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# THE SEARCH FOR A NATIONAL LAND USE POLICY: FOR THE CITIES' SAKE

Shelby D. Green\*

One of [the federal agencies] was preserving the area as a park, the other altering the landscape for flood control, the third funding airport construction.<sup>1</sup>

## Introduction

In the early 1970s, it seemed likely that Congress would pass national land use legislation. Several Senate and House bills aimed at establishing a national land use policy that would require comprehensive land use planning by state and local governments, as well as coordination between them.<sup>2</sup> Unfortunately, the proposed legislation failed to win the approval of Congress. And now, nearly three decades later, little has changed. In fact, land use regulation remains a patchwork of discrete state and federal laws and policies on use and development. Sometimes these policies are at odds with each other and respond largely to economic forces and private interests. Some of the resulting land use and development patterns have been destructive to the vitality of cities, the environment, and the ecology.<sup>3</sup>

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1. See John R. Nolon, *Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina*, 13 PACE ENVTL. L. REV. 685, 718 (1996) [hereinafter Nolon, *Fusing Economic*]. Senator Henry Jackson proposed national legislation to resolve conflicts between federal, state and local governments. One of the examples of this conflict cited by Senator Jackson was the quoted example which refers to a conflict between Florida state, county, and local town governments. See *id.*

2. See discussion of the proposed legislation *infra* Parts VI.C., Conclusion.

3. See generally A REPORT OF THE AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE, AND PLANNING LAW 310-14 (Richard P. Fishman ed., 1978) [hereinafter HOUSING FOR ALL].

A handful of states (Florida, Georgia, Hawaii, Maryland, Maine, New Jersey, Oregon, Rhode Island, Vermont, and Washington) have enacted legislation prescribing state and regional comprehensive planning and growth management. See generally Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481 (1993); Patricia E. Salkin, *Statewide Comprehensive Planning: The Next Wave*, in STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 236 (Peter A. Buchsbaum & Larry J.

This article offers a survey of federal legislation and statements of policy that have shaped and directed land use and related phenomena, including the location of population, economic growth, and the character of urban development. Part I of this article provides a historical development of land use policies and laws, as well as presents academic and scientific theories supporting a national land use policy. Part II of this article describes patterns of urban and suburban growth and their consequences, such as the decline of the viability of cities and the loss of agricultural land. Part III discusses the government's spending on infrastructure and the results of this spending as well as federal housing funding laws and their effects. Part IV discusses federal spending on urban programs, such as block grants and enterprise and empowerment zones. Part V analyzes federal laws dealing with agriculture, natural resources, and the environment. Part VI details modern federal legislation dealing with land use planning in various areas. This article concludes by advocating the need for more comprehensive federal legislation on land use. Because this article surveys a great range of legislation, the applications and effects of which have not been tested or seriously studied, the object of this article is necessarily limited. In large measure, this article strives to provide some reference to the various land use laws and policies and to prompt further study that could lead to an effort to adopt a comprehensive national plan for land use.

## I. Background

### A. Historical Perspective

Prior to the New Deal, the federal government's involvement in land use issues was limited and modest. Various laws offered subsidies to farmers, established homesteading programs for the settlement of the West and Midwest, authorized the development of canals, and provided funding for the construction of roads and rails. Each of these measures was related to the supply of labor for the industrialization of the country.<sup>4</sup> Then, beginning in the early 1900s, while still not stating any particular policy, federal legislation precipitated a momentous shift in land use patterns. Federal funding for the interstate highway system enabled a dispersion of

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Smith, eds. 1993); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

4. See James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 211 & nn.5-7 (1982).

urban populations into the outer city.<sup>5</sup> Urban communities were cut in half in surrender to the highway's insistence upon the most direct route. Trees gave way to pavement and billboards along the way.

In the 1940s, federal mortgage and interest subsidy programs and tax relief for home mortgagors enabled more home buying and the development of the single-family suburban housing pattern.<sup>6</sup> And, in the 1960s, federal grant-in-aid programs for highways, infrastructure and housing urged an even greater movement of individuals and businesses to suburban areas. Usually it was the more affluent who moved to the suburban areas, leaving concentrations of the poor in the inner cities.<sup>7</sup>

### **B. The Need for a Federally Mandated Land Use Policy**

Many academics and scientists have argued that control of the negative effects of unguided land use can best be accomplished through policy set at the national level. Their arguments have several foundations. First, local governments are ill-equipped to manage large projects like power-generation plants and municipal services facilities. These projects impact land use because they are often located in areas where their effects are not necessarily local. In fact, many times the facilities are situated very close to municipal lines. The effect may be such that while the benefits that the facility provides accrue to one city or town, the harms spill over into adjoining communities. In other words, while one town enjoys the benefit of additional jobs and tax revenue, adjoining towns may experience traffic congestion, flooding from filled wetlands, pollution, economic and social dislocations, thereby creating artificial disparities between communities.<sup>8</sup> The same cross-boundary effects result from the "ribbon or strip development"<sup>9</sup> of commercial

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5. See *id.* at 212-213; see also discussion *infra* Parts III.A., III.B.

6. See *id.*

7. See *id.* at 214-15.

8. See generally Wickersham, *supra* note 3, at 503. This "spillover" problem has also been described as the "metropolitan problem," i.e., the phenomenon of the "non-congruence of problem units with policy-making units." *Id.* Because metropolitan areas are interdependent social and economic units, comprised of a multiplicity of local governments that generally act in their own self-interests, the policies adopted and pursued by each may have effects, though often unintended, upon other parts of the region. Thus, to the extent that there is any planning within a metropolitan area, it is fragmented, fractional and often in internal conflict. See HOUSING FOR ALL, *supra* note 3, at 12-13; see also ROBERT L. LINEBERRY & IRA SHARKANSKY, URBAN POLITICS AND PUBLIC POLICY 154 (3d ed. 1978).

9. See *infra* Part III.B. for a discussion of this phenomena and its effects.

and business establishments along major highways. Since such development exists in relation to the highway, as opposed to an existing town center, the development may overlap the boundaries of two or more municipalities.<sup>10</sup>

Second, academics and scientists argue that in making decisions about large projects, local politics may force an immediate and narrow course of action rather than one that considers the long-term effects on the entire region. Third, where specific federal laws and programs affecting land use do have application, they can be frustrated by local land use mechanisms and practices such as zoning provisions and exclusionary building codes.<sup>11</sup>

Similar arguments were made more than two decades ago by the Council on Environmental Quality in its first annual report. The report pointed out three basic deficiencies in existing local land use schemes:

1. environmental values were often sacrificed because local governments either failed to appreciate the effects of their decisions upon an ecological system located only partly within their borders or nevertheless opted for increased tax revenues that development would bring;
2. social and fiscal pressures felt at the local level made it as difficult to site certain kinds of development as to prevent development in environmentally critical areas, even though a clear regional need for the development might be indisputable; and
3. large public works projects, often federally assisted airports and highways, had a disruptive effect upon local planning by inducing overwhelming and ill-considered secondary development in their surrounding areas.<sup>12</sup>

The federal government is in the best position to establish a workable land use policy because of its ready mechanisms for gathering

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10. For example, to get from White Plains, N.Y., to Delhi, N.Y., one travels north on Interstate Highway 87 to the town of Kingston to the northwest. From that point, one drives 50 miles along Route 28. On this route, one passes through twenty-two developed places and along twenty-two open stretches of scenic beauty, although strip commercial development has pockmarked Route 28 and there is evidence of development sprawling out in ways that disturb the natural and scenic character. As one makes this drive, one passes through the jurisdictions of fourteen towns and villages, three counties, and ten different regional administrative regions of powerful state agencies. See John R. Nolon, *The Route 28 Corridor: One of America's Most Endangered Scenic By-Ways*, 1 LAND USE L. RPTR. 7 (1994) [hereinafter Nolon, *Route 28*].

11. See Wickersham, *supra* note 3, at 506; see also COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT 184-86 (1970).

12. COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 165-97, 224-30 (1972).

data on population, market and employment trends. This data is necessary in any effort to eliminate conflicts between public and private policies and between local and regional policies.

## II. Post-War Patterns of Population Growth and Its Consequences

### A. Urban and Suburban Growth

Since World War II, the most remarkable change in prevailing patterns of population growth has been the movement of population to cities, both urban and suburban.<sup>13</sup> In 1960, the nation was divided about equally between urban, rural, and suburban residents.<sup>14</sup> However, by 1990, the urban population had declined to 31.3%, the rural population had fallen to 22.5%, and the suburban population had grown to 46.2% - nearly half of the nation.<sup>15</sup> In fact, by 1990, nearly 192 million persons, 77.5% of the population, lived in metropolitan statistical areas, compared with 112 million or 63% of the population, in 1960.<sup>16</sup>

During the course of this shift to suburban life, some once thriving urban cities gradually declined.<sup>17</sup> In an important recent work, David Rusk compared the growth of 346 "growing cities," 71 "stagnant cities," and 101 "declining cities" during the period of 1960 to 1990.<sup>18</sup> He found, on average, that "growing cities" began to incorporate outlying areas. The result was that such cities grew in total area by 272%.<sup>19</sup> The average size of "growing cities" in 1990 was sixty-three square miles.<sup>20</sup> "Declining cities" were 50% larger than "growing cities" in 1960, but grew by only 16%, within an average

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13. See HOUSING FOR ALL, *supra* note 3, at 5.

14. See *id.* at 1378.

15. See *id.* at 1354, 1378.

16. See John Charles Boger, *Race and the American City: The Kerner Commission Report in Retrospect- An Introduction*, 71 N.C. L. REV. 1289, n.102 (1993) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, No. 32, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 27 (111th ed.)); see also Peter Dreier, *The Urban Crisis: The Kerner Commission Report Revisited: America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1377-78 (1993) [hereinafter Dreier, *Urban Crisis*].

17. See *id.* at 1378.

18. Boger, *supra* note 16, at 1346 (citing David Rusk, *Cities Without Suburbs*, NEW DEMOCRAT, May 1992, at 17, 19); see also DAVID RUSK, CITIES WITHOUT SUBURBS 9-11 (1993). The declining cities include Detroit, Cleveland, Louisville, Milwaukee, Syracuse, Harrisburg, and Richmond. The growing cities include Houston, Columbus, Nashville, Indianapolis, Albuquerque, Madison, and Raleigh. See *id.* at 11.

19. Boger, *supra* note 16, at 1346.

20. *Id.*

size of thirty square miles in 1990.<sup>21</sup> In the decades since 1950, eighteen of the nation's twenty-five largest cities suffered a net loss in population.<sup>22</sup> As the population in large cities decreased, independent suburbs grew by more than sixty million persons.<sup>23</sup>

A second remarkable post-war change in population growth has been the change in the demographic composition of city populations.<sup>24</sup> Central cities, which in 1959 housed only twenty-seven percent of the nation's poor, had become home to forty-three percent of the poverty population by 1985.<sup>25</sup> Many of the nation's larger urban centers, especially in the northeast and north central states, are older, declining, central-city areas surrounded by expanding and more affluent suburbs.<sup>26</sup> The population in these central cities has become poor and disproportionately black, Hispanic and Asian.<sup>27</sup> Meanwhile, suburban communities have remained disproportionately white and affluent.<sup>28</sup>

Post-war employment patterns also underwent important changes. Between 1951 and 1970, manufacturing employment significantly declined within twelve of the thirty largest cities in the nation.<sup>29</sup> This decline occurred primarily in the older and more industrialized centers of the northeast and north central regions.<sup>30</sup> During the same period, employment in the suburbs increased around all but one of the thirty largest cities involved.<sup>31</sup>

21. RUSK, CITIES WITHOUT SUBURBS, *supra* note 18, at 22; Boger, *supra* note 16, at 1346.

22. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE U.S. 283 (1985).

23. See *id.*; See also Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J. L. & POL'Y 513, 513-14 (1996).

24. See Drier, *Urban Crisis*, *supra* note 16, at 1376-78.

25. See Boger, *supra* note 16, at 1316.

26. JACKSON, *supra* note 22, at 284; see also RUSK, CITIES WITHOUT SUBURBS, *supra* note 18, at 5-8 (examining the move from city to suburb).

27. See Boger, *supra* note 16, at 1310-12. During the same period, in central city areas, poverty rates rose sharply, from 9.8% in 1970 to 15.4% in 1987, while suburban rates rose only slightly, from 5.3% to 6.5%, and non-metropolitan poverty rates actually declined from 14.8% to 13.8%. See Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in THE URBAN UNDERCLASS 7 (Christopher Jencks & Paul E. Petersen eds., 1991).

28. See Boger, *supra* note 16, at 1310-12.

29. HOUSING FOR ALL, *supra* note 3, at 5 (citing THE DOMESTIC COUNCIL, THE 1976 REPORT ON NATIONAL GROWTH AND DEVELOPMENT 33 (1976)).

30. See *id.*

31. See *id.*; see also Boger, *supra* note 16, at 1317 (noting that most new job creation occurred in suburban areas).

### 1. *Sprawl*

From these demographic shifts we can discern the emergence of a pattern of land development. This development consists of ever-expanding suburban residential subdivisions, retail shopping centers, industrial parks, and office complexes outside of the city.<sup>32</sup> Each developing area forms a region and is linked by a network of highways.<sup>33</sup> The old city pattern, consisting of a downtown core functioning as a business and cultural center that served the surrounding urban and suburban residents, has become obscured.<sup>34</sup>

Perhaps the most intractable consequence of suburbanization is sprawl.<sup>35</sup> Low population density, and consequently, an inefficient allocation of resources in a given area most significantly characterize the phenomenon.<sup>36</sup> Industrial and commercial development locates anywhere in the metropolitan area, usually in places most accessible by automobile and on the periphery of the metropolitan area.<sup>37</sup> Residential development is then lured to a new outer-ring of the metropolitan area.<sup>38</sup> To accommodate these forms of development, land is divided and subdivided for scattered, small-scale developments.

One result of this division is that irreplaceable natural and recreational resources are lost.<sup>39</sup> Other consequences include higher total and per capita costs for extending basic water and sewer services over greater distances to these developments, additional costs for road construction to connect the scattered development, and additional costs for new schools or school transportation for children living along the sprawl.<sup>40</sup> At the same time, core land and infrastructure in the cities become underutilized.<sup>41</sup>

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32. See Wickersham, *supra* note 3, at 494; see also JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4-9 (1991) (using the term "edge city" to describe new commercial roads in the former suburbs).

33. See Wickersham, *supra* note 3, at 494.

34. See *id.*

35. See HOUSING FOR ALL, *supra* note 3, at 9.

36. See *id.*

37. See Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159, 161 (1997).

38. See *id.* The new residents are thus lured to "edge cities." These edge cities, often at the intersection of interstate highways, become new centers of commerce and communications in the region, having but one purpose, i.e., to service the new peripheral residents. See *id.* at 162.

