A CHALLENGE TO SUSTAINABLE GOVERNMENTS?

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"Sustainability," an environmentally-friendly term that previously incited political unrest, economic uncertainty, and even emotional outrage, has become quite commonplace. In federal, state, and local agencies, sustainable practices have dominated dialogues relating to indoor air quality, water availability, energy use and production; but also growth planning and development controls, public spaces and aesthetics. Governmental entities are installing low-flow water fixtures and energy-efficient appliances, redesigning rooftops and skylines, and inviting industry and neighborhoods to the negotiation table to determine the character of future communities. Sustainability has become the vocabulary of politics and is changing those past practices that have become known as resource-wasteful, inefficient, and costly relative to human and environmental needs.

Despite the explosion of interest and excitement, many have wondered whether sustainability would find its own limits, or if limitations would be dredged from strategic litigation[1] aimed precisely at identifying both the meaning of sustainability and the nexus between traditional police power authority and a growing awareness of long-term public welfare needs in the natural environment. A recent lawsuit over "green" product purchasing preferences may provide some insight into both of these questions: Ash Grove Texas, L.P, a cement manufacturing company, has challenged the authority of the City of Dallas to extend preferential purchasing status to "green" cement.[2] In the context of the Ash Grove lawsuit, this essay introduces the controversy between sustainability and its discontents to explore the question of whether the economic disruption caused by the onslaught of sustainable practices in government is itself sustainable. This

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1. *See generally* Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008) (discussing the political dimensions and strategic consequences of common law tort litigation to effect political reactions to the sources of climate change).

2. Plaintiff's Original Complaint and Application for Injunctive Relief, Ash Grove Texas, L.P. v. City of Dallas, No. 3:08-cv-02114-O (N. Dist. Tex. filed Nov. 26, 2008) [hereinafter *Ash Grove* Complaint] (complaint on file with author).

essay argues that the future of sustainability in government is likely to be secure, far-reaching, and pervasive.

Sustainability has been defined as the ability to meet the needs of the present while ensuring that future generations have the same or better opportunities—in short, preserving the ability to make resource choices in the future.[3] Accomplishing this goal compels us to engage in a new discourse to construct (both conceptually and physically)[4] a new character of the built environment that centralizes the interdependency of our surroundings and our survival needs. The discourse draws on the vocabulary of ecosystem services, defined as the non-commodity, yet economically valuable benefits that humans derive from ecological systems directly (such as in flood control effects of floodplains and wetlands) and also indirectly (such as sediment filtering accomplished in wetlands).[5]

Equipped with this new vocabulary, sustainable practices have enabled local governments to envision environmentally-protective agendas in which the familiar tension between environmental and property rights camps dissolves: "the key element of sustainable development is the recognition that economic and environmental goals are inextricably linked."[6] Sustainability converges economic, environmental, and social concerns into policies and practices that prioritize human long-term needs in our present-day infrastructure, residences, offices, and other consumer-based decision-making processes. Hence, sustainability is not aimed at causing the economic regicide that some may have feared: sustainable practices do not compel the cessation of economic growth, or that we cease constructing buildings or extracting resources. Rather, the principles of sustainability merely require some rethinking on how resources are extracted and used, how buildings relate to the natural environment, and

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3. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE ix (1987).

4. Anna Peterson, *Environmental Ethics and the Social Construction of Nature*, 21 ENVTL. ETHICS 339, 342–46 (1999) (discussing the various applications of constructivism).

5. *See* J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did Lucas Open a Pandora's Box?*, 22 J. LAND USE & ENVTL. L. 525, 525–26 (2007).

6. NATIONAL COMMISSION ON THE ENVIRONMENT, CHOOSING A SUSTAINABLE FUTURE: THE REPORT OF THE NATIONAL COMMISSION ON THE ENVIRONMENT 2 (1993); *see also* OUR COMMON FUTURE, *supra* note 3, at 4 ("These are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one."); *see also* J. William Futrell, *Defining Sustainable Development Law*, 19 NAT. RESOURCES & ENV'T 9, 9 (2004) ("'[S]ustainable development' has denoted an effort to meld concerns for environmental protection, economic well-being, and social justice.").

how the built environment implements the values of human and environmental health.

