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I. Introduction

The most serious unresolved environmental problem in this country is land use. Although there have been significant legislative initiatives in recent years to deal with air, water, and even noise pollution,[1] and to require federal agencies to consider the environmental impact of their decision making,[2] little has been done about the important interrelated problem of land use. Air and water can be cleaned up and recycled, even if at great cost to society, but once prime agricultural land is paved, estuaries filled, or wetlands drained, little can be done to undo the results.[3] Moreover, the pattern of land use in this country contributes to the loss of valuable open space and to the wasteful consumption of energy.

Problems arise because land use decisions are generally determined by the unrestrained forces of the market. In addition, governmental planning has often been left to local officials who do not understand or are not concerned about the possible environmental effects of their decisions. Unfortunately, the politics of zoning has often left special interests with the upper hand. We can no longer afford such a haphazard approach to land use planning. Concerned citizens in many communities are beginning to demand positive action to avoid more urban sprawl.

Land is a national resource — indeed our most important resource — and we must begin to think of it in such terms. The supply of land is finite, but our demands on it are continuing to accelerate. It is estimated, for example, that in the next 30 years we must build as much as we have built before.[4] An area the size of New Jersey must be converted to urban use every decade — over 700,000 acres a year. This means hundreds of

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[1]Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857 *et seq.* (1970); Federal Water Pollution Control Act Amendments of 1972, 12 U.S.C. § 24, 15 U.S.C. §§ 633, 636(g), 31 U.S.C. § 711, 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972); Noise Control Act of 1972, 42 U.S.C. §§ 4901 *et seq.* (Supp. II, 1972), 49 U.S.C.A. §1431 (1974 Supp.).

[2]National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970).

[3]*Hearings on H.R. 4862 et al., National Land Use Planning Act of 1973, Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 242 (1973) (remarks of Russell Train, Chairman of the Council on Environmental Quality).

[4]119 Cong. Rec. 654 (1973) (remarks of Senator Jackson).

new power plants, transmission lines, rights of way, parks, streets, and highways.[5] In addition, each year an increasing number of acres are disturbed and often permanently degraded by strip mining operations.[6]

Only in recent years has attention focused on relating land use to the environment — the ecological capacity of the land to absorb initially a particular use and the long term effect of that use on the natural environment. Essential to this analysis is the understanding that aquifers, watersheds, flood plains, and other ecologically fragile and important resource areas do not stop at jurisdictional lines or political boundaries. Indeed, land uses such as airports, oil refineries, and shopping centers often have an environmental, economic, and "growth inducing" impact beyond the immediate area involved. Thus, although we may not yet be critically short of land, it is time to begin relating land use decisions to environmental limitations and to provide a decision-making process which, when necessary, transcends these traditional boundaries.

Right now there is no "national" land use policy. There are, however, a multitude of state, local, and federal activities that affect land use. There is no framework on the federal level — nor in most states — to coordinate decision making, to assure that various local, state, and national programs and agencies do not work at cross purposes. Moreover, most states have no policies or procedures for managing future growth — to decide optimal locations for future power plants, schools, feedlots, factories, and new housing. The challenge is one of determining optimal land uses — preserving needed open space and valuable farm land, while developing areas where the impact on the environment and quality of life can be minimized. Thus, to maximize effective planning, we need to begin now to develop policies that will assure optimum citizen participation and representation of all interests in determining what areas need to be preserved and where the necessary new development should go.

At the present time, we are not doing so well. An increasing number of conscious decisions by communities to limit growth[7] reflect the frustrations of citizens faced with rising taxes and new urban problems. Many local governments have resorted to exclusionary zoning,[8] and others are holding referendums on refineries. Developers complain of delay, red tape, duplicative requirements, added expense, and uncertainty in obtaining permits. In many cases, environmental groups and other concerned citizens resort to the courts to decide important land use questions.

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[5] *Id.*

[6] *See generally* HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, SURFACE MINING CONTROL AND RECLAMATION ACT OF 1974, H.R. REP. NO. 93-1072, 93d Cong., 2d Sess. (1974).

[7] *See* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal 1974); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

[8] Oakwood at Madison, Inc. v. Madison Township, 117 N.J. Super. 11, 283 A.2d 353 (1971). *See generally* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

These examples of discontent with the status quo point to the need for federal legislation to provide financial aid and policy direction to states and local governments. In this article, I will demonstrate the extent of the federal government's involvement in land use and explain why a national land use bill similar to the one I sponsored in the last Congress is important.[9] I will also discuss some of the controversial issues involved and attempt to dispel some of the myths and misunderstandings that permeated the debate in the 93d Congress.

II. Federal Decision Making and Land Use

A threshold question is whether the federal government should become involved at all in land use planning involving nonfederal lands.[10] The fact is the federal government is already heavily involved in all kinds of land use matters. Perhaps a more pragmatic question is, to what result?

Federal agencies now administer over 100 federal programs affecting land use. Most federal grants, loans, permits, and other expenditures for highways, sewer lines, water projects, mass transit, housing, and airports affect land use in almost every corner of every state. In 1973, for example, an estimated 13 billion federal dollars were pumped into the states for public works projects.[11]

Federal income tax laws influence land use by rewarding development of land. Capital gains rates on sales and exchanges of property[12] encourage land owners to sell to developers who in turn take accelerated depreciation deductions for large scale developments.[13] Concern about the environmental effect of these tax-sheltered developments in coastal areas led the Administration to propose the Environmental Protection

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[9]H.R. Rep. No. 93-798, 93d Cong., 2d Sess. (1974) [hereinafter referred to as H.R. 10294]. The House Rules Committee voted on Feb. 26, 1974, to indefinitely postpone floor consideration of the bill. Additional hearings were held on April 23, 25, and 26, 1974. *Hearings on H.R. 10294, Land Use Planning Act of 1974, Before Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs,* 93d Cong., 1st Sess. (1974). On May 14, 1974 the Rules Committee granted a rule, sending H.R. 10294 to the House floor, but on June 11, 1974, the House voted 211-204 not to adopt the rule, thus deferring any further debate on the bill. On July 22, 1974, Congressman Udall introduced H.R. 16028, a revised version of H.R. 10294 which incorporated a number of amendments that had been accepted by the bill's sponsors. No further action was taken in the 93d Congress on this bill.