39. See *id.*

40. See *id.* at 163-70.

41. See *id.* at 162. Burchell points out that there are benefits associated with sprawl, though often not discussed, including the reduced transit capital costs and operating losses related to reduced use of this mode of transit in locations where



A recent study estimated the capital costs associated with sprawl at \$1.3 billion over twenty years for roads, water, sewer and school facilities, plus additional operating and maintenance costs of \$400 million annually.<sup>42</sup> The study also estimated that if 500,000 new residents arrived in New Jersey in the next two decades, each house would cost \$12,000 to \$15,000 more because of sprawl development than if development patterns were more compact.<sup>43</sup>

Initially, the costs of sprawl are not distributed proportionately. The delivery of services to new development areas costs the government more than those located closer to existing facilities.<sup>44</sup> However, such costs may be re-distributed evenly to users under a scheme called "average" cost pricing. As a result, some users subsidize other users.<sup>45</sup> Since people with higher incomes can more easily afford newer homes, this inequity results in a subsidy for the rich, funded by the poor.<sup>46</sup> The resulting subsidy encourages development in costly-to-serve locations.<sup>47</sup>

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sprawl is dominant because private automobiles bear these transportation costs. *See id.* at 166. Also, reduced commuting time to increasingly suburban jobs is a benefit. *See id.* Burchell argues that an understanding of the full costs of transportation requires a consideration of, among other things, the different impacts on public services, the economy and the environment and on individuals, how these impacts are distributed over time, the aggregate efficiency of different development patterns, as well as the distribution of impacts of those patterns on different groups. In the work cited, Burchell presented costs of two growth patterns – sprawl and managed growth, finding that managed growth resulted in savings in dollar costs of homes, infrastructure and national resources, but significantly burdened overall economic growth. *See id.* at 170-81.

42. *See* Kevin Kasowski, *The Costs of Sprawl, Revisited*, in DEVELOPMENTS, THE NATIONAL GROWTH MANAGEMENT LEADERSHIP PROJECT NEWSLETTER, Sept. 1992, at 1. The study was conducted by the Center for Urban Studies at Rutgers University. The article refers to a 1989 monograph for the Urban Land Institute by James Frank, who estimated that a \$48,000 per house sprawl "premium" for providing services to a three unit per acre development located ten miles from central facilities and employment centers. The same costs for a home in a twelve-unit per acre development, located closer in with an equal mix of townhouses, garden apartments and single family, would be 50% lower. *See id.* at 3; *see generally* Burchell, *supra* note 37; Robert H. Freilich and Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997).

43. Kasowski, *supra* note 42, at 3.

44. *See id.* at 4.

45. *See id.*

46. *See id.*

47. *See id.* Some municipalities have sought to recapture the costs of sprawl through impact fees for schools, roads, sewers, and other such facilities. Another strategy being used in the case of the utilities industry is the "least cost" development, which entails building in more compact development patterns and in a more conservation-minded fashion. *See id.* at 4-6.

## 2. Suburbanization and Its Effect on Cities

Suburbanization has produced considerable direct and negative effects on the environment, the ecology, and the cities.<sup>48</sup> These effects are circular and self-perpetuating.<sup>49</sup> Aesthetically, the low-density, large-lot housing which most characteristically describes suburbanization, and the phenomenon of two or three new houses built in the middle of a field, can destroy the visual image of a long-established green rural area.<sup>50</sup> Environmentally, the increased use of the private automobile to get from home to the city centers, another suburb, or an industrial park has meant the destruction of natural areas for roads and parking lots. And, with more roads comes increased traffic, congestion, noise and pollution.<sup>51</sup> The infrastructure in suburban areas requires additional costs as well. The provision of water, sewer systems, garbage collection, roads, and maintenance services to suburban developments means additional costs in getting these services to those outer areas.<sup>52</sup>

In the cities, there is a decline in the quantity of affordable housing. Movement to the suburbs has resulted in a reduced demand for residential and commercial properties in the urban core, and consequently fewer developers initiate development there. The higher per capita cost for public services in urban areas has also affected the tax base. The increased cost of providing services to employers, whose employees are not taxed because they do not reside in the city, and to nonresidents, requires municipal governments to bear a higher per capita cost for government services.<sup>53</sup> Attempts to finance these costs through higher taxes only lead to further distortions in metropolitan development as high-income households, firms, and other taxpayers seek to avoid the higher taxes by escaping the cities.<sup>54</sup> It thus follows that as job opportuni-

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48. See Wickersham, *supra* note 3, at 495-96.

49. See *id.*

50. See Wickersham, *supra* note 3, at 495; see also Freilich and Peshoff, *supra* note 42, at 184, 193.

51. See Wickerhsam, *supra* note 3, at 495.

52. See Burchell, *supra* note 37, at 162.

53. See John F. Kain, *Failure in Diagnosis: A Critique of the National Urban Policy*, 11 URB. LAW., 261-62 (1979).

54. See *id.* Kain states that existing governmental structures, particularly, "the placement of jurisdictional boundaries, tend[ed] to magnify the effects of poverty, discrimination, and capital obsolescence and make it inordinately difficult to correct these structural deficiencies or to cope with the array of problems they spawn[ed]. The structure of local governments in metropolitan areas allow or seem to allow, high- and middle-income households to escape responsibility for the city's problems and permit a degree of discrimination in the provision of urban services within metro-

ties relocate from cities to industrial parks outside the cities in areas not served by public transportation, the jobs become less accessible to the central city job seeker who lacks private transportation.<sup>55</sup> Consequently, the region's poor and disadvantaged, who are left in the urban cities, are increasingly finding themselves unemployed and unable to pay taxes. And, with an insufficient number of jobs for the urban areas and an insufficient tax base to provide municipal services for urban residents, libraries are underfunded, roads go unrepaired, and housing needs are unmet.<sup>56</sup> In short, cities cannot adequately accommodate the growing needs of their residents.

Populations are becoming increasingly more balkanized. The low-density, large-lot feature of suburban housing developments results in higher per unit costs,<sup>57</sup> which ultimately work to create and perpetuate the segregation of classes and races.<sup>58</sup> With suburbanization, the central city has come to hold a higher concentration of lower income and minority populations while the suburbs have come to embrace a more affluent, white population.<sup>59</sup>

This balkanization has also precipitated the breakdown of communities and the simultaneous emergence of urban problems. The disparities between the wealthy and the poor and between the number of jobs available and workers who seek them have led to classic social and economic ills, such as the decrease in investment by financial institutions in the urban areas, crime, and poverty. As families and businesses move away, the metropolitan area loses its sense of community. Ironically, suburbanization has brought to suburbia many of the urban ills that originally urged movement away from urban cities.<sup>60</sup> As suburbanization increases, so too does business development and traffic congestion in the suburbs.<sup>61</sup> Coincidentally, as more middle-class urban dwellers move into the

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politan areas that would be unconstitutional if it occurred within a single political jurisdiction." *Id.* at 261; *see also* Burchell, *supra* note 37, at 162-63.

55. *See* Lewyn, *supra* note 23, at 518-19.

56. *See* Freilich & Peshoff, *supra* note 42, at 191.

57. *See* Wickersham, *supra* note 3, at 495-96; *see also* Freilich and Peshoff, *supra* note 42, at 184, 191.

58. *See* Wickersham, *supra* note 3, at 495-96; *see also* Freilich and Peshoff, *supra* note 42, at 184.

59. *See* HOUSING FOR ALL, *supra* note 3, at 5-6 (citing COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 93D CONG., 1<sup>ST</sup> SESS., STUDY OF THE CENTRAL CITY PROBLEM AND URBAN RENEWAL POLICY); *see also* Boger, *supra* note 16, at 1298; *see also* RUSK, CITIES WITHOUT SUBURBS, *supra* note 18, at 7, 29.

60. *See* Lewyn, *supra* note 23, at 520.

61. *See id.* at 520-21.

suburbs, the underclass and working class move into those areas the middle-class abandoned, including those bordering on the suburbs.

### B. Loss of Agricultural Land

It is estimated that the United States is losing nearly five million acres of agricultural land each year to competing residential, commercial, and industrial land uses.<sup>62</sup> In the twenty-year period between 1954 and 1974, 119 million farmland acres, or nearly 6 million acres per year, were lost largely to suburban growth.<sup>63</sup> This loss is particularly worrisome in light of projections that the demand for United States agricultural products was estimated to increase sixty to eighty-five percent between 1980 and 2000.<sup>64</sup> This increased demand could only be met by planting more acres because the rate and magnitude of agricultural technological advances needed just to maintain food production in a given area is unpredictable.<sup>65</sup>

The conversion of land from farm to non-farm uses occurs most often near the outer perimeters of municipalities.<sup>66</sup> This pattern results from land speculators targeting farmland away from municipalities where land prices are lower and long-term profits higher.<sup>67</sup> Farmland is also attractive because it is flat, well-drained, vacant, and often has an extensive system of market roads already in place.

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62. See Sam Sheronick, Note, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583, (1991). This Note states that between 1980 and 1989, an average of 4,741,200 acres of United States farmland was converted each year to nonagricultural use. See *id.* at n.2, citing U.S. Dep't of Agriculture, *Agricultural Statistics 1989*, 373. See also NATIONAL AGRICULTURAL LANDS STUDY ("NALS"), FINAL REPORT 35 (1981).

63. See Julian Conrad Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 444 (1982).

64. See Sheronick, Note, *supra* note 62, at 583.

65. See *id.* at 583-84 & nn.4&5 (citing Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401, 402-03 (1987)).

66. See Sheronick, Note, *supra* note 62, at 584 & n.17 (citing J. BADEN, *THE VANISHING FARMLAND CRISIS* 89 (1984)).

67. See Sheronick, Note, *supra* note 62, at 584-85 & n.19 (citing J. KNOX, *AN EXAMINATION OF THE EFFECTIVENESS OF COUNTY ZONING TO PRESERVE PRIME AGRICULTURAL LAND IN IOWA* 13 (1979)). Sheronick states that land near the urban fringe typically costs five times more than land located deeper in rural areas. See *id.* In addition, the development of rural land by adding sewers and electricity also increases land values by a factor of five. See *id.* See also William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521, 536-37 (1986) (discussing trends in cropland conversion).

Yet, these benefits of farmland for farming are lost to the expansion of urban and suburban areas for residential and industrial uses.<sup>68</sup>

The loss of agricultural land immediately threatens the environment and the health of the nation's population in several significant ways. First, decreased food production, resulting from an increase in the rate of conversion of farmland to other land uses, at the same time as the nation is expanding, portends food shortages.

Second, as agricultural production is forced onto more hilly land or land less suited for agricultural use, cultivation produces greater soil erosion and more water pollution from more sediment, pesticides and fertilizers.<sup>69</sup> Conversion of farmland to townhouses and industrial parks also causes environmental injury of another kind: the destruction of green areas and open fields and an accretion of cement and steel.

Finally, the conversion of farmland to residential uses leads to increased costs. As farmland is driven out of production, the costs of maintaining a support industry for processing agricultural products and servicing farms (e.g., elevator operators, chemical suppliers, mechanics) must be borne by fewer farmers.<sup>70</sup> To the extent that these supporting industries in the same area collapse, farmers are forced to travel further to accommodate the demand for their products, thereby increasing their production costs and contributing to existing road congestion, air and noise pollution.<sup>71</sup>

### III. Federal Laws and Programs That Affect Land Use

Demographic shifts and changes in land use patterns are attributable to a number of factors. Foremost are economic factors, including market and industry changes.<sup>72</sup> Perhaps equally significant,

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68. See Church, *supra* note 67, at 535. Church predicted cropland losses from these sources to be about twenty-five million acres by the year 2000 and just over sixty million acres by the year 2020. See *id.* at 536.

69. See Sandra A. Hoffman, *Farmland and Open Space Preservation in Michigan: An Empirical Analysis*, 19 U. MICH. J. L. REFORM 1107, 1120-21 (1986).

70. See *id.* at 1121.

71. See *id.* at 1123. See also David Berry & Thomas Plaut, *Retaining Agricultural Activities Under Urban Pressures: A Review of Land Use Conflicts and Policies*, 9 POL'Y SCI. 153, 157-60 (1978).

72. Some have theorized that the national economic policy of the post-war era, by encouraging consumption to spur production, has produced inefficient and short-sighted land use. See Elliott D. Sclar & Walter Hook, *The Importance of Cities to the National Economy*, in INTERWOVEN DESTINIES: CITIES AND THE NATION 48, 54 (Henry G. Cisneros ed., 1993).

The current policy approach to urban America evolved in the three decades following World War II at a time when the U.S. economy was globally pre-

at least in the movement outward, is the individual desire for space, quiet and beauty. But it is evident that the operation of the various federal laws and programs, as well as the absence of comprehensive planning within and between local governments, are also significant factors in changes in land use patterns.

### A. Federal Spending on Highways and Other Infrastructure

Since the early twentieth century, Washington has in some way been involved with urban infrastructure - from subway systems to sewage-treatment plants to municipal buses. Cities, though, were the first to begin thinking comprehensively about urban infrastructure.<sup>73</sup> Early on, cities were forced to address the sewage disposal problem because sewage began to contaminate the groundwater.<sup>74</sup> Given the many street-corner communal water pumps,<sup>75</sup> and the enormous cost and complexity of the sewer systems, municipalities had to plan systematically.<sup>76</sup> The emergence of new technologies and advancements in transportation in this period likewise presented new challenges for cities, such as dealing with trains on elevated tracks which blocked light and air and produced noise

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eminent. With wide differences between the productivity of labor in the United States and other countries, and with European and Japanese spending power weakened by the war, U.S. policy was more concerned with maintaining consumer demand for U.S. products than with minimizing the costs of production. Thus U.S. public policy was used more to stimulate consumption and less to maximize productive efficiency. As a result, many public investments led to changes in the spatial distribution of economic activity that have imposed significant additional costs on the economy.

*Id.*

73. See Bruce Seely, *A Republic Bound Together*, WILSON Q. 19 (Winter 1993).

74. See *id.* at 27.

75. See *id.* The advent of running water exacerbated the health problems of inadequate sewage disposal, and the coming of horsecars created the enormous sanitation problem of disposing of solid waste. See *id.* As these systems grew larger, it became more important to understand linkages with other systems. By the last third of the nineteenth century, planners including Frederick Law Olmsted and Daniel Burnham were attempting to conceive whole cities, combining attention to parks, roads, water supply, and other services. Yet, most cities continued to react to problems as they arose and could no longer be avoided and often with solutions that had unanticipated consequences. See *id.* at 27-28. As they studied the problems, cities sometime resorted to rather extreme (at least by current standards) stopgap measures such as an 1844 Boston ordinance which forbade its residents to take baths without a doctor's order. Eventually they came to the realization that the construction of sewers like those in European cities in the 1850's was the only long-term solution. See *id.* at 27.