One steadily increasing trend has been the governmental exhibition of leadership in sustainability. Sustainable governmental policies have included the conversion of public transportation fleets into electric, biodiesel, and compressed natural gas-power vehicles;[7] or designing and constructing public buildings as "green" buildings;[8] or even designing public open spaces with low-water dependent vegetation.[9] In the last several decades, state and local governments have also participated in purchasing strategies designed to reduce the environmental impact of public policies, public buildings, and public spaces. For instance, San Francisco adopted a policy prohibiting the purchase of products made from hardwoods taken from tropical areas suffering over-harvesting problems.[10] Many local governments now purchase only energy-efficient appliances and fixtures for public buildings.[11] The idea behind green purchasing strategies is that government may, like any consumer, act as a responsible player in the consumer market by purchasing cleaner products.

In May 2007, the City of Dallas, Texas announced its adoption of a green cement purchasing policy. The starting point for this strategy was awareness: Dallas recognized that cement production constitutes approximately 43% of all point sources of air pollutant emissions in the Dallas-Fort Worth region, and that its purchase of cement for infrastructure and capital facility construction contributes to an already

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7. *See* Charles Smith, Jr., *High-Performance Building Envelopes: High Performance Straw Bale* (May 1, 2007), http://www.edcmag.com/Articles/Featured_Special_Sections/BNP_ GUID_9-5-2006_A_10000000000000095483 (discussing the decision of the City of Santa Clarita, California fleet conversion in coordination with construction of an energy and water efficient straw-bale bus depot).

8. *See, e.g.*, ATLANTA, GA ORDINANCES ch. 75, § 19 (requires LEED Silver certification for certain city-funded projects), *available at* http://www.municode.com/resources/gateway.asp?pid=10376&sid=10; Austin, Tex., Resolution 000608-43 (June 8, 2000) (requires all municipal projects over 5,000 sq ft earn a minimum of LEED Silver certification).

9. CITY OF COSTA MESA, CAL. COUNCIL POLICY 500–12 (Sept. 4, 2007) (specifying low-water use landscaping, with consideration given for artificial turf for public recreational fields).

10. S.F., CAL., ENV'T CODE §§ 800–09 (2006), *available at* http://www.municode.com/Resources/gateway.asp?pid=14134&sid=5.

11. *See, e.g.*, CITY OF COSTA MESA, *supra* note 9 ("The City shall purchase environmentally-friendly materials, products, and preferable cleaning products for use in City operations. Contractors and suppliers shall provide such materials and products within the specifications prepared by the City and with the assurance that the products are operationally effective."); *see also*, NYC ADMIN. CODE § 6-127 (2005), http://24.97.137.100/nyc/AdCode/entered.htm; EPA's guidance on green purchasing, *available at* http://www.energystar.gov/index.cfm?c=bulk_purchasing.bus_purchasing; Consortium for Energy Efficiency, *Energy-Efficient Purchasing by State and Local Government: Triggering a Landslide Down the Slippery Slope to Market Transformation* (2004), http://www.cee1.org/gov/purch/2004_purchasing.pdf.

troublesome circumstance of air pollution.[12] The City sought to reduce its status as an indirect cause of emissions by purchasing products that are produced in cleaner, more sustainable processes. The City's resolution distinguishes between "wet" and "dry" concrete manufacturing processes[13] and authorizes the City Manager:

> to specify the purchase of dry kiln cement as the base bid in City of Dallas bid packages, with an alternative bid for the purchase of cement from a unspecified source and preferential purchasing for bids from a cement kiln with emission rates of 1.7 pounds of NOx per ton of clinker or less.[14]

The green cement strategy was part of the City's comprehensive effort to reduce air emissions which included vehicle fleet conversion to cleaner fuels, green building construction, and a target of overall energy efficiency.[15]

Soon after the City of Dallas resolved to implement its policy, several other governmental entities followed with their own versions of green cement purchasing policies, including the City of Fort Worth, the City of Plano, the City of Arlington, and Tarrant County (also defendants in the suit, along with Dallas County schools).[16] Although the various resolutions are substantially similar, the City of Plano's approach extends the purchasing preference even to bids that exceed non-green bids by up to 105%.[17] At the time the lawsuit was filed, there was a strong indication that other local governments in the region would soon follow Dallas's lead.[18]

On November 26, 2008, Plaintiff Ash Grove Texas, L.P., a manufacturer of concrete, filed a complaint and application for injunctive relief in the federal district court for the Northern District of Texas. In

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12. CITY OF DALLAS CEMENT PURCHASING STRATEGY/POLICY, adopted May 23, 2007, *available at* http://greendallas.net/pdfs/cement_kiln_ordinance.pdf.

13. *Id.*

14. *Id.* Clinker is the "product of a Portland cement kiln from which finished cement is manufactured by milling and grinding." TEX. ADMIN. CODE § 117.3101(1).

