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Crossing the Home-Rule Boundaries Should Be Mandatory: Advocating for a Watershed Approach to Zoning and Land Use in Ohio

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CROSSING THE HOME-RULE BOUNDARIES SHOULD BE MANDATORY: ADVOCATING FOR A WATERSHED APPROACH TO ZONING AND LAND USE IN OHIO

MELANIE SHWAB*

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I. INTRODUCTION

Ohio has a polarized history of water-resource management and planning. In 1925, Alfred Bettman, an Ohio-native and corporate lawyer, gained national recognition as the innovator of comprehensive planning when he proposed, and the City of Cincinnati adopted, the country’s first comprehensive plan to “guide growth

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and structure” in pursuit of “public health, safety, and welfare.”¹ In the same year, the Ohio Supreme Court upheld the constitutionality of comprehensive zoning in *Pritz v. Messer*.² The United States Supreme Court followed Ohio’s lead one year later in 1926, upholding the constitutionality of zoning in the landmark case *Village of Euclid v. Ambler Realty Co.*³ In stark contrast, Ohio’s poor planning and water-resource management has been subject to national criticism and jokes—most famously in 1969, when the grossly-polluted Cuyahoga River caught on fire.⁴

¹ STUART MECK & KENNETH PEARLMAN, OHIO PLANNING AND ZONING LAW 4 (2007). In 1915, Alfred Bettman decided that city planning was the key to reforming municipal corruption over zoning ordinances and, therefore, proposed a bill that authorized citizen-run planning commissions to create municipal plans that, once adopted, could not be disregarded by city council. Lora A. Lucero, *The American Planning Association and Trends in Land Use Litigation*, in CURRENT TRENDS AND PRACTICAL STRATEGIES FOR LAND USE LAW AND ZONING 85, 98 n.13 (Patricia E. Salkin ed., 2004) [hereinafter “CURRENT TRENDS”]. This legislation was the first of its kind influencing planning and zoning laws throughout the country. *Id.* Bettman was a principal drafter of the Standard City Planning and Zoning Enabling Statutes of 1935 and founder of the American City Planning Institute. *Id.* He also wrote an amicus brief on behalf of the National Conference on City Planning, Ohio State Conference on City Planning, and the National Housing Board in *Village of Euclid v. Ambler Realty Co.* *Id.* at 87.

² *Pritz v. Messer*, 149 N.E. 30, 37 (Ohio 1925), *overruled on other grounds by* *Hudson v. Albrecht, Inc.*, 458 N.E.2d 852, 855-56 (Ohio 1984). Alfred Bettman wrote as amicus curiae for the City of Cincinnati against a constitutional challenge to a zoning ordinance establishing districts in the city with specific limitations including building heights and set-backs. *Id.* at 32. The Ohio Supreme Court upheld the constitutionality of the zoning ordinance because “[u]nder the police power society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the preservation of the public health, morals, or safety” and restrictions of building heights and set-backs have such “a relation to the public health and safety.” *Id.* at 33-34 (citing *State v. Cunningham*, 119 N.E. 361 (Ohio 1918)).

³ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926); MECK & PEARLMAN, *supra* note 1, at 4-5. An Ohio district court struck down the Village of Euclid’s zoning ordinance as exceeding municipal police power, concluding that this type of land-use regulation amounted to a “taking” of Ambler’s property in violation of eminent domain. *See* *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 314-15, 317 (N.D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926) (stating that while “police power is not susceptible of exact definition . . . [I]t is not true that the public welfare is a justification for the taking of private property for the general good”). Ambler’s arguments relied on individual property rights and the potential value of the property if used for industry purposes rather than residential, as the zoning ordinance required. *See* Lucero, *supra* note 1, at 88. Bettman argued to the Supreme Court that the constitutionality of zoning ordinances should be upheld where the goal was to “prevent developments that might have a ‘detrimental effect upon public health, safety, convenience, morals, and welfare.’” *Id.* Bettman rebutted Ambler’s argument by stating that “specific claims of unfairness to the property owner could be dealt with individually without barring zoning altogether” and the Supreme Court agreed upholding the constitutionality of the ordinance. *Id.*

⁴ DAVID ZWICK & MARCY BENSTOCK, WATER WASTELAND 3 (1972). The Cuyahoga River in central Cleveland ignited into flames after oil and industrial waste entered the water on June 22, 1969. *Id.* Clevelanders joked that “[a]nyone who falls into the Cuyahoga does not drown . . . He decays.” *The Cities: The Price of Optimism*, TIME, Aug. 1, 1969, available at <http://www.time.com/time/magazine/article/0,9171,901182,00.html>. Apparently the Cuyahoga burned periodically since John D. Rockefeller built refineries along its banks in

Adding to the embarrassment, Congress cited the Cuyahoga “Burning River” incident as good reason for more comprehensive federal regulation over water pollution.⁵ The collective failure of state governments to manage water pollution spurred the enactment of the Clean Water Act in 1972.⁶ However, the Clean Water Act does not directly regulate all aspects of water pollution; the greatest contributor to water pollution, “nonpoint source” pollution,⁷ is left to state management.⁸

Optimal management and conservation of water resources requires a holistic approach and planning model. This is because adequate water quality requires conscientious land use planning, and the two are inextricably linked.⁹ Land use planning and water-resource management must be part of a comprehensive plan with hydrological boundaries as its geographic borders.

Yet, unlike a number of states, Ohio follows the opposite approach.¹⁰ Land use decision-making is a product of zoning regulations enacted in accordance with

the 1860s. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 99-104 (2002).

⁵ See Adler, *supra* note 4, at 90 n.5 (citing Water Pollution – 1970, Part 2: Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 91st Cong. 412 (1970)) (statement of Carl B. Stokes, Mayor of Cleveland); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting).

⁶ See 33 U.S.C. §§ 1266-1268 (2006). See generally Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983) (discussing the requirements and regulations under the Clean Water Act); Adler, *supra* note 4, at 129-31. Congress specifically targeted the Great Lakes for cleanup. 33 U.S.C. § 1268.

⁷ A “nonpoint source” is any source without a discrete source of discharge—such as an industrial facility or power plant. See *infra* Part II.B. The Clean Water Act (“CWA”) defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (2006). The Code also defines a “source” as “any building, structure, facility, or installation from which there is or may be the discharge of pollutants.” *Id.* § 1316(a)(3). The CWA does not define “nonpoint source” other than everything else other than “point sources.” See *id.* § 1362.

⁸ See sources *infra* note 45.

⁹ See U.S. ENVTL. PROT. AGENCY, WATERSHEDS: A WATERSHED APPROACH, <http://www.epa.gov/owow/watershed/approach.html> (last visited Feb. 28, 2010) [hereinafter “U.S. EPA WATERSHED APPROACH”] (land use activities directly affect the health of water quality in a watershed); U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, BENEFITS DERIVED FROM TAKING A WATERSHED APPROACH, *available at* <http://www.epa.gov/owow/watershed/framework/ch5.html> (last revised Sept. 12, 2008) [hereinafter “U.S. EPA WATERSHED BENEFITS”]; A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 PACE ENVTL. L. REV. 149, 149 (2002).

¹⁰ Florida, Oregon, California, New York, Maryland, New Jersey, Washington, Minnesota, Wisconsin, Hawaii, Montana, and Georgia have all adopted comprehensive, statewide land-use planning approaches. See JULIAN CONRAD JUERGENSMAYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 501-03, 505 (2d ed. 2007) (discussing the details of a few of these states’ comprehensive plans).

political boundaries rather than hydrological “watershed” boundaries.¹¹ Political boundaries follow a land use planning model that no longer meets the ecological needs of the state because “water knows no boundaries,” making political boundaries superficial parameters for abating water pollution.¹²

Ohio’s current zoning practices further entrench political boundaries as the dominant land use approach because, while the state’s townships and counties enact zoning regulations in accordance with a comprehensive plan, municipalities endowed with home-rule powers may zone in the absence of any plan.¹³ This piecemeal approach to zoning and land use exacerbates nonpoint source water pollution in the state.¹⁴ The solution for reducing nonpoint source pollution is statewide adoption of a “watershed-approach” to zoning and land use planning. This is a comprehensive plan with a dual purpose—preserve water quality and regulate land use activities uniformly—to reduce nonpoint source pollution.¹⁵

This Article advocates that Ohio adopt a mandatory “watershed-approach” to land use planning and zoning throughout the state. Ohio should adopt this approach to increase water quality in the state by reducing nonpoint source pollution, achieve greater environmental regulation uniformity, and offset the unfettered zoning power of municipalities operating in the absence of a comprehensive plan.

Part II discusses the environmental problem of water pollution and why curbing nonpoint source pollution is truly a state’s burden that requires legislative attention and reform. Part III.A explains the solution to nonpoint source pollution in Ohio—implementation of a mandatory statewide “watershed approach” model to land use planning and zoning; Part III.B discusses the current voluntary efforts in Ohio to implement watershed-approach planning and the perceived legal barriers to their success.

Part IV.A explains the following: (1) the current structure of zoning and land use practices among Ohio local governments; (2) why these practices are inadequate to reduce nonpoint source water pollution; and (3) why mandating a watershed-approach to zoning in the state is constitutionally permissible under the Home Rule Amendment of the Ohio Constitution. Lastly, Part IV.C opines that home rule is a

¹¹ See discussion *infra* Parts III.A, IV.A.

¹² See MILWAUKEE PUB. POLICY FORUM REPORT, *Clean Water, Healthy Future: Asset Management for Regional Prosperity*, Feb. 2006, REG’L REPORT, at 2, available at <http://www.publicpolicyforum.org/pdfs/CleanWaterRegional.pdf>; Charles P. Lord et al., *Natural Cities: Urban Ecology and the Restoration of Urban Ecosystems*, 21 VA. ENVTL. L. J. 317, 329 (2003).

¹³ See MECK & PEARLMAN, *supra* note 1, at 5-6. See OHIO REV. CODE ANN. § 519.02 (Westlaw 2010); *Cent. Motors Corp. v. City of Pepper Pike*, 409 N.E.2d 258, 280 (Ohio Ct. App. 1979) (“Ohio law does not require a municipality to adopt a comprehensive zoning plan as a condition precedent to the enactment of zoning legislation.”).

¹⁴ See, e.g., Paula J. Lebowitz, *Land Use, Land Abuse and Land Re-Use: A Framework for the Implementation of TMDLs for Nonpoint Source Polluted Waterbodies*, 19 PACE ENVTL. L. REV. 97, 122 (2001) (“The regulation of land use has been delegated from the state to the municipalities . . . that allows them nearly exclusive control over the determination of how land within the municipality will be used. By and large, this system of fragmented local control has been a failure in the protection of environmental resources and water quality.”).

¹⁵ See discussion *infra* Part III.A., Part III.B.

political barrier rather than a legal one, and, therefore, statewide adoption of a watershed plan for land use ultimately confronts the challenge of overcoming political opposition.

II. MANAGING WATER POLLUTION: A STATE OBLIGATION

A. History and Purpose of the Clean Water Act

National legislative concern over water pollution originated with Congress's enactment of the Rivers and Harbors Act of 1899,¹⁶ making it a crime for any person or industry to discharge refuse into tributaries and navigable waters of the United States without a permit.¹⁷ It was not until the Water Quality Improvement Act of 1965¹⁸ that states were collectively subject to federal enforcement of comprehensive water-resource management.¹⁹ The Act encouraged states to adopt effluent limitations²⁰—pollutant discharge maximums—and water quality standards for all water bodies; but at that time, the Act had limited enforcement power and failed to reduce water pollution.²¹ Sweeping enforcement power came in the 1972 Federal Water Pollution Control Act Amendments,²² known as the Clean Water Act (“CWA”) of 1972. The CWA required states to issue water quality standards for intrastate waters subject to federal approval.²³

The CWA of 1972 is the principal body of water pollution law currently in effect, and has the stated purpose of “[r]estor[ing] and maintain[ing] [the] chemical, physical and biological integrity of the Nation’s waters.”²⁴ To accomplish this, the CWA introduced a federal permit system to regulate point source contributors of water pollution—discrete conveyances of discharge—and delegated to the states the role of administering the permit program as well as enforcing water quality standards and effluent limitations for all direct discharges into surface waters.²⁵ Nonpoint

¹⁶ Pub. L. No. 9-245, 30 Stat. 1151 (1899) (codified as 33 U.S.C. §§ 403-404, 406 (2006)).

