>39</sup> The APA sought funding from HUD and the Henry Jackson Foundation<sup>40</sup> in 1992 and 1993,<sup>41</sup> finally receiving funding in 1994.<sup>42</sup>

At the request of HUD, the APA created an advisory board, known as the “directorate”, comprised primarily of representatives of APA and of numerous national associations representing state and local government officials.<sup>43</sup> The directorate also included three private sector members-at-large: the executive director of the International Municipal Lawyers Association,<sup>44</sup> an attorney for the Environmental Law Institute designated as a representative of environmentalists,<sup>45</sup> and a home builder<sup>46</sup> designated as representative of the “Built Environment”<sup>47</sup>—that is, “home builders, office and industrial developers, real estate agents, general contractors, road builders, engineers, architects, and others who are generally

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38. Meck, *supra* note 4, at 3. According to a recent APA study, about three-quarters of the states either are implementing or are considering statewide planning reforms. See Patricia E. Salkin, *The Next Generation of Planning & Zoning Enabling Acts Is on the Horizon: 2002 Growing Smart Legislative Guidebook Is a Must-Read for Land Use Practitioners*, 30 REAL ESTATE L.J. 353, 360–61 (2002).

39. See Meck, *supra* note 4, at 4; Salkin, *supra* note 38, at 356.

40. The Henry M. Jackson Foundation is a Seattle-based nonprofit public policy foundation that makes grants in four areas: foreign affairs, environmental issues, public service, and human rights. See Jonathan Brinckman, *Meeting Takes On Salmon Issues*, PORTLAND OREGONIAN, Oct. 15, 1998, at C1, available at 1998 WL 20379438 (describing the foundation); Henry M. Jackson Foundation, Home Page, at <http://www.hmjackson.org> (last visited Nov. 8, 2002).

41. Meck, *supra* note 4, at 5; e-mail from Stuart Meck to Michael Lewyn, Associate Professor, John Marshall Law School (July 19, 2002) (on file with author) (APA proposal first submitted to HUD in fall of 1992).

42. Meck, *supra* note 4, at 5. Eventually, five other government agencies, a second foundation, and the Siemens Corporation agreed to fund the Guidebook, as did the APA itself. See Manley, *supra* note 35, at 88. Ultimately, twenty-eight percent of the project's costs were paid by private sources and seventy-two percent were paid by the six federal agencies. *Id.* However, the Guidebook's recommendations are “the views of the authors and do not necessarily reflect the views or policies of HUD, the U.S. government, or any other project sponsor.” GUIDEBOOK, *supra* note 2, at ii.

43. See Meck, *supra* note 4, at 7.

44. See GUIDEBOOK, *supra* note 2, at xxxvi.

45. *Id.*

46. See Meck, *supra* note 4, at 11.

47. See GUIDEBOOK, *supra* note 2, at xxxvi.



classed as the built environment.”<sup>48</sup> The directorate met twice a year during the duration of the project and succeeded in reaching a consensus on most issues.<sup>49</sup> In addition, the APA began an outreach program, mailing a semi-annual project newsletter to numerous interest groups and maintaining a project website. As a result, the APA received hundreds of pages of comments and recommendations<sup>50</sup> from environmental groups, organizations representing builders and developers, organizations representing the sign industry, historic preservation groups, and numerous other organizations.<sup>51</sup> The APA later adopted eighty-five percent of those suggestions in some form.<sup>52</sup>

The APA released an interim edition of the Guidebook in 1996. This first edition focused on state and regional planning, as well as affordable housing.<sup>53</sup> A second edition replaced the first in 1998<sup>54</sup> and was more extensive, containing model legislation on local land use planning, state review and approval of local land use plans, and integration of local land use plans with state environmental law.<sup>55</sup> Finally, the APA published the final edition of the Guidebook in 2002.<sup>56</sup>

### C. *The Guidebook: Why It Exists, What It Does*

The final edition of the Guidebook explains in its preface that SZEa and the SPEA “are incapable of meeting the challenges of the twenty-first century.”<sup>57</sup> Specifically, the Guidebook asserts that these 1920s model statutes:

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48. *Id.* at A-8.

49. *Id.* But see *supra* note 8 (describing dissents by representatives of environmentalists and developers).

50. See Manley, *supra* note 35, at 87 (“APA received over 320 pages of comments in just the last year of the project.”).

51. *Id.*; see also Meck, *supra* note 4, at 9. But see HUD’s *Legislative Guidebook Its Potential Impact on Property Rights and Small Businesses, Including Minority-Owned Businesses: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 7–24 (2002), available at 2002 WL 25099884 (statement of R. James Claus, Ph.D., Principal, Claus Consulting) [hereinafter Claus Testimony] (Guidebook opponent claims that APA did not seek sufficient business input).

52. See Manley, *supra* note 35, at 87.

53. See Meck, *supra* note 4, at 7.

54. *Id.*

55. *Id.* at 8.

56. See GUIDEBOOK, *supra* note 2.

57. *Id.* at xxix.

1. Fail to discuss the states' role in land use regulation because at that time land use planning was generally a local, rather than a state, activity.<sup>58</sup> By contrast, state legislatures now take an active role in land use regulation in order to ensure uniformity and to address issues spilling across jurisdictional boundaries;<sup>59</sup>
2. Do not address environmental issues such as the value of preserving vacant, developable land or the environmental consequences of the form and relative compactness of metropolitan areas;<sup>60</sup>
3. Provide inadequate opportunities for citizen participation in the zoning process;<sup>61</sup> and
4. Fail to consider the courts' increased scrutiny of land use regulation in recent decades.<sup>62</sup>

The Guidebook contains fifteen chapters, covering the topics addressed in the earlier editions and adding detailed discussion of zoning, subdivision regulation, smart growth legislation, state biodiversity conservation plans, environmental protection, procedures for siting controversial state facilities, development oriented towards public transit, development moratoria, judicial review, public records of plans and regulations, and a wide variety of other issues.<sup>63</sup> Accompanying the Guidebook is a User Manual that, by means of checklists and case studies, seeks to help government officials use the Guidebook and in particular, "to tailor a program of statutory reform that will meet the unique needs of their state."<sup>64</sup> The User Manual also instructs readers that each chapter in the Guidebook follows the following format: first a chapter outline identifying the major topics in the

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at xxix-xxx.

63. *Id.* at xlviii-l. However, the discussion below focuses only on issues raising constitutional concerns and thus does not address many of the issues discussed in the Guidebook.

64. See Meck, *supra* note 4, at 8.

chapter, then an introduction setting forth a general discussion of the subject matter covering and summarizing its contents, then commentary to individual model statutes, and finally draft statutory language and alternatives.<sup>65</sup>

What the Guidebook does *not* do is directly address the federal role in land use regulation; that issue is left to Congress.<sup>66</sup> Instead, the Guidebook seeks to guide state and local land use law.

## II. ANALYSIS: THE GUIDEBOOK AND THE CONSTITUTION

Guidebook critics allege the following constitutional infirmities in the Guidebook's model statutes:

1. The Guidebook's model sign regulation law violates the First Amendment by restricting businesses' right to advertise;<sup>67</sup>
2. Guidebook provisions regarding zoning-related searches violate the Fourth Amendment;<sup>68</sup>

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65. See Salkin, *supra* note 38, at 358–59.

66. See GUIDEBOOK, *supra* note 2, at xlviii–l (listing Guidebook's highlights without once mentioning the word “federal”). However, Representative Earl Blumenauer and Senator Lincoln Chafee sought to facilitate planning reform by introducing the Community Character Act (CCA) (H.R. 1433/S. 975). Salkin, *supra* note 38, at 362. This bill proposes that the federal government grant money to the states for development or revision of land use planning legislation, land-use plans, and plan elements. *Id.* at 363. The CCA requires states to comply with some of the Guidebook's goals (such as enhanced citizen participation and multi-jurisdictional cooperation) in order to be eligible for funds. *Id.* The CCA has not met with universal acclaim and thus may not pass in its present form. See, e.g., Claus Testimony, *supra* note 51 (attacking CCA); Evan Halper, *State Plans Offensive in Sprawl War*, L.A. TIMES, May 12, 2002, at B8, available at 2002 WL 2475142 (noting Bush Administration opposition to CCA). Accordingly, I choose not to address the wisdom or constitutionality of the CCA in this article. I note, however, statutes that (like the initial version of the CCA) require states to adhere to federally established conditions in order to receive federal funds are by no means unconstitutional per se. See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (such conditions are constitutional under federal “spending power,” as set forth in Article I of the Constitution, if (1) in pursuit of general welfare, (2) sufficiently unambiguous that states can “exercise their choice [to comply with conditions in order to receive federal funds] knowingly,” (3) related to federal interest in program at issue, and (4) not otherwise unconstitutional).

67. See Defenders of Property Rights, *Executive Summary of the HUD/APA Smart Growth Legislative Guidebook*, at <http://www.defendersproprights.org/issues/guidebook/summary.htm> (visited June 3, 2002) [hereinafter *DPR Summary*]; Claus Testimony, *supra* note 51.

3. A wide variety of Guidebook proposals violate the Fifth Amendment,<sup>69</sup> especially the "Takings Clause" of that Amendment;<sup>70</sup>

4. The Guidebook's model statutes violate the Tenth Amendment by increasing federal power over land use;<sup>71</sup> and

5. The Guidebook's model statute governing design districts violates the Equal Protection Clause<sup>72</sup> of the Fourteenth Amendment.<sup>73</sup>

Each of these issues will be addressed in turn.

#### A. *The Guidebook and the First Amendment*

Section 8-201(2)(h) of the Guidebook states that local zoning laws may regulate "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."<sup>74</sup> This statute closely resembles Hawaii's statute allowing counties to "adopt ordinances regulating billboards

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68. See *DPR Summary*, *supra* note 67.

69. *Id.* See also Harry C. Alford, Testimony Before the House Judiciary Subcommittee on the Constitution, Mar. 7, 2002, *available at* 2002 WL 25099881 (asserting that Guidebook's amortization provisions "may indeed activate the 'takings' clause and result in costly litigation"); Pombo/Peterson Letter, *supra* note 9 (asserting that unspecified Guidebook provisions "would trample the rights of private property owners by seizing their land without the just compensation that our Constitution requires"); Nancie G. Marzulla, *Martinez Must Save Property Rights from Antigrowth Elites*, INSIGHT ON THE NEWS, Dec. 31, 2001, at 45, *available at* 2001 WL 31036021 ("the guidebook recommends an 'amortization' plan, which will give small-business owners a limited period to enjoy their . . . signs before they must be removed altogether, without payment of just compensation as required by the U.S. Constitution"); Claus Testimony, *supra* note 51 (alleging numerous Fifth Amendment violations).

70. See U.S. CONST. amend. V (asserting that property may not be "taken for public use, without just compensation").

71. See *DPR Summary*, *supra* note 67.

72. See U.S. CONST. amend. XIV (saying that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

73. See *DPR Summary*, *supra* note 67 (asserting that historic/design district statutes violate Amendment).

74. GUIDEBOOK, *supra* note 2, § 8-201(2)(h), at 8-51.

and outdoor advertising devices not prohibited by [state law]<sup>75</sup> and in particular to “[r]egulate the size, manner of construction, color, illumination, location, and appearance of any class of billboard or outdoor advertising device.”<sup>76</sup>

Other states’ laws give local governments even more leeway to regulate outdoor advertising.<sup>77</sup> For example, Maine law not only limits the number,<sup>78</sup> location,<sup>79</sup> and height<sup>80</sup> of on-premise signs,<sup>81</sup> but also provides that state law “shall not supersede the provisions of any other statute, regulation, ordinance or resolution, the requirements of which are more strict than those of this chapter and not inconsistent therewith.”<sup>82</sup> Vermont and Rhode Island likewise allow local governments to enact sign regulations stricter than those implemented by state government, without limiting local discretion as to the nature of such regulations.<sup>83</sup> While the Guidebook limits municipal sign regulation to “location, period

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75. HAW. REV. STAT. § 445-113 (1993).

76. *Id.* at § 445-113(2).

77. See GUIDEBOOK, *supra* note 2, at 8-45 to 8-50.

78. See ME. REV. STAT. ANN. tit. 23, § 1914(2) (West 1992) (on-premise signs generally may not exceed ten in number); *infra* note 81 (defining on-premises signs).

79. See *id.* § 1914(4) (on-premise signs may not be within thirty-three feet of center line of highway unless the highway is over sixty-six feet in width, or within twenty feet from the outside edge of public way with over two travel lines, or within right-of-way).

80. See *id.* § 1914(8) (maximum height of on-premise sign is typically twenty-five feet above ground level of land upon which it is located, or ten feet above roof of building if sign affixed to building).

81. An “on-premise” sign is one which advertises “a business, its products or its services at the point of manufacture, distribution or sale, hence on-premise.” *Metromedia v. City of San Diego*, 453 U.S. 490, 526 n.5 (1981) (Brennan, J., concurring) (citation omitted). Government typically regulates off-premise advertisements more strictly than on-premise advertisements. See DANIEL R. MANDELKER, LAND USE LAW § 111.09, at 447 (4th ed. 1997) (“Sign ordinances that prohibit off-premise billboards usually allow on-premise business signs.”); *cf.* *Metromedia*, 453 U.S. at 511–13 (plurality opinion) (stating that government may constitutionally regulate off-premise signs more strictly than on-premises signs, and justifying on-premise/off-premise distinction on ground that a business “has a stronger interest in identifying its place of business . . . than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere”) (citation omitted).

82. See ME. REV. STAT. ANN. tit. 23, § 1922 (West 1992).

83. See VT. STAT. ANN. tit. 10, § 505 (1998) (saying that state billboard laws “shall not supersede the provisions of any local ordinances whose requirements are more strict than those of this chapter”); R.I. GEN. LAWS § 24-10.1-9 (1997) (asserting that nothing in state outdoor advertising statutes “shall be construed to abrogate or affect the provisions of any lawful ordinance, regulation or resolution, which are more restrictive than the provisions of this chapter”).

of display, size, height, spacing, movement and aesthetic features of signs,”<sup>84</sup> the laws of Maine, Rhode Island, and Vermont do not include even this bit of protection for landowners. Rather, all three states apparently give local governments unlimited power to regulate billboards.

Nevertheless, DPR argues that the Guidebook’s model statute violates the First Amendment,<sup>85</sup> primarily because it “allows local governments virtually unlimited control over the ability of a businessperson to advertise in his or her place of business.”<sup>86</sup> In other words, DPR asserts that by giving local governments power to regulate on-premise signs, Section 8-201(2)(h) violates landowners’ First Amendment right to advertise their businesses.<sup>87</sup> This argument is unlikely to prevail in court because the most relevant state and federal district court decisions generally uphold the government’s right to regulate on-premise signs. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>88</sup> and more recently in *Lorillard Tobacco Co. v. Reilly*,<sup>89</sup> the Supreme Court held that under the First Amendment, even truthful advertising concerning lawful activity may nevertheless be regulated if (1) a “substantial” government interest justifies regulation,<sup>90</sup> (2) the regulation at issue “directly advances the

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84. GUIDEBOOK, *supra* note 2, § 8-201(2)(h) at 8-51.

