

R E S P O N S E

Legislating Sustainable Design: The Challenge of Local Control and Political Will

by Lavea Brachman

Lavea Brachman, JD, MCP, is Executive Director and a founder of the Greater Ohio Policy Center, a nonprofit organization researching and advancing smart growth, land use, and economic revitalization policies in Ohio. She is also a non-resident senior fellow in the Brookings Institution Metropolitan Policy Program.

Sara C. Bronin's *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*¹ revisits the age-old, American democratic debate of finding the right balance between local control and imposition of a statutory regime for the greater public good. Fundamentally, I agree with the article's premise that state policy powers are generally underutilized in the land use reform context and could be used productively to advance implementation of local green building design and construction. However, I would argue that implementation of this concept faces steep practical and political obstacles, particularly in certain states around the country, and caution that these challenges may dictate a modification in Bronin's recommendation. It will require a different vehicle or process in order for state policy to override "traditional" local land use laws, such as zoning ordinances and design controls, to enable states to "take back their police power"² in these areas.

I heartily concur with the general thrust of Bronin's argument that states should play a more prominent role in advancing sustainable development and design practices. As the result of either state inaction or proactive statutory regimes, an uneven playing field has emerged that encourages unsustainable development in several ways beyond the construction and design context, including encouraging greenfields development and sprawl over adaptive reuse, urban infill or brownfield redevelopment, or incentivizing development in rural, exurban or unincorporated areas outside cities (so-called townships in some states, like Ohio, Pennsylvania, and Indiana), instead of in urbanized environments. Some of the state policies causing these perverse impacts are not even directly land use-related but arise from other areas of state power, such as taxing authority where taxes are imposed unevenly on different types of jurisdictions, thus skewing the

market and private sector development decisions about where to invest and develop. Conversely, such as in the case of green building where the market may not account sufficiently for negative externalities over the longer term, state intervention is beneficial. There is no question, then, that states can and should be more proactive about reexamining land use-related policies. Where they have been silent, they should act to encourage sustainable growth; where they have acted, with perverse impacts, they should reform policies to discourage unsustainable growth practices.

In addition, the uniformity among local jurisdictions in the implementation of green building practices that would result from state standards would be advantageous, thereby possibly removing the decisionmaking about construction and development practices from the confines of local politics and reducing the favoritism that inevitably taints local development processes. This would advance the green building cause considerably, and perhaps transcend the parochialism that pervades many of our local communities when confronted with new ideas, such as green building and sustainable communities. Ultimately, state intervention would go a long way toward leveling the playing field between projects that use conventional materials that are less costly in the short-term, and projects providing long-term community benefits for which local planning commissions are unable to account. Ideally, sound government policy should promote the greater public good, reflecting the philosophical democratic underpinnings on which our country was founded.

I. Challenges and Barriers to Implementation

However, *real politik* barriers to implementing the recommendation that states should adopt land use powers to promote green building may prove too steep to overcome. First, it is a more complicated process than Bronin suggests for states to adopt statewide rules that either "influence land use

1. Sara Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 40 ELR (ENV'T L. & POL'Y ANN. REV.) 10733 (Aug. 2010) (a longer version of this Article was originally published at 93 MINN. L. REV. 231 (2008)).

2. *Id.* at 10733.

decisionmaking or address sustainable design techniques,”³ particularly in states where there is a strong constitutionally grounded tradition of home rule and local control, as in places like Ohio, Michigan, Pennsylvania, Indiana, and other Midwestern states. The challenge of galvanizing sufficient political will to adopt such rules cannot be ignored.

A second and related point is that there tends to be an overlap between places with a long tradition of home rule and strong local control, and those with legal, economic, and cultural conditions that cause them to be less predisposed to pass sustainable building codes in the first place. Therefore, the proposed changes in state law to provide for green building are generally more applicable in places with some existing tradition of or popular support for less traditional building and development. In many states it is difficult to imagine scenarios where these changes in green building would take place in a vacuum without advancing a broader sustainability agenda and bolder reforms. Where there is opportunity, arguments for green building should be made in the context of the larger macroeconomic changes that are taking place and the reality that communities with sustainable growth patterns are more likely to compete in the new twenty-first century economy. In order to compete, workers must live closer to where they work, so denser communities will attract new workers, and transportation costs will be reduced. While this less incremental approach may seem to be bolder and less achievable and thus a “heavier lift,” placing a plea for state-level green building codes in this broader context will help forge deeper and wider support for sustainability reforms in the long term.

Finally, even if green building codes are implemented, they are merely a small piece of overall sustainable development. At one point Bronin points to particular states (such as California, Connecticut, and Arizona) that have begun experimenting with state-level reforms in the green building arena.⁴ However, these are not tied to other reforms that ultimately would prove to have a more widespread impact on business practices and land use activities. It is perhaps more likely that contextualizing and making the case for the merits of sustainable development more broadly will lead more naturally to green building in many places.

