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## National Land-Use Planning in America: Something Whose Time Has Never Come

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# National Land-Use Planning In America: Something Whose Time Has Never Come<sup>1</sup>

Jerold S. Kayden \*

## I. INTRODUCTION

In 1986 Daniel Mandelker authored a casebook, entitled *Federal Land Use Law*, that classified, correctly, a number of laws enacted at the national level of government as “land use” laws. More recently Vice-President Al Gore has made the issue of sprawl a national one, decrying prevalent development patterns in metropolitan and fringe areas and urging the implementation of a more planned approach to land-use. To the American land-use expert, including Daniel Mandelker, however, neither the Mandelker casebook nor the Vice-President’s anti-sprawl proposal would be evidence that the United States has, or will have, a system of national land-use planning in the sense that experts from other countries would understand that term. Indeed, American experts would list, in order of importance, the local level, the state level, and the national level as exercising *de jure* and *de facto* authority over land-use planning and regulation. This reality is so readily accepted by the American audience, and so shocks an international one bred in countries steeped with systems of national land-use planning, that it becomes worthwhile to explore anew the nature of our land-use planning and regulatory system and suggest why it is locally based and why it is unlikely to become anything but locally or state based.

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1. This article is adapted from a chapter that will appear in a forthcoming book comparing national-level land-use planning in countries around the world. *See NATIONAL-LEVEL SPATIAL PLANNING IN DEMOCRATIC COUNTRIES: TIME FOR A REEXAMINATION* (Rachelle Alterman ed., forthcoming 2000). In order to explain the United States system to an international audience, parts of the chapter and this Article necessarily till soil familiar to the American planning law expert.

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This article discusses the legal and institutional structure for land-use planning and regulation in the United States, concluding that the national government has not and does not practice what would constitute national land-use planning as that term is commonly understood in the United States and abroad. The reasons for this absence stem from a country-specific blend of constitutional, historical, cultural, and economic ingredients that together favor local land-use planning and regulation over higher level exercises. Recent experience indicates greater interest in and acceptance of state-level planning and regulation, especially in regions of the country facing high growth rates and threats to environmentally sensitive lands. This “rise up the ladder” to a higher level of government, however, shows no signs of topping out at the national level, and the conditions that have previously confined the national role show no signs of abating.

To the extent it exists, the national role finds itself expressed through a patchwork of laws, institutions, and actions covering five principal areas: environmental regulation; management of nationally-owned land; transportation policy and finance; housing and economic development subsidies; and anti-land-use planning and regulation. Although singly and together these patches have a substantial impact on the use and development of land, they do not assemble into a coherent, comprehensive approach worthy of the label “national land use planning.”

## II. WHAT IS MEANT BY NATIONAL LAND USE PLANNING AND ITS ABSENCE IN AMERICA

In discussing the presence or absence of national land-use planning, the definition of terms is essential, especially if they are to be understood in an international context in which comparative analysis is relevant.<sup>2</sup> As employed in this article, land-use planning is a process conducted by public officials to analyze and recommend in a comprehensive manner, from social, economic, environmental,

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2. See Rachelle Alterman & Jerold S. Kayden, *Developer Provisions of Public Benefits: Toward a Consensus Vocabulary*, in PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 22-23 (Rachelle Alterman ed. 1988).

infrastructure capacity, aesthetic, and other relevant aspects, the best present and future uses of geographically specified land areas. The usual product of public-sector land-use planning is a land-use plan, consisting of text and maps, covering a defined area such as a neighborhood or municipality. The plan itself does not directly control the use of land, although it may indirectly control use by influencing or directing the regulation, such as zoning and subdivision, that expressly control such use.<sup>3</sup> National land-use planning, then, would be land-use planning conducted by national government agencies. Other adjectival words, such as territorial, spatial, and positive planning, are not a usual part of the American legal and professional planning vocabulary, although they may be found in academic literature, especially that written for international audiences. Sectoral planning such as economic or social welfare planning, and planning for infrastructure projects, public land, public housing, and economic development among others, are not understood by American planners to be part of the conventional land-use planning practice.

Unlike many other countries, the United States does not have a national land-use planning law denominated as such nor any other differently named national law that would be construed as its functional equivalent.<sup>4</sup> Furthermore, there is no articulated or commonly accepted national land-use policy emanating from executive or legislative branches that, although short of a law, guides national executive or legislative actions. When it comes to characterizing the national role, members of the professional, academic, and lay communities involved in land-use planning and

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3. Charles Haar's pathbreaking law review article first illuminated the different legal statuses for the comprehensive land-use plan, including the possibility that it might have no meaningful legal status vis-à-vis land-use regulation. See Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155-57 (1955). Today, the legal status of the comprehensive plan varies from state to state. See Robert Lincoln, *Implementing the Consistency Doctrine*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 89-104 (1996).

4. Understanding a country's formal legal framework, as articulated by its declarative laws, does not necessarily provide adequate assistance in decoding the nation's true legal and institutional posture for a given area of law and policy. "Black letter" laws and implementing institutions may mask, as much as reveal, empirical realities forged by history, culture, economics, and politics. In the case of the United States, however, there is neither a de jure nor a de facto national land-use law or policy.

regulation would not deem it primary.<sup>5</sup>

The lone attempt to enact legislatively a national land-use policy law,<sup>6</sup> albeit a toothless one, foundered politically close to thirty years ago. Introduced by Senator Henry M. Jackson on January 29, 1970, Senate Bill S. 3354, the “National Land Use Policy Act of 1970,” proposed to establish “a national policy to encourage and assist the several states to more effectively exercise their constitutional responsibilities for the planning, management, and administration of the Nation’s land resources through the development and implementation of comprehensive ‘Statewide Environmental, Recreational and Industrial Land Use Plans,’ (hereinafter referred to as Statewide Land Use Plans) and management programs designed to achieve an ecologically and environmentally sound use of the nation’s land resources.”<sup>7</sup>

The proposed law did not authorize the national government to plan, let alone regulate, the use and development of land or the location of infrastructure. Instead, it merely intended to engage national, state, and local levels in a process of consultation and information exchange on matters of land-use, a step that would nonetheless represent a substantial expansion of the extant national role. The original Jackson bill never came to a vote in the Senate, but subsequent versions, watered-down from the original and receiving only luke-warm support from the Senator himself, eventually garnered majority support in the Senate but failed in the House of Representatives.<sup>8</sup> Simply put, even the thin gruel of national land-use policy represented by S. 3354 and successor bills proved politically inedible.