85. See U.S. CONST. amend. I (saying “Congress shall make no law . . . abridging freedom of speech”); *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994) (The Fourteenth Amendment makes this clause applicable to states and their political subdivisions.).

86. See *DPR Summary*, *supra* note 67.

87. Another Guidebook critic points out that the Guidebook contains no “qualifying language whatsoever [explaining] that [sign] 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.” Claus Testimony, *supra* note 51; see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (similar three-part test governs content-neutral regulations of commercial speech)). But if every statute was unconstitutional unless it quoted relevant Supreme Court case law, the SZEAs and every land use statute patterned on the SZEAs would be unconstitutional unless they were regularly rewritten to parrot language from the Supreme Court’s most recent decisions—obviously an absurd result. See *supra* note 27 (courts generally uphold SZEAs-type zoning laws). Thus, the Guidebook’s lack of detail on this point raises no constitutional problem.

88. 447 U.S. 557 (1980).

89. 533 U.S. 525.

90. *Id.* at 554 (quoting *Central Hudson*, 447 U.S. at 566).

governmental interest asserted,”<sup>91</sup> and (3) the regulation is “not more extensive than is necessary to serve that interest.”<sup>92</sup> Later decisions make clear that traffic safety and aesthetic rationales for on-premise sign regulation<sup>93</sup> are “substantial” within the meaning of *Central Hudson*.<sup>94</sup> Thus, only the last two prongs of *Central Hudson* create controversy in cases involving regulation of on-premise signs.

As a rule, “[r]easonable restrictions governing size, setbacks, lighting, color, placement, orientation, design, number, height, spacing, or otherwise regulating the manner of advertising devices, will be upheld.”<sup>95</sup> Although local governments generally regulate on-premise commercial signs less strictly than off-premise commercial signs,<sup>96</sup> courts usually uphold zoning ordinances regulating on-premise signs under the *Central Hudson* test. For example, in *Brewster v. City of Dallas*,<sup>97</sup> the plaintiff asserted that a zoning ordinance restricting “the location of signs . . . [and] the size, luminance and movement of signs; their projection from building walls; the size and number of words they may contain, and the number of signs at a given location”<sup>98</sup> violated the First Amendment as it pertained to on-premise commercial signs.<sup>99</sup> The court rejected the plaintiff’s First Amendment claim,

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91. *Id.*

92. *Id.* However, some courts hold that the *Central Hudson* test does not govern government regulation of noncommercial signs. See *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 385–88 (6th Cir. 1996) (constitutionality of sign ordinance restricting both commercial and noncommercial yard signs not decided under *Central Hudson* test; instead, ordinance valid only if “narrowly tailored” to state interest and landowners have “ample alternative channels of communication”). But see *Long Island Bd. of Realtors, Inc. v. Inc. Village of Massapequa Park*, 277 F.3d 622 (2d Cir. 2002) (where city sign ordinance made no distinction between commercial and noncommercial on-premise signs, court applied *Central Hudson* test without mentioning absence of commercial/noncommercial distinction).

93. See *infra* notes 102–05, 125–26, 130–35 and accompanying text.

94. See *Metromedia v. City of San Diego*, 453 U.S. 490, 507–08 (1981) (plurality opinion) (“[T]he twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals.”).

95. 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 14A.08, at 14A-20 to 21 (1996 ed.) [hereinafter RATHKOPF & RATHKOPF].

96. See MANDELKER, *supra* note 81, at § 111.09, at 447.

97. 703 F. Supp. 1260 (N.D. Texas 1988).

98. *Id.* at 1262.

99. *Id.* at 1263.

holding that, as required by *Central Hudson*,<sup>100</sup> the city's ordinance (1) directly advanced the city's legitimate interests<sup>101</sup> and (2) reached no further than necessary to satisfy those interests.<sup>102</sup> As to the former issue, the court held that the ordinance directly advanced the city's substantial interests in "promoting traffic safety, communications efficiency, and landscape quality and preservation."<sup>103</sup> The court based that conclusion on the city's finding that "the restrictions promoted efficiency by ensuring that persons exposed to signs are not so overwhelmed by the number of messages presented that they cannot find the information they seek,"<sup>104</sup> and on the absence of evidence contradicting the city's finding that its ordinance promoted traffic safety<sup>105</sup> and created "some positive aesthetic effect."<sup>106</sup> As to the latter issue, the court found that the city's zoning ordinance "reach[ed] no further than necessary to accomplish its objectives"<sup>107</sup> because it "merely regulates, without prohibiting, on-site advertising"<sup>108</sup> and was "content neutral."<sup>109</sup> The ordinance was thus probably constitutional<sup>110</sup>

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100. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

101. *See Brewster*, 703 F. Supp. at 1264-65.

102. *Id.* at 1265-66.

103. *Id.* at 1264.

104. *Id.* at 1265.

105. *Id.*

106. *Id.* Although the plaintiff submitted affidavits asserting that the restrictions did not promote safety and that motorists would be unable to comprehend signs conforming to the ordinance, *id.* at 1264-65, the court termed these affidavits "conclusory," *id.* at 1265 n.5, and "conjectural," *id.* at 1265.

107. *Id.* (citing *Metromedia v. City of San Diego*, 453 U.S. 490, 507 (1981)).

108. *Brewster*, 703 F. Supp. at 1265. By contrast, "a total ban on on-premises signs may violate the First Amendment . . . [because] the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property." *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 591 (6th Cir. 1987).

109. *Brewster*, 703 F. Supp. at 1265. A "content neutral" regulation is one that government "justifi[es] without reference to the content of the regulated speech." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). By contrast, "A regulation of speech is content based when the content conveyed determines whether the speech is subject to restriction." *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F. Supp. 2d 755, 763 (N.D. Ohio 2000) (citations omitted). Because the language of Section 8-201(2)(h) of the Guidebook is virtually identical to the *Brewster* court's description of the statute upheld in that case, it follows that Section 8-201(2)(h) is also content-neutral. *Cf. DPR Summary*, *supra* note 67 (asserting without elaboration that the Guidebook regulates content); *GUIDEBOOK*, *supra* note 2, at 8-50 (stating that § 8-201 "does not authorize regulation of content").

110. *Brewster*, 703 F. Supp. at 1265 (citation omitted); *see also* North



because “[it] does not select the messages the public can see; it merely regulates the non-communicative aspects of signs. Sign owners can still display their messages; the only change is in the way they can display them.”<sup>111</sup>

In some respects, *Brewster* is directly on point. Just as the Guidebook allows regulation of signs’ location, size, height, and other non-communicative aspects,<sup>112</sup> the ordinance upheld in *Brewster* regulated signs’ location, size, and similar aesthetic features.<sup>113</sup> It follows that if *Brewster* is still good law, Section 8-201(2)(h) of the Guidebook is clearly constitutional. It could be argued, however, that the *Brewster* court erred in one important respect. The *Brewster* court deferred to the city’s judgment that its zoning laws directly advanced its goals of safety, aesthetic values, and efficiency,<sup>114</sup> based on that court’s assumption that “as plaintiff, *Brewster* bears the burden of proof.”<sup>115</sup> But Supreme Court precedent holds that “the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”<sup>116</sup> Thus, *Brewster* does not answer the question of whether, given that the government has the burden of proof, Section 8-201(2)(h) and similar regulations are constitutional.

To meet its burden of justifying a restriction on commercial speech, a state or local government need not supply the court with “a surfeit of background information.”<sup>117</sup> Instead, the Supreme Court “[permits] litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether or even . . . to justify restrictions based solely on history, consensus, and simple common sense.”<sup>118</sup> In other words, a state or municipality can

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Olmsted Chamber of Commerce, 86 F. Supp. 2d at 764, 769–73 (holding that content-based restrictions on commercial speech subject to *Central Hudson* test, and that under *Central Hudson*, such content-based restrictions did not directly advance city’s aesthetic and traffic safety interest, because signs with disfavored content unlikely to be “less safe or less aesthetically pleasing than other signs”) (citations omitted).

111. *Brewster*, 703 F. Supp. at 1266.

112. GUIDEBOOK, *supra* note 2, § 8-201(2)(h), at 8-51.

113. *Brewster*, 703 F. Supp. at 1262.

114. *Id.* at 1265.

115. *Id.*

116. *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1507 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

117. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

118. *Id.*

constitutionally regulate commercial speech, such as signs, as long as it gives the court some reason to believe that the sign restrictions at issue do in fact advance aesthetics, traffic safety, or some other public goal.

Two California cases suggest that where government seeks to regulate on-premise signs, its burden of proof is easily met. In *Rodriguez v. Solis*,<sup>119</sup> a city denied an auto dealer's request for a permit to erect on-premise signs within fifty feet of a freeway "on the ground that the signs would not be compatible with the landscaped environment of Freeway 41 [the freeway in question]."<sup>120</sup> Thus, the question presented was "whether a municipality can constitutionally restrict a property owner from erecting an onsite business sign oriented towards a landscaped freeway."<sup>121</sup> The plaintiff argued that the city "failed to establish that the ordinance advances aesthetic interests."<sup>122</sup> Put another way, the plaintiff asserted that the city failed to meet its burden of proving that the city's regulation directly advanced a substantial government interest (as required by *Central Hudson*).<sup>123</sup> The court did not deny that the city had the burden of proof, but nevertheless found that "[b]y characterizing signs along Freeway 41 as visual blight and then taking measures to limit or prohibit such signs, the city council took steps to advance the governmental interest of controlling that visual blight."<sup>124</sup> In other words, the *Rodriguez* court held that because the city characterized plaintiff's on-premise signs as "visual blight," any regulation of those signs directly advanced the city's substantial<sup>125</sup> interest in controlling visual blight. So even if the city had the burden of showing that its regulations directly advanced its aesthetic interest, the city met this burden. The *Rodriguez* court went on to hold that the city satisfied the *Central Hudson*<sup>126</sup> Court's requirement that "the ordinance reaches no further than necessary to accomplish the city's objective."<sup>127</sup> In support of this conclusion,

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119. 2 Cal. Rptr. 2d 50, 53 (Cal. Ct. App. 1991).

120. *Id.*; see also *id.* at 52-53 (describing underlying facts in detail).

121. *Id.* at 60.

122. *Id.* at 61.

123. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (holding regulation of commercial speech unconstitutional unless it "directly advances" substantial governmental interest).

124. *Rodriguez*, 2 Cal. Rptr. 2d at 61.

125. *Id.* (characterizing city's interest as "substantial").

126. See *Central Hudson*, 447 U.S. at 566.

127. *Rodriguez*, 2 Cal. Rptr. 2d at 61.

the court pointed out that the city “has not banned all onsite billboards . . . . The only type of sign advertising disallowed is that which can be reasonably construed as contributing to visual blight.”<sup>128</sup> Thus, *Rodriguez* suggests that as long as a city’s restrictions on on-premise signs merely regulate “visual blight” rather than outlawing all onsite signs, such regulations are not overbroad under *Central Hudson*. It logically follows that the Guidebook’s model statute (which also seeks to regulate rather than to eliminate on-premise signs) is also constitutional under *Central Hudson*.

The *Rodriguez* court relied partially on *dicta* from *City of Indio v. Arroyo*.<sup>129</sup> In *Arroyo*, the city sought to remove a mural painted on the location of a small convenience store on the ground that the mural was larger than allowed by the city’s sign ordinance.<sup>130</sup> The court implicitly acknowledged that the municipality had the burden of proof, stating that if “the city could demonstrate, for example, that the mural posed a traffic hazard . . . then abatement would be proper.”<sup>131</sup> The court further held that the city’s ordinance was unconstitutionally overbroad because the mural was a noncommercial depiction of the owners’ Mexican heritage rather than a commercial advertisement<sup>132</sup> and aesthetic judgments that might justify regulation of commercial speech could not justify suppression of such artistic speech.<sup>133</sup> But the court added in *dicta*, “[t]he city’s interest in its esthetic environment is directly advanced by the ordinance’s regulation of commercial speech. We have little doubt that if, for example, the Arroyos’ wall advertised ‘Cold Beer, Come Inside!’ it could properly be regulated in the precise fashion contemplated with regard to the mural as it exists.”<sup>134</sup> In other words, *Arroyo* states that the size of an on-premise sign or mural may be limited on aesthetic grounds—a proposition completely consistent with the Guidebook’s position

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128. *Id.*

129. 191 Cal. Rptr. 565 (Cal. Ct. App. 1983).

130. The mural was 110 square feet in area, *id.* at 566, but under the sign ordinance the “area of the attached sign could not exceed ninety square feet,” *id.* at 567–68.

131. *Id.* at 570 (emphasis added).

132. *Id.* at 566 (describing mural).

133. *Id.* at 570 (holding the ordinance “overbroad” as applied to noncommercial mural because city “cannot . . . suppress the ideological expression of its residents in pursuit of a municipal interest in esthetics”).

134. *Id.* at 569.

that local governments may regulate the “size, height, spacing, movement and aesthetic features of signs.”<sup>135</sup>

Both *Arroyo* and *Rodriguez* support the proposition that even if a municipality has the burden of justifying its regulations, it nevertheless may limit the size and location of on-premise commercial signs. It follows that under these cases, the Guidebook’s model statute limiting the size, location, and other aesthetic features of on-premise signs does not violate the First Amendment.

It could be argued that *In re Deyo*<sup>136</sup> compels a contrary outcome. In *Deyo*, the owner of commercial office space challenged a city ordinance that “prohibited on-premise signs advertising the sale or lease of real estate.”<sup>137</sup> The Vermont courts found that the ordinance was unconstitutional for two reasons. First, “by permitting other types of signs that are distracting to motorists, the traffic safety benefits of the ordinance were undermined.”<sup>138</sup> Second, “the sign ordinance substantially limited property owners’ ability to market their property because the alternatives available – listing with real estate agents or advertising in the classified section of newspapers – were less than satisfactory.”<sup>139</sup> The law invalidated in *Deyo* completely prohibited on-site signs related to real estate transactions. By contrast, the *Brewster* and *Rodriguez* courts implicitly distinguished cases such as *Deyo*, by emphasizing that the ordinances at issue were constitutional because they “merely regulate[d], without prohibiting, on-site advertising.”<sup>140</sup> In other words, *Deyo* held that a city government could not completely prohibit the erection of on-premise signs, whether for one type of business

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135. GUIDEBOOK, *supra* note 2, § 8-201(2)(h), at 8-51 (emphasis added).

136. 670 A.2d 793 (Vt. 1995).

137. *Id.* at 794.

138. *Id.* at 795; *cf.* *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ban on “For Sale” signs unconstitutional where law’s goal was to suppress information about “white flight” from a city); *Wheeler v. Comm’r of Highways*, 822 F.2d 586, 590 (6th Cir. 1975) (suggesting that total ban on on-premise signs would be unconstitutional).

139. *Deyo*, 670 A.2d at 795.