76. See *id.* at 27-29. By 1870, the largest cities were undertaking such measures with smaller municipalities making the transition between 1890 and 1920. They were constructing water and sewer systems, as well as water filtration and sewage treatment operations. See *id.*

pollution. Furthermore, with the growth of bicycle use in the 1890s, and the car a decade later, states turned their attention to road construction, so that by 1910 every eastern state had created a state highway department to work to accommodate the automobile.<sup>77</sup>

Highway construction was the first significant area of federal government involvement in infrastructure. The initial federal role in highway construction was strictly advisory until 1905 when the Office of Public Roads (the "Bureau") was designated.<sup>78</sup> The Bureau worked to implement the Federal-Aid Road Act of 1916,<sup>79</sup> which provided modest subsidies for state highway construction costs. Through such grants state construction and maintenance became subject to federal inspection.<sup>80</sup> Until 1944, most funds appropriated under this Act were used for highway work in the rural/urban fringe of cities or in small communities. Thereafter, funds were used for urban roads. By 1921, the highway policy included a limited system of inter-city roads and what would become the United States numbered-route system. This numbered-route system was the first national transportation system of any type in America.<sup>81</sup>

Several New Deal programs also contributed to the nation's infrastructure. Roads were among the most important projects, with between thirty-five and forty-five percent of all workers on federal relief having worked on highway projects of various types.<sup>82</sup> The Civilian Works Administration ("CWA"), in its brief existence from 1933-34, repaired 255,000 miles of roads.<sup>83</sup> "Through 1938, the Public Works Administration ("PWA") provided more than \$1

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77. *See id.* at 30. As early as 1893, however, the U.S. Department of Agriculture opened an office to gather information about roads. *See id.*

78. *See id.* at 30. In 1913, Congress passed legislation authorizing tax-exempt bonds for the purpose of funding programs for urban infrastructure. *See* Income Tax Law of 1913, Ch. 16, 38 Stat. 114 (1913).

79. *See* Ch. 241, 39 Stat. 355 (1916).

80. *See* Seely, *supra* note 73, at 30.

81. *See id.* at 31.

The 1944 Federal Highway Aid provided a huge increase in federal aid, to \$1.5 billion over three years, for an expanded system of primary, urban, and secondary roads. The bill also authorized but did not fund a new network of interstate roads between cities. As it turned out, however, inflation was the major worry after the war, and President Harry S. Truman sought to restrain federal spending. Yet the growing number of cars on the roads made it seem obvious to all that a massive new highway system was essential.

*Id.* at 33.

82. *See id.* at 32.

83. *See id.*

billion for more than 11,000 individual highway projects. The Works Progress Administration ("WPA") spent \$3.69 billion on roads during its existence (1935-43), building 572,000 miles of roads, 67,000 miles of city streets, and 78,000 bridges."<sup>84</sup> It should be noted, however, that nearly "twenty percent of PWA funds and at least a third of WPA funds were for wages, and thus went directly into the pockets of the previously unemployed."<sup>85</sup>

In 1956, Congress enacted a new Federal-Aid Highway Act,<sup>86</sup> which called for a grand plan for the properly articulated highway system.<sup>87</sup> The Act included the authorization of the 42,500 mile National System of Defense and Interstate Highways and authorized outlays of \$25 billion over twelve years, to be provided by highway-user taxes (gasoline taxes and excise taxes on tires),<sup>88</sup> with the actual construction work to be carried out by the states.<sup>89</sup> The Act envisioned a system of highways that would provide access to cities containing state capitals and to the majority of urban cities with populations of 50,000 or more, and 6,700 miles of limited access, multi-lane highways transversing those urban areas.<sup>90</sup>

Since 1913, the federal government has encouraged the development of urban infrastructure through tax relief under the tax-exempt bonds program<sup>91</sup> and direct funding under the Intermodal Surface Transportation Efficiency Act.<sup>92</sup> Tax-exempt bonds allow

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84. Seely, *supra* note 73, at 32.

85. *See id.* at 32.

Driven by the need to put people to work, the federal government found itself engaged in fields where it had never before been involved. A listing of PWA projects includes many buildings (7,488 schools, 822 hospitals, and 4,287 other public buildings) . . . 1,850 sewer systems; 375 electric-power projects and 470 flood-control projects . . . [d]uring World War II, government officials continued to plan big public-works programs, fearing the return of the depression in peacetime. Infrastructure and employment programs had become firmly linked.

*Id.* at 32-33.

86. *See* Federal-Aid Highway Act of 1956, Ch. 462, 70 Stat. 374 (codified as amended in scattered sections of 23 U.S.C.).

87. *See generally* Robert E. Reiter, *The Impact of the Federal Highway Program on Urban Areas*, 1 URB. LAW. 76 (1969).

88. Seely, *supra* note 73, at 340.

89. *See id.*

90. Federal-Aid Highway Act of 1956, ch. 462, § 108 (1956), 23 U.S.C. § 101 (1958); *see also* HERBERT H. SMITH, *THE CITIZEN'S GUIDE TO PLANNING* 15 (1961). By 1955, total subsidies to road-based modes of transportation had risen to \$1.34 billion annually, representing thirty percent of the total cost of road provisions. *See* Sclar & Hook, *supra* note 72, at 56.

91. *See* I.R.C. § 103.

92. *See* Pub. L. No. 102-240, 105 Stat. 1914, 23 U.S.C. §§ 101-40 (1991); *See infra* Part VI.E.



municipalities to raise revenues for infrastructure and capital improvements by exempting the interest earned on the bonds from taxation.<sup>93</sup> The federal government has thereby enabled municipalities profitably to issue bonds with lower interest rates.

### **B. Effects of Federal Government Spending on Infrastructure**

Governmental expenditure on infrastructure and, more importantly, highways, had the well-intended objective of connecting the country and facilitating commerce through a system of national highways. More roads meant more jobs in construction and maintenance, more business along highways, more personal convenience, and an easier delivery of freight.

Despite these benefits, the negative effects of such expansion were far greater. Foremost was the disruption of neighborhoods. Multi-lane highways often ran through the middle of city neighborhoods, uprooting thousands, destroying entire communities and creating new housing patterns outside the city.<sup>94</sup> Moreover, interstate highways provided an "escape" from the city to the open country, which seemed to operate to defeat the purposes of federal spending on urban revitalization programs.<sup>95</sup>

The low-density, single-family housing pattern found in most of the nation's suburban areas was made possible in part by high-speed highways. By facilitating travel, these highways reduced the importance of compact urban development. As highways stretched out from existing urban areas, development quickly followed, overrunning existing planning and zoning ordinances. The phenomenon of strip commercial development along non-limited access roads is a prime example of the irresistibility of such development pressures. As previously mentioned, with high-speed highways came increased private use of the automobile which brought air pollution, congested traffic, the blight of billboards, fast food restaurants, and gas stations to serve the commuter.

### **C. Federal Spending on Tax Benefits and Mortgage Insurance**

Although not their stated intentions, various federal tax measures have operated since the mid-1940s to shape a particular housing pattern. The tax provisions which provide for a deduction from gross income of real estate taxes and interest on home mortgages

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93. See I.R.C. § 103(b)(1).

94. See *HOUSING FOR ALL*, *supra* note 3, at 30; JACKSON, *supra* note 22, at 293.

95. See *infra* Part IV., IV.A., discussing urban revitalization programs; see also Freilich & Peshoff, *supra* note 42, at 187.

made home purchase more affordable.<sup>96</sup> Tax code provisions treated buying and selling real property as capital gains, which are taxed at a lower rate than other types of incomes; deferred the payment of taxes on gain if the proceeds from a sale of a home were used to purchase a new home within two years of a sale;<sup>97</sup> forgave tax liability on gain (up to \$200,000) from the sale of a principal residence in the case of taxpayers over fifty-five years of age;<sup>98</sup> and more recently, excluded from income up to \$500,000 of gain on the sale of a principal residence for couples and half that for an individual.<sup>99</sup> All of these provisions were designed to enable more persons to afford homes.<sup>100</sup>

Other federal programs operated in conjunction with the tax programs to make housing more affordable. Most significant of these were the mortgage insurance programs under the Federal Housing Administration ("FHA") and the Veteran's Administration ("VA").<sup>101</sup> These aimed to increase the availability of private loans for housing through the provision of mortgage insurance to benefit lenders.<sup>102</sup> The programs set interest rate ceilings, established uniform lending criteria, required lower downpayments and offered longer terms than conventional mortgages.<sup>103</sup>

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96. See I.R.C. §§ 163-64.

97. See I.R.C. § 1034.

98. See I.R.C. § 121.

99. See I.R.C. § 121(b)(3), Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1997).

100. See Freilich & Peshoff, *supra* note 42, at 187. The authors argue that the mortgage tax deduction effectively lowered taxpayer liability in a way that was perhaps not intended. To take full advantage of these provisions, higher incomes required higher home mortgages, and thus higher housing costs. This deduction encouraged sprawl by providing the means to protect more income by buying more homes, as larger, more expensive homes were more likely to be found outside city centers. See *id.* at 187.

101. See generally 12 U.S.C. §§ 1701-50(g) (1994).

102. See *id.*

103. See *id.* (discussing the Federal National Mortgage Association ("Fannie Mae") at 12 U.S.C. §§ 1716-23(h) (1994); see also 12 U.S.C. §§ 1451-59 (1994) (discussing the Federal Home Loan Mortgage Corporation ("Freddie Mac")). Fannie Mae and Freddie Mac purchase housing loans made by private lenders. Fannie Mae was established to draw more funds into the residential housing market, to redistribute these funds regionally, and to insulate housing markets from monetary and fiscal policy. Freddie Mac was established as a subsidiary to the Federal Home Loan Bank System to create a pass-through program for conventional mortgages. Additionally, the federal government also purchases mortgages made by private lenders through the Government National Mortgage Association ("Ginnie Mae"), 12 U.S.C. §§ 1716-23(h) (1994). See also Lily M. Hoffman & Barbara S. Heisler, *Home Finance: Buying and Keeping a House in a Changing Financial Environment*, in HANDBOOK OF HOUSING, AND THE BUILT ENVIRONMENT IN THE UNITED STATES 149, 152-3 (Elizabeth Huttman & William Van Vliet eds. 1988). "Ginnie Mae buys and packages FHA/VA-insured mortgages and sells them directly to investors, creating a 'pass-through' by guaranteeing

The FHA and VA mortgage insurance program guidelines contained various eligibility requirements other than the income of the homebuyer. The house had to sit on a relatively large lot, in a low-density setting, be constructed by conventional construction methods, and be an individual unit.<sup>104</sup> In addition, in determining the amount and availability of mortgage insurance, the FHA and VA based their appraisals in part on neighborhood quality, giving lower appraisals to homes in neighborhoods that were predominately black.<sup>105</sup>

These federal agencies even maintained a policy to perpetuate segregated neighborhoods.<sup>106</sup> In furtherance of this policy, the FHA recommended that municipalities enact racially restrictive zoning ordinances and restrictive covenants prohibiting black owners.<sup>107</sup> The FHA and VA set evaluation standards that did not make adequate allowances for the higher cost of individualized work required in the inner city. The rehabilitation of old houses in the inner-city required specialized procurement and customized work, and consequently required a greater number of skilled workers and higher levels of supervision and control.<sup>108</sup> Added to these

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principal and interest to the ultimate investor and servicing fees to the originator . . . ." (citations omitted) *Id.* at 153.

The Homeownership Assistance Program provides mortgage insurance for the purchase of one to four family homes, authorizes down payments as low as \$200 and subsidizes the interest paid by qualified low-income homebuyers on their mortgage loans, reducing interest rates to as low as 1% per year. *See* 12 U.S.C. § 1715(z) (1998). The availability of below market interest rates for mortgages under the Homeownership Assistance Program enabled more minorities to purchase homes. However, in many respects, the program proved a failure for minorities. In particular, default and foreclosure rates reached higher than 18% in 1979. It appears that realtors, acting to exploit racial attitudes, were able to acquire properties from whites at artificially low prices and sold them to blacks at inflated values. Laxity in enforcement of standards resulted in loan balances higher than the value of the homes. *See* Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1312-13 (1995).

104. *See* Schill & Wachter, *supra* note 103, at 1309.

105. *See id.* at 1309-10.

106. *See id.* at 1310. "The FHA underwriting manual warned against making loans in areas with 'inharmonious racial groups' and instructed lenders that '[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.'" *Id.* (citations omitted); *see also* Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill & Wachter*, 143 U. PA. L. REV. 1351, 1355-56 (1995) (examining the interplay of housing policies and the poor).

107. *See* Schill & Wachter, *supra* note 103, at 1310.

108. *See* JOSEPH L. STEVENS, *IMPACT OF FEDERAL LEGISLATION AND PROGRAMS ON PRIVATE LAND IN URBAN AND METROPOLITAN DEVELOPMENT* 10-11 (1973) (not-

difficulties were archaic, and sometimes racially-motivated segregationist, local building codes, which frequently made restoration difficult.<sup>109</sup>

#### **D. Effects of Federal Government Spending on Tax Benefits and Mortgage Insurance**

The housing tax benefits and mortgage insurance programs have undoubtedly worked to make housing available to those who otherwise lacked both the resources for the down payment and the private insurance required for a conventional home loan. These benefits also made housing available to those who would be unable to pay market rates on other housing.<sup>110</sup> At the same time, these programs also have worked to create undesirable land development patterns and have often been at odds with other urban housing and revitalization programs.<sup>111</sup>

Eligibility requirements for benefits under these programs, such as a large lot, low-density and individual units, could be more easily achieved outside the central city. Accordingly, these requirements led to a decline in development and purchase inside the city and, as such, a decline in the vitality of the central city.<sup>112</sup> Suburbia rapidly became an attractive investment area for private developers of single-family housing.<sup>113</sup> In addition, because the FHA and VA required lower downpayments and offered lower interest rates, and longer-than-average mortgages, there were more home purchases outside the city. This was especially true in light of the fact that structures within the cities often did not meet the other requirements for FHA and VA loans (i.e., lot-size and low-density.)<sup>114</sup> Furthermore, to the extent that the insurability of a mortgage by the FHA or VA were principal factors in the sale of homes and profitability to investors, homes outside the cities had the greater advantage.<sup>115</sup>

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ing mortgage capital for home improvement was largely unavailable and noting FHA restrictions).

109. See *id.*; see generally HOUSING FOR ALL, *supra* note 3, at 19; see generally JACKSON, *supra* note 22, at 301 (noting increases in minimum zonage laws).

110. See Freilich & Peshoff, *supra* note 42, at 186-87.

111. See *infra* Part IV. and discussion of urban revitalization programs.

112. See Schill & Wachter, *supra* note 103, at 1308-11; see generally HOUSING FOR ALL, *supra* note 3, at 16-19.

113. See STEVENS, *supra* note 108, at 10; see also HOUSING FOR ALL, *supra* note 3, at 18; Schill & Wachter, *supra* note 103, at 1309 n. 96.

114. See STEVENS, *supra* note 108, at 10-11; see also Fishman, *supra* note 3, at 17-18.

115. See *id.*; see also JACKSON, *supra* note 22, at 293-94; Schill & Wachter, *supra* note 103, at 1309-11.

The same eligibility requirements cited above operated to the greater advantage of those who could afford to purchase a larger home which met the FHA and VA standards. Such persons were more likely to be white and wealthier.

Because far less mortgage insurance was offered on older structures in the inner cities than on newer houses in the suburbs, these federal programs helped to further push homebuyers out of central city.<sup>116</sup> With the wealthier households leaving for the outer areas came a following of providers of goods and services, leading to a decline in the urban residential tax base.<sup>117</sup> It seems that the very programs whose original aim was to improve the lives of citizens by providing the opportunity to purchase affordable housing ultimately were the ones significantly responsible for degrading the lives of those left behind.

