

GOVERNMENT CONTROL OF URBAN LAND USE: A COMPARATIVE MAJOR PROGRAM ANALYSIS

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Among the most troublesome urban problems facing American society are those that are closely tied to how land is used, including how land should be developed and how land use resources should be allocated. Most of our population lives and works in metropolitan areas and is intimately affected by how these urban land use related problems are dealt with. Satisfactory progress in solving or at least substantially alleviating these problems may be necessary if this country is to avoid increasing the polarity between rich and poor and between privileged and disadvantaged that can have such long-term adverse national consequences. Among the many current land use related urban problems are housing quality and affordability, especially for the poor; neighborhood security from crime and violence; the extent and impact of racial, ethnic and class segregation in urban communities; pollution and other threats to the natural environment; the amount and burden of taxes and other charges on real estate, including property taxes and utility costs; and channeling urban growth and revitalization efforts. Concerns over these and other land use related problems are accentuated by uncertainties as to the future. That American urban areas will change over time is assured. Whether that change will be for better or worse is difficult to predict, but current trends justify pessimism about many areas.

Given the seriousness of urban land use related problems and the widespread concerns they have created, government frequently has responded with legal controls. Major government efforts usually consist of programs of action, with legal controls as essential components. This article focuses on four such programs, each different and each highly important. The commonly used term "government program" as used here means government efforts to help resolve some aspects of an urban land use-related problem through imposition of legal controls, with the government efforts focused on achieving at least some clearly declared objectives, and with a government administrative staff having been assigned responsibility for administering the controls and achieving the declared objectives. The four programs that this article reviews are public housing, federally aided urban renewal, zoning, and managed growth.

The principal purpose of this article in exploring this sampling of programs is to come to some at least tentative generalizations as to how government deals with urban land use related problems, its effectiveness

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and limitations in doing so, and how its efforts might be improved. The programs considered are sufficiently diverse in the problems they are grappling with and the range of controls they impose to give the basis for cautious generalizing. Each of the programs considered also is of such importance as to merit current review and evaluation of its performance quite apart from its relevance to broader generalizations. Each has been in effect in many communities and has made a major impact on urban land use. Each has also drawn heavy criticism and has generated extensive controversy. This article gives special attention to program criticisms and controversies, as these factors are so important in how programs are shaped, how they evolve, and in what they are able to achieve. Despite being controversial in many communities, the programs remain as major means of control in much of the United States. The one exception is federal urban renewal which has been terminated, although succeeded by other less ambitious government programs seeking similar renewal objectives. Urban renewal is included not only because of its aggressive approach to crucial urban problems but because of what it indicates as to why major land use related programs may ultimately be closed down after many years of significant impact.

I. PUBLIC HOUSING

Public housing—government owned and operated rental housing for the poor—emerged out of the Depression of the 1930s as a major housing program involving joint participation by federal and local government.¹

1. There is extensive literature on public housing going back to the 1930s, although scholarly interest has declined in recent years. Some of the more helpful public housing publications are these: NAT. ASS'N OF HOUSING AND REDEV. OFFICIALS, *THE MANY FACES OF PUBLIC HOUSING* (1990) [hereinafter NAHRO REPORT]; RACHEL G. BRATT, *REBUILDING A LOW-INCOME HOUSING POLICY* (1989); ROBERT MOORE FISHER, *20 YEARS OF PUBLIC HOUSING* (1959); LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING, A CENTURY OF FRUSTRATION* (1968); EUGENE J. MEEHAN, *PUBLIC HOUSING POLICY, CONVENTION VERSUS REALITY* (1975); RAYMOND J. STRUYK, *A NEW SYSTEM FOR PUBLIC HOUSING, SAVING A NATIONAL RESOURCE* (1980); IRVING WELFELD, *WHERE WE LIVE: A SOCIAL HISTORY OF AMERICAN HOUSING* (1988); REPORT OF THE NAT. COMMISSION ON URBAN PROBS. (DOUGLAS COMMISSION), *BUILDING THE AMERICAN CITY* 108-33, 188-190 (1968); REPORT OF THE NAT. HOUSING TASK FORCE, *A DECENT PLACE TO LIVE* (1988), reprinted in *Senate Hearings* 689, 100th Congr., 2d. Sess. 133, 172-75 (1988); John Atlas & Peter Dreier, *From "Projects" to Communities: Redeeming Public Housing*, 50 J. HOUSING 21 (1993); John F. Bauman, *Public Housing: The Dreadful Saga of a Durable Policy*, 8 J. PL. LIT. 347 (1994); Charles E. Connerly, *What Should Be Done With the Public Housing Program*, 52 J. AM. PLAN. ASS'N 142 (1986); Fred Fuchs, *Introduction to HUD Conventional Public Housing, Section 8 Existing Housing, Voucher, and Subsidized Housing Programs*, Part I, 25 CLEARINGHOUSE REV. 782 (1991); Michael H. Schill, *Distressed Public*

The vast preponderance of public housing in the United States has been and continues to be federally aided,² but there are some local public housing authorities that operate without federal assistance, receiving government financial assistance only from state or local sources.³ Under the federally aided program, the federal government provides much of the funding; and local public housing authorities build, maintain, and operate the housing, subject to some restrictions imposed by federal statutes and regulations. State enabling acts provide for the creation of local public housing authorities.⁴ A large number of units have been added to the national stock of public housing since the late 1930s but with sharp variations over time. A surge of additions occurred in the early 1950s and again in the period 1968 to 1974, but relatively few units have been added in recent years. Added units have been mostly of new structures built as public housing, although some tax foreclosed properties, former military facilities, and other used structures have been converted to public housing. A small percentage of all units have been withdrawn from the public housing stock, mostly by demolition or sale.

Currently, there are approximately 1.4 million public housing units in the United States,⁵ and a total of 3,200 local public housing authorities

Housing: Where Do We Go From Here?, 60 U. CHI. L. REV. 497 (1993) [hereinafter *Distressed Public Housing*]; Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990) [hereinafter *Privatizing Federal Low Income Housing*]; Special Project, *Public Housing*, 22 VAND. L. REV. 875 (1968-1969).

Much of the data in the NAHRO Report is from a 1989 NAHRO survey of 202 public housing authorities across the country, authorities that manage 45 percent of all public housing units. The general tone and approach of the NAHRO Report is pro-public housing.

2. Federal participation in the public housing program started with the Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (1988 & Supp. 1992)).

3. Five hundred local public housing authorities operate without federal funding assistance, mostly in small cities, each authority responsible for a small number of units. NEIGHBORHOOD POLICY INSTITUTE, *THE SILENT SCANDAL* 1 (1991).

4. *E.g.*, the Public Housing Authority enabling legislation in the State of New York, a very important public housing state, N.Y. Public Housing Law, §§ 400-566 (McKinney 1989 & Supp. 1994).

5. COUNCIL OF LARGE PUB. HOUSING AUTHS., *BASIC FACTS ABOUT PUBLIC HOUSING*, 1 (Feb. 1993) [hereinafter *BASIC FACTS*]. Eight percent of the 1,400,000 units were unoccupied as of 1991. *Id.*

are active in administering the 13,200 public housing developments.⁶ Not surprisingly, public housing is heavily concentrated in big cities and the sixteen largest public housing authorities, excluding the one in New York City, operate thirty percent of all public housing units, an average of 18,000 units per authority.⁷ Half the units operated by these sixteen authorities are "high-rise" buildings—four stories or more.⁸ The New York City Housing Authority operates by far the largest number of housing units of any authority in the United States, a total of almost 180,000 units,⁹ and most of these units are in high-rise buildings. Since 1968, construction of new high-rise federally aided public housing structures for families with children has generally been prohibited.¹⁰

Nationally, a total of about 3.4 million people are estimated to be living in public housing.¹¹ Residents are poor, with household incomes averaging less than one-fourth of the national average for household income.¹² A majority of public housing households have no wage earner,¹³ and a majority of public housing tenants are on welfare or social security.¹⁴ Also, over two-thirds of public housing residents are nonwhite,¹⁵ and many projects are totally or extensively segregated by

6. BASIC FACTS, *supra* note 5, at 1. The number of public housing residents (3,400,000) is probably substantially understated, as it does not include illegal residents. *Id.* at 11 n.4. The New York Public Housing Authority estimates that there are 38,000 illegal families living in New York public housing, a total of 105,000 persons. *Id.*

7. NAHRO REPORT, *supra* note 1, at 28.

8. *Id.* at 19.

9. Stephan B. Kinnaird, Note, *Public Housing: Abandon HOPE, But Not Privatization*, 103 YALE L.J. 961 (1994).

10. 42 U.S.C. §1437d(a) (Supp. 1992).

11. BASIC FACTS, *supra* note 5, at 1.

12. NAHRO REPORT, *supra* note 1, at 2.

13. Only forty percent of nonelderly public housing households have a wage earner. Atlas & Dreier, *supra* note 1, at 26.

14. The NAHRO survey disclosed that as of 1988, public housing residents' income sources were employment income, 24 percent; social security, 24 percent; welfare, 41 percent; and the remainder from miscellaneous sources. See NAHRO REPORT, *supra* note 1, at 2. A 1992 Council of Large Public Housing Authorities study showed that only about 20% of households in public housing depend primarily on earned income. BASIC FACTS, *supra* note 5, at 3.

15. A Council of Large Public Housing Authorities' study disclosed that in 1992 the race-ethnic percentages of public housing residents to be white, 33%; black, 56%; Hispanic, 7%; Asians, 2%; Native Americans and others, 2%. BASIC FACTS, *supra* note 5, at 3. In family developments (nonelderly developments), the percentages were white, 20%; black, 70%; Hispanic, 7%; Asians, 2%; Native Americans and others, 2%. *Id.*

race.¹⁶ A high percentage of public housing households with children are headed by a single parent, usually the mother.¹⁷ Some projects are restricted to the elderly, and in all projects about 600,000 occupants are elderly.¹⁸

As knowledgeable observers in a recent article stated: "The first thing to appreciate about public housing is that it has become the housing of last resort for the very poor—often those without jobs, skills, or hopes."¹⁹ Yet, there is insufficient public housing to fill the demand. Estimates are that as many as one million households are on public housing waiting lists.²⁰ Waiting time before units become available varies considerably among cities. In small cities it is often only a year, in some big cities it is eight or more years.²¹ And obviously, far more households below the poverty line that are not on public housing waiting lists need better or cheaper housing that public housing might provide if available.²²

16. On racial segregation in public housing, see BRATT, *supra* note 1, at 70-72; HOUSING DESEGREGATION AND FEDERAL POLICY (John M. Goering ed., 1986); LAWRENCE FRIEDMAN, PUBLIC HOUSING: THE POLITICS OF POVERTY, ch. 4 (1969); and Schill, *Distressed Public Housing*, *supra* note 1, at 514-15, 519-20.

17. The NAHRO survey found that 60 percent of public housing households included children and over three-fourths of these households with children were headed by single parents. NAHRO REPORT, *supra* note 1, at 2.

18. *Id.* at 4.

19. Atlas & Dreier, *supra* note 1, at 21. The NAHRO Report makes a similar observation: "[M]ore and more, it [public housing] has become a permanent rather than a temporary solution [for residents]. This has happened because the socioeconomic characteristics of public housing residents have changed and because people have nowhere else to go to find affordable housing." NAHRO REPORT, *supra* note 1, at 1.

HUD data shows that as of 1992 the gross household income for households living in family public housing developments was \$7,394 per year. BASIC FACTS, *supra* note 5, at 3. In 1991, 57% of public housing households had incomes only between 10% and 30% of the metropolitan area's median income. *Id.* at 4.

20. BASIC FACTS, *supra* note 5, at 4.

21. NAHRO REPORT, *supra* note 1, at 6.

22. One estimate is that in 1987 nearly three-fourths of the approximately 7.5 million rental households with incomes then below the poverty line did not live in public housing or other subsidized rental housing. Michael A. Wolf, *HUD and Housing in the 1990s: Crisis in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545, 551 (1991). In addition, many homeowners have incomes below the poverty line but do not receive housing subsidies. ARLENE ZAREMBKA, THE URBAN HOUSING CRISIS, SOCIAL, ECONOMIC, AND LEGAL ISSUES AND PROPOSALS 1 (1990). Also, it is estimated that 750,000 persons are homeless on a typical night. Anthony Downs, *Creating More Affordable Housing*, 49 J. HOUSING 174 (1992). Moreover, there is a growing shortage of low-rent private housing, as many such units have been removed from the market or their rents raised substantially. *Id.*; Wolf, *supra* at 548-52. This has caused some

Federal financial assistance to government sponsored public housing has changed over time. Initially, federal aid consisted only of principal and interest payments on local public housing authority long-term bonds, the bonds being issued to pay for land use acquisition and building construction costs. Operating and maintenance costs were paid for by tenant rents. In the early days of public housing, tenants were somewhat better off financially than those of later years and could pay rents sufficient to carry the non-debt service costs of the projects. Many tenants, during the Depression of the thirties, were middle-class people suffering temporary reverses.²³ However, the 1949 Housing Act passed by Congress effectively limited public housing to the very poor in most instances.²⁴ This ultimately meant relatively lower rents that, together with the higher upkeep and repair costs as the housing stock aged, resulted in need for more federal help as rentals no longer could cover operating and maintenance costs. Rentals from many tenants also declined considerably when in 1969 Congress placed a cap on public housing rents at twenty-five percent of a tenant's total income,²⁵ later raised to thirty percent, with some exceptions.²⁶ Thirty percent of total income is widely considered to be the most that low-income persons should spend on housing without risking extreme deprivation in their overall living standards, and some have such low incomes that even thirty percent is more than they can afford.

Congress has recognized the financial squeeze on local public housing authorities by supplementing initial capital cost assistance with subsidies for operating costs²⁷ and major repair and modernization expenditures. Subsidies for operating costs started modestly in 1961 and were increased

homelessness and has also resulted in many poor people, although living in decent housing, having to pay an unduly high percentage of their income on rent, thereby requiring sacrifices on other essentials of living.

23. "Millions of the new poor were culturally members of the middle class who had fallen from economic grace after 1929 As a whole, these people were better equipped to demand measures of alleviation than the lowest group of the urban poor before or since In the period of postwar prosperity, public housing lost most of its middle-class clientele." FRIEDMAN, *supra* note 1, at 15.

24. Housing Act of 1949, Pub. L. No. 81-171, §§ 301-302, 63 Stat. 422-24 (1949).

25. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213(a), 83 Stat. 379, 389 (1970).

26. 42 U.S.C. § 1437a(a)(1)(A) (1988 & Supp. 1992). Currently the mean rent in public housing is \$170 per month, and rents now cover about 46% of operating costs. BASIC FACTS, *supra* note 5, at 2.

27. Operating expenses include mostly utilities, ordinary maintenance (upkeep and minor repairs), administration, and insurance. NAHRO REPORT, *supra* note 1, at 34.

substantially thereafter.²⁸ They now total over \$2 billion annually,²⁹ and cover about one-third of most housing authorities' operating expenses, but over half of such expenses are incurred by the largest housing authorities.³⁰ It is much more expensive per unit to operate public housing in big cities than in smaller communities, but the per unit rental income for big city public housing is about the same as that for public housing elsewhere.³¹ Since 1975, Congress also has made funds available for major repairs and modernizing of project buildings.³² These funds have varied considerably year by year, increasing in 1993 to \$3.1 billion annually.³³ The need has escalated rapidly as buildings have aged and many needed repairs deferred. The cost to modernize the public housing stock has been estimated at between \$14 billion and \$29 billion.³⁴ As with operating costs, the per unit cost to modernize big city public housing is considerably higher than the per unit modernization cost of public housing elsewhere.³⁵

The primary objective of public housing has been to provide decent housing to poor people at rentals they can afford. But other objectives have also existed and have helped broaden political support for public housing programs. In depression or recession periods, if major new additions to the public housing stock were seriously being considered, the argument was advanced that the added jobs and other outlays needed to build the new projects would help revive the economy locally and even nationally and also provide work relief for unemployed construction

28. BRATT, *supra* note 1, at 58-59.

29. 42 U.S.C.A. § 1437g(c) (Supp. 1994).

30. NAHRO REPORT, *supra* note 1, at 33-35.

31. *See id.*

32. Funding to improve the physical condition of existing public housing is authorized by 42 U.S.C. § 1437 (1988 & Supp. 1992).

33. BASIC FACTS, *supra* note 5, at 2. In addition, in 1992, \$200 million was earmarked for major reconstruction of obsolete projects, and in 1993, \$300 million for severely distressed public housing. *Id.*

34. Schill, *Distressed Public Housing*, *supra* note 1, at 501. A 1985 Congressionally mandated study estimated the cost at \$21 billion. NAHRO REPORT, *supra* note 1, at 21. Deferred physical maintenance has contributed to a substantial vacancy rate in many public housing projects, and mismanagement allegedly is a contributing reason for some projects not being properly maintained. *See* Kinnaird, *supra* note 9, at 967-70.

35. One study estimates the average per unit modernization cost of public housing operated by the largest authorities to be about \$27,000 but only about \$10,500 for public housing operated by the smallest authorities. NAHRO REPORT, *supra* note 1, at 22.

workers.³⁶ Moreover, new public housing projects can help eliminate substandard slum housing, as new public housing projects often are built on sites previously occupied by substandard housing structures.³⁷ Public housing also is seen as a potential means of reducing racial segregation, given the power of public housing authorities to select sites, using eminent domain when needed, and the authorities' power to select tenants.³⁸

Whether located in central cities or elsewhere, public housing has always been controversial, with powerful supporters and opponents.³⁹ It has generally been strongly supported by politicians from districts with many poor people, by citizen action groups that seek to further interests of the poor, and by those in the government bureaucracy that manage and provide services to public housing projects. Construction trade unions have often been very favorable to public housing. However, much of the broader popular support that the public housing concept originally had has disappeared as the projects have commonly come to be seen as centers of crime and violence, often perceived as poorly managed and run-down and requiring wasteful expenditures of taxpayer moneys. Private real estate interests have for the most part always been opposed to public housing as unfair and threatening competition. Conservative business and political groups have opposed such housing, earlier labeling it as socialism, more

36. On earlier objectives of the public housing program see FISHER, *supra* note 1, ch. 8.

37. Slum clearance has been a government public housing objective since the Housing Act of 1937. That act makes reference to aiding slum clearance projects, and in its Declaration of Policy, retained to the present time, states as the government's policy "to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income" 42 U.S.C. § 1437 (1988).

38. This is implicit, for example, in the Federal Civil Rights Act of 1968 that prohibits racial discrimination, among other forms of discrimination, in all federally assisted housing, public housing included. Pub. L. 90-284, §§ 802-803, 82 Stat. 73, 81-83 (1969) (codified as amended at 42 U.S.C. §§ 3602-3604 (1988)). On other efforts to use public housing as a means of reducing racial segregation, see *infra* note 56.

39. On the friends and enemies of public housing, see FISHER, *supra* note 1, at 19-22; Jewel Bellush & Murray Hausknecht, *Public Housing: The Contexts of Failure*, in *URBAN Renewal: People, Politics, and Planning* 457-60 (Jewel Bellush & Murray Hausknecht eds., 1967). Bellush and Hausknecht note the ambivalence of organized labor to public housing. Interest groups actively involved in pushing for or against the public housing program in its formative years are also discussed by Marc A. Weiss, *The Origins and Legacy of Urban Renewal*, in *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT*, ch. 15 (J. Paul Mitchell ed., 1990). In addition, Weiss considers how public housing and urban renewal issues were interrelated in the political maneuvering over public housing and urban renewal legislation during the 1930s to 1950s. *Id.*

recently as the inevitable reflection of the inefficiencies of government ownership. The Reagan and Bush administrations were negative on the public housing idea and this adversity carried over to the top officials in the Department of Housing and Urban Development (HUD), the department responsible for administering federal participation in the public housing program. Moreover, the Clinton Administration, in its efforts to adapt to aggressive conservative forces in Congress following the 1994 election, has become increasingly critical of public housing.

Some critics of public housing take the position that there is a need for government housing assistance to the poor, but that public housing is too costly to the federal government and helps too small a percentage of those in need.⁴⁰ It would be better, it is asserted, if federal funds spent on public housing were distributed more widely and in other ways than building and operating government-owned rental housing. The private sector, these critics usually add, should also be more extensively involved in housing the poor, as it is more efficient.⁴¹

The federal government has long been involved in a variety of financial aid efforts to help the private sector provide more affordable housing to more people.⁴² Most of these efforts have benefited moderate-income home buyers or tenants, but a few of these many federal housing aid programs have also been directed at helping the poor. The poor who have benefited, however, have been mostly those with incomes exceeding what is typical of public housing tenants. However, one

40. See *infra* note 52.

41. This view is vigorously asserted in Kinnaird, *supra* note 9, where it is recommended that much of the public housing stock be sold to private interests at market prices and that housing assistance to the poor increasingly be through rent vouchers. The lack of efficiency in public housing is also of major concern to Schill. See Schill, *Distressed Public Housing*, *supra* note 1, at 535-38. But irrespective of the efficiency argument, some take the position that public housing tenants need the greater leasehold protection available to them over what they would receive as tenants in private housing, even with very substantial government rental subsidies of their private dwellings. See, e.g., Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681 (1994).