140. *Brewster v. City of Dallas*, 703 F. Supp. 1260, 1265 (N.D. Texas 1988); *see also Rodriguez v. Solis*, 2 Cal. Rptr. 2d 50, 61 (Cal. Ct. App. 1991) (allowing regulation where city “has not banned all onsite billboards”). The regulation/prohibition distinction, however, only applies to on-premise signs. *See JUERGENSMEYER & ROBERTS, supra* note 17, § 10.16, at 479 (bans on off-premise signs generally constitutional).

or for all local businesses. *Brewster* and *Rodriguez* addressed an entirely different question: whether a city government could regulate on-premise signs, without prohibiting them, by regulating the size and location of such signs.

Section 8-201(2)(h) of the Guidebook resembles the ordinance upheld in *Brewster* rather than the ordinance struck down in *Deyo*. The Guidebook statute apparently does not allow local governments to prohibit on-premise signs altogether, either for all commercial enterprises or for one particular type of business. Instead, the Guidebook authorizes regulation of the “location, period of display, size, height, spacing, movement and aesthetic features of signs”<sup>141</sup>—just as the ordinance upheld in *Brewster* regulated “the location of signs” and “the size, luminance and movement of signs; their projection from building walls; the size and number of words they may contain, and the number of signs at a given location.”<sup>142</sup>

One might argue that by allowing local governments to regulate the “location” of signs, the Guidebook in fact allows the prohibition of such signs because a zoning ordinance providing that “there shall be no advertising signs in city X” not only prohibits the erection of such signs but also regulates their location by excluding them from city X. But such an interpretation of the Guidebook is probably incorrect, for three reasons. First, if the Guidebook’s authors intended to allow local governments to prohibit signs, they could have used the term “prohibit,” which they did not do. Second, as noted above, the *Brewster* court interpreted an ordinance that regulated the “location”<sup>143</sup> of signs as an invitation to regulate signs rather than prohibiting them entirely.<sup>144</sup> It follows that the Guidebook should be similarly interpreted. Third, Supreme Court precedent holds that if “a statute is susceptible of two constructions, by one of which grave and doubtful

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141. GUIDEBOOK, *supra* note 2, § 8-201(2)(h), at 8-51.

142. *Brewster*, 703 F. Supp. at 1262. Courts also apply the regulation/prohibition distinction to sign regulations affecting homes rather than businesses. See *Long Island Bd. of Realtors, Inc. v. Inc. Village of Massapequa Park*, 277 F.3d 622, 627–28 (2d Cir. 2002) (upholding ordinance “regulat[ing] the number, size and location of signs on residential property” and prohibit[ing] “off-site commercial advertisements on residential property” because “nothing on the face of the challenged [laws] . . . prohibits [plaintiff] from displaying real estate signs”).

143. *Brewster*, 703 F. Supp. at 1262.

144. *Id.* at 1265.

constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to avoid the latter."<sup>145</sup> So if lower courts can possibly interpret Section 8-201(2)(h) to authorize mere regulation of on-premise sign location and aesthetics rather than citywide<sup>146</sup> prohibitions of such signs, they will do so and thus uphold that statute and similarly worded state statutes against a First Amendment challenge.

Because no federal appellate case is on point, the constitutionality of local regulation of on-premise signs is not yet clear beyond all dispute. However, relevant district court and state cases hold that statutes that regulate the size, location, and similar aesthetic features of on-premise signs are consistent with the First Amendment. It follows that if Section 8-201(2)(h) is correctly interpreted to allow such regulation, it too is probably consistent with the First Amendment under existing case law. But any statute that seeks to outlaw on-premises signs is constitutionally questionable.

### *B. The Guidebook and the Fourth Amendment*

The Fourth Amendment provides that persons' rights "against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>147</sup> The Fourth Amendment applies to both the federal government and to state and local governments<sup>148</sup> and its purpose is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."<sup>149</sup> As a general rule, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>150</sup> Section 11-101 of the Guidebook

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145. *Harris v. United States*, 122 S. Ct. 2406, 2413 (2002) (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

146. Obviously, an ordinance keeping on-premise signs out of one specific location is a "regulation" rather than a "prohibition." For example, in *Rodriguez*, the court allowed a city to prohibit the plaintiff from installing an on-premise sign near a freeway. *Rodriguez v. Solis*, 2 Cal. Rptr. 2d 50, 60 (Cal. Ct. App. 1991).

147. U.S. CONST. amend. IV.

148. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (citation omitted).

149. *Id.*

150. *Id.* at 528-29 (noting the existence of certain "carefully defined" exceptions to this rule) (citations omitted).

provides that a municipality may obtain a warrant to search a landowner's property<sup>151</sup> after proving to a court "that there is probable cause to believe that the property is not in compliance with land development regulations."<sup>152</sup> DPR asserts that Section 11-101 violates the Fourth Amendment's prohibition of "unreasonable searches and seizures"<sup>153</sup> because, *inter alia*,<sup>154</sup> that statute (1) does not require municipal inspectors to give landowners advance notice of searches,<sup>155</sup> (2) allows police officers to accompany zoning inspectors on searches,<sup>156</sup> and (3) allows local governments to act upon communications from any person.<sup>157</sup> Each of these contentions will be addressed in turn.

### 1. Notice

Section 11-101(7) of the Guidebook provides that local government officials "*may* notify or warn persons that they are or may be violating land development regulations"<sup>158</sup> before searching their property. The Guidebook's use of the word

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151. See GUIDEBOOK, *supra* note 2, § 11-101(4), at 11-13.

152. *Id.*

153. U.S. CONST. amend. IV.

154. Two other Fourth Amendment-related arguments are more difficult to understand, but apparently relate to potential police misconduct. The DPR asserts that under Section 11-101(4), "local officials could rezone high crime residential areas enabling code enforcement officials (accompanied by the police) to search every building in the rezoned area for suspected violations." *DPR Summary*, *supra* note 67. But nothing in Section 11-101(4) authorizes rezoning of entire neighborhoods or refers to "high crime areas," and in any event it is not clear why such a rezoning would implicate the Fourth Amendment. The DPR also complains about the Guidebook's willingness to immunize persons performing searches from trespass liability. See GUIDEBOOK, *supra* note 2, § 11-101(5), at 11-14 (zoning inspections not a violation of state criminal trespass laws, nor shall owners or occupants of property have a cause of action for trespass "except for intentional, knowing or reckless damage to the property"). Because trespass is traditionally a state claim, a state's failure to provide such a claim has no obvious relevance to the federal Constitution. *Cf. Eliason Corp. v. Bureau of Safety and Regulation*, 564 F. Supp. 1298 (D. Mich. 1983) (discussing federal civil rights claim arising out of allegedly unlawful search and then going on to describe trespass claim under state law). Of course, any state law that sought to foreclose federal claims arising out of unlawful searches would violate the Constitution's Supremacy Clause. See U.S. CONST. art. VI (saying that federal law "shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

155. *DPR Summary*, *supra* note 67.

156. *Id.*

157. *Id.*

158. GUIDEBOOK, *supra* note 2, § 11-101(7), at 11-14 (emphasis added).

"may" indicates that such notice is not mandatory—a proposition that, according to DPR, is contrary to the Fourth Amendment.<sup>159</sup> Two Supreme Court cases are highly relevant. In *Camara v. Municipal Court*,<sup>160</sup> the Supreme Court held that building inspectors must obtain search warrants in order to engage in housing-related administrative searches.<sup>161</sup> But under *Camara*, "there is no obligation on the inspector to give advance notice, or, if he is denied entry, to indicate his intention to return with a warrant, make the time of his return known in advance, or arrange a time convenient to the occupant."<sup>162</sup>

In *Marshall v. Barlow's, Inc.*,<sup>163</sup> the Court extended *Camara* by holding that under the Fourth Amendment, agents of the Secretary of Labor must obtain search warrants in order to inspect employment facilities for safety hazards.<sup>164</sup> In support of this decision, the Court pointed out that a warrant requirement would not cripple the Labor Department's ability to perform surprise inspections because "warrants may be issued *ex parte* and executed without delay and without prior

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159. See *DPR Summary*, *supra* note 67 (suggesting that Amendment prohibits local governments from obtaining "inspection warrants for suspected land violations without first notifying the owner of the property that the property is the subject of an investigation").

160. 387 U.S. 523 (1967).

161. *Id.* at 534 ("[W]e hold that administrative searches of the kind at issue are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in . . . other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections."). The Guidebook complies with the warrant requirement set forth in *Camara*. See GUIDEBOOK, *supra* note 2, § 11-101(4), at 11-13 (saying that zoning inspectors may petition courts for search warrant, and may obtain warrant only after demonstrating probable cause to believe property not in compliance with land use regulations). I note that the warrant requirement does not apply to all administrative searches. See *United States v. Biswell*, 406 U.S. 311, 316 (1972) (holding that search warrant requirement does not apply to "pervasively regulated" businesses).

162. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.1(g), at 397-98 (3d ed. 1996) (criticizing the Court's failure to require such notice, but noting that "[t]here is no great likelihood that the Court will have the occasion to provide this protection in the immediate future" because Fourth Amendment litigation arising out of administrative inspections is "infrequent").

163. 436 U.S. 307 (1978).

164. *Id.* at 309, 311.



notice, thereby preserving the element of surprise.”<sup>165</sup> Thus, *Barlow* suggests that the Fourth Amendment allows government inspectors to search land “without prior notice.”<sup>166</sup>

## 2. Police Searches and Administrative Searches

Section 11-101(4)(d) of the Guidebook provides that zoning inspectors “may be accompanied by one or more sworn officers of the [local] police department.”<sup>167</sup> These officers “shall not participate in the inspection, and an entry and inspection pursuant to this paragraph shall not, by the mere presence of police officers pursuant to this paragraph, be considered to be a search by police officials.”<sup>168</sup> The commentary to this provision explains that police officers “should accompany planning agency or code enforcement personnel only when it is believed there is a possibility of violence against the personnel in performance of their duties”<sup>169</sup> and may not participate in searches.<sup>170</sup> DPR complains that even though Section 11-104(4)(d) explicitly prohibits police officers from participating in zoning inspections, their mere presence creates a risk that the police might “surreptitiously gather evidence for possible criminal charges against a property owner.”<sup>171</sup> Thus, the question presented is whether police officers may constitutionally accompany zoning inspectors on a search.

The case of *Alexander v. City and County of San Francisco*<sup>172</sup> is nearly on point. *Alexander* arose out of the following facts: City health inspectors visited a homeowner’s residence in order to search the premises.<sup>173</sup> The homeowner shot at police officers who accompanied the inspectors and was in turn fatally shot.<sup>174</sup> The executor of the homeowner’s estate sued the city, alleging that the officers violated the homeowner’s Fourth Amendment rights because they “entered [the homeowner’s house] for the purpose of arresting him, but

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165. *Id.* at 316 (italics in original).

166. *Id.*

167. GUIDEBOOK, *supra* note 2, § 11-101(4)(d), at 11-13.

168. *Id.*

169. *Id.* at 11-14.

170. *Id.*

171. DPR Summary, *supra* note 67.

172. 29 F.3d 1355 (9th Cir. 1994).

173. *Id.* at 1357–59.

174. *Id.* at 1358.

had only an administrative inspection warrant in their possession.”<sup>175</sup> The trial court granted defendants’ motion for summary judgment, but the Ninth Circuit reversed.<sup>176</sup> The court initially noted that “*as an initial matter* a forcible entry warrant provides a lawful basis for entry,”<sup>177</sup> without making a distinction between police officers and health inspectors. Thus, *Alexander* suggests that a valid administrative warrant may justify entry by both administrative inspectors and police officers.

The court nevertheless went on to hold that summary judgment was inappropriate because “if in fact the officers’ primary purpose in storming the house was to arrest [the homeowner] rather than to assist the health officials in executing the inspection warrant, then [the homeowner’s] Fourth Amendment rights were violated.”<sup>178</sup> It logically follows from this statement that if the officers’ primary purpose was to assist the health officials rather than to make an arrest, no Fourth Amendment violation occurred. Thus, *Alexander* stands for the proposition that police officers may accompany zoning inspectors on searches if their goal is to protect the inspectors, but may not do so if their goal is to act as criminal investigators (i.e., to arrest landowners or perform searches that might lead to such arrests). Because the Guidebook allows police to pursue the former goal but not the latter,<sup>179</sup> its language accurately tracks that of *Alexander* and thus does not violate the Fourth Amendment.

### 3. Who Can Complain

Section 11-101(6) of the Guidebook provides that a municipality “may receive from any person informal communications alleging that a person or persons are or may be violating land development regulations . . . [and] may act upon communications as defined in this paragraph as it deems appropriate.”<sup>180</sup> DPR complains that under this model statute, local governments may obtain inspection warrants based on

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175. *Id.* at 1357.

176. *Id.*

177. *Id.* at 1361 n.5 (italics in original).

178. *Id.* at 1360.

179. See *supra* notes 161–62 and accompanying text.

180. GUIDEBOOK, *supra* note 2, § 11-101(6), at 11-14.

allegations “by anyone, such as neighbors, nearby businesses, or other ‘interested citizens.’”<sup>181</sup> It is well settled that even searches based on anonymous tips do not automatically violate the Fourth Amendment, both in the criminal context<sup>182</sup> and in the administrative context.<sup>183</sup> Thus, Section 11-101(6) presents no Fourth Amendment problem.

### C. *The Guidebook and the Fifth Amendment*

The Fifth Amendment provides that no person may be “deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>184</sup> Pursuant to the Due Process and Takings Clauses of that amendment, Guidebook critics attack the Guidebook’s provisions regarding (1) development moratoria;<sup>185</sup> (2) design review districts;<sup>186</sup> (3) historic preservation;<sup>187</sup> (4) rezoning of existing land uses;<sup>188</sup> (5) local government approval of subdivisions;<sup>189</sup> (6) transferable development rights;<sup>190</sup> (7) criminal sanctions for violation of zoning laws;<sup>191</sup> (8) dedications of property in exchange for building permits;<sup>192</sup> and (9) amortization of nonconforming uses.<sup>193</sup> Each of these issues will be addressed in turn.

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181. *DPR Summary*, *supra* note 67.

182. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (“While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.”).

183. *See People v. Paulson*, 265 Cal. Rptr. 479 (Cal. Ct. App. 1990) (upholding search of bar by alcoholic beverage control officer based upon tip by “anonymous informer”); *McDonald v. State*, 778 S.W. 2d 88 (Tex. Crim. App. 1989) (upholding “administrative” inspection of bar based on “telephone tip” from unnamed “reliable informant”).

184. U.S. CONST. amend. V.

185. *See infra* note 207 and accompanying text.

186. *See infra* note 221 and accompanying text.

187. *See infra* note 225 and accompanying text.

188. *See infra* note 243 and accompanying text.

189. *See infra* notes 249 and accompanying text.

190. *See infra* note 264 and accompanying text.

191. *See infra* note 295 and accompanying text.

192. *See infra* notes 314–15, 324 and accompanying text.

193. *See infra* note 334 and accompanying text.