### E. Funding for Housing for the Urban Poor

The federal government has provided funding for low-income housing since 1937.<sup>118</sup> The early housing acts had as their primary goal the provision of decent housing to the inner city poor, and the clearance of slums and blighted areas.<sup>119</sup> The objective behind such goals was twofold: (1) to stimulate interest in cities; and (2) to address a serious social problem.<sup>120</sup>

The Housing Act of 1954 took a broader, more comprehensive approach to the problems of slums and urban blight.<sup>121</sup> This Act,

116. See STEVENS, *supra* note 108, at 11; see also HOUSING FOR ALL, *supra* note 3, at 18.

117. See Kain, *supra* note 53, at 262.

118. See 42 U.S.C. §1437 (1994). Congress declared the federal policy to "promote the general welfare of the Nation by employing its funds and credit . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income[.]" *Id.*

119. See *id.* The Act required the elimination of one slum dwelling for every new unit of low rent public housing built. See *id.*

120. The Housing Act of 1949. See 42 U.S.C. § 1441 (1994); declared substantially the same goal as the 1937 Act, and recognized slums as a national problem. The 1949 Act provided further that

(1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life . . .

*Id.*

121. See The Housing Act of 1954, Ch. 649, 68 Stat. 590, 596-603 (1954).

by way of provisions for urban renewal, such as conservation, restoration and rehabilitation, hoped to address these problems *before* conditions reached a stage where clearance became necessary.<sup>122</sup> The Housing and Urban Development Act of 1968<sup>123</sup> aimed to increase housing for low-income households in order to avoid concentrations of the most economically and socially deprived groups. This Act also aimed to create an environment where tenants regarded the dwellings as their homes and the projects as their neighborhood.<sup>124</sup> The Act also contained provisions under the Neighborhood Development Program to facilitate more rapid renewal and development of urban areas on an effective scale.<sup>125</sup>

The Cranston-Gonzalez National Affordable Housing Act of 1990<sup>126</sup> set up numerous programs aimed at achieving the goal of increasing the quantity and quality of housing for the urban

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122. *See id.* The Housing Act of 1954 added Sections 220 and 221, making FHA mortgage assistance available on liberal terms for primarily low-and moderate-cost housing in an urban renewal area or elsewhere for families displaced by urban renewal. To encourage planning, the act also provided funds to state planning agencies.

123. Pub. L. No. 90-448, 82 Stat. 476, codified as 42 U.S.C. § 1428(a) (1994).

124. *See id.*

125. *See id.* at 518-526; *see also* Roy Green, *The Public Housing Tenancy: Violations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681 (1994).

The Section 8 program was created under the Housing and Community Development Act of 1974, (codified as amended at 42 U.S.C. § 1437(f) (1994)). Under the program, owners of private housing enter into contracts with public housing authorities to provide housing to eligible low-income families. In exchange, the private owners receive direct government payments equal to the difference between the fair market rent on the housing and the rent that the tenant can afford to pay, an amount limited to thirty percent of the tenant's income. Housing qualifies as Section 8 housing if it meets government quality standards and have a market rental value no greater than an amount that the administering agency determines to represent a fair market rent for suitable housing in that locality. *See* 42 U.S.C. § 1437(f) (1994). Under the Section 8 Housing Voucher Program, low-income families are given vouchers to obtain housing in the private market. The amount of the voucher represents fair market rent, but recipients may pay more if they choose to spend more of their own funds, or may pay less and keep the difference, provided that they find a unit in suitable condition. The vouchers do not correspond to any specific housing unit. *See id.*

The Housing Development Grant Program, 42 U.S.C. § 1437(o), was enacted in 1985 to provide HUD-administered grants for new construction and substantial rehabilitation of urban housing. 42 U.S.C. § 1437(o) was repealed by Pub. L. 101-625 Title II § 289(b)(1), 104 Stat. 4128 (1990).

126. *See* The Cranston-Gonzalez National Affordable Housing Act, Pub. L. 101-625, 104 Stat. 4079, 42 U.S.C. § 12701. The Cranston-Gonzalez Act amended the Emergency Low Income Housing Preservation Act of 1987 and created the Low-Income Housing Preservation and Resident Homeownership Act of 1990 whose aim is to preserve and retain affordable housing for low-income families.

poor.<sup>127</sup> In part, the Act established the National Homeownership Trust through the Department of Housing and Urban Development ("HUD"), which provided financial assistance to first-time homebuyers through payments to buy down the mortgage interest rate at or below 6% and funded downpayments and closing costs for homebuyers.<sup>128</sup> Essentially, the trust provided first-time homebuyers with funds to supplement the downpayment.<sup>129</sup> The HUD assistance payments were then secured by a junior mortgage on the property without any requirement that interest be added or accrued to the amount owed.<sup>130</sup> As such, these provisions had the effect of decreasing the homebuyer's initial cash outlay, while not increasing monthly payments.<sup>131</sup>

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127. The various programs include funds for rehabilitation grants, direct loan programs to finance rehabilitation of low and moderate income single family and multi-family properties, special financial assistance for first-time homebuyers, planning grants, and loan supplements for undeserved rural areas. See 42 U.S.C. §§ 12748, 12872 (1994).

128. See 42 U.S.C. § 12852(a) (1994).

129. To qualify, a homebuyer's family income cannot exceed 95% of the median income of a family of four persons in the area and the income must be recertified biannually. See 42 U.S.C. § 12852(b) (1994).

130. In some instances the repayment of the entire balance may be waived if sales proceeds are insufficient. See 42 U.S.C. § 12852 (1994). By its terms, the trust was to terminate on September 30, 1994. See 42 U.S.C. § 12859 (1995).

131. Beginning with the Reagan administration, Congress has reduced spending on housing programs by large amounts as part of a broader agenda to reduce domestic spending to pay for tax cuts and military expansion. In 1996 alone, Congress reduced HUD's budget from \$26 billion to \$19 billion, which was 28 percent of the 1980 HUD budget in constant dollars. Congress also eliminated revenue sharing and urban development action grants for cities and cut community development block grants, mass transit grants, and economic assistance grants. See Peter Dreier, *The New Politics of Housing, How to Rebuild the Constituency for a Progressive Federal Housing Policy*, J. AM. PLAN. ASS'N, 5, 7 (Winter 1997) [hereinafter Dreier, *New Politics*].

However, at the same time the administration and Congress reduced such demand-side subsidies, they enacted new legislation providing supply-side subsidies. One in particular, the Low-Income Housing Tax Credit, deserves some comment here. This program was intended to encourage the production and rehabilitation of low-income rental housing by providing a tax credit to owners of low-income rental properties that housed a minimum percentage of low-income tenants at below market rents. See 18 U.S.C. § 42 (1998). The tax credit may be claimed annually, generally over a ten-year period, by an owner of a qualified residential rental project beginning with the taxable year in which the building is placed in service. See 26 U.S.C. § 42(f). The residential rental projects qualify for the tax credit if: (1) twenty percent or more of the units are occupied by individuals with incomes that are no more than fifty percent of an area median income, adjusted for family size, or (2) forty percent or more of the units are occupied by individuals with incomes that are no more than sixty percent of an area median income, as adjusted for family size. Regardless of which condition is satisfied, the gross rent paid by a family in a low-income unit may not exceed thirty percent of the imputed income limitation that is determined by assuming a family size equal to 1.5 times the number of bedrooms in the unit. See 26 U.S.C. § 42(g) (1988 &

## F. Results of Federal Housing Funding

While early federal housing funding worked to improve the quality of life in inner cities through the clearance of slums and blighted areas, later programs also facilitated home ownership and the rental of decent housing through low interest rates to providers of housing and financial assistance to providers and renters. Despite such benefits, some federal housing measures have impacted land use in negative ways.

### 1. Racial Segregation

In administering the various urban housing acts, the Department of Housing and Urban Development established policies under which sites and tenants for particular projects were selected on the basis of race.<sup>132</sup> Until the mid-1960s, HUD maintained a policy urging local public housing authorities to follow a "neighborhood composition rule," meaning that the racial composition of public housing developments should mirror their neighborhoods.<sup>133</sup>

### 2. Creation of Ghettoes of the Poor

Public housing projects generally were constructed on inner city sites. Community opposition often made it difficult to acquire land outside the cities.<sup>134</sup> These factors combined often meant that projects were constructed in the least desirable parts of town. Ra-

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Supp. 1990). The tax credit is the lesser of a building's "qualified basis" times the "applicable percentage." 26 U.S.C. § 42(a) (1988). In addition, a building owner must apply to the designated state or local housing authority in order to receive the tax credit based upon an amount of credit allocated to the state by the federal government. See 26 U.S.C. § 42(h) (1988 & Supp. 1990). Response to this program has been mixed. The limitations on the amount claimed and the red tape encountered in applying for the credit have discouraged many potential investors and until the credit is made profitable, participation by the private sector will be minimal.

132. See HOUSING FOR ALL, *supra* note 3, at 22-23; see generally *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969); Dreier, *New Politics*, *supra* note 131, at 8 (1997); Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970); Comment, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871 (1966). It was not until 1966 that HUD issue detailed regulations establishing a policy against discriminatory site selection. See HUD, LOW RENT HOUSING MANUAL § 205.1(g) (1967). The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et. seq.*, bars discrimination in the sale or rental of private as well as publicly assisted housing based on race, color, familiar status, religion or national origin. In subsequent regulations, HUD established new project selection criteria to implement the mandates of the FHA. See 24 C.F.R. § 100, 700.

133. See *id.* at 1295.

134. See Green, *supra* note 125, at 692, 694, n. 67.



cial minorities often predominantly occupied these areas.<sup>135</sup> By virtue of their ghetto status, such areas continued to be the least desirable places to reside and therefore lack the spark necessary to encourage improvements, investments and upkeep. Instead, as history has revealed, the areas became blighted, rendering such property an inefficient and visually unattractive form of land use. From the overall structure of the various housing programs, a concentrated ghettoized poverty in the inner city has resulted. Program requirements limiting eligibility to the very poor, the equivalent elimination program (one slum dwelling demolished for every new unit built),<sup>136</sup> the architectural choice of high density towers for housing "projects," and poor management and upkeep, have all contributed to this result.<sup>137</sup>

#### IV. Federal Spending on Urban Programs

The list of federal urban programs is too long and varied for an exhaustive study here.<sup>138</sup> However, those programs that have had

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135. See Schill & Wachter, *supra* note 103, at 1295-96.

136. See *supra* text accompanying note 118.

137. See Schill & Wachter, *supra* note 103, at 1295-97. A recent study of public housing in Philadelphia reported that an average neighborhood with no public housing units would be expected to have a 13% poverty rate. The poverty rate would climb to 31.8% if the neighborhood had an average proportion of public housing. See *id.* at 1307. The conclusion drawn is that project-based public housing generates negative spillover effects (higher poverty rates) in urban neighborhoods. See *id.*

138. A sampling of such programs include:

1. The Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301, *repealed by* 42 U.S.C. § 5316 (1975), under which Congress recognized that slums and blighted city neighborhoods required not only physical renewal but a coordinated social and economic rehabilitation program. The act set up the "Model Cities" program and authorized HUD to provide grants and technical assistance to help communities plan, develop, and carry out model cities programs — locally prepared programs for rebuilding or revitalizing entire sections or neighborhoods of blighted areas by the coordinated use of all available federal, state, and local public and private sources. Section 204 of the Act required review by a metropolitan planning agency of applications for federal funding for hospitals, airports, libraries, water supply and distribution facilities, sewerage facilities, waste treatment works, highways, transportation facilities, and water development and land conservation projects. This program was abolished by Housing and Community Development Act of 1974, 42 U.S.C. § 5301. The success of the Model Cities Program was compromised by the realities of the congressional appropriations process. Originally, the program was to include only six cities, but that number eventually escalated to 225 as more members of Congress insisted that cities in their states and districts be included. However, funding at a level sufficient to make a difference in the status of 225, as opposed to six, cities was unlikely. See Otto J. Hetzel, *Some Historical Lessons for Implementing the Cinton Administration's Empowerment Zones and Enterprise Communities Program: Experiences from the Model Cities Program*, 26 URB. LAW. 63, 72 (Winter, 1994). In addition, other federal and state agencies were reluctant to divert or give priority to

Model Cities over other programs. *See id.* at 73. Furthermore, it was often difficult for individual cities to determine what sources of funds and benefits were available from the various federal agencies with those resources. *See id.* at 76. While planning seemed to be the cornerstone of the program, it seems that planning became an end in itself, as judgments were made as to how much planning was to be done and who would do such planning. But, the product was often viewed less critically. *See id.* at 75.

2. Neighborhood Facilities Programs, which provides grants to local agencies to finance the construction of neighborhood centers for low and moderate-income residents of selected areas. This program was abolished by Housing and Community Development Act of 1974, 42 U.S.C. § 5301.

3. Community Reinvestment Act, 12 U.S.C. § 2901 (1998), which was designed to promote affirmative and ongoing efforts by regulated financial institutions to help meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations. The aim was to encourage business investment in the cities and to discourage movement outside the city. In this connection, the current act and regulations establish guidelines and tests for evaluating the lending practices of banks.

4. The Urban Revitalization Demonstration Program, 42 U.S.C. § 14371 (1994 & Supp. 1998), provided for challenge grants to encourage the development of new design techniques and living arrangements to end the isolation of low-income households.

Federal expenditures for defense and space programs and other governmental facilities have contributed to the development of specific regions of the country as local businesses and housing developments spring up to service these facilities. *See HOUSING FOR ALL, supra* note 3, at 16 n.69, discussing Brevard County, Florida and how it benefited from the space program; Seattle, from defense spending and the Washington D.C. area from the location of the Atomic Energy Commission and the National Bureau of Standards. *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT, *supra* note 11, at 165-97.

In addition, the location of the Air Force Academy and some space development facilities near Colorado Springs, raised the potential for growth in the city and contributed heavily to the reasons why a European developer purchased some 22,000 acres between the eastern edge of the city and the site of possible additional space facilities development. This developer was successful in convincing the city to annex his entire parcel, thereby prompting a need to rethink and revise the city's comprehensive plan, zoning, capital improvements and programs for the preservation of a quality central city business area. *See SMITH, supra* note 90, at 10.

The reverse of this is also true. For example, the closing of a military base can result in economic decline in an area, resulting from loss of jobs, tax base and reduced consumer spending.

A number of laws aim to affect economic and regional development by coordinating federal and state efforts for comprehensive planning in road building, mine-area restoration, sewage treatment facilities, timber development, fish and wildlife conservation, and natural resources conservation. *See e.g.*, Appalachian Regional Development Commission, Pub. L. 89-4, 79 Stat. 5, *codified as amended* at 40 U.S.C. § 462 (1998); Department of Commerce's five regional development programs: Coastal Plains, Four Corners, New England, Ozarks, and Upper Great Lakes. Regional Development Act of 1975, Pub. L. No. 94-188, 89 Stat. 1087; Public Works Improvement Act of 1984, 42 U.S.C. § 3121; Public Works Economic Development Act of 1965, Pub. L. No. 89-136, 79 Stat. 552, *as codified* at 42 U.S.C. § 3121; Public Works and Economic Development Act Amendments of 1976, Pub. L. 94-487, 90 Stat. 2331.