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5. Daniel Mandelker’s casebook, *FEDERAL LAND USE LAW*, explores federal laws affecting the use of land but never makes the claim that there is comprehensive national land-use policy, planning, or regulation as those terms are employed in this article. See DANIEL MANDELKER, *FEDERAL LAND USE LAW* (1986). The 1977 edition of a general land-use law casebook devoted only nine out of 1,084 pages to national land-use policy. See CHARLES M. HAAR, *LAND-USE PLANNING* 1078 (3d ed. 1977). Even that slight entry disappeared in the casebook’s 1989 edition. See CHARLES M. HAAR & MICHAEL WOLF, *LAND-USE PLANNING* (4th ed. 1989).

6. S. 3354, 91st Cong. (1970).

7. *Id.* at § 402(a).

8. Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation* (last modified Nov. 3, 1999) <<http://www.law.pace.edu/landuse/library/jackso~1>>.

Instead, the historical record of land-use planning over the course of the past century shows that legislative and administrative efforts in land-use planning and regulation have predominantly occurred at the state and local levels. States have constitutional authority under their so-called “police powers”<sup>9</sup> to plan and regulate the use and development of land. Under that authority they have legislated the structure within which land-use planning and regulation takes place, enacting laws that enable, mandate, or guide local governments in their adoption of local land-use plans and regulations.<sup>10</sup> Although the national government inspired states to engage in land-use planning in the 1920s, especially through the preparation of model legislative acts on zoning and city planning drafted by ad hoc national advisory committees appointed by Secretary of Commerce, later President, Herbert Hoover, it never went further in its assertion of authority.<sup>11</sup>

Furthermore, even as states have legislated the basic structure of planning and regulation, they have played only a supporting role to local governments, which exercise the greatest *de jure* and *de facto* control over the use and development of the majority of land holdings in the United States. Virtually all local governments have adopted local zoning ordinances to control land-use within their political boundaries, and such laws have more often than not enjoyed a near absolute status as untouchable local government prerogatives, even when such regulations stand in the way of higher level goals and even though the legal authority for such local actions paradoxically devolves from higher level laws. Planning is similarly local in practice. The model of the local plan, known variously as the comprehensive, general, or master plan, covers only the area within a local jurisdiction. Land use plans spanning a region larger than one municipality, let alone a state, are still the exception rather than the rule, although there is some movement up the ladder over the past

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9. Although never mentioned in the national constitution, the “police power” refers to the residual power of state government to enact laws that promote or protect the health, safety, morals, and general welfare of its citizens.

10. See Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in *MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 1-17* (1996).

11. See U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1924); U.S. DEP’T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1927).

twenty-five years as part of a “quiet revolution” in land-use administration.<sup>12</sup>

### III. EXPLANATIONS FOR THE NATIONAL ABSENCE

What explains the national absence in land-use planning in the United States, as well as the strong preference for local planning? Explanations derive from a complicated mixture of American law, history, culture, institutional capacities, political structures, economic systems, demography, land utilization and ownership patterns, stages of nationwide development, and the like. Although it would be too lengthy an effort here to rehearse all factors, it is worth discussing the more significant ones.

To begin with, in a federal system whose central government emerged after, rather than before, the constituent states, it is not altogether surprising that the allocation of governmental roles and responsibilities in land-use would not automatically be understood as a national responsibility. The constitutional articles that allocate roles and responsibilities to the President and Congress do not mention land-use planning. Indeed the Constitution’s only reference to what may be expressly deemed a planning subject occurs in the Bill of Rights, through the Fifth Amendment’s injunction against takings for public use without just compensation.<sup>13</sup> Thus, at the time the national system was established, the framers did not put their thumbs on the national planning side of the scale.

This is not to say, however, that the national government would lack the authority, pursuant to interpretive United States Supreme Court opinions, to engage in national land-use planning.<sup>14</sup> The national government enjoys supreme authority to enact laws that govern matters affecting the interests of more than one state, even if

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12. See David Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 19-26* (1996).

13. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

14. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (rejecting claims that it is beyond the authority of the federal government to regulate mining on land).

individual states or citizens disagree.<sup>15</sup> Article I, Section 8 grants to Congress the power to regulate commerce among the several states (the “Commerce Clause”).<sup>16</sup> It may easily be argued that because the use of land by one party inevitably affects others and because such “others” can reside across state lines from the initial user, the Constitution axiomatically grants the national government the power to control local land-use. Although recent United States Supreme Court decisions have chipped away at any automatic presumption of sweeping national authority,<sup>17</sup> it is unlikely that national land-use planning as such would fall on the unconstitutional side of the line.

Another factor explaining the absence of national land-use planning is the very size of the United States, compared to that of other countries, and the resulting greater possibility of topographical, economic, social, and cultural variations that would intrinsically complicate efforts to plan and regulate centrally. The idea of a Washington, D.C.-based official, or even a regional representative, attempting to plan and control land-use development for each and every American city and town is on its face an operational nightmare. Furthermore, the United States does not face overwhelming national imperatives, such as grave natural resource deficiencies, neighboring military threats, or the challenges of early stages of economic development, that have elsewhere rendered national land-use planning and regulation a matter of national survival rather than one of arguably greater efficiency and equity. Indeed, it has been at times of great national crisis that the United States government has come closest to introducing far-reaching initiatives involving aspects of land-use planning. For example, when faced with the development of the mid-western and western portions of the country in the 1800s,<sup>18</sup> the Depression of the 1930s,<sup>19</sup> and the urban riots of the late 1960s,<sup>20</sup>

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15. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . .”).