## 1. Development Moratoria

### a. The Guidebook's Rules

Eight states authorize local governments to impose development moratoria, which are temporary prohibitions on new development or on connection of newly developed property to publicly owned water and sewer lines.<sup>194</sup> Typically, moratoria are imposed when municipal officials are preparing an extensive amendment of land use regulations and seek to have pending requests for development considered under the new rules they wish to adopt<sup>195</sup> or when public facilities such as roads and sewers are not yet adequate to serve new development.<sup>196</sup>

Rather than adopting a one-size-fits-all provision on moratoria, Section 8-604(3) of the Guidebook proposes three model state statutes. Alternative One allows moratoria (1) where development presents a "significant threat to the public health or safety or general welfare"<sup>197</sup> or (2) where a municipality is in the process of preparing or amending either a local comprehensive plan or land development regulations implementing a new or amended local comprehensive plan.<sup>198</sup> Alternative Two allows a moratorium in the situations listed in Alternative One<sup>199</sup> and also to prevent "a shortage or overburden of public facilities that would otherwise occur during the effective term of the moratorium or that is reasonably foreseeable as a result of any proposed or

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194. See GUIDEBOOK, *supra* note 2, at 8-180 to 8-183 (The states include Arizona, California, Maine, Minnesota, New Hampshire, New Jersey, Oregon, and Washington.).

195. *Id.* at 8-179 to 8-180. If local governments decline to adopt a moratorium in that situation, they may be faced with a deluge of development permit applications filed in order to avoid presumably more restrictive provisions in the new enactments. *Id.* at 8-179.

196. *Id.* at 8-180.

197. GUIDEBOOK, *supra* note 2, § 8-604(3), at 8-187.

198. *Id.*

199. *Id.* (allowing moratorium for preparation or amendment of comprehensive plan or related regulations, if (1) municipality in process of preparing first such plan, or (2) municipality responding to "substantial change in conditions not contemplated at the time the present local comprehensive plan was adopted or most recently amended" and allowing moratorium in response to "significant threat to the public health or safety or the general welfare" presented by possible development).

anticipated development.”<sup>200</sup> Alternative Three allows moratoria only to prevent the shortage or overburden of public facilities referred to in Alternative Two<sup>201</sup> or to prevent “a significant threat to the public health or safety.”<sup>202</sup> Moratoria are limited to 180 days unless a municipality enacts extensions.<sup>203</sup> The Guidebook gives legislatures the option of further restricting moratoria in already-developed areas.<sup>204</sup>

*b. Moratoria Are Constitutional . . .*

The Supreme Court recently upheld a development moratorium in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>205</sup> In *Tahoe-Sierra*, the question before the Court was whether “a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause.”<sup>206</sup> The Supreme Court flatly refused to ban moratoria, holding that “the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”<sup>207</sup> Instead, the Court held that the constitutionality of moratoria, like the constitutionality of most other land use regulations not involving a physical occupation of property,<sup>208</sup> or elimination of the property’s economic value,<sup>209</sup> is governed by the balancing test generally used to decide whether a government regulation constitutes an

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200. *Id.*

201. *Id.* at 8-187 to 8-188.

202. *Id.* at 8-188.

203. GUIDEBOOK, *supra* note 2, § 8-604(5)(c), at 8-188 (limiting length of moratoria); *id.*, §8-604(8), at 8-189 (governing extensions of moratoria); *infra* notes 206–11 and accompanying text (describing time limit issue in more detail).

204. See GUIDEBOOK, *supra* note 2, § 8-604(4), at 8-188 (moratoria disallowed in “smart growth areas” unless development presents a “significant threat to the public health and safety”); *id.* at 4-131 to 4-132 (“smart growth areas” are central cities listed by state legislature plus other areas with central water and sewer service and over six dwelling units per acre); *id.* at 8-188 (containing commentary explaining that moratoria rarely appropriate in areas which already have sufficient public facilities and infrastructure).

205. 122 S. Ct. 1465 (2002).

206. *Id.* at 1470 (italics in original).

207. *Id.* at 1485.

208. *Id.* at 1478–79 (citations omitted).

209. *Id.* at 1483 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

unconstitutional taking.<sup>210</sup> Under this test, the courts weigh “the regulation’s economic impact on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”<sup>211</sup> Thus, *Tahoe-Sierra* bars any claim that development moratoria are always unconstitutional.<sup>212</sup>

*c. But Not If They Are Permanent*

However, under *Tahoe-Sierra*, a moratorium may be an unconstitutional taking if it is permanent rather than temporary.<sup>213</sup> DPR asserts that the Guidebook in fact endorses permanent moratoria, and is thus unconstitutional under *Tahoe-Sierra*, because it contains “no meaningful time limit for moratoria when the local government still perceives that a need for moratoria exists.”<sup>214</sup> Section 8-604(5) of the Guidebook states that a moratorium’s term “except as otherwise provided herein, shall not be more than [180] days.”<sup>215</sup> Section 8-604(8) states that a local government “may extend an ordinance establishing a moratorium on the issuance of development permits for [only one or up to two] additional [180]-day

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210. *Id.* at 1489–90.

211. *Id.* at 1475 n.10 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

212. The case of *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) is not to the contrary. In *Monterey*, the Court found a taking where a city’s repeated refusal to grant the plaintiff a development permit “was inconsistent not only with the city’s general ordinances and policies but even with the shifting ad hoc instructions previously imposed by the city.” *Id.* at 722. One Guidebook critic asserts that just as the *Monterey* defendant “got into trouble because it had to ‘continuously invent reasons not present in the code to stop development it didn’t want[,] [t]he Guidebook’s moratorium statute now legitimizes delay while reasons for denial are worked out.” Claus Testimony, *supra* note 51. This argument makes no sense, because the Guidebook’s moratorium statute is precisely the kind of “general policy” that the *Monterey* defendant refused to follow. See *Monterey*, 526 U.S. at 722 (emphasizing that *Monterey* plaintiff “did not bring a broad challenge to the constitutionality of the city’s general land-use ordinances or policies, and our holding did not extend to a challenge of that sort”).

213. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1484 (2002) (“[A] permanent deprivation of the owner’s use of the entire area is a taking . . . whereas a temporary restriction that merely causes a diminution of value is not.”) (citation omitted); *id.* at 1486 (“[T]he better approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances.”) (citation omitted).

214. *DPR Summary*, *supra* note 67.

215. GUIDEBOOK, *supra* note 2, § 8-604(5), at 8-188 (brackets in original).

period[s].”<sup>216</sup> The existence of brackets in the Guidebook’s language could be interpreted either to mean that local governments may adopt no more than two 180-day extensions or that legislatures may, by deleting these brackets, allow unlimited moratoria.

But the Guidebook’s commentary clarifies this ambiguity, explaining that a “moratorium ordinance must state a duration for the moratoria not in excess of 180 days, but a moratorium may be extended by ordinance . . . An extension *may not last over 180 days*, and the Section provides for either *only one extension or two* at the adopting legislature’s option.”<sup>217</sup> Thus, the Guidebook’s authors intended to limit moratoria to 180 days for an initial moratorium and 180 for each of two possible extensions. This yields a grand total of 540 days, a length of time contemplated by the *Tahoe-Sierra* Court’s statement that “we could not possibly conclude that every delay of over one year is constitutionally unacceptable.”<sup>218</sup> It follows that the Guidebook, if properly interpreted, authorizes temporary rather than permanent moratoria. Because temporary moratoria are constitutional, the Guidebook’s moratorium provisions are constitutional as well.

## 2. Design Review and Historic Preservation

Design review regulations attempt to “promote community character by insuring that a certain architectural style or styles are followed . . . or, in contrast, that architectural diversity is encouraged.”<sup>219</sup> The former type of regulation seeks to ensure that new buildings are compatible with nearby buildings, while the latter type of regulation seeks to avoid monotony.<sup>220</sup> Historic preservation ordinances similarly seek to protect the character of neighborhoods, but are generally limited to districts “that may be associated with an important historic event or person or are representative of a certain

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216. *Id.* § 8-604(8), at 8-189.

217. *Id.* at 8-186 (emphasis added).

218. *Tahoe-Sierra*, 122 S. Ct. at 1489. In fact, the *Tahoe-Sierra* Court upheld a thirty-two-month moratorium, *id.*, and noted that state statutes have authorized moratoria for as long as three years. *Id.* at 1489 n.37.

219. GUIDEBOOK, *supra* note 2, at 9-25.

220. *Id.*

architectural type or period.”<sup>221</sup> Section 9-301 of the Guidebook authorizes both forms of regulation.

*a. Design Review*

Section 9-301 of the Guidebook authorizes local governments to designate “areas by ordinance as design review districts”<sup>222</sup>—areas with structures “united aesthetically by development or that, in the determination of the local legislative body, [have] the potential to be united aesthetically by development.”<sup>223</sup> Within such areas, property owners must obtain a “certificate of appropriateness”<sup>224</sup> — a written decision by a local design review board that their development conforms with the design review ordinance<sup>225</sup> — for “all proposed development removing, destroying, adding, or altering exterior [and interior] architectural features of properties located in a . . . design review district.”<sup>226</sup> Design review board decisions must be based on “standards of review to be applied . . . in reviewing applications for the certificate of appropriateness. These criteria shall include such matters as are consistent with the desired character of the exterior [and interior] architectural features of buildings and structures and their surroundings.”<sup>227</sup> One Guidebook critic suggests that Section 9-301 violates the Fifth Amendment by giving government veto power over “changes to the interior or exterior of [a] business—a process involving layers of bureaucracy and subject to the personal opinions of government officials.”<sup>228</sup>

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221. *Id.* at 9-24.

222. *Id.* § 9-301(1)(b) at 9-29.

223. *Id.* § 9-301(2)(d) at 9-30.

224. *Id.* § 9-301(2)(a) at 9-29.

225. *Id.*

226. *Id.* § 9-301(7) at 9-34.

227. *Id.* § 9-301(g) at 9-32.

228. *DPR Summary*, *supra* note 67. I note in passing that this statute’s reference to regulation of building interiors creates no constitutional problem, because “[f]or the most part, courts have supported designation of interiors of buildings as well as exteriors where commissions have been given the authority to designate and regulate ‘structures’ or ‘buildings’.” 2 RATHKOPF & RATHKOPF, *supra* note 95, § 15.03[4], at 15-30; *see also* Weinberg v. Berry, 634 F. Supp. 86, 92 (D.C. 1986) (rejecting claim that a statute “which permits designation of the interior of buildings as historic landmarks is unconstitutional on its face as a violation of the Takings Clause”); Shubert Org., Inc. v. Landmarks Preservation Comm’n, 570 N.Y.S.2d 504 (1991) (upholding designation of both exterior and interior of buildings as historic landmarks); *cf.* United Artists’ Theater Circuit,



Both the United States Supreme Court and the majority of state courts allow government to regulate land use to promote aesthetic values.<sup>229</sup> Nevertheless, the Guidebook commentary itself concedes that design review ordinances may violate due process under case law invalidating such statutes as “an improper delegation of power or because they were unconstitutionally vague and thus it was difficult for a board to make a decision based on the standards in the ordinance.”<sup>230</sup>

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Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993) (holding that a city historic commission’s attempt to designate both interior and exterior of building as “historic” was not authorized by city historic preservation ordinance, but was not unconstitutional taking).

229. See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“[I]t is within the power of the legislature to determine that the community should be beautiful as well as healthy.”) (dictum); *City and County of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (“It is well settled that the state may legitimately exercise its police powers to advance esthetic values.”); JUERGENSMEYER & ROBERTS, *supra* note 17, § 12.5, at 571 (“[A] majority of states allow architectural design review regulations based solely on aesthetic considerations.”).

230. GUIDEBOOK, *supra* note 2, at 9-27. In fact, the case law is almost evenly split on this issue. Cases rejecting vaguely worded design ordinances include the following: *Anderson v. City of Issaquah*, 851 P.2d 744, 751 (Wash. App. 1993) (holding that city zoning laws providing that new structures “should bear a good relationship with the Issaquah Valley and surrounding mountains,” have windows, doors, eaves and parapets of “appropriate proportions,” “harmonious” colors and lighting, and be “compatible with adjacent buildings” were unconstitutionally vague because they “do not give effective or meaningful guidance to [permit] applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code”); *Waterfront Estates Development, Inc. v. City of Palos Hills*, 597 N.E.2d 641, 648 (Ill. App.3d 1992) (holding that a city ordinance prohibiting “inappropriateness or incompatibility with the surrounding neighborhood . . . unconstitutionally delegates overbroad discretion to the [local Appearance] Commission”); *Morristown Road. Associates v. Mayo*, 394 A.2d 157, 162 (N.J. 1978) (holding that a city ordinance providing that “proposed structures shall be related harmoniously to the terrain and to existing buildings in the vicinity . . . does not adequately circumscribe the process of administrative decision”); *City of West Palm Beach v. State ex rel. Duffey*, 30 So. 2d 491, 492 (Fla. 1947) (invalidating city ordinance requiring that “completed appearance of every new building or structure must substantially equal that of adjacent buildings or structures in said subdivision in appearance, square foot area, and height” on the ground that law left zoning decisions “to the whim or caprice of the administrative agency”). But see *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 311–12 (Mo. 1975) (holding that local requirements that proposed structures “conform to proper architectural standards in appearance and design” and be in “general conformity with the style and design of surrounding structures and conducive to the proper architectural development of the City” were not unlawful delegation of power to architectural review board because they were “sufficient in their general standards calling for a factual determination of the suitability of any proposed structure with reference to the character of the surrounding neighborhood”); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 219 (Wis. 1955) (rejecting vagueness challenge to

As a rule, a land use "ordinance is void for vagueness if it fails to give persons of ordinary intelligence fair notice that their contemplated conduct is proscribed by the ordinance"<sup>231</sup> and is an unconstitutional delegation of power to administrative agencies if it is not "accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will."<sup>232</sup> In other words, both the "delegation doctrine" and the "vagueness doctrine" prohibit government from granting unlimited discretion to design review boards.

One might argue that Section 9-301 is unconstitutional under both doctrines because it does not establish substantive criteria to govern design review boards. But the Guidebook *directs* local governments to create such criteria by stating that a local "design review ordinance adopted pursuant to this Section shall include . . . *standards of review* to be applied by the historic preservation board and/or design review board in reviewing applications for the certificate of appropriateness."<sup>233</sup> In other words, if State X enacts a zoning enabling statute patterned on the Guidebook and a local zoning ordinance authorized by that section fails to include "standards of review to be applied by the . . . design review board,"<sup>234</sup> the ordinance violates both Section 9-301 *and* the Due Process Clause.<sup>235</sup>

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ordinance authorizing denial of building permits if "exterior architectural appeal and functional plan of the proposed structure will, when erected . . . be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed" as to "cause a substantial depreciation in the property values of said neighborhood"); *Novi v. City of Pacifica*, 215 Cal. Rptr. 439, 439 (Cal App. 1985) (holding that "land-use ordinances precluding uses that would be detrimental to the 'general welfare' and precluding developments that would be 'monotonous' in design and external appearance are not unconstitutionally vague."); *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74, 76 (Ohio App. 1963) (upholding ordinance allowing architectural board of review to "maintain the high character of community development, and to protect real estate within this City from impairment or destruction of value, by regulating according to proper architectural principles the design, use of materials, finished grade lines and orientation of all new buildings").