The Tennessee Valley Authority is a regional development program concerned with developing the river basin area touching parts of seven states. The program includes

the most visible impact on land use: the urban renewal programs, the block grant-in-aid programs, and the enterprise zone programs, certainly deserve some mention.

### A. Urban Renewal

The Urban Renewal Program, established under the Housing Act of 1949, was amended and revised several times, and ultimately was consolidated with other programs under the Housing and Community Development Act of 1974.<sup>139</sup> Like the federal housing programs, the objectives of the urban renewal programs included the physical renewal of inner-city slums and blighted areas.<sup>140</sup> The federal government provided grants to local authorities for the acquisition, assembly, clearance and site preparation of slum property. The cleared land was then sold at a write-down to private developers for redevelopment in accordance with a locally-prepared, federally-approved plan.<sup>141</sup> The programs also provided capital grants for rehabilitating existing structures.<sup>142</sup>

### B. Block Grants

Beginning in 1974, the federal government provided funds to urban areas through block grants under the Housing and Community Development Act of 1974.<sup>143</sup> This Act linked the provision of com-

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assistance in the development of flood control, water use, power supply, recreation, wildlife, agriculture, forestry, minerals, education, environmental protection, and industrial development. 16 U.S.C. § 831 (1985).

The federal government has also influenced local land use in connection with the disposition of its land. The Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 490, attempted to promote harmonious intergovernmental relations and encouraged sound planning, zoning, and land use practices, by requiring that before offering for sale federal land situated within an urban area, the Department of Housing and Urban Development had to give the local government having jurisdiction over zoning and land use regulation the opportunity of zoning for the use of such land in accordance with local comprehensive planning. The Housing and Urban Development Act of 1968, 42 U.S.C. § 3931, required that advance acquisition of land be limited to public purposes and that the acquisition of land to be utilized to achieve economy, efficiency, and comprehensively planned development of the area.

139. See 42 U.S.C. § 1437(f) (1998).

140. See Fishman, *supra* note 3, at 26.

141. See *id.*

142. The original urban renewal programs were continued and expanded in intermediate legislation, including the Housing Act of 1959, 12 U.S.C. § 24 and the Housing Act of 1964, 42 U.S.C. § 5301. See also The Historic Preservation Act, Pub. L. 89-665, 80 Stat. 915, 16 U.S.C. § 470, which established a program for the preservation of historic properties throughout the nation.

143. See 42 U.S.C. § 5301 (1998). See generally John R. Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 250 (1982) [hereinafter Nolon, *Reexamining*

munity development block grants to the submission of a housing assistance plan. The underlying goals of this legislation included the avoidance of the social and economic dislocations associated with urban renewal and the facilitation of the planning of unified community development and housing programs. These unified development and housing programs would achieve the objectives of decent housing, a suitable living environment, and expanding economic opportunity, primarily for families in low and moderate income brackets.<sup>144</sup>

### C. Enterprise and Empowerment Zones

Federal tax legislation provides for tax benefits to enterprise and empowerment zones.<sup>145</sup> Enterprise and empowerment zones are economically depressed urban areas targeted for revitalization on the basis of legislatively mandated criteria.<sup>146</sup> Businesses located in empowerment zones, however, are given a broader range of fed-

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*Federal Housing*]. In § 5301(b), Congress declared that "the welfare of the Nation and the well-being of its citizens depend on . . . systematic and sustained action by Federal, State and local governments . . . to conserve and renew older urban areas, to improve the living environment of low- and moderate-income families, and to develop new centers of population growth and economic activity," as well as on the "substantial expansion of and greater continuity in the scope and level of Federal Assistance, together with increased private investment in support of community development activities." *See id.* at (b)(2).

Block grants replaced then existing development programs, including the Public Facilities Loan Program; the Open Space Program; the Planning Advance Program; the Water-Sewer, Neighborhood Facilities and Advanced Land Acquisition Programs; the Urban Renewal, Code Enforcement and Neighborhood Development Programs; and the Model Cities Programs. *See S. REP. NO. 93-693*, at 48-49 (2d Sess. 1974).

144. Congress stated further that "[i]t is also the purpose of this chapter to further the development of a national urban growth policy by consolidating a number of complex and overlapping programs of financial assistance to communities of varying sizes and needs into a consistent system of Federal aid which:

1. provides assistance on an annual basis, with maximum certainty and minimum delay, upon which communities can rely in their planning;
2. encourages community development activities which are consistent with comprehensive local and areawide development planning;
3. furthers achievement of the national housing goal of a decent home and a suitable living environment for every America family; and
4. fosters the undertaking of housing and community development activities in a coordinated and mutually supportive manner by Federal agencies and programs, as well as by communities.

42 U.S.C. § 5301(d) (1974).

145. *See* 26 U.S.C. § 1394.

146. *See* Revenue Reconciliation Act of 1993, Title XIII of the Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 13301 *et. seq.* (enacted August 6, 1993), adding to or amending various sections of the Internal Revenue Code, including §§ 38 (c), 39 (d), 51 (i), (1)(a), 196 (c), (6), 20 (c), 1391, 1392, 1393, 1394, 1396, 1397, and 1402.

eral tax benefits than those located in enterprise communities.<sup>147</sup> Nonetheless, the objective of both is to encourage economic development in the designated areas by offering various incentives, including tax benefits and access to capital.<sup>148</sup> An additional aim of these programs is to improve infrastructure by requiring state and local governments to dedicate resources to the enterprise zone project.<sup>149</sup>

The empowerment zones require a "strategic plan" from all applicants, including pledges of state, local, and private resources as

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Under the act, selected federal government departments are given the power to designate eligible areas as empowerment zones or enterprise communities. Eligible areas include urban areas with a maximum population of the lesser of 200,000, or the greater of 50,000 or 10% of the population of the most populous city, located within the nominated area or a rural area with a population no greater than 30,000. See I.R.C. § 1392(a)(1)(A)-(B). These areas must be subject to pervasive poverty, unemployment and general distress. See I.R.C. § 1392(a)(2). This is indicated by such phenomenon as high crime rates, high vacancy rates, or the designation of an area as a disaster area or high intensity drug trafficking area, job loss and economic distress due to closures of military bases or restrictions on timber harvesting. See *Conf. Comm. Rep.*, 93 Stand. Fed. Tax. Rep. (CCH) ¶933,787. Eligible urban areas must not exceed twenty square miles, must have a continuous boundary and must be located entirely within no more than two contiguous states. Rural areas are limited to 1000 square miles and must consist of not more than three noncontiguous parcels when located in more than one state or may be located entirely within no more than three contiguous states. Eligible areas may not include any portion of a central business district unless the area is one characterized by pervasive poverty. See I.R.C. § 1392(a)(3)(A)-(D).

The Act creates authority for six urban and three rural empowerment zones, and sixty-five urban and thirty-rural enterprise communities. The tax benefits provided under the Act to businesses locating in the zones include:

1. An employment and training credit of \$3000 per employee.
2. An enhanced (up to \$20,000) additional expensing of equipment, i.e., instead of taking a deduction for depreciation, a taxpayer may elect to treat all of some of the cost of qualifying property as a currently deductible expense. See I.R.C. § 179.
3. Financing of qualified facilities in the zones through tax-exempt bonds, up to \$3 million per zone or community, not to exceed \$20 million. In order to use these bonds, thirty-five percent of a qualifying business' employees must be zone residents and the business must generate eighty percent of its gross income from its operations within the zone. See I.R.C. §§ 1394(c)(A)-(B).

147. See *id.*

148. The act enables entrepreneurs to look to enterprise zone facility bonds as a source of capital. See I.R.C. § 1391. See generally Mildred W. Robinson, *Empowerment Zones and Enterprise Communities Under the Omnibus Budget and Reconciliation Act of 1993: A Preliminary Concept with Some Modifications*, 11 J.L. & Pol. 345 (1995); see also ENTERPRISE ZONES, NEW DIRECTIONS IN ECONOMIC DEVELOPMENT (Roy E. Green ed. 1991) (analyzing and criticizing the Act).

149. See I.R.C. § 1391. See generally Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Programs: Experiences from the Model Cities Program*, 26 URB. LAW. 63, 64 (1994) [hereinafter Hetzel, *Historical Lessons*]; Sara A. Levitan & Elizabeth L. Miller, *Enterprise Zones; A.P. Based on Rhetoric*, in THE GEORGE WASHINGTON UNIVERSITY CENTER FOR SOCIAL POLICY STUDIES (1992).

they pertain to the coordinated economic, human, community, and physical development objectives of the target areas. Such objectives include safe streets, clean air and water.<sup>150</sup> These plans must include a detailed description of the resources which will be made available for the revitalization effort, provide for broad-based community participation in the formulation of the plan, develop a system for monitoring zone performance, as well as contain measures to stringently prohibit any form of assistance to businesses from areas other than the nominated area.<sup>151</sup> The Department of Housing and Urban Development and the Department of Agriculture are given responsibility for administering the program, and are accordingly provided with the necessary planning guidebooks by various agencies. However, no mechanism currently exists for coordination with other agencies in order to effectuate a more organized delivery system.<sup>152</sup>

#### **D. Effects of Urban Renewal, Block Grants, and Enterprise and Empowerment Zones**

Urban renewal and development programs undoubtedly have worked hard to halt the decay and deterioration of the city in a steadfast effort to improve land values and raise tax bases.<sup>153</sup> Despite such altruistic motivations, however, critics still find fault with these programs. Primarily, it is argued that the benefits of urban renewal were more often reaped by businesses than individuals in poor communities. Some critics have suggested that, in retrospect, the principal goal of urban renewal programs generally was not to benefit the poor, but rather to assist the downtown business district that would be revived through slum clearance and better housing.<sup>154</sup> This seems to be the case with the enterprise zone program. However, at the same time, there is truth in the notion that an improved business district will, in turn, work to the advantage of everyone by creating more jobs and more commerce – both of which will have the consequence of attracting non-residents to the city.<sup>155</sup>

Critics of urban renewal programs have also pointed to the decentralized character of local governments and the absence of any

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150. See I.R.C. § 1391(2).

151. See I.R.C. § 1391.

152. See Hetzel, *Historical Lessons*, *supra* note 149, at 74.

153. See *id.* at 66-67.

154. See Quinton Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 400 (1994).

155. See *id.* at 443.

coordination between them, which substantially limited what urban renewal programs could achieve.<sup>156</sup> And, despite the fact that many of the urban renewal programs required recipients of federal funds to coordinate their projects with local comprehensive plans, critics have noted that such a requirement was unrealistic and could never have been achieved given the general failure of state and local governments to adopt comprehensive plans.<sup>157</sup>

Finally, urban renewal programs have been criticized on the ground that at least until replacement housing units had been constructed, the programs failed to place even temporarily significant numbers of inner-city residents. Furthermore, such programs did not provide for new housing for all those displaced, especially those most in need.<sup>158</sup> As a result, old slums became more crowded and new slum areas emerged.<sup>159</sup>

## V. Federal Laws on Agriculture, Natural Resources, and the Environment

Specific federal laws on natural resources, the environment and agriculture have directly determined land use by way of facilitating

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156. *See id.* at 402-03.

157. *See id.*

158. It was reported that during the first decade of urban renewal, more than 60 percent of the families displaced were blacks, though blacks numbered less than one third of the total city populations involved. "Through June 1965, reconstruction of urban renewal land was for institutional and public purposes (27 percent), and housing (36 percent), and prior to 1963, most of the new housing was for the upper middle-income occupancy." Shusheim, *Housing in Perspective*, 19 PUB. INT. 27 (1970). Fishman reports that at the end of 1971, approximately 600,000 housing units had been demolished on urban renewal sites, but only 201,000 new units had been completed, with an additional 43,000 units under construction, the majority of which were unsubsidized. *See HOUSING FOR ALL*, *supra* note 3, at 27; *see also* Johnstone, *supra* note 154, at 396, 398 (estimating the demolition of 400,000 dwelling units and stating that many thousands of businesses, mostly small enterprises, were forced to move as a result of urban renewal projects). At a later stage in the program's evolution the federal government made modest cash grants available to persons forced to move because of urban renewal. *See id.*

159. *See* Johnstone, *supra* note 154 at 398. Johnstone states further that while considerable housing was built on renewal sites, the total was far less than what was demolished and most of the new housing was for upper or middle-income residents. *Id.* *See also* NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY: REPORT TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES 163 (1969) (accompanied by research reports and background papers, the "Douglas Commission Report" greatly affected urban legislation in 1968 and 1969 and specifically generated Federal revenue sharing). Johnstone states that it was also the case that while slums were being cleared, they were not being eliminated, but merely replicated or intensified elsewhere as occupants of renewal areas shifted locations. *See* Johnstone, *supra* note 154, at 399.

and encouraging certain land uses and by strictly prohibiting others.

### A. Agricultural Land Use and Natural Resources

Most recently, the federal government, through the Department of Agriculture, has been involved in efforts to preserve agricultural land use.<sup>160</sup> In 1976, the department adopted a policy under which federal agencies were urged to refrain from using prime farmland for federal projects.<sup>161</sup> The Department was required to intercede whenever a federal agency planned to build on prime farmland.<sup>162</sup> In 1976, and again four years later, the President's Council on Environmental Quality urged federal department heads to analyze the effect of their agencies' work on farmland<sup>163</sup> and to incorporate such findings into environmental impact statements as required by the National Environmental Policy Act.<sup>164</sup>

Reacting in part to the agricultural lands study, Congress enacted the Farmland Protection Policy Act.<sup>165</sup> The aim of this legislation was to minimize the extent to which Federal programs contributed to the unnecessary and irreversible conversion of farmland to nonagricultural uses.<sup>166</sup> The Act required the Department of Agriculture to develop criteria by reference to which the effects of federal programs on the conversion of farmland to non-agricultural uses would be determined and identified.<sup>167</sup> Based on these criteria, the Act required federal agencies to "identify and take into account the adverse effects" of their programs on the preservation of farmland, to consider alternative actions to lessen such effects, and to the extent practicable, to ensure their programs are compatible with other state, local, and private efforts to protect

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160. See NAT'L. AGRICULTURAL LANDS STUDY, FINAL REPORT 8 (1981).

161. See Sheronick, Note, *supra* note 62, at 586 (citing Dunford, *The Evolution of Federal Farmland Protection Policy*, 37 J. SOIL & WATER CONSERVATION 133 (May-June 1982) (citing USDA, Secretary's Memorandum No. 1827, Supplement 1, Washington, D.C. (June 21, 1976))); see also J. W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763 (1993).

162. See Sheronick, Note, *supra* note 62, at 586-87 (citing, Dunford, *The Evolution of Federal Farmland Protection Policy*, 37 J. SOIL & WATER CONSERVATION 133 (1982)).