42. On federally aided housing programs directed at the private sector, see BRATT, *supra* note 1, 86-103; ANTHONY DOWNS, *FEDERAL HOUSING SUBSIDIES: HOW ARE THEY WORKING* (1973); *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT* (J. Paul Mitchell ed., 1985); George Sternlieb & David Listokin, *A Review of National Housing Policy*, in *HOUSING AMERICA'S POOR*, 14, 14-44 (Peter D. Salins ed., 1987); Rachel G. Bratt, *Federal Constraints and Retrenchment in Housing: The Opportunities and Limits of State and Local Governments*, 8 J.L. & POL. 651, 651-72 (1992). Some states also have programs to aid the private sector in providing more affordable housing. See *id.* at 672-81; Theodore C. Taub, *The Future of Affordable Housing*, 22 URB. LAW. 659, 660-75 (1990).

program in particular, the so-called Section 8 program, has channeled aid through the private sector but includes among its beneficiaries a substantial number of persons in the public housing income range.⁴³

Section 8 is principally a rent supplement program, with the federal government providing funds to pay much of each qualifying tenant's rent in privately owned housing.⁴⁴ The rent subsidy is the difference between the fair market rental of the housing and the amount that the tenant can afford to pay, the tenant's share usually being thirty percent of the tenant's monthly income. Subsidy payments are made directly to the landlords. Tenant eligibility requirements are similar to those for public housing. Landlords who choose to participate must agree to the governmental restrictions imposed and must rent properties that the program

43. On the Section 8 Program, see CHARLES E. DAYE ET AL., *HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS* 143-52 (2d ed. 1989); Fred Fuchs, *Introduction to HUD Conventional Public Housing, Section 8 Existing Housing, Voucher, and Subsidized Housing Programs, Part II*, 25 *CLEARINGHOUSE REV.* 990 (1991); Mahlon R. Straszheim, *The Section 8 Rental Assistance Program: Costs and Policy Options*, in *HOUSING POLICY FOR THE EIGHTIES* 169 (Dale R. Marshall & Roger Montegomery eds., 1979); U.S. DEP'T OF HOUSING AND URBAN DEV., *PARTICIPATION AND BENEFITS IN THE URBAN SECTION 8 PROGRAM* (1991).

Although benefiting far fewer tenants than public housing and Section 8 programs, the housing efforts of community development corporations, many of which the federal government has helped fund, are an increasingly significant form of poverty-level housing. Community development corporations are non-profit private organizations that now are operating in many inner-city communities throughout urban America. They are mostly small and neighborhood-centered, and not only construct, rehabilitate, and operate housing, but many of them also provide job training, social services, and neighborhood economic development as well. About half their outside funding aid nationwide comes from federal, state, and local government, the remainder mostly from a variety of charitable sources, including foundations and large corporations. On these organizations, see MICHAEL A. STEGMAN & J. DAVID HOLDEN, *NONFEDERAL HOUSING PROGRAMS, HOW STATES AND LOCALITIES ARE RESPONDING TO FEDERAL CUTBACKS IN LOW-INCOME HOUSING*, 97-139 (1987); AVIS C. VIDAL, *REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS* (1992). For a proposal that control over public housing be turned over to community development corporations, see Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 *N.C. L. REV.* 1619, 1642-43 (1993).

44. The Section 8 program was established by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 1437 (1988 & Supp. 1992)).

Recently, Congress provided for a block grant program, the so-called HOME program, that in some respects is similar to the Section 8 Program. Among other purposes, the HOME Program makes some funding available for affordable rental housing assistance to low-income and very low-income families. The funding assistance, however, is channeled through local or state governments. 42 U.S.C. §§ 12741 & 12742 (Supp. 1992).

administrators consider acceptable. Local public housing authorities handle much of the administrative detail of the Section 8 program. The program was initiated by the Housing and Community Development Act of 1974, and has been through many permutations since it was first set up. It earlier included a new construction and substantial rehabilitation component that provided financial assistance to builders of new housing, privately owned, for rental to low-income people. But the main thrust of the program has been rent subsidies for tenants of existing housing. Tenants in almost three million housing units are now receiving Section 8 rental housing assistance,⁴⁵ and federal government assistance for Section 8 housing currently is about fourteen billion dollars a year.⁴⁶

The Section 8 Program makes perfectly clear that workable federally funded programs of rental housing assistance to poor people, including the very poor, are possible without government ownership and operation of the dwelling units. This approach, however, is costly, requires extensive and expensive government administration, and, as is true of most all federal poverty aid programs, is subject to sharp shifts in control formats, including the amounts of monetary aid.

If, as Section 8 demonstrates, it is feasible for the federal government effectively to provide housing aid to many very poor people by channeling that aid through the private sector, does this mean that other forms of federal housing assistance should be substituted for the public housing approach and that existing public housing should be privatized? Would housing aid cost to the federal government thereby be reduced and would better quality housing in a better environment then be available to the income level of poor people now living in public housing? During the Bush Administration, Secretary Kemp of HUD thought so. He strongly promoted housing aid to the poor channeled into private housing and advocated the sale of existing public housing to existing tenants.⁴⁷ This drew support but also strong opposition. Opponents argued that many public housing tenants would not want to purchase; few such tenants could afford to do so except on terms that would amount to a near give-away of

45. In 1990, tenants in 2.5 million housing units were being subsidized by Section 8 rental housing assistance. 1993 Statistical Abstract of the United States, Table 583. As of 1994, it was 2.8 million units. Interview with HUD official.

46. In FY 1994, Section 8 housing assistance was \$14.1 billion, but approximately 10% of this was for non-rental subsidies. Interview with HUD official.

47. See, e.g., Jack Kemp, *A Homeownership Challenge*, 48 J. HOUSING 7 (1991), (responding to Congressman Clay's opposition to the sale of public housing to low-income families in William L. Clay, *Don't Sell Public Housing*, 47 J. HOUSING 189 (1990)).

the estimated \$70 billion government investment in public housing;⁴⁸ and before they could be sold, most units would need expensive rehabilitation. Furthermore, it was argued, the most likely buyers would be the most financially reliable tenants, thereby adversely affecting the remaining public housing projects by drawing away some of their best, most stable tenants. Also, most sales likely would be of the better units, including many scattered-site single family and duplex dwellings, with the result that some of those unable to buy would be deprived of more desirable units.⁴⁹

A HUD sponsored demonstration to test out the privatization concept largely verified the arguments of those opposed to public housing privatization. In this demonstration effort, carried out during the late 1980s, seventeen cooperating public housing authorities in different regions offered a total of over 1,300 public housing units for sale to existing public housing tenants. Terms and procedures varied considerably among the participating local authorities, but results were generally disappointing, as sales went slowly and many units remained unsold.⁵⁰ Despite the discouraging results of the demonstration, Congress passed the National Affordable Housing Act of 1990 that includes authorization for home ownership sales of some public housing units. The act authorizes local nonprofit entities, under HUD regulations and with HUD funding, to take over public housing projects, renovate them, and sell the units to existing residents or others. Progress is being made toward sale of a modest number of units pursuant to this

48. For an estimate that the government investment in public housing totals \$70 billion, see COUNCIL OF LARGE PUB. HOUSING AUTHS., *PUBLIC HOUSING TODAY* 7 (rev. ed. 1988).

49. For a discussion on the merits of public housing privatization, see Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 1; William M. Rohe & Michael A. Stegman, *Public Housing Home Ownership: Will it Work and for Whom?*, 58 J. AM. PLAN. ASS'N 144 (1992). Schill, in his excellent treatment of the subject, also takes the position that a federal requirement mandating public housing sales to tenants at deep discounts from fair market value and against the wishes of public housing authority owners would lead to unconstitutional takings and possibly unconstitutionally impair the public authorities' contractual rights as well. See Schill, *Privatizing Federal Low Income Assistance*, *supra* note 1, at 928-48. A similar Fifth Amendment takings position is adopted in Megan Glasheen & Christopher Hornig, *Public Housing Authorities and Hope I: May HUD Give Away What It Doesn't Own?*, 25 URB. LAW. 69 (1993).

50. For an evaluation of this public housing homeownership demonstration, see Rohe & Stegman, *supra* note 49 (providing a summary of the Public Housing Homeownership Demonstration of the U. S. Department of Housing and Urban Development, April 1990). An earlier program of public housing unit sales to tenants had similar disappointing results. See Kinnaird, *supra* note 9, at 974-75.

authorization.⁵¹

Whether existing federally assisted public housing should be privatized is a somewhat different issue from whether additional such housing should be built. One position is that the existing stock of public housing should be retained under government ownership and operation but little or no additional public housing should be built. Government disposition of the present public housing stock by sale to tenants or others, according to this position, would be too much of a net government financial sacrifice and would be too disruptive of the lives of most present public housing tenants. However, construction of new public housing arguably is unduly expensive, and unbuilt housing obviously lacks tenants whose lives can be disrupted. Moreover, the argument goes, it is now cheaper and better for the government to assist in housing the poor, including those in the public housing income range, by providing financial help to house them in privately owned and operated housing than in new government owned units.⁵² This seems to be a widely adhered to position today, both in

51. See 42 U.S.C. §§ 1437aaa to 1437aaa-8 (Supp. 1992). The public housing disposition program is known as HOPE-1. For an attack on both public housing and HOPE-1, see Kinnaird, *supra* note 9. As of late 1994, about \$100 million had been approved by the federal government for the HOPE-1 program and 29 grantees had been approved for implementation grants. Many of the housing units will be renovated prior to offering them for sale. Interview with a HUD official.

52. *E.g.*, Schill, *Privatizing Federal Low Income Assistance*, *supra* note 1, at 900-13. But Schill also is of the opinion that more distressed public housing should be demolished and those persons displaced assisted by other demand-oriented subsidies. *Id.* at 498.

A unique approach to housing the poor is proposed by Irving Welfeld, a long-time HUD employee and a nonconformist on many housing issues. He believes that the federal government should provide housing assistance to more poor people than it now does, and a feasible way of doing so is reducing the dollar amount of federal help per family. At the same overall cost to the government, more poor people could be helped by spreading aid more broadly but more thinly. The aim should be to provide the poor with decent housing, as opposed to average housing which has so frequently been the aim in the past. Also, federal aid should vary with how much of its income a family is willing to spend on housing: no aid if it spends less than 20 percent of its income on housing, no additional aid if it spends over 35 percent of its income on housing, and varying shares in aid for amounts in between. The percentage share of housing cost to the poor covered by federal assistance should be greatest for those spending 25 percent of their income on housing. Welfeld argues that not only can this aid formula reduce federal cost per family for housing assistance, thereby enabling more families to be helped, but it also will enhance pressure by the poor on their landlords to hold down rentals. Welfeld favors making public housing landlords and tenants subject to this same aid formula, thereby forcing public housing to be more competitive and efficient. WELFELD, *supra* note 1, at 247-61; and Irving Welfeld, *Poor Tenants, Poor Landlords, Poor Policy*, 92 THE PUB. INTEREST 110 (1988).

terms of how public housing is perceived on the merits and in terms of what approaches are likely to prevail in the political arena. There are of course those who disagree with this position: some preferring elimination of most all government owned public housing,⁵³ and others favoring not only government retention of the present public housing stock but adding substantially to it.⁵⁴ One difficulty in evaluating the relative merits of public housing and government aided private housing for the poor is the lack of sufficiently reliable cost data for making comparisons. Much of the cost data available is too old or too biased to be accurate indicators of current costs. There is the added uncertainty, important in any comparison, of what realistic political and administrative prospects there are for modifying either approach so as to increase its efficiency and reduce its cost without impairing the quality of housing provided.

Although much of the controversy over public housing has centered on costs of the program to the federal government and possibilities of reducing those costs by shifting federal housing assistance for the poor to other forms of housing aid, the public housing controversy has not been restricted to cost issues. Racial segregation, that characterizes so much public housing, also has been a controversial issue. Not only are many multi-unit public housing projects, including many of the very large ones, occupied entirely or nearly so by persons of one race, but projects commonly are located in much larger urban communities similarly segregated by race.⁵⁵ Opponents of segregation stress that public housing, with its potential for breaking down racial segregation, instead has been used as a means of furthering it, with all the heightened animosities and reduced job and educational opportunities that accompany racial segregation. Some legislative and judicial moves have been made to reduce racial segregation in public housing projects, but many projects remain segregated.⁵⁶ The basic reason for this continued segregation is

53. See, e.g., Kinnaird, *supra* note 9.

54. E.g., BRATT, *supra* note 1, at 82-85; Connerly, *supra* note 1, at 150.

55. On racial segregation in public housing, see sources cited *supra* note 16.

56. Congress has taken some less than fully effective steps to eliminate racial discrimination and segregation in housing, most notably by passage of fair housing legislation in 1968, 1988, and 1992, (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988 & Supp. 1992)). On the effectiveness of this legislation, see James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989). Possible tactics for desegregating public housing projects are discussed in Ted R. Miller & Mildred DePallo, *Desegregating Public Housing: Effective Strategies*, 43 J. HOUSING 9 (1986). This study was financed by HUD and directed principally to local public housing agencies. The authors note that there have been few examples of voluntary desegregation action and that: "an integration initiative can be politically dangerous in many jurisdictions, since it risks making enemies

simple: opposition to residential racial integration is pervasive and intense and the bias by whites against typical public housing minority residents is particularly strong. This makes it politically difficult to locate minority occupied public housing in white neighborhoods, and white flight may well result if such placements occur. Similar biases can surface among project residents if attempts are made to integrate projects racially. Nor

out of some of those involved." *Id.* at 18.

Limitations on courts as institutions for desegregating public housing are well-illustrated by the *Gautreaux* cases, which after more than twenty years of federal court litigation, political maneuvering, and administrative compromise have achieved only modest housing desegregation. The cases arose in the Chicago area. One case was against the Chicago Housing Authority (CHA) and sought to reduce segregation in public housing administered by CHA, especially by requiring small-scale scatter-site housing for black families in largely white communities. *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969), 304 F. Supp. 736 (N.D. Ill. 1969). The court ordered the CHA to provide scatter-site public housing. However, due to procrastination by CHA and other city officials, little such housing has been provided. The other *Gautreaux* case was against HUD. The result was aggressively contested, and at one stage went to the United States Supreme Court. *Hills v. Gautreaux*, 425 U.S. 284 (1976). The Supreme Court held in favor of plaintiffs opposing HUD. An agreement was reached whereby public housing and public housing-eligible families in Chicago would be entitled to Section 8 rental subsidy housing at various locations throughout the Chicago area, including the suburbs. Pursuant to this agreement, 4,500 low-income black families out of a qualifying pool of 40,000 families, have been relocated, a majority of them to predominantly white middle-class suburbs. On the *Gautreaux* cases, see Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988); Leonard Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 NO. ILL. U. L. REV. 589 (1992); A. Dan Tarlock, *Remedying the Irremediable: The Lessons of Gautreaux*, 64 CHI.-KENT L. REV. 573 (1988). Professor Tarlock, in his article, takes the position that the law of judicial remedies, even when constitutional questions are involved, should recognize that there are limitations on what courts can accomplish, and that responsibility on many issues rests principally with a community's political institutions, no matter how imperfect and corrupt they may be. *Id.* at 583-84. The inference is that the long and involved history of the *Gautreaux* cases, marked by dilatory and evasive tactics, and accomplishing relatively little, is the result of courts being asked to do the impossible: reform a local system when prevailing local views and the political power structure are strongly opposed to the reform.

Racial quotas, that might be a workable means of integrating public housing, have been held unconstitutional on equal protection grounds. See, e.g., *Burney v. Housing Auth. of County of Beaver*, 551 F. Supp. 746 (W.D. Pa. 1982), *vacated on other grounds*, 735 F.2d 113 (3d Cir. 1984), *noted in* 28 WASH. U. J. URB. & CONTEMP. L. 397 (1985). For arguments in favor of a race-conscious public housing integration plan that would not be an illegal quota, see Dale J. Lois, Note, *Racial Integration in Urban Public Housing: The Method is Legal, The Time Has Come*, 34 N.Y.L. SCH. L. REV. 349 (1989). On racial desegregation and federal housing policies, see HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 16, at 197-326 (1986).

is prejudice exclusively that of whites against nonwhites. Nonwhites may be opposed and resent movement of other racial or ethnic groups than their own into largely or entirely nonwhite public housing projects. Discrimination based on race has declined sharply in many job, school, public facility, and recreational settings but it remains virulent in housing, especially housing for the poor.

Race has not been the only controversial issue concerning who should live in public housing. Differences have emerged over other selection criteria, and grounds for terminating tenancies have also been contentious. It has generally been agreed that public housing should be for poor people, but there has been disagreement over how poor.⁵⁷ Some believe that the resident population of public housing should include more regularly employed working poor and fewer chronically unemployed, as this would help the housing authorities financially, and because the working poor with steady jobs are likely to be good role models for other tenants. However, despite federal statutory requirements for an income mix in public housing, many projects have relatively few working poor residents but a high proportion of residents who are very poor.⁵⁸ There also are those who are of the opinion that problem families in public housing should be dealt with more strictly and more of them evicted, especially if unduly disturbing to neighbors or if family members engage in serious illegal activity on the premises, such as vandalism or drug dealing.⁵⁹

57. On public housing tenant selection criteria, see STRUYK, *supra* note 1, at 105-10.

58. Income-mix requirements for public housing were imposed by the Housing and Community Development Act of 1974, Pub. L. No. 93-383 § 201(a)(3), 88 Stat. 633, 654-655 (requiring that at least 20 per cent of certain dwelling units be occupied by "very low-income families"). Further statutory modifications were made, the latest in 1992, limiting mandatory admission preferences for the very poor to fifty percent of a public housing authority's housing stock. Housing and Community Development Act of 1992, 42 U.S.C. § 1437d(c)(4) (Supp. 1992). For an evaluation of the tenant selection provisions of the 1974 act, with special reference to the experience of one city, see Ellen Gesmer, *Discrimination in Public Housing Under the Housing and Community Development Act of 1974: A Critique of the New Haven Experience*, 13 URB. L. ANN. 49 (1977).

59. *E.g.*, Atlas & Dreier, *supra* note 1, at 28-33. The term "problem family" or "problem tenant" is ambiguous. A lengthy list of possible criteria emerged when public housing managers in one big city were interviewed as to whom they considered problem tenants. The list included breaking rules set by management; property damage; chronic rent arrears; health problems, such as senility and alcoholism; criminal or antisocial activity of any family member, such as theft, assault, narcotics violations, and vandalism; chronic interpersonal problems, such as harassment of neighbors and others, conflict over child control, and racial or ethnic conflict; sanitation related practices, such as housekeeping problems severe enough to concern neighbors; and nuisance behavior,

One way to reduce the possible need for stricter eviction practices is more rigorous screening at the admission stage, which would exclude many problem families from public housing residency early-on.⁶⁰ This approach has received some support.⁶¹

There are obvious, if not entirely satisfactory, answers to these tenant selection and exclusion arguments. For instance, while the working poor can usually find decent housing in the private housing market, many of the chronically unemployed cannot, so more working poor in public housing will probably mean more chronically unemployed becoming homeless or living in very substandard premises. As to stricter eviction standards, if excluded from public housing, where will problem families go? Will many of them, too, become homeless? And should those in problem families who are not engaged in deviant behavior be evicted because of the conduct of those family members whose behavior is unacceptable? Arguably, the present lenient eviction practices followed by many local public housing authorities are defensible, and the disturbing and disturbed residents of public housing are first and foremost the responsibility of the police or social workers, not public housing landlords.

Another controversial public housing issue has been management: how should public housing be managed and what should be done about management shortcomings?⁶² Public housing is a difficult resource to manage, as adequate funding for operation and maintenance is not always assured; the divided responsibility between local government and HUD complicates administration and can lead to friction over policies; and the tenant population includes many with special needs or who create serious problems for both their neighbors and for management. In addition, there has been corruption in some local authorities and others have been highly

including loud and disruptive music, parties, and domestic quarrels. RICHARD S. SCOBIE, *PROBLEM TENANTS IN PUBLIC HOUSING, WHO, WHERE, AND WHY ARE THEY?*, 53-54 (1975). A surprising result of the Scobie study was how few tenants were categorized as problems using any of the housing managers' criteria other than rule breaking. The per project percentage of problem tenants ranged only between 2.2 and 4.1 percent. *Id.* at 62. But note that the study was conducted in the early 1970s.

60. For recommendations as to better screening practices and, as well, housing authority marketing efforts to attract better tenants, see Raymond J. Struyk & Jennifer L. Blake, *Selecting Tenants: The Law, Markets, and PHA Practices*, 40 J. HOUSING 8 (1983). In seeking a desirable pool of tenants, Struyk and Blake suggest that housing authorities consider not only economic and demographic factors but also such tenant behavior characteristics as prompt payment of rent, control of children, absence of criminal activity, and reasonable use of the premises. *Id.* at 11.

61. *E.g.*, Struyk & Blake, *supra* note 60.

