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John R. Nolon

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Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*

JOHN R. NOLON**

1. Introduction

This article explains, illustrates, and evaluates the legal system employed in the United States to regulate the use of privately-owned land and provides an illustrative checklist of the components of the system. The checklist is intended to facilitate a comparison of the U.S. system with land use regimes in other countries. The article also describes how, in recent years, this system has evolved to meet the challenge of urban sprawl through innovative smart growth measures and how it has dealt with recent threats to local natural resources through the advent of local environmental laws and standards.

The U.S. system of land use control was based initially on English law precedents. The English system established strong private property rights which were limited initially by a few common law doctrines created and enforced principally by the courts. Gradually a system of regulating building construction and particularly noxious, or inappropriately located, land uses evolved at the local level. There was no "national" land use system in England at the time of the creation of the federal republic in the United States.

Under the U.S. system of government, states retained the power to define and limit property rights, including the right to use the land and its natural resources. From that reservoir of authority, states have delegated land use control principally to local

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** Professor of Law, Pace University School of Law, Counsel to the Law School's Land Use Law Center; Visiting Professor, Yale School of Forestry and Environmental Studies. The author gratefully acknowledges the assistance of Susan Moritz, Research Consultant.

governments, including the power to create land use districts that dictate how cities, towns, and villages and their surrounding regions develop. States began by empowering local governments to adopt land use plans, to establish uniform zoning districts, and to review and approve land subdivision and site development. In most states, local governments have been given additional powers by their states to achieve proper development patterns and to mitigate the adverse impacts of land development on natural resources and the environment. Some state and federal laws have been adopted that limit local land use authority to ensure that statewide, regional, and federal interests are protected.

The U.S. Constitution[1] gave the national Congress the power to regulate interstate commerce, including the authority to prevent sources of environmental pollution that enter navigable waters or travel across state lines in the air. This authority has been broadly interpreted, sustaining some federal regulation of private land, such as strip mining, when there is a rational basis for finding that the activity affects interstate commerce. Congress also has the authority to tax and spend, which it can use to discourage private pollution and to encourage positive state and local activity regarding the environment and land development.

This multi-jurisdictional approach has resulted in overlapping regimes, with all three levels of government establishing rules for some matters, such as wetlands and habitat protection, preservation of natural resources, transportation development, and prevention of environmental pollution. As a result, the contemporary challenge is to integrate some of the various governmental influences on private land use to limit waste and redundancy while preserving the need for flexibility in addressing diverse regional, state, and federal interests.

2. English Common Law Origins

Following the Battle of Hastings in 1066, the Norman system of governing England was based on feudal tenure, a method of land control under which trusted allies of King William were given rights in the land, which they held of the King, not privately or exclusively.[2] Those who held the land owed defined services to the sovereign, and the sovereign owed them protection in return.

1. The text of the United States Constitution is available online at <http://www.house.gov/Constitution/Constitution.html>.

2. *See generally*, A.W.B. Simpson; *A History of the Land Law* (Oxford) (1986).

This form of land control was replaced by individual property ownership. This began with an early act of Parliament, the Statute of Quia Emptores, adopted in 1290, that gave those who held land the power to transfer it to the private ownership of others, subject to the state's right to tax, take, and control the land.

Under early English common law, private land ownership was regarded as sacred. In 1782, William Blackstone, one of the earliest commentators on the common law, referred to the right of property as "that sole and despotic dominion which one man claims over the external things of the world, in total exclusion of the right of any other individual in the universe."[3] Although few land use regulations existed by this time, Blackstone noted, even then, that property rights were to be enjoyed "without any control or diminution, save only by the laws of the land."[4] The right to exclude others from the land was protected by trespass actions brought in the common law courts. Any intentional incursion onto the land of another, whether actual damage occurred or not, was actionable. Liability for intentional trespass was absolute, regardless of motive or harm effected. Damages were assessed in proportion to actual injury caused to the property. Even when no actual damage resulted from a trespass, courts awarded nominal damages to settle property disputes.