163. In 1979, the Department and the Council on Environmental Quality conducted the National Agricultural Lands Study, an eighteen-month study, to assess empirically the extent of farmland conversion in the nation. See Sheronick, Note, *supra*, note 62, at 587.

164. See 42 U.S.C. §§ 4321-4347 (1981).

165. 7 U.S.C. § 4201, *et seq.* (1981).

166. See *id.* § 4201(b).

167. See *id.* § 4202(a).



farmland.<sup>168</sup> Also under this law, the federal government guaranteed the payment of loans made by selected lending institutions for the benefit of state trust funds established for the purpose of preserving farmland.<sup>169</sup>

The Food Security Act of 1985<sup>170</sup> also took steps to preserve land used for agricultural purposes. For instance, the Act required the implementation of conservation plans for certain land and prohibited the conversion of some highly erodible soil and wetland into farming uses.<sup>171</sup> Under the Conservation Reserve Program,<sup>172</sup> the Secretary of Agriculture is authorized to enter into contracts with eligible owners and operators of highly erodible cropland to assist them in conserving and improving the soil and water resources on their farms and ranches.<sup>173</sup> Moreover, the program permits farmers to convert the participating land into permanent vegetative cover in accordance with an approved conservation plan and, in exchange, receive annual rental payments.<sup>174</sup> The farmer also receives technical assistance, cost-sharing for conservation easements and annual rental payments to compensate for the removal of the land from production.<sup>175</sup>

Various other Department of Agriculture programs also aim to protect and conserve natural resources. For example, the Agricultural Research Service conducts research in soil and water conservation and agricultural engineering,<sup>176</sup> while the Cooperative State Research Service provides grants to state schools for research in agriculture, rural community life, and forestry.<sup>177</sup> The Farm Home Administration operates a program that offers direct loans to farmers and ranchers unable to obtain credit elsewhere for real estate acquisition, farm and ranch improvement and operation, watershed

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168. *See id.* §§ 4202(b), 4203. *See also* Eagle Foundation, Inc. v. Dole, 813 F.2d 798 (7th Cir. 1987) (holding that in deciding where to build a highway, considerations set out in the Farmland Protection Policy Act regarding the protection of farmlands. Must be regarded equally with considerations set out in the Department of Transportation Act, regarding protection of public wildlife refuge and the two statutes should be harmonized when possible).

169. *See* 7 U.S.C. § 4206 (1988).

170. Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended at 7 U.S.C. §§ 1308-1, 1731, 1736(p); 15 U.S.C. §§ 713a-14a (1994); 16 U.S.C. § 3811, *et seq.* (1985)).

171. Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended at 7 U.S.C. §§ 1308-1, 1731, 1736(p); 15 U.S.C. §§ 713a-14a (1994); 16 U.S.C. § 3811, *et seq.* (1985)).

172. 16 U.S.C. §§ 590(a), 3831 (1994).

173. *See id.*

174. *See id.*

175. *See* 16 U.S.C. § 3831 (1994).

176. *See* 7 U.S.C. §§ 5902, 5907 (1994).

177. *See* 15 U.S.C. §§ 4301-06 (1994).

development, flood prevention, and soil and water conservation.<sup>178</sup> The Soil Conservation Service administers several programs relating to use, protection, and development of land, including research and technical assistance to farmers and community groups in conservation and land use planning, and small watershed management control.<sup>179</sup>

Finally, federal tax code provisions also help the preservation of farmland through preferential estate tax treatment<sup>180</sup> and deductions for gifts or sales below market value of development easements or fee simple title in farmlands with restrictions.<sup>181</sup>

Federal tax code provisions on conservation easements generally encourage land owners to preserve land in its natural state by allowing a deduction from gross income of the value of the easement created or conveyed as a charitable gift.<sup>182</sup> Conservation easements are valuable devices for protecting scenic, historic, and ecologically significant property because they contain restrictions on the type and extent of any development on the land subject to the easement.<sup>183</sup> To be eligible for the tax benefit, the easement must be "donated in perpetuity, exclusively for conservation purposes, [such as natural wildlife habitats, scenic open space, historic land, and outdoor recreation,] to a qualified conservation organization or public agency."<sup>184</sup>

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178. See 7 U.S.C. § 1929 (1994).

179. See 16 U.S.C. § 2001, *et. seq.* (1994). Several other programs on natural resources deserve mention. The Great Plains Conservation Program provides services and cost-sharing assistance for the development and implementation of land conservation plans in the Great Plains area and assists in planning for conservation and development of natural resources, including recreation facilities. See 16 U.S.C. § 590p(b)(1994). Other programs include:

1. The Corps of Engineers (Department of Defense) engages in a number of activities related to the control and development of water resources, including the improvement of channels and harbors, flood control studies, and beach erosion control. See 16 U.S.C. §§ 459e-7(a), 459f-7, 459g-5, 459h-5 (1994); 33 U.S.C. §401, 403 (1994).

2. The Bureau of Reclamation (United States Department of Interior), engages in programs in the area of water supplies and control, particularly with regard to irrigation, emergency power supplies, potential reclamation projects and flood control. See Federal Reclamation Act of 1902, Pub. L. No. 161, Ch. 1093, 32 Stat. 388; 43 U.S.C. § 371 (1994).

180. See I.R.C. §§ 1040, 2032A (1998).

181. See I.R.C. §170 (1998).

182. See I.R.C. § 170 (1998).

183. See generally J. DIEHL & T. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* 5, 6 (1988).

184. See Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 825 (1990); see also I.R.C. § 170(h); see generally DIEHL & BARRETT, *supra* note 183, at 12-21; I.R.C. § 170(h)(4)(A). Conservation easements

## B. Environmental Policies, Agencies and Enforcement

The underlying purpose of the National Environmental Policy Act ("NEPA") is to establish and maintain environmental harmony and to fulfill the social, economic and other needs of this and future generations.<sup>185</sup> NEPA also directs federal agencies to develop procedures to support and to carry out that end in recognition of the "profound impact of man's activities — including the influences of population growth, increased high-density urbanization, and industrial expansion."<sup>186</sup> NEPA requires that all the federal agencies prepare environmental impact statements for "major Federal actions significantly affecting the quality of human environment," and plan and develop alternative management strategies for the optimal use of natural resources.<sup>187</sup> NEPA also provides the authority for the creation of the Environmental Protection Agency ("EPA") charged with carrying out the provisions of the Act.<sup>188</sup>

Federal legislation also exists concerning the prevention of water pollution. Programs have been established to maintain and improve water quality and regulate the development in wetlands.<sup>189</sup>

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donated in a will at the owner's death result in a deduction of the full value of the easement from the value of the estate. *See* I.R.C. § 170.

The Open Space Land and Urban Beautification Program provides grants to public agencies to ensure the protection of lands having scenic, recreational, or historic value, and to promote development and preservation of park and recreation areas within the urban environment. *See* 42 U.S.C. §§ 5305, 5318 (1994).

185. *See* 42 U.S.C. §§ 4321-4347 (1994).

186. *Id.* NEPA established the Council on Environmental Quality which requires agencies to consider and report on the environmental effects of all proposed legislation. *See id.*

187. *See* 42 U.S.C. § 4332(2)(c) (1994).

188. *See* 42 U.S.C. §§ 4321-4347 (1994).

189. *See* Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1977); 1987 Water Quality Act, 33 U.S.C. 1329 (1987); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311 (1972) [hereinafter FWPCA]. The FWPCA contained planning and implementation requirements for pollution control, including: (1) basin, area-wide, and facilities plans to meet water-quality objectives; (2) state implementation plans and related transportation and stationary source controls to achieve air quality objectives; and (3) the development of state and local controls for land development in coastal zones. *Id.* at. §§ 1313-14. *See also* The Federal Water Pollution Control Act Amendments of 1990, Pub. L. Nos. 92-500, 95-217, 100-4, 33 U.S.C. § 1314 (1990) (calling for comprehensive programs for water pollution control, requiring the administrator to cooperate with related state and federal agencies (including the Corps of Engineers and the Bureau of Reclamation) to prepare and develop comprehensive programs for preventing, reducing or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters). These amendments authorized funds for grants for research and development and required that each planning agency receiving a grant under the Act to de-

In addition, federal legislation on air pollution<sup>190</sup> aim to reduce air pollution by placing limits on airborne discharges, and requiring that plans by recipients of EPA grants include measures to insure attainment and maintenance of pollution control standards, including land use and transportation controls.<sup>191</sup>

In addition to these acts, the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"),<sup>192</sup> was enacted to enable the federal government to clean up sites that contained dangerous levels of hazardous and toxic chemicals that posing a serious threat to public health and the environment. CERCLA created a revolving fund, known as Superfund, for the

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velop a comprehensive pollution control plan. The amendments called for the administrator to encourage cooperative activities by the states for the prevention, reduction, and elimination of pollution and to encourage the enactment of uniform state laws on this subject. *See id.* at § 1314. *But see also infra* Part V.C and discussion of the exemption provided by NEPA to environmental impact statement requirements.

Wetlands are a vital natural resource. They provide habitat for fish and wildlife, flood and storm drainage control, shoreline erosion protection, groundwater recharge and water quality improvement. *See generally* Joseph G. Theiss, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1 (1991). However, wetlands are being lost at an alarming rate, most significantly by their conversion to cropland for agricultural. *See id.* at 4. *See* Clean Water Act, 33 U.S.C. §§ 1251-1387 (1977) for federal protection of wetlands. Under these provisions, the Army Corps of Engineers and the EPA have authority to oversee wetlands protection. However, both have taken the position that they lack authority over "de minimis" discharges into wetlands in agricultural conversion cases and over land clearing activities that involve only removal of wetland vegetation or over the drainage of wetlands. *See* Theiss, *supra*, at 6. The reasons offered by these agencies is that such activities do not involve a point source discharge. *See id.* at 27-28. These agencies have taken these positions despite their conclusions that such activities pose great risks to the natural ecology and human welfare. *See id.* Theiss argues that these positions are largely political and in response from, among other groups, the agricultural industry, as it is difficult to imagine how any drainage or clearing operation can occur without some discharge of dredged or fill material, including redeposit of soil or vegetation as vegetation is cleared and the deposit of fill material and dredged spoil, in connection with the construction of a drainage system consisting of ditches and levees, involving a discharge of pollutants. *See id.* at 36-38.

190. *See* Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (1970); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C.).

191. *See* 42 U.S.C. § 7410 (1970); *see generally* Mandelker & Rothchild, *The Role of Land-Use Controls in Combatting Air Pollution Under the Clean Air Act of 1970*, 3 ECOLOGY L. Q. 235 (1973). The Clean Air Act Amendments of 1990 provide, among other things, "for attainment and maintenance of health protective national ambient air quality standards", and require federal actions to conform with certain requirements of the act and that all transportation plans conform with state implementation plans for areas that are in violation of the federal standards. *See* 42 U.S.C. § 7506(c).

192. *See* 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

cleanup of such contaminated sites and authorized the EPA to use the fund for long-term remedial actions and short-term emergency removal actions.<sup>193</sup> Under CERCLA, the EPA has three options for cleaning up a hazardous waste site: (1) clean up the site itself using the Superfund and then bring a cost recovery action against potentially responsible parties to recoup its costs; (2) order the potentially responsible persons to clean up the site; or (3) enter into a settlement agreement with the potentially responsible persons for cleanup or cost recovery.<sup>194</sup>

The EPA's vigorous enforcement of CERCLA has left some land totally unattractive or unsuitable for potential development. Such areas have been called "brownfields," which the EPA has defined as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."<sup>195</sup> Most brownfields are located in urban areas in major cities and include facilities such as shut-down steel mills, unproductive mining operations, abandoned timber mills, closed defense installations, rejected retail sites, unoccupied office buildings, and deserted industrial facilities.<sup>196</sup> Some brownfields are heavily contaminated, such as former steel mills and industrial sites, but most are not.<sup>197</sup> In fact, some brownfields actually contain no contamination; yet productive use and development are still precluded in fear of CERCLA cleanup liability.<sup>198</sup> Property owners are unable to sell such property, thus leading to abandonment. Abandonment, in turn, leads to losses in the tax base, physical deterioration of buildings, vandalism and dumping, unintended pollution from the spreading of existing pollution, and the taint of the "brownfield" designation affecting other properties in the neighborhood.<sup>199</sup> According to a recent study of the U.S. Conference of Mayors, thirty-nine cities that reported the presence of brownfields in their communities

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193. See 42 U.S.C. § 9604 (1998).

194. See 42 U.S.C. § 9606.

195. U.S. Environmental Protection Agency, Office of Solid Waste and Response, EPA/540/R-94/068, *The Brownfields Economic Redevelopment Initiative: Application Guidelines for Demonstration Pilots #2* (Sept. 1995); see also Robert H. Abrams, *Comment: Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265 (1997).

196. See Abrams, *supra* note 195, at 274.

197. See *id.* at 269.

198. See *id.*

199. See *id.*

"identified more than 20,000 such properties or sites of multiple properties."<sup>200</sup>

The argument has been made that the EPA has narrowed its enforcement of CERCLA, reducing the scope of Superfund's impact on the redevelopment of minimally contaminated sites, such that the major cause of higher costs associated with redevelopment of brownfields is now state enforcement.<sup>201</sup> Unfortunately, state agencies have entered the field in a role similar to how CERCLA was conventionally thought to operate: as a huge and almost unlimited source of potential legal liability and travail for brownfield developers and their lenders.<sup>202</sup> Perhaps the best prescription for action is the cooperative federalism that had been employed under the Clean Air Act and the Clean Water Act. Under these Acts, the federal role is that of policymaker and facilitator, and the state role is to make the redevelopment of brownfields a reality.

### C. Negative Implications of Environmental Laws

Environmental laws have not only worked to improve the quality of the air and water, but they have also raised the level of national consciousness about the environment. However, these laws have not escaped criticism for some of their negative impacts on land use, as well as their tendency to overlap each other, inevitably resulting in conflict. Primarily, the limited focus of environmental laws hinders their impact. An impact statement under NEPA concerns only the environmental effects of a single project at a single point, but does not concern patterns of development. In addition, critics contend that most laws are medium-specific (i.e., dealing with either air or water) and generally do not look at the environment as an integrated ecological system.

Second, transportation controls designed to meet ambient air-quality standards allegedly have increased the cost of automobile commuting by way of higher gasoline prices and tolls. These

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200. See U.S. CONFERENCE OF MAYORS, IMPACT OF BROWNFIELDS ON U.S. CITIES: A 39-CITY SURVEY 1 (Jan. 25, 1996). The U.S. General Accounting Office reports that the U.S. Conference of Mayors estimates that there are over 425,000 brownfields sites in the country. Some states have adopted measures to address the brownfields problem within their cities. The State of New York adopted an environmental bond act in 1997, which included provisions for the remediation of brownfields. See generally Abrams, *supra* note 195, at 277-84; David L. Markell, *Legal Development: Some Overall Observations About the 1996 New York State Environmental Bond Act And a Closer Look at Title 5 And Its Approach to the "Brownfields" Dilemma*, 60 ALB. L. REV. 1217 (1997).