62. On public housing management, see BRATT, *supra* note 1, at 67-70; FRIEDMAN, *supra* note 1, at 131-46; *see generally* STRUYK, *supra* note 1, at 99-177 (discussing in detail public housing management).

inefficient, political patronage being a contributing factor in some instances.⁶³ Nor has HUD been entirely free of internal corruption and scandal.⁶⁴ Moreover, many local public housing administrators reputedly have been insensitive to tenant complaints and legitimate tenant interests, particularly distressing to a tenant population that generally lacks the same freedom to move elsewhere enjoyed by most tenants.⁶⁵

HUD has undertaken a series of initiatives to improve management of local public housing authorities, such as training courses for project managers, adding funds to projects in greatest need to enable management to make operational and repair improvements, and encouraging further participation of tenants in management. Most of these initiatives have been short-term demonstration efforts involving a limited number of selected projects or authorities. As demonstrations, they were not sustained or expanded, and inadequacies in how they were designed and evaluated restricted their informational value.⁶⁶ The idea of tenant involvement in management has attracted considerable support, and public housing resident associations and councils are common, as are tenant residents on the governing boards of housing authorities.⁶⁷ Tenant management corporations, controlled and largely staffed by public housing tenants, have been formed in a small number of cities and contract to manage public housing projects for their local public housing authorities.⁶⁸ No doubt, organizations of public housing tenants can help ease landlord-tenant tensions in public housing projects, but it is unlikely that any but a relatively few public housing projects will ever be run by

63. On PHA corruption, see Kinnaird, *supra* note 9, at 971-72.

64. See IRVING WELFELD, HUD SCANDALS, HOWLING HEADLINES AND SILENT FIASCOES (1992); Wolf, *supra* note 22, at 553-67.

65. On public housing tenants' perceptions of management's responsiveness to tenant needs, see STRUYK, *supra* note 1, at 127-29. It has also been claimed that the special needs of the elderly in public housing are being largely ignored. Paul R. Votto, *Elderly Housing: The Shame of the Public Housing Profession*, 45 J. HOUSING 266 (1988). "Most public housing senior projects are nothing more than warehouses of the poor and frail." *Id.* at 268.

66. On the initiatives, see STRUYK, *supra* note 1, at 135-61.

67. NAHRO REPORT, *supra* note 1, at 9-10. To date, most resident-management efforts have resulted in only token tenant influence. Atlas & Dreier, *supra* note 1, at 33.

68. On tenant management corporations, see Robert Kolodny, *The Emergence of Self-Help as a Housing Strategy for the Urban Poor*, in CRITICAL PERSPECTIVES ON HOUSING 450-53, 456-61 (Rachel G. Bratt et al. eds., 1986); and STRUYK, *supra* note 1, at 136-61. Congress has recently authorized procedures under which tenants may apply to have management of distressed public housing projects transferred to tenant management corporations or other organizations. Housing and Development Act of 1992, Pub. L. No. 102-550, § 121, 106 Stat. 3672, 3701-3708 (1992).

tenant groups.

What is likely to be the future of public housing? The need for decent, affordable housing for the poor will remain and in central cities will increase considerably if, as seems likely, even more poor people, including more of the very poor, become central city residents. To help fill the need, substantial government assistance will still be made available but there is a question as to how much of this need government will try to fill and whether the share of government aid going to public housing will be phased down and even eventually eliminated in favor of assisting the poor to live in privately owned and operated housing. Estimates of the relative governmental cost of the two approaches will be important considerations in the decisions made. There seems little chance that much of the present stock of public housing will be privatized, as the resultant investment loss to government would be too great. But gradually, existing public housing projects will be demolished as deterioration makes it uneconomical to retain them and the massive funding needed for their rehabilitation is not forthcoming. Upon demolition, it is uncertain how much will be replaced and what form any replacements will take, whether public housing or some type of publicly aided private housing. As discussed above, determinations as to the preferred form of additional government assisted housing for the poor raise quite different cost considerations from determinations as to whether existing public housing should be privatized. Moreover, if, as is possible, government eventually opts to spread its housing aid much more broadly to cover most all the poor who need housing help, little or no new public housing would be made available unless government massively expands its total monetary commitment to housing the poor. This is an improbable possibility, at least in the near future. Obviously, the per unit cost of public housing to government is much greater than some of the other conceivable forms of housing assistance, such as modest rent supplements. Also, as a result of the recent sharp political shift to the right in Washington, it seems quite possible that in the years immediately ahead there will be a substantial reduction in federal government funding of housing for the poor, both public housing and private sector housing. If this occurs, along with anticipated cuts in funding of federal health and welfare programs for the poor, the resulting hardships may be so extensive and severe as to result eventually in policy reversals and massive new federal funding for housing those close to or below the poverty line.

Extensive government funding is so essential to public housing that if the program is to continue at anything close to its present scale of providing living quarters for millions of poor people, the federal government must provide most of the funding assistance. The states are not in the financial position to take over, although some additional state or even locally funded public housing may be provided, adding a significant but at most very limited number of new units to the overall

supply of public housing. Nor are drastic changes likely in how public housing is managed. The federal government, as principal funder, will continue to insist on imposing important management standards on local housing authorities, regardless of how much this is resented by the local authorities.⁶⁹ Overall, however, management seems certain to remain largely a local responsibility. More localities may experiment with new management arrangements, such as new ways of sharing management responsibility with tenant groups or contracting out management to private organizations. But the local housing authority format will probably continue, with authority personnel performing substantial management functions for most all projects. In general, local housing authorities have done a difficult job reasonably well, and they provide valuable local input in resolving many of the problems inherent in public housing.

Due to the high incidence of violent crime and drug dealing in large public housing projects and the unfavorable reputations of many large projects, most of any new public housing built or acquired in the future will quite likely be scatter-site small complexes of one to a half dozen dwelling units each. Many of these well may be existing housing that local housing authorities purchase, including some structures purchased at tax or mortgage foreclosure sales. The small-complex scatter-site approach also can make it easier to locate public housing outside existing low-income neighborhoods and to place minority public housing residents in predominantly white communities. However, such a scatter-site approach seems certain to meet strong resistance because of race and class prejudices and an aversion to public housing being located in most neighborhoods that now lack such housing.

Public housing has been more of a success than its opponents will admit. Through the years it has provided decent housing at an affordable price to many millions of poor people who would otherwise not have been as satisfactorily housed. However, the public housing program has encountered difficulties and has always been contentious. Many of its difficulties are inherent in any effort to provide decent and affordable housing to poor people, especially the very poor. The program is particularly important to central cities, where so many poor people reside, and its difficulties have been particularly visible and acute in large central city public housing projects. As a concept, public housing remains

69. Illustrative of this resentment is the detailed account by a local housing authority executive director of what he perceives to be unduly burdensome and inconsistent federal restrictions on local housing authorities. A.W. "Gus" Kuhn, *PHA Management: Are the Critics Right?*, 45 J. HOUSING 67 (1988). At one point Kuhn states: "housing authorities have become puppets at the hands of the Department of Housing and Urban Development, and it, therefore, becomes highly questionable whether local housing authorities are really locally owned and operated as envisioned under the Housing Acts of 1937 and 1949." *Id.* at 71-72.

controversial; and its future is uncertain as alternative forms of housing for the poor attract support and as the federal government, the principal source of public housing financial assistance, faces serious budgetary constraints and growing popular antipathy to government funded aid programs for the poor.

II. URBAN RENEWAL

The urban renewal program, heavily funded by the federal government, was a major force in American urban affairs for a quarter of a century.⁷⁰ It was terminated in 1974, but in modified form subsequent government programs have used somewhat similar approaches in efforts to achieve similar goals. The urban renewal program can be seen as part of a long continuum of government attempts, through cooperation with the private sector, to revitalize urban areas, especially central cities.

The principal concern of urban renewal was physical deterioration of urban areas. Its primary goals were elimination of slums and the renovation of central business districts.⁷¹ To some, notably many land use planners, comprehensive planning of entire cities became a major urban renewal goal—the rational restructuring of urban complexes. And to many mayors and other local government officials, urban renewal was seen as a means of increasing the property tax base of their cities, an increase that usually follows from new or extensively renovated structures. Still other urban renewal goals, in relation to some projects, were attracting back more upper-income residents to central cities and also strengthening urban hospitals, universities, and cultural centers by providing them with expansion space or making their surrounding

70. On urban renewal, see MARTIN ANDERSON, *THE FEDERAL BULLDOZER, A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* (1964); RICHARD D. BINGHAM, *PUBLIC HOUSING AND URBAN RENEWAL, AN ANALYSIS OF FEDERAL-LOCAL RELATIONS* (1975); SUSAN S. FAINSTEIN ET AL., *RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT* (rev. ed. 1986); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC., HOW AMERICA REBUILDS CITIES 15-60* (1989); FRIEDMAN, *supra* note 1, at 147-172; SCOTT GREER, *URBAN RENEWAL AND AMERICAN CITIES, THE DILEMMA OF DEMOCRATIC INTERVENTION* (1965); Weiss, *supra* note 39, at 253-74; *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* (James Q. Wilson ed., 1966); REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, pt. 2, ch. 6; *Symposium, Urban Renewal, Part I*, 25 *LAW & CONTEMP. PROBS.* 631 (1960); *Symposium, Urban Renewal, Part II*, 26 *LAW & CONTEMP. PROBS.* 1 (1961); Quintin Johnstone, *The Federal Urban Renewal Program*, 25 *U. CHI. L. REV.* 301 (1958); Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 *HARV. L. REV.* 504 (1959).

71. For an analysis of community planning goals of urban renewal, see GREER, *supra* note 70, at 180-84.

neighborhoods safer and more attractive. Although there were some renewal projects in suburbs and small towns, urban renewal was primarily directed at central cities.

The typical urban renewal procedure was for a local government agency to acquire land in need of redevelopment, clear it, and then sell the vacant land to a private or public developer who would build on it in accord with a local government plan for reuse. The writedown between acquisition cost and resale price—the difference in value between the land acquired improved and sold cleared—plus some administrative costs, were known as net project costs, and paid for mostly by federal government grants. In the typical project, however, most of the total cost was paid for by a private developer who purchased and built on the property. The usual attraction of renewal sites to private developers was the availability of large tracts of central city land that the private sector, not having eminent domain rights, normally could not assemble at a fair price, if at all. And these tracts normally came as raw land, the developer not having to pay the value of the prior improvements or the cost of removing them. In addition, the renewal plan often resulted in an upgrading of the neighborhood that was beneficial to the developer's project.

In its basic features, urban renewal was simple; in its detailed operations, of course, it was much more complicated. Many of these complexities resulted from requirements imposed by federal statutes or regulations on local public authorities (LPAs), the agencies responsible for administering the programs at the local level. The LPAs were established by state enabling acts and their form varied somewhat from state to state, but many were semi-independent local authorities.⁷² A separate federal agency, the Urban Renewal Administration, was set up to oversee the federal government's interests in the program. The program was established by Title I of a federal statute, the Housing Act of 1949,⁷³ the same act that was so important to the expansion of public housing. A

72. In some states, the LPAs were the local housing authorities or departments of city government. On LPAs, see William L. Slayton, *The Operation and Achievements of the Urban Renewal Program*, in WILSON, *supra* note 70, at 189, 195.

Many of the state enabling acts were challenged on the grounds that LPA eminent domain acquisitions, because allegedly not for a public use, were unconstitutional takings under the federal constitution or relevant state constitutions. A particularly troublesome question was whether land could validly be taken by government from one private person for the purpose of transferring it to another private person pursuant to an urban renewal plan. Almost all the urban renewal acts challenged were, however, upheld as constitutional, a leading and very influential case being *Berman v. Parker*, 348 U.S. 26 (1954). Also see C. C. Marvel, Annotation, *Validity, Construction and Effect of Statutes Providing for Urban Redevelopment by Private Enterprise*, 44 A.L.R.2d 1414, 1420-21 (1955).

73. Housing Act of 1949, ch. 338, §§ 101-110, 63 Stat. 413, 414-421.

number of federal statutory changes pertaining to urban renewal were made in subsequent years, particularly enactments in 1954⁷⁴ and 1968.⁷⁵ In 1974, with passage of the Housing and Community Development Act of 1974,⁷⁶ the urban renewal program was replaced by a block grant scheme allocating federal community development funds more equally and to more cities, with extensive discretion in each locality as to how federal aid funds were spent and with less federal oversight.⁷⁷ Under the 1974 act, localities were entitled to federal funding largely on an entitlement basis, and the act replaced not only the urban renewal program but also a number of other programs under which federal funds were distributed for particular urban land use development projects.⁷⁸

The urban renewal program not only required that there be federal approval of each proposed project before federal funding would be provided, but as a prerequisite to such funding it was also required that the locality adopt a federally approved workable program. Proper preparation of a workable program was a major undertaking that required careful local government determination of needs and strategies for action.⁷⁹ Extensive preparatory work also was necessary for each urban

74. Housing Act of 1954, ch. 649, §§ 301-316, 68 Stat. 590, 622-630.

75. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476.

76. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 1437 (West 1988 & Supp. 1992)).

77. On the Housing and Community Development Act of 1974, see Richard DeLeon & Richard T. LeGates, *Community Development Block Grants: Redistribution Effects and Equity Issues*, 9 URB. LAW. 364 (1977); and Patricia Harris, *Recent Trends in the Community Development Grant Program*, 15 URB. L. ANN. 3 (1978).

78. A total of ten programs were replaced by the Community Development Block Grant Program. For a listing of these programs see DeLeon & LeGates, *supra* note 77, at 369 n.6.

79. The workable program requirement was initiated by the Housing Act of 1954, ch. 649, § 303, 68 Stat. 590, 623-624. The Housing and Home Finance Agency, predecessor of the Department of Housing and Urban Development, later established essential elements of a workable program. These included determination by the locality of the nature and extent of local slum and blight conditions, a comprehensive plan for dealing with these conditions, a showing that adequate building and housing codes have been or shortly will be adopted, acceptance of local responsibility for relocating families displaced by government activity, a showing of financing needs and funding sources to accomplish program objectives, the contemplated administrative organization for implementing the program, and plans for citizen participation in carrying out the program. Federal approval of a workable program was also required for federal funding of public housing. On workable programs, see Charles S. Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROBS. 685 (1960); ROBERT C. WEAVER, *THE URBAN COMPLEX* 95-102 (1964); and F. David

renewal project. Many of these projects involved large parcels of land, commonly an entire city block or more, fully improved with residential or commercial structures.⁸⁰ Areas selected for renewal had to be slums or blighted. An early requirement that renewal sites be predominantly residential, either before or after renewal, was eased with a number of exceptions.⁸¹ This helped make possible more downtown or near-downtown store or office building renewal projects. In addition to site selection, the local public authority had to make determinations as to ultimate use, cost estimates, and relocation needs. It then was required to prepare a formal urban renewal plan describing the proposed project and setting forth its objectives. Once the plan was adopted by the local governing body, commonly a city council, it would go for approval to the federal Urban Renewal Administration, the agency responsible for the federal role in the program. If the Urban Renewal Administration approved, a contract would be entered into between the local public agency and the federal government under which the federal government would agree to pay its share of the net project cost. Thereafter, the land would be acquired, using eminent domain or the threat of eminent domain where necessary; present occupants would relocate; any needed site clearance would take place—and many projects involved total or near-total clearance; any necessary streets, sewers, or other infrastructure facilities would be added; the land would be transferred, usually by sale; and finally, new construction or site rehabilitation would occur in accord with the project plan. Most dispositions were to private developers but some were to public entities, including public housing authorities. In some instances, the entire process took many years; and if an acceptable developer could not be obtained, the land remained vacant indefinitely.⁸²

Urban renewal projects resulted in the demolition of an estimated 400,000 dwelling units,⁸³ residents of which, most of them poor people, had to relocate. In addition, many thousands of businesses, mostly small enterprises, were forced to move as a result of urban renewal projects.

Clarke, *Basis for Measuring "Workable Program" Progress*, 19 J. HOUSING 524 (1962).

The emphasis on planning in urban renewal resulted in employment of many city planners nationally. See Weiss, *supra* note 39, at 268-70.

80. One District of Columbia project covered 560 acres, almost a square mile. FRIEDEN & SAGALYN, *supra* note 70, at 27.

81. On the predominantly residential requirement and its modifications over time, see Ashley A. Foard & Hilber Fefferman, *Federal Urban Renewal Legislation*, in WILSON, *supra* note 70, at 104-113; and FRIEDEN & SAGALYN, *supra* note 70, at 22-25.

82. Martin Anderson claimed that the estimated time, as of 1961, for completion of the typical urban renewal project was twelve years. ANDERSON, *supra* note 70, at 90.

83. REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, at 163. This estimate was as of 1968.

Many of these residents and businesses needed relocation help, and the federal government at a later stage in the program's evolution made modest cash grants available to relocatees forced to move because of urban renewal.⁸⁴

The major funding contribution of the federal government to urban renewal was the federal payment, by grant, of two-thirds of net project costs.⁸⁵ The remaining one-third was the responsibility of local government and could be met by cash payments or by local government additions to project areas of such needed public facilities as new streets and sidewalks.⁸⁶ Over the quarter century of federally-aided urban renewal, there were approximately 2,100 federally approved urban renewal projects⁸⁷ in about 1,000 localities.⁸⁸

Despite its promise and achievements, the urban renewal program drew extensive criticism and generated a great deal of dissension over its objectives, the nature and effect of its projects, and whether government should even be involved in such a program. As one distinguished commentator observed: "Urban renewal is not the most expensive or the most far-reaching domestic governmental program of our time, yet it is one of the most widely discussed and perhaps the most controversial."⁸⁹ Persistently the most controversial aspect of the program was how and to what extent the program should be directed to helping the poor. Was elimination of slums within renewal areas to be the major benefit to the poor, assuming this to be a benefit, or was a large volume of new or

84. On government assistance to urban renewal relocatees, see FRIEDEN & SAGALYN, *supra* note 70, at 30-37; and Chester Hartman, *The Housing of Relocated Families*, in WILSON, *supra* note 70, at 293, 313-15.

85. The federal share was not to exceed three-fourths for projects in cities having a population of 50,000 or less. 42 U.S.C. § 1468a (1970). For the relative distribution of all federal funds for net project costs between cities over and under populations of 50,000, see REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, at 161.

86. A few states provided state funds to assist their cities in meeting urban renewal costs. William L. Slayton, *State and Local Incentives and Techniques for Urban Renewal*, 25 LAW & CONTEMP. PROBS. 793, 801-05 (1960).

87. U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1976*, Table 1282 (1976).

88. U.S. DEP'T OF HOUSING & URBAN DEV., 1974 STATISTICAL YEARBOOK 21 (1974). From 1949 to 1975, federal government grant funds reserved for urban renewal projects totaled \$10.1 billion and as of 1974, \$6.8 billion in grant funds had been disbursed. Statistical Abstract, *supra* note 86, at table no. 282. The urban renewal program also provided financial assistance in the form of federal loans and loan guarantees; and as of 1975, the total of these commitments outstanding was \$4.8 billion. Budget of the U.S. Gov't, FY 1975, Appendix 503 (1974).

89. WILSON, *supra* note 70, at xiii.

rehabilitated housing to be developed for the poor as well, much of it in renewal areas? Was the principal emphasis of the program to be redevelopment that aided the poor or was it to be renewing downtown business districts that thereby would help revitalize cities, benefit business, and increase property tax yields? This struggle over the primary purpose of urban renewal was an important feature of the extended prepassage history of the Housing Act of 1949, the act that launched the urban renewal program,⁹⁰ and the struggle continued throughout the life of the program.

The Housing Act of 1949 was an omnibus act that initially attracted considerable support from both advocates for the poor and business interests, as it contained provisions appealing to each of these groups. Title I of the act provided for slum clearance and urban redevelopment, and although unclear as to just what the urban renewal reuse emphasis would be, its terms and its legislative history were subject to interpretations encouraging to both sides in the struggle over purpose. Title III of the act also provided for public housing, very much favored by advocates for the poor, although strongly disfavored by many business interests. The act offered enough to each concerned group to enable its eventual passage.

As it turned out, most urban renewal decisions, including what the primary purpose of the program should be, were left largely to local and federal government officials responsible for program administration, who were influenced by outside developers, private or public, willing to build on available renewal properties. For the most part, the renewal decisions made were disappointing to those concerned about the poor. Overall, the emphasis was heavily on strengthening downtown business areas by replacing old structures with new office buildings, stores, or middle- and upper-income housing. Considerable new housing was built on renewal sites, but much less than what was demolished, and most of the new housing was for upper- or middle-income residents.⁹¹ Although by

90. The prepassage struggle over what became the Housing Act of 1949 is described in Foard & Fefferman, *supra* note 81, at 79-93. The support and influence of the public housing lobby in passage of the act are discussed in Weiss, *supra* note 39, at 270-72.

91. As of 1967, of the approximately 400,000 dwelling units demolished in urban renewal areas, only about half as many dwelling units had been or were scheduled to be constructed at the renewal sites. Only about 10 percent of the new dwelling units were to be public housing and almost two-thirds of them were to be for middle- and upper-income residents. See REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, at 163.

statute areas scheduled for renewal had to be slums or blighted,⁹² in meeting this requirement many renewal sites were selected adjacent to established downtown commercial areas, thereby enabling geographical expansion of downtown business districts with office or store building reuse. Some renewal projects adjacent to downtown areas included construction of luxury apartment buildings sited to attract high-income residents by the proximity to downtown.

Not only were those concerned about the poor disappointed with the prevailing forms of development on urban renewal sites but they were incensed by the hardships, financial and emotional, encountered by many residents of urban renewal areas forced to relocate as the result of renewal projects.⁹³ Relocates not only had moving expenses, but there were emotional hardships in being uprooted from home communities, and the housing they moved to often was more expensive or otherwise less satisfactory than what they had left. Minorities, it became evident, were particularly vulnerable to relocation hardships because of the difficulty they faced in finding housing elsewhere. It also became evident that although slums were being cleared, they were not being eliminated; they were merely being replicated or intensified elsewhere as occupants of renewal areas shifted locations. Concern was also expressed for the relocation hardships encountered by the thousands of small businesses forced by urban renewal to relocate. Not only did these businesses have moving expenses but many retailers, in particular, suffered extensive good will losses when forced out of their established locations.