16. U.S. CONST. art. I, § 8.

17. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (striking down parts of federal gun control law as impinging upon residuary and inviolable state sovereignty guaranteed by provisions of the Constitution); *United States v. Lopez*, 514 U.S. 549, 559-67 (1995) (striking down federal gun control law as beyond power of national government under Commerce Clause).

18. *See* PETER WOLF, *LAND IN AMERICA: ITS VALUE, USE AND CONTROL* 36-66 (1981).

19. The National Planning Board and the Tennessee Valley Authority are two examples of



the national government sponsored initiatives involving aspects of national planning approaches. Without the constant presence of such concerns, however, the imperative to institutionalize such interventions has faltered.

The relative primacy of private property and private market ideology in the United States provides another explanation for the meek national role. In a country where the percentage of privately owned land has been estimated at roughly sixty percent of all land,<sup>21</sup> it is understandable that the national government may have less of a claim or interest in what should happen on that land than in countries where land is or has been owned predominantly by the state.<sup>22</sup> Americans historically have valued private property in land, and that sentiment has diminished the ability of all levels of government to plan and regulate in ways that unduly upset private property owner expectations.<sup>23</sup> Overall, the fundamental role of the private sector in the American economy fosters a strong counterweight to government authority, and this reality touches land-use regulation as well as other public-private interactions.

Another explanation for the absence of national land-use planning is the preference many individuals appear to express for local control over their lives. Some observers argue that smaller, i.e., local governments, are inherently more responsive to citizens than larger,

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aggressive federal government responses to the Depression. See MEL SCOTT, *AMERICAN CITY PLANNING* 300-16 (1971).

20. President Lyndon Johnson's "Great Society" programs attempted to calm, involve, and rejuvenate inner cities in part through participatory planning efforts. See, e.g., *Demonstration Cities and Metropolitan Development Program*, 42 U.S.C. § 3301 (1966) (stressing constructive engagement of neighborhood residents).

21. Wolf, *supra* note 18, at 443.

22. In the territory comprising the former Soviet Union, for example, states and republics attempting the difficult transition from state to mixed private-state ownership have begun to reconsider their national planning and regulatory legal frameworks to match the potential changes in ownership patterns. See JEROLD S. KAYDEN ET AL., *A GUIDE TO LAND AUCTIONS IN UKRAINE* 43-82 (1995); INTERNATIONAL FINANCE CORPORATION, *LAND PRIVATIZATION AND FARM REORGANIZATION IN RUSSIA* 1-5 (1995); Jerold S. Kayden, *The Role of Government in Private Land Markets*, in *PRIVATIZATION OF LAND AND URBAN DEVELOPMENT IN UKRAINE* 55-69 (1993).

23. The Supreme Court of the United States has noted that private property in land, as distinct from private personal property, occupies a special historical place in American constitutional culture. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

far-away governments.<sup>24</sup> If so, then owners and neighbors may prefer to find their land locally planned and regulated by persons they know and can more easily influence rather than by persons more remote by measures of distance, knowledge, and susceptibility to influence.

#### IV. THE LIMITED ROLE OF NATIONAL GOVERNMENT

What role, then, does the national government play in terms of land-use planning and regulation? The national role takes its shape from a patchwork of laws, institutions, and actions that, singly and together, exert an important influence over the use and development of land. This patchwork has arisen usually in response to specific land-use problems that suggest national, rather than local, solutions, and is composed of five principal patches: environmental regulation; management of nationally-owned land; transportation policy and finance; housing and economic development subsidies; and anti-land-use planning and regulation.<sup>25</sup>

##### A. *Environmental Laws*

Beginning in 1970 the national government has enacted a bevy of environmental laws that make it, rather than the states and local governments, the leader in environmental protection. These laws include the following:

- National Environmental Policy Act (1970)<sup>26</sup>
- Clear Air Act (1970)<sup>27</sup>
- Clear Water Act (1972)<sup>28</sup>
- Coastal Zone Management Act (1972)<sup>29</sup>
- Endangered Species Act (1973)<sup>30</sup>
- Safe Drinking Water Act (1974)<sup>31</sup>

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24. See generally Gerald Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

25. A more inclusive list of patches could add the nation's agricultural, water, energy, and tax policies insofar as they affect the use and development of land.

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

27. Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1970).

28. Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1972).

29. Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* (1972).

30. Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (1973).

31. Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (1974).

- Toxic Substances Control Act (known as ToSCA) (1976)<sup>32</sup>
- Resource Conservation and Recovery Act (known as ReCRA) (1976)<sup>33</sup>
- Surface Mining Control and Reclamation Act<sup>34</sup>
- Comprehensive Environmental Response, Compensation, and Liability Act (known as CERCLA or “Superfund”) (1980).<sup>35</sup>

This national environmental regime is composed of one law-making institution (Congress), two hybrid law-making, law-administering institutions (national administrative agencies and states), one law-reviewing institution (judiciary), and two actively participating non-public parties (non-governmental organizations and regulated parties). Congress drafts and adopts the laws, setting fundamental goals and policies within each piece of legislation while at the same time delegating enormous discretion to national administrative agencies. The national administrative agencies implement the laws on an ongoing basis. They draft and adopt regulations announcing environmental standards or even mandating technology, grant or deny permits to industry, local governments, and sometimes private developers, approve state and local environmental plans that satisfy the requirements of the national law and administrative regulations, and enforce conduct through administrative and judicial action. The Environmental Protection Agency, the national government’s central environmental institution, has primary administrative responsibility for the key environmental laws (Clean Air, Clean Water, CERCLA, ReCRA, etc.). Other national executive branch agencies, especially the Departments of Interior, Agricultural, and Commerce, and the Army Corps of Engineers, also have formal roles under some of these laws.

The states now increasingly work in partnership with, or may even

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32. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (1976).

33. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1976) (also known as “Solid Waste Disposal Act”).

34. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1977).

35. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1980) (see also 1986 Superfund Amendments and Reauthorization Act).

supplant, the national government. This was not always the case. The initial years of the national environmental intervention relied heavily on a top-down, centralized, “one size fits all” administrative approach. The rationale for centralization at the highest jurisdictional level was surely plausible. Pollution does not recognize political boundaries. The acidic air emitted by coal-burning Midwestern power plants results in acid rain wreaking havoc on the forests and lakes of New England. Depending on which way the wind blows and water flows, individual states, let alone cities, could not be assumed to act in the best interests of their neighbors when they acted in their own self-interest.