¹⁷ See 33 U.S.C. § 407.

¹⁸ Pub. L. No. 89-234, 79 Stat. 903 (1965) (superseded 1972). Although, “[s]erious federal interest in protection of surface waters extends back as far as 1948 when Congress passed the Federal Water Pollution Control Act.” Shimshon Balanson, Note, *Holding Nature Responsible: The Natural Conditions Exception to Water Quality Standards of the Clean Water Act*, 56 CLEV. ST. L. REV. 1057, 1060 (2008).

¹⁹ Gaba, *supra* note 6, at 1177-78.

²⁰ See *id.* at 1178-80. “Effluent” refers to waste material that is discharged into the environment. See CWA § 502(11), 33 U.S.C. § 1362(11) (2006). “Effluent limitations” refers to the restriction on the quantity, rate, and concentration of such waste that is discharged into navigable waters. *Id.*

²¹ See Gaba, *supra* note 6, at 1178-80.

²² Pub. L. No. 92-500, 86 Stat. 816 (2006) (codified as amended at 33 U.S.C. §§ 1251-1387).

²³ See 33 U.S.C. §§ 1311(b)(1)(C), 1313(a)(1); PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology, 511 U.S. 700, 704 (1994).

²⁴ 33 U.S.C. § 1251(a).

sources—diffuse contaminants without a discrete origination—are specifically exempt from the CWA permit program.²⁶

Federal regulatory mandates regarding nonpoint source pollution have a shorter history. The 1987 Amendments to the CWA introduced nonpoint source pollution into its regulatory framework in Sections 208 and 319.²⁷ Section 208 calls for states' participation in three ways: (1) assess damage to water quality attributable to nonpoint source pollution; (2) develop programs to abate it—regulatory or non-regulatory; and (3) submit these programs, "Section 208 Plans," to the U.S. Environmental Protection Agency ("U.S. EPA") for approval. Section 208 plans are included in Ohio's required Water Quality Management ("WQM") Plan—a report which has been referred to as "an encyclopedia . . . used to plot and direct actions that abate pollution and preserve clean water"; the WQM Plan addresses nine elements of water quality that the state supervises, including nonpoint sources.²⁸ Another reporting requirement, pursuant to Section 303(d), is that Ohio identify annually all "impaired" surface waters—those water bodies within the state's borders that fail to meet the state-established water quality standards.²⁹

The CWA Section 319 adds financial muscle to its ambitious nonpoint source management program—marrying the federal government's interest in controlling

²⁵ See *id.* § 1342. The CWA is triggered by the "discharge of any pollutant from a point source into the navigable waters of the United States." *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.* 299 F.3d 1007, 1009 (9th Cir. 2002). Point sources cannot discharge pollutants into navigable surface waters without a permit from the National Pollutant Discharge Elimination System (NPDES). See *id.* § 1342 (establishing NPDES).

²⁶ See *id.* § 1342; *Ore. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (stating, "[w]hen Congress established the National Pollutant Discharge Elimination System (NPDES) in 1972 and concomitantly created a new approach to regulating and abating water pollution, it drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under [33 U.S.C. § 1342]. Nonpoint sources, because of their very nature, are not regulated under the NPDES." (citations and footnotes omitted)).

²⁷ Pub. L. No. 100-4, 101 Stat. 7 (1987) (now codified as amended at 33 U.S.C. § 1288 (2006)); see 33 U.S.C. § 1329; *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1352 (N.D. Cal. 2000); see also *Ore. Natural Res. Council*, 834 F.2d at 849 n. 12 (noting that "Congress recently amended [this year] the Clean Water Act and added a new provision dealing with nonpoint sources of pollution" and that Congress added to section 1251(a) that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented").

²⁸ OHIO ENVTL. PROT. AGENCY DIV. OF SURFACE WATER, OHIO 2008 FINAL INTEGRATED REPORT- SECTION C: MANAGING WATER QUALITY C-10 (2008), http://www.epa.ohio.gov/portals/35/tmdl/2008IntReport/Final_SectionC_ProgramSummaries.pdf [hereinafter "OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY"]; see 33 U.S.C. § 1313(d) (requiring State WQM Plans). The CWA requires that the State WQM Plans include—total daily maximum loads (TMDLs), effluent limits, municipal and industrial waste treatment, nonpoint source management and control, management agencies, implementation measures, dredge and fill program, basin plans, and ground water. See 33 U.S.C. § 1313(d); OEPA 2008 WATER QUALITY REPORT SECTION C-MANAGING WATER QUALITY; see generally 40 C.F.R. §§ 130.1-130.15 (1994) (federal regulations addressing these plans).

²⁹ See Clean Water Act (CWA) § 303, 33 U.S.C. § 1313(d) (2006).

nonpoint source pollution with continual state needs for funding.³⁰ It is a grant program, administered by the Ohio Environmental Protection Agency (“OEPA”), that annually distributes federal grants specifically targeted for communities’ and organizations’ uses to correct water quality impairments caused by nonpoint source pollution.³¹ These federal grants are Ohio’s primary funding source for nonpoint source pollution abatement. Subsidized costs offer part, but not all, of a regulatory solution, because these grants require willing and able takers, meaning that the true “cornerstone of Ohio’s 319 program is working with watershed groups and others who are implementing locally developed watershed management plans” to reduce nonpoint source pollution.³² While the CWA reporting requirements and subsequent amendments have directed states’ attention to the problem of nonpoint source pollution—and backed that directive with federal monies, although the sufficiency of funding is a hotly debated point—the regulatory structure is a relatively new one, and it requires state action in the absence of a federal “how-to.” As such, this Article argues that increased legislative attention and policy-making is necessary for this cognizable problem.

B. Sources of Water Pollution: Point Source and Nonpoint Source

Distinguishing the sources of water pollution is biologically and legally significant. All water pollution originates from point sources, nonpoint sources, or both. Point sources are discrete points of discharge—such as manufacturing plants, factories, pipes, and sewage plants—and are subject to the NPDES permit program for any and all direct discharges into surface waters.³³ More than three decades after the NPDES permit program began, Ohio, like most other states, implemented the NPDES with minimal difficulty and reduced point source pollution effectively.³⁴

Nonpoint source pollution is the leading cause of water pollution in the United States.³⁵ Unlike point sources, nonpoint sources are not attributable to a single or

³⁰ See U.S. ENVTL. PROT. AGENCY, POLLUTED RUNOFF (NONPOINT SOURCE POLLUTION): CLEAN WATER ACT SECTION 319, <http://www.epa.gov/owow/nps/cwact.html> (last visited Dec. 22, 2008).

³¹ See OEPA, SECTION 319 GRANT PROGRAM, <http://www.epa.ohio.gov/dsw/nps/319program.aspx#success> (last visited Oct. 26, 2009) [hereinafter OEPA SECTION 319 GRANT PROGRAM].

³² See OEPA SECTION 319 PROGRAM, *supra* note 31.

³³ See sources *supra* note 23. Point sources comprise mostly of the following types—Publicly Owned Treatment Works (POTWs), Combined Sewer Systems (CSSs), and industrial facilities. See generally OHIO ADMIN. CODE 3745:38-03 (2000); OHIO REV. CODE ANN. § 6111.01 (LexisNexis 2010). POTWs are treatment plants for municipal sewage, the used water of a community including waterborne waste from residences, business, and industry. See generally OHIO ADMIN. CODE 3745:3-01 (2002) (definitions). CSSs are a combination of street storm sewers and residential sewers, eliminating the need for two separate systems. See OHIO REV. CODE ANN. § 6117.01(A)(9).

³⁴ See OHIO EPA, OHIO NONPOINT SOURCE POLLUTION CONTROL PROGRAM, <http://www.epa.state.oh.us/dsw/nps/index.aspx> (last visited Oct. 25, 2009) [hereinafter “OEPA NONPOINT SOURCE POLLUTION”] (noting that the CWA’s point source regulations are effective at reducing point source pollution in Ohio’s waters).

³⁵ See generally U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS; 2002 REPORTING CYCLE,

defined point of discharge and constitute a wider span of contaminants because the pollution is discharged over an expansive land area.³⁶ Nonpoint sources are diffuse forms of pollution caused by sediment, nutrients, and organic and toxic substances originating from land-use activities, all carried to lakes and streams by surface runoff.³⁷ Nonpoint source pollution occurs due to contamination that accumulates en route from wherever the runoff originated.³⁸ The pollution results from storm water and melted snow runoff that drains over surfaces to everywhere that water accumulates.³⁹

Nonpoint source pollution is attributable to common land-use activities—agriculture, farming, construction, mining, development complexes, golf courses, paved driveways, and parking lots.⁴⁰ In communities where land use development occurs in the absence of conscientious planning, the runoff channels and drains to wherever the land or gravity takes it—neighboring “downstream” towns, lakes, streams, basements, storm sewers, or groundwater.⁴¹ Increasing impervious surfaces—hard surfaces impenetrable by water runoff, such as parking lots—harms water quality.⁴² When impervious cover of land areas increase, it forces water to run off of these surfaces at a greater speed, which in turn creates several effects: (1) the

<http://www.epa.gov/305b/2002report/report2002305b.pdf> (last visited Jan. 9, 2009); *see also* League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002) (stating that nonpoint source pollution is the “largest source of water pollution in the United States, far outstripping point source pollution from factories, sewage plants, and chemical spills.”); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1338 (N.D. Cal. 2000) (acknowledging that ‘nonpoint source pollution has become the dominant water quality problem in the United States’).

³⁶ *See Forsgren*, 309 F.3d at 1184; William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 560-64 (2004).

³⁷ U.S. GEOLOGICAL SURVEY, WATER GLOSSARY, <http://ga.water.usgs.gov/edu/dictionary.html#W> (last visited Feb. 2, 2009).

³⁸ *Forsgren*, 309 F.3d at 1186 (citing *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998)); *Andreen supra* note 36, at 562-65.

³⁹ *See* OEPA NONPOINT SOURCE POLLUTION, *supra* note 34; John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 369 (2002).

⁴⁰ U.S. ENVTL. PROT. AGENCY, THE WATERSHED PROTECTION APPROACH: AN OVERVIEW 1 (1991), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockkey=100001ZK.txt> [hereinafter “U.S. EPA WATERSHED PROTECTION APPROACH”]; *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (noting the connection between land use and nonpoint source pollution).

⁴¹ *See generally* *Boettler v. Bd. of Twp. Trs., Green Twp.*, 165 N.E.2d 705, 708-10 (Ohio C.P. Summit County 1960) (recognizing the “downstream” effect of land development and increasing surface water movement to neighboring municipalities); OEPA NONPOINT SOURCE POLLUTION, *supra* note 34.

⁴² OHIO ENVTL. PROT. AGENCY, DIVISION OF SURFACE WATER, OHIO 2008 FINAL INTEGRATED REPORT- SECTION A: AN OVERVIEW OF WATER QUALITY, A-9-A-10, available for download at <http://www.epa.ohio.gov/dsw/tmdl/2008IntReport/2008OhioIntegratedReport.aspx> (last visited Mar. 18, 2010) [hereinafter “OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW”].

rate of stream erosion increases, hindering the stream's ability to assimilate nutrients and pollution; (2) higher volumes of runoff increase the amount of pollutants; and (3) surface water temperatures rise after runoff is carried over hot surfaces and enters the stream, thereafter reducing oxygen concentrations necessary for healthy aquatic life.⁴³ An increase in impervious cover is inevitable as communities develop, so without the realistic option of reducing impervious surfaces, the size and placement of those surfaces is even more critical.

Most significantly, the deteriorative effect of nonpoint source pollution is a cumulative result of land use, making "spot" improvements to runoff ultimately ineffective.⁴⁴ Traditionally, states regulate land use within their borders, and the CWA's provisions do not interfere with that tradition to the extent that the CWA requires states to monitor nonpoint source pollution and reduce it. But, as noted, the CWA stops short of instructing *how* states must accomplish this.⁴⁵

Environmental experts and agencies recognize that the abstract and amorphous nature of nonpoint source pollution makes it the most difficult to manage.⁴⁶ Moreover, the experts and agencies agree that effective management of nonpoint source pollution requires a partnership between the biological needs of surface waters and control over land use activities contributing to nonpoint source pollution.⁴⁷ Yet, such collaboration rarely occurs; in Ohio, municipal zoning and land use occurs without consideration to the impact on nonpoint source pollution.