15. *See* Green Dallas: Air Quality, http://www.greendallas.net/air_quality.html.

16. CITY OF FORT WORTH RES. NO. 3536-10-2007, adopted Oct. 2, 2007; CITY OF ARLINGTON RES. NO. 08-0026, adopted Jan. 8, 2008; CITY OF PLANO RES. NO. 2008-4-40(R), adopted Apr. 28, 2008; DALLAS COUNTY SCHOOLS RESOLUTION ON ENVIRONMENTALLY PREFERABLE PURCHASING, adopted Oct. 16, 2008; TARRANT COUNTY RESOLUTION ASSIGNING PREFERENTIAL PURCHASE PRIORITY FOR THE PURCHASE OF DRY KILN CEMENT AS THE BASE BID IN TARRANT COUNTY BID PACKAGES, adopted Nov. 18, 2008.

17. CITY OF PLANO, *supra* note 16; *see* TEX. LOC. GOV'T. CODE ANN. § 271.907(c).

18. In the *Ash Grove* Complaint, *supra* note 2, at para. 69, the plaintiffs identified the City of Grand Prairie, the City of Mansfield, the City of Burleson, City of Denton and Denton County.

each of the causes of action, Ash Grove attacked the distinction between "wet" and "dry" manufacturing processes. First, Ash Grove alleged a violation of Texas' Competitive Bidding Statute, which limits the appropriate considerations in local governments' acceptance of bids for public projects.[19] The purpose of this statute is to make the bidding process competitive and to insure that preferences in accepting bids are based on appropriate factors of quality.[20] Second, Ash Grove alleged that the purchasing policies violate Texas' Preferential Purchasing Statute, which the plaintiffs argued only allows local governments to adopt preferential purchasing policies related to air quality where a state or federal standard is already in effect.[21] Third, Ash Grove alleged that the purchasing policies are preempted, characterizing the policies as efforts to directly regulate the industry of cement production. Fourth, Ash Grove alleged that the policies are arbitrary and capricious, given that different cement plants could produce different levels of NOx, without regard to whether the particular plant employs a "wet" or "dry" process. Finally, Ash Grove alleged several constitutional defects, including void for vagueness, regulatory takings and equal protection.

So, what is special about this lawsuit? It certainly *could not* be that a city, more than any other governmental or non-governmental entity, has a duty to purchase "dirty" products (outside of a conspicuously absent contractual duty to do so). Similarly, the plaintiffs would be ill-advised to argue that the defendants are obligated to spend tax dollars to insure the financial maintenance of a single company that refuses to update its production process, particularly where cleaner alternatives are available and are bid competitively. Ash Grove also does not allege that "green" products suffer in terms of quality. Rather, this case illustrates that sustainability *can* cause economic tensions by prioritizing human and environmental health over "business as usual," by embracing technological advances over past practices, and more specifically, by championing the move to sustainable practices based on the credible promise of sustainable economic growth, but without regard for the

19. TEX. LOC. GOV'T. CODE ANN. § 252.043.

20. Sterrett v. Bell, 240 S.W.2d 516, 520 (Tex. Civ. App.-Dallas 1951, no writ).

21. *See* TEX. LOC. GOV'T. CODE ANN. § 271.907. Ash Grove asserts that the mere mention of such state and federal standards acts to the exclusion of unaddressed air quality issues from consideration in public contract. It is not clear how far the plain language of this statute needs to stretch to accommodate Ash Grove's reading: first, the statute contains its own exclusionary provisions, and does not include unaddressed air quality issues as excluded from consideration; second, perhaps more importantly, the statute expressly allows local governments to give preference to goods and services that exceed existing state and federal environmental standards.

equally credible fear of those dreadful economic consequences for what we now understand to be dirty investments. In reality, the story of Ash Grove involves a company that has not kept pace with progressive, sustainable practices, and is now facing the consequences of that choice. This suit does aim at the heart of government's role in achieving sustainability, but it is largely doubtful that the lawsuit will provide the plaintiffs with the answers that they prefer.

Clearly, any change in a governmental purchasing preference will impact participants in the market, particularly where the emerging preference diverges from past expectations. In this case, Ash Grove alleges that its viability relies on supplying otherwise competitive public contract bidders who will no longer purchase cement from Ash Grove due to the type of production process employed. The claimed injury is alleged to be a direct cause of the shift to sustainability: although in the past Ash Grove's suppliers may have had no market reason to consider cement production methods as a factor in the strength or weakness of their products, the new, sustainable policies are forcing a modification of their practices to remain competitive.[22] The plaintiffs further charge that governmental entities cannot legitimately (even if only indirectly) manipulate the market by refusing to allow higher-polluting materials producers and suppliers to be competitive in public construction bidding.