Devolution of environmental authority to the state level, however, has grown dramatically in recent years. States now prepare their own plans and programs that, once certified by the responsible national administrative agency as satisfying the letter of the national law and implementing regulations, allow the states themselves to administer the environmental plan and program and grant or deny permits to local parties.<sup>36</sup> In addition, states may adopt even more stringent standards than those required under the national law.

The reviewing institution, the federal judiciary, considers challenges from private actors to a given law or administrative action.<sup>37</sup> Private non-governmental organizations (NGO) and regulated parties participate in the administrative rule-making process and are also able to bring lawsuits against agencies. They will assert, for example, that the environmental administrator has failed to adopt an environmental standard, has acted arbitrarily and capriciously unsupported by substantial evidence in the record, or has otherwise improperly interpreted the law under which it operates.<sup>38</sup>

Taken alone or together, the national environmental laws and institutions should not be characterized as creating a regime of national land-use planning or regulation. They are usually single-issue laws focused on a single environmental media. For example, the

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36. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1342(b) (state permit plan).

37. *See* Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, 519-46 (1992).

38. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (addressing interpretation of regulations defining wetlands).

Clean Air Act and Clean Water Act employ “command and control” strategies dictating “end of pipe” or “end of smokestack” pollution results, mandate use of specific control technologies, or, more recently, impress efficiency-oriented “market-based” regulatory solutions that allow polluters to trade “pollution permits.”<sup>39</sup> What they intentionally do not do, however, is provide the opportunity to balance comprehensively the range of other concerns, from economic development and social equity to infrastructure capacity and quality of life, that undergird boilerplate land-use planning and regulation. They do not mandate preparation of national, state, or local land-use plans nor do they determine across the typical land-use palette a spectrum of uses, densities, and shapes for development. Indeed, a 1990 amendment to the Clear Air Act expressly cautioned, “Nothing in this [act] constitutes an infringement on the existing authority of counties and cities to plan or control land-use, and nothing in this [act] provides or transfers authority over such land use.”<sup>40</sup>

At the same time, lawmakers, law administrators, and judges have recognized the axiomatic reality that land uses and their location contribute to pollution and that one of the obvious ways to control pollution may involve some attention to land-use planning and regulation. Indeed, in one extreme case, a judicial interpretation of the Clean Water Act triggered a court-ordered moratorium on all commercial development within the Boston metropolitan area until the Commonwealth of Massachusetts developed a meaningful program for the treatment of sewage being dumped in Boston Harbor.<sup>41</sup> Not surprisingly, such a measure helped prod the legislature to act expeditiously to address the problem.<sup>42</sup>

Although national environmental laws and institutions do not authorize or conduct national land-use planning and regulation as such, they nevertheless introduce slices of land-use planning and regulation as part of their overall regimes. These slices fall into five categories: environmental plans with land-use elements; collaborative

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39. See Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 B.C. ENVTL. AFF. L. REV. 547, 547-55 (1992).

40. 42 U.S.C. § 7431.

41. See Haar & Wolf, *supra* note 5, at 773.

42. *Id.*

planning among different levels of government; nationally granted land-use permits; environmental impact review; and financial grants for local environmental cleanup.

First, environmental laws may require or encourage preparation of state or territorially based environmental plans that include some sort of land-use component. For example, under the Clean Air Act, states prepare a "State Implementation Plan" that establishes "enforceable emission limitations and other control measures" and demonstrates how the state will reach national primary and secondary ambient air quality standards.<sup>43</sup> In preparing this plan a state may choose that mix of control measures deemed best suited to its particular situation, including "Transportation Control Measures" that may include state and local land-use controls, such as site plan review, mixed-use zoning, and transit-oriented design standards, that encourage mass transit and discourage single-occupancy vehicle travel.<sup>44</sup> However, as described earlier, efforts by the national Environmental Protection Agency to require local governments to include such controls in the arsenal of air pollution control weapons have met with Congressional disapproval.<sup>45</sup>

Other federal environmental laws provide financial incentives for the preparation of plans and additional measures that affect the use and development of land. Under the Coastal Zone Management Act, for example, states have been eligible to receive financial grants from the national government to assist in preparing and managing a program for the preservation of coastal areas.<sup>46</sup> Ongoing administrative grants are available to states that have obtained approval from the national government for their coastal management program.<sup>47</sup> Such approval is contingent, among other things, on a "definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant

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43. 42 U.S.C. § 7410(a)(2)(A).

44. See Edith M. Netter & Jay Wickersham, *Driving to Extremes: Planning to Minimize the Air Pollution Impacts of Cars and Trucks (Part I)*, 16 ZONING & PLAN. L. REP. 145, 149-50 (1993).

45. See *supra* note 40 and accompanying text.

46. 16 U.S.C. §§ 1454, 1455.

47. *Id.*

impact on the coastal waters,”<sup>48</sup> and upon demonstration that the state has assumed the authority “to administer land use and water use regulations to control development to ensure compliance with the management program, and to resolve conflicts among competing uses.”<sup>49</sup>

A second slice of land-use planning within the environmental law regime is that such laws may encourage collaborative decision-making between public and private sectors involved in land development and regulation to create plans that take into account interests beyond the environmental objective. Under the Endangered Species Act, for example, land that is designated critical habitat for endangered species is normally difficult, if not impossible, to develop.<sup>50</sup> However, in the face of political unpopularity over such draconian national intrusions, the Department of the Interior has experimented under one section of the act to allow parties to work together on the preparation of so-called habitat “conservation plans” that give play to non-environmental, as well as environmental, interests.<sup>51</sup> Pioneering efforts in California and Texas have tested successfully different institutional arrangements to oversee selection, planning, and monitoring of such habitats, that allow development while ensuring achievement of biological diversity.<sup>52</sup>

Third, environmental laws may authorize national agencies to grant or deny permission to develop land. Under Section 404 of the Clean Water Act, for example, landowners may not dredge or fill, let alone develop, any wetland<sup>53</sup> without first obtaining a permit from the Army Corps of Engineers, a national agency concerned principally with the construction of dams and the maintenance of navigable waterways.<sup>54</sup> Because wetlands located in and near metropolitan areas are increasingly attractive development sites, the Section 404

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48. 16 U.S.C. § 1455(d)(2)(B).