231. *Marty's Adult World of Enfield v. Town of Enfield*, 20 F.3d 512, 516 (2d Cir. 1994) (citation omitted).

232. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 (1976) (citations omitted).

233. GUIDEBOOK, *supra* note 2, § 9-301, 9-301(g), at 9-32 (emphasis added).

234. *Id.*

235. Moreover, the Guidebook seeks to insulate landowners from arbitrary behavior through "catch-all" provisions governing all sections of the Guidebook. Section 8-102(5) of the Guidebook provides that *all* land use regulations must "contain approval standards and criteria that are clear and objective." *Id.* at 8-29. Thus, any vagueness challenge to § 9-101 of the Guidebook, which authorizes local

Therefore, Section 9-301 is not itself unconstitutional and a landowner who wishes to challenge a design review board decision on constitutional grounds should assert that the local ordinance authorizing that decision is unconstitutionally vague, rather than challenging the vagueness of the state law authorizing that ordinance.

Cases invalidating overly vague design review ordinances indirectly support this view; those cases invalidated local zoning laws, rather than attacking state zoning enabling statutes that authorized local governments to enact those laws.<sup>236</sup> And wisely so because if state enabling acts had to be as specific as a local ordinance must be in order to pass constitutional muster, states would have to micromanage local zoning boards by dictating what sort of building designs should be allowed and which should be forbidden.<sup>237</sup>

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governments to designate environmentally sensitive areas as "critical and sensitive areas" and to prohibit "particular uses, activities and structures" in such areas, § 9-101(5)(f), must also fail, because overly vague local regulation violates both the Constitution and the Guidebook. *Id.* at 9-8; cf. *DPR Summary*, *supra* note 67 (criticizing § 9-101 for allowing local governments "to regulate and prohibit land use in [environmentally sensitive] areas without limitation"). Nor do such environmental regulations ordinarily violate the Takings or Due Process Clauses of the Fifth Amendment. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (Environmental regulation is subject to same "takings" test as other government regulation, and thus not a taking unless such regulation (1) deprives a landowner of all economically beneficial use of his or her property, or (2) is unduly intrusive based on the court's balancing of "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."); *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251, 252 (N.J. 1991) (upholding regulation that "strictly limit[ed] residential development on such [environmentally sensitive] land"); *Graham v. Estuary Props.*, 399 So. 2d 1374, 1381 (Fla. 1981) (holding that "[p]rotection of environmentally sensitive areas and pollution prevention are legitimate subjects within the police power").

236. *See supra* note 230 (citing cases from Florida, Illinois, New Jersey and Washington invalidating overly vague city ordinances allowing city to reject development on design-related grounds). Moreover, a contrary view would yield absurd results. If zoning enabling statutes were rendered invalid by the enactment of vague local zoning ordinances, the zoning enabling laws of Florida, Illinois, New Jersey and Washington (the states in which these cases arose) would be unconstitutional—a proposition that none of these cases even support.

237. Guidebook critics, who attack the Guidebook for reducing local zoning power, would presumably find such a result unwelcome. *See DPR Summary*, *supra* note 67 (stating that the Guidebook "replac[es] local control over economic and land use planning with federally crafted and state mandated standards").

*b. Historic Preservation*

Section 9-301 also authorizes historic preservation ordinances that designate areas as historic preservation districts and designate individual properties as historic landmarks.<sup>238</sup> If a property or district is so designated, "a certificate of appropriateness [must] be obtained from a historic preservation board for development affecting the . . . architectural features of all or specified proposed development therein."<sup>239</sup> A historic preservation board's decision as to issuance of such certificates must be governed by municipally enacted criteria dictating the "desired character of the exterior [and interior] architectural features of buildings and structures and their surroundings in a historic district . . . or on properties that have been designated as historic landmarks."<sup>240</sup>

Over time, all fifty states and over five hundred local governments enacted historic preservation legislation<sup>241</sup> and in 1978 the Supreme Court held that historic preservation "is an entirely permissible governmental goal."<sup>242</sup> Nevertheless, DPR suggests that the historic preservation portion of Section 9-301 may be unconstitutional because it authorizes not only regulation of historic buildings, but also regulation of undeveloped private land in historic districts.<sup>243</sup> "[T]he courts have consistently rejected the notion that nonhistoric structures are exempt from control [under historic preservation laws]."<sup>244</sup> And just as local governments may regulate nonhistoric buildings within historic districts, they may regulate undeveloped land within historic districts. For

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238. GUIDEBOOK, *supra* note 2, § 9-301(1)(a). To be so designated, a property must (1) be associated with historically significant events or the lives of persons significant in those events, (2) embody the distinctive characteristics of a type, period or method of construction, be of high artistic value, represent the work of a master, or (3) be likely to yield historically important information. *Id.* § 9-301(3)(e)(1)-(4).

239. *Id.* § 9-301(1)(a).

240. *Id.* § 9-301(3)(g).

241. See *Estate of Tippet v. City of Miami*, 645 So. 2d 533, 535 (Fla. Dist. Ct. App. 1994) (Gersten, J., concurring) (observing that by the late 1970s, "all 50 states and more than 500 municipalities had enacted preservation laws. In 1992, local historic preservation ordinances numbered more than 1700.") (citations omitted).

242. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).

243. DPR Summary, *supra* note 67.

244. 2 RATHKOPF & RATHKOPF, *supra* note 95, § 15.03[1][a], at 15-18 to 19.

example, in *A-S-P Associates v. City of Raleigh*,<sup>245</sup> the owner of a vacant lot within a historic district<sup>246</sup> asserted that “even if the [city’s historic preservation] Ordinance is a valid exercise of the police power insofar as it applied to historic structures, it is invalid when applied to new construction on property such as [plaintiffs] vacant lot.”<sup>247</sup> The landowner asserted that such zoning was unreasonable and thus was unconstitutional under the doctrine of “substantive due process,” under which all arbitrary regulation of liberty or property constitutes a regulation without due process and thus violates the Fourteenth Amendment.<sup>248</sup>

The North Carolina Supreme Court rejected the landowner’s substantive due process claim, for two reasons. First, “preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district. . . . [j]ust as important is the preservation and protection of the setting or scene in which [structures of architectural and historical significance] are situated.”<sup>249</sup> Second, the zoning law did not totally prohibit development of new structures, but merely required the plaintiff “to construct them in a manner that will not result in a structure incongruous with the historic aspects of the Historic District.”<sup>250</sup> DPR suggests that Section 9-301 may be unconstitutional because it applies to “undeveloped private land.”<sup>251</sup> But in *A-S-P Associates*, the court held that a vacant lot within a historic district could be regulated.<sup>252</sup> In other words, “undeveloped private land” within historic districts may be regulated. Thus, DPR’s argument was

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245. 258 S.E.2d 444 (N.C. 1979).

246. *Id.* at 447.

247. *Id.* at 448.

248. *Id.*; see also *Tri-Corp Mgmt. Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir. 2002) (“To state a substantive due process claim in the context of zoning regulations, a plaintiff must establish that (1) a constitutionally protected property or liberty interest exists and (2) that constitutionally protected interest has been deprived through arbitrary and capricious action.”).

249. *A-S-P Assocs.*, 258 S.E.2d at 451 (quoting *Maher v. City of New Orleans*, 371 F. Supp. 653, 663 (E.D. La. 1974)).

250. *Id.*; see also *Coscan Washington, Inc. v. Md. Nat’l Capital Park & Planning Comm’n*, 590 A.2d 1080 (Md. Ct. Spec. App. 1991) (upholding county’s regulation of building materials in new subdivision near historic area, based on public interest in protecting historic site).

251. *DPR Summary*, *supra* note 67.

252. *A-S-P Assocs.*, 258 S.E.2d at 448–50.

rejected by the *A-S-P Associates* court and is unlikely to bar enforcement of Section 9-301.

### 3. Rezoning

Section 8-201(3) of the Guidebook contains a list of provisions that must be included in a zoning ordinance. DPR attacks this section not for any of its provisions, but for a sin of omission: that it “authorizes zoning of land uses and structures within the local jurisdiction without regard for current uses.”<sup>253</sup> But the text of the SZEa shows that a zoning enabling act need not endorse existing land uses. Section 9 of that statute provides that “[w]herever the regulations made under the authority of this act . . . impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern.”<sup>254</sup> By allowing local governments to create “higher standards” for land use than authorized by other statutes, Section 9 of SZEa allows municipalities to use their zoning powers to overturn existing land use statutes. And if a municipality can reject existing statutes, it is by definition ignoring “current uses” of land. It logically follows that if Section 8-201(3) is unconstitutional, SZEa is also unconstitutional. This would be an absurd result given the courts’ repeated approval of the many zoning laws patterned on SZEa.<sup>255</sup> In other words, SZEa shows no more regard for current uses than does the Guidebook. Thus, the continued survival of SZEa-inspired zoning laws suggests that Section 8-201(3) is constitutional.

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253. *DPR Summary*, *supra* note 67.

254. SZEa § 9, *quoted in* WEINSTEIN, *supra* note 16, § 32.01, at 9.

255. *See supra* notes 20–21, 24–25 and accompanying text (describing general acceptance of SZEa by both state legislatures and courts), JUERGENSEMEYER & ROBERTS, *supra* note 17, § 3.4B, at 44 (saying the Supreme Court adopted “highly deferential standard of judicial review of municipal zoning”). It does not follow, however, that local governments always have the right to terminate preexisting land uses that conform to prior zoning but violate a newly enacted zoning law. *See infra* notes 327–68 and accompanying text (discussing dispute over this issue).

#### 4. Subdivision Approval

A subdivision is “any land, vacant or improved, which is divided or proposed to be divided into two or more lots, parcels, or tracts for the purpose of offer, sale, lease, or development, whether immediate or future.”<sup>256</sup> Section 8-301(4) of the Guidebook provides that no person “shall subdivide any land until the . . . [map] designating the areas to be subdivided has been approved pursuant to this Section by the local government having jurisdiction over the land.”<sup>257</sup> Subsection (b) of that model statute provides that “[a]ny purported subdivision of land or plat recordation of a minor subdivision, resubdivision, or final plat that has not been so approved is void.”<sup>258</sup>

DPR interprets Section 8-301(4) to mean that “[c]urrent subdivisions . . . that have not been approved by the local government pursuant to the Guidebook’s recommendations are considered void.”<sup>259</sup> Supreme Court precedent holds that government regulation is especially likely to constitute an unconstitutional “taking” if such regulation interferes with a landowner’s “reasonable investment-backed expectations.”<sup>260</sup> If a zoning enabling statute provides that a subdivision approved long ago is “void,” obviously that statute interferes with subdividers’ reasonable expectations and thus may well be an unconstitutional taking.

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256. GUIDEBOOK, *supra* note 2, § 8-101.

257. *Id.* § 8-301(4).

258. *Id.* § 8-301(4)(b).

259. *DPR Summary*, *supra* note 67. It is well settled, of course, that local governments may constitutionally have veto power over future subdivisions. *See, e.g., Norton v. Village of Corrales*, 103 F.3d 928, 931–33 (10th Cir. 1996) (municipal denial of subdivision application did not violate substantive due process); *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1224–25 (2d Cir.1994) (holding that where plaintiff’s subdivision application was rejected due to rezoning, a Takings Clause attack upon rezoning would be meritless because “as an applicant for subdivision and site plan approval, [the plaintiff] had no cognizable vested interest in the existing zoning of its property.”); *L.M. Everhart Constr., Inc. v. Jefferson County Planning Comm’n*, 2 F.3d 48, 49 (4th Cir. 1993) (holding that where local government conditionally approved subdivision application but then enacted zoning ordinance which barred subdivision as planned, court rejected landowner’s due process claim); *Marshall v. Bd. of County Comm’rs*, 912 F. Supp. 1456, 1472–74 (D. Wyo. 1996) (rejecting claim that by “denying approval of the [plaintiff’s] subdivision as proposed, [city officials] have destroyed his investment-backed expectations”).

260. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Such an interpretation of Section 8-301(4), however, is probably incorrect. Subsection 8-301(4), as noted above, provides that no person “*shall* subdivide any land” without municipal approval.<sup>261</sup> The phrase “*shall*” is in the future tense. That is, it probably means that no one may subdivide land in the future without municipal approval and therefore does not mandate municipal re-approval of existing subdivisions. It logically follows that Section 8-301(4), if narrowly interpreted, is not constitutionally problematic. If Section 8-301(4) or a similarly worded state law is challenged in court, the court is likely to adopt such a narrow interpretation based on the principle that if “a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court’s] duty is to adopt the latter.”<sup>262</sup>

## 5. Just Compensation and Transfers of Development Rights

A transfer of development rights (TDR) is a landowner’s “yielding of some or all of the right to develop or use a parcel of land in exchange for a right to develop or use another parcel of land, or another portion of the same parcel of land, more intensively.”<sup>263</sup> In the twenty-five states allowing TDR programs,<sup>264</sup> a local government may limit development of land it wishes to protect from development without paying cash compensation, as long as it compensates the landowner in-kind by allowing higher densities on other districts or parcels.<sup>265</sup> The Guidebook defines the land on which a TDR limits development as a “sending” district or parcel of land<sup>266</sup> and

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261. GUIDEBOOK, *supra* note 2, § 8-301(4).

262. *Harris v. United States*, 122 S. Ct. 2406, 2413 (2002) (quoting *United States ex. rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

263. GUIDEBOOK, *supra* note 2, at 9-37.

264. *Id.* at 9-43 (adding that 107 local and regional governments actually adopted such programs).

265. *Id.* at 9-37 (stating that one goal of TDRs is to allow government to regulate development without paying cash to landowners).

266. *Id.* § 9-401(3)(d) (The “Sending District” is the district in which development rights are limited) and (e) (The “Sending Parcel” is the parcel of land in which development rights are limited.) Such districts or parcels are usually in historic or environmentally sensitive areas. See GUIDEBOOK, *supra* note 2, at 9-37.



defines the land that may be developed more intensively due to the TDR as the “receiving” district or parcel.<sup>267</sup> The receiving parcel need not be owned by the burdened landowner; instead, the landowner may sell her<sup>268</sup> TDR to a developer who wishes to exceed density limits on the receiving parcel.<sup>269</sup> Thus, “burdened landowners are paid market value for the property rights they lose and developers pay market value for the additional development rights they purchase.”<sup>270</sup>

Section 9-401 of the Guidebook authorizes TDRs, providing that a “local government may adopt local land development regulations and amendments that include provisions for the transfer of development rights.”<sup>271</sup> Section 9-401 defines a “transfer of development rights” as a procedure “whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel.”<sup>272</sup> The Guidebook seeks to protect landowners’ finances by providing that “receiving districts” may not be “downzone[d] . . . to the degree that owners cannot make a reasonable use of their property.”<sup>273</sup> Thus, under the Guidebook, TDRs may not be used to render private land completely valueless.