⁴³ *Id.* at A-10.

⁴⁴ See generally OEPA NONPOINT SOURCE POLLUTION, *supra* note 34.

⁴⁵ See Clean Water Act (CWA) § 208, 33 U.S.C. § 1288 (2006); CWA § 319, 33 U.S.C. § 1329; *Pronsolino v. Marcus*, 91 F. Supp.2d 1337, 1341-42, 1346 (N.D. Cal. 2000) (explaining that the Clean Water Act of 1972 intended to address all sources of pollution, but because of the nature of nonpoint source pollution, the Act intended "to mitigate nonpoint-source pollution through state land-use regulation.") The OEPA states that "[a]ll pollution is not created equally" when referring to the distinct obligations of the state and federal governments for controlling water pollution. OEPA NONPOINT SOURCE POLLUTION, *supra* note 34. The agency notes that although "[t]raditional images of water pollution often consist of a pipe spewing industrial contaminants into a river," the federal Clean Water Act has mostly solved this problem because the Act mandates environmental policies and controls for point source pollution. *Id.* But the agency recognizes that reducing nonpoint source pollution remains an unmet problem because nonpoint source pollution is the result of land use and controlling land use is a power of the state. *Id.* So, although the Clean Water Act "call[s] upon states to develop comprehensive plans to manage nonpoint source pollution," the Act does not mandate a particular plan. *Id.*

⁴⁶ See, e.g., OEPA NONPOINT SOURCE POLLUTION, *supra* note 34; Steven J. Hipfel, *Enforcement of Nonpoint Source Water Pollution Control and Abatement Measures Applicable to Federal Facilities, Activities and Land Management Practices under Federal and State Law*, 8 ENVTL. LAW. 75, 80-81 (2001) (stating that "[r]egulators have identified watershed management as the necessary mechanism for controlling and abating nonpoint source water pollution because this approach involves examination of all water quality stressors within a defined water basin instead of viewing individual pollutant sources in isolation."); Daniel R. Mandelker, *Controlling Nonpoint Source Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479, 480-82 (1989).

⁴⁷ See U.S. EPA WATERSHED APPROACH, *supra* note 9; OEPA NONPOINT SOURCE POLLUTION, *supra* note 34 and text accompanying note 45. Professor Tarlock advocates for watershed management as an optimal approach yet local governments "face formidable

C. Water as a Resource: Maintaining Water Quality Standards

The state of Ohio is “water-rich,” bordered on its North by Lake Erie, and on its south by the Ohio River, with thousands of miles of surface waters in between.⁴⁸ Ensuring suitable conditions of these waters is critical because they support the state’s needs for drinking water and recreational and economic activities, all of which contribute to a robust standard of living and state economy.⁴⁹ In fact, Ohio’s surface waters, not groundwater, are the primary water source for drinking, swimming, boating, fishing, industrial operations, power generation, irrigation, and mining.⁵⁰

Pursuant to the CWA, all states adopt water quality standards “to protect, maintain and improve the quality of the nation’s surface waters.”⁵¹ “Water quality standards” set upper limits on the amount of pollution permitted in surface waters.⁵² These water quality standards are ambient standards rather than discharge standards, but ambient standards form the basis of direct pollutant discharge limitations into surface waters under the federal permit program.⁵³

The OEPA monitors the state’s water quality and promulgates its water quality standards.⁵⁴ One component of Ohio’s water quality standards is a “designated use.”⁵⁵ The OEPA assigns a designated use for each water body segment—drinking, recreation, or industrial uses.⁵⁶ All surface waters must attain the water quality standards for their respective designated use.⁵⁷

Pursuant to the CWA Section 305, the OEPA generates a biennial report indicating the general conditions of the state’s surface waters and identifies all

boundaries in trying to adapt their land use and related powers to watershed governance. Local governments are locked into their jurisdictional ‘box’ that . . . boundary laws draw.” Tarlock, *supra* note 9, at 161. For this reason, collaboration is rare, stating that “[t]he first barrier [to watershed planning] is the concept of watershed itself.” *Id.* at 162.

⁴⁸ OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY, *supra* note 28, at C-15; *see* Clean Water Act (CWA) § 303, 33 U.S.C. § 1313(a)(3)(A) (2006).

⁵² OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY, *supra* note 28, at C-15.

⁵³ *Id.*

⁵⁴ *See* 33 U.S.C. §§ 1313(a)(2)-(3)(A) (every state develops water quality standards for each of its bodies of water); *see generally* OHIO ADMIN. CODE 3745-1-01 (2007). For an explanation of Ohio’s water quality standards, *see* OHIO EPA, WATER QUALITY STANDARDS OVERVIEW, <http://epa.ohio.gov/dsw/wqs/index.aspx> (last visited March 18, 2010) [hereinafter “OEPA WATER QUALITY STANDARDS”].

⁵⁵ *See* OHIO ADMIN. CODE 3745-1-02. Ohio water quality standards contain four key components: (1) beneficial use designations; (2) numeric criteria; (3) narrative criteria; and (4) biological criteria. *See* 3745-1-01-3745-1-54.

⁵⁶ *See* OEPA WATER QUALITY STANDARDS, *supra* note 54.

⁵⁷ *Id.*

“impaired” waters—those failing to attain purity minimums.⁵⁸ This state-level review further enables the OEPA to establish effluent limitations—pollutant discharge maximums—for all water bodies.⁵⁹ When Ohio’s surface waters fail to attain the water quality standards based on the OEPA’s effluent limitations, then the effluent limitations are increased, and discharge maximums are decreased.⁶⁰ Effluent limitations are increased—meaning that pollutant discharge must decrease—to improve water quality and compensate for pollution levels.

Heightened effluent limitations remain in place until the water body attains its designated purity level.⁶¹ The assignment of total maximum daily loadings (TMDLs) is a pollutant-control program to identify and restore polluted waters.⁶² TMDLs are best-estimate calculations generated by the OEPA of the total combined amount of water pollution of point and nonpoint sources for each water body.⁶³ In addition, states calculate a TMDL amount for each pollutant found in impaired waters.⁶⁴

States that effectively manage nonpoint source pollution have an economic advantage over those states that do not.⁶⁵ Put most simply, water quality standards and TMDLs equate to a “total” pollution amount, without distinguishing between point sources and nonpoint sources.⁶⁶ TMDLs are mandatory; therefore, when reduction in pollution is necessary, point sources, rather than nonpoint sources, must reduce *their* discharge levels into impaired waters.⁶⁷ Increasing control over point sources is problematic; many of Ohio’s point sources make up profitable industries in the state, contributing revenue, creating jobs, and reducing property taxes for residents.⁶⁸ Therefore, when Ohio forces point sources to reduce discharges beyond

⁵⁸ The biennial report satisfies the CWA’s Section 305(b) water quality reports and Section 303(d) lists of impaired waters. See 33 U.S.C. §§ 1315(b)(1), 1313(d); 40 C.F.R. § 130.8 (water quality report).

⁵⁹ See generally *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992); Andreen, *supra* note 36, at 548-52.

⁶⁰ See 33 U.S.C. § 1311(b)(1)(C); Gaba, *supra* note 6, at 1169-70.

⁶¹ Gaba, *supra* note 6, at 1169-70.

⁶² U.S. ENVTL. PROT. AGENCY, OVERVIEW OF CURRENT TOTAL MAXIMUM DAILY LOAD: PROGRAM AND REGULATIONS, <http://www.epa.gov/owow/tmdl/overviewoftmdl.html> (last visited Oct. 10, 2008).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* For more detailed information on the economic benefits and detriments of water pollution, see RICHARD L. REVESZ, FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY 68-90 (1997); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 233-41 (2003); U.S. EPA WATERSHED BENEFITS, *supra* note 9.

⁶⁶ U.S. EPA WATERSHED BENEFITS, *supra* note 9; see also *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) (following the EPA’s interpretation that TMDLs apply to both nonpoint and point sources).

⁶⁷ *Pronsolino*, 291 F.3d 1123.; U.S. EPA WATERSHED BENEFITS, *supra* note 9.

⁶⁸ See OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY, *supra* note 28, at C-15; U.S. ENVTL. PROT. AGENCY, WATERS DATA,

the level of other states, Ohio is at an economic disadvantage.⁶⁹ If Ohio reduces its nonpoint source pollution quantifiably, then fewer point sources and industries must bear the sole burden of improving water quality.⁷⁰ The nexus between economics, water quality, and a watershed-approach to zoning and land use is a compelling reason alone for change, even if increased water quality alone is not.

Currently, Ohio's water-resource management remains polarized—success and failure abound. The state is a recognized leader in the U.S. for innovative methods of water quality monitoring and data assessment of environmental stressors.⁷¹ Also, according to the 2008 Ohio Water Quality Report, Ohio's "large rivers"⁷² and their watersheds stand at 78.7% full attainment of the state's goals, compared to the same large rivers' 62% attainment in the 1990s, and merely 21% attainment during the 1980s.⁷³

The same statistics highlight Ohio's failure because Ohio's own attainment goals are only 80% of the federal minimum standards, making the rate of improvement commendable, but still falling short of what is required.⁷⁴ Out of 249 surface waters monitored, 241 failed to meet the federal minimum water quality standards.⁷⁵ Nonpoint source pollution is the principal cause of the deficiency, and most of Ohio's watershed impairments are due to physical modifications and urbanization of the landscape.⁷⁶ The OEPA attributes its incremental success in improving water quality over the year to its water quality monitoring efforts, but the agency's 2008 report concludes more somberly, that "with proper planning of [land use] development, many of these problems can be mitigated or avoided *entirely*."⁷⁷

<http://www.epa.gov/waters/data/index.html> (last visited Nov. 10, 2008) (compilation of water quality data, statistics, and general information).

⁶⁹ See U.S. ENVTL. PROT. AGENCY, WATERS DATA, *supra* note 68.

⁷⁰ See OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY, *supra* note 28.

⁷¹ See OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-1, A-3. In other words, Ohio is a leader at knowing precisely *how bad* the current state of water resources actually are in the state.

⁷² The Ohio EPA designates twenty-three "large rivers" in Ohio as those that drain more than 500 square miles. *Id.* at A-5.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See U.S. ENVTL. PROT. AGENCY, NATIONAL ASSESSMENT DATABASE, <http://www.epa.gov/waters/305b/index.html> (last visited Nov. 10, 2008); OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-7. The "top 5" impairments being: siltation/sediment, nutrients, habitat modification, hydromodification, organic enrichment/ dissolved oxygen. For scientific details of these impairments see *id.* at A-8.

⁷⁷ OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-10 (emphasis added).

III. THE WATERSHED APPROACH TO LAND USE: A SOLUTION TO NONPOINT SOURCE POLLUTION

A. *The Watershed Approach Planning Model*

A “watershed” is an elusive concept. It is a geographical unit with hydrological boundaries, typically spanning land areas across several political jurisdictions; thus, it does not operate as a jurisdictional planning unit.⁷⁸ As a unit, a “watershed” generally refers to the area of land defined by a common drainage basin that contributes runoff to a common outlet—a point on a larger stream, a lake, an underlying aquifer, or an ocean.⁷⁹ Accordingly, every watershed has unique biological and land area characteristics; factors such as population density, geography, land use, and existing water quality are determinative of these characteristics.⁸⁰ Therefore, local governments, whose jurisdictions cross particular watersheds, are best equipped to agree upon land use controls and planning to improve the health of those watersheds.⁸¹

Broadly, a “watershed-approach” is a comprehensive effort to address causes of water pollution within a watershed.⁸² The U.S. EPA identifies three common features of a watershed approach: (1) hydrological boundaries as a geologic focus; (2) well-integrated partnerships—including both private and public stakeholders; and (3) action driven by environmental objectives and scientific evidence.⁸³ Integrated “watershed management” requires control over both land use and water resources.⁸⁴

⁷⁸ See SUSAN HILL MACKENZIE, INTEGRATED RESOURCE MANAGEMENT: THE ECOSYSTEM APPROACH TO THE GREAT LAKES BASIN 200-03 (1996); Tarlock, *supra* note 9, at 161-62; Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 1088-94 (1995).

⁷⁹ U.S. EPA WATERSHED PROTECTION APPROACH, *supra* note 40, at 3.