49. 16 U.S.C. § 1455(d)(10)(A).

50. 16 U.S.C. § 1538.

51. 16 U.S.C. § 1539(a)(2)(A)&(B).

52. See Douglas P. Wheeler, *Ecosystem Management: An Organizing Principle for Land Use*, in *LAND USE IN AMERICA* 155-72 (Henry Diamond & Patrick Noonan, eds., 1996).

53. Administrative regulations prepared pursuant to the Clean Water Act provide the specific definition of a wetland.

54. 33 U.S.C. § 1344.

review has played a significant, and sometimes notorious, role in a number of land development projects.<sup>55</sup>

Fourth, environmental laws may require national agencies to conduct environmental impact reviews for national actions having a significant effect on the environment. The National Environmental Policy Act requires all national agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man’s environment.”<sup>56</sup> Specifically, the act requires all agencies of the federal government to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action. . . .”<sup>57</sup> Private activities on land become subject to this review when they require some federal approval or grant of money constituting a “major Federal action.”

In practice the environmental impact statement requirement has had a profound impact on private and public development projects across the country. Although it is only advisory, in the sense that it does not by its own terms veto a project even if the review reveals such project to be environmentally harmful, the transparency of information compiled for the statement, coupled with the procedural requirements for the review, have generated public opposition and lawsuits sufficient to cancel or modify proposed projects.<sup>58</sup> Additionally, NEPA has spawned state copycat legislation (so-called “little NEPAs”) mandating state and local environmental impact

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55. See, e.g., *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), (wetlands designation prevented limestone extraction); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (wetlands designation prevented residential development).

56. 42 U.S.C. § 4332(A).

57. 42 U.S.C. § 4332(C)(i-iii).

58. See Wolf Von Eckardt, *Camelot Rises on Boston Bay; The Kennedy Library Museum: After 18 Years of Bickering and Frustration, a Triumph*, WASH. POST, Oct. 14, 1979, at H1 (describing community opposition to proposed library in Cambridge, resulting in relocation to site in Boston).



reviews that in many cases pack a more substantive land-use review wallop than that required by the federal NEPA itself.<sup>59</sup> Finally, NEPA has spurred similar provisions in other national laws requiring assessments to determine the impact of various federal actions on historic properties (Section 106 reviews)<sup>60</sup> and parkland and historic sites (Section 4(f) reviews).<sup>61</sup>

Fifth, environmental laws may provide financial grants for local environmental cleanup efforts that make development or redevelopment of land possible. The Clean Water Act, for example, has provided for sewage treatment facilities grants to state and local governments that provide infrastructure capacity to accommodate growth,<sup>62</sup> while the Comprehensive Environmental Response, Compensation, and Liability Act establishes a “Hazardous Substance Superfund” to assist in the cleanup of hazardous waste sites, known as “brownfield” sites, often located in or near the central city and often a barrier to inner city redevelopment.<sup>63</sup>

### 1. Continuing Disjunction Between Environmental and Land Use Approaches

Even with the reliance on slices of land-use approaches by the national environmental regime, environmental policy and land-use policy in the United States remain to a surprising extent (notwithstanding the efforts of scholars such as Daniel Mandelker) separate and distinct fields, created and implemented by different levels of governments and studied by different sets of academics and professionals. The average environmental policymaker is as unfamiliar with zoning as the average land-use policymaker is with the Clear Air Act. Yet, zoning’s predilection for single-family, one-acre development patterns in many suburban areas may engender a substantial dependence on the automobile, whose polluting side effects are subsequently addressed by environmental laws from

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59. See, e.g., New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law § 8-0101 *et seq.* (1998) (substantive little NEPA).

60. National Historic Preservation Act, 16 U.S.C. § 470(f) (1998).

61. Department of Transportation Act, 49 U.S.C. § 303(c) (1998).

62. 33 U.S.C. § 1281(g) (1994).

63. 42 U.S.C. § 9611 (1994).

Congress and implementing regulations from the Environmental Protection Agency.

The reasons for this disjunction are situational and functional. Land use controls emerged locally in the early twentieth century to address inevitable conflicts between land uses. Such incompatibilities were not limited to health and safety concerns—the ambit of environmental laws—but instead extended to the gamut of issues—noise, odors, visual blight, and other offenses to the senses—that traditional Anglo-American nuisance law had mediated heretofore. Zoning, the principal regulatory tool, codified nuisance law and helped stabilize residential property values by dispatching incompatible land uses into distinctly separate districts.<sup>64</sup> Zoning would tell landowners what they could do with their property through its trio of use, height, and bulk restrictions. State government, let alone national government, could hardly from such a distance tell residents where residential, commercial, and industrial uses should go.

In contrast, national environmental policy emerged some fifty years later in the wake of growing concern about links between chemical pesticides and health woes,<sup>65</sup> links not specifically tied to local land-use concerns. Indeed, ecologists highlighted the holistic character of the environment, captured by the metaphor of “Spaceship Earth,” that inherently militated against localized remedies for environmental degradation.<sup>66</sup> The national environmental movement ultimately seized upon pollution standards for air and water, as opposed to land, thereby emphasizing the fluidity of elements whose very nature transcends local boundaries and anchored geography.<sup>67</sup>

As the national government has become more interested in land-based pollution, such as wetland development and solid and hazardous waste disposal, and as local governments have become

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64. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-89 (1926).

65. See, e.g., RACHEL CARSON, *THE SILENT SPRING* 1 (1962) (the pioneering popular book on this link).

66. See, e.g., EVAN EISENBERG, *THE ECOLOGY OF EDEN* 1 (1998) (describing history of recent ecological movement and aspects of environmental degradation).