[10]Public Land Law Review Commission, One Third of the Nation's Land, a Report to the President and to Congress (1970).

[11]Office of Management and Budget, Executive Office of the President, Special Analysis, Budget of the United States Government, Fiscal Year 1974, at 226 (1973).

[12]Int. Rev. Code of 1954, §§ 1202, 1221.

[13]Int. Rev. Code of 1954, §§ 167(j)(2) (residential real property allowed depreciation rates of up to 200% of straight line), 167(k) (expenditures to rehabilitate low-income rental housing), 1250 (special recapture rules for qualified low-income housing).

Tax Act of 1973.[14] This Act would have denied capital gains treatment and depreciation deductions to certain developments on critical coastal wetlands.

In addition to federal income tax laws, the federal estate tax laws also have significant land use implications. The federal estate tax is based on the fair market value of the estate. Since the development potential of rural land near the urban fringes often far surprasses its value for farming or open space, heavy estate taxes are incurred, and heirs may be forced to sell all or a part of the estate to pay the tax due. To remedy this problem, legislation was introduced in the 93d Congress which would allow certain open space and agricultural land to be assessed for estate tax purposes at use value rather than fair market value.[15]

Many other well-established federal policies, such as the agricultural subsidy program and resource-energy development policies including the leasing of public lands for coal, oil, shale, and other development have broad land use implications. A few examples will illustrate the ongoing and pervasive federal presence in land use decisions.

In December, 1973, the President signed the Flood Disaster Protection Act.[16] This Act requires all landowners in designated flood prone areas to obtain national flood insurance or forfeit eligibility for federally related financing for building, including federally insured home loans.[17] Moreover, communities within identified flood zones must adopt flood plain ordinances consistent with federal standards.[18] Past experience with flood damage and financial loss led Congress to compel states and communities to enact land use controls for flood plains.

The Environmental Protection Agency (EPA) is one federal agency which has become increasingly involved in local land use decisions. In a recent draft of an environmental impact statement, the EPA recommended that a proposed sewage treatment plant in New Jersey be limited to a capacity necessary to serve a population of 250,000.[19] The EPA apparently determined that any larger population growth in that area would lead to air quality degradation violating federal standards. Moreover, the EPA warned that it would withhold approval of an operating permit for anything larger. This is a classic example of federal land use

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[14]H.R. 5584, 93d Cong., 1st Sess. (1973).

[15]H.R. 15840, 93d Cong., 2d Sess. (1974) (sponsored by Representative Udall). This bill (and companion measures) were referred to the Committee on Ways and Means, July 10, 1974. The bill contains a recapture feature which provides that if land is later sold at a higher price than the original valuation, the seller must "rebate" the difference between the sale price and the original assessment. *Id.* at 5-6.

[16]42 U.S.C.A. §§ 4001 *et seq.* (1974 Supp.).

[17]42 U.S.C.A. §§ 4012(a), 4106 (1974 Supp.).

[18]42 U.S.C.A. §4002(b)(3) (1974 Supp.).

[19]The Urban Land Institute, *Energy and Land Use,* ENVIRONMENTAL COMMENT (Sept. 13, 1974).

control, and an important case, since a *water* quality permit was being used to control *air* quality. The federal government effectively decided to limit growth in an area in order to prevent unacceptable future pollution.

The EPA has also assumed extensive land use planning functions under the authority of the Clean Air Act amendments of 1970.[20] Under the Act, the EPA is reviewing plans for large scale developments such as shopping centers and apartment complexes — any project that will attract large numbers of automobiles — as "indirect sources" of air pollution.[21]

In these examples the EPA is acting within its existing authority to enforce pollution standards, but as such decisions become more frequent, they will create more friction between local officials and the federal government. Such single-focus land use control by the federal government has been criticized as excessive, unnecessary, and even illegal. Indeed, legislation has been introduced in Congress to strip the EPA of the land use authority it claims under the Clean Air Act.[22] The disruption and possible economic effects of indirect regulation are legitimate concerns about the EPA approach to land use problems.

Although the Clean Air Act standards must be enforced, the present approach raises legitimate and serious questions about the wisdom of basing land use decisions on air quality alone. An adverse effect of project review, for example, may be to reinforce the move to sparsely settled areas as developers seek cleaner air. Developers may also seek to defeat EPA's objective by opting for smaller scale development to avoid the review process associated with large parking facilities.[23] The EPA's activities provide an example of the indirect influences of federal programs on land use, and underscore the need for states and communities to de-

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[20]42 U.S.C. §§ 1857 *et seq.* (1970).

[21]42 U.S.C. §1857c-5 (1970) requires states to develop an implementation plan to enforce clean air quality standards. The state plan must include methods for review of new sources prior to construction. 42 U.S.C. §§ 1857c-5(a)(4), (d) (1970). If a state plan has not been approved, the EPA, according to regulations promulgated under the Act, reviews the construction proposals. *See* 40 C.F.R. § 52.22(b) (1974), 35 Fed. Reg. 25291-301 (1974). These controls over new construction led Congress to include a restriction in the appropriations bill which prohibits the EPA from using any funds for fiscal 1975 to tax or otherwise regulate parking facilities. H.R. 16901, 93d Cong., 2d Sess. § 510 (1974). The exact legal effect of this provision on the EPA's authority is still unclear, but implementation of the "indirect source" regulations has been postponed until July 1, 1975. 39 Fed. Reg. 45014-15 (1974).