The problem for Ash Grove, and other similarly-situated manufacturers whose production processes have not maintained pace with sustainable practices, is that the sole static factor in this case seems to be Ash Grove's production process. Indeed, the notable premise underlying each of Ash Grove's allegations is the hardship that Ash Grove claims against evolution in technology and economics, as well as in human, social, and environmental needs. The unfortunate character of this case, then, is that relatively few manufacturers in an industry, who have attempted to capitalize on the short-term vision of retaining a soon-to-be outdated manufacturing process, are suffering a relatively predictable impact in the market shift to sustainable practices.[23] The few are being left behind.

The danger of this case may simply be in allowing our sympathies to replace a critical analysis of the sophistry embedded in the allegations. To

22. *Ash Grove* Complaint, *supra* note 2, at para. 68.

23. OUR COMMON FUTURE, *supra* note 3, at 62–63 (arguing that in the shift from development practices to sustainable development goals, an emphasis must be placed on perspective: "[T]he compatibility of environmental and economic objectives is often lost in the pursuit of individual or group gains, with little regard for the impacts on others, with a blind faith in science's ability to find solutions, and in ignorance of the distant consequences of today's decisions.").

bolster its case, Ash Grove asserts that the *quality* of a product (a relevant factor in public purchasing requirements)[24] ought not be dependent on the levels of pollution caused in its production. That is, if pollution levels from the cement production process do not impact the structural stability, permeability, traction, or durability of cement, then what valid public policy concern would be served by such a purchasing preference? Of course, green procurement strategies are premised on the exercise of public purchasing prerogative, and are intended neither to directly regulate nor influence market availability of cement produced from non-green processes.[25] Nevertheless, the purchasing policies of Dallas and the other defendants clearly distinguish among otherwise equal products based on the resources expended or pollution emitted in production. Or, more specifically, the Dallas purchasing policy and those of its co-defendants illustrate that the charge toward sustainability has changed the way we calculate the value of a product, by expanding the scope of our values to include the externalities[26] of the production process.

In a sense, that industrial externalities can be—and perhaps should be—so influential in consumer valuation *could* raise deep philosophical questions that force us to choose between alternative theories of causation and intention, quality and competition. This, of course, is the approach offered by Ash Grove in the lawsuit. However, given the advantages we have enjoyed in the shift to sustainability (such as healthier and more affordable homes, accessible and walkable communities, and a more diverse and complex natural surrounding, among others) it would not be surprising if Ash Grove's challenge should fail.[27] Sustainability does not allow us to continue to ignore the costs of bringing a product to market.

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24. TEX. LOC. GOV'T ANN. § 252.043. In Tex. Highway Comm'n v. Texas Ass'n of Steel Importers, Inc., 372 S.W.2d 525, 529 (Tex. 1963), the court recognized that agencies are empowered to identify the required characteristics of products sought in public contracts, so long as the specifications relate to the quality of the product or service.

25. Of course, bidders for such a contract have no right, vested or otherwise, even as the lowest bidder, as cities are entitled to reject any and all bids. A & A Constr. Co., Inc. v. City of Corpus Christi, 527 S.W.2d 833 (Tex. Civ. App. 1975).

26. HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 45 (1996) ("When increasingly vital facts, including the very capacity of the earth to support life, have to be treated as 'externalities,' then it is past time to change the basic framework of our thinking so that we can treat these critical issues internally and centrally.").

27. A motion to dismiss has been filed by one of the defendants, who, in a stroke of the sublime, relies on Dr. Seuss to bring the point of sustainability to the court. See Dave Levinthal, *No Kidding: Dallas Schools Evoke Dr. Seuss to Make Case Against Cement Plant*, DALLAS MORNING NEWS DALLAS CITY HALL BLOG, Feb. 24, 2009, http://cityhallblog.dallasnews.com/archives/2009/02/ no-kidding-dallas-county-schoo.html.

The point of sustainable practices is not to disrupt existing markets, not to interfere with property rights, and not to place non-human interests above economic ones. Instead, sustainability integrates a comprehensive, "whole systems" analysis of every product, an integration made necessary essentially because we failed to do so in the past. The idea of sustainable industry is persuasive because it is flexible and responsive to new technologies and circumstances. Sustainable practices are likewise persuasive because they are economically, environmentally, and socially superior to the alternatives in the long term. What will make sustainability pervasive, however, is that, in its inclusiveness, sustainable choices are valuable choices.