67. See Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1998); Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1998).

more concerned with water tables and conservation of open space, the intersection of environmental and land-use policy is becoming increasingly apparent. Furthermore, as more states require environmental impact assessments of private projects that effectively replicate land-use regulatory reviews, the desire for efficient government administration will suggest closer scrutiny of duplicative efforts, with an eye toward merging aspects of the two regimes.

### *B. Management of Nationally Owned Land*

The national government owns and manages roughly thirty percent of all land in the United States.<sup>68</sup> Although such an ownership stake might be thought to be a wedge for the national government in articulating a national land-use plan or policy, it has never been perceived or used as such. One reason is that most of this land is located in Alaska and a few Western states, far from major population centers and relatively inaccessible except to those interested in natural resource exploitation or tourism. Even a clearly articulated, planned vision for this land would leave most Americans unaware and untouched on a daily basis. Furthermore, articulated national goals and objectives for nationally-owned land have run afoul of locally perceived interests in the few states where national ownership is an issue.<sup>69</sup>

The Federal Land Policy and Management Act of 1976 provides a framework for the planning, management, and use of nationally-owned land.<sup>70</sup> Institutionally, the Department of the Interior, through its Bureau of Land Management, its Fish and Wildlife Service, and its National Park Service, and the Department of Agriculture, through its Forest Service, have prime responsibility for nationally-owned land. Depending on the type of land, the legislative mandate set forth in the several relevant laws may prescribe a single use or multiple uses. For example, national parkland managed by the National Park Service is designated for the singular purpose of providing national

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68. See Wolf, *supra* note 18 and accompanying text.

69. See, e.g., *Secretary Babbitt Predicted Strong Opposition to a Plan*, INSIDE ENERGY, May 4, 1998, at 12 (describing local opposition from ranchers to land sale plan).

70. 43 U.S.C. § 1701 *et seq.* (1998).

parks for the enjoyment of present and future generations of Americans.<sup>71</sup> The Bureau of Land Management and the Forest Service have more contested mandates allowing multiple land uses, with recreation and open space protection purposes competing head-to-head with logging, mining, and grazing activities.<sup>72</sup> Here, the debate focuses as much on such issues as the fee structure for use of public lands by private licensees, including cattle owners, timber companies, and mining interests, as on the nature of appropriate uses for the land.

### *C. Transportation Policy and Finance*

For the past forty-five years, the national government has played a fundamental role in the planning and financing of much of the nation's transportation infrastructure, especially the coast-to-coast network of interstate highways. During most of this road-building period, the national government through its Federal Highway Administration and Department of Transportation provided ninety percent funding, with states providing the remaining ten percent. Although this federal program probably had greater impact on the land-use patterns of metropolitan America than any other national government-sponsored activity, by lubricating suburbanization trends, its legal framework only recently took a strongly conscious note of the "land use" aspects of highways and other transportation projects.<sup>73</sup>

In 1991 Congress enacted the "Intermodal Surface Transportation Efficiency Act of 1992" (ISTEA),<sup>74</sup> setting forth a comprehensive intergovernmental planning approach that relied, much more than ever before, on federal, state, and regional involvement, as well as on an affirmative obligation to prepare long-range transportation plans for urbanized areas. The act did not dramatically alter previous roles of the federal government, retaining its principal funding

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71. National Park Service Act, 16 U.S.C. § 1902 (1998).

72. See 43 U.S.C. § 1712.

73. The national government has played a significant role in other large infrastructure projects, including navigable water, dam, energy, and airport projects, but none has had as dramatic a land-use impact as the federal highway building program.

74. 23 U.S.C. § 101 *et seq.* (1994).

responsibilities for a wide variety of transportation projects. At the same time, the act strengthened and expanded the notion of planning, including land-use planning, as part of delivering transportation projects. The key institutional players would be an existing or newly formed Metropolitan Planning Organization (MPO),<sup>75</sup> responsible for preparing long-range transportation plans,<sup>76</sup> along with the states, which would be required to prepare their own long-range plan relying on the MPO-prepared plans as well as on state-prepared plans for areas outside the jurisdiction of existing MPOs.<sup>77</sup> The plans would consider not only direct transportation issues but the impact of land-use and development patterns on transportation outcomes.<sup>78</sup>

MPOs and states also would prepare Transportation Improvement Programs (TIPs) that would specify projects and programs within the metropolitan area that would receive funding obtained in part from the national government.<sup>79</sup> The state would approve the locally prepared TIP, which would have to be consistent with the state's and MPO's own long-range transportation plan, and the state also would adopt its own TIP.<sup>80</sup> Significantly, ISTEA set aside three percent of a project budget to pay for this level of planning, with two percent going to the state and one percent going to MPOs.<sup>81</sup> In a new gesture toward alternative transportation modes, ISTEA also set aside 10% of its surface transportation block grant funding for so-called "transportation enhancements" such as bike and pedestrian paths, scenic easements, and other types of non-highway facilities that would necessarily involve land-use planning considerations.<sup>82</sup>

In addition to its intergovernmental consistency requirement, ISTEA established a conformity relationship outside of itself with the Clean Air Act. Both the long-range transportation plan and the transportation improvement program would have to be in conformity with the "State Implementation Plan" demanded under the Clean Air

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75. 23 U.S.C. § 134(g).

76. 23 U.S.C. § 135(e).

77. *Id.*

78. 23 U.S.C. §§ 134(f); 135(c).

79. 23 U.S.C. § 134(h).

80. 23 U.S.C. §§ 134(h)(5); 135(f); 135(f)(12).

81. 23 U.S.C. §§ 104(f)(1); 307(c)(1).

82. 23 U.S.C. § 133(d)(2).

Act.<sup>83</sup> In this way, ISTEA introduced cutting-edge change at the national level by weaving previously discrete actions into a land-use, transportation, and air quality web. Since transportation investment decisions obviously have a major impact on land-use and environmental quality, this legally imposed relationship between plans and institutions represented an important break with prior planning practices.<sup>84</sup> Congress recently reauthorized ISTEA as the Transportation Equity Act for the 21st Century” (TEA-21), continuing many of its land-use planning innovations.