DPR argues that TDRs violate the Takings Clause by violating the Fifth Amendment’s demand “that just compensation be paid in money.”<sup>274</sup> In other words, the group

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267. *Id.* § 9-401(3)(b) (The “Receiving District” is the district in which additional development is allowed due to TDR) and (c) (The “Receiving Parcel” is the parcel of land in which additional development allowed due to TDR.).

268. Rather than using the cumbersome “his/her,” I choose to use “his” and “her” interchangeably where appropriate.

269. Franklin G. Lee, Comment, *Transferable Development Rights and the Deprivation of all Economically Beneficial Use: Can TDRs Salvage Regulations that Would Otherwise Constitute a Taking?*, 34 IDAHO L. REV. 679, 686 (1998).

270. *Id.*

271. GUIDEBOOK, *supra* note 2, § 9-401(1).

272. *Id.* § 9-401(3)(f).

273. *Id.* at 9-61.

274. DPR Summary, *supra* note 67. DPR also criticizes a related Guidebook provision, Section 9-402. This section authorizes purchase of development rights (PDR) programs, under which a government compensates a landowner for the right to develop the land rather than for the full value of the parcel (including the title and the right to possess the land). See GUIDEBOOK, *supra* note 2, at 9-63; DPR Summary, *supra* note 67 (asserting that 9-402 unconstitutionally compensates landowners for mere “use” rather than full “value” of land). Section 9-402(5) of the Guidebook sets forth the elements of a “purchase of development

contends that TDRs are an attempt to compensate landowners for the taking of their land, but are not constitutionally acceptable because they are in-kind transfers rather than transfers of money. By contrast, the Guidebook's authors reason that by allowing landowners to make "a reasonable use of their property"<sup>275</sup> in the receiving district, a TDR-adopting municipality commits no taking requiring just compensation.

The Arizona Court of Appeals' decision in *Corrigan v. City of Scottsdale*<sup>276</sup> supports the former view. In *Corrigan*, a property owner challenged a zoning ordinance that prohibited new development within his land but awarded TDRs allowing development in adjacent land owned by the plaintiff.<sup>277</sup> The court found that the TDRs were a taking, reasoning: "[t]he city claims this action is a legitimate exercise of [zoning] police power and yet it attempts a form of compensation by way of transfer of density credits. If this were a valid exercise of police power there would be no need for any form of compensation."<sup>278</sup> The *Corrigan* court went on to hold that the TDRs did not constitute "just compensation" as required by the Arizona Constitution because that constitution "requires compensation for such a taking to be made by payment of money in an amount that has been judicially determined"<sup>279</sup> and TDRs thus violate that constitution by compensating landowners in land rather than in money.<sup>280</sup> *Corrigan*, standing alone, suggests that Section 9-401 may violate a constitutional requirement that "just compensation be paid in money."<sup>281</sup>

It is not clear, however, whether *Corrigan* is good law even in Arizona. The Arizona Supreme Court, in a decision addressing the proper measure of damages for the alleged taking, stated: "[w]e express no opinion as to the legality or

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rights agreement." The Guidebook's use of the term "agreement" indicates that PDRs, unlike TDRs, are consensual transactions between a landowner and a government rather than results of government regulation. If this is the case, PDRs obviously implicate no constitutional questions.

275. GUIDEBOOK, *supra* note 2, at 9-61.

276. 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in part, rev'd in part on other grounds*, 720 P.2d 513 (Ariz. 1986), *cert. denied sub. nom. City of Scottsdale v. Corrigan*, 479 U.S. 986 (1986).

277. *Id.* at 530-32.

278. *Id.* at 538. The term "density credits" is synonymous with TDRs.

279. *Id.* at 540.

280. *Id.*

281. *DPR Summary*, *supra* note 67.

constitutionality of [the city's] scheme."<sup>282</sup> More importantly, *Corrigan* is of questionable relevance to cases interpreting the federal Constitution; the court's narrow interpretation of "just compensation" is based on the Arizona Constitution's requirement that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury . . . ."<sup>283</sup> The Arizona Constitution's references to compensation being "paid into court for the owner," "secured by bond," and "paid into the State treasury" imply that compensation may only be paid in cash. By contrast, the federal Constitution merely requires "just compensation" without adding details, thus arguably giving governments more flexibility in choosing the manner of compensation.

Finally, United States Supreme Court precedent<sup>284</sup> is inconsistent with *Corrigan*. In *Penn Central Transportation Co. v. City of New York*,<sup>285</sup> the Supreme Court rejected a Takings Clause claim by a landowner whose request to build a fifty-five-story office tower atop a historic train terminal was denied pursuant to New York City's historic landmark ordinance.<sup>286</sup> The landmark ordinance contained a TDR provision that allowed the owners of landmark sites to transfer development rights from a landmark parcel to other parcels owned by the same landowner.<sup>287</sup> The Court found that the historic landmark ordinance was not a taking, partially because of the TDR provision. The Court reasoned that even if the city outlawed all attempts to build above the terminal,<sup>288</sup> the TDR law precluded a finding that plaintiff had been denied all economically beneficial use of its air rights because the TDRs:

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282. *Corrigan*, 720 P.2d at 514 n.1.

283. ARIZ. CONST. art. II, § 17 (cited in *Corrigan*, 720 P.2d at 540).

284. As is most state court precedent. See GUIDEBOOK, *supra* note 2, at 9-40 to 9-43 (showing that a majority of relevant state court decisions uphold TDRs against constitutional challenges).

285. 438 U.S. 104 (1978).

286. *Id.* at 116-18 (describing underlying facts in detail).

287. *Id.* at 114.

288. In fact, the city had not done so. Although the city made it clear that it opposed building any structure with over fifty stories above the terminal, "nothing the [city] ha[s] said or done suggests an intention to prohibit any construction above the Terminal." *Id.* at 137.

made [plaintiff's rights] transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. . . . While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [plaintiffs] and, for that reason, are to be taken into account in considering the impact of regulation.<sup>289</sup>

In other words, *Penn Central* held that because the city's historic preservation law included a TDR, plaintiff's air rights were not worthless and thus no taking occurred.<sup>290</sup> If the presence of TDRs precludes an otherwise unconstitutional regulation from being a taking, it logically follows that TDRs are not themselves unconstitutional under the Takings Clause and that *Corrigan* is not relevant to federal constitutional claims.

It could be that *Penn Central* is no longer relevant to most cases involving TDRs, based on Justice Scalia's concurrence in *Suitum v. Tahoe Regional Planning Agency*.<sup>291</sup> In *Suitum*, a landowner challenged a regional planning agency's decision that her lot was ineligible for development because it was in an environmentally sensitive area.<sup>292</sup> The regional planning agency sought to mitigate the harshness of its development restrictions by granting affected property owners TDRs;<sup>293</sup> rather than seeking to use those TDRs, plaintiff filed suit alleging a Takings Clause violation. The lower courts dismissed her claim on the ground that her claim was not ripe for judicial consideration,<sup>294</sup> reasoning that because plaintiff had not yet applied to use those TDRs, the value of her TDRs, and thus her economic losses caused by the TDRs, were not yet known.<sup>295</sup> The Supreme Court disagreed, reasoning that the

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289. *Id.*

290. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1483 (2002) (where landowner deprived of all economically beneficial use of property, an unconstitutional "taking" occurs).

291. 520 U.S. 725, 745-50 (1997).

292. *Id.* at 729-31.

293. *Id.* at 732-33.

294. *Id.* at 733-34. Under the ripeness doctrine, a landowner may not file a Takings Clause lawsuit in federal court until she has (a) received a final decision from government officials regarding her property and (b) sought compensation from those officials for the alleged taking. *Id.* at 734.

295. *Id.* at 733.

case was ripe for review because the parties agreed that the plaintiff did in fact have the right to sell her TDRs<sup>296</sup> and the valuation of plaintiff's TDR was an issue of fact, which could be resolved in federal court.<sup>297</sup>

Justice Scalia wrote a separate concurrence, joined by Justices O'Connor and Thomas.<sup>298</sup> In that concurrence, Justice Scalia wrote that the case was ripe for judicial action because a takings claim is ripe for review as soon as "the government had finally determined the permissible *use* of the land."<sup>299</sup> Justice Scalia added that in his view, the landowner's TDRs were irrelevant to the question of whether a taking occurred because even if the TDRs were equal in value to plaintiff's land, she had lost the right to use *her own* land. She thus suffered a taking even if she received the right to develop *other* land in exchange.<sup>300</sup> Instead, "the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation."<sup>301</sup>

More importantly, Justice Scalia added that he was not opposed to TDRs; rather, TDRs "may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property *is* taken."<sup>302</sup> By asserting that a TDR may constitute "just compensation," Justice Scalia bluntly repudiated the *Corrigan* court's suggestion that because a TDR is not in cash, it may not constitute "just compensation."<sup>303</sup>

In sum, both the *Penn Central* Court and Justice Scalia's *Suitum* concurrence held that land use regulations that include TDRs do not automatically violate the Takings Clause. The *Penn Central* court so held because TDRs may prevent an

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296. *Id.* at 739–40.

297. *Id.* at 741–42.

298. *Id.* at 745 (Scalia, J., concurring).

299. *Id.* at 746.

300. *Id.* at 747.

301. *Id.* Justice Scalia distinguished *Penn Central* on the ground that in that case, the same landowner owned both the sending parcel and the receiving parcel, a scenario not the case in *Suitum*. *Id.* at 749.

302. *Id.* at 750.

303. In any event, the most relevant post-*Suitum* federal decision reaffirmed *Penn Central* and rejected Justice Scalia's concurrence by holding that under *Penn Central*, "the value of TDRs is to be considered to answer the threshold question of whether a taking has occurred." *Good v. United States*, 39 Fed. Cl. 81, 108 (Fed. Cl. 1997).

otherwise confiscatory regulation from constituting a "taking;" Justice Scalia because TDRs may constitute "just compensation" for such a taking. Either way, Section 9-401 and other statutes authorizing TDRs are constitutional on their face.

## 6. Crime and Punishment Under the Guidebook

Section 11-302(1) of the Guidebook provides that it is "a criminal offense to intentionally [or knowingly] violate the land development regulations of any local government."<sup>304</sup> This statute does not, however, specify the appropriate penalties for such criminal violations. Nevertheless, DPR suggests that Section 11-302 is unconstitutional because it "criminalizes and allows imprisonment for anyone who intentionally or knowingly violates any land development regulation."<sup>305</sup>

The Guidebook's criminal enforcement procedures are hardly unique; for example, the SZEa provides that a "violation of this act or of [any ordinance authorized thereby] is hereby declared to be a misdemeanor, and [a] local legislative body may provide for the punishment thereof by fine or imprisonment or both."<sup>306</sup> More importantly, courts usually uphold such statutes. For example, in *Hadachek v. Sebastian*,<sup>307</sup> the Supreme Court upheld a conviction of a petitioner "[who] was convicted of a misdemeanor for the violation of an ordinance of the city of Los Angeles which makes it unlawful for any person to establish or operate a brickyard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city."<sup>308</sup> The Court rejected claims that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment<sup>309</sup> and constituted "the taking of property without compensation."<sup>310</sup>

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304. GUIDEBOOK, *supra* note 2, § 11-302(1).

305. DPR Summary, *supra* note 67.

306. SZEa, § 8, *quoted in* WEINSTEIN, *supra* note 16, § 32.01, at 8; *see also* JUERGENSEMEYER & ROBERTS, *supra* note 17, § 5.40, at 264 (saying "many zoning ordinances provide for criminal penalties").

307. 239 U.S. 394 (1915).

308. *Id.* at 404.

309. *Id.* at 407, 412-13.

310. *Id.* at 407.

Because *Hadachek* fails to directly address the distinction between criminal and civil liability, that case is not directly on point. More recent state court decisions, however, explicitly allow criminal punishment for zoning violations. In *City of North Royalton v. Vodicka*,<sup>311</sup> police arrested the defendant for having an overly high fence, a misdemeanor offense under the city code.<sup>312</sup> The defendant asserted that “the classification of his [zoning code] violations . . . as fourth degree misdemeanors somehow violates his constitutional rights to equal protection and due process.”<sup>313</sup> An Ohio court disagreed, finding no “constitutional infirmity in the application of these city zoning ordinances . . . [or] on the face of this legislative scheme.”<sup>314</sup> In *Calhoun v. Town Board Saugerties*,<sup>315</sup> a New York court stated that where municipal law made violations of zoning ordinances a misdemeanor, those ordinances could be enforced as long as the state provided “minimal due process protections.”<sup>316</sup> In sum, both common practice and case law support the conclusion that criminal punishments may be assessed for violation of zoning laws. It logically follows that the Guidebook’s endorsement of such criminal penalties is constitutional.

## 7. Exactions

Rather than flatly granting or rejecting an application for a building permit, a government agency will sometimes grant permits on condition that “a developer provide certain improvements in a new development or, in some cases, pay a fee to cover the expense of the local government providing those improvements off-site.”<sup>317</sup> These conditional permits are known as “exactions.”<sup>318</sup> Local governments mandate exactions for two reasons. First, some improvements, such as streets, streetlights, and utilities, are “reasonably necessary for the public health, safety [and] welfare.”<sup>319</sup> Second, “the

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311. No. 53209, 1988 WL 5187 (Ohio Ct. App. 8 Dist. 1988).

312. *Id.* at \*1.

313. *Id.* at \*4.

314. *Id.*

315. 406 N.Y.S.2d 661 (N.Y. Sup. Ct. 1978).

316. *Id.* at 663.

317. GUIDEBOOK, *supra* note 2, at 8-129.

318. *Id.*

319. *Id.*

development itself is creating the demand for the improvements, and the public as a whole should not bear the cost of constructing improvements for new development."<sup>320</sup> Exactions are hardly new; SPEA<sup>321</sup> allows local governments to impose exactions for streets, open spaces, and utilities.<sup>322</sup>

Section 8-601(4) of the Guidebook provides that exactions for improvements "shall be in reasonable proportion to the demand for such improvements that can be reasonably attributed to developments subject to the ordinance."<sup>323</sup> Guidebook critics contend that this provision differs materially<sup>324</sup> from the rule set forth by the Supreme Court in *Dolan v. City of Tigard*.<sup>325</sup> In *Dolan*, a city allowed a landowner to double the size of her plumbing and electric supply store.<sup>326</sup> The municipality conditioned that approval upon flood control and traffic improvements, including the dedication of land for an easement/"greenway"<sup>327</sup> that recreational users could use to enter her land<sup>328</sup> and a pedestrian/bicycle pathway.<sup>329</sup> The plaintiff raised a Takings Clause claim, asserting that "the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements."<sup>330</sup>

The Court held that the city's exaction was constitutional only if "the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [the] proposed development."<sup>331</sup> Thus, the decisive legal issue was the nature of this "required relationship." The Court rejected the view that the city need only show "the 'reasonable relationship' test adopted by a majority of the state courts . . . because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the

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320. *Id.*

321. *See supra* notes 29-34 and accompanying text.

322. SPEA, § 14, *quoted in* GUIDEBOOK, *supra* note 2, at 8-130.

323. *Id.* § 8-601(4).

324. *See infra* notes 333-34 (explaining argument).

325. 512 U.S. 374 (1994).