[22]H.R. 15858, 93d Cong., 2d Sess. (1974) was referred to the Committee on Interstate and Foreign Commerce on July 11, 1974. The EPA has established a land use office to coordinate statutory activities within the EPA that have an impact on land use. This announcement followed the defeat of the land use bill in the house (H.R. 10294). The EPA maintains that its land use office only facilitates coordination of existing authority and serves as a liaison with state and local government.

[23]EPA, REPORT ON THE ECONOMIC AND LAND USE IMPACT OF FEDERAL REGULATIONS TO REVIEW INDIRECT SOURCES OF AIR POLLUTION PRIOR TO CONSTRUCTION (Preliminary Draft, 1974).

velop their own comprehensive planning — with applicable pollution standards in mind — in order to avoid additional federal regulation.

Another illustration demonstrates how a federally financed program may influence land use patterns by inadvertently subsidizing urban sprawl. The federal government, through the EPA, finances new sewer trunk lines,[24] many of which are built into vacant areas. Yet the growth and environmental impact of such projects, which naturally encourage further development, are rarely given adequate consideration. Thus, many key decisions about future growth in these communities are made when sewer construction grants are approved. Communities faced with financial obligations to pay their share of the cost are anxious to develop the area rapidly to allow the new community to absorb the amortization costs. In effect, these projects serve as an expensive, long-term inducement to uncharted growth.

III. Federal-State Coordination

Manifestly, federal decision making is not a panacea. Indeed, the proliferation of federal programs and lack of meaningful coordination in federal decision making are difficult obstacles to solving local land use problems. There is often little coordination between agencies within the federal government, and no effective intergovernmental mechanism for settling conflicts. There is no national land use, public works, or growth policy. We should consider developing such policies,[25] but in the meantime it makes sense to require coordination in federal decision making. Land use must become an important element of *national* decision making, just as it must take on more meaning on the state and local level. More cooperation at all levels of government is needed, along with more information on the long-term effects of such projects as building a jet port in the Everglades or developing oil shale in the state of Utah.

A. The New States' Rights

Perhaps a more important aspect of federal decision making is whether federal programs should be required to be consistent with state land use policies and plans. Once a state develops land use planning and the mechanisms for controlling growth, potentially inconsistent and thus disruptive federal activities should be subject to state review. An important, but overlooked provision in the Land Use Planning Act of 1974 required such consistency.[26] It would have allowed states some control

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[24]Council on Environmental Quality, Interceptor Sewers and Suburban Sprawl: The Impact of Construction Grants on Residential Land Use (1974).

[25]*See* Hartke, *Toward a National Growth Policy*, 22 Catholic L. Rev. 231 (1973).

[26]H.R. 10294, at 43-44.

> Sec. 111 (a) Federal projects and activities significantly affecting the use of non-Federal land . . . shall be consistent with comprehensive land use planning processes which con-

over the many federal programs affecting land use, particularly in reference to the crucial energy development decisions that must be made in the next few years.

Preservation of states' rights is a cornerstone of our system of federalism and the new states' rights dialogue concerning energy policy is a healthy sign. Many coastal states are uneasy about the economic and social impact of projected offshore federal leasing programs, not only for environmental reasons, but because of the potential rapid population growth, the strain on existing facilities, and the innumerable social consequences. Indeed, the decision by the Department of Interior to lease up to 10 million acres of the outer continental shelf in 1975 may have done more to promote coastal zone planning than anything since the Santa Barbara oil spill of 1969.[27] Some states are requesting more time and money to plan for the new energy facilities and the secondary effects of mineral development.[28]

Federal-state friction is also developing in western states where the development of coal, coal tar, oil shale, coal slurry, and natural gas deposits is being encouraged by a Department of Interior anxious to begin Project Independence.[29] The western states involved, however, are unenthusiastic about providing energy for the rest of the country while absorbing many detrimental side effects. The rapid growth in many of these energy-rich areas will require construction of bridges, schools, and other facilities to accommodate the mushrooming population.[30] Public officials and private citizens are expressing concern about the effect on the air quality, the water supply, and the quality of life in this region.

These emerging conflicts illustrate the need for more and better planning. The states must act or risk unacceptable social, economic, and environmental consequences. The time to begin land use planning is now if "local control" is to have any meaning and if energy decisions are not to be abdicated to Washington. It is therefore unfortunate that Utah, a state facing many of these energy-related land use problems in the next decade, rejected the land use referendum last November.[31] Moreover, a national land use bill would benefit states such as Utah just as the Coastal Zone Act is now assisting coastal states in developing land management programs.

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form to the provisions of this title, except in cases of overriding national interest as determined by the President.

[27]Washington Post, Nov. 30, 1974, § A (Editorials), at 10, col. 1.

[28]SENATE COMM. ON COMMERCE, NORTH SEA OIL AND GAS: IMPACT OF DEVELOPMENT ON THE COASTAL ZONE (Comm. Print, 1974).

[29]FEA, PROJECT INDEPENDENCE (a summary) (1974).

[30]*Hearings, Payments in Lieu of Taxes, Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs,* 93d Cong., 2d Sess. 74 (1974).

[31]The Utah State Legislature passed land use legislation early in 1974, Senate Bill No. 23, Utah Legislature, 1974 Budget Session. Opponents were able to bring the land use plan up for a referendum vote in the November, 1974, election where it was defeated.