⁸⁰ *Id.* As part of the Great Lakes, Lake Erie is not just managed in Ohio, but also by federal regulations, interstate agreements and coalitions among many Midwest states, and the Great Lakes Compact. See generally 33 U.S.C. § 1258; OHIO REV. CODE §1522.01-08; GREAT LAKES BASIN COMPACT & LEGISLATIVE HISTORY, available at <http://www.glc.org/about/glbc.html> (last visited Oct. 30, 2008). Other than citing Lake Erie as an example, Lake Erie is not intended to be covered by this Article’s proposed watershed planning framework.

⁸¹ See U.S. EPA WATERSHED PROTECTION APPROACH, *supra* note 40, at 1. The U.S. EPA defines a watershed action plan as “an itemization of the problems, priorities and activities the local watershed group would like to address. . . . [I]t serves as a guide for the watershed group by mapping a strategy for improving or protecting the watershed. . . . A watershed action plan will . . . accurately identify pollutants and pollution sources so that appropriate and effective solutions can be formulated.” OHIO ENVTL. PROT. AGENCY, A GUIDE TO DEVELOPING LOCAL WATERSHED ACTION PLANS IN OHIO (1997), available at http://www.uptuscwatershed.org/Cuyahoga/action_plan/wsguide.pdf; see also *Allion v. City of Toledo*, 124 N.E. 237, 238 (Ohio 1919) (recognizing generally that local authorities are presumed to be familiar with local conditions and the needs of their respective communities).

⁸² U.S. EPA WATERSHED PROTECTION APPROACH, *supra* note 40, at 7.

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 4. The control over water itself—groundwater rights and extraction—is outside the scope of this Article. Control over water resources refers generally to surface waters

The watershed approach planning model is the most effective framework to abate nonpoint source pollution because it addresses the sources of pollution in a holistic manner.⁸⁵ For this reason, the U.S. EPA recommends that states implement a “watershed approach” for land use planning to reduce nonpoint source pollution, as an environmental and economic solution.⁸⁶ For states with the political will to do so, the U.S. EPA and its state-partner agencies, such as the OEPA, provide extensive guidance documents, model legislation, and sample statewide watershed management plans, in addition to grant funding.⁸⁷ Both agencies, in appealing to a broad audience, have developed extensive, user-friendly websites focused on educating the public and local governments about watersheds and watershed planning.⁸⁸

B. Current Watershed Approach Model in Ohio

Watershed management planning in Ohio is not a novel concept—just underutilized. Dozens of administrative agencies, political subdivisions, and volunteer grassroots organizations already conduct watershed planning in the state.⁸⁹ Existing utilization of a watershed approach to monitoring water quality and land use planning—at least in some communities—is valuable leverage the state should use

within local governments’ jurisdictions, and the land areas accompanying the waters’ drainage basins—i.e. the “watershed.” See Tarlock, *supra* note 9, at 161. This Article refers to “watershed management” generally to mean management over an implemented watershed approach comprehensive plan. The U.S. EPA uses the phrase “watershed management” generally to mean any number of diverse programs seeking to reduce water pollution, such as waste allocations for point sources under the CWA. See 33 U.S.C. §§ 1311(e), 1312(a) (2006) (allocations according to Section 303 of the CWA).

⁸⁵ See U.S. EPA WATERSHED APPROACH, *supra* note 9.

⁸⁶ See *id.*; Lebowitz, *supra* note 14, at 113 (noting that the EPA adopted the Watershed Approach as a framework for environmental management in 1996); see also OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, A REVIEW OF STATEWIDE WATERSHED MANAGEMENT APPROACHES 7 (2002), available at http://www.epa.gov/owow/watershed/approaches_fr.pdf. In this 2002 final report, the EPA surveyed twenty states, including Ohio, that implemented a statewide management approach to water monitoring and concluded that greater partnership between land use planning and zoning is needed for success. *Id.* at 1, 50.

⁸⁷ See generally OFFICE OF WATER, *supra* note 86; OEPA NONPOINT SOURCE POLLUTION, *supra* note 34; OHIO LAKE ERIE COMM’N, LINKING LAND USE AND LAKE ERIE: BEST LOCAL LAND USE PRACTICES, available at <http://www.balancedgrowth.ohio.gov/BestLocalLandUsePractices.aspx> (follow “Download the Best Local Land Use Practices document here.” hyperlink) (last visited Mar. 10, 2010).

⁸⁸ See U.S. ENVTL. PROT. AGENCY, WATERSHEDS, <http://www.epa.gov/owow/watershed> (last visited Mar. 10, 2010). The site offers an interactive portion where any person or local government official can “surf their watershed” by typing in their location. *Id.*

⁸⁹ See, e.g., OEPA 2008 WATER QUALITY REPORT SECTION C: MANAGING WATER QUALITY, *supra* note 28, at C-21. Other agencies include Ohio Department of Natural Resources, Ohio EPA, Ohio Department of Development, and the Northeast Ohio Regional Sewer District (“NEORS”). For a sample listing of watersheds within Northeast Ohio, see NEORS, WHAT IS A WATERSHED?, <http://www.neorsd.org/whatisawatershed.php> (last visited Mar. 10, 2010). According to the NEORS, more than two dozen watersheds drain into the state’s largest watershed—Lake Erie. *Id.*

to its advantage. In short, Ohio can adopt a watershed approach as a comprehensive state plan for zoning and land use with minimal administrative and budgetary burden because much of the work has already been done.

First, the state is already divided into watershed “units” for water quality monitoring purposes, relieving local governments of this task.⁹⁰ Second, a prototype watershed plan for Ohio’s surface waters already exists. In 2004, the Ohio Lake Erie Commission released a “Watershed Balanced Growth” Plan (“Plan”), outlining a comprehensive, watershed approach to maintaining the health of the Lake Erie watersheds.⁹¹ Ohio’s land use, urban planning, and policy experts laud this plan as an “ideal one” for Ohio.⁹² The Plan is designed as an “action plan” and policy model for local governments to follow in order to best link local land use activities with the ecological needs of the watershed.⁹³ It provides the following guiding principles: (1) protect and restore the health of the watershed and stream integrity to the extent feasible; (2) include all economic and environmental factors into cost-benefit accounting in land use and development decisions; (3) avoid development decisions that shift economic benefits or environmental burdens from one location to another; (4) promote Ohioans’ public access to and enjoyment of water resources; and (5) encourage land use development initiatives that address the need to protect and preserve access to water resources.⁹⁴

Ohio local governments should enact zoning in accordance with these parameters for two purposes: (1) to reduce nonpoint source pollution in an economical and efficient manner and (2) to ensure that zoning and land use practices are accountable to a comprehensive plan designed to protect surface waters. A more detailed description of the boundaries of each watershed and a listing of the communities residing in each watershed should be compiled into an administrative Watershed Code.

⁹⁰ NEORSD, *supra* note 89. On its website, NEORSD provides abbreviated fact sheets for every area watershed in the northeast region of the state. *Id.* Data is collected for each watershed and it is surprisingly detailed. *Id.* For instance, the Euclid Creek Watershed collects drainage from a 24.1 square-mile area and is comprised of thirteen different communities including Lyndhurst (17.7%), Highland Heights (19.6%), Richmond Heights (16.5%), Willoughby Hills (9.9%), Beachwood (8.2%), and the remaining communities comprise 28.1% of the land area. *Id.* (follow “Euclid Creek” hyperlink).

⁹¹ See OHIO LAKE ERIE COMM’N, LAKE ERIE PROTECTION & RESTORATION PLAN 2008, <http://www.lakeerie.test.ohio.gov/Portals/0/Reports/2008LEPRplan.pdf> (last visited April 13, 2010). This particular plan is for Lake Erie but the principles are applicable to any and all watersheds. *Id.*

⁹² Interview with Dr. Wendy Kellogg, Levin Coll. of Urban Affairs, Cleveland State Univ., in Cleveland, OH (Oct. 20, 2008). In August 2009, the Ohio Lake Erie Commission and Ohio Water Resources Council announced that the organizations “have taken Balanced Growth Planning statewide.” See *Ohio Balanced Growth Planning*, <http://www.balancedgrowth.ohio.gov/BalancedGrowthPlanning.aspx> (last visited Mar. 10, 2010).

⁹³ OHIO LAKE ERIE COMM’N, *supra* note 91. It is a policy model, rather than a regulatory structure because the State of Ohio will not directly regulate *how* local governments zone under a statewide watershed approach to land use. Instead, the guiding principles are such that zoning regulations are accountable to a comprehensive plan.

⁹⁴ See *id.* at xiii.

A third reason why enacting a watershed approach in Ohio is desirable is because the prototype plan works. Most notably, the OEPA attributes the successful restoration of Ohio's Cuyahoga River to application of "Watershed Balanced Growth" principles.⁹⁵ In 2008, after almost two hundred years, a twelve mile section of the Cuyahoga River flows free after removal of a dam, and the Ohio EPA anticipates full attainment of water quality standards.⁹⁶ Leading up to this success, the City of Kent and Summit County collaborated and engaged the public's interest in the Cuyahoga River's restoration, and, as a result, the communities collectively agreed to modify several dams.⁹⁷ The communities secured funding from Section 319 grants and Ohio's EPA Water Resources Restoration Sponsor Program.⁹⁸ Now, the Cuyahoga River watershed communities enjoy the benefits of flowing water, savings on sewage treatment costs, improved access to downtown Kent, and enhanced aesthetic areas with a park and recreation.⁹⁹

The OEPA applauds the Cuyahoga River restoration as a "success story."¹⁰⁰ Even so, while "[t]he investment in planning and project implementation has begun to yield some measurable changes in water quality," the OEPA's report concludes more somberly, stating that the "social science aspect of changing land use decisions and . . . attitudes will take some time. The success and future challenge of improving water quality lies in the ability to effect change on the landscape that translates to [surface water] improvements."¹⁰¹

C. Watershed Management Requires Mandatory Planning

Planning in Ohio is permissive, rather than mandatory.¹⁰² Several reasons favor mandatory watershed approach planning over voluntary efforts. First, the status quo

⁹⁵ See OEPA, SECTION 319 GRANT PROGRAM DOCUMENTS: TARGETED WATERSHEDS--MEASURE SP-12 WATERSHEDS, at 8-11 (2009), available at <http://www.epa.ohio.gov/dsw/nps/319Program.aspx> (follow "FFY09 Measure SP-12 Watersheds" hyperlink).

⁹⁶ OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-17.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.* at A-15; see also U.S. ENVTL. PROT. AGENCY, NONPOINT SOURCE GRANT PROGRAM HIGHLIGHTS: TARGETED WATERSHED GRANT PROJECTS, http://www.epa.gov/r5water/wshednps/topic_nps_high.htm (last visited Mar. 10, 2010).

¹⁰¹ OEPA 2008 WATER QUALITY REPORT SECTION A: OVERVIEW, *supra* note 42, at A-11-A-12.

¹⁰² See Robert F. Benintendi, *The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 U. DAYTON L. REV. 207, 207 (1991). Such planning forums include planning commissions whose duty is prescribed by statute with little clarity and substantive requirements. See OHIO REV. CODE ANN. § 713.02 (West 2010). Likewise, a *regional planning commission* authorizes that planning commissions of any kind may combine with one or more commissions to cooperatively create a regional planning commission, but it is voluntary, and the statute contains virtually no substantive requirements. See *id.* § 713.21. Under Ohio Revised Code § 3734.52, county or multi-county solid waste districts may be created in order to ease the local burden of planning. See *id.* § 3734.52(D).

continues to fail. As Part II.D and Part III.B discussed, voluntary efforts throughout Ohio fail to reduce nonpoint source pollution enough for Ohio's water bodies to attain the federal minimum standards of water quality.

Second, the uniquely complex, amorphous, and migratory nature of nonpoint source pollution demands a holistic, rather than "spot" improvement approach. Polluted water runoff manifests, migrates, and ultimately collects across jurisdictions.¹⁰³ For example, the City of Beachwood, Ohio is a "downstream" city—lower in elevation than neighboring jurisdictions—and, as a result, increased runoff from nearby development projects causes flooding and damage to the city's receiving streams and drainage basins.¹⁰⁴ To ameliorate the problem, the city aggressively sought out a watershed-boundary approach to land use development and zoning; however, the city's continued success at reducing flooding damage ultimately requires collaboration with dozens of other communities within the five watersheds convening over Beachwood's city limits due to the impact of local land use decisions in other parts of the watershed.¹⁰⁵ Despite any one locality's best efforts at addressing long-term problems of water pollution, unless the state mandates a policy, particular local governments have no real reason to consider the effects of nonpoint source pollution any more than their neighbors.¹⁰⁶

Third, and related to the second reason, is the "hold out" problem. Without mandatory, statewide oversight of zoning and planning developments, communities can simply "opt out" if they perceive their self-interests to be better served in other ways.¹⁰⁷ For example, one survey sent to local and regional government representatives asked them questions about perceived "obstacles . . . for multi-jurisdictional watershed management programs."¹⁰⁸ One question was whether their community was participating in any form of multi-jurisdictional watershed planning, and of those who knew, 50.2% said *yes*.¹⁰⁹ The most common barrier to collaborating with neighboring communities was funding,¹¹⁰ but nearly one-third of

¹⁰³ See *supra* Part II.A-B.