One response of those concerned about the effect of urban renewal on the poor was to publicize the program's shortcomings as they saw them.⁹⁴ There also was pressure exerted on Congress and relevant

92. Following the Housing Act of 1954, that added the term "urban renewal" to the statutory lexicon (68 Stat. 622), more attention was given to blight removal in selecting areas to be renewed, blight being a vague concept that included slum housing and other physically run-down properties that could be rebuilt for a more desirable use. Many, but not all, nonresidential areas found to be blighted had high incidences of property tax delinquency, declining property values, and vacancies. The term "blight," however, was capable of being stretched so as to delineate areas with less serious adverse market characteristics but that might be attractive to developers, especially if cleared. On slum and blight definitional problems and how these terms were manipulated in selecting urban renewal sites, see FRIEDEN & SAGALYN, *supra* note 70, at 23-24; and GREER, *supra* note 70, at 29-31.

93. *See infra* note 94.

94. Illustrative of the criticism of urban renewal for its impact on housing for the poor and the cost and trauma it caused relocates are these commentaries: JOSEPH P. FRIED, HOUSING CRISIS U.S.A. 88-94 (1971); Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in WILSON, *supra* note 70, at 359-79; FRIEDEN & SAGALYN, *supra* note 70, at 29-37; FRIEDMAN, *supra* note 1, at 166-72; REPORT OF THE

federal and state government agencies to redirect the program and correct its perceived deficiencies. There were some limited successes with Congress. For example, the statutory requirement that renewal projects be predominantly residential before or after development was retained, although with some modifications;⁹⁵ statutory requirements in later urban renewal years added some low-income housing reuse requirements for urban renewal areas;⁹⁶ and, beginning in 1956, the federal government made payments to residents and small businesses forced to relocate from urban renewal areas—payments, however, that some critics considered inadequate.⁹⁷ Political pressure on local public authorities also was effective in some instances to shape urban renewal projects more favorably to the interests of the poor, with organized citizen participation often a useful tactic.⁹⁸

Looking back at the urban renewal program over its quarter-century history, its principal emphasis generally was not on benefiting the poor through slum clearance and better housing; rather, it was on downtown business district revival and accompanying increases in city property taxes. Nor did slum clearance prove to be an effective way of eliminating slums, as following clearance, slums tended to move or be intensified elsewhere. Moreover, urban renewal resulted in substantial net loss of low-income housing in renewal areas, many close-knit low-income communities were broken up, and renewal caused substantial hardship to many resident and business relocatees.

NAT. COMMISSION ON URBAN PROBS., *supra* note 1, at 167; and Herbert J. Gans, *The Human Implications of Current Redevelopment and Relocation Planning*, 25 J. AM. INST. OF PLANNERS 15 (1959). But for a less critical analysis of urban renewal relocation, by a former URA official, see Martin Millsbaugh, *Problems and Opportunities of Relocation*, in *Symposium, Urban Renewal, Part II*, *supra* note 70, at 6.

95. On the predominantly residential requirement, see *supra* note 81.

96. The Housing and Urban Development Act of 1968 required that a majority of all subsequently built urban renewal project housing be for low- and moderate-income families or individuals and at least 20 percent of such housing be for low-income individuals or families. Pub. L. No. 90-448, § 512, 82 Stat. 476, 524-525.

97. See *supra* note 84.

98. Citizen participation was strongly encouraged by the workable program. *Supra* note 79. On citizen participation in urban renewal, see generally GREER, *supra* note 70, at 118-23; and James Q. Wilson, *Planning and Politics: Citizen Participation in Urban Renewal*, in WILSON, *supra* note 70, at 407. For a case study particularly concerned with citizen participation in urban renewal projects in one section of a big city, Chicago's Hyde Park-Kenwood area, see PETER H. ROSSI & ROBERT A. DENTLER, *THE POLITICS OF URBAN RENEWAL, THE CHICAGO FINDINGS* (1961). Compare the experience in Boston, as described in HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* (4th prt. 1962), and in Walter McQuade, *Urban Renewal in Boston*, in WILSON, *supra* note 70, at 259, 273.

Another controversial urban renewal issue was the cost of the program to the federal government, and especially how much of the net project cost should be assumed by the federal government and how much by the localities. The original generally applicable net project cost formula of two-thirds to be paid by the federal government and one-third by the localities was retained, although there were attempts within the federal government to reduce the federal percentage.⁹⁹ These attempts were strongly resisted by the localities that claimed, given their needs and resources, even one-third was an undue burden on them. Indirectly, a locality's share could be reduced by noncash credits for public facilities added by the locality that did not exclusively benefit the project area or would have been provided even without the urban renewal project. Liberally allowed noncash credits in effect increased the amount of project costs paid by the federal government. Noncash credits and their manipulation were at times contentious matters.¹⁰⁰

Workable programs also generated controversy. Many local officials gave only limited attention to this detailed and demanding set of requirements, considering the workable program a matter of low priority and a mere formality to receiving federal aid.¹⁰¹ Many localities, for example, failed to comply with workable program directives to appoint or convene citizen participation committees or to enact or enforce requisite housing and other codes. Such neglect of workable program requirements resulted in federal compliance pressure on a number of localities.¹⁰² There were sharp differences as to how workable programs should be viewed: as mandatory standards to be rigorously and consistently enforced nationwide or as means of educating local communities on their needs and with federal demands made cautiously and adjusted to each locality's circumstances.¹⁰³ The workable program issue was further complicated by uncertainty as to exactly what the program's requirements meant, and also by doubts about the effects of implementing such a radical effort at social control as the workable program. Moreover, there were concerns about possible political backlash against local government leaders if they adhered rigorously to workable program requirements.

99. Controversy over federal-local sharing of costs is discussed in Foard & Fefferman, *supra* note 81, at 113-25.

100. On the noncash credit issue, see *id.* at 119-24; and ANDERSON, *supra* note 70, at 30-34. Anderson claims that nationwide 60 percent of the local share consisted of noncash credits and that the federal government paid for two-thirds of these. *Id.* at 33-34.

101. Rhyne, *supra* note 79, at 696.

102. WEAVER, *supra* note 79, at 97-102.

103. On hard line and soft line approaches to workable programs, see GREER, *supra* note 70, at 110-13.

The ultimate and most fundamental urban renewal controversy was over whether the program merited retention. Opposition eventually became so strong as to bring about its termination in 1974. Among the many considerations that led to termination were financial cost of the program to the federal government; localities' objections to the workable program requirement and even to federal intervention generally in the urban renewal process; hardships caused relocatees forced to move from renewal areas; the length of time it took to complete renewal projects, indicative of gross inefficiencies in the process; and inequalities in federal urban renewal funding allocations, some cities receiving far more than others of comparable size and with comparable problems, some cities receiving nothing. Perhaps the most damaging attack on the program was the widely read and referred to book by Martin Anderson, *The Federal Bulldozer*, published in 1964.¹⁰⁴ After a lengthy analysis of the program, Anderson urged its repeal because, he asserted, it was regressive, costly, benefited high-income groups but hurt low-income groups, and had negligible results compared to what the private market could achieve. The gist of his position was that free enterprise is the answer to the problems urban renewal sought to address, and he concluded his book by stating: "The federal urban renewal program conceived in 1949 had admirable goals. Unfortunately it has not and cannot achieve them. Only free enterprise can."¹⁰⁵ This free enterprise position applied to urban renewal was particularly appealing to conservative political interests.

Another very troublesome attack on the urban renewal program was that the decentralized character of American local government limited substantially what it could achieve. Important to this conclusion is the obvious fact that metropolitan regions are functional units with many interdependencies between central cities and their suburbs. The reasoning then is that these interdependencies are so important that for any comprehensive government urban renewal efforts to be successful, cooperation among local governments throughout the region is required, and yet diversity among these governments as to their perceived interests makes such cooperation generally impossible. Furthermore, the tradition in this country of local government autonomy over local affairs is so

104. See ANDERSON, *supra* note 70. The Anderson book was severely criticized for its conclusions and the inaccuracy of its data. See, e.g., Robert P. Groberg, *Urban Renewal Realistically Reappraised*, 30 LAW & CONTEMP. PROBS. 212 (1960), reprinted in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, *supra* note 70, at 155; and Isadore Candeub, "Federal Bulldozer" Labeled "Journalistic Rehash" of Old Anti-renewal Arguments, 9 J. HOUSING 473 (1964). And see CHARLES ABRAMS, THE CITY IS THE FRONTIER 155 n.1 (1965).

105. ANDERSON, *supra* note 70, at 230.

strong that the federal government lacks effective power to force the requisite coordinated political action needed for comprehensive urban renewal. Some spot renewal efforts are possible, such as adding new subsidized housing for the poor in central cities. Also, with sufficient government subsidy, urban renewal may provide enough new construction of taxable properties, commercial or residential, to at least temporarily strengthen central city property tax bases. But, it is reasoned, renewal that defies basic underlying trends in how urban regions evolve, how physical space is allocated, and how political power over urban land use matters is distributed, cannot be a successful strategy for urban revitalization.¹⁰⁶ This analysis bears some resemblance to that of Martin Anderson, but with more stress on urban renewal's political limitations.

Whatever the reasons and however valid the justifications, the urban renewal program came to an end in the mid-1970s. No equally grandiose government program for physical revitalization of American urban areas has since been attempted. The federal government has retained some interest in revitalizing depressed urban areas through funding help for renewal-type improvements. Among federal government efforts of this kind have been community development block grants, under which local and state government grant recipients could use the funds provided for urban renewal purposes, among others;¹⁰⁷ urban development action grants, commonly referred to as UDAGs, that allocate federal funds to distressed urban areas for targeted physical improvements;¹⁰⁸ and low-income housing tax credits under the income tax that encourage more new and rehabilitated low-income rental housing, much of this housing certain to be in distressed inner-city areas.¹⁰⁹ But federal government funding

106. This analysis is substantially that of the respected scholar and commentator on urban renewal, Scott Greer, writing in the 1960s. See particularly GREER, *supra* note 70, at 125-64, 165-84. Greer adds this further limitation on the potential of urban renewal: "[Urban renewal's] most important limits are, simply, the limits of our knowledge. . . . We do not know enough about the forces producing the metropolis and we know less of the stratagems that would allow us to control its growth." *Id.* at 185.

107. See 42 U.S.C. § 5301 (1988 & Supp. 1992). On the block grant program, see Duane A. Martin, *The President and the Cities: Clinton's Urban Aid Agenda*, 26 URB. LAW. 99, 124-26 (1994); and Richard S. Williamson, *Community Development Block Grants*, 14 URB. LAW. 283 (1982).

108. 42 U.S.C. § 5318 (1988). On UDAGS, see Martin, *supra* note 107, at 108-09; and Comment, *Urban Development Action Grants: A Housing-Linked Strategy for Economic Revitalization of Depressed Urban Areas*, 26 WAYNE L. REV. 1469 (1980).

109. 26 U.S.C. § 42 (1988 & Supp. 1992).

of urban revitalization has declined considerably since the mid-1970s.¹¹⁰ On a modified scale, some states and cities have continued to engage in sporadic urban renewal efforts, of particular significance being the entrepreneurial ventures some states and central cities have entered into with large business interests to retain or expand local business activity by building or modernizing central city office buildings, parking garages, sports complexes, moderate-income housing, and other structures for which there appears to be market demand.¹¹¹ Government involvement in urban renewal did not end with the federal urban renewal program termination in 1974, but since then it has been less ambitious and has had less impact on cities nationwide.

III. ZONING

Zoning has become the major form of land use and development regulation imposed by local government in the United States.¹¹² Most municipalities, including all big cities except Houston,¹¹³ now have zoning programs in effect. Although in scope and detail of coverage, zoning ordinances vary considerably among municipalities, they have

110. On federal government cutbacks in aid to cities, see Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1383-1386 (1993) and Martin, *supra* note 107, at 100-16.

111. On entrepreneurial urban development projects with local or state government and private business participation, see John J. Kirilin & Dale R. Marshall, *Urban Governance: The New Politics of Entrepreneurship*, in URBAN CHANGE AND POVERTY (Michael G.H. McGeary & Laurence E. Lynn, Jr. eds., 1988); Robert H. Freilich & Brenda L. Nichols, *Public/Private Partnerships in Joint Development: The Legal and Financial Anatomy of Large-Scale Urban Development Projects*, 1986 INST. ON PLAN. ZONING & EMINENT DOMAIN 1-1 (1986); and Daniel R. Mandelker, *Public Entrepreneurship: A Legal Primer*, 15 REAL EST. L.J. 3 (1986).

112. For general coverage of zoning, see ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3d (1986); RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED (1985); *The Land Use Awakening: Zoning Law in the Seventies*, A.B.A. SEC. OF URB., ST. & LOC. GOV'T L. (Robert H. Freilich and Eric O. Stuhler eds., 1982); ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar and Jerold S. Kayden eds., 1989); MARTIN A. GARRETT, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS (1987); DANIEL R. MANDELKER, LAND USE LAW (2d ed., 1988); NORMAN WILLIAMS, JR., AMERICAN LAND PLANNING LAW 329-533 (rev. 1985); REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, pt. 3, ch. 1; Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709 (1986); and Norman Williams, Jr., *Planning Law in the 1990's*, 31 ARIZ. L. REV. 471 (1989).

113. On the zoning situation in Houston, see *infra* note 139.

some common characteristics. They regulate land use on a district by district basis, the same restrictions applying substantially to all land use parcels within each kind of district, denominated a zone. Typically, zoning ordinances restrict the kind of land use permitted within each zone, such as residential, commercial, or industrial, or some subcategory of one of these principal uses. The height, bulk, and lot location of buildings within each zone also are usually restricted. It is common today for all land use in a municipality to be zoned and to be covered by zoning restrictions. Most modern zoning ordinances are long and complex, with many amendments or with recent extensive revisions. The ordinances also normally include an official map delineating zone locations.

Zoning controls generally are prospective only, structures and uses prohibited by a zoning enactment usually may be retained if in existence when the provision was passed. But some ordinances require that such nonconforming features be phased out over time. Zoning also is a form of regulation, predicated on the police power, and does not provide for compensation to those with an interest in zoned land use who are adversely affected by zoning restrictions. Compensation, however, may be required if the zoning is determined by the courts to be an unconstitutional taking.

Although zoning is principally a local government form of land use control, the states also have assumed zoning responsibilities. Each state has authorized the zoning activities of its municipalities, usually by zoning enabling acts. In addition, some states have, through legislation, imposed land use controls that override or supplement local zoning.¹¹⁴ State courts are active in resolving zoning controversies, and in the course of doing so, determine the validity of zoning and rezoning actions of local zoning agencies and rule on the meaning and constitutionality of zoning enabling acts and ordinances. In many states, zoning cases are among the most common kinds of cases filed in state courts.

114. On state government use of the zoning power, see 1 ANDERSON, *supra* note 112, §§ 2.01-2.14. Affordable housing statutes enacted by some states seek to limit local exclusionary zoning efforts. They include the widely commented on New Jersey Fair Housing Act of 1985, N.J. STAT. ANN. §§ 52-27D301 to 52-27D329, as amended (West 1986 & Supp. 1994), the New Jersey legislature's response to the Mount Laurel fair share cases; and the 1969 Massachusetts Low- and Moderate-Income Housing Act, MASS. GEN. LAWS. ANN. ch. 40B, §§ 20-23, as amended (West 1979 & 1994 Supp.), often referred to as the anti-snob zoning law. The Massachusetts Act, under some circumstances, enables a state agency to override local zoning board decisions to block construction of government subsidized low- or moderate-income housing. For recent discussions of the New Jersey and Massachusetts statutes, see Colloquium, *Mount Laurel and the Fair Housing Act: Success or Failure?*, 19 FORDHAM URB. L.J. 59 (1991); and Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992).

Zoning as an important means of legal control over land use is a twentieth century development. Although some limited-purpose land use controls based on districting were instituted earlier, the first comprehensive zoning ordinance was enacted by New York City in 1916. The ordinance divided most of the city into zones, with different use and development restrictions for each type of zone.¹¹⁵ Thereafter, zoning as a form of control spread rapidly throughout the United States, influenced by a well-publicized model state zoning enabling act, the Standard State Zoning Enabling Act, prepared under the auspices of the United States Chamber of Commerce in 1922 and followed as a model by many states. The spread of zoning also was aided by the widely publicized United States Supreme Court *Euclid* decision in 1926 upholding the constitutionality of zoning.¹¹⁶

Zoning in its earlier form contemplated a land control program that could rationally and fairly determine in advance how urban areas should develop in the future: what changes would be permitted in developed areas and what kinds of improvements and uses would be permitted in undeveloped ones. For already developed areas, the usual objective was to create stability by perpetuating current uses and limiting prospects for change. Some kind of planning was contemplated for almost all zoning, but it was rare for written plans to be prepared in advance of enacting zoning ordinances.¹¹⁷ City councils and other local governing bodies,

115. The 1916 New York City Zoning Resolution has been extensively amended at various times since it was originally enacted. It was comprehensively revised in 1961, in part to adapt to urban renewal proposals, and has had many amendments since 1961. The City's zoning regulations are now a long and complex patchwork. For arguments that another comprehensive revision is needed, see Norman Marcus, *New York City Zoning—1961-1991: Turning Back the Clock—But with An Up-to-the-Minute Social Agenda*, 19 *FORDHAM URB. L.J.* 707 (1992).

116. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Indicative of the significance of the *Euclid* case is that a conference was held in 1986 to celebrate its sixtieth anniversary, and papers given at the conference were the nucleus for a superb book on zoning, *ZONING AND THE AMERICAN DREAM*, *supra* note 112. On the early history of zoning, see SEYMOUR I. TOLL, *ZONED AMERICAN* (1969).

The earlier concept of zoning as providing relatively fixed use districts with little anticipated need for change is often referred to as Euclidean zoning, after the form of zoning involved in, or perceived by the Court as involved in, *Euclid v. Ambler Realty Co.*

117. Early state zoning enabling acts usually provided that zoning should be in accord with a comprehensive plan, a requirement of the Standard State Zoning Enabling Act, but these acts generally were not construed to require a separate written plan, some courts concluding that the zoning ordinance itself was adequate expression of a comprehensive plan. On the comprehensive plan requirement, see 1 ANDERSON, *supra* note 112, §§ 5.02-5.11.

drawing on expert consultants as they felt needed, were considered competent to set standards for the future without resort to pre-enactment written plans.

For the most part, zoning early-on was anticipated to be self-executing in that the ordinance would clearly set forth what could or could not be done and land owners could proceed accordingly. A local building inspector or other local government official might have to approve new construction or major remodeling, but these officials would have no authorized discretion to depart from the terms of the ordinance. However, it was recognized that some flexibility in the system might, on occasion, be needed. The ordinance might have undesirable consequences if applied to some land parcels, and building inspectors or other local officials might misinterpret the ordinance to the land owners' disadvantage. Administrative relief in these situations was therefore made available. Variances could be granted if application of the ordinance would cause unnecessary hardship to a land owner; and special use permits, also known as special exceptions or conditional uses, could be authorized by a local government agency, in its discretion, for certain designated uses otherwise prohibited in the applicable zone, such as an airport or trailer camp. Furthermore, appeal was available from local government rulings that a land owner considered to be in violation of the ordinance. One or more local government administrative agencies, such as a board of zoning appeals, was generally designated to consider requests for these kinds of relief, with further appeal then possible to the courts.

As zoning has matured, it has changed significantly. Zoning ordinances have become more detailed, typically with more kinds of districts and more restrictions on how land may be used and developed in most districts. Also, professional land planners are more extensively relied on, with central cities and many larger suburbs having professional planning staffs that devote much of their time to zoning matters. In addition, some localities have developed and maintain written comprehensive plans; and a few states, by statute, require that local zoning ordinances be consistent with these separately prepared plans.¹¹⁸

A particularly important change in zoning has been the move in many localities toward more flexibility, often with more discretion in local zoning administrators and local governing bodies to adapt to changing needs and demands as they emerge. It has become evident that the relatively fixed and predetermined form of zoning as initially conceived is unsuited to the manifold pressures for change, often unpredictable, in how land, especially urban land, should be developed and used. Pressures

118. On consistency requirements, see ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS, CASES AND MATERIALS* 403-06 (1981); and MANDELKER, *supra* note 112, §§ 3.15-3.17.

exerted have come both from market forces and political interests and have had to be accommodated. One response has been rather liberal granting of variances and special permits when requested, and the volume of these requests has been substantial, with appeal to the courts common. Another response has been the adoption in many localities of new forms of zoning that authorize departures from the conventional model. One of these new forms is contract zoning, in which a property owner covenants with local government zoning authorities on how land will be used or improved if rezoned.¹¹⁹ Another is floating zones, in which a zoned district is provided for, but is not located on the zoning map until later, often after negotiation with one or more developers.¹²⁰

With the advent of large multiple lot developments, most of them large subdivisions of single-family dwellings built by the same developers, came the planned unit development as a land control variant of zoning.¹²¹ Rather than requiring each structure and each lot to comply with the same zoning requirements, under the planned unit development form of control, the entire subdivision is considered a functional unit. The developer has options to cluster and mix uses and to design structures to enhance utility and increase market appeal. But the developer's plan must be approved in advance by local government authorities. Planned unit developments are now common in much of the United States. A less frequently used form of land control is performance zoning, which is attractive to some developers because of the greater design and use discretion it gives them, particularly suitable to industrial properties.¹²² Replacing many of the more usual use and structure standards, performance zoning requires adherence to measurable limits on such conditions as noise, environmental pollution, water runoff, and traffic generated from each lot or site area, and may limit permissible buildable areas to protect existing natural resources such as wetlands and woodlands. Developing acceptable performance standards and recruiting staff sufficiently skilled to monitor compliance effectively has proven difficult.

Zoning is a powerful means for controlling land use and development, and one that has varied considerably over time and from locality to locality. But its perceived objectives are likely to differ with different

119. On contract zoning, see MANDELKER, *supra* note 112, §§ 6.60-6.62; and Note, *Contract and Conditional Zoning*, 23 HASTINGS L.J. 825 (1972).