B. The Coastal Zone Management Act: A First Step

In 1972, the President signed the Coastal Zone Management Act (CZMA) into law.[32] This legislation was in response to serious land use problems in our coastal areas where development pressures are clashing with a particularly fragile ecology. In recent years, we have learned a great deal about the ecology of our beaches, wetlands, tidal waters, and salt marshes and the importance of protecting these areas. Yet a substantial part of our industrial society — and our population — is located in the coastal zone and much of our future growth and new energy development is expected to occur there. The CZMA established a grant-in-aid program which assists coastal states to develop the necessary planning framework and policies to balance development needs with environmental considerations. Within 2 years after enactment, 31 of the 34 eligible states[33] qualified for and received funds.

In order to qualify for program development grants under the Act, participating states must proceed to define the coastal zone[34] and to identify what kinds of land uses will be "permissible" within it.[35] In short, the states must assert some authority to regulate development in these areas to preserve and protect the natural resources and environment of these lands and waters.[36]

Under the CZMA, areas affected include coastal waters and adjacent shorelines, extending inland to the extent that these lands have a direct and significant impact on the coast.[37] This is necessarily an arbitrary boundary and may, therefore, contribute to even more fragmented planning and result in developmental pressures on *other* fragile areas outside the coastal zone. Experience has shown that developers look for the area of least resistance.[38] Nevertheless, the CZMA is an important first step in focusing attention on the serious land use problems along the coastlines. A great deal can be learned from what is transpiring in the coastal states under this program. This information will be valuable in developing a similar program for managing growth and development in *all* states.

At the time Congress was considering the coastal zone legislation, land use legislation was also pending.[39] In spite of their similar purpose and

[32]16 U.S.C. §§ 1451 *et seq.* (Supp. II, 1972).

[33]The Act includes as "coastal zone" states those bordering the Great Lakes. 16 U.S.C. §§ 1453(c) (Supp. II, 1972). *See also* Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MANAGEMENT JOURNAL 235 (1974).

[34]16 U.S.C. § 1454(b)(1) (Supp. II, 1972).

[35]16 U.S.C. §1454(b)(2) (Supp. II, 1972).

[36]16 U.S.C. § 1452 (Supp. II, 1972).

[37]16 U.S.C. §1453 (Supp. II, 1972).

[38]*See generally* Comment, *Coastal Controls in California: Wave of the Future?* 11 HARV. J. LEGIS. 463 (1974).

[39]In the 92d Congress, S. 632 passed the Senate in September of 1972, but H.R. 7211, reported by the House Committee on Interior and Insular Affairs, was held by the Rules Committee until adjournment.

approach, national land use legislation has met with much more opposition than the CZMA. In 1972 the CZMA passed the House with only six dissenting votes, yet 2 years later the Land Use Planning Act was rejected by the House of Representatives. At the time, the Administration's position was that comprehensive land use legislation was preferable to the piecemeal approach of the CZMA. The CZMA and the Land Use Planning Act are compatible and legislative and regulatory mechanisms can be developed to coordinate the two programs in coastal states.[40] Eventually, however, one program would be the most efficient and economical approach. Hopefully, the states' acceptance of the CZMA will persuade Congress to develop the comprehensive approach to land use problems that is needed in all areas of the country.

IV. The Land Use Planning Act

A. Legislative Background

During the 3 years that Congress has considered land use legislation, volumes of testimony and commentary have been compiled on the need for federal legislation.[41] There are, of course, legitimate points of disagreement over the exact language; the amount of funding; the relationship between the federal, state, and local governments under the act; and other issues. There is general agreement, however, that existing procedures for land use decision making in this country — at all levels of government — are woefully inadequate.[42] Land use authority is fragmented among thousands of local jurisdictions, with little intergovernmental coordination. Too often decisions are made on inadequate information and public involvement. As a result, decisions are made on an ad hoc basis in reaction to specific problems. Such single focus treatment overlooks the broad range of social, economic, and environmental concerns that are usually involved.

The Nixon Administration originally advocated a national land use bill[43] but reversed its position before the House bill reached the floor.

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[40]H.R. 10294, at 91-92. H.R. 10294 contained provisions to assure that the land use program was in addition to and not in derogation of the CZMA and called for coordination and interaction of the two programs in the coastal states.

[41]*See, e.g., Hearings on S. 268, Land Use Policy and Planning Assistance Act, Before the Senate Comm. on Interior and Insular Affairs,* 93d Cong., 1st Sess. (1973); *Hearings, National Land Use Planning, Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. (1971); *Hearings, Land Use Planning Act of 1973, supra* note 3; *Hearings, Land Use Planning Act of 1974, supra* note 9. *See also* The Use of Land: A Citizen's Policy Guide to Urban Growth (W. Reilly ed. 1973).

[42]*See* F. Bosselman & D. Callies, The Quiet Revolution in Land Use Controls (1971); The Use of Land, *supra* note 41.

[43]*See Hearings, Land Use Planning Act of 1973, supra* note 3 at 218 (testimony of Under Secretary Whitaker and Secretary Morton, Dept. of Interior). Moreover, in his 1974 State of the Union Message, President Nixon said, "[A]doption of the National Land Use Policy Act, first proposed in 1971, remains a high priority of my Administration." 120 Cong. Rec. (daily

Despite support from state and local government organizations and many citizens, labor, and trade associations,[44] the House of Representatives voted on June 11, 1974, not to debate H.R. 10294, effectively blocking any further consideration of a land use bill in the 93d Congress. The change in Administration policy, and opposition by the Chamber of Commerce, agricultural, timber, business, and right-wing organizations contributed to the House vote.