¹⁰⁴ See CITY OF BEACHWOOD, OHIO, STORM WATER MANAGEMENT PROGRAM 24-25 (2003), available at <http://www.beachwoodohio.com/stormwater.pdf>. Since 2001, the city has been an active member of a voluntary watershed group, the Euclid Creek Watershed Council (ECWC), an organization with the purpose of bringing together the ten communities, including Beachwood, residing within the Euclid Creek's watershed. See *id.* at 24.

¹⁰⁵ *Id.* at 3; see also Lebowitz, *supra* note 14, at 122 (noting the problem of "downstream" communities bearing the burden of "upstream" development).

¹⁰⁶ See Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 384-86, 392-94, 410 (2000).

¹⁰⁷ See *id.*

¹⁰⁸ OHIO STORM WATER TASK FORCE, ANALYSIS OF ENABLING LEGISLATION FROM A MULTI-JURISDICTIONAL WATERSHED PERSPECTIVE 3 (2005), available at <http://www.wmao.org/oswtf/storm/documents/FinalReport-OSTF-319-Grant-StormWater-MGT-Watershed-Basis.pdf> [hereinafter "MULTI-JURISDICTIONAL WATERSHED PERSPECTIVE"].

¹⁰⁹ It should be noted that in reviewing the responses to the question, one-third of respondents indicated that they either did not know, refused, or skipped the question altogether.

¹¹⁰ *Id.* 45.2% of respondents who answered that question on the survey stated the most common barrier to collaborating with neighboring communities was funding.

respondents cited “lack of trust toward neighboring communities,” making it the second most problematic issue with multi-jurisdictional collaboration.¹¹¹

Competing local self-interests make the “hold out” problem the greatest impediment to watershed planning. This is because local governments base their land use determinations on local concerns, and it is clear why they do so. Ohio’s local governments compete for many of the same benefits—business, tourism, employment opportunities, real property tax deductions, and resident satisfaction. In fact, competing self-interests on a larger scale—regional, statewide, and national—prompted Congress, in part, to mandate statewide enforcement for other environmental problems, such as coastal management, wetlands, floodplains, and shoreline development.¹¹² Indeed, the state of Ohio also has the duty to “control and conserve its natural resources for the benefit of all the inhabitants of the state.”¹¹³

IV. LAND USE PLANNING AND ZONING IN OHIO

A. Distinguishing Zoning and Planning

Courts and local governments are misguided when they treat “zoning” and “planning” as indistinguishable concepts. “Zoning” and “planning” are often used interchangeably, but these concepts are not synonymous.¹¹⁴ The confusion between the two concepts is a reason why the scope of local governments’ zoning power remains muddled, notwithstanding the fifty years since the Ohio Supreme Court distinguished the two concepts in *State ex rel. Kearns v. Ohio Power Co.*¹¹⁵ The Court stated that:

z[on]ing is concerned chiefly with the use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with . . . regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters . . . within the police power.¹¹⁶

¹¹¹ *Id.*

¹¹² See Nolon, *supra* note 39, at 375-79.

¹¹³ *State v. Martin*, 152 N.E.2d 898, 901 (Ohio Ct. App. 1957), *aff’d*, 151 N.E.2d 7 (Ohio 1958) (citing *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185 (1923)).

¹¹⁴ See, e.g., *State ex rel. Kearns v. Ohio Power Co.*, 127 N.E.2d 394, 396 (Ohio 1955) (noting that planning and zoning are not synonymous); *Ryan v. Bd. of Twp. Trustees*, No. 89AP-1441, 1990 Ohio LEXIS 5519, at *8 (noting that Ohio cases have actually found zoning ordinances by themselves to be comprehensive plans); Benintendi, *supra* note 102, at 209 (arguing that Ohio should adopt comprehensive planning and noting the confusion in planning and zoning concepts). In assessing land use cases throughout the United States, Professor Daniel R. Mandelker has described Ohio courts’ decisions as “either erratic or difficult to characterize.” See MECK & PEARLMAN, *supra* note 1, at 11 (quoting DANIEL R. MANDELKER, LAND USE LAW 11 (4th ed. 1997)).

¹¹⁵ See *Kearns*, 127 N.E.2d 394.

¹¹⁶ See *id.* at 399. The Court further noted that authority granted to a county board was in fact intended “to meet the necessities of a changing and expanding civilization . . . to adopt and enforce planning measures whereby facilities and installations which serve the public needs in specified areas may be regulated and controlled as to location.” *Id.*

Planning as a policy-oriented process is defined as involving several features—

- (1) systematically gathering of information that properly informs the government of future problems facing the jurisdictional community;
- (2) establishing goals by which to address such concerns;
- (3) actively identifying alternative courses of action and reviewing the effectiveness of each;
- (4) selecting and implementing the best course of action available; and
- (5) ensuring that the goals are met after implementing a course of action.¹¹⁷

Planning is best described as “the foundation upon which zoning regulations should be built.”¹¹⁸ Planning embraces zoning but not vice versa; zoning is a “product of planning.”¹¹⁹ The power to plan, when exercised as *policy* of the state, is a function of *state’s* police powers inherent in its sovereignty under the Tenth Amendment of the United States Constitution.¹²⁰ There is “no such thing as *municipal* police power as distinguished from *state* police power.”¹²¹ Although the state has delegated to its municipalities—through the Home Rule Amendment of the Ohio Constitution—¹²² the power to exercise police powers concurrently with the state, where “there is a conflict in the exercise of [concurrent] powers, the state

¹¹⁷ MECK & PEARLMAN, *supra* note 1 at 66; 1 JOHN B. GOTHERMAN ET. AL., LOCAL GOVERNMENT LAW-MUNICIPAL, VOL. 1 63-64 (2d ed. 2004). Another general definition of “planning” takes a more esoteric form, that it is the “physical development of the community and its environs in relation to its social and economic well-being for the fulfillment of the rightful common destiny, according to a ‘master plan’ based on careful and comprehensive surveys . . . of present conditions and the prospects of future growth of the municipality.” Benintendi, *supra* note 102, 210 (quoting Angermeier v. Borough of Sea Girt, 142 A.2d 624, 629 (N.J. 1958)).

¹¹⁸ See Benintendi, *supra* note 102, 210.

¹¹⁹ See *id.* at n.19 (quoting 5 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 37.01 (1978)).

¹²⁰ Cleveland Tel. Co. v. Cleveland, 121 N.E. 701 (1918); see GOTHERMAN ET. AL., *supra* note 117, at 738-41 (citing *Cleveland Telephone*, 121 N.E. at 701). Gotherman further explains, “Municipalities are not independent sovereignties, and therefore can exercise only such police power as the sovereign people of this state have in the constitution of Ohio delegated to them.” *Id.* at 741 (quoting *Cleveland Tel.*, 121 N.E. at 701). Police powers are broad, generally to mean “the governmental authority to enact and enforce regulations to preserve and promote the public health, safety, morals, and general welfare.” *Id.* at 738-39; see, e.g., Canton v. State, 766 N.E.2d 963 (Ohio 2002) (finding the state had no comprehensive planning scheme); see also MECK & PEARLMAN, *supra* note 1, at 57 (“In recent years, the state has enacted statutes which address land use issues of statewide concern and, in effect, take back . . . delegated power. . . for example, a greater concern for the environment by regulating the location of hazardous waste facilities.”).

¹²¹ See GOTHERMAN ET. AL., *supra* note 120 at 740 (emphasis added) (citing *Cleveland Tel.*, 121 N.E. at 701).

¹²² OHIO CONST. art. XVIII, § 3.

exercise prevails.”¹²³ The limitation on municipal exercise of police powers, including the authority to make zoning regulations, is inherent in the constitutional grant.¹²⁴ The constitutional grant of zoning power to local governments does *not* abrogate the state’s comprehensive planning power.¹²⁵

It is apparent that Ohio has plenty of zoning but little planning. Ohio courts have previously addressed whether municipalities must create their own comprehensive plan, but this examination confuses the real issue. There are two reasons why home-rule municipalities are not required to zone in accordance with a comprehensive plan or create one of their own. First, their constitutional grant of authority simply does not require a self-executing comprehensive plan.¹²⁶ This point is only obvious once the concepts of *zoning* and *planning* are distinguished. Second, Ohio’s General Assembly has not adopted a comprehensive plan in accordance with which home-rule municipalities are required to zone. It is the *absence* of a statewide mandatory watershed-approach plan for land use that is extremely problematic. The current absence of a watershed-approach planning scheme means only that it has yet to be adopted, not that it is impermissible to do so under the Ohio Constitution.

If the General Assembly adopted a comprehensive planning framework—a watershed-approach—municipalities would have to zone in accordance with that plan because of the inherent limitations of local government powers.

B. Zoning Authority in Ohio

All authority to regulate any land use—to plan or zone—belongs to the state as part of the state’s “police power”—an inherent power of sovereign states reserved under the Tenth Amendment of the Federal Constitution.¹²⁷ The state’s “police power” is generally recognized as the authority to make regulations for the “public health, safety, morals, and welfare” of society and zoning is one function of this broad authority.¹²⁸ In turn, the state of Ohio delegates much of its police power to local governments.¹²⁹

¹²³ GOTHERMAN ET. AL., *supra* note 117 at 741 (citing *Rispo Realty & Dev. Co. v. City of Parma*, 564 N.E.2d 425 (Ohio 1990)).

¹²⁴ *See id.*; *see also infra* Part IV.A.2 discussing the home-rule provision.

¹²⁵ An example of the state exercising its planning power to oversee local planning is for solid waste management. *See* MECK & PEARLMAN, *supra* note 1, at 68. With this, the state oversee local planning and inquires whether the planning meets specific statutory criteria. *See* OHIO REV. CODE ANN. §§ 3734.50-3732.576 (establishing the solid waste planning process and details the requirements). The Ohio EPA formulates a management plan under that authority, and local governments are further required to account for their own planning. This is also an exception to permissive planning in Ohio.

¹²⁶ *See supra* note 95; *see also* *Cent. Motors Corp. v. City of Pepper Pike*, 409 N.E.2d 258, 280 (Ohio Ct. App. 1979) (stating that “Ohio law does not require a municipality to adopt a comprehensive zoning plan as a condition precedent to the enactment of zoning legislation” unlike townships, with *express* zoning enabling requirements).

¹²⁷ *See* MECK & PEARLMAN, *supra* note 1, at 55; GOTHERMAN ET. AL., *supra* note 117, at 740; *supra* note 121.

¹²⁸ MECK & PEARLMAN, *supra* note 1, at 38-40. Regarding the definition of police power, “[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power

This delegation of authority creates a “four-track system of planning and zoning power”¹³⁰ inclusive of Ohio’s four local government units: townships, counties, charter municipalities,¹³¹ and non-charter, or statutory plan, municipalities.¹³² Municipalities are further classified as villages or cities—depending on population.¹³³

All of Ohio’s local governments possess one of two types of zoning power granted by the state: (1) *statutory authority* to townships and counties; and (2) *constitutional authority* to municipalities.¹³⁴

1. Statutory Authority

Statutory zoning is the most common form of zoning authority in the United States, modeled after the Standard Zoning Enabling Act in 1935.¹³⁵ The state delegates zoning authority through “enabling” legislation from which local governments inherit their zoning power.¹³⁶ In Ohio, statutory zoning authority applies to Ohio’s unincorporated civil jurisdictions—townships and counties.¹³⁷ The Ohio Constitution does not define townships, but recognizes them as units of

to municipal affairs.” *Berman v. Parker*, 348 U.S. 26, 32 (1954). It is important to note that “police power differs from eminent domain in that it involves no taking of private property for public use, although it may deprive the owner of his property or impair its value without such actual taking . . . [and also] its exercise requires no payment of compensation.” *See N. Ohio Sign Contractors v. Lakewood*, 513 N.E.2d 324, 333 (Ohio 1987).