201. See Abrams, *supra* note 195, at 291.

202. See *id.*

higher costs, in turn, may have directly prompted the dispersal of employment centers out of the central city to a workforce that would not have to commute.<sup>203</sup> Similarly, laws designed to limit water pollution reportedly have induced firms to abandon old plants, particularly those located in high density urban areas, sooner than they otherwise might have.<sup>204</sup> It is not only less expensive to build pollution abatement technology into a new plant than to add it to an old one, but abatement-devices require space which may not be available at older congested industrial sites. Such moves by industries cause or contribute to existing urban problems and disparities which then necessitate more federal aid for ailing cities.

There are other notable gaps and flaws. For instance, federal water control legislation exempted nearly all of the EPA's water pollution control activities from NEPA's environmental impact statement requirements, thereby allowing for the construction of large-scale projects, like sewers and sewage treatment plants, without a comprehensive evaluation of negative impacts.<sup>205</sup> A streamlined environmental impact procedure was also available under the federal-aid highway program.<sup>206</sup> And, as discussed earlier, irrespective of the benefits which a national road system provides, the federal highway program is at least partially responsible for sprawl and the exodus to the suburbs.<sup>207</sup>

The farm runoff exemption has also suffered sharp criticism for creating an unofficial license to pollute.<sup>208</sup> Federal water pollution legislation has largely ignored the complex problem of halting the flow of farm-related pollutants (i.e., farm chemicals such as pesticides and fertilizers) from open land runoff.<sup>209</sup> In fact, one researcher pointed out almost twenty-five years ago that millions of tons of soil were eroding annually into surface waters from farms and ranches and contributing to the national water pollution prob-

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203. See COUNCIL ON ENVIRONMENTAL QUALITY THIRD ANNUAL REPORT, *supra* note 12, at 33-34; HOUSING FOR ALL, *supra* note 3, at 35.

204. See HOUSING FOR ALL, *supra* note 3, at 35.

205. See 42 U.S.C. §§ 4321-4347 (1994). See also notes 188-189 and accompanying text.

206. See James M. Thomas, *HUD's NEPA Responsibilities Under the Housing and Community Development Act of 1974: Delegation or Derogation?*, 10 URB. L. J. 179, 198-99, 204 (1975); *infra* Part VI.C. and accompanying notes for a discussion of planning and environmental protection requirements under highway legislation.

207. See *id.*, at 204 n.153.

208. See Theiss, *supra* note 189, at 25-28.

209. See *id.* at 28-29; N. William Hines, *The Land Ethic and American Agriculture*, 27 LOY. L.A. L. REV. 841, 845 (1994) [hereinafter Hines, *Land Ethic*].

lem.<sup>210</sup> While states have adopted a number of controls on erosion from shorelines and lake shores, the main efforts to control the erosion from agricultural land involve voluntary compliance with the conservation recommendations.<sup>211</sup>

Finally, it has been advanced that the continued abandonment of brownfield sites, because of their potential contamination and consequent liability, contributes to burdens on urban cities. These burdens include declines in the tax base, reductions in job opportunities, blight, and feelings of despair from deteriorating, unused properties. The inability to use brownfields without some risk of liability serves to increase development pressures on greenfields in rural and suburban areas. And, from development in rural and suburban areas come sprawl, pollution, and loss of open space.<sup>212</sup>

## VI. Federal Legislation on Land Use Planning

Although there is no national or comprehensive planning system for land use, discrete provisions of various statutes have encouraged some type of land use or urban planning in various respects.<sup>213</sup> This section details coastal zone management legislation, the federal grant review process, and federal requirements for planning housing.

### A. Coastal Zone Management

Federal legislation on the coastal zone authorizes federal funds for state planning and control for the protection of environmentally critical areas bordering coastal waters. The Coastal Zone Management Act of 1972, and as amended in 1976 and 1980 ("CZMA"),<sup>214</sup> was enacted after a report prepared by the Commission on Marine Science, Engineering, and Resources. This study concluded that "coastal pollution [was] a national problem arising

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210. See Hines, *Land Ethic*, *supra* note 208, at 845 (citing N. William Hines, *Agriculture: The Unseen Foe in the War on Pollution*, 55 Cornell L. Rev. 740 (1970)); see also N. William Hines, *Farmers, Feedlots and Federalism: The Impact of the 1972 Federal Water Pollution Control Amendments on Agriculture*, 19 S. D. L. REV. 540 (1974) [hereinafter Hines, *Farmers*].

211. Hines, *Land Ethic*, *supra* note 209, at 846.

212. See Paul Skanton Kibel, *The Urban Nexus: Open Space, Brownfields and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 595 (1998).

213. Specific planning requirements under environmental and agricultural laws have already been discussed. See *supra* note 3 and accompanying text.

214. See 16 U.S.C. § 1451, *et. seq.* (1998).



from the piecemeal development of coastal ecosystems without an overall strategy for comprehensive coastal management.”<sup>215</sup>

CZMA is regarded as the first comprehensive federal legislation on the use of a natural resource. Under the Act, coastal management would begin at the local level, since many of the problems are specific to a geographic area. The Act encourages states to implement a coastal management plan and gives such states control over both state and federal agency activity in the area.<sup>216</sup> The Act further requires coordination and regular consultation between states, federal agencies and coastal land users.<sup>217</sup> The CZMA guidelines permit the states a choice of methods of implementation. States may create standards for local implementation, subject to state review and approval; direct state regulation and implementation, subject to state review and approval; direct state regulation and implementation, with state administrative review of all land and water use decisions; or a combination of these techniques.<sup>218</sup>

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215. 118 CONG. REC. S14170-14171, 14179 (statement of Senator Hollings).

216. See 16 U.S.C. § 1451 (1998).

217. See 16 U.S.C. § 1451 (1998). The Act requires that coastal management plans include: (1) an identification of coastal zone boundaries; (2) a definition of permissible land and water uses; (3) an inventory and designation of areas of particular concern; (4) an identification of the means by which the state proposes to exert control over land and water uses; (5) broad guidelines on priority of uses; and (6) a description of a proposed organizational structure; (7) a definition of “beach” and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value; (8) a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities; and (9) a planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion. 16 U.S.C. §1455(d)(2) (1998). See NEW YORK STATE DEPARTMENT OF STATE COASTAL MANAGEMENT PROGRAM, NEW YORK COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT § 6 (1992) for a discussion of the New York state coastal management plan. The Coastal Zone Protection Act of 1996, 110 Stat. 1380, provided funding for development grants.

218. See 42 U.S.C. § 9111 (1995). Under the Coastal Zone Act Reauthorization Amendments, 16 U.S.C. §1455b (1998), realizing the connections between coastal water quality and land use activities, Congress required states and territories with approved coastal management plans to develop coastal nonpoint pollution control programs, establish management measures and implementation guidelines. These requirements were loosely modeled after the technology-based point source effluent guidelines of the Clean Water Act, that management measures should be based on technical and ecological achievability, rather than on cause and effect linkage between participating land use activities and particular water quality problems.

## B. A-95 Review

The Intergovernmental Cooperation Act of 1968<sup>219</sup> established the A-95 review process. This process required that all applications for federal grants be reviewed by a state, regional, or metropolitan clearinghouse for the purpose of identifying the relationship of the proposed project to area-wide comprehensive plans, and for identifying any possible inter-jurisdictional problems or opportunities associated with the proposal.<sup>220</sup> The A-95 review process was less successful than originally anticipated for several reasons. First, there were too few clearinghouses and comprehensive plans. Only a few metropolitan areas developed arrangements to effectively coordinate actions to implement local planning,<sup>221</sup> and few states adopted what would be called comprehensive land use plans.<sup>222</sup>

The regional agencies that usually perform the review task under the A-95 review process are Councils of Government ("COGs"). They are voluntary associations of elected officials from jurisdictions in the region whose powers extend only to matters involving federal money, rather than to local decisions, and are largely advisory. In other words, their duties have typically been limited to recommending disapproval of local grant applications that are inconsistent with metropolitan criteria. Thus, to the extent that the COGs have generally lacked the power to compel local govern-

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219. See Intergovernmental Cooperation Act of 1968 as amended, 42 U.S.C. § 4231 (1970), repealed Pub. L. 97-258, Stat. 1080 (1982), recodified at 31 U.S.C. § 6501, *et. seq.*

220. Circular A-95 implemented the law by defining the federal programs subject to the review and comment of planning agencies, the procedures for designating state, regional and metropolitan "clearinghouses," and the methods for obtaining review and comment by the areawide agency or clearinghouse of applications for federal assistance. See William Reilly, *New Directions in Federal Land Use Legislation* in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 331, 340 (David Listokin ed., 1974) for a discussion of the program. See also ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, REPORT ON GOVERNMENTAL STRUCTURE, ORGANIZATION AND PLANNING IN METROPOLITAN AREAS (1961). This report noted improved inter-local communication, cooperation and coordination as a result of the program.

A number of federal agencies, too numerous to cite here, adopted guidelines for the A-95 review process, but they include the Department of Energy, 10 CFR Part 1005; Federal Housing Administration, 23 CFR Part 635; Environmental Protection Agency, 40 CFR Part 29; Department of Housing & Urban Development, 24 CFR Part 52; Corps of Engineers, 33 CFR Part 384; Secretary of Transportation, 49 CFR Part 17.

221. See Reilly, *supra* note 220, at 340, 344.

222. See *id.*

ments to take specific action that they were not inclined to do, the objectives of the A-95 Review Process could not be achieved.<sup>223</sup>

### C. Planning in Housing

Planning requirements, in connection with federal funding of urban housing funding, were imposed under the 701 Program, created by the Housing Act of 1954.<sup>224</sup> This legislation authorized a program of "Urban Planning Assistance,"<sup>225</sup> which aimed to expand the urban redevelopment programs to encourage cities to look at the broad problems of slums and blight, and to stimulate private residential development and the provision of private low-cost housing for persons displaced by redevelopment or other government action.<sup>226</sup> The program also sought to aid official state, metropolitan and regional planning agencies to perform planning work in metropolitan and regional areas, including surveys, land use studies, urban renewal plans, and technical services.<sup>227</sup> The early emphasis on public developmental planning and land use planning, particularly to avert blight in small communities, was broadened to include planning for human resources, fiscal issues and the preparation of regulatory and administrative measures.<sup>228</sup> Subsequent comprehensive plans prepared with 701 Program funds were required to contain a "housing element" which would take into account all available evidence of the assumptions and statistical bases upon which the projection of zoning, community facilities, and population growth was based, so that the housing needs of both the region and the local communities would be adequately covered in terms of existing and prospective immigrant population growth.<sup>229</sup> Later housing legislation reflected a broadened concern for area-wide planning, for example, by making eligibility for federal grants for the acquisition of open space dependent upon a de-

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223. See generally *HOUSING FOR ALL*, *supra* note 3, at 37; Reilly, *supra* note 220, at 342. Reilly states that after two decades of planning legislation being adopted, most have not been particularly comprehensive and that local governments still tended to be insular. See *id.* at 344-47.

224. See 40 U.S.C. § 460-62 (1986).

225. See *id.*

226. See *id.*

227. See S. Rep. No. 83-1472, 2d Sess. (1954).

228. See *id.*

229. Reilly states that the 701 program contributed to the training and development of the urban planning profession and supported comprehensive planning, serving to lessen the imbalance that had the designers of roads, sewers and airports determining the shape of our cities. See Reilly, *supra* note 220, at 337-38, 343.

termination that the funds were "needed . . . as part of the comprehensively planned development of the urban area."<sup>230</sup>

The Demonstration Cities and Metropolitan Development Act of 1966<sup>231</sup> required review by a metropolitan planning agency of applications for federal funding for hospitals, airports, libraries, water supply and distribution facilities, sewerage facilities, waste treatment works, highways, transportation facilities, and water development and land conservation projects.<sup>232</sup> A "Housing Assistance Plan" under the Housing and Community Development Act of 1974 was required of all applicants for community development block grants. The plan was required to include a survey of the condition of the community's housing stock, establish numerical goals for meeting the housing needs of the community, as well as indicate locations of proposed housing for lower income persons. The plan's goals were to further revitalize the community, promote greater choice of housing opportunities and avoid concentrations of assisted persons. In furtherance of such objectives, the Act required that applications for housing assistance be submitted to the local government for its certification. The local government had to certify that the plan was, in fact, consistent with the housing assistance plan, so as to assure a unified strategy for community development and housing.<sup>233</sup>

Under the federally mandated Comprehensive Housing Affordability Strategy ("CHAS"),<sup>234</sup> one requirement for receiving a variety of affordable housing related assistance is that state and local governments must provide a CHAS. A CHAS includes, among other things, a five-year projection of housing needs, the resources available to meet those needs, and the government's plan for addressing those needs.<sup>235</sup>

Despite all the planning language, there has been no comprehensive analysis of the planning requirements under the discrete pieces of legislation. However, there are questions as to whether the planning objectives have been achieved in light of some identified problems. Namely, the 701 program has been repeatedly criticized for requiring burdensome compliance, including detailed plans with a long list of required "elements," regardless of the size or

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230. Housing and Urban Development Act of 1970, 42 U.S.C. § 1500(b).

231. *See* 42 U.S.C. § 3334 (1995).

232. *See id.*

233. *See* 42 U.S.C. § 3334(b) (1995).

234. *See* 42 U.S.C. § 12705 (1995).

235. *See id.*

character of the community, thereby discouraging some smaller cities and towns.<sup>236</sup> And, most significant in the evaluation of the success of these federal planning requirements, which require coordination with local and regional plans, is the absence of local and regional plans in most areas of the country. Only a handful of states or regions have adopted programs on planning.<sup>237</sup>

#### D. Planning Under Urban Development Programs

A major statement of policy on land use appeared under the Housing and Urban Development Act of 1970.<sup>238</sup> This legislation aimed to develop a national urban growth policy and to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of the states, metropolitan areas, cities, counties, towns, and communities in predominantly rural areas which demonstrated a special potential for accelerated growth.<sup>239</sup> The legislation also encouraged the prudent use and conservation of natural resources, as well as supported development which would assure communities adequate tax bases, community services, job opportunities, and well-balanced neighborhoods in socially, economically, and physically attractive living environments.<sup>240</sup>

Under the Act, Congress took notice of the rapid growth of the urban population and uneven expansion of urban development, the decline in farm population, slower growth in rural areas, and the

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236. See SMITH, *supra* note 90, at 43. Smith states:

One of the worst features of 701 was dangling of the federal carrot of financial aid before uninformed, ill-prepared local officials and citizens . . . [N]o attempt was made to educate the public about planning: what it was, how to make it effective and what necessary policy decisions were called for if it was to work.

...

The buzz-word of this period became "gamesmanship." How well you knew how to play the game with the appropriate review authorities and the connections you had in Washington and state governments could be the determining factor in whether you got approval for both 701 master planning and/or an urban renewal project. Professional capability took a back seat to the ability to cut red tape and get some "free" federal money for local governments.

*Id.* at 45; See also Thomas, *supra* note 206, at 198-99.

While pursuant to the Housing and Community Development Act of 1974, HUD was required to prepare reports on "National Urban Growth," we have found no other information on the implementation of the provisions of the act or development of a national policy.