#### *D. Housing and Economic Development Subsidies*

Since the 1930s the national government has distributed money directly to states, local governments, special purpose local agencies, and private developers for housing construction and the redevelopment of urban and rural areas. Indeed, in the eyes of many, these distributions of funds have constituted America’s national urban policy.<sup>85</sup> At one time, traditional land-use planning itself received official recognition under the national urban policy umbrella. Under the federal Section 701 program of the 1950s, the national government distributed grants expressly for the preparation by local governmental units of urban land-use plans.<sup>86</sup> More recently, rather than receive money from the national government to pay for land-use planning, local governments have employed land-use planning to enhance their efforts to wrest available grant and loan money from the national government for urban redevelopment.

Specifically, the national Department of Housing and Urban Development (HUD), along with smaller government agencies (the Department of Commerce’s Economic Development Administration and the Small Business Administration), makes intergovernmental transfers of money in two principal ways: block grants and categorical grants. Block grants are distributions of money as a

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83. See *supra* note 43 and accompanying text.

84. See Edith Netter & Jay Wickersham, *Driving to Extremes: Planning to Minimize the Air Pollution Impacts of Cars and Trucks (Part II)*, 16 ZONING & PLAN. L. REP. 153, 155-58 (1993).

85. See *The President’s National Urban Policy Report* 11-2 to 11-3 (1978).

86. 40 U.S.C. § 461(c) (1982).

matter of right to local governments for a broad range of urban development purposes. The size of the grant is determined according to a formula set forth in the authorizing legislation. HUD ensures that the money is being spent in accordance with the requirements of the legislation by reviewing reports which summarize what cities have done and will do with the money. This review prompts local governments to rely on aspects of land-use planning approaches to secure, and continue to secure, their block grant money.

Categorical grants are awarded competitively, with municipalities and developers applying to the national agencies to demonstrate why their proposed project or program is superior to other proposals. Applications for such funds frequently demand some degree of planning in order to compete effectively under the stated requirements of the grant legislation and implementing agency regulations. Most recently, for example, under the “empowerment zone” program, HUD has reviewed applications from cities across the country for designation of an empowerment zone, a designation that brings financial rewards to a geographically distinct area.<sup>87</sup> The empowerment zone program expressly requires a detailed and inclusive planning exercise by each city, bringing all stakeholders together to consider ways in which a poor area of the city might be regenerated.<sup>88</sup>

### *E. Anti-Land Use Planning and Regulation*

The most recent attempted incursion of the national government into land-use planning and regulation is, ironically, anti-land-use planning and regulation. The Congress has debated for several years a number of proposals that would provide legislative protection extending beyond what the Constitution provides for private property owners aggrieved by national government planning and regulatory actions. These congressional rumblings are a legislative response to increased activity in the courts. Under the national constitution’s Just Compensation Clause, which commands, “nor shall private property

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87. Designation and Treatment of Empowerment Zones, Enterprise Communities, and Rural Development Investment Areas, 26 U.S.C. § 1391 *et seq.* (1993).

88. *Id.*, § 1391(f)(2).

be taken for public use, without just compensation,” property owners have challenged local zoning regulations, coastal development controls, denial of wetlands permits, and similar restrictions on property development.<sup>89</sup> Judges have struggled to define an acceptable balance between government regulation on behalf of the public’s health, safety, and general welfare and the constitutional view that owners not be forced to bear burdens more properly borne by society as a whole. By issuing important opinions establishing that, although owners are not entitled to the most profitable use of their property, they are entitled not to be denied all economically viable use,<sup>90</sup> the Supreme Court of the United States has raised the stakes in the government regulation versus private property game.

The congressional bills would essentially supplant the Court’s constitutional jurisprudence, substituting a standard far less deferential to government regulation and concomitantly far more accommodating to the interests of owners, in a real sense, an anti-planning, anti-regulatory national government initiative. Under bills considered, but never enacted, by the full Congress, monetary compensation would be paid to landowners every time a national government action diminished the value of an owner’s property by more than twenty percent or thirty-three percent.<sup>91</sup> These ideas expanded on a Presidential Executive Order (Executive Order 12,630), issued in 1988, requiring all federal agencies to conduct a “takings impact assessment” prior to the adoption of any regulation or action to determine whether or not the proposed regulation or action would unconstitutionally infringe upon the rights of property owners.<sup>92</sup> More recent proposed legislation in Congress attempts to make it faster and easier for property owners to gain relief in the federal courts.<sup>93</sup> At the present time, however, it is likely that such bills will meet the same fate as Senator Jackson’s S. 3354.

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89. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (challenging coastal restrictions).

90. *Id.* at 1016, 1018, 1026, 1030.

91. H.R. 925, Job Creation and Wage Enhancement Act of 1995; S. 605: Omnibus Property Rights Act of 1995.

92. Exec. Order No. 12,630; 53 Fed. Reg. 8859 (1988).

93. *See, e.g.*, H.R. 1534 (1998).



## V. STATE AND REGIONAL LAND USE PLANNING AND REGULATION

Although highly valued by Americans, the balkanized system of land-use planning and regulation, with every municipal tub on its own bottom, has generated sufficient problems to motivate some localities and citizens to yield to higher level planning and regulatory solutions. Under the rubrics of “state growth management” or “state planning,” an increasing number of states are introducing stronger regional and statewide planning and regulatory requirements. Indeed, these state roles begin to approximate the roles played by national governments in many countries around the world. While this upward trend might theoretically suggest the possibility of a climb even higher, there is no evidence that the dialogue includes the national level.