B. Procedure for Land Use Planning

The Land Use Planning Act would have provided $100 million a year for 8 years to assist states in developing comprehensive land use planning.[45] The Department of Interior would have administered the program, providing initial grants to states that have established a land use agency with primary authority for developing and administering a land use planning process and also an intergovernmental advisory council consisting of elected local government officials.[46] Participating states would have 3 years to develop a planning process.[47] Thereafter, additional grants would be predicated on whether the state had in fact developed and was beginning to implement a land use program consistent with the terms of the Act. The bill's purpose was to encourage participating states to develop a procedural framework and state policies, but it did not provide for federal review of state or local decisions concerning land use on nonfederal lands.[48] The Secretary of the Interior would not review state or local land use decisions but would merely determine whether the state had developed a program which met the procedural requirements set forth in the Act. Thus, while H.R. 10294 required participating states to develop policies and to regulate land use involving certain critical areas and activities,[49] the federal government would not determine which areas were "critical" or what kinds of development would be permitted within those areas.[50]

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ed. Jan. 30, 1974) at H 373. On February 26, 1974, however, the Rules Committee was informed that the Nixon Administration had changed its position concerning the Interior Committee-reported bill. After several months of uncertainty, the White House announced on May 14 that the Administration supported a substitute measure introduced by Congressmen Rhodes and Steiger of Arizona (H.R. 13790).

[44]Active support was received from several groups including the National League of Cities, U.S. Conference of Mayors, the National Association of Counties, the National Association of Regional Councils, and the Council of State Governments.

[45]H.R. 10294 §§ 103 (a), (c).

[46]*Id.* § 108(d).

[47]*Id.* § 104.

[48]*Id.* § 106(d).

[49]This emphasis on process rather than a single land use plan parallels the approach taken by the American Law Institute. *See* ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, 1971).

[50]A provision did allow for federal review of state designation of "areas of critical environmental concern of *more than statewide significance*" but only authorized the Secretary to deny

The procedural emphasis of the Act is based on at least three premises. First, most states lack a decision-making process for managing future growth and land use patterns which takes into account all relevant economic, social, and environmental considerations, and which provides for maximum public involvement.[51] Moreover, a land use plan without some means for implementation and enforcement is basically meaningless. Finally, it may be years before most states develop a statewide land use plan, but that is insufficient reason to delay reform of our archaic land use decision-making mechanisms.

The Land Use Planning Act also reflects the growing awareness that some land use decisions have a significant impact outside the local jurisdiction involved. In these cases, the state, the region, and sometimes the nation have a legitimate interest in the outcome. While perhaps 90 percent of all land use decisions affect only the immediate jurisdiction involved — and should rightfully remain subject to local control — the state should play a role in the broader land use questions. Many decisions are matters properly of state concern: the siting of public facilities such as airports and highway interchanges; developments of regional benefit including energy facilities and low-cost housing; large-scale developments including large scale subdivisions and land sales projects; and developments in flood plains, wetlands, and natural hazard areas.[52]

The states do have, under their police powers, the authority to regulate land use in the interest of the health, welfare, and safety of their citizens.[53] A number have already developed specific legislation to regulate land use in wetlands,[54] along scenic waterways,[55] and other critical areas.[56] In most cases, however, this authority has traditionally been delegated to local government where it has been exercised through zoning regulations. The Land Use Planning Act was a straightforward appeal to the states to assert some statewide control and establish regulatory policies for critical areas and activities which cut across jurisdictional lines.[57] Currently,

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additional grants if the states had not *designated* an area that the Secretary had determined was of more than state concern. This still did not allow for federal review of state *decisions* affecting such an area. H.R. 10294 § 108(d)(2).

[51]ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, at 5 1971).

[52]The Coastal Zone Management Act requirements for development within the coastal zones are reflected in H.R. 10294. *See, e.g.*, 16 U.S.C. §§ 1454(b)(3), (b)(6); 1455 (c)(8), (e)(2) (Supp. III, 1973).

[53]The landmark case is Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). For a discussion of this case see S. TOLL, ZONED AMERICAN 213-53 (1969).

[54]CONN. GEN. STATE ANN. §§ 22a-36 to -45 (Supp. 1974); MD. ANN. CODE art. NR, §§ 9-101 to -310 (1974).

[55]ORE. REV. STAT. §§ 390.805-.925 (1973).

[56]A Summary of State Land Use Controls, published by Land Use Planning Reports, Washington, D.C. July, 1974. *See also* Environmental Policy Division, Congressional Research Service, NATIONAL LAND USE POLICY LEGISLATION 93d CONG., ANALYSIS OF LEGISLATIVE PROPOSALS AND STATE LAWS (1973).

[57]H.R. 10294 required, for example, that states develop a method of implementation to

thousands of jurisdictions exercise land use controls. The resulting proliferation and fragmentation of authority are not conducive to rational decision making.

It is important to point out that this legislation did not seek to usurp the important role which local government can and does play within a comprehensive statewide planning process. Indeed, the states were encouraged to continue to utilize local governments for developing and implementing land use controls and criteria.[58] In addition, where state and local decisions were inconsistent, an appeals procedure was provided to resolve the conflicts.[59]

In sum, the land use planning process defined by this Act would encourage local involvement and local implementation in the majority of land use decisions, but state oversight and the adoption of specific state policies for areas of critical concern would also be required. Regional and interstate cooperation would be encouraged as well.[60]

C. The Public Lands

The Land Use Planning Act also provided planning for the publicly owned land.[61] It is proper to require the federal government to plan for the public lands if we are to ask the states to increase their planning efforts for nonfederal lands. Public land use planning involves many special problems. In many of our western states there are contiguous nonfederal and federal lands, checkerboard ownership patterns, and an excessive number of federal managing agencies. All of these factors make planning more difficult and require more coordination between local and federal land managers. Our public lands also hold considerable untapped mineral resources including coal, oil shale, geothermal steam, oil, and natural gas, much of which, with careful planning, will help to fill future energy needs. These lands also provide timber for forest products and forage for much of our livestock production, and are perhaps our greatest recreational and aesthetic national resource. Further, it is now clear that the federal government will retain ownership of the public lands for the use and enjoyment of all future generations.[62] We need, therefore, to plan carefully for the protection and wise use of these resources[63] to balance our recreational, economic, and environmental

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regulate the use of land within areas involving critical land use activities of more than local concern. H.R. REP. No. 798, 93d Cong., 2d Sess. 47 (1974) [hereinafter cited as H.R. REP. No. 798].