¹²⁹ *See MECK & PEARLMAN, supra* note 1, at 40, 55 (stating that “[a]ll states delegate power to local governments to regulate and perform other needed tasks”).

¹³⁰ *Id.* at 55.

¹³¹ A home rule charter may be adopted under the Ohio Constitution Article XVIII, § 7, and operates as a city or village constitution. *See GOTHERMAN ET. AL., supra* 120, at 52 (citing OHIO CONST. art. XVIII, §§ 2, 7). Municipalities can choose their form of government under the Ohio Constitution—charter, non-charter, or statutory. *See* George D. Vaubel, *Municipal Home Rule in Ohio (1976-1995)*, 22 Ohio N.U. L. Rev. 143, 152-54 (1995); Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U. DAYTON L. REV. 533, 535-41 (discussing the variety of forms of Ohio governments and the legal implications of each).

¹³² A municipal government that is organized without a charter, then is under “the general statutory plan of government in the manner provided by general laws passed by the legislature . . . for cities and villages.” *GOTHERMAN ET. AL., supra* 117, at 52. For purposes of this Article, “municipalities” refers to those local governments with home-rule powers.

¹³³ OHIO CONST. art. XVIII § 1. Cities have a population over 5,000 residents, whereas villages have resident populations under 5,000.

¹³⁴ *See GOTHERMAN ET. AL., supra* note 117, at 836.

¹³⁵ *See CURRENT TRENDS, supra* note 1, at 63; JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 46 (1998).

¹³⁶ *MECK & PEARLMAN, supra* note 1, at 40.

¹³⁷ Diana M. Anelli, *Municipal Law for the Non-Specialist Attorney: Who’s in Charge? A Tour of the Municipal Landscape*, 1.1 (OHIO STATE BAR ASS’N CLE INSTITUTE 2003); *see* REBECCA C. PRINCEHORN, *OHIO LOCAL GOVERNMENT LAW-TOWNSHIP* 9 (1st ed. 2004). This Article is concerned with civil townships, referred to only as “townships.”

government and agencies of the state.¹³⁸ Townships' zoning power is expressly limited by the statutory requirements in the Ohio Revised Code, and, accordingly, townships' zoning regulations are valid inasmuch as they comply with such requirements.¹³⁹

One requirement is that zoning regulations bear a reasonable relationship to public health, safety, or the general welfare.¹⁴⁰ Another requirement, specific to townships' zoning regulations but inapplicable to municipalities, is that zoning regulations must be enacted "in accordance with a comprehensive plan."¹⁴¹ The existence of a "comprehensive plan" is a condition precedent to townships enacting any zoning regulations. Because townships derive their zoning authority pursuant only to state statute, and the statute requires a comprehensive plan, then townships must enact zoning regulations in conformity with the prevailing plan.¹⁴²

2. Constitutional Authority—The Home Rule Amendment

Ohio's municipalities derive their zoning power from Article XVIII, Section 3—the "Home Rule Amendment."¹⁴³ Specifically, the Ohio Constitution grants

¹³⁸ See OHIO CONST. art. X, § 1; PRINCEHORN, *supra* note 137, at 10.

¹³⁹ Bainbridge Twp. Bd. of Trustee v. Funtime, Inc., 563 N.E.2d 717, 719 (Ohio 1990) (stating that "authority townships possess to enact local police power regulations is limited to that which is specifically conferred by statute"); see also OHIO REV. CODE ANN. § 519.01-.99. Ohio counties may adopt charters, granting home rule powers. See OHIO CONST. art. X, § 3. Under limited circumstances townships may adopt a "limited home rule government." See OHIO REV. CODE ANN. §§ 504.01-504.04.

¹⁴⁰ This is required for any form of government. See GOTHERMAN ET. AL., *supra* note 117, at 740; Holeton v. Crouse Cartage Co., 748 N.E.2d 1111, 1118 (Ohio 2001) (quoting Froelich v. City of Cleveland, 124 N.E.2d 212, 216 (Ohio 1919) (stating "neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.")).

¹⁴¹ OHIO REV. CODE ANN. § 519.02 (West 2010). Here is the statutory language stated in full:

[i]n the interest of the public health and safety, the board of township trustees may regulate by resolution, *in accordance with a comprehensive plan*, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins For all these purposes, the board may divide all or any part . . . of the township into districts or zones of such number, shape, and area as the board determines.

Id. (emphasis added).

¹⁴² See *id.* Cf. Cent. Motors Corp. v. City of Pepper Pike, 409 N.E. 2d 258, 280 (Ohio Ct. App. 1979) (noting that municipalities, unlike townships, do not need a comprehensive plan).

¹⁴³ See Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 780 (Ohio 2006).

municipalities “police powers,” and Ohio courts interpret zoning power as an exercise of “police power.”¹⁴⁴

The constitutional grant of home rule powers is a distinct characteristic of Ohio’s municipalities.¹⁴⁵ In 1912, at the fourth Ohio Constitutional Convention, delegates proposed the home-rule amendment,—now Article XVIII of the Ohio Constitution—and the electorate overwhelmingly approved.¹⁴⁶ A Convention delegate stated “home-rule” to mean “the right of the people . . . to control their own affairs.”¹⁴⁷ Ohio’s citizens wanted greater control over local affairs through their local government, so delegates drafted the home-rule amendment to abrogate the common law doctrine of “Dillon’s Rule,” a doctrine of strict construction “nearly universally recognized” throughout the country which limited municipal powers to those expressly delegated and necessarily implied.¹⁴⁸ Under Dillon’s Rule, Ohio’s municipalities operated as “creatures of the state,” able to exercise only those powers granted by the General Assembly.¹⁴⁹ But under the home-rule amendment, municipalities have the power to govern themselves and enact local legislation not in conflict with general laws of the state.¹⁵⁰ Because of the home-rule amendment,

¹⁴⁴ See GOTHERMAN ET. AL., *supra* note 117, at 7. Similar to Ohio, California courts interpret their home-rule provision as a grant of zoning authority. See *Brougher v. Bd. of Public Works*, 271 P. 487, 491-92 (Cal. 1928). Courts in other states, however, such as Pennsylvania and New York, have *not* interpreted their home rule provisions as a source of zoning power—the courts distinguish zoning power from general police powers. See *Kline v. City of Harrisburg*, 68 A.2d 182, 186-88 (Penn. 1948); *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 188-89 (N.Y. 2001).

¹⁴⁵ GOTHERMAN ET. AL., *supra* note 117, at 7.

¹⁴⁶ STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION* 39-40, 358 (2004); see also *Cleveland Telephone Co. v. City of Cleveland*, 121 N.E. 701, 710 (Ohio 1918) (Wanamaker, J., dissenting) (noting the popularity of the home-rule amendment and the fact that “in the ten counties containing the ten largest cities of Ohio, the vote in favor of the home rule amendment, Article XVIII, showed a majority of more than 100,000”).

¹⁴⁷ See GOTHERMAN ET. AL., *supra* note 117, at 6 (citing 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1442 (1912)). The “home rule movement” has a lengthy history; early in the nineteenth century, Alexis de Tocqueville wrote about the “localist nature of American life, and fairly strong notions of local government independence.” David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2277-80 (2003).

¹⁴⁸ GEORGE D. VAUBEL, *MUNICIPAL HOME RULE IN OHIO* 12 (1978); see also GOTHERMAN ET. AL., *supra* note 117, at 6 (citing *Schaffer v. Bd. of Trustees of Franklin County Veterans Memorial*, 168 N.E.2d 547, 549 (1960)).

¹⁴⁹ STEINGLASS & SCARSELLI, *supra* note 146, at 327. Article XVIII of the Ohio Constitution was fashioned after California’s constitution. *Id.* However, unlike Ohio, California became one of the most progressive states enacting statutes that impose planning requirements on local governments for zoning and land use. See Cal. Govt. Code §§ 65300, 65860(a)(ii) (West 2008) (as amended in 1984). In two recent Ohio Supreme Court decisions, Justice Maureen O’Connor cited to the California Supreme Court’s home-rule analysis as illustrative of what the majority of the court should follow. See *City of Cincinnati v. Baskin*, 859 N.E.2d 514, 522-23 (Ohio 2006) (O’Connor, J., concurring); *Am. Fin. Servs. Ass’n v. City of Cleveland*, 858 N.E.2d 776, 789 (Ohio 2006) (O’Connor, J., concurring).

municipalities exercise greater local autonomy in several respects, including the power to enact zoning regulations in the absence of enabling statutes.¹⁵¹

The home-rule provision of Article XVIII, Section 3 of the Ohio Constitution states, “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”¹⁵² This provision grants municipalities two distinct powers:¹⁵³

- (1) the power of local self-government, and
- (2) the “broad police power to act within their borders,” not in conflict with the general laws of the state.

Assuming that the state of Ohio adopts a watershed-approach plan—requiring all local governments to conform their zoning to the needs of the watershed—such a regulation would be constitutionally permissible under the home-rule amendment. To determine whether a state regulation violates home-rule powers under Section 3, Ohio courts decide as a threshold inquiry whether the statute regulates a power “of local self-government, on the one hand, or is a police regulation . . . on the other.”¹⁵⁴ Although intuitively, and to the untrained eye, the constitutional grant of all “powers of local self government” would seem to encompass zoning, it does not. Ohio courts

¹⁵⁰ *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 781; *City of Dublin v. State*, 909 N.E.2d 152, 154-55 (Ohio Ct. App. 2009); see also VAUBEL, *supra* note 148, at 15 (“the proposal for municipal Home Rule was intended to accomplish three specific things: first, to make it possible for municipalities to have, if they desired, different forms of municipal organization; second, to invest municipalities with all powers of local government not denied to them or in conflict with the general laws of the state—rather than only such power as the General Assembly might confer; and third, to clarify and expand the power of municipalities to operate public utilities”); 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1433 (1912) (George W. Knight, a delegate to the 1912 Constitutional Convention, stating the three major objectives of the amendment and the intention to leave the state with as broad and much power as it did before).

¹⁵¹ See Vaubel, *supra* note 131, 156-57 (1995).

¹⁵² OHIO CONST. art. XVIII, § 3.

¹⁵³ See, e.g., *Baskin*, 859 N.E.2d at 516; *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 780; *Twinsburg v. State Emp. Relations Bd.*, 530 N.E.2d 26, 28 (Ohio 1988), *overruled on other grounds*, *Rocky River v. State Emp’t Relations Bd.*, 539 N.E.2d 103 (Ohio 1989). Article XVIII of the Ohio Constitution also granted municipalities additional powers including the power of self-determination in the form of government, under Section 7, which states that “[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise there under all powers of local self-government.” OHIO CONST. art. XVIII, § 7. Also, under Section 4 of Article XVIII, municipalities have the authority to own and operate public utilities. OHIO CONST. art. XVIII § 4; see, e.g., *Pfau v. City of Cincinnati*, 50 N.E.2d 172, 173 (Ohio 1943); *Dravo-Doyle Co. v. Village of Orrville*, 112 N.E. 508, 509 (Ohio 1915).