What specific problems are such higher level approaches attempting to remedy? Lack of regional planning or control may create conditions suitable for sprawl development. Sprawl is accused of needlessly consuming valuable open space and agricultural land, increasing costs of infrastructure by not taking advantage of existing infrastructure in developed areas, increasing the cost of housing to the extent that higher densities are not allowed, and promoting reliance on the automobile that may produce greater congestion and air pollution.<sup>94</sup> Furthermore, the ability of suburban communities to wield zoning as an exclusionary measure may exacerbate the plight of inner city residents, making it economically difficult for them to obtain decent jobs and housing in outlying metropolitan areas.<sup>95</sup>

Not surprisingly, the states that have adopted laws going well beyond traditional authorizations for local zoning controls contain broad expanses of environmentally sensitive land, fear an onslaught of new residents moving from other states, or have otherwise

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94. See, e.g., RICHARD MOE & CARTER WILKIE, CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL 228-29, 245-49, 256-58 (1997); JONATHAN BARNETT, THE FRACTURED METROPOLIS: IMPROVING THE NEW CITY, RESTORING THE OLD CITY, RESHAPING THE REGION 25-26 (1995). Although some commentators are skeptical that sprawl is such a bad thing, see Peter Gordon & Harry W. Richardson, *Prove It: The Costs and Benefits of Sprawl*, 16 BROOKINGS REV., Sept. 22, 1998, at 16, the perception that it is continues to inform many state actions.

95. See CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 4-8 (1996).

experienced the problems of enormous growth. Vermont, Hawaii, Oregon, and Florida, the first generation, were primarily concerned with the preservation of environmentally sensitive land and, in Florida's case, explosive growth and infrastructure impacts.<sup>96</sup> The second generation, Washington, New Jersey, California, Rhode Island, Maine, and Georgia, attempted to address a wider range of issues derived from their local context.<sup>97</sup> Although it is impossible to describe one single model that encapsulates all of these laws, it is possible to set forth key elements underlying typical state growth management laws.

#### *A. State Level Planning and Plans*

The state laws may call for preparation of a state planning document to guide the actions of state agencies. In the case of Hawaii, for example, the state actually prepared a land-use plan that geographically covered the state.<sup>98</sup> In other states, however, the plans tend to be strategic in nature, describing broad goals, objectives, and policies.<sup>99</sup>

#### *B. Local Plan Preparation Requirement*

The state laws may require local governments to prepare comprehensive plans and include sections within such plans dealing with specified issues such as affordable housing, open space and agricultural lands, transportation, and so forth.<sup>100</sup> The state laws may provide financial incentives to prepare the plans and penalties for those communities that fail to prepare plans, including ineligibility for certain state funds or the removal of local authority to regulate for certain purposes.<sup>101</sup>

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96. See THOMAS PELHAM, *STATE LAND-USE PLANNING AND REGULATION 1* (1979).

97. See Callies, *supra* note 12, at 19-26.

98. Hawaii State Planning Act, Haw. Rev. State. § 226-1 *et seq.* (1978).

99. See Nancy Stroud, *State Review and Certification of Local Plans*, in *MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS* 85-87 (1996).

100. *Id.* at 86.

101. *Id.*

### *C. Consistency and Review Requirement*

The state laws may require horizontal and vertical consistency requirements for local plans and actions.<sup>102</sup> For example, all municipal actions must be in accordance with the municipally adopted comprehensive plan. The comprehensive plan must be consistent with state goals and objectives or with the state plan itself. State actions within the municipal jurisdiction must be consistent with the local comprehensive plan. Finally, local plans may be reviewed, and even approved, by higher level authorities.

### *D. Concurrency Requirements*

The state laws may require that public facilities and services needed to support new development be available concurrently with the impacts of the new development. In Florida, for example, there have been concurrency requirements attached to six facilities and services: transportation, water, sewer, solid waste, parks and recreation, and storm water management.<sup>103</sup> Interestingly, this “pay as you grow” model may create unanticipated consequences, when development leapfrogs to areas of low traffic congestion where road infrastructure may be able to accommodate new growth, but where growth is otherwise not desirable.

### *E. Urban Growth Boundaries*

The state laws may authorize the drawing of a boundary line around a metropolitan area within which development is encouraged and outside of which development is deterred. Oregon has adopted urban growth boundaries, and the city of Portland has operated within one for years.<sup>104</sup>

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102. See Robert Lincoln, *Implementing the Consistency Doctrine*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 96-102 (1996).

103. See JOHN DEGROVE, THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES 16-17 (1992).

104. Oregon State Senate Bill 100 (1973).

### *F. Areas of Critical State Concern*

The state laws may designate or authorize a state agency to designate certain areas as sufficiently sensitive (almost always from an environmental point of view) to need special legal protection.<sup>105</sup>

### *G. Developments of Regional Impact*

The state laws may require developments of a certain size or impact to undergo special regional review above and beyond requirements imposed upon other development.<sup>106</sup>

### *H. Regional Plans and Planning Agencies*

State laws may authorize the formation of a regional planning agency to prepare plans and regulate land uses for areas including more than one local government jurisdiction.<sup>107</sup>

### *I. Horizontal Intergovernmental Agreements*

State laws may authorize cooperative agreements between neighboring local jurisdictions.<sup>108</sup>

### *J. Fair Share Housing*

State laws may require municipalities to plan and regulate in ways that encourage development within the municipality of its “fair share” of the region’s present and prospective housing needs for all income classes.<sup>109</sup>

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105. See James F. Berry, *Areas of Critical State Concern*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 105-07 (1996).

106. See Marya Morris, *Approaches to Regulating Developments of Regional Impact*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 111-18 (1996).

107. See, e.g., Cape Cod Commission Act, 1989 Mass. Laws 716 *et seq.* (1989).

108. See Patricia Salkin, *Interlocal Approaches to Land-Use Decision Making*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 39-40 (1996).

109. See Harvey Moskowitz, *State and Regional Fair-Share Housing Planning*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 153-57 (1996).

## VI. CONCLUSION

This article has discussed the legal and institutional structure for land-use planning and regulation in the United States, concluding that the national government has not and does not practice what would constitute national land-use planning as that term is commonly understood in the United States and internationally. The reasons for this absence stem from a country-specific blend of constitutional, historical, cultural, and economic ingredients that together favor local land-use planning and regulation over higher level exercises. Recent experience indicates greater interest in and acceptance of state-level planning and regulation, especially in regions of the country facing high growth rates and threats to their environmentally sensitive lands. This “rise up the ladder” to a higher level of government, however, shows no signs of topping out at the national level, and the conditions that have previously limited the national role show no signs of abating. Thus, while the national role will continue in patchwork fashion, a more comprehensive effort appears unlikely to emerge in the near future.