[58]H.R. 10294, § 106(b).

[59]*Id.* § 106(c)(2).

[60]*Id.* § 107.

[61]*Id.* §§ 301-04.

[62]This was the recommendation of the Public Land Law Review Commission. *See* note 10 *supra*.

[63]H.R. 10294 § 201 provided for a study of the need for land use planning for the 90 million

needs. The Land Use Planning Act of 1974 would mandate such planning.

In addition to his duties regarding the unique land use planning problems of the public lands, the Secretary of Interior would be directed to conduct a study and submit recommendations to the Congress concerning future national land use policies.[64] In recent years there has been more and more interest in the feasibility of developing a national growth policy. Although several bills of this nature have been introduced and hearings held,[65] the idea is still at the discussion level. The study proposed would provide a means for focusing more national attention on the questions of growth and land use. Do we want to consciously influence growth patterns on a national level, encouraging growth in some areas of the country and discouraging it in others? And, if so, is it possible to do so under our existing federal system?

D. Sanctions and Incentives

No state would be required to participate in the grant program to be established under the Land Use Planning Act. Economic "sanctions" against those states not participating after 3 years were originally suggested, but because of strong opposition, were dropped from the bill.[66] These sanctions were in the form of reduced federal grants for airports, highways, and recreational programs,[67] all of which are activities with substantial land use impacts.

There were, however, some direct and indirect incentives for states to participate. Primarily, the Act provided federal money to states qualifying under the Act.[68] A less obvious incentive was a provision requiring public hearings in any state not participating in the program after 5 years before any "major federal land use activity affecting non-federal lands" in that state could be approved.[69] These hearings would serve as a forum for consideration of the application of the policies set forth in the Act. This procedure would insure that federal programs would be compatible

acres of Indian reservation lands. There was considerable controversy over the question of what authority tribes do or should have over non-Indians with holdings within Indian reservations. These complexities were left for further study before actual establishment of a grant program for Indian tribes and a task force would be appointed to conduct a 2-year study. H.R. REP. No. 798 at 38-41.

[64]*Id.* § 403.

[65]*Hearings on the Impact of Growth on the Environment, Before a Subcomm. of the Senate Comm. on Public Works,* 93d Cong., 1st Sess. (1973); *Hearings on a National Public Works Investment Policy: A Strategy for Balanced Population Growth and Economic Development, Before a Subcomm. of the House Comm. on Public Works,* 93d Cong., 1st Sess. (1973).

[66]For a discussion of the "cross-over" sanctions issue see H.R. Rep. No. 798 at 33-35, 69-70.

[67]H.R. 10294 § 112.

[68]The bill authorized $100 million a year for 8 years in matching grants, the federal government providing 75 percent of the cost. *Id.* §§ 408, 409.

[69]*Id.* § 110.

with the policies established by this bill even in those states which had not yet established a land use planning process.

Perhaps one of the strongest incentives for states to participate[70] is the "federal consistency" provision. Under the Act, the states could determine what federal activities are acceptable as "consistent" with their own land use policies and plans. The states would not have an absolute veto, but the bill provided the framework for federal-state cooperation with some leverage for the states.

V. The Controversy

Land use, as I hope I have demonstrated, is a problem with federal, state, and local dimensions that requires the attention and resources of the federal government. Certainly national leadership is now needed to develop and coordinate new and imaginative land use policies. The proposed bill, however, was never enacted in large part because of the controversial nature of land use planning. Many of the arguments against the Act were the result of misunderstandings that have been exploited and stretched out of proportion by land use opponents. Property owners have been told, for example, that land use planning threatens their property rights. Further, real estate developers and environmentalists have questioned the appropriate land uses from contrasting positions. Finally, many are concerned about energy resource development as related to land use policies. Any new land use decisions will have to face similar challenges.

A. The Equity Issue

A pervasive and very difficult policy question underlying land use planning is whether a property owner who suffers an economic loss as a result of some land use decision should be compensated for his loss and conversely, whether other property owners who reap significant economic benefits from governmental decisions have an inherent right to a windfall. Should not a system be devised to balance "windfalls for wipe outs"[71] among property owners? Is there any inherent right to maximize development potential and profit from land when it is through community services and other acts of governent that a new value is created?

The problem is one of regulating land use to protect the environment and the community's health and safety within the bounds of the fifth amendment. In some cases, the local or state government may have to condemn and purchase property, but compensation should be required only where the regulation of use effectively denies an owner any economic return. In most cases, some alternative relief for the property owner could be devised.

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[70] *Id.* § 111.

[71] Hagman, *Windfalls for Wipeouts*, The Good Earth of America 109 (C. Harris ed. 1974).

Although federal legislation for land use control anticipates more vigorous regulation of land use by state and local governments, it is clear that all such regulation must be within the bounds of the fifth amendment. In fact, H.R. 10294 included a significant disclaimer that nothing in the Act would "enhance or diminish the rights of owners of property as provided by the Constitution of the United States."[72] Despite this, critics claimed that states would prohibit or inhibit land development, particularly within areas of critical environmental concern.[73] The anticipated regulation was seen as a serious threat to private property rights. Although the bill only required the states to develop methods to regulate land use, the emotional issue of private property rights was injected into the debate. As Russell Train, Administrator of the Environmental Protection Agency, once stated:

> Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate over land use legislation in the Congress and in State legislatures throughout the country.[74]

The sponsors recognized that there is a gray area between what is proper state regulation under the police power and what amounts to a "taking" that requires compensation, and that existing precedents offer little guidance.[75] In 1922, Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[76] The courts have since applied a "balancing test" in a manner that defies generalization.