120. On floating zones, see MANDELKER, *supra* note 112, § 6.59.

121. On planned unit developments, see MANDELKER, *id.* §§ 9.20-9.26; and Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 3 (1965).

122. On performance zoning, see DOUGLAS R. PORTER ET AL, *FLEXIBLE ZONING: HOW IT WORKS* (1988); and Martin Jaffe, *Performance Zoning: A Reassessment*, 3 LAND USE L. & ZONING DIG., n. 3, at 3 (1993).

interest groups and with the type of zoning program in effect. Also, the perception of what zoning seeks to accomplish may vary with the kind of community involved: for example, developed or undeveloped; central city or suburb; downtown or outlying commercial; or high-income, moderate-income, or low-income residential. However, there are certain broad objectives that are evident in most zoning programs:

—Local government in each locality should be the principal government decision maker as to land within that locality, including what zoning regulations should be imposed and how they should be administered.

—Zoning, through the districting device, should prevent inconsistent land uses, including adverse spillover effects or externalities, within and among districts in each local jurisdiction. The implication here is that the market unrestrained can have undesirable consequences within a locality, including a reduction in land values from undesirable spillovers.

—Zoning should exert major influence over the character and ambiance of life in each zoned district. This can mean influencing not only what goes on in the district—what sorts of work, recreation, or residential lifestyle behavior, for instance—but also what kinds of people regularly are present there. Whether publicly admitted or not, a major appeal of zoning in many residential communities is that it helps preserve the community for residents of the same economic and social class and with much the same life styles; it frequently is used to deter most minorities, the poor, and often those of moderate income from moving into more affluent districts.

There are other zoning objectives; those which are more common merit mention here. One of these is an increase in the local property tax base by zoning favorable to major new developments that will add substantially to the tax rolls. For example, rezoning to permit a major new shopping center or office building complex, or increasing the permitted height or bulk of buildings in downtown areas. Decreasing local government expenditures is another rather common zoning goal; for example, large lot single-family zoning requirements may reduce the need for expensive new local public schools, or a refusal to zone a riverfront area for any development may relieve local government from having to construct an expensive retaining wall or levee. Increasingly, too, zoning is being used to achieve greater environmental protection. Illustrative of this are height and setback requirements for high-rise buildings to provide more sunlight and better air circulation, bulk restrictions on buildings in high-density areas to limit traffic volume and accompanying pollution, limiting most heavy industry to a separate zone, and the creation of open-space zones to protect wetlands, woodlands, and agriculture. Some zoning ordinances have provisions expressly designed to further the objective of more housing for low- and moderate-income people. Inclusionary zoning provisions have this aim and usually provide for a mandatory set-aside of

a certain number of housing units for low- and moderate-income tenants or buyers as a condition for approval of a new housing project. They may also provide incentives such as density bonuses or accelerated zoning approval procedures for those developers who voluntarily agree to such set-asides.¹²³

Still another zoning objective, one that is apparent in many zoning ordinances, is the improvement or protection of the aesthetic appearance of buildings, urban landscapes, or other physical areas. Zoned sign controls and architectural style conformity requirements for all houses in some residential neighborhoods are examples of efforts to further the aesthetic objective. There also are aesthetic objectives implicit in many downtown building height, bulk, and setback requirements, especially along major boulevards or waterfronts with impressive skyline potential. However, the subjective nature of beauty has made the aesthetic objective an especially difficult one to implement or justify.¹²⁴

As is evident from this brief review, zoning can be structured in many ways to achieve a variety of objectives. It is a form of land control subject to extensive shaping and adjusting to accommodate local pressures and needs. However, as with all major forms of government land control, zoning has created considerable controversy and has been heavily criticized. The extent to which zoning should be used to preserve community character or ambiance by keeping out some kinds of people, often including residents who are poor, less-affluent, or are racial or ethnic minorities (so-called exclusionary zoning), has been very controversial.¹²⁵ But what can be done about exclusionary zoning? There is no doubt that exclusionary zoning is common and popular in many suburbs and many sections of central cities. It is made possible by

123. There is a considerable literature on inclusionary zoning, although adoption of this device has been fairly limited. On inclusionary zoning, see for example, DWIGHT MERRIAM ET AL., *INCLUSIONARY ZONING MOVES DOWNTOWN* (1985); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 183 (1991); and Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

124. On aesthetic zoning, see JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989); and MANDELKER, *supra* note 112, §§ 11.01-11.21.

125. On exclusionary zoning, see 1 ANDERSON, *supra* note 112, ch. 8; RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970s* (1973); MANDELKER, *supra* note 112, ch. 7; 1 WILLIAMS, *AMERICAN LAND PLANNING LAW*, *supra* note 112, chs. 59-66; 1 MANAGEMENT & CONTROL OF GROWTH, chs. 6 & 7 (Randall W. Scott et al. eds., 1975); REPORT OF THE NAT. COMMISSION ON URBAN PROBS., *supra* note 1, at 211-17; and Orlando E. Delogu, *The Misuse of Land Control Power Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29 (1980).

such zoning requirements as single family detached dwelling unit districts, large residential lots, large front-footage for residential lots, large minimum floor space per dwelling unit, prohibitions on mobile homes, and variance grants for new high-income resident apartment buildings in central city transition areas. High occupancy cost is used to exclude those targeted as undesirables.

Exclusionary zoning has been severely criticized by many politicians, citizen action groups, and scholars, but it persists because it is strongly favored by many localities and in many neighborhoods. Legal efforts have been made to eliminate it using such means as inclusionary zoning,¹²⁶ state legislative intervention, notably New Jersey's Fair Housing Act¹²⁷ and the Massachusetts Anti-Snob Zoning Act,¹²⁸ and resort to the courts, with a scattering of opinions negating or curbing some aspects of exclusionary zoning,¹²⁹ the best-known of these being the *Mount Laurel* cases in New Jersey.¹³⁰ The net effect of these efforts has at best been modest.¹³¹ Residential segregation, grounded heavily on income and class, is a major feature of American society; and support for exclusion in most places has been too strong to overcome.

Exclusionary zoning is particularly troublesome when its adverse consequences extend to neighboring communities. The relative autonomy of each municipality over zoning matters usually makes it impossible for an adversely affected municipality to prevent negative spillover caused by the zoning actions of neighboring municipalities. Among those that

126. See *supra* note 123.

127. N.J. STAT. ANN. §§ 52-27D301 to 52-27D329, as amended (West 1986 & Supp. 1994). See also *supra* note 114.

128. 1969 Massachusetts Low- and Moderate-Income Housing Act (codified at MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1979 & Supp. 1994)). See also *supra* note 114.

129. Recent exclusionary zoning caselaw is considered in 3 WILLIAMS, *AMERICAN LAND PLANNING LAW*, *supra* note 112, at ch. 66. Also see Richard Briffault, *Our Localism: Part I - The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 39-58 (1990); and Thomas W. Mayo, *Exclusionary Zoning, Remedies, and the Expansive Role of the Court in Public Law Litigation*, 31 SYRACUSE L. REV. 755 (1980), noting a reticence of courts to become involved in exclusionary zoning matters. *Id.* at 757.

130. *Southern Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel I)*, 336 A.2d 713 (N.J. 1975), *appeal dismissed for want of jurisdiction & cert. denied*, 423 U.S. 808 (1975); *Southern Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel II)*, 456 A.2d 390 (N.J. 1983).

131. There are even mixed views as to the accomplishments of New Jersey's fair housing efforts. Cf. Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535 (1988); and Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989).

normally have little recourse are central cities and their residents, adversely impacted from exclusionary zoning by the suburbs. But should control over possible intra-regional exclusionary zoning spillover be a responsibility assumed by some more centralized government—a regional government, the state, or the federal government? This raises the more fundamental and highly controversial issue of the extent to which effective local government control over land should be cut back and more responsibility assumed by governments with jurisdictions that extend throughout a metropolitan region or beyond. There has been some movement toward more responsibility over regional land use problems being assumed by governments with regional or wider jurisdictions; but, except in a few places, this has had little effect in curbing exclusionary zoning.¹³²

Another controversial feature of zoning concerns procedure. There are those who believe that, although zoning flexibility is needed, procedures for obtaining variances and other forms of government approval are unduly slow and expensive, and are especially burdensome on developers, to whom timing can be crucial. There also are assertions that local administrative hearing procedures on zoning matters frequently are conducted so informally as to lack elementary due process; procedural rules often are inconsistently applied and give too much discretion to government decision makers. In addition, local government officials who participate in the approval process commonly lack the necessary training or expertise to perform adequately.¹³³ Among solutions proposed are more explicit and detailed statutory directives, including expanded and revised enabling acts, and statewide administrative agencies that would review local administrative agency rulings.¹³⁴

One argument made in support of the piecemeal and arguably inefficient and economically irrational nature of zoning procedures is that they are a useful participatory means of resolving local conflicts among

132. Among state governments that have had some success in limiting exclusionary zoning are New Jersey and Massachusetts. On the experience of these states, see *supra* note 114. Local-state growth management programs also are promising means for more effective control of exclusionary zoning.

133. On zoning's procedural deficiencies, see, for example, BABCOCK, *supra* note 112, 153-56; 5 Williams, *American Land Planning Law*, *supra* note 112, §§ 163.80-163.81; Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); and for an attack on the initiative and referendum as a means of rezoning, see David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53 (1991).

134. See, e.g., BABCOCK, *supra* note 112, 156-57; George W. Liebmann, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 URB. LAW. 1, 1-24 (1991).

land owners, developers, and neighbors, especially in stable residential communities.¹³⁵ These procedures not only protect existing viable residential communities from overly rapid change, it is asserted, but help to foster and preserve local community values and a much-to-be-desired sense of belonging. Citizen access is encouraged by the zoning process, and zoning board officials are sensitive to local opinion, even though their decisions often may seem arbitrary and inconsistent when measured by legal standards.

Another troublesome zoning issue on which there are conflicting views is the proper role of planning and plans in zoning programs. Should there be a plan requirement, should the plan be included in a separate document from the zoning ordinances, who should prepare and approve the plan, how detailed and comprehensive should it be, and should there be a legal requirement that the zoning ordinance be consistent with the plan? Further problems relate to growth management programs that impose comprehensive planning regionally or state-wide, and which, in plan implementation, absorb zoning as but one control element in a broad-based governmental approach to urban growth. Should such growth management programs be adopted in more states and more fully implemented in states where adopted? On all these questions there are sharp differences of opinion.

The strongly pro-planning position is that, in the interests of fairness and rationality, local government should develop carefully prepared and considered comprehensive plans as to how land should be used and developed over time, and that zoning and other relevant controls should be consistent with these plans.¹³⁶ Critics of the pro-planning position argue that there are too many uncertainties about the future to justify a requirement that zoning or other legal controls adhere to detailed planning

135. For an elaboration of this pro-participation zoning argument, see Steele, *supra* note 112. On the merits of piecemeal zoning change also see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983). A piecemeal—case by case—approach to much government land development is essential and even inevitable according to one informed observer. See Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

136. On the pro-planning position, as it pertains to zoning, see, for example, Charles M. Haar, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); and Daniel R. Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976). For an analysis of consistency doctrine reform issues, see JOSEPH DiMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980).

blueprints.¹³⁷ These uncertainties are greatest for undeveloped land or developed land in transition areas, but also apply to stable developed areas, as over time these areas too are likely to be under change pressures difficult to predict. Furthermore, the market, according to some, is a better and more desirable predictor of land use needs than are planners, and mandated government plans demanding compliance seriously interfere with the market. Some critics also believe that zoning works best when zoning changes occur piecemeal or on a case by case basis, and that requiring conformity with a comprehensive plan seriously handicaps this optimal process. Moreover, a comprehensive plan is likely to be ambiguous and difficult to apply if the plan must be approved by a politically responsible body, such as a city council. So many conflicting interests must be weighed by this kind of body that, if approved, the plan will include evasive compromise language that is more confusion than guide. If the plan is prepared by unelected professional planners and needs no further approval, this poses problems, too, as it would be subject to criticism as undemocratic, for technocrats should not be given such power. To be sure, professional planning expertise is needed, but, it is claimed, should be kept within bounds politically. Still another aspect of the comprehensive planning problem is that some small localities with planning and zoning obligations employ no professional planners, often because they cannot afford them, so needed expertise may be unavailable for comprehensive planning. One approach followed in some localities that may ease somewhat critics' complaints about comprehensive plans is to regularly revise comprehensive plans as new needs and demands emerge.¹³⁸ Also, as the next section indicates, some growth management programs have resolved successfully a number of land planning's problems, but they have done so by giving more power to government than many opponents of planning consider acceptable.

Most zoning critics merely recommend systemic reform. But there

137. On arguments against aspects of planning that bear on zoning, see Krasnowiecki, *supra* note 135, at 744-49; ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION*, ch. 3 (1977); Rose, *supra* note 135, at 873-82; Lawrence Susskind, *Should State Government Mandate Local Planning? ...No*, *PLAN.* July 1978, at 17 (responding to a contrary position by Daniel Mandelker, *Should State Government Mandate Local Planning? ...Yes*, *PLAN.* July 1978, at 14); and A. Dan Tarlock, *Consistency With Adopted Land Use Plans as a Standard of Review: The Case Against*, 9 *URB. L. ANN.* 69 (1975).

138. The ALI Model Land Development Code, section 3-105, requires that the local plan include a short-term program every one to five years that sets forth what public actions are to be undertaken to fulfill the plan's goals. Krasnowiecki proposes instead local government annual stock-taking reports that set long- and short-range projections and explain or criticize failure to achieve projections declared in the preceding annual report. Krasnowiecki, *supra* note 135, at 747-48.

are those who believe that zoning has such basic faults that all zoning should be eliminated and other forms of control relied on instead. Arguments in support of this position have created considerable interest but so far have imposed no serious threat to zoning programs. Most of those who favor the abolition of zoning are wary of government regulation and believe that market forces should be given more influence over how land is used and developed than is possible with zoning. Zoning, it is asserted, is inefficient and inequitable. It gives land value windfalls to many property owners and often increases unnecessarily the cost of housing and other kinds of land use to purchasers and tenants. Some zoning opponents have proposed what they consider less costly but fairer controls as substitutes for zoning. One such proposal is for more extensive reliance on restrictive covenants imposed on land by private land owners. This, it is argued, would more efficiently and equitably protect property from adverse inconsistent uses than does zoning, as restrictive covenants better reflect market forces and the will of local property owners.¹³⁹ Other proposals also would replace zoning with controls less restrictive of market forces and hopefully less likely to create negative spillovers. Among such proposals are detailed suggestions for an expanded nuisance prevention system;¹⁴⁰ legislatively-imposed density restrictions on developing undeveloped land, with little additional

139. On the restrictive covenant rather than zoning approach, see Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972); and Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 295-307 (1990). This approach was for many years adhered to by Houston, the only big city in the United States without zoning, and Siegan argues that the Houston experience should be widely followed. Siegan's position is weakened somewhat by Houston's enactment of a zoning ordinance in 1991. That enactment, however, was subject to a referendum in 1993 and it was defeated, as zoning had been in two prior referenda. On the 1993 Houston referendum and future land control alternatives, see Donna H. Kristaponis, *Zoning Houston, Why It Matters, and the Aftermath of the Referendum*, 1994 PROCEEDINGS OF INST. ON PLAN., ZONING & EMINENT DOMAIN 2-1 (1994). For a composite of Siegan's speeches given prior to the 1993 referendum and urging Houston voters to reject zoning, see Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 CAL. W.L. REV. 127 (1994).

For another approach to the problem, but also concluding that zoning should be eliminated, see Krasnowiecki, *supra* note 135. Krasnowiecki argues that self-administering rules laid down by the legislative body of a municipality long in advance of development, the fundamental idea of zoning, is inconsistent with how zoning works or should work. *Id.* at 719-20. He proposes that zoning be replaced by an adjudicative model of land control that, at least for new housing development, would provide for local government case by case approval, but also would require persuasive reasons to rebut a general presumption that projects be approved. *Id.* at 749-50.

140. See Ellickson, *supra* note 139.

government limitation on such development;¹⁴¹ and the allocation of extensive land control rights to private neighborhood organizations resembling condominium associations.¹⁴²

Zoning is so well established and widely prevalent in the United States that it probably will remain the principal local government land use control program for the indefinite future in many states. In the other states, states with regional or state-wide growth management programs, it will continue as a highly important element in these more expansive and comprehensive land use control efforts. Zoning's effectiveness in furthering powerful interest group preferences, its adaptability to diverse conditions, and, as a regulatory device, its modest cost to government, will help perpetuate it as a major means by which government controls land use and development.

IV. GROWTH MANAGEMENT

Growth management is a land use control program that seeks to regulate the rate, location and character of urban growth and development.¹⁴³ It characteristically relies heavily on long-term

141. See Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981). Under the Kmiec proposal, density would be based principally on the ratio of floor space of structures on a parcel to total area of the parcel left open, and density maximums would vary with the types of use the land is put to: residential, commercial, industrial, or mixed-use. Common law nuisance restrictions would still apply and restrictive covenants would be permitted.

142. ROBERT H. NELSON, *supra* note 137.

For market-oriented zoning replacement proposals, see GARRETT, *supra* note 112, ch. 4; and Robert H. Nelson, *Zoning Myth and Practice—From Euclid into the Future*, in ZONING AND THE AMERICAN DREAM, *supra* note 112, ch.11. Compare WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 69-71 (1985) (proposing that zoning rights be salable if zoning is retained).

143. Among recent helpful publications on growth management are these: CARL ABBOTT ET AL., *PLANNING THE OREGON WAY, A TWENTY-YEAR EVALUATION* (1994); *UNDERSTANDING GROWTH MANAGEMENT: CRITICAL ISSUES AND A RESEARCH AGENDA* (David J. Brower et al. eds., 1989); *STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT* (Peter A. Buchsbaum and Larry J. Smith eds., 1993); JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES* (1992); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); ERIC D. KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* (1993); GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* (1992); *STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT: POLICY ISSUES AND PRACTICAL CONCERNS* (Douglas

comprehensive planning, increasingly involves substantial guidance by state government, and frequently seeks to deal with a variety of public concerns as to the economic, life style, and environmental costs of urban expansion regionally or state-wide. In many respects it resembles zoning, but it typically relies more on comprehensive planning and resorts to a more varied set of legal controls. Zoning is even being co-opted in many places as one of the control devices of growth management. Also, growth management programs usually focus on urban-rural fringe areas, rather than on older and more densely settled central cities and inner suburbs. Zoning, of course, generally has been of particular importance in older, built-up urban areas, although it is often applicable in the outer reaches of metropolitan areas as well.¹⁴⁴

Instances are readily apparent of legal controls, zoning included, long being used to block or limit severely growth in communities fearful of being overwhelmed by rapid population increase or extensive new development. The modern growth management program, however, usually takes a different approach. It generally seeks to accommodate rather than deny growth, and attempts to do so by rational planning, backed by meaningful legal controls that aim to balance fairly the benefits and burdens that accompany growth. Moreover, the trend is for each managed growth program to apply not just to a single city or town subject

R. Porter ed., 1992); GROWTH MANAGEMENT: KEEPING ON TARGET? (Douglas R. Porter ed., 1986); GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990'S (Jay M. Stein ed., 1993); James M. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENV'L L. REV. 489 (1994); Symposium, *Growth Management and the Environment in the 1990s*, 24 LOY. L.A. L. REV. 905 (1991); Anthony Downs, *Growth Management: Satan or Savior?*, 58 J. AM. PLAN. ASS'N 419 (1992); and *Guidance for Growth: A Symposium on Washington State's Growth Management Act*, 16 U. PUGET SOUND L. REV. 863 (1993). Earlier works of major importance in formulating and publicizing the growth management movement are MANAGEMENT & CONTROL OF GROWTH (Randall W. Scott et al. eds., 1975) (published by the Urban Land Institute, with funding from the U.S. Department of Housing and Urban Development); and THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH (William K. Reilly ed., 1973), a task force report sponsored by the Rockefeller Brothers Fund. Also see a near book-length article on growth controls that has had considerable influence on planners, economists, and legal scholars, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

144. In comparing growth management and zoning, some observers have stressed that growth management is active and dynamic, while zoning is reactive, passive and static. E.g., Benjamin Chinitz, *Growth Management: Good for the Town, Bad for the Nation?*, 56 J. AM. PLAN. ASS'N 3, 6 (1990). There is some merit in this as growth management commonly seeks to establish future development patterns for largely undeveloped areas, whereas zoning often seeks to freeze existing development patterns for already developed communities.

to heavy growth pressures, but to much larger regions, thus reducing the risks of negative spillover from legal controls imposed in just one locality.¹⁴⁵ To help facilitate fair and achievable growth management programs over wide areas, the trend also is toward extensive state government intervention in program planning and implementation.¹⁴⁶

There are many concerns that arise as to how prospective urban growth may affect a community. Among these are the added infrastructure needed to accommodate anticipated growth, and when it is likely to be in place; threats to the environment from further growth; and effects of growth on local life styles and the character of local neighborhoods. Financial costs also are often concerns. For example, what are the likely impacts of growth on costs of housing, commutation, and utilities; and what will growth do to property tax assessments and rates? Perceptions of urban growth may vary depending on the vantage point of the observer. Certainly, the merits of growth can differ considerably when looked at by government officials of a single town or city accustomed to acting autonomously on land issues pertaining to their community, or by regional or state government officials contemplating region-wide or state-wide action.