Therefore, the article should highlight and address the challenges in galvanizing the statewide collective political will—beyond just acknowledging the conflict between state power and local autonomy—in order to make the recommended legislative changes. Expansion of state powers in any area of the law can incite opposition, territoriality, and controversy, but particularly in the area of land use in places with a deeply embedded home rule constitutional tradition. Home rule is typically defined as the power of a local city or county to set up its own system of self-government without receiving

a charter from the state; it is explicitly allowed under some state constitutions. Home rule, which is a cornerstone of local law in many Midwestern states, seems to have had its origins when these states were borne out of the Northwest Territory. It shifts much of the responsibility for local government from the state legislature to the local community. As they emerged into statehood in the early 19th century, these states adopted home rule clauses and many decided to create incorporated territory called townships wherever cities did not exist. Township leaders have historically dominated the legislatures (in places like Ohio, Pennsylvania, Michigan, Indiana, Illinois, to name a few), skewing laws toward rural interests, and steering control back to the localities. This rural-urban schism is at the heart of the political will challenges to Bronin’s proposal. Of course, the extent of the schism would vary from state to state, depending upon the degree of control that localities are accustomed to having. Generally, a local jurisdiction that adopts a home rule charter has the ability to amend its governmental organization and powers to suit its needs. In many states, local leaders utilize these charters as both a sword and a shield to vigorously defend their interests and protect the powers they already have.

Based on this background, then, the understanding of and preference for sustainable building and development, and thus the proposed reforms related to such sustainability issues, are likely to vary widely from state to state. Therefore, even under the best circumstances, the advantages of sustainable development may not be widely understood or accepted. It would advance Bronin’s argument to acknowledge and define the conditions under which the suggested reforms might occur. In the places that are further along in understanding and adopting sustainable practices, there will be less opposition, even in the face of a preference for local control. As a result, these places are more likely to be implementing green building codes already. Ironically, it is the places that have less green cultures that need state law to change the most—and those places tend to be the states where state law change related to the governance of localities is the hardest to come by. The primary challenge, then, is how to make the business and economic case for green building, particularly in the current economic climate. While it makes legal and rational sense to endow states with the power of requiring green building codes in communities, shoring up the political will to legislate this outcome will be very challenging. The arguments must be couched in terms that highlight the places that need to adopt green building in order to be more competitive in a global, twenty-first century economy. A related argument would be to point to the job creation that would accompany a growth in the green building industry due to the need for new skills. In the states previously dominated by the auto industry, such as Michigan, Ohio, and Indiana, worker retraining is necessary for an economy driven by low carbon and green jobs.

3. *Id.* at 10738.

4. *Id.*

In many of these places, then, change in a state green building code should be part of a larger effort to reinvest in our cities and promote local and regional planning. Part of accomplishing these goals is modernizing arcane state planning and zoning statutes, which many states have not amended since the 1940s, in order to facilitate regional planning or allow for new kinds of zoning, such as urban agriculture.

II. Alternative or Complementary Solutions

Alternative or complementary ways to Bronin's recommendations are proposed here that would help change public perception and encourage acceptance of the underlying sustainability principles, and thus help advance the cause of greater state regulation of green building. First, as suggested earlier, the proposed green building reforms could be packaged with other reforms, as part of a larger revision of state planning statutes to change the uneven playing field between sustainable and traditional development. This comment recommends advancing a "package" of land use improvements that would achieve greater sustainability rather than just green building. It might seem easier to take a "single shot" approach with green building codes, but in the current economic climate in which there is very little new construction at all, the threshold is even higher to demonstrate how a change in green building law and codes would have an economically competitive impact. Therefore, a package that incentivizes cross-jurisdictional planning might be more compelling.

Also, rather than legislate a change in practices, another option would be to change administrative policy to advance sustainability practices through executive action rather than through legislative reforms. A governor or cabinet official could utilize her discretionary authority to impose or create state incentives for green building. It might be practical to target certain locations for these changes, such as urban areas where rehabilitation projects are more likely. On a practical level, companies doing urban development and rehabilitation work may be more likely to adopt green building practices than those building in greenfields.

Finally, a hybrid approach, whereby a local buy-in process—where local authorities would retain some authority over the sustainability principles that are applied—would be utilized in combination with changes in state administrative or statutory law change, might be the best solution. A process such as that alluded to in the article would be instructive for Bronin to flesh out further. In the face of the potential practical and political will impediments to implementation, this might be an appealing compromise solution; particularly as many states transition to new economies and learn the advantages of sustainability for doing business but are unlikely to make large-scale reforms overnight.