237. See *infra* Parts II.B.2, III.C.1.

238. See 42 U.S.C. § 4501, *et. seq.* (1995).

239. See *id.* § 4501.

240. See *id.*

migration to the cities.<sup>241</sup> Congress also noted that the imbalance between the nation's needs and resources seriously threatened the physical environment, economic and social development, and proper conservation of natural resources.<sup>242</sup> It was with these in mind that the Act called for coordination within a system of orderly development and established priorities consistent with a national urban growth policy. The Act declared that the national urban growth policy should, among other things: (1) favor patterns of urbanization, economic development, and stabilization which offer a range of alternative locations and encourage the size in urban regions, and in smaller urban places which have a potential for accelerated growth; (2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas; (3) help reverse trends of migration and physical growth which reinforce disparities among states, regions, and cities; (4) treat comprehensively the problems of poverty and employment which are associated with disorderly urbanization and rural decline; (5) develop the means to encourage good housing for all Americans without regard to race or creed; (6) refine the role of the Federal government in revitalizing existing communities and encourage planned, large-scale urban and new community development; (7) strengthen the capacity of general government institutions to contribute to balanced urban growth and stabilization;<sup>243</sup> and (8) facilitate the increased coordination in the administration of federal programs in order to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.<sup>244</sup> Although promising and forward-looking, there is nothing indicating any kind of implementation of the policies of this Act.

Under the Housing and Community Development of Act of 1974,<sup>245</sup> part of the application for federal grants was required to consist of a three-year community development plan summary, which identified community development needs and then demon-

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241. See 42 U.S.C. § 4502(a) (1995).

242. See *id.*

243. This provision aimed specifically at the improvement of local government through federal program coordination and fiscal planning, state government modernization, revenue reform, statewide zoning and land use activities, and significant federal support for public sector manpower planning and training. See *id.*

244. See 42 U.S.C. § 4502(d) (1995).

245. See 42 U.S.C. § 5301, *et. seq.* (1995).

strated a comprehensive strategy for meeting those needs.<sup>246</sup> The plan was required to set forth both short-term and long-term community development objectives, "developed in accordance with area-wide development planning and national urban growth policies," and was designed to address the identified community development needs.<sup>247</sup> After 1977, HUD was directed to withhold comprehensive planning funds from local agencies that were not engaged in comprehensive planning, including the requisite land use and housing elements.<sup>248</sup> In addition, the Act set forth specific responsibilities under NEPA, essentially requiring all applicants for funds to demonstrate that a proposed project would or would not significantly affect the quality of the human environment.<sup>249</sup> The Act provided for an advance payment of up to ten percent of the requested grant to be used to defray the costs of pre-project planning activities including the planning and conduct of environmental reviews.<sup>250</sup>

#### **E. Planning Under Highway, Mass Transportation, Capital Improvement and Economic Development Legislation**

In 1962, the Federal Highway Act established the requirement that the expenditure of highway construction funds in urban areas with populations in excess of 50,000 be approved only upon a finding that the proposed project was "based on a continuing comprehensive transportation planning process carried out on cooperatively by states and local communities."<sup>251</sup> Such plans were to include transit and land use planning on a par with the highway planning's strict compliance with all environmental requirements, full opportunity for citizen participation at all planning stages, and enhancement of the local government and regional planning agency role in urban transportation planning, while, at the same time, reducing the state's provision of funds and construction serv-

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246. *See id.* § 5304.

247. *See id.* § 5304(b)(4).

248. *See id.* § 5304(a)(3), (b).

249. *See id.* § 5304(g)(1); *see generally* Thomas, *supra* note 206. The regulations adopted pursuant to the act required applicants for funds to identify existing environmental conditions and current trends that were likely to develop without the proposed project as well as the nature and magnitude of all environmental impacts of the project.

250. *See* Thomas, *supra* note 206, at 202.

251. Federal Aid Highway Act of 1962, §9a, 23 U.S.C. § 134 (1990).

ices as much as possible.<sup>252</sup> The Act also prohibited highway construction until the administration had conducted a thorough analysis of all discoverable environmental consequences of its proposed action and of the reasonable alternatives to it, including not building.<sup>253</sup>

The Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA")<sup>254</sup> revealed a similar mindset as above in requiring regional "metropolitan planning organizations" to undertake long term transportation planning that accounted for land use planning.<sup>255</sup> ISTEA provided federal funding for surface transportation projects,<sup>256</sup> authorizing \$156 billion for fiscal years 1992 through 1997.<sup>257</sup>

ISTEA represented a significant shift in federal transportation policy from funding highways designed for automobiles to creating intermodal transportation systems that include highways, rail and mass transit. And, unlike the former policy, the new policy called

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252. See 23 C.F.R. §§ 450.100-122 (1998).

253. See 23 U.S.C. § 134 (1990).

254. See 23 U.S.C. §§ 101-140 (1995).

255. See 23 U.S.C. §§ 134 (1991).

256. ISTEA also contained provisions for setting programs for environmental protection and safety on the highways.

257. Several reauthorization measures were considered by Congress. The Clinton Administration proposal, National Economic Crossroads Transportation Efficiency Act (NEXTEA), S. 468, 105th Cong. (1998) and H.R. 1268, 105th Cong. (1998). Some other bills seemed to seek a return to the pre-ISTEA days away from comprehensive, national programs to a fragmented state by state approach. One bill, S.335, 105th Cong. (1998) H.R. 674, the Streamlined Transportation Efficiency Program for the 21st Century (STEP 21) would ensure a more even distribution of funds among the various states and would give states more authority to determine their transportation priorities.

ISTEA Works, S.586 105th Cong. (1998), would fund highways at about \$26 billion yearly, increase funding for enhancement programs to about \$600 million annually (about the same as the NEXTEA bill) and would double annual CMAQ funding. The Surface Transportation Authority and Regulatory Streamlining Act (STARS 2000), S.532 105th Cong. (1998), would give more authority to states and localities although to a lesser extent than the STEP 21 bill. This bill would also reduce air pollution expenditures. The Transportation Empowerment Act, S.867 105th Cong. (1998), would cut the federal gas tax by twelve cents and turn most transportation funding authority over to the states. Ultimately, a compromise bill was passed. See Transportation Equity Act for the 21st Century (TEA 21), Pub. L. No. 105-178, 112 Stat. 107.

Besides disagreement as to the level of funding, there is debate over the Transportation Enhancements Program, which required the set-aside of transportation funds for alternative transportation, such as bikeways, construction, renovation of abandoned railway stations. These have been locally popular, because they frequently help revitalize neglected downtown areas and spur economic development.



for systems that were unified and connected.<sup>258</sup> ISTEA also reinforced the goals of the Clean Air Act by making air pollution a central concern of transportation planning and funding.<sup>259</sup> In this regard, conformity means that no project or program may be included in state or a Metropolitan Planning Organizations ("MPO") for a nonattainment area if it causes new violations of the air quality standards, worsens current violations, or delays the attainment of air quality standards.<sup>260</sup>

Under ISTEA, the planning responsibility for areas with populations in excess of 50,000 has been delegated to a MPO.<sup>261</sup> MPOs must develop long range transportation plans for the region as well as short range transportation improvement programs ("TIPs").<sup>262</sup> TIPs identify the programs and projects on which the MPO will spend federal funds and must be consistent with the goals of the long-range plan.<sup>263</sup> In developing both the long range plan and TIP, the MPO must take land use into consideration on the theory that transportation developments affect land development patterns.<sup>264</sup>

Another significant change in policy under ISTEA is the requirement of planning at the state level. Each state is required to develop a long-range transportation plan for all areas of the state as well as a state-wide transportation improvement program ("STIP") which must take into consideration the MPO long-range plans.<sup>265</sup> For all areas not included in an MPO region, the Department of Transportation is responsible for assessing their needs and incorporating those needs into the state's long-range plan.

In 1991, \$3.3 billion in federal aid was spent on public transit and \$15.1 billion on highways,<sup>266</sup> while in 1995, \$4.6 billion was spent on public transit and \$19.9 billion on highways.<sup>267</sup> This shift may be

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258. See, e.g., Jayne E. Daly, *Transportation and Clean Air: Making the Land Use Connection*, 4 LAND USE LAW RPT. 2, 6 (1994).

259. See *id.*

260. See *id.* The Federal Highway Act of 1991, authorized an Environmental Analysis Division which had the responsibility for implementing transportation provisions of the 1990 Clean Air Amendments. See *id.*

261. See 23 U.S.C. 134(h) (1990).

262. See *id.*

263. See *id.*

264. See *id.*

265. See 23 U.S.C. § 135 (1991).

266. See Department of Transportation and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-516, 104 Stat. 2155 (1991).

267. See Department of Transportation and Related Agencies Appropriations Act, 1995, Pub. L. No. 104-205, 110 Stat. 2964 (1995).

explained by the fact that 1992 marked the official end of the construction of the interstate highway system.<sup>268</sup>

#### **F. Effects of Planning Under Planning Under Highway, Mass Transportation, Capital Improvement and Economic Development Legislation**

The effects of actual government spending on urban transportation have been discussed earlier. However, information on the effect of stated federal planning requirements in this area is scarce. Despite planning requirements under the 1962 Highway Act,<sup>269</sup> suburbanization, sprawl and their attendant consequences seemed to continue unabated.<sup>270</sup> While ISTEA promised a new era in American transportation, the results so far have been disappointing.

Although ISTEA emphasized planning and local control, and gave states some degree of flexibility in spending federal transportation dollars, few states have taken advantage of these provisions to shift funds from highways to, for example, bike lanes or rail service.<sup>271</sup> Out of a total of more than \$15 billion appropriated for ISTEA's surface transportation program for the first four fiscal years, states designated only about \$400 million for such "alternate transit."<sup>272</sup>

#### **Conclusion**

In 1971, Congress came within a few votes of passing the Land Use Policy and Planning Assistance Act of 1973.<sup>273</sup> The Bill proposed a new federal grant-in-aid program to provide funds to states to develop statewide land use plans.<sup>274</sup> The program would have linked funds to state programs that asserted control, directly or indirectly or concurrently with their local governments over "areas of

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268. See Jonathan Walters, *The Highway Revolution That Wasn't*, GOVERNING (May 1995).

269. Federal Highway Act of 1962, 23 U.S.C.S. §§ 101, 103, 104, 133, 134, 203, 214, 303 (1962).

270. See *infra* Part II.A.1 and accompanying notes.

271. See, e.g., Walters, *supra* note 268.

272. See *id.* Walters states that the reason for this disappointment is that the dream of ISTEA and that of environmentalists and preservationists is not shared by most Americans. Most Americans love the roads and love to drive.

273. This Bill, S.268, was passed by the Senate, but the analogous measure failed to pass the House. For a comprehensive discussion of the history of this bill and the related bills, see Jayne E. Daly, *A Glimpse of the Past, A Vision for the Future*, Senator Henry M. Jackson and National Land Use Legislation, URB. LAW. 1, 7 (Winter 1996).

274. S. 3354, 91st Cong., 2d Sess. (1970).

critical environmental concern," "areas impacted by key facilities" and all large-scale development.<sup>275</sup>

The Bill would have required states to develop a land use planning process and a state land use program.<sup>276</sup> States would have been required to have a method for assuring that the "development of regional benefit," which affects the constituents of more than one local government, was not unduly restricted or excluded by local governments,<sup>277</sup> to identify and control their "areas impacted by key facilities," defined to include major airports, highway interchanges and recreational developments,<sup>278</sup> as well as to control large-scale development.<sup>279</sup> The Bill prescribed three methods of acceptable state control: (1) direct and exclusive state land use regulation; (2) concurrent state-local regulation as was provided in most state coastal wetland protection laws; and (3) state-prescribed land use criteria and standards subject to local implementation and judicial enforcement.<sup>280</sup>

The Bill would have required a federal project that significantly affected land use be consistent with the state land use program ex-

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275. S. 3354, 91st Cong., 2d Sess. §§ 402-03 (1970). S. 3354 was the bill first introduced by Senator Jackson in 1970. It underwent significant amendment and was reintroduced the following year as S. 632 and eventually was incorporated into the administration's bill as part of the compromise bill, S. 268.

276. S. 632, 92d Cong., 1st Sess. § 501(e) (1971). S. 632, entitled Land and Water Resource Planning Act of 1971, was introduced by Senator Henry Jackson in 1971. The provisions were identical to those contained in S. 3354. Under this bill, a state land use planning process would have been required to include among other things, an inventory of the state's land and natural resources; a compilation of data relating to population densities, trends of growth and environmental conditions and trends; an inventory of needs and priorities concerning the use of federal lands within the State; a method of identifying large-scale development and development and land use of regional benefit; a method of designating areas of critical environmental concern and areas impacted by "key facilities"; a method of coordinating state and local agency land use programs; and provisions for public participation in development of the planning process. In connection with these obligations, a state would have been required to establish a state planning agency, which would have assumed responsibility for development and administration of the state land use program and for coordinating all state, local and federal planning activities.

277. See Reilly, *supra* note 220 at 353.

278. S. 632 92d Cong., 1st Sess. (1971).

279. See *id.*

280. See *id.* The bill proposed to establish an Office of Land Use Policy Administration with the Department of Interior as well as a National Advisory Board on Land Use Policy composed of the Director of the Office of Land Use Policy Administration and representatives of eight departments and agencies administering land use programs, to act as a communications exchange concerning land use programs of each department or agency and to assist the Secretary "in the coordination of the review of statewide land use planning processes and state land use programs." *Id.*

cept in cases of overriding national interest,<sup>281</sup> and would have required coordination between federal agencies managing federal lands and state land use programs to the extent that such coordination was practicable and not inconsistent with paramount national policies, programs, and interests.<sup>282</sup> The proposed scheme, by its own terms, would have avoided the spillover effects from local acts on large-scale development, contained undesired sprawl, ensured informed choices on the location and site of land activities and enabled conservation by foresight.

As stated in the beginning of this Article, Senator Jackson's Bill failed. Since then, federal legislation affecting urban issues, the environment, transportation, housing, and land use generally remains as it was then - an intricate matrix. But the matrix, in many ways, is without logic. In large measure, connections between the discrete laws and programs are fortuitous, and not always harmonious or complementary. At best, one measure is ignorant of another. At worst, one is defeating or mollifying. To take highway funds as just one example of a federal measure, it becomes immediately clear that construction leads to suburbanization. Suburbanization, in turn, leads to inefficient and destructive land use and an exodus from the city, which then leads to decay and economic decline, and ultimately to inefficient, ugly and destructive land use and a drain on fiscal resources. For the cities' sake, it is time to think comprehensively and nationally about land use.

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281. *See id.* at § 306(a).

282. *See id.* at § 401(a). S. 268 distinguished between land use decisions of regional or state impact which were to be elevated to state agency control, and decisions of purely local impact which were not intended to be affected by the legislation. The bill represented an attempt to conserve the best features of local control by disencumbering local governments of decisions which threatened to overwhelm and discredit them. The bill recognized implicitly that the local perspective is often limited, and that local development-dependent revenue collection systems were counter-regional. Input from those in the region affected by local decisions was thus necessary in making land use allocations.