¹⁵⁴ Vaubel, *supra* note 151, at 156. The initial determination in the *Canton* test to determine whether municipal action falls under the “power of local self-government” was stated in *Marich v. Bob Bennett Construction Co.*, 880 N.E.2d 906, 911 (Ohio 2008), as “[i]f an allegedly conflicting city ordinance relate[d] solely to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.” *Id.* (quoting *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 780).

have long held that “[t]he enactment of zoning laws by a municipality is an exercise of the *police power*, rather than an exercise of the power of ‘local self-government,’ as granted by Section 3, Article XVIII, of the Ohio Constitution.”¹⁵⁵ The source of zoning power as a “police power,” rather than one of “local self-government” is a critical distinction because only municipal police powers are limited by a “conflicts” analysis.¹⁵⁶

a. Statewide Concern Doctrine

The statewide concern doctrine was once conceptualized as a limitation on municipal exercise of police power—that municipalities could not enact regulations affecting matters of “statewide concern.”¹⁵⁷ However, a recent Ohio Supreme Court decision, *American Financial Services Assoc. v. City of Cleveland*, has clarified that the statewide concern doctrine is not a limitation on municipal police powers—such as zoning—but a means of determining whether a particular exercise of municipal power falls under “powers of local self-government” or “police power.”¹⁵⁸ This is important because the General Assembly cannot override municipal legislation promulgated pursuant to the “powers of local self-government.” The purpose of the statewide concern doctrine is to distinguish substantive matters that are “strictly local” from matters “statewide” in interest when courts must decide whether a municipal regulation was enacted within the parameters of its “power of local self-government.”¹⁵⁹ If the regulation concerns a subject matter that “affects the general

¹⁵⁵ *Garcia v. Siffrin Residential Ass’n* 407 N.E.2d 1369 (Ohio 1980) (syll. para. 2); Vaubel, *supra* note 151, at 175 (stating that “[m]unicipal power to zone remains firmly embedded within municipal police power” and also that “there have been no serious deviations [from which the courts] . . . consider the constitutional grant of municipal police power to be the source of municipal zoning authority”); *see, e.g.*, *City of Canton v. Ohio*, 766 N.E.2d 963, 966 (Ohio 2002); *Rispo Realty & Dev. Co. v. City of Parma*, 564 N.E.2d 425, 427 (Ohio 1990) (stating that “Ohio law has long recognized that the enactment of zoning laws by a municipality is an exercise of its police power as described under Section 3, Article XVIII of the Ohio Constitution”); *Schneiderman v. Sesanstein*, 167 N.E. 158, 158 (Ohio 1929). Vaubel also cites *Pritz v. Messer*, for this proposition noting that *Pritz* recognized zoning as a police power—pointing out that “in the absence of statutory provisions, Ohio municipalities would still have the power to zone as a consequence of the constitutional grant of local self-government power under Section 3, Article XVIII . . . [but the court meant] ‘local self-government’ [broadly as] the total grant of Home Rule powers rather than as a designation of local powers which are distinguishable from police regulations.” VAUBEL, *supra* note 148, at 821.

¹⁵⁶ *See Garcia*, 407 N.E.2d at 270. The last clause, “as are not in conflict with general laws,” modifies only the *second* clause and *not* the “powers of local self-government.” *City of Twinsburg*, 530 N.E.2d at 28.

¹⁵⁷ *See Am. Fin. Servs. Ass’n*, 858 N.E.2d at 781-82 (quoting VAUBEL, *supra* note 148, at 1108) (stating that “the term ‘statewide concern’ describes ‘the extent of state police power which was left unimpaired by the adoption of the Home Rule Amendments as well as . . . those areas of authority which are outside the outer limits of ‘local’ power”); *see also* Vaubel, *supra* note 131, at 197-204 (discussing several cases where the doctrine was applied to municipal zoning and whether municipal zoning ordinances infringed on the state’s power to regulate matters of state interest).

¹⁵⁸ *See Am. Fin. Servs. Assoc.*, 858 N.E.2d at 782.

¹⁵⁹ *Id.* (quoting *State ex rel. Hackley v. Edmonds*, 80 N.E.2d 769 (Ohio 1948)).

public of the state as a whole *more* than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.”¹⁶⁰ Matters of “statewide concern” means that “a comprehensive statutory plan is . . . necessary to promote the safety and welfare of all the citizens” and thus, the power is not one of local self-government.¹⁶¹ Instead, the power at issue is a police power.

Previous cases analyzing statewide concern as a limitation on municipal zoning are still relevant because they demonstrate that when the state enacts legislation pursuant to its *planning* power: (1) the exercise of state planning power does not implicate powers of local self-government, and (2) municipal police powers—including zoning—are curtailed by the statewide comprehensive planning scheme. This line of cases found that the state statutes enacted pursuant to the state’s planning function were properly exercised state police powers of “statewide concern” in the face of municipal zoning regulations. In addition to the fact that Ohio is charged with the duty of formulating a plan to control nonpoint source pollution,¹⁶² the Ohio Supreme Court has upheld natural resource conservation,¹⁶³ environmental harms impacting public health,¹⁶⁴ and matters with extra-territorial

¹⁶⁰ *Cleveland Elec. Illuminating Co. v. City of Painesville*, 239 N.E.2d 75, 78 (Ohio 1968) (emphasis added). The Court had previously stated the test in *Beachwood v. Bd. of Elections*, 148 N.E.2d 921 (Ohio 1958), to be that local government legislation infringed on matters of statewide concern—and thus exceeded its powers of local self-government—“if the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.” *Id.* at 923.

¹⁶¹ *City of Kettering v. State Emp’t Relations Bd.*, 496 N.E.2d 983, 988 (Ohio 1986).

¹⁶² See *supra* Part II discussing the state obligation to control nonpoint source pollution.

¹⁶³ State regulation enacted for the purpose of natural resource conservation is a valid exercise of the state’s police powers leaving “municipal authorities subordinate to the state police power in matters of statewide import.” See *City of Columbus v. Teater*, 374 N.E.2d 154, 158-59 (Ohio 1978). In *Teater*, a municipality challenged a state statute as infringing on its home-rule authority because “the statute sought to prevent . . . municipalities, from building improvements near, or modifying the course of, a stream outside the borders of the municipality and [therefore] interfere with the designation of a river as ‘scenic’ according to the state director of natural resources.” Vaubel, *supra* note 131, 239 (1995). The Court upheld the state statute as overriding municipal in constructing a water supply reservoir that interfered with a designated scenic area pursuant to state statute. See *Teater*, 374 N.E.2d at 159-60.

¹⁶⁴ Comprehensive state regulation addressing environmental harms impacting public health and interest is a function of state police power. See, e.g., *City of Canton v. Whitman*, 337 N.E.2d 766, 768-71 (Ohio 1975). The court resolved the issue of whether the state may require a municipality to fluoridate a municipally owned and operated water supply and specifically, whether the state statute requiring fluoridation is a valid exercise of the state police power. *Id.* at 768. The Director of the OEPA had directed an order to the City of Canton to fluoridate its water. *Id.* at 768-69. The court concluded that fluoridation is “intrinsic” a matter of public health, and therefore falls under the state’s police power. *Id.* at 769-70. In *Clermont Environmental Reclamation Co. v. Wiederhold*, 442 N.E.2d 1278 (Ohio 1982), the Ohio General Assembly enacted a comprehensive measure to address a statewide health problem caused by the disposal of chemical by-products from industrial and

impact¹⁶⁵ as matters of statewide concern.¹⁶⁶ Regulation of nonpoint source pollution encompasses all three of the foregoing “matters of statewide concern”: (1) managing nonpoint source pollution is an exercise of natural resource conservation; (2) nonpoint source pollution is an environmental harm affecting the public health for drinking water resources and supply; and (3) the migratory nature of nonpoint source pollution affects multiple jurisdictions. State adoption of the proposed watershed plan would further the state’s policy choice pursuant to its exercise of state police powers in protecting the state’s natural resources, public health, and addressing a matter with extra-jurisdictional impact in addition to its duty pursuant to the CWA to reduce nonpoint source pollution in the state. Therefore, state adoption of a comprehensive watershed plan is an appropriate exercise of the General Assembly’s authority.

manufacturing processes. *Id.* at 1279. The Ohio Revised Code Hazardous Waste statute was amended with the “aim and purpose of reasonably assuring that the facilities in the state where hazardous wastes would be disposed of would be designed, sited, and operated in such a manner as to protect the public interest[.]” *Id.* In furtherance of this purpose, the amendment created a Hazardous Waste Facility Approval Board with approval power over the location of hazardous waste facilities. *Id.* at 1280; *see also* OHIO REV. CODE ANN. § 3734.05(D)(3) (West 2010). In this case, the Ohio Supreme Court did not differentiate between “political subdivision” and “municipality”; however, the court applied a “general laws” and “statewide concern” analysis, so authority on the subject concludes that in this case political subdivision and municipality are interchangeable. *See* Vaubel, *supra* note 131, at 204. The municipality argued that the amended statute infringed on its zoning authority. *See id.* at 218 (stating that “although the principal concern in the case focused on whether a general law was involved, the court concluded that the location of a hazardous waste facility involved an exercise of police power”). The Court ultimately held that the municipality’s home-rule powers were not violated because hazardous contaminants posed a threat to the general public health, and this was more of a state interest than a local one. *Clermont*, 442 N.E.2d at 1283. The state exercised its police powers by enacting a statewide comprehensive plan. *Id.* at 1280.

¹⁶⁵ Matters affecting multiple jurisdictions—such as detachment and annexation of territory, and electric lines constructed across multiple local governments’ boundaries—are appropriately regulated pursuant to the state’s police powers as matters of “statewide concern.” *See Beachwood*, 148 N.E.2d at 922-23. The court stated that “[w]here a proceeding . . . is no longer one which falls within the sphere of local self-government but is one which must be governed by the general law of the state” then pursuant to the “statewide concern” doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern. *Id.*; *see* *Prudential Co-op Realty Co. v. City of Youngstown*, 160 N.E. 695, 696 (Ohio 1928) (stating that no extraterritorial authority is conferred upon municipalities by the home rule amendment to the Ohio Constitution). Similarly in *Cleveland Electric*, the court upheld a state statute authorizing the construction of electric lines across multiple political jurisdictions. *Cleveland Elec.*, 239 N.E.2d at 78.

¹⁶⁶ Professor Vaubel notes that application of the doctrine remains unsettled but not for specific areas of regulation. Environmental concerns—esthetic, health-related, and natural resource conservation, *are* consistently upheld as “substantial state interests,” also referred to by the courts as “statewide concern.” Because these areas are upheld as state interests, then statutory regulation over these areas receive deferential treatment by the courts. *See* Vaubel, *supra* note 131, at 215.

b. Municipal Police Powers

The next inquiry is whether a state statute adopting a comprehensive watershed plan would take precedence over a local zoning ordinance that does not conform to the dictates of the plan. Unlike the powers of local self-government, municipal zoning regulations—an exercise of municipal police powers—are limited by any “conflict with general laws in the state.”¹⁶⁷ This Article proceeds, therefore, with a constitutional analysis of municipal “police power” because that power includes the power to zone. With a watershed-approach plan in place, municipal zoning ordinances are subject to a “conflicts” analysis—clause 3 of Section 3 which states “as are not in conflict with general laws.”¹⁶⁸ This simple clause requires an exegesis for “conflict” and “general laws.” The test applied for “conflict” is “whether the ordinance forbids that which the statute permits, or permits that which the statute forbids.”¹⁶⁹ A “conflict” arises only when the statute is specifically tailored to regulate the same subject matter as the municipal ordinance.¹⁷⁰ Assuming the state statute is a “general law”—analyzed below—and an exercise of police power, zoning ordinances will conflict with the watershed plan if they are not in accordance with that plan, because such ordinances will expressly allow what the statute forbids—zoning not in accordance with the watershed plan.

A “conflict” between a state statute and municipal ordinance requires that the statute be a “general law.”¹⁷¹ A four-part test determines whether the statute constitutes a “general law”: (1) the statute must be part of a statewide and comprehensive legislative enactment; (2) the statute operates uniformly across the state; (3) the statute “sets forth police, sanitary, or similar regulations, rather than purport[s] only to grant or limit municipalities’ legislative power to do so”; and (4) the statute prescribes a rule of conduct to be applied to all citizens generally.¹⁷²

The proposed statewide watershed-approach plan for zoning satisfies the first part of the “general law” test because the plan would be a statewide comprehensive legislative enactment. The statute proposed by this Article presumes that the watershed-plan will deal with all aspects of zoning and land use that quantifiably and

¹⁶⁷ *Am. Fin. Servs. Ass’n v. City of Cleveland*, 858 N.E.2d 776 (Ohio 2006).

¹⁶⁸ *See Vaubel, supra* note 131, at 172-74 (noting that the conflicts analysis applies only to police power regulations).

¹⁶⁹ *Vill. of Struthers v. Sokol*, 140 N.E. 519, 523 (Ohio 1923). This case first established the “conflict” test. *See Vaubel, supra* note 131, at 184.

¹⁷⁰ *See City of Youngstown v. Evans*, 168 N.E. 844, 846 (Ohio 1929); *City of Akron v. Scalera*, 19 N.E.2d 279, 289 (1939); *see GOTHERMAN ET. AL., supra* note 117, at 61. Municipalities and the state may exercise concurrent police powers in the same area of regulation, so this in itself does not create a “conflict” under Section 3 of Article XVIII. *See, e.g., Rispo*, 564 N.E.2d at 430; *Interurban Ry. & Terminal Co. v. Pub. Utilities Comm’n*, 120 N.E. 831 (Ohio 1918) (stating that the “[g]overnment cannot divest itself of sovereign powers by surrender, nonexercise, or by contract . . . municipalities and the state may concurrently exercise police powers in the same field of regulation, but if there is a conflict in the exercise of police power, the state exercise prevails and the local exercise is invalid”).