Growth control objectives are responses to a variety of concerns; as prospects of urban growth usually raise multiple concerns, it is not surprising that growth control programs usually have multiple objectives. Multiple objectives also broaden program support, although they can create problems as to which objectives should receive priority and as to how possible inconsistencies among objectives should be handled. As

145. Some commentators refer to earlier no growth or slow growth attempts as first generation growth control measures, typified by small population bedroom suburbs' restrictions on new residential construction. These first generation measures have been followed by more comprehensive and sophisticated second generation controls covering much larger areas. See, e.g., Peter Navarro & Richard Carson, *Growth Controls: Policy Analysis for the Second Generation*, 24 POL'Y SCI. 127 (1991). Also see LAWRENCE B. BURROWS, *GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS* (1978).

146. The increased involvement of the states in land development was signaled early-on by an influential book published in 1971, FRED BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL*, updated by Professor Callies in *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994). Also, in 1975, the influential American Law Institute proposed a model code under which more land development policy making responsibility would be assumed by state government, with administration taken over largely by local agencies. A.L.I., *A MODEL LAND DEV. CODE (Proposed Official Draft 1975)*. For commentary on the code, see Fred P. Bosselman et al., *Some Observations on the American Law Institute's Model Land Development Code*, in *THE LAND USE AWAKENING, ZONING LAW IN THE SEVENTIES* (Robert H. Freilich & Eric O. Stuhler eds., 1981).

disclosed by legislative declarations of purpose, program plans and program performance, common objectives of current growth management programs are these:

—Prevent urban sprawl by encouraging more dense and more compact development, and avoiding leap-frog development projects in urban rural fringe areas;

—Through proper siting, design, and installation timing, limit the cost of new and expanded infrastructure, such as roads, mass transit facilities, sewers, utilities, and schools;

—Preserve and protect the environment and needed open space areas, including farm and forest lands, flood plains, wetlands, river front and coastal terrain, adequate water supplies, and air and water quality;

—Preserve the quality of life of existing urban communities, which to many means protecting the character of existing communities from newcomers of a different race, ethnic background, or social class;

—Adopt policies that will restrain increases in housing costs and that will assure a substantial volume of housing in newly developed areas that persons of moderate income can afford;

—Prevent growth and development in any one city or town that will unjustifiably have a negative impact on neighboring cities or towns;

—Encourage economic development and added employment opportunities, especially in depressed localities and regions.¹⁴⁷

Growth management programs do not exist nationally but at present are limited principally to those states, regions, and localities faced with rapid growth and development pressures. Growth management is highly political,¹⁴⁸ usually requiring careful consensus building among key potential support groups, especially at the initial formulation and early

147. On managed growth objectives, see BURROWS, *supra* note 145, at 11-12; DEGROVE, *supra* note 143, at 2-3 and ch. 10; DAVID R. GODSCHALK ET AL., *CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT* 8-9, 191-92 (1977); Douglas R. Porter, *Issues in State and Regional Growth Management*, in *STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT*, *supra* note 143, ch. 7; Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 *PACE L. REV.* 481, at 484-85 (1993); and Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 *PACE L. REV.* 327, 337-47 (1993).

Economic development is a more recent addition to the objectives of growth management and one authority on the subject has concluded that inclusion of economic development components has been an important factor in enabling some growth management systems politically to survive during the severe recession of the early 1990s. DEGROVE, *supra* note 143, at 166.

148. On the political aspects of growth management, see JOHN M. DEGROVE, *LAND GROWTH & POLITICS* (1984).

implementation stages.¹⁴⁹ Some groups are prone to be supportive, the professional land planners and their trade associations, for example, and most citizen action groups concerned with the environment. Also, growth management is often seen as highly desirable by residents of communities undergoing sharp population expansion and threatened with increasingly serious traffic problems, sharp tax increases, overcrowded schools, enhanced personal security risks, water shortages, and decline in the quality of such public amenities as nearby parks, playgrounds, beaches, and camping areas. It is no surprise that growth management has been especially popular in places like Southern California, the San Francisco Bay Area, metropolitan Portland (Oregon), and much of Florida. Interjection of economic development into growth management agendas has also generated support from some business and labor groups concerned about jobs and new business opportunities.

There also are groups inclined to oppose growth management, although a carefully crafted program may attract their support, or at least weaken their resistance. Opposition is likely from many developers, most speculators in vacant lands near the urban-rural fringe, and farmers just beyond urbanized areas who may have been waiting years for anticipated big profits from selling out to developers. Civil rights groups will probably be negative if growth management efforts will appreciably increase race, ethnic or class exclusion, and especially if those supporting these efforts obviously are seeking to expand the exclusions. Grassroots property rights groups also have emerged to resist growth management on the grounds that it improperly, and even illegally, encroaches on the property rights of land owners.

Support for growth control has been sufficiently strong for a scattering of local governments, mostly suburban towns, many of them in

149. On pro- and anti-growth management groups, see GODSCHALK ET AL., *supra* note 147, at 13-15; KNAAP & NELSON, *supra* note 143, ch. 7; Dowell Myers, *The Ecology of "Quality of Life" and Urban Growth*, in UNDERSTANDING GROWTH MANAGEMENT, *supra* note 143, at 87-104; and Sylvia Lewis, *Goodbye, Ramapo. Hello, Yakima and Isle of Palms*, 58 PLAN., July, 1992, at 9.

In Oregon, an influential citizens' action group, 1,000 Friends of Oregon, is heavily involved in advancing growth management objectives, including through political pressure and litigation. On the Oregon organization, see DEGROVE, *supra* note 148, at 278-79; and Gerrit Knaap, *Land Use Politics in Oregon*, in ABBOTT ET AL., *supra* note 143, at 9-10. Similar 1,000 Friends organizations supportive of growth management have been established in Florida and Massachusetts; and a comparable organization, New Jersey Future, operates in New Jersey.

California,¹⁵⁰ to have put into effect impressive growth management programs without significant, if any, state government involvement. Some of these programs, such as the one in Ramapo, New York, and the one in Petaluma, California, have been extensively publicized as a result of major litigation upholding their validity.¹⁵¹ Among other local growth management programs of note are those adopted in Boulder, Colorado; Lincoln, Nebraska; San Diego, California; and Montgomery County, Maryland.¹⁵² However, the most important development in growth management programs has been the extensive involvement of a number of state governments in these programs, the state imposing requirements on localities as to program planning and operations. Programs are largely administered by localities but pursuant to state directives and oversight. Nine states are now substantially involved with their localities in growth management: Oregon and Washington in the Pacific Northwest; Florida and Georgia in the Southeast; and Maryland, New Jersey, Rhode Island,

150. On local government growth management programs in California, see MADELYN GLICKFELD & NED LEVINE, *REGIONAL GROWTH ... LOCAL REACTION: THE ENACTMENT AND EFFECTS OF LOCAL GROWTH CONTROL AND MANAGEMENT MEASURES IN CALIFORNIA* (1992). This study indicates that as of 1989, approximately three-fourths of all cities and counties in California had enacted at least one growth control measure. *Id.* at 21. On growth management in California, also see IRVING SCHIFFMAN, *ALTERNATIVE TECHNIQUES FOR MANAGING GROWTH* (1990), and Richard T. LeGates, *The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area*, 24 *LOY. L.A. L. REV.* 1035 (1991).

151. *Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972); *Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See also* *Associated Home Builders, Greater Eastbay Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976); *Board of County Comm. of Arapahoe County v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986). *But see* *City of Boca Raton v. Boca Villas Corp.*, 371 So.2d 154 (Fla. App. 1979), *cert. denied*, 381 So.2d 765 (Fla.), *cert. denied*, 449 U.S. 824 (1980); *Rancourt v. Town of Barnstead*, 523 A.2d 55 (N.H. 1986). On legal challenges to local growth control measures, see Julie H. Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 *URB. LAW.* 285 (1990); and Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 *LOY. L.A. L. REV.* 1205 (1991).

152. *See generally* on these and similar programs, *GROWTH MANAGEMENT: KEEPING ON TARGET?*, *supra* note 143. On the Lincoln and San Diego programs, see Douglas R. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 *LOY. L.A. L. REV.* 1015 (1991). The Boulder and Montgomery County programs are discussed in KELLY, *supra* note 143, at 53-61, 95-99, 198-205.

Vermont and Maine among the Middle Atlantic and New England states.¹⁵³ Important state legislation in the 1970s and thereafter, starting with a Vermont statute in 1970,¹⁵⁴ a Florida statute in 1972,¹⁵⁵ and an Oregon statute in 1973,¹⁵⁶ have authorized these joint local-state land use control ventures. The initial legislative enactments have been extensively amended or supplemented in most of the states, indicating both the political controversy that growth management creates and the difficulties in establishing workable and affordable growth management programs.¹⁵⁷ In Hawaii, there also are stringent state-wide land-use controls that manage growth, but these controls are imposed and implemented by the state government with little local government participation.¹⁵⁸

Planning is an essential feature of most growth management programs, and legislation providing for growth management programs that extend regionally or state-wide either mandates or strongly encourages

153. The basic growth management statutes in the nine states are the following: Florida, FLA. STAT. ANN. §§ 163.3161-3239, 186.001-.515, 187.201, 189.401-.427, 190.001-.048 (West Supp. 1995); Georgia, GA. CODE ANN. §§ 36-70-1 to 36-70-5 (1993), §§ 50-8-7 to 50-8-8 & 50-8-39.1 (1994 & Supp. 1994); Maine, ME. REV. STAT. ANN. tit. 5, §§ 13001-13004; and tit. 30A, §§ 4312-4349 (West Supp. 1994); Maryland, MD. ANN. CODE art. 66b §§ 1.00-12.01 (1988 & Supp. 1992); MD. CODE ANN., STATE FIN. & PROC. §§ 5-101 to 5-7A-02 (1995); New Jersey, N.J. STAT. ANN. §§ 52:18A-196 to 207 (West 1986 & Supp. 1994); Oregon, OR. REV. STAT. §§ 195, 197, 199 (1993); Rhode Island, R.I. GEN. LAWS §§ 45-22.2-1 to 14 (1991 & Supp. 1994); Vermont, VT. STAT. ANN. tit. 10, §§ 6001-6092 (1993) & tit. 24, §§ 4301-4495 (1992); and Washington, WASH. REV. CODE ANN. §§ 36.70.010-36.70.980, 36.70A.045-36.70A.902 (West 1991 & Supp. 1994).

154. Public Act. No. 250, 1969 Vt. Adj. Sess.

155. 1972 Fla. Laws ch. 72-317.

156. 1973 Or. Laws ch. 80.

157. The Florida legislative changes have been particularly frequent, consisting of a sequence of important statutes: the Environmental Land and Water Management Act of 1972, 1972 Fla. Laws ch. 72-317; the Local Government Comprehensive Planning Act of 1975, 1975 Fla. Laws ch. 75-257; the State and Regional Planning Act of 1984, 1984 Fla. Laws, ch. 84-257; the Growth Management Act of 1985, 1985 Fla. Laws ch. 85-55; and the Growth Management Act of 1993, 1993 Fla. Laws ch. 93-206. On the tortuous history of growth management legislation in Florida, see DEGROVE, *supra* note 143, at 7-31.

158. On the Hawaii experience, see DEGROVE, *supra* note 148, at 9-58; and David L. Callies, *Land-Use Planning in the Fiftieth State*, in STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 143, at 125-36. The basic Hawaii statute is HAW. REV. STAT. §§ 225M-1 to 225M-4 (Supp. 1992) & §§ 226-1 to 226-107 (1985 & Supp. 1993). Local government in Hawaii historically has been weak. The state has four counties but no separate cities, towns or villages.

comprehensive planning efforts. It is usually expected that most of the planning will be by local government—towns, cities, counties, or in a few places metropolitan regional governments.¹⁵⁹ However, growth management programs involving extensive local and state government participation generally require that the plans be consistent with state goals and policies. A properly prepared plan requires extensive research on population and development trends, popular objectives and preferences, social and economic costs of possible alternative approaches, and legal limits on possible action.¹⁶⁰ It also requires a sense of what is politically acceptable. Planning becomes even more demanding and difficult if the planners are expected to take into consideration the interests of neighboring communities and the entire metropolitan region. And in some states, Florida in particular, planning is further complicated by a concurrency requirement that adequate public infrastructure and services be in place when development occurs so as to avoid the situation of new communities being seriously deficient in such community essentials as sewers, water supply, roads, and parks.¹⁶¹ Many cities and towns have a long history of some planning as a guide to their land control efforts, zoning especially. But growth management planning generally must be more comprehensive and politically is more contentious than what most local government planning officials previously have encountered. For smaller localities that cannot afford to hire the expertise necessary to prepare a proper plan, some state governments have provided funding help.¹⁶²

To assure that local government plans meet state standards and further not just local interests but regional or even state-wide interests as well, states with joint local-state growth management programs provide for state

159. Important metropolitan regional governments with important growth management planning functions include the Portland, Oregon Metropolitan Service District and the Atlanta, Georgia Regional Commission. On the relevance of these bodies for growth management, see DEGROVE, *supra* note 143, at 138-55.

160. For some suggestions as to how growth management plans should be developed, see GODSCHALK ET AL., *supra* note 147, ch. 15.

161. This so-called concurrency requirement is imposed by statute in Florida. FLA. STAT. ANN. §§ 163.3164(23), 163.3177(10h), 163.3180 (West Supp. 1993). On concurrency, see DEGROVE, *supra* note 143, at 163-64; Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992); David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 291-311 (1993); and Thomas M. Walsh and Roger A. Pearce, *The Concurrency Requirement of the Washington State Growth Management Act*, 16 U. PUGET SOUND L. REV. 1025 (1993).

162. These states include Florida, Oregon, Maine, Rhode Island, Vermont, and Washington. See Dennis E. Gale, *Eight State-Sponsored Growth Management Programs: A Comparative Analysis*, 58 J. AM. PLAN. ASS'N 425, 432-33 (1992).

government monitoring of local planning efforts.¹⁶³ Under these programs, state statutes generally provide for state agency review of local government plans to determine if the local plans meet state growth management objectives, are consistent with any state growth management plans, and are adequately coordinated with the plans of nearby localities.¹⁶⁴ In some states, state approval of local government plans is required,¹⁶⁵ which may entail, as in New Jersey, detailed procedures for state-local government negotiation of growth management agreements.¹⁶⁶ Local governments that fail to comply with state growth management planning requirements may be vulnerable to sanctions, such as loss of eligibility for certain state grants.¹⁶⁷ In Rhode Island, failure of a local government to prepare a comprehensive plan can result in the state doing so.¹⁶⁸ Local-state conflict over compliance with state imposed requirements has frequently arisen, and appellate or mediation hearing bodies and procedures have been established or authorized in some states to deal with these conflict situations.¹⁶⁹ Clearly, there is recognition not

163. On intergovernmental state-local growth management planning, see DEGROVE, *supra* note 143 at 137 (stating that four of seven states which have new or revamped growth management systems, have capitalized on existing bureaucratic structures to enhance the link between state and local governments and to provide greater-than-local perspectives on issues that are regional in nature); Scott A. Bollens, *State Growth Management: Intergovernmental Frameworks and Policy Objectives*, 58 J. AM. PLAN. ASS'N 454 (1992); Gale, *supra* note 162, at 425-38; and Porter, *State Growth Management*, *supra* note 147, at 483-95.

164. *E.g.*, FLA. STAT. ANN. § 163.3177(9) (West 1990 & Supp. 1994); and OR. REV. STAT. §§ 197.015(1), 197.250-251, & 197.274 (1993).

165. *E.g.*, OR. REV. STAT. §§ 197.250-251 (1993).

166. On New Jersey negotiated agreements, see DEGROVE, *supra* note 143, at 46-48; and Gale, *supra* note 162, at 433-35. *See also* Judith Eleanor Innes, *Group Processes and the Social Construction of Growth Management: Florida, Vermont and New Jersey*, 58 J. AM. PLAN. ASS'N 440, at 447-50 (1992).

167. *E.g.*, WASH. REV. CODE ANN. §§ 36.70A.340, .345 (West Supp. 1994). Also see the chart on state sanctioning possibilities, in Gale, *supra* note 162, at 432. Sanctions have been applied sparingly, states being more interested in negotiating compliance with localities than taking the politically troublesome step of imposing sanctions. *See* Porter, *supra* note 147, at 494.

168. R.I. GEN. LAWS § 45.22.2-13 (1991). In Florida, if a local government has not prepared or properly prepared a required comprehensive plan, a regional planning agency for the area must do so. FLA. STAT. ANN. § 163.3167(4) (West 1990 & Supp. 1994).

169. *E.g.*, OR. REV. STAT. §§ 197.805, 197.860 (1993) (special reviewing agency and procedures); FLA. STAT. ANN. § 163.3184(16)(j) (West Supp. 1994) (informal dispute resolution authorized); GA. CODE ANN. § 50-8-7.1(d) (1990) (mediation). On dispute resolution, also see Gale, *supra* note 162, at 427-28; and Porter, *supra* note 147,

only that planning is highly important to effective growth management, but also that a structure needs to be found that will resolve the inevitable dissension created by the planning process. States and their localities often will have different growth management objectives, the localities seeking to further their own self-interests despite any negative consequences for their immediate neighbors or the larger region, and state government usually concerned with state-wide or region-wide interests that may well be inconsistent with individual locality preferences.

A striking feature of growth management programs is the wide range of legal controls relied on to carry out growth management objectives and plans. Urban growth can be influenced in so many ways that almost every type of legal control over urban land potentially is adaptable to effective growth management.¹⁷⁰ A particular legal control becomes part of a growth management program if aimed at achieving growth management objectives. Among legal controls commonly used in urban growth management efforts are development caps on new construction. These include such limits set by a city or town as the maximum number of new housing unit permits, the maximum total square footage of new office space that will be authorized each year, and moratoria for a period of time on new residential or industrial construction. Another common approach is to restrict the kind of use permitted at particular locations, with the aim of affecting patterns of growth. Zoning and subdivision regulations often are imposed as growth management techniques for regulating the form and intensity of urban growth. A similar approach is to encourage more compact urban areas and to prevent urban sprawl by establishing urban growth boundaries at or somewhat beyond existing built-up outskirts of metropolitan regions, and by prohibiting or drastically limiting most urban-type development outside these boundaries. Oregon and Hawaii have most effectively made use of urban growth boundaries.¹⁷¹ A special aim of urban growth boundary restrictions has usually been the protection of natural resource areas from the damaging

at 494-95.

170. For a survey of the varied and wide-ranging legal controls and alternative techniques available to growth management, see SCHIFFMAN, *supra* note 150. Among techniques covered by Schiffman, generally not considered in discussions of growth management controls, are agricultural buffers, density bonuses, land trusts, transferable development rights, and zero lot line housing. On growth management techniques, also see MANAGEMENT & CONTROL OF GROWTH, *supra* note 143, chs. 12, 14 & 15.

171. On urban growth boundaries, see Robert C. Einsweiler & Deborah A. Howe, *Managing "The Land Between": A Rural Development Paradigm*, in ABBOTT ET AL., *supra* note 143, ch. 12; KELLY, *supra* note 143, at 53-54, 119-20, 213-16; KNAAP & NELSON, *supra* note 143, ch. 2; Arthur C. Nelson, *Oregon's Urban Growth Boundary Policy as a Landmark Planning Tool*, in ABBOTT ET AL., *supra* note 143, ch. 2.

effects of urban growth. These protected areas often include agricultural and forest lands and such environmentally sensitive areas as wetlands, flood plains, and river and lake fronts. Among other legal controls resorted to for protecting natural resource areas from urban growth are development permit requirements, environmental impact statement requirements, and restraints on air, water, and ground pollution.¹⁷² Still another set of legal controls that are imposed in efforts to affect urban growth relate to government authorization of where and when needed infrastructure may be constructed. Because adequate roads and utility installations are normally necessary to properly open urban-rural fringe areas to urban development, the government may regulate the rate and intensity of development by implementing concurrency requirements that adequate infrastructure be available by the time that major urban development occurs. This can be another effective means of managing urban growth.¹⁷³ Additionally, some central cities make use of their power to limit utility extensions beyond their boundaries as a means of reducing the negative impacts of suburban growth on the central cities.¹⁷⁴

Government funding and the manipulation of fund-raising techniques are additional forms of legal control frequently used by governments to carry out growth management objectives. Illustrative of these controls are: appropriation of public funds to build roads or to build and operate mass transit facilities; purchase by government of open-space areas to remove them temporarily or permanently from urban development;¹⁷⁵ and property tax preferences to owners of agricultural lands near urban

172. On the relation of environmental considerations to controlling urban growth, see John S. Banta, *Environmental Protection and Growth Management*, in UNDERSTANDING GROWTH MANAGEMENT, *supra* note 143, at 134-55. For comprehensive review of the law of open space and natural resource protection, see 5B RICHARD R. POWELL, *POWELL ON REAL PROPERTY*, ch. 79A (Patrick J. Rohan, rev. ed. 1994); and WILLIAMS, *supra* note 112, chs. 157, 158 (1985 & Supp. 1993).

173. On concurrency, see sources cited *supra* note 161.

174. Supportive of such central city action is Biggs, *supra* note 151, at 304, stating that the fact that city action denying extension of municipal services outside its boundaries is the proper exercise of city power to affect legitimate policy goals.