In light of this problem, the Committee on Interior and Insular Affairs did not attempt to write into this legislation any specific provision mandating the states to pay compensation in particular situations, but instead wisely left this matter to applicable state law and constitutional safeguards. Indeed, the central idea inherent in the bill is that land use regulation can be accomplished without compensation in most cases.

There are a number of techniques which can be utilized in conjunction with legitimate regulation and land use controls that can provide some equity other than condemnation compensation to property owners affected by the regulation. States are experimenting, for example, with preferential tax assessment,[77] creation of agricultural districts to protect

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[72]H.R. 10294 § 106(d)(3).

[73]*Id.* §§ 105(b), 106(c)(1).

[74]Train, *Foreword* to F. BOSSELMAN, D. CALLIES & J. BONTA, THE TAKING ISSUE, (1973).

[75]For a discussion of the case law, see F. BOSSELMAN, D. CALLIES & J. BONTA, THE TAKING ISSUE, *supra* note 78 at chapter 9.

[76]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[77]*See generally* U.S. DEP'T OF AGRICULTURE, ECONOMIC REPORT NO. 256, STATE PROGRAMS FOR

farmland from development,[78] restrictive agreements,[79] and the transfer of development rights.[80] These are all mechanisms which promote rational land use and the maintenance of open space, but also consider economic burdens imposed on property owners.

States should also consider alternatives to the present property tax system, such as taxing at use value. In many ways, the tax assessors have been the land use planners in this country, in that our property tax system has had an enormous, often adverse, impact on land use, since property assessment generally reflects development potential.[81] In many cases the property tax results in open space and farm land being sold and developed rather than maintained in its existing uses.

Zoning ordinances are another form of land use control commonly utilized on the local level. The point is, states can regulate land use in "critical areas" without encountering major problems with the private property "question." An example of accepted state "zoning" is the Connecticut wetlands law. It does not prohibit all development in fragile wetlands, but does require a permit for certain uses. If an aggrieved land owner claims there has been a "taking" and he is being denied the effective use of his property, the court can either grant or deny compensation or remand the case to the appropriate agency for reconsideration or modification of the permit.

As we have matured as an industrial society, there has been a growing sophistication and increasing acceptance of the public right involved in actions involving private land.[82] Still, a great deal of future land use regulation will depend on a continuance of the shift in attitudes about "ownership" of land toward acceptance of the idea of "stewardship" and on a recognition that development rights are not inherent in the ownership of land itself, but are severable and can be transferred.

Most assuredly, the issue of private property rights is a difficult one, but it is one that can be resolved. I think most members of Congress

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THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND. Preferential assessments have been criticized for not being effective enough to curb development once the price is right — even where there is a recapture provision for back taxes. *See* NADER TASK FORCE REPORT ON LAND USE IN CALIFORNIA, POWER AND LAND IN CALIFORNIA (1971).

[78]New York has such a law. N.Y. AGRIC. & MKTS. LAW §§ 300 *et seq.* (McKinney 1954).

[79]*E.g.*, CAL. GOV'T CODE § 51252 (West Supp. 1974). The California Land Conservation Act of 1965 (The Williamson Act), CAL. GOV'T CODE §§ 51200 *et seq.* has been criticized as providing tax subsidies for big land owners. *See* NADER TASK FORCE REPORT *supra* note 72. The next step may be mandatory restrictive agreements — to effect the right lands — or preferential assessment and a capital gains tax on land sales to make up for the loss in revenue.

[80]At the present time, legislation for transfer of development rights is being considered in New Jersey and Maryland. The purpose is to preserve certain areas from development without denying property owners of economic benefits.

[81]CONGRESSIONAL RESEARCH SERVICE FOR SENATE SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT OPERATION, 92d Cong., 2d Sess., PROPERTY TAXATION: EFFECTS ON LAND USE AND LOCAL GOVERNMENT REVENUE (Comm. Print. 1971).

[82]F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

understood that the Land Use Planning Act was not a threat to constitutional rights, but many conservative and right-wing organizations in this country opposed the bill on this basis and were able to generate a tremendous public response to this emotional issue. I am convinced that rational land use planning in the long run *enhances* property values rather than diminishes them, and I remain hopeful that this viewpoint will be accepted by the people and the Congress.

B. The Economic Question

A second major problem which the concept of land use planning attempts to resolve is the rational balancing of economic and environmental needs. We have learned from sad experience that the market system does not include the social costs of a polluted environment. These costs are "external" and, in the majority of cases, can only be charged to the causal corporation through a nonmarket mechanism. Comprehensive land use planning would include a consideration of these costs.

Moreover, there were claims that the land use legislation was based on a "no growth" philosophy and would slow or even halt new construction, and that it would lead to vexatious litigation, further delaying new development. Yet the bill's supporters, including a number of national associations representing important elements of the real estate and development industry, believed that the legislation adequately balanced environmental and economic considerations. Indeed, the Act required that all demands for the land be given full consideration.[83] One purpose was to encourage states to develop a process in which development decisions could be made in a rational and fair manner. The legislation was supported by realtors and shopping center developers simply because right now they are facing layers and layers of bureaucratic requirements, multiple proceedings at all levels of government to obtain permits, expensive delays, and duplicative proceedings which are too often followed by litigation. Builders and developers have a legitimate right to some predictability as to when and where they will be permitted to build. States should develop an open process which will consider *all* interests, and within which the necessary economic decisions can be made.

In the past, developers have generally had their way in local zoning decisions. Now, however, the climate is markedly different with concerned citizens and suburban groups stopping development proposals, enacting moratoriums, and resorting to the courts to prevent unwanted developments. Environmentalists oppose expediting development decisions. Businessmen are beginning to accept the need for a thorough evaluation of the environmental considerations, but they also want decisions made with some finality. Developing an open process which guarantees public involvement at all levels and facilitates development deci-

[83]H.R.10294 § 105(c).

sions should help and not hinder the economic sector.