¹⁷¹ *Canton v. State*, 766 N.E.2d 963, 967 (Ohio 2002); *Marich v. Bob Bennet Constr. Co.*, 880 N.E.2d 906, 911 (Ohio 2008).

¹⁷² *Canton v. State*, 766 N.E.2d 963, 967 (Ohio 2002); *Marich*, 880 N.E.2d 906, 911.

negatively impact the health of the watershed, similar to *Clermont*, where the state regulation dealt with all aspects of hazardous waste facility locations.¹⁷³ Thus, the *Clermont* plan presumed, as this Article's watershed-approach plan does too, that when local governments seek to locate hazardous waste facilities, or zone for development, local governments will look to the legislative plan for guidance.¹⁷⁴ A comprehensive watershed plan presumes precedence over all local zoning concerns—that is, zoning's effect on the watershed must be taken into consideration when promulgating a zoning ordinance. Both are distinguishable from *Canton v. State*, where the state legislation was not part of a comprehensive plan for the zoning of manufactured homes because the statute sought to regulate only particular aspects about manufactured homes—such as taxes.¹⁷⁵ The statute proposed here is the very type of statewide comprehensive plan that *Canton* envisions—the passage of the plan itself.

The plan satisfies the second part of the “general laws” test because the plan will apply uniformly across the state. The Ohio Supreme Court does not require literal uniform application of a comprehensive statutory scheme. In *Ohioans for Concealed Carry, Inc. v. City of Clyde*,¹⁷⁶ the Court rejected the notion that a statutory framework is not uniform because its application “will inherently vary to some degree from jurisdiction to jurisdiction.”¹⁷⁷ A statutory framework is a uniform one if it “applies to all parts of the state without exception, and the basic process is a uniform one.”¹⁷⁸ A statute's application to all local governments is a uniform one notwithstanding varying outcomes among the jurisdictions.¹⁷⁹ The proposed watershed-approach framework will apply to all entities in the state differentiating only in result, but not application.

A watershed-approach plan satisfies the third part of the “general laws” test because the statute would be an exercise of state police powers, and it would not merely limit municipal legislative power to set forth separate police powers.¹⁸⁰ The statute's purpose is not to limit municipal zoning but, rather, to protect the health of the watershed and to ensure that land use in the state does not interfere with that purpose. Zoning in accordance with the plan is necessary for the plan's success. The plan is necessary to improve water quality by reducing nonpoint source pollution, and the fact that local governments must zone in accordance with the

¹⁷³ *Clermont*, 442 N.E.2d 1278 (Ohio 1982).

¹⁷⁴ *See id.*

¹⁷⁵ *See Canton v. State*, 766 N.E.2d 963 (Ohio 2002). For example, state legislation purporting to regulate only the zoning of commercial lot size would *not* be a comprehensive plan, just regulating particulars in the absence of larger plan within the appropriate purposes of state police powers.

¹⁷⁶ *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967 (Ohio 2008).

¹⁷⁷ *Id.* at 974 (quoting *Marich*, 880 N.E.2d at 22).

¹⁷⁸ *Id.* at 974 (quoting *Marich*, 880 N.E.2d at 24).

¹⁷⁹ *Id.* at 974-75. The *Clyde* Court distinguished its prior holding in *Canton* where the statute was deemed *not* uniform because there, “it effectively applied only in older areas of the state, i.e., cities where residential areas no longer have effective deed restrictions or no longer have active homeowner associations.” *Id.* at 974 (quoting *Marich*, 880 N.E.2d at 30).

¹⁸⁰ *See Vill. of West Jefferson v. Robinson*, 205 N.E.2d 382 (Ohio 1965).

plan—thereby limiting municipal zoning in some circumstances—is merely incidental to making this plan work.

The fourth and final element of the “general laws” test—whether a state statute prescribes a rule of conduct for all citizens—is also satisfied by the proposed watershed-approach plan because the plan will prescribe conduct for all entities with authority to zone. The Court in *Canton* narrowly applied the requirement to mean that rules of conduct apply to each individual citizen,¹⁸¹ but the Court has since relaxed its approach to that requirement, instead finding that the statute must apply generally to all those who would fall within the ambit of its legislation. For instance, in *American Financial Services*, the state legislation purported to regulate predatory lending in Ohio and the Court found that the statute satisfied the fourth requirement because the statute “established rules of conduct for all *lenders* in Ohio.”¹⁸² Accordingly, the Ohio Supreme Court is now likely to find that a watershed plan satisfies the fourth requirement of the “general laws” test because the plan will establish conduct for all entities responsible for zoning.

C. “Home-Rule” as a Political, Not a Legal Barrier

The foregoing analysis raises the question that, if statewide watershed planning is constitutionally permissible under home-rule governance, then why is the oft-cited reason against implementing such planning due to “conflicts with home-rule”?¹⁸³ The idea that local affairs should be determined locally—the basic proposition of home-rule—is deeply engrained in the politics of Ohio’s local governments.¹⁸⁴ Professor David Barron suggests that “American local government law’s recognition of home rule, broadly understood, seems to be on a collision course with meaningful . . . reform.”¹⁸⁵ Maintaining “localism” is so customary that citing “home rule conflicts” operates as a mantra voiced by interest groups and lobbies opposed to innovative land use change and is one that many citizens, local governments, and environmental groups accept as true.¹⁸⁶ In Ohio, active opponents to land use

¹⁸¹ *Canton*, 766 N.E.2d at 970 (holding that the statute at issue did *not* satisfy the fourth requirement because “the statute applie[d] to municipal legislative bodies, not to citizens generally.”).

¹⁸² *Am. Fin. Servs.*, 858 N.E.2d at 784 (emphasis added).

¹⁸³ See Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 540 (2000).

¹⁸⁴ See, e.g., Kevin O’Brien, *Ohio Justices’ Home-Rule Decision Shows that Politics Really Rules*, CLEVELAND PLAIN DEALER, June 21, 2009, at XX; Kevin O’Brien, *Ohio Supreme Court Undermines Home Rule and Cleveland’s Future*, CLEVELAND PLAIN DEALER, June 11, 2009, at XX (stating “Goodbye, home rule. Hello, Big Brother . . . That’s the gist of Wednesday’s horrendous Ohio Supreme Court ruling that state law trumps municipal residency ordinances. Home rule is a cornerstone of Ohio’s Constitution . . . [the recent decision] . . . was an audacious and arrogant assault on local autonomy and taxpayers and, oh yeah, the Ohio Constitution.”).

¹⁸⁵ Barron, *supra* note 147, at 2268.

¹⁸⁶ *Id.*; see *Ohio Smart Growth Agenda*, ECOCITY CLEVELAND, Fall 1998, at 3, available at http://www.ecocitycleveland.org/pdf_files/sm-grow.pdf, 2-3, 7-9, 12-13 (last visited Oct. 3, 2008) [hereinafter “OHIO SMART GROWTH AGENDA”].

planning reform are developers, home builders,¹⁸⁷ farmers,¹⁸⁸ the highway lobby,¹⁸⁹ newly growing suburbs, and townships.¹⁹⁰

The status quo prevails due to a misconception over the power that home-rule actually confers. Many reformers—land use planners, lawyers, environmentalists, politicians—offer communities “voluntary” or “incentive-based” plans in an effort to sidestep mandatory action, assuming that this kind of action is a legal impediment to the exercise of all local government powers.¹⁹¹ The cycle is apparent: proponents of watershed planning propose change to the extent that they believe political will allows, and conversely, politically-outspoken critics of reform, refute political will on the basis of “legality.”¹⁹² Whichever source of political will is truly the barrier to

¹⁸⁷ See OHIO SMART GROWTH AGENDA, *supra* note 186, at 4-5. Ohio’s state home builders association and farm bureau have been mentioned by several individuals in Ohio’s planning community, to represent the strongest lobbying efforts to the Ohio General Assembly with respect to “smart growth” or “watershed planning” or any other land use planning reform measure. One such individual has even stated that

Ohioans would want reform [in land use planning] if they were aware of the benefits. For those Ohioans who do know about it, their voices have been stymied again and again before reaching the General Assembly. The overwhelming farm bureau and homebuilders lobby in Ohio is able to whisk away the legislation somehow . . . so this is what we are up against.

Interview (Anonymous), Cleveland State Univ., in Cleveland, Ohio (Oct. 15, 2008).

¹⁸⁸ *Id.*

¹⁸⁹ See OHIO SMART GROWTH AGENDA, *supra* note 186, at 4. The group argues that the highway lobby is

a powerful industry . . . that grew up with the Interstate highway system and lives off the steady flow of [Ohio Department of Transportation] contracts. This includes contractors, cement and asphalt companies, construction unions, and engineering firms. The Ohio Contractors Association and the Ohio Construction Information Association are aggressive opponents of smart growth, environmental regulation, transit, and regional planning[.]

Id.

¹⁹⁰ *Id.* Local experts contend that:

[T]he “political system seldom changes direction until there is a crisis. And, despite all the problems created by haphazard [land] development, it’s difficult for many people to perceive a crisis. Communities change gradually; the worst impacts may not be visible for many years. . . . [Therefore, land use reform advocates] need to make the case with clear language that cuts through the complexity of land use and development issues.” *Id.* The opposition is described as “less of a movement than a collection of entrenched interests that want to maintain the status quo.”

Id. at 3.

¹⁹¹ See Barron, *supra* note 147, at 2270. In 2002, one such progressive group, EcoCity Cleveland pursued statewide organization under a “Smart Growth initiative.” In order to “not interfere with home rule . . . [l]ocal governments would still make land use decisions. But they would have incentives to coordinate at the regional level.” See OHIO SMART GROWTH AGENDA, *supra* note 186, at 13.

¹⁹² See *id.*

land use reform is ultimately of little consequence because, most importantly, as Part IV sets out, change is constitutionally permissible under the Ohio Constitution.

V. CONCLUSION

As this Article has explained, a watershed-approach to land use and zoning is ecologically desirable, but its successful implementation is stymied because the hydrological boundaries do not conform to political boundaries.¹⁹³ Meanwhile, Ohio's piecemeal-approach to zoning and land use continues to harm water quality, depleting valuable water resources in the state and putting Ohio at an economic disadvantage to other states privy to the reform suggested in this Article.¹⁹⁴ Many local political leaders already recognize that Ohio's current approach to land use is antiquated and detrimental.¹⁹⁵ One leader's remarks captures why this Article addresses such a pivotal issue in Ohio. President Kenneth Stillman of the Ohio-Kentucky-Indiana Regional Council of Governments, one of the areawide agencies with authority to prepare a Section 208 Plan under the CWA, stated that—

[T]he state's provisions for planning and land-use control are a patchwork of weak law, fragmented code, and a plethora of court cases. Local day-to-day land-use activity appears to center on individual zoning and subdivision approvals with little attention to how those discrete [*sic*] actions compose the 'big picture.' We also see . . . no state policy on land planning, no single state agency that oversees land planning . . . Ohio lacks direction on growth, and the political will to substantially change inefficient systems One can say that Ohio is thus at a long-term . . . disadvantage.¹⁹⁶

Although his remarks are true and sound bleak, this does not need to be the case. If Ohio's General Assembly, through its citizens, gathers the political will to implement a mandatory statewide watershed-approach to zoning and land use, the General Assembly can do so knowing that it is permissible under the Ohio Constitution.¹⁹⁷

¹⁹³ See *supra* Part II.B.

¹⁹⁴ See *supra* Part II.C discussing water quality standards.

¹⁹⁵ See OHIO SMART GROWTH AGENDA, *supra* note 186, at 32. The article also captured another person's conclusions about home-rule stating that:

Home rule is a powerful legal and cultural tradition in Ohio . . . but one unfortunate side effect is the absence of meaningful coordination or even communication on regional, multi-county or statewide development and land-use patterns. Our state pattern is really just the sum of local actions, with a result where the total may be less than the sum of the parts.

Id.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* For a discussion on how political climate affects water resource planning, see generally Helen M. Ingram, *The Political Economy of Regional Water Institutions*, 31 AM. J. AGRIC. ECON. 10 (1973).