175. An extreme form of government land acquisition to further urban growth objectives is land banking, the purpose of which is to remove large blocks of developable land from current urban development forces and to enable government eventually to dispose of the land consistent with urban growth plans, perhaps profiting from sale of the land as well. Such support for land banking as previously existed in the United States has largely disappeared. On land banking, see ANN L. STRONG, *LAND BANKING: EUROPEAN REALITY, AMERICAN PROSPECT* (1979); HARVEY L. FLECHNER, *LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT* (1974); and A.L.I., *supra* note 146, at Art. 6.

communities for as long as the use remains agricultural, thereby preventing or postponing urbanization. Government also frequently shifts the costs of new infrastructure resulting from urban growth to developers and benefited private land owners. Cost shifting tactics include special assessments, exactions, impact fees, and forced dedications. Major considerations in growth management are how and by whom new infrastructure costs should be paid, and whether placing the cost burden heavily on private sector developers and land owners in the immediate vicinity will seriously discourage desired growth.

As a recognized movement, urban growth management in the United States goes back to the early 1970s.¹⁷⁶ Since then, what has it accomplished? Probably its most important achievement has been its effect in expanding reliance on, and acceptance of, comprehensive planning as essential to effective government control of urban land use. Much of this increased approval of comprehensive planning results from the adoption of joint local-state growth management programs by nine states. In all of these programs, comprehensive planning is an essential feature. Moreover, these states have made great progress in developing comprehensive plans that, through negotiation, data exchange, and careful review, adjust the inherent differences that arise between individual localities and their respective states over plan provisions. These procedures for plan development and approval, and the institutional structures created to make the procedures workable, are additional highly significant contributions of contemporary urban growth management. It has become evident that, in most states, comprehensive planning capable of being fully implemented requires meaningful participation by a unit of government with jurisdiction greater than a single town or city. The spillover problem from autonomous town or city controls, and the lack of financial resources sufficient to enable any one town or city on its own to implement many important aspects of comprehensive plans, dictate the need for regional, state, or federal government intervention, with state government intervention often the most feasible. Local government generally is too powerful to be ignored; but it is too self-centered and resource-limited to be given exclusive comprehensive planning responsibility. Furthermore, without the inducements, coercive or otherwise, that a higher level of government can usually bring to bear,

176. Common features of contemporary urban growth management, however, appeared earlier, such as master plans, comprehensive plans, development plans, and state land development planning. For discussions of these earlier planning approaches, see James B. Milner, *The Development Plan and Master Plans: Comparisons*, in *LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE* 47 (Charles M. Haar ed., 1964); Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 *LAW & CONTEMP. PROBS.* 353 (1955); and A.L.I., *supra* note 146, Commentary on Art. 7.

many local governments will never become involved in comprehensive planning.

In their actual impact on urban growth, the achievements of growth management programs have been less impressive. Most of the programs that include substantial joint local-state government action have not been in effect long enough to get much beyond the planning stage. As to the others, including Oregon, accurate calculation of the effects of growth management programs on the rate and type of urban growth is difficult, and data are sketchy.¹⁷⁷ A number of hard-to-measure variables, other than growth management program requirements, have been relevant to growth patterns. Such variables include in-state prosperity, the degree of state fiscal stress, infrastructure adequacy, population density, and population migration patterns, all of which can vary considerably over time and from place to place. Despite data evaluation difficulties, certain conclusions as to urban growth management program impacts seem obvious. For example, it is apparent that in some places urban growth management has resulted in more compact urban development, and in areas just beyond urbanized regions, has resulted in more agricultural land preservation and less natural resource destruction in environmentally sensitive areas. This seems quite evident in the Portland, Oregon, area, including much of the Willamette Valley south of Portland,¹⁷⁸ and in Hawaii, especially greater Honolulu, which includes the entire island of Oahu.¹⁷⁹ Another apparent impact of growth management is that in Florida, and probably in other states, growth management concurrency requirements have reduced the likelihood that newly urbanized communities will lack adequate infrastructure and public services.¹⁸⁰ Furthermore, whatever their effect on enhanced urban sprawl and higher housing prices, the phased growth management programs of some local governments have retarded growth within their borders.¹⁸¹ Growth

177. For excellent evaluations of the Oregon program, see ABBOTT ET AL., *supra* note 143; and KNAAP & NELSON, *supra* note 143. For a brief summation of the Oregon program's achievements, see Arthur C. Nelson, *Blazing New Planning Trails in Oregon*, 49 URB. LAND 32 (1990).

178. See generally, Einsweiler & Howe, *supra* note 171; KELLY, *supra* note 143, at 118-20, 213-15; KNAAP & NELSON, *supra* note 143, at 147-53; Nelson, *supra* note 171.

179. KELLY, *supra* note 143, at 106-07.

180. On concurrency requirements, see sources cited *supra* note 161.

181. A California study indicates that the effect of growth caps on population increases in localities imposing these caps has been rather limited. John D. Landis, *Do Growth Controls Work? A New Assessment*, 58 J. AM. PLAN. ASS'N 489 (1992). But compare data on growth control restraints in Santa Cruz, California discussed in Paul L. Niebanck, *Growth Controls and the Production of Inequality*, in UNDERSTANDING

management is a comparatively new movement, but it has been achieving results beyond just the preparation and adoption of promising comprehensive plans.

Despite their planning and other achievements to date, and their promise of greater achievements in the future, urban growth management programs have drawn considerable criticism and have created considerable controversy. Some of the criticism has been directed at the planning process: that the process takes too long, data on which plans are based often are inadequate and incompetently assessed, sufficient state oversight of local planning is commonly lacking, and states have frequently failed to provide enough, if any, funding and technical assistance to localities in need of help to prepare satisfactory plans.¹⁸² Criticism has also been leveled at the consequences of urban growth management programs, at what their effect has been, and what their effect would be even if they achieved their objectives. One growth management effect that has been criticized is the adverse spillover consequences of some programs, consequences that state-wide and region-wide programs have sought to correct, presumably with some success.¹⁸³

Some commentators are suggesting, however, that for certain problems, natural resource and environmental protection particularly, even state-wide growth management is insufficient to deal with spillover, and that more

GROWTH MANAGEMENT, *supra* note 143, at 105, 107-16.

182. For adverse comments about the growth management planning process, see DEGROVE, *supra* note 143, at 30, 49, 63-64, 113, 167; Banta, *supra* note 172, at 148-49, 154-55; Pelham, *supra* note 161, at 1047-52; Gary Pivo, *Is the Growth Management Act Working? A Survey of Resource Lands and Critical Areas Development Regulations*, 16 U. PUGET SOUND L. REV., 1141, 1175-79 (1993); and Porter, *State Growth Management*, *supra* note 147, at 502-03.

183. On spillover consequences, see ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, U.S. DEP'T OF HOUSING AND URB. DEV., "NOT IN MY BACKYARD," REMOVING BARRIERS TO AFFORDABLE HOUSING 2-3 & 2-4 (1991), and on urban sprawl, see *infra* notes 189-90.

An eminent observer of the urban scene, Anthony Downs, takes the position that a new vision of metropolitan area growth is needed that favors less sprawl and more dense development, and for change to occur it is important that middle- and upper-income suburban residents in large numbers adopt this vision and recognize that metropolitan area problems are regional in nature and require implementation of regional policies. The new vision is necessary to counter the disadvantages of the present dominant vision of unlimited low-density spread of metropolitan areas, disadvantages such as frequent traffic congestion, lack of enough affordable housing, socioeconomic isolation of the poor in central cities, sitings of undesirable land uses, and excessive loss of open space. DOWNS, *supra* note 143, ch. 1. But Downs is pessimistic about the new vision being extensively enough adopted to reverse current low-density metropolitan growth patterns. *Id.* at 195. In his analysis, however, he gives little attention to what has been achieved so far by the growth management movement.

national or even international governmental intervention is needed.¹⁸⁴ Growth management has also been attacked for interfering with market forces, with resultant costly inefficiencies. This attack usually focuses on higher housing costs. Although studies vary considerably as to how extensively housing costs are increased as a result of growth management programs, the conclusion is generally that the increase is appreciable.¹⁸⁵ Higher housing prices are most likely to be incurred by home buyers entering a housing market after controls are imposed, and by tenants. They also tend to have exclusionary effects on lower-income, especially minority, residents. Of course, higher prices may be accompanied by added amenities, such as lower residential densities and less traffic congestion,¹⁸⁶ and one answer to the exclusionary effects of higher market prices for housing is increased government subsidies for low- and moderate-income residents.¹⁸⁷ Moreover, in some circumstances, more expensive housing may be a necessary corollary of achieving acceptable environmental protection.¹⁸⁸

Another controversial growth management issue is urban sprawl: has

184. *E.g.*, Banta, *supra* note 172, at 144-46; GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990S, *supra* note 143, at 223-24. Sustainable development, preserving the environment globally for future as well as present human needs, is a currently popular concept in environmental protection circles that looks to more than state-wide growth management. On sustainable development, see *id.* at 228-30; and Lloyd W. Bookout, *Sustainable Development: Looking at the Big Picture*, 50 URB. LAND 36 (1991).

185. On housing cost effects of growth management, see KELLY, *supra* note 143, at 179-205; William A. Fischel, *What Do Economists Know About Growth Controls? A Research Review*, in UNDERSTANDING GROWTH MANAGEMENT, *supra* note 143, at 59-86; Robert Engle et al., *On the Theory of Growth Controls*, 32 J. URB. ECON. 269 (1992); and Lawrence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 J. L. & ECON. 149 (1987). However, lenient controls may result in little or no growth management impact on housing prices. See results of a growth control study of seven mid-sized California cities, in Landis, *supra* note 181.

186. The amenity tradeoff possibility is stressed in Navarro & Carson, *supra* note 145.

187. On the subsidy point, see David R. Godschalk, *In Defense of Growth Management*, 58 J. AM. PLAN. ASS'N 422, 424 (1992), responding to Anthony Downs in *Regulatory Barriers to Affordable Housing*, who defends the recommendations for dealing with housing cost increases resulting from government regulations, as made in ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 183. The Commission's report is generally negative on growth controls, stressing the adverse spillover consequences possible from legally imposed growth controls. *Id.* at 2-1 to 2-5.

188. This seems to be Chinitz's view. See Chinitz, *supra* note 144, at 7-8.

growth management effectively contained urban sprawl, can it do so, and is urban sprawl really undesirable and something to be avoided? Urban sprawl, although a term with varying shades of meaning, usually denotes overall low-density development at the urban periphery, often including leap-frog development at scattered locations surrounded by rural openspace, and extended built-up commercial and industrial strips alongside major highways at the outskirts of urban areas. The evils attributed to urban sprawl include: more costly infrastructure such as roads and utilities, as they must be extended more widely than would be necessary with more compact development; longer commutation requirements; and loss of more agricultural and other open-space lands than would have occurred with more dense and less spread-out urbanization.¹⁸⁹ But how effective have growth management programs been in preventing sprawl? Towns and cities imposing controls independently of their neighbors can usually do little to prevent urban sprawl, and often their growth control efforts will actually increase it.¹⁹⁰ However, what about growth management programs that are region-wide or state-wide; how effective have they been in curtailing sprawl? Data are unavailable to satisfactorily answer this question, but there are indications that even in Oregon and Florida, two of the more experienced states in joint local-state growth management efforts, considerable urban sprawl has occurred.¹⁹¹ The issue of urban sprawl becomes more troublesome and

189. On the purported evils of urban sprawl, see KELLY, *supra* note 143, at 130-34, 164-73; REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL* (1975); and William A. Fischel, *Growth Management Reconsidered: Good for the Town, Bad For the Nation?*, *A Comment*, 57 J. AM. PLAN. ASS'N 341 (1991).

190. However, those localities whose jurisdiction includes extensive nonurbanized but urbanizable areas have the potential to prevent or drastically limit urban sprawl and its adverse consequences. These jurisdictions include many counties, if they have the legal authority; towns and cities with extraterritorial zoning powers; and the occasional town or city that, usually as the result of relatively recent annexation, has expanded its boundaries well beyond the present urban-rural fringe. Annexation and city-county consolidation as means of dealing with urban sprawl and a number of other urban problems are being urged by some. See, e.g., KELLY, *supra* note 143, at 73-77; DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993). But in most states, cities lack the effective power to expand geographically.

191. On the Oregon and Florida experience, see KNAAP & NELSON, *supra* note 143, at 219-20; Porter, *State Growth Management*, *supra* note 147, at 496-97; and Keith W. Dearborn & Ann M. Gygi, *Planner's Panacea or Pandora's Box: A Realistic Assessment of the Role of Urban Growth Areas in Achieving Growth Management Goals*, 16 U. PUGET SOUND L. REV. 975, at 1004-10 (1993). The Portland metropolitan area has had better results in containing urban growth within designated boundaries, in part because of higher housing density requirements imposed within those boundaries. See Porter, *State Growth Management*, *supra* note 147, at 497. However, Knaap & Nelson,

contentious if the views of some knowledgeable observers are considered: that urban sprawl frequently is beneficial and generally not to be discouraged. Among arguments advanced by these observers are that in a market economy urban sprawl is efficient; that sprawl is accompanied by decentralization of both employment and residential sites, thereby reducing traffic congestion and commutation distances; that without sprawl, more compact urbanization occurs that exacerbates environmental problems; and that, if denser urban development is what is desired, infill following sprawl is likely to result ultimately in a more dense urban area.¹⁹²

A very basic controversy that has haunted the growth management movement since its inception is the degree of effective autonomy each town and city should have in controlling land within its borders. Should this autonomy be nearly complete or should power be extensively shared with geographically larger units of government: the county, a regional government, the state or the federal government? And if shared, on what matters, and how fully should power be shared? In growth management settings, the tension usually is over the relative power of localities and the states, often centered on home rule rights. Whatever the declared reasons for the positions they take on controversial growth management issues, local governments and their influential constituencies often are motivated by the desire to retain power. Friction over how power should be allocated can be a significant undercurrent in any of the other controversial growth management issues.

Although legislation and comprehensive plans are the principal legal sources for how urban growth management programs are structured and implemented, judicial case law also is significant. There is, for instance, a substantial body of case law that helps clarify the legal limits of the various land use related controls, such as zoning and subdivision regulations, available to government in furthering its growth management efforts. Some of these opinions clear up ambiguities in statutes or administrative regulations pertaining to land use controls. Some set forth criteria for what is and is not constitutionally permissible in government imposing controls on land use. Among these latter are such well-known recent United States Supreme Court cases as *Nollan*,¹⁹³ *First*

supra note 143, see risks that this containment will not continue. *Id.* at 64-68.

192. These views are considered in Chinitz, *supra* note 144; and Ivonne Audirac et al., *Ideal Urban Form and Visions of the Good Life: Florida's Growth Management Dilemma*, 56 J. AM. PLAN. ASS'N 470 (1990).

193. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (stating that conditioning a landowner's building permit on the landowner granting a public-access easement is, without compensation, an unconstitutional taking because there is not a nexus between the condition imposed and the government purpose behind the restriction

English,¹⁹⁴ *Lucas*,¹⁹⁵ and *Dolan*.¹⁹⁶ There is also a line of cases testing the constitutionality of staged growth measures taken by individual towns or cities. These measures generally have been upheld as constitutional, but run the risk of invalidity if they prevent reasonable use of land for an excessive period of time.¹⁹⁷ As to the growth management programs in the nine states engaged in joint local-state growth management efforts, the most extensive body of judicial case law has developed in Oregon, the state that has done the most in program implementation. Much of the Oregon litigation concerns alleged noncompliance with local government plans or with land management goals adopted by the State Land Conservation and Development Commission.¹⁹⁸ In the other eight states, there is much less case law dealing directly with urban growth management programs, as the programs in these states have been less fully implemented than in Oregon, and some are too new to have resulted in court action.

The urban growth management concept has great and growing appeal, particularly in communities under heavy growth pressure. Growth management programs have become a major means of urban land use control in many parts of the United States. Moreover, their importance

on building).

194. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (stating that where an ordinance denies a landowner all use of its property for a substantial period of time, the invalidation of the ordinance without payment of fair value for the use of the property during the period of temporary taking would be a constitutionally insufficient remedy).

195. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992) (holding that if a state regulation deprives land of all economically beneficial use, without compensation, it is an unconstitutional taking, unless justified on title or nuisance grounds).

196. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (holding that for a constitutional municipal exaction conditioning private land development, without compensation, there must be rough proportionality between the exaction and the impact of the proposed development).

197. *See supra* note 151.

198. The Oregon caselaw is surveyed in 5 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW, LAND USE AND THE POLICE POWER*, §§ 160.15-160.26.50 (rev. ed. 1985 & 1994 Supp.). Many of these cases are appeals to Oregon appellate courts from decisions of a state agency, the Land Use Board of Appeals (LUBA). LUBA, established by the state legislature in 1979, has initial review jurisdiction over most land use decisions of local, state, and special district government agencies. LUBA, rather than state trial courts, was given this jurisdiction to provide greater expertise and consistency in land use decisions. On LUBA, see Edward J. Sullivan, *Oregon Blazes a Trail*, in *STATE AND REGIONAL COMPREHENSIVE PLANNING*, *supra* note 143, at 69-79.

has been substantially enhanced by the emergence of joint local-state government efforts to integrate diverse types of legal controls pursuant to comprehensive plans, and to do so on a regional or state-wide basis, generally absorbing zoning in the process. These intergovernmental efforts have had a particularly successful implementation record in Oregon, and they have politically and statutorily pieced together very promising operational structures in states as different as Florida, New Jersey, and Vermont. In addition, there is considerable support in other states for adopting state-wide comprehensive planning directed at achieving growth management goals, including California, New York, Pennsylvania, Massachusetts, Connecticut, Virginia, and North Carolina.¹⁹⁹ The urban growth management movement shows great vitality and promise. But growth management programs are faced with very difficult power sharing, funding, goal consistency, and government coordination problems. Whether they can overcome such serious problems remains to be seen. If they can, they well may become the most important force in American government efforts to control urban land.

V. CONCLUSIONS

The sample of four separate and unique government land control programs reviewed above suggests some significant generalizations about why government imposes major programs to control urban land use, how its programmatic efforts are shaped, and what it is able to accomplish. The importance, variety and longevity of the programs reviewed enhance their usefulness as sources of valid observations about the government land use control process.

A. Program Objectives

Each government urban land use control program typically is a response to some problem widely perceived as serious enough to merit government imposition of legal controls, and with a government commitment that through the program it will attempt to substantially alleviate the central problem. Among the problems that government urban land use control programs have sought to deal with are living conditions of the poor, the decline of many central cities, reducing the incompatibility of land uses, threats to the natural environment, and spatial patterns of urban expansion. Each program typically does not seek to deal with all aspects of the underlying problem, but rather focuses more

199. On support for statewide comprehensive planning in these states, see Patricia E. Salkin, *Statewide Comprehensive Planning: The Next Wave*, in STATE AND REGIONAL COMPREHENSIVE PLANNING, *supra* note 143, at 236-55.

narrowly and on one principal objective or a narrow range of principal objectives. These focal objectives have broad support and substantial appeal, are well-publicized, and tend to characterize what the program is about. Illustrative objectives of this sort are improved housing for the poor, slum clearance, revitalizing central city downtown areas, reducing incompatibility of land uses, eliminating environmental pollution, and facilitating orderly and cost efficient urban expansion. But to enhance public and political support, each program typically develops ancillary objectives that appeal to important interest groups. Examples of objectives of this sort are adding jobs during a recessionary period or in a depressed area, increasing the local property tax base, preserving local land values, protecting community life styles by effectively excluding residents and businesses the community considers undesirable, and holding down government service costs. Joint local-state growth management programs, with their emphasis on comprehensiveness in planning, are atypical in the large number of objectives they seek to advance. Such a broad-based approach helps attract support for the program but creates difficulties in efforts to balance so many competing, and to some extent inconsistent, objectives.

B. Opposition, Controversy, and Compromise

Although all major government urban land use control programs develop extensive popular and political support, they all also encounter opposition, and at least some aspects of each program become controversial. Opposition is to be expected, as all major government land controls have adverse effects on some groups. For instance, controls may result in many people's property taxes being increased, their property values reduced, their business opportunities curtailed, or their neighborhoods threatened in other ways they oppose. Control programs also may fail to deliver as promised, or may have serious dysfunctional side effects, thereby adding to the opposition. Slum clearance, for example, may have severe negative consequences for many poor people and businesses forced to relocate, public housing projects often become centers of drug dealing and violence threatening to all project and nearby residents, and zoning frequently blocks much-needed change. Program shortcomings of these kinds may emerge early in the life of a program or they may arise later when underlying conditions change, as by a city aging and its buildings and infrastructure deteriorating, or by massive demographic shifts in a community resulting in a population with new needs and preferences. A program appropriate for one period may become ill-suited to a later one. Ideological differences, too, can lead to opposition or heighten opposition feelings. Common ideological differences apparent in urban land use control controversies are the merits of regulation versus the free market, of comprehensive planning versus

more narrowly directed control responses, and of local home rule versus added effective power in regional, state, or national governments.

Opposition is an inherent feature of major urban land use control programs but so are attempts, often successful, to respond to this opposition. Opposition results in controversy, and controversy frequently leads to compromise that yields program modifications. All the programs reviewed have gone through extensive modifications over time, largely in response to controversy and resultant compromise. These modifications may be in the laws authorizing a program, in program procedures, or in program staffing. Relatively frequent changes of these kinds tend to occur in all government urban land use control programs, and can be essential to continued program viability. The rate of change in laws pertaining to such programs is quite different from the glacial evolution usually characteristic of common law concepts. Program modification also may occur in how government officials choose to use their discretion in program administration and enforcement. Those in government responsible for program implementation have considerable discretion in just how the program is carried out: how fully and vigorously, and in which objectives are emphasized. Program controversies may center, not on the laws setting up the program, but on the discretionary policies and practices of those government officials charged with program implementation. Examples of this are the alleged mismanagement of public housing in some localities, frequent criticism of zoning boards of appeal in their largely discretionary rulings on variance requests, and the ostensible favoritism of federal officials in approving projects for allocation of urban renewal funds.