Environmentalists, while supporting the land use legislation generally, were concerned about state review of local decisions concerning "developments of regional benefit."[84] They believed, for example, that if a community rejects a refinery, the state should not have the authority to overrule this decision, or if there is a state siting decision, the community should have an opportunity to veto.

Nevertheless, the states should have some role in reviewing land use decisions which have an impact beyond the immediate jurisdiction. Refineries, for example, have to be sited. Moreover, planning to accommodate our future housing needs — for all income levels — must be given wider consideration. These decisions should not be made solely on the basis of local support or opposition especially when egregious environmental problems affecting the entire state may result.

C. Energy and Land Use

There is another aspect to the economics of land use planning. The Arab oil embargo forced us to reexamine our extravagant energy consumption habits. If we are to move toward energy self-sufficiency, and at least cut our dependence on foreign sources, the most sensible way is through energy conservation. Moreover, energy conservation is relevant to our inflationary problems — for example, a cut of 20 percent of our total consumption would reduce imports by 50 percent, saving us about $10 billion a year. At the present time, energy consumption in this country is increasing by the unacceptable rate of approximately 4½ percent per year.[85]

We should begin now to reward and encourage energy conservation. Our existing land use patterns and practices are good examples of how we waste energy. The way we have designed our residential developments and our cities is a case in point, as a new government report, "The Costs of Sprawl," demonstrates.[86] The study showed that a high density

[84]*Id.* § 105(f) provided that states develop a process to "assure that local regulations do not unreasonably restrict or exclude development and land use of regional or national benefit."

[85]Morris K. Udall, *Reducing the Demand for Energy,* New York Times, Oct. 25, 1974, § 1 at 39, col. 2. In the 93d Congress, Congressman Udall sponsored the National Energy Conservation Act, H.R. 11343, 93d Cong., 1st Sess. (1973), as reported from the House of Representatives Committee on Interior and Insular Affairs, Dec. 10, 1974 (H.R. REP. No. 1546, 93d Cong., 2d Sess. (1974)). The bill would have established a Council on Energy Policy to regulate the national rate of growth in energy use. The present rate of growth is in excess of 4.5 percent a year (over 7 percent in the electrical sector) while the legislation set a goal of 2 percent growth per year, a figure also recommended by the recent Ford Foundation Energy Policy Project. *See* ENERGY POLICY PROJECT OF THE FORD FOUNDATION, A TIME TO CHOOSE, AMERICA'S ENERGY FUTURE (1974). *See also Hearings on H.R. 11343 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs,* 93d Cong., 2d Sess., ser. 55 (1974).

[86]REAL ESTATE RESEARCH CORPORATION, THE COSTS OF SPRAWL, ENVIRONMENTAL AND ECONOMIC COSTS OF ALTERNATIVE RESIDENTIAL DEVELOPMENT PATTERNS AT THE URBAN FRINGE (1974).

planned development utilizes 50 percent less energy than the more common low density sprawl we see in American suburbia.[87] One estimate is that by planning our future communities along the lines suggested by the study, we could cut the streets needed by as much as 75 percent.[88] Since transportation accounts for one-fourth of our overall energy use, this would be a significant saving. Over a 30-year period, for example, it is estimated that this could save 1.5 billion barrels of crude oil — at the present level, a year's worth of imports.[89]

There are, of course, many other ways energy conservation and land use are related. As the former head of the Federal Energy Administration, John Sawhill, has stated:

> With energy conservation as an imperative for public policy, urban leaders have a new incentive to make needed changes. The growing satellite suburbs and shopping areas around our core cities seem even less viable. The ribbons of concrete expressways that once generated civic pride now seem more like liabilities. The glass-walled office towers now seem less aesthetic than energy wasting.[90]

The impact of mounting energy costs is staggering. Indeed, it may well be that the combination of high energy prices and other economic costs of sprawl have taken out of the reach of most American families the possibility of living in a single family home.[91] I submit that energy conservation must be a more significant factor in future land use decision making in this country.

VI. Conclusion

If we are going to avoid the continued waste and exploitation of our resources and the high economic and social costs resulting from existing land use patterns in this country, we are going to have to develop a more rational and comprehensive approach to land use planning. While it may be true that we are not yet running out of land, there are increasing conflicts over uses for our best land. We cannot ignore the danger signs. I do not think Americans want more smog alerts, polluted rivers, or crowded freeways. We have used up some of our best land and are losing other valuable areas to erosion, concrete, and a multitude of uses without regard for the consequences. If we are to get through an age of scarcity

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[87] *Id.*

[88] The Urban Land Institute, *Energy and Land Use,* Environmental Comment (Sept. 13, 1974).

[89] *Id.*

[90] Address by John Sawhill, former Administrator, FEA, Greater Philadelphia Chamber of Commerce, June 14, 1974.

[91] Lippman, *1-Family Housing Costly, Inefficient,* Washington Post, Oct. 21, 1974, § 1 at 1 col. 5.

we are going to need better national resource planning,[92] and we need to decide, as states and as a nation, which lands are important for what uses — which lands are scenic or fragile and should be protected, which lands are essential to fulfill our future food and fiber needs, and which areas should be designated for residential or commercial development. As Aldo Leopold once said, "land is not a commodity but a community to which we all belong."[93]

[92]Russell Train, Administrator of the Environmental Protection Agency, has called for national resource planning. Train, *The Challenge of Scarcity*, 74 *Cry California, the Journal of California Tomorrow*, (1974).

[93]A. LEOPOLD, A SAND COUNTY ALMANAC (1949).