326. *Id.* at 379.

327. *Id.* at 393-94.

328. *Id.* at 379.

329. *Id.* at 379-80.

330. *Id.* at 385-86.

331. *Id.* at 388.



Equal Protection Clause of the Fourteenth Amendment.”<sup>332</sup> Instead, the appropriate test was “rough proportionality,” meaning “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.”<sup>333</sup> Some Guidebook critics assert that Section 8-601 of the Guidebook, which authorizes exactions of various types, is inconsistent with the *Dolan* Court’s “rough proportionality” test and instead endorses the “reasonable relationship” test rejected by the Supreme Court.<sup>334</sup>

But a careful reading of Section 8-601(4) suggests otherwise. Under this model statute, all improvements “required by an improvements and exactions ordinance shall be in *reasonable proportion to the demand for such improvements* that can be reasonably attributed to developments subject to the ordinance.”<sup>335</sup> In other words, to satisfy the requirements of Section 8-601(4), a local government must do more than show that an exaction is somehow related to a development; instead, the burden of the exaction upon a developer must be “in reasonable proportion” to the impact of the development at issue. This language apparently tracks the *Dolan* Court’s “rough proportionality” test.

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332. *Id.* at 391.

333. *Id.* The *Dolan* Court went on to find that no such “proportionality” existed between the exaction and the difficulties caused by plaintiff’s plan to expand her store. Specifically, the Court found that the greenway, by giving recreational visitors the right to cross through plaintiff’s land, would eliminate plaintiff’s right to exclude the public from her property, and thus was totally disproportionate to the city’s legitimate interest in preventing flooding. *Id.* at 393. Similarly, the Court found that the city had not shown “rough proportionality” between the pedestrian/bicycle pathway and the city’s interest in reducing traffic congestion because the city’s finding that:

the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system *will*, or is *likely* to, offset some of the traffic demand . . . the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

*Id.* at 395–96 (citation omitted).

334. See Claus Testimony, *supra* note 51, at 16 (“[A]ccording 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.”); *DPR Summary*, *supra* note 67 (asserting that the Guidebook endorses “reasonable relationship test”).

335. GUIDEBOOK, *supra* note 2, § 8-601(4) (emphasis added).

To the extent that Section 8-601(4) and similar state statutes are ambiguous on this point, such statutes are likely to be upheld based on the well-settled principle of statutory construction that if “a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court’s] duty is to adopt the latter.”<sup>336</sup> Under this rule, the courts will uphold Section 8-601(4) because it is “susceptible” of being construed to affirm the *Dolan* Court’s “rough proportionality” test. In other words, if Section 8-601(4) could reasonably be interpreted either to adopt the (incorrect) “reasonable relationship” test or the “rough proportionality” test endorsed by the *Dolan* Court, the courts will assume that that statute has the latter meaning in order to uphold its constitutionality. Because Section 8-601(4) requires that exactions “be in reasonable proportion to the demand for such improvements,” that statute could reasonably be construed to adopt the “rough proportionality” test endorsed by the *Dolan* Court. Thus, Section 8-601(4) is constitutional.

#### 8. Amortization of Nonconforming Uses

A “nonconforming use is a land use, or a structure, which was allowed under local land development regulations when established, but [which] would not be permitted under current development regulations.”<sup>337</sup> States and local governments generally adopt one of two methods for dealing with nonconforming uses. The majority of states and local governments “grandfather” nonconforming uses. Thus, the locality allows a land use to continue as long as it was legal at the time it was commenced.<sup>338</sup> When the nonconforming use is terminated, the protection of grandfathering is lost and resumption of the nonconforming use is not allowed.<sup>339</sup> Some states, however, authorize “amortization” of nonconforming uses. Amortization requires “the termination of a nonconforming use after a period of time.”<sup>340</sup> The Guidebook concedes that amortization is “a controversial land use

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336. *Harris v. United States*, 122 S. Ct. 2406, 2413 (2002).

337. GUIDEBOOK, *supra* note 2, at 8-111.

338. *Id.* at 8-112 (noting that grandfathering is the “usual approach”).

339. *Id.*

340. *Id.*

regulation technique, as owners of nonconforming uses can claim that the removal of a nonconforming use at the end of an amortization period, without compensation, is unconstitutional.”<sup>341</sup>

Section 8-502(4) expressly authorizes amortization, providing that local governments may “state a period of time after which nonconforming land uses . . . must terminate”<sup>342</sup> or set forth criteria that designated local officials may, on a case-by-case basis, use to establish “a period of time after which a nonconforming land use . . . must terminate.”<sup>343</sup> Guidebook critics assert that Section 8-502(4) violates the Takings Clause by allowing local governments to terminate land uses without compensation.<sup>344</sup> Although the majority of courts uphold amortization in principle,<sup>345</sup> a few courts find amortization to

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341. *Id.*

342. GUIDEBOOK, *supra* note 2, § 8-502(4)(a).

343. *Id.* § 8-502(4)(b); *see also id.* at 8-125 (explaining that the provision gives officials discretion to establish relevant time periods on a case-by-case basis).

344. *See* Marzulla, *supra* note 69, noting that, [a]fter prescribing uniform size, shape and color standards by which every [business's commercial] sign is required to look alike, the guidebook recommends an ‘amortization’ plan, which will give small-business owners a limited period to enjoy their identical signs before they must be removed altogether, without payment of just compensation as required by the U.S. Constitution.

*See also* Alford, *supra* note 69, at 6 (asserting that the Guidebook's amortization provisions “may indeed activate the ‘takings’ clause”); *DPR Summary*, *supra* note 67 (Amortization “allows local governments to get rid of unwanted uses and/or property owners without having to provide any compensation.”); Claus Testimony, *supra* note 51, at 12 (describing amortization as “simply a compensation-avoidance scheme”).

345. *See* JUERGENSMEYER & ROBERTS, *supra* note 17, § 4.39, at 160 (“Most courts have upheld amortization in principle and have examined the reasonableness of specific applications on a case by case basis.”); Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5th 391 (1992) (citing cases from three federal circuits and twenty-five states holding that amortization “valid if reasonable,” and cases from only four states taking contrary view). A few of the cases upholding amortization are: *Georgia Outdoor Adver., Inc. v. City of Waynesville*, 900 F.2d 783, 786–87 (4th Cir. 1990) (holding that amortization provisions not always constitutional or unconstitutional, but instead are “only one of the facts that the district court should consider”) (citation omitted); *Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973) (“The ‘amortization’ method has been established . . . as a proper method to terminate nonconforming uses.”); *Naegele Outdoor Adver., Inc. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) (rejecting Takings Clause claim against ordinance containing amortization provision); *SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359, 1371 (S.D. Tex. 1986) (“[A]mortization is a

be unconstitutional under state versions of the Takings Clause.<sup>346</sup> Thus, amortization is unconstitutional under several state constitutions.

Although the Supreme Court has not yet explicitly addressed the status of amortization under the federal Constitution, the Court's case law is highly relevant. It is well-settled that under the federal Takings Clause, a land use regulation is generally<sup>347</sup> a compensable taking when a

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valid method of eliminating existing nonconforming uses of land" and no taking occurred because plaintiffs "ha[ve] six months to minimize their losses and to recoup their investments."); *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1032 (Ind. 1998) (noting that "most other courts that have considered the issue have held that amortization provisions are not unconstitutional per se" and agreeing with majority rule); *Naegele Outdoor Adver. Co. v. Village of Minnetonka*, 162 N.W.2d 206, 213 (Minn. 1968) (holding that amortization period in zoning ordinance constitutional on its face because "several conceivable applications of the ordinance are reasonable"); *Village of Oak Park v. Gordon*, 205 N.E.2d 464, 465-66 (Ill. 1965) (where plaintiff challenged ordinance limiting number of tenants in rooming houses, court holds that amortization ordinances "entitled to a presumption of validity" though invalid as applied due to absence of evidence "that the public interest would be subserved in any way by requiring defendant to alter his property to accommodate two roomers instead of four"); *Wolf v. City of Omaha*, 129 N.W.2d 501 (Neb. 1964) (upholding ordinance with amortization provision and citing numerous relevant cases); cf. *Eller Media Co. v. City of Houston*, No. 01-00-00588-CV, 2001 WL 1298901, at \*10-11 (Tex. App. 2001) (holding without explanation that law "requiring the removal of certain signs is a taking," but adding that because "amortization periods allowed more than enough time for the [sign] owners to recoup their investment," amortization provision of ordinance provided just compensation for taking).

346. See, e.g., *Pa. N.W. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991) ("[T]he amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution" because "[i]f municipalities were free to amortize nonconforming uses out of existence, future economic development could be seriously compromised" because destruction of businesses might "deter . . . investors" and cause "economic waste."); *Loundsbury v. City of Keene*, 453 A.2d 1278, 1281 (N.H. 1982) (Even if amortization supported by "reasonable public purpose . . . the proposed action would result in a 'taking' and the City would have to provide just compensation to the plaintiff."); *Hoffman v. Kinealy*, 389 S.W.2d 745, 754-55 (Mo. 1965) (Despite amortization provision in local zoning ordinance, "termination of [landowners'] lawful pre-existing nonconforming use . . . would constitute the taking of private property for public use without just compensation" in violation of state constitution.). But cf. *Univ. City v. Dively Auto Body Co.*, 417 S.W.2d 107, 110-11 (Mo. 1967) (distinguishing *Hoffman* and upholding amortization where zoning ordinances limited height and number of landowner's signs rather than seeking to compel removal of signs).

347. Even if government action deprives a landowner of all economically beneficial use of her land, the landowner's right to compensation is limited by "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

landowner has suffered a total taking of her property. Such a total taking requires “[a] permanent ‘obliteration of the value’ of a fee simple estate.”<sup>348</sup> This occurs “when *no* productive or economically beneficial use of [the] land is permitted.”<sup>349</sup> But when a land use regulation diminishes the value of a landowner’s property by less than 100 percent,<sup>350</sup> the federal courts apply the balancing test enunciated in *Penn Central*<sup>351</sup> and endorsed in more recent cases.<sup>352</sup> Under this “partial takings” test, federal courts weigh the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [as well as] the character of the governmental action.”<sup>353</sup> The phrase “character of . . . government action” means that a regulation must be “reasonably necessary to the effectuation of a substantial public purpose.”<sup>354</sup> It follows that unless amortization of nonconforming uses always deprives a landowner of one hundred percent of her property’s fair market value, it is not *per se* unconstitutional under the federal Constitution and is subject to the case-by-case balancing test enunciated in *Penn Central*.

The few amortization cases that reveal any awareness of *Penn Central* hold that zoning ordinances amortizing nonconforming uses are “partial takings” requiring application of the *Penn Central* balancing test rather than unconstitutional “total takings.” For example, in *Board of Zoning Appeals, Bloomington, Indiana v. Leisz*,<sup>355</sup> two landlords (a husband and wife) challenged a zoning ordinance that “limited the occupancy of dwellings in certain neighborhoods to a maximum

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348. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1483 (2002).

349. *Id.* (citing *Lucas*, 505 U.S. at 1017).

350. *Tahoe-Sierra*, 122 S. Ct. at 1483 (citing *Lucas*, 505 U.S. at 1019 n.8 (noting that balancing test applies even if landowner’s property values diminished by ninety-five percent)).

351. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted).

352. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (reaffirming Court’s endorsement of *Penn Central*’s balancing test).

353. *Penn Central*, 438 U.S. at 124.

354. *Palazzolo*, 533 U.S. at 632, 634 (O’Connor, J., concurring). Justice O’Connor supplied the crucial fifth vote in favor of the Court’s *Palazzolo* decision; thus, her opinion is likely to be followed by future courts.

355. 702 N.E.2d 1026 (Ind. 1998).

of three unrelated adults per unit.”<sup>356</sup> The ordinance, enacted on June 8, 1985, provided that owners of nonconforming properties could continue to rent to more than three tenants per unit only if they registered with the city by October 1, 1985.<sup>357</sup> Thus, the ordinance combined (1) an amortization period of several months for landlords who failed to register and (2) grandfathering for landlords who chose to register. The plaintiffs failed to register and asserted that the ordinance was an unconstitutional taking because “any ordinance which bans an existing lawful use within a zoned area is unconstitutional as a taking of property.”<sup>358</sup>

The *Leisz* court rejected the plaintiffs’ argument that “amortization provisions are unconstitutional per se . . . [as] an issue of federal constitutional law”<sup>359</sup> for three reasons. First, the ordinance “involved no physical invasion of the [plaintiffs’] property.”<sup>360</sup> Second, the ordinance “does not deny [the plaintiffs] all economically beneficial or productive use of their land . . . [but merely] denies them at most 25% to 40% of the rental income that they might otherwise receive.”<sup>361</sup> Third, “state courts that have found amortization provisions unconstitutional have done so on the basis of their state constitution,” rather than the federal Constitution.<sup>362</sup> The court went on to reject plaintiffs’ claims under the *Penn Central* balancing test.<sup>363</sup> Thus, *Leisz* presents a classic example of a situation where a zoning law amortizing nonconforming uses did not deprive landowners of all economically beneficial use of their land.<sup>364</sup>

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356. *Id.* at 1027.

357. *Id.*

358. *Id.* at 1028 (quoting Brief of Appellee at 4).

359. *Id.* at 1032.

360. *Id.* at 1029.

361. *Id.*

362. *Id.* at 1032. The only exception to this rule, according to the court, was an earlier Indiana decision that the court overruled. *Id.* The court explicitly declined to address the constitutionality of amortization under state law, because neither party had addressed state constitutional issues. *Id.*

363. The court’s rejection of the plaintiffs’ claim was based upon the public interest favoring the registration requirement, *id.* at 1030, the fact that the plaintiffs’ property “continue[d] to have an economically viable use, even if it is somewhat diminished,” *id.*, and on the absence of any evidence that the ordinance caused “interference with [the plaintiffs’] reasonable investment-based expectations.” *Id.*

364. Indeed, it could be argued that even in the absence of amortization, zoning laws that terminate nonconforming uses are not per se unconstitutional

Federal courts as well as state courts apply the *Penn Central* test to amortization-related cases. In *Georgia Outdoor Advertising, Inc. v. City of Waynesville*,<sup>365</sup> a city sought to “effectively prohibit all off-premise outdoor signs in the city”<sup>366</sup> by enacting an ordinance containing a four-year amortization period.<sup>367</sup> The Fourth Circuit rejected claims that amortization provisions either immunized zoning laws from constitutional scrutiny or automatically invalidated such laws. Instead, the court held that courts should apply the *Penn Central* balancing test<sup>368</sup> and that amortization provisions are “only ‘one of the facts that the district court should consider’”<sup>369</sup> in deciding whether a zoning regulation constitutes an unconstitutional taking.<sup>370</sup>

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under *Penn Central*. The traditional argument against such termination is that by eliminating a landowner’s “vested right” in his existing land use, a government deprives the landowner of all economically beneficial use of that “right.” See *Hoffman v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) (describing “right to continue a lawful conforming use . . . as a vested right” and holding that enforcement of zoning law would “terminate and take” the right despite law’s amortization provision). But the Supreme Court has held that in Takings Clause cases, courts must focus on “the parcel as a whole.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1481 (2002). Arguably, the landowner’s right to continue an existing use is only part of the parcel rather than “the parcel as a whole”, and thus a law prohibiting that use is not a “total taking” automatically requiring compensation. For example, in *Leisz* the court held that an amortization ordinance created only a “partial taking” because the plaintiffs had lost only twenty-five to forty percent of rental value, *Leisz*, 702 N.E.2d at 1029, even though they lost one hundred percent of their alleged right to continue renting to an unlimited number of tenants. Because the *Leisz* plaintiffs lost only twenty-five to forty percent of rental value, the court might have upheld the city’s zoning ordinance even if the city had chosen to terminate their “right” immediately rather than creating an amortization period.