C. *Legal Controls Imposed*

There are four principal kinds of legal controls potentially useful in government efforts to deal with urban land use problems. They are regulation, government subsidies, taxation for control purposes, and government ownership.²⁰⁰ The last three of these obviously rely

200. Regulation, as the term is used here, consists of government imposed restrictions on how land may be used or developed and by whom. Regulation may take many forms, and may unconditionally prohibit certain uses or developments. Or it may permit a use or development only under limited circumstances or if required government approval or other requisite steps are first taken. Government subsidies are government funds or funding supports provided to achieve control goals. Subsidies may be grants of money or they may be loans or mortgage insurance or other insurance not obtainable in the private market. Subsidies make money available directly or through supports or backups that may induce funding from private sources. Taxation for control purposes involves tax preferences or disincentives imposed not just to raise revenue but to influence taxpayer behavior for other purposes. This kind of legal control may take such

primarily on some type of government economic aid to further government objectives. The four programs reviewed above suggest some significant conclusions about the legal controls utilized by major urban land use control programs. Some programs must have substantial government economic aid to achieve their principal objectives, regulation is not enough. Depending on the nature of the program and its political acceptability, this aid can come in the form of subsidies, tax inducements, or favorable use of government owned realty, or some combination of these. More particularly, this may mean building and operating government owned housing, as in the public housing program; government providing writedown costs for land acquisition and clearance, as in urban renewal; or government funding for infrastructure, as in some managed growth programs. In many instances, the private sector will not, and usually cannot, fill the need to which the controls are directed, at least without extensive government economic aid. Politically, and often constitutionally, regulation alone will not suffice. In the big programs of government aid, however, regulation can be a helpful, even essential, supplement to the economic aid government makes available, bolstering or conditioning that aid. But not all major government urban land control programs require large infusions of government economic aid. Some need rely only on regulation, which is generally far cheaper to government than if one or more of the other control forms is used. Illustrative of the many government programs relying almost entirely on regulation are zoning and some managed growth efforts.

D. *Intergovernmental Participation*

The need for massive economic aid from government is one reason major government urban land control programs often are intergovernmental in nature, with extensive cooperative participation of two or more levels of government—local, state, and federal. The federal government, in particular, is likely to be involved because it is, or at least has been, the best source of large-scale economic aid. Local government participation is likely because of the strong tradition that land is a local

forms as tax exemptions, tax deductions, or preferred tax rates for some classes of taxpayers. Government ownership as a kind of legal control is the use of government owned property to achieve control objectives. Thus government land may be used for government operations, for designated private recreational or business purposes, or for other purposes consistent with the public interest. Much of the land in the United States, including many urban sites, is owned by government and quite universally held for furtherance of some legal control objective. Government ownership of land—with government directing how its land shall be used, developed, or disposed of—historically has been a highly important means for government legally to control land, and this kind of control remains significant today even for urban land.

government concern, and because its proximity to those most affected can greatly facilitate the imposition of controls and hopefully also minimize opposition. Furthermore, federal and state governments may become involved to enhance prospects for consistent application of program objectives throughout metropolitan areas or beyond, and to reduce negative spillover risks from local government action. These intergovernmental cooperative ventures, however, create their own frictions. Almost invariably the different levels of government have disagreements with one another over such matters as how aid should be conditioned, how it should be dispensed, who should be benefited, and how programs should be administered. Federal-local government frictions were pronounced in the urban renewal program, for example, and they often have emerged in the public housing program. Local-state frictions have arisen frequently in joint local-state urban growth management programs. Intergovernmental programs in which substantial controls are imposed, but in which economic aid is an essential and comes principally from one level of government, seem particularly vulnerable to intergovernmental conflict. The quid pro quo for aid then is likely to be such substantial intervention by the aid provider as to create resentment in the other participating governments.

E. Federal Government Financial Assistance

Federal financial aid to urban areas, including direct or indirect funding to help physically renew and revitalize central cities and their poverty enclaves, has declined in recent years. In part this results from an ideology prevalent in many powerful political circles that the federal government, and to some extent all government, should be less involved in local problems, and land use problems in particular. But also important are the continued federal budgetary deficits and the tremendous accumulated federal debt. These budget and debt problems, together with the federal government's priority commitments on entitlement programs, mean that federal financial aid for urban land use purposes probably will remain very tight for some time to come. This puts increased financial pressures on local government, and especially on the states, to fund the kinds of programs that the federal government has been relied on to fund. Obviously there are very real limitations on local and state government funding capacities.

F. Role of the Courts

Determining what legal controls will be utilized, and when and how controls will be put into effect, is overwhelmingly the responsibility of legislatures, including city councils, and of administrative agencies assigned to program implementation. Little help from the courts is

required. Innovative legislative measures pertaining to control programs may come before the courts for rulings as to their constitutionality. Courts are occasionally also called on to construe the meaning of relevant land use statutes or regulations, and the courts regularly are resorted to for resolution of a few kinds of conflicts that arise frequently in administering some programs, such as evictions from public housing and appeals in zoning variance cases. Overwhelmingly, however, controversies that arise in connection with major urban land use control programs of the kinds considered here are left to the political arena for determination, without involvement of the courts.

G. *Program Termination*

Once adopted and operational, major government urban land use control programs are difficult to terminate. Over time, policies and procedures are likely to be modified in response to how a program's actual and anticipated performance is perceived by persons with influence and authority, and these periodic modifications usually are sufficient to sustain the program indefinitely. However, termination can occur. Conditions that may lead to termination are conflicting program objectives, especially if powerful interest groups become dissatisfied with compromise arrangements, persistently high government funding costs, and troublesome adverse side effects, particularly if they are more serious than originally anticipated and are not corrected or even correctable. A combination of these conditions was largely responsible for bringing an end to the federal urban renewal program. High government funding costs and adverse side effects in the form of extensive on-site criminal activity are threatening termination of the present federal government-supported public housing program. This threat to public housing is enhanced by an available alternative, attractive to many, of privately owned but federally subsidized low-income housing. A major government control program may be terminated as a separate program by being absorbed into a larger program with broader objectives and potentially greater effectiveness. For example, zoning in some places is in the process of being incorporated into more inclusive and ambitious growth management programs. Still another reason for ending a major government urban growth control program is that the problem that gave rise to the program has faded away. Illustrative of this are towns that established strict phased growth programs when under heavy growth pressure, and then the growth stopped, either because the town became fully developed or was no longer an attractive growth center, following which the phased growth program was ended. For one reason or another, eventually every major government urban land use control program no doubt will be terminated. But programs of this kind have very long life anticipation.

H. *A Particularly Crucial Underlying Problem*

One underlying problem pertaining to urban land use is so serious and so far-reaching and disastrous in its consequences, with even more disastrous consequences threatened for the future, that it is imperative that more realistic and constructive solutions be sought. This problem is that of the poor and disadvantaged, particularly those with little education, few if any skills, and little or no steady employment possibilities, who are concentrated mostly in central city urban enclaves under conditions discouraging to human development, and under circumstances far too often conducive to unacceptable behavior. Life in these inner-city enclaves is marked by unusually high incidences of unemployment, crime, substance abuse, welfare reliance, school dropouts, teenage pregnancy, and single-parent families. Moreover, conditions in inner-city communities seem likely to get worse as available employment for the unskilled and semi-skilled declines still further, due in large part to increased automation of manufacturing jobs and further movement of low-skilled jobs to other domestic areas or abroad; as inner-city poverty or near-poverty populations expand; and, as inner-city frustrations and resentments more frequently result in hostile and disruptive acts, acts directed not only inward but outward toward the majority population.

Inner-city troubles are accentuated by racial and ethnic discrimination. A high percentage of inner-city residents are minorities. Being minorities limits where they can live and tends to restrict them to inner-city neighborhoods. This discrimination against minority inner-city residents has become more intense with the growing incidences of undesirable conduct by inner-city minority residents. Many majority whites oppose movement of inner-city minorities into predominantly white neighborhoods, in no small part out of fear that this movement will cause a decline in neighborhood security and in neighborhood economic and moral values. Many majority whites even oppose expanding aid to inner-cities, arguing that the high incidence of undesirable behavior by inner-city residents has shown that those in these areas are not deserving of greater assistance. Why help those who choose to behave improperly, the reasoning goes. Opportunities for a better life are available, and if not taken advantage of, the rest of society should not be required to increase the help it makes possible, especially if this means paying higher taxes. It is even being widely asserted that sharp cuts in welfare assistance, housing aid included, will be beneficial to the poor by eliminating their dependency life styles and forcing them to seek gainful employment that will lift them out of poverty. Very popular, however, are proposals for tougher criminal laws, more criminal convictions, and longer imprisonments. Emphasis on coercion or threats of coercion is considered by many as the best way to deal with those who get seriously out of line or who may be tempted to do so.

Crucial to more satisfactory and effective government efforts to resolve the problem of the urban poor and disadvantaged are changes in popular attitudes toward the problem. It must be recognized that the problem is everyone's responsibility, not just the responsibility of those in central cities, where most poverty is centered; and that conditions will get worse for all of us if current social disorganization trends in poverty-stricken communities are not reversed. Furthermore, relying too heavily on more punitive criminal laws and more aggressive criminal law enforcement will not solve the problem. Nor, if adopted, will the drastic reductions in welfare assistance being proposed have the beneficial consequences for the poor that it is asserted will be forthcoming. Fundamental flaws exist in our society that need correction. There is relatively little that a more coercive criminal law process can do to correct them and cutting welfare assistance is not the answer either.

Achieving major changes in popular attitudes toward the urban poor, however, will be very difficult. The persistently unacceptable behavioral patterns of many in urban communities who are poor and disadvantaged makes it much harder to change these attitudes. The offenders usually are at fault and deserving of blame, but finding fault and placing blame does little to eliminate unacceptable behavioral patterns in the communities from which these people come. We should focus much more on reducing the underlying causes of poverty and the unacceptable behavior that so frequently accompanies poverty, especially in urban communities with large concentrations of poor people. We must realize that effective corrective action often will cost money, substantial sums of money, and that middle- and upper-income taxpayers—including those in the suburbs—will be paying most of this cost if appropriate measure are taken. Moreover, those expenditures, if properly made, will be in the long-term interests of everyone by reducing the potentially calamitous risks of a highly bifurcated and polarized society.

I. *Recommendations*

The four programs reviewed, over long periods of time, have records of considerable accomplishment consistent with their objectives. They all have been contentious and have drawn strong opposition, but each has shown remarkable resilience and a capacity to survive. Only one of the four has been terminated, and then only after a quarter-century of substantial achievement in many American cities. Considering the experience of the four programs, and especially the serious social problems they have sought to deal with, what proposals seem feasible, with a realistic possibility of eventual adoption, that will enable American government to improve how it influences and controls urban land use? The following are some suggestions.

1. What government can and should be doing to deal more effectively

with the urban poor and disadvantaged, especially those concentrated in inner-city communities, obviously is a major concern, but one that goes well beyond what land use controls alone can accomplish. New approaches to such matters as education, job training, welfare, police protection, and health services are needed that transcend issues of spatial allocations of use or the size, quality or cost of land improvements. But how land is used does have a bearing on urban poverty and must be considered in government attempts to deal more effectively with that poverty and its consequences. Segregated enclaves of the inner-city poor and disadvantaged are important aspects of urban land use, as are such matters as the location of jobs open to the poor within reasonable commuting distance; the adequacy of public infrastructure in inner-city communities heavily populated by poor people; and the quality and cost of housing for the poor wherever they live.

One needed land use related approach to reducing poverty and the consequences of poverty is providing better or cheaper housing to far more poor people. Existing public housing should be retained under government control, and it should be repaired and renovated where needed, unless so physically deteriorated as to make this too costly. In addition, conditions in most high-rise public housing projects should be improved by more careful tenant selection and a better-balanced tenant mix that would include more stable families headed by persons steadily employed. Further, there should be a substantial increase in the total number of government assisted housing units for the poor by adding new units of scatter-site public housing or more Section 8-type rental subsidies to benefit poor tenants. Government at all levels, moreover, should be providing much greater financial support to community development corporations, private non-profit organizations that are providing not only housing, but also social services and job-training to poverty-level residents of many big city neighborhoods.²⁰¹

More recreational facilities also should be provided in inner-city communities, including more playgrounds, ball fields, tennis courts, and indoor and outdoor basketball courts. Young people everywhere are attracted to sports, but adequate participant sports facilities are lacking in most inner-city neighborhoods. More and better sports facilities would help divert energies away from undesirable aspects of street life. Needed at such facilities, however, are adequate monitoring and supervision, a substantial added expense. With sufficient oversight, recreational activities will be better organized and the risks of delinquent behavior at the recreational areas will be greatly reduced.

In addition, more land use related efforts should be made by government to expand employment opportunities for poor people,

201. On community development corporations see *supra* note 43.

particularly the poor in inner-city poverty enclaves. A helpful move of this kind would include much-enlarged programs for repairing, maintaining, and modernizing public infrastructure such as streets, bridges, water supply systems, sewers, waste treatment plants, and park facilities. In most big cities, particularly in poverty neighborhoods, much of this infrastructure is in serious need of upgrading and improved maintenance. If the chronically poor were given priority in employment to do this work, both their needs and the cities' needs would be accommodated. Lower labor efficiency, at least in the short run, might be a cost element of these efforts; but this is likely to be a cost factor that must be calculated and absorbed in almost any major attempt to bring large numbers of poor people, many with little work experience, into the job market. Still another example of a land use related approach for adding to the job prospects of poor people is establishing more effective enterprise zones, or empowerment zones as they are also known, in designated economically depressed urban areas.²⁰² Through government-provided tax breaks and other government benefits, the hope is that these will attract businesses into the benefited areas and, with or without job preferences, provide considerable new employment for poor people nearby. But to have much of an impact, these programs must receive far more in government benefits than existing programs in this country have been provided up to now.

The above, then, are illustrative land use related measures to aid the urban poor. Many others are possible. What should be underscored again, however, is that much more should and can be done, in the interests of all of us, to improve the lot of the American poor, but that any approach with a major impact will be financially costly. The cost must be incurred if we are to reverse the trends toward an increasingly divided and disruptive society.

2. Large concentrations of poor and disadvantaged people in any locality place heavy financial burdens on local governments where these people live. The burdens are so great that most central cities and inner suburbs where these concentrations exist find themselves unable adequately to meet their obligations to their poor and disadvantaged residents. Under present funding arrangements, they certainly cannot greatly increase what they provide this segment of their population. They

202. On the new federal government empowerment zone and enterprise communities program, strongly backed by the Clinton Administration and authorized by Congress in the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416, 477 (codified as amended at 26 U.S.C. §§ 1 et seq. (West 1994)), see Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Program: Experiences from the Model Cities Program*, 26 URB. LAW. 63 (1994). The article includes suggestions for making the program a success.

need and should acquire large new infusions of funding. One means of making available such increased funding is by restructuring the local tax system, especially the property tax. The added help needed by the poor should be looked at as an obligation of all taxpayers, including those in middle- and upper-income suburbs. The property tax, as currently structured, enables many suburban taxpayers to avoid much of their obligation. One way of correcting this inequitable result is to apply the same property tax assessment practices and the same tax rates state-wide, and then to allocate the gross proceeds from the tax to the localities in proportion to population or some local need formula. Another way of dealing with the underlying funding problem is to shift to federal or state government even more financial responsibility for housing the poor and for providing more jobs and a better physical environment in inner-city poverty neighborhoods. In either instance, many taxpayers not living or working in localities with large concentrations of poor people would be required to share more fairly the burdens of dealing with poverty.

3. More detailed and accurate data are needed on land use trends and on the impact of government controls, both current and prospective. When new or substantially modified controls are seriously considered, appropriate data on likely impacts should be assembled more frequently than has been the case in the past. Too often, legislative and administrative requirements are based on guess or political preference, without the needed factual foundation. This unduly increases chances of wasted resources, wasted efforts, and disappointing and dysfunctional results. Ongoing programs also should be regularly and carefully evaluated to determine if they are achieving their objectives, and doing so at acceptable costs and without unacceptable side effects. Not only should data assembly be made by persons competent to do so, but studies and reports should be objective and sufficiently complete. There is a danger that such data assembly and summation will be biased and slanted in favor of private or public interest sources that control the information process. Developing qualified and objective data research directed at government land controls can be difficult. More attempts should be made to create government or private agency traditions of unbiased research on government control impacts, even on issues that are politically volatile. Emergence over the last few decades of a large coterie of land planners qualified to do needed data assembly and evaluation has been extremely helpful. But assuring that these specialists will be assigned to needed control impact studies, with appropriate instructions as to objectivity, is problematic. When needed studies are made, their release and distribution may be greatly curtailed. A form of government land control research that should more often be followed is the experimental demonstration study: selecting one or more limited areas and imposing controls under measurable testing conditions. On occasion, government agencies have used this approach, but for reliable results, a considerable period of time

may be needed, and legislatures, in particular, have been reluctant to wait, and too frequently have been willing to act on insufficient evidence.

4. Thorough planning prior to imposing government land use controls is a rational way to proceed, and comprehensive planning that considers all relevant objectives and alternative means of achieving those objectives is the ideal form of planning. But in the field of government land use controls, comprehensive planning has had a spotty and generally ineffective record, despite being strongly advocated by planning professionals. It was, for example, often ignored or slighted in administration of the urban renewal program, and its impact, if any, on most zoning programs has been unimpressive. However, the situation is much different in many urban growth management programs. Through often arduous and contentious negotiation and review procedures, the joint local-state growth management programs appear to be making comprehensive planning work. Politically tested plans have been produced that have good prospects for successful implementation. In some states, notably Oregon, much has already been achieved in plan implementation. The big contribution of growth management so far is its development of procedures and institutions that enable differing local, regional, and state-wide interests to be adjusted and compromised in the process of producing comprehensive plans with realistic possibilities of being fulfilled. Some doubts, however, remain. Will sufficient government funding be forthcoming to enable the plans to be carried out adequately? How well will the interstate and international aspects of problems be dealt with? And in plan implementation, can the many different and in part conflicting objectives that the plans seek to achieve be balanced to enable all objectives to be furthered without controversies that will destroy the entire growth management program? Particularly troublesome is the question of whether the growth management objective of revitalizing distressed central city and inner-suburb areas can be integrated into a program format that traditionally has focused on outer-suburban-fringe expansion. Conflict over competing objectives and which ones should be favored in implementation was an important reason for termination of the federal urban renewal program. The joint local-state growth management programs, however, have such good prospects of long-term success in developing and making comprehensive plans operational that these programs deserve to be sustained, adequately funded, and emulated by more states.

5. Joint local-state growth management programs also merit support and wider adoption because of the promise they show for improving solutions to land use problems extending over much or all of a metropolitan region. In many respects each metropolitan region is a functional unit, but the fragmentation of local government can often weaken a region and cause inequitable allocation of benefits and burdens within it. A common example is the spillover effect from one local

government jurisdiction to others from exclusionary residential zoning. Negative spillovers also are possible from zoned industrial and commercial activity incompatible with uses in adjoining towns. Another example is the possible negative effect on its neighbors of one town, acting independently, drastically limiting growth under a growth control program. More efforts should be made to resolve such regional problems by developing and implementing policies and imposing land controls that fairly coordinate and balance interests of the entire metropolitan region or of those towns within the region affected by the control efforts. Complete federal or state government takeover of control programs is one way of doing this, but on urban land use issues this has often proven to be impossible. On these issues, local government commonly is too influential politically to be excluded. Another approach that recently has been effective in a few places is central city annexation of surrounding areas, reaching out close to or beyond the urban-rural fringe. This provides a general purpose government for substantially the entire metropolitan area. But in most localities this is not a viable possibility because of strong suburban opposition. Joint local-state growth management programs appear to be much better possibilities. With nudging, direction and funding help from the state, local governments are being encouraged to face up to regional and state-wide urban land use problems, and to participate in control programs likely to be in the region's, as well as the state's, long-term interests.

6. Administration of government urban land use control programs in some communities should be made more efficient. There is unnecessary waste, even corruption, in some programs. Charges of this kind are often leveled at management of public housing. Furthermore, acquiring mandatory government approvals for land use and development may take an unjustifiably long period of time, thereby risking serious losses to land owners. Due to the cyclical nature of real estate financing and construction costs, as well as the cyclical character of real estate sales and rental markets, developers are especially subject to substantial losses when long delays occur in obtaining requisite government approvals. Illustrative of such delays, often indicating government inefficiency, are those that commonly occur in obtaining variances and other zoning approvals. Similar delays also frequently arose before urban renewal sites were ready for development.

The changes outlined above will not easily be made. Some are opposed by powerful vested interests, others are inconsistent with widely held popular views, and most will be very costly to government and ultimately to taxpayers. The proposals for improving the lot of the poor and for reducing poverty on a large scale will encounter strong resistance, particularly from that large percentage of the population that currently believes the best way to deal more effectively with inner-city problems is

greatly increased government funding for added police, added criminal prosecutions, and added prison capacity, and favors sharp cutbacks in government welfare expenditures for the poor. Unfortunately, more adversity may have to be experienced before the nation is willing to take needed steps toward resolving its most serious urban problems, including those that are land use related. Among adverse developments of this kind that may occur are: more middle-class people drifting into poverty or on the verge of doing so; more violent and damaging riots in or emanating from inner-city poverty areas; more objectionable features to living and working in high-growth areas; and more environmental deterioration and destruction in or near urban communities. Some conditions may have to get much worse before needed changes are attainable. This too often has been the American way.