365. 900 F.2d 783 (4th Cir. 1990).

366. *Id.* at 784.

367. *Id.* at 785.

368. *Id.* at 786–87.

369. *Id.* (quoting *Naegele Outdoor Adver., Inc. v. City of Durham*, 844 F.2d 172, 177 (4th Cir. 1988)).

370. The court accordingly reversed a district court decision entering judgment for the plaintiff and added that on remand, “the crucial inquiry centers on the second prong of the [*Penn Central*] test: whether the ordinance denies [the plaintiff] economically viable use of its property.” *Id.* at 787. Specifically, the Fourth Circuit ordered the district court to consider whether the plaintiff (a company that leased the land on which its signs stood) could sublease or assign that land to others, whether the plaintiff would be obligated to honor its leases after being forced to remove signs, the cost of sign removal, and whether the signs could retain some value (either as salvage value or by being erected in other cities) after being removed from the city at issue. *Id.* at 787–89.

Similarly, in *Naegele Outdoor Advertising, Inc. v. City of Durham*,<sup>371</sup> a district court cited *Penn Central* in support of its holding that "the benefit conferred by the grant of an amortization period may be taken into account in considering the economic impact of the regulation."<sup>372</sup> Specifically, the court found an outdoor advertising company who challenged a city ordinance limiting off-premise signs "has not been deprived of all economically viable use of its property."<sup>373</sup> This was so partially because of the amortization period and partially because even after the amortization period ended, the plaintiff's revenue from signs in the relevant market would only be reduced by 29.75 percent.<sup>374</sup> The court went on to find that no taking occurred because the other elements of the *Penn Central* test also did not support the plaintiff's claim: the plaintiff's investment-backed expectations were either unreasonable or nonexistent<sup>375</sup> and the city's regulations were justified by a legitimate aesthetic purpose.<sup>376</sup> Thus, *Naegele*, like *Georgia Outdoor*, holds that amortization is not always an unconstitutional taking and that the *Penn Central* balancing test must be applied to amortization ordinances.

Although many opinions discuss amortization, only a few bother to consider *Penn Central*. Those cases suggest that zoning laws that (like Section 8-502(4)) provide for amortization of nonconforming uses are subject to the *Penn Central* balancing test and thus do not on their face breach the Takings Clause in every conceivable case. This does not mean, however, that such laws are always constitutional as applied. A municipal land use decision that renders a landowners' property economically useless or that otherwise goes "too far"<sup>377</sup> under the *Penn Central* test creates a compensable taking, amortization or no amortization.<sup>378</sup> So even though the

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371. 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994).

372. *Id.* at 1078 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978)).

373. *Id.* at 1080.

374. *Id.* at 1078.

375. *Id.* at 1079.

376. *Id.* at 1080.

377. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (regulation creates an unconstitutional taking if it "goes too far").

378. A regulation that deprives a landowner of all economically beneficial use of her property may also violate Section 8-201(4)(a) of the Guidebook, which



Guidebook's authorization of amortization is not *per se* unconstitutional, a municipality that chooses to amortize nonconforming uses may be at risk for Takings Clause lawsuits.

#### *D. Tenth Amendment*

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>379</sup> The purpose of this amendment is to "allay lingering concerns about the extent of the national power"<sup>380</sup> by reserving to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."<sup>381</sup>

DPR suggests that the Guidebook creates "uniform national standards"<sup>382</sup> and thus violates the Tenth Amendment. But the Guidebook is not a model federal statute, but a set of model *state* statutes.<sup>383</sup> Although the Guidebook is federally funded, the Guidebook's opening pages state that it does not "reflect the views of HUD, the U.S. government, or any other project sponsor,"<sup>384</sup> and the Secretary of HUD said that the Guidebook "does not have an imprimatur of the federal government, it does not have any sort of guidelines and there'll be no coercion for states or localities to adopt it."<sup>385</sup> Indeed, some Guidebook critics complain that the Guidebook *increases*, rather than decreases, state power. For example, one critic complains that the Guidebook forces localities to "abide by state-dictated land controls."<sup>386</sup> Because the purpose of the Tenth Amendment is to protect state power rather than local power, such concerns have no significance under the federal Constitution.

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requires that zoning ordinances "provide a reasonable use as of right for every lot or parcel."

379. U.S. CONST. amend. X.

380. *Alden v. Maine*, 527 U.S. 706, 713–14 (1999).

381. *Id.* at 714.

382. *DPR Summary*, *supra* note 67.

383. See Manley, *supra* note 35 (The Guidebook "offers a diversified menu of approaches that state and local governments can apply.").

384. *GUIDEBOOK*, *supra* note 2, at ii.

385. *DPR Quick Facts*, *supra* note 9.

386. Taylor, *supra* note 8; see also Claus Testimony, *supra* note 51 (the Guidebook increases "state control of local environments").

The Guidebook may nevertheless constitute a federal intrusion into state prerogatives because it is funded by the federal government. Yet the SZEAs were not only funded by the federal government, but *drafted* by the federal government.<sup>387</sup> So if the Guidebook is unconstitutional because of its federal support, the SZEAs, and thus every state zoning enabling statute enacted pursuant to the SZEAs, is unconstitutional. Given the courts' consistent endorsement of post-SZEA zoning,<sup>388</sup> this is an absurd result.

*E. The Fourteenth Amendment*

The Fourteenth Amendment provides, in relevant part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>389</sup> In the context of land use regulation, courts usually interpret the Equal Protection Clause to require "that classifications promote a legitimate government end in a rational way."<sup>390</sup> In zoning-related cases, this "restraint is more theoretical than real since [zoning] ordinances are reviewed under a highly deferential standard. Distinctions between commercial and residential use or types of commercial use, or between single-family and multi-family use are not likely to be invalidated."<sup>391</sup> Similarly, courts generally apply minimal scrutiny to local governments' aesthetic decisions and uphold findings by design review boards that certain structures are inharmonious with surrounding neighborhoods.<sup>392</sup>

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387. See *supra* notes 16–17 and accompanying text.

388. See *supra* note 27 (citing cases). Moreover, several federal court decisions uphold far more severe restraints on state government, such as laws requiring the states to comply with federal mandates in order to receive federal funds. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (holding that the federal government could order states to raise drinking age in order to receive federal highway funds).

389. U.S. CONST. amend. XIV, § 1.

390. JUERGENSMEYER & ROBERTS, *supra* note 17, § 10.14, at 468. The only exceptions to this rule are where regulation affects a suspect class (that is, discriminates on a generally impermissible basis such as race or gender) or a fundamental right (such as the right to practice one's religion). Such regulations are far less likely to pass constitutional muster than other land use regulations. *Id.*

391. *Id.*

392. See *infra* notes 399–410 and accompanying text (discussing cases in which courts deferred to design review boards).

Nevertheless, DPR suggests that Section 9-301 of the Guidebook (which, as noted above, allows local governments to designate areas as “design review districts”)<sup>393</sup> violates the Equal Protection Clause. DPR argues that the Guidebook allows local governments to “arbitrarily designate any area as a ‘Design Review Districts’ [sic] and subject property owners in just those areas to mandatory standards on the design and aesthetics of . . . their property.”<sup>394</sup> According to DPR, the distinction between design review districts and other areas creates irrational “different treatment”<sup>395</sup> between property owners in design review areas and property owners in other areas.

If the Guidebook told local governments to randomly designate certain blocks as “design review blocks” this argument would be persuasive. But in fact, the Guidebook itself both includes criteria for designation of design review districts and orders local governments to enact such criteria. Section 9-301 of the Guidebook, which authorizes local governments to establish “design review districts,”<sup>396</sup> limits local discretion to arbitrarily establish such districts by requiring that a design review district be a “geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united aesthetically by development or that, in the determination of the local legislative body, has the potential to be united aesthetically by development.”<sup>397</sup> This provision is not the only limit upon local discretion. Section 9-301 requires that local governments themselves establish “criteria to be applied . . . in selecting areas to be designated by ordinance as design review districts.”<sup>398</sup> Thus, a municipality that arbitrarily designates a

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393. See GUIDEBOOK, *supra* note 2, § 9-301(1)(b); *supra* note 222 and accompanying text.

394. DPR Summary, *supra* note 67.

395. *Id.*

396. GUIDEBOOK, *supra* note 2, § 9-301(1)(b).

397. *Id.* § 9-301(2)(d).

398. *Id.* § 9-301(3)(f). In addition, the Guidebook imposes procedural constraints upon local design review agencies. *Id.* § 9-301(3)(j) (if design review ordinance creates new board, at least one board member must have expertise in history, architecture, architectural history, archaeology, or land-use planning); *id.* § 9-301(5)(b) (design review district may be adopted only if municipality has adopted comprehensive plan first); *id.* § 9-301(6) (design review district’s boundaries must be listed in ordinance).

block or neighborhood as a "design review district" violates not only the Fourteenth Amendment, but the Guidebook as well.

Moreover, courts generally defer to aesthetic decisions by design review boards. For example, in *Breneric Associates v. City of Del Mar*,<sup>399</sup> a city design review board denied plaintiffs' building permit application on the ground that their proposed design "was inconsistent with the residence's architectural style and was inharmonious with the surrounding neighborhood."<sup>400</sup> The controversy revolved around plaintiffs' proposal to use glass on a house's roof deck and their proposed siting of an addition to the house.<sup>401</sup> A California court rejected plaintiff's equal protection claim, reasoning that the "denial of a permit bore a rational relationship to a permissible government objective because . . . the proposed development was rejected for transgressing aesthetic considerations, which are legitimate state objectives."<sup>402</sup> Further, "the facts cited in the resolution as the basis for [the city's] determination show that the 'wisdom [of the decision] is at least fairly debatable.'"<sup>403</sup> Thus, *Breneric Associates* suggests that courts will uphold "fairly debatable" aesthetic decisions by local governments.

*Sievert v. City of Mill Valley*<sup>404</sup> also merits discussion. In that case, a city refused to allow plaintiffs to modify their home because the modification would "increase the apparent mass of the structure"<sup>405</sup> and thus violate a design review ordinance's requirement that a proposed structure not create "substantial disharmony with its locale and surroundings."<sup>406</sup> Plaintiffs raised an equal protection claim against the city, asserting that the city "arbitrarily denied plaintiffs' application while approving applications for other similarly situated applicants."<sup>407</sup> The court rejected that claim on two grounds. First, although the city approved building permits for nearby structures, plaintiffs failed to show that those structures were

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399. 81 Cal. Rptr. 2d 324 (Cal. Ct. App. 1998).

400. *Id.* at 328.

401. *Id.* at 329.

402. *Id.* at 338 (citations omitted).

403. *Id.* (second alteration in original) (citation omitted).

404. 1992 WL 500514 (N.D. Cal. 1992).

405. *Id.* at \*2.

406. *Id.* at \*1.

407. *Id.* at \*7-8.

“similarly situated”<sup>408</sup> in any way. Second, “building restrictions based upon visual impact are well within the legitimate objectives of local government”<sup>409</sup> and thus generally “rationally related to a legitimate government objective”<sup>410</sup> absent some evidence that the city acted for an improper purpose.

*Breneric* and *Sievert* are not directly on point because they involve municipal decisions that structures within areas governed by design review were inharmonious with their surroundings, while DPR questions the constitutionality of decisions that a given block or neighborhood should be within a design review district at all. Nevertheless, these cases do suggest that design-related decisions by local governments will generally be upheld under the Equal Protection Clause. Because Section 9-301 allows local governments to make design-related decisions, Section 9-301 and similarly worded state laws will also probably be upheld under the Equal Protection Clause.

#### *F. Enabling Statutes and Unconstitutional Applications*

“Historically, states are enablers. They authorize local governments to plan and regulate land use, but do not usually tell them how to do it.”<sup>411</sup> The Guidebook’s model statutes, if enacted by the states, will not change this pattern. Even if the Guidebook provisions referenced above are not unconstitutional on their face, they give local governments so much discretion that some applications of some municipal ordinances will create constitutional problems. For example, a municipal zoning decision, enacted pursuant to an otherwise constitutional state law or municipal ordinance, will violate the Takings Clause if the city totally eviscerates an individual landowner’s property values.<sup>412</sup> Does the city’s use of its zoning code to enact an unconstitutional taking mean that the state law authorizing municipal zoning is itself unconstitutional?

Again, SZEa is on point. SZEa is so broadly written that it could allow any number of unconstitutional decisions: it

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408. *Id.* at \*8.

409. *Id.*

410. *Id.*

411. Mandelker, *supra* note 15, at 11.

412. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

allows local governments to regulate buildings in a wide variety of ways,<sup>413</sup> but does not explicitly limit the extent to which local governments may reduce a landowner's property values. But it does not follow that the dozens of state laws based on SZEAs are unconstitutional.<sup>414</sup> Thus, the possible unconstitutionality of municipal zoning decisions does not render the Guidebook or similarly phrased state zoning enabling acts unconstitutional.

## CONCLUSION

None of the Guidebook's most controversial provisions are unconstitutional on their face. Thus, state legislatures can safely enact the Guidebook into law if they please, especially if courts narrowly construe the Guidebook's more ambiguous and controversial provisions. This does not mean, however, that by doing so, states will immunize local zoning decisions from constitutional challenges. The Guidebook, like SZEAs, authorizes local governments to enact zoning ordinances, but those ordinances will be subject to the same constitutional requirements that already limit government regulation of property rights.

Although the Guidebook may not raise significant constitutional concerns, its provisions implicate a variety of significant policy concerns. These issues include whether on-premise billboards create enough visual blight to justify local regulation, whether development moratoria are necessary to solve the problems occasionally created by new development, and whether amortization of nonconforming uses adequately protects landowners from the impact of zoning laws that outlaw preexisting land uses. As the Guidebook makes its way through state legislatures, legislators will have the responsibility of deciding whether the Guidebook correctly addresses these issues.

Because the Guidebook merely authorizes local governments to address these issues, rather than commanding them to do so, local governments, too, may be faced with difficult policy choices if states enact Guidebook-inspired enabling statutes—choices involving the balancing of private

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413. See SZEAs, § 1, quoted in WEINSTEIN, *supra* note 16, § 32.01, at 4.

414. See *supra* notes 20–22, 27 and accompanying text (describing judicial acceptance of statutes patterned on SZEAs).

property rights against the aesthetic and environmental concerns justifying many of the land use regulations discussed above.