The powerful right of individuals to use their land under the common law was balanced to a degree by the doctrine of nuisance, which established that private landowners might not use their property in a way that was injurious to property held by others.[5] Nuisance remedies were limited, by and large, to enjoining land uses that actually injured the owners or occupants of adjacent land, along with consequential damages. Offensive intrusions included the effects of smoke, dust, noise, or heat that interfered with or diminished the normal uses of nearby property. Nuisance rules limiting injurious land uses evolved slowly and only in response to one private party's dispute against another.

By the time cities matured in England, the private ownership of city lots made urban development easier—allowing individuals to build as they wished on their land in response to market demands. Unfettered land ownership in urban areas, however, gave

3. W. Blackstone; *Commentaries on the Laws of England* (1782) at 2.
4. *Ibid.* at 138.
5. *See Aldred's Case* [1611] 9 Coke R.D.F. 57b.

rise to dangerous overcrowding, impossible traffic congestion, and the rapid spread of disease and fire.[6]

In England, the great fire of 1666 in London led to the adoption of municipal building construction laws that required brick exteriors, wider streets, and open space along the Thames River for access to water for firefighting.[7] Land use was regulated to a minor degree, as well, with activities such as breweries and tanneries prohibited in the central city. The law provided for compensation to be paid to any individual lot owner who was prohibited from building . . . .

England's principal legacies to the United States are, first, strong support for the private ownership of land, with uses limited by nuisance doctrines, and, second, the legitimacy of regulation of building construction and of the location of noxious land uses by the local municipality.[8] Land use regulation under the common law system relied on municipalities, not state, provincial, or national governments.

3. Colonial Period

By the time of the development of the American colonies, individual property rights were well established. Individuals were thought to hold powerful control over their land—a concept that limited the power of the state to regulate that land.[9] Early colonial charter companies and towns allocated private ownership of land to each founding family. These grants were often subject to land use restrictions, such as requiring buildings to be perpendicular to the street and not to exceed 35 feet in height. In this early period, land uses were regulated more by conditions imposed on the land titles conveyed by colonial authorities than by governmental regulation. Lands granted to founding families were eventually subdivided by inheritance and transfer, creating lots for private use: agricultural, commercial, and residential. Colonial settlements evolved into cities, townships, and counties which eventually achieved governmental status and the power to legislate.

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6. *See* Rutherford H. Platt; *Land Use and Society: Geography, Law, and Public Policy*; revised edition (Island Press) (2004) at 82.

7. *See ibid.* at 84.

8. *See ibid.* at 81.

9. *See generally*, John F. Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause" [2000], *Zoning and Planning Law Handbook*, Chapter 3., *reprinted from* 94 Nw. U. L. Rev. 1099.

These municipalities were regarded not as sovereign entities but as creatures of the state, authorized by state law to exercise a wide variety of powers affecting the health, safety, and welfare of their citizens. Most were deemed to have only those powers delegated by their state legislatures, and those additional powers fairly implied in that delegation. As early as 1787, the City of New York was granted power to enact laws directing private landowners to arrange buildings uniformly in certain neighborhoods. In 1784, the Connecticut assembly had granted some cities authority to adopt laws regulating the placement and construction of private buildings. Similar laws were adopted in Virginia and Georgia at about the same time. By the end of the 18th century, post-colonial landowners had grown accustomed to governmental regulation of building on the land in the interests of public health, safety, and even aesthetics.[10]

4. Formation of the Federal Republic

The U.S. system of government established formally in the 1780s, after the American Revolution, involved the creation by the people of sovereign states, vested with full powers, including the police power that permits state legislatures to enact laws to protect the public health, safety, welfare, and morals. States are governed by constitutions, adopted in conventions by representatives selected by local gatherings of the people of the state. The U.S. Constitution was drafted by delegates selected by the states and was signed by them in 1787. It created a federal government that has the power to legislate only within the parameters of the specific powers delegated to it in the Constitution. Notably, the full police powers of the states were not delegated to the federal government.

The principal power given to the federal government that affects private land use is the power to regulate interstate commerce, under Article I, § 8 of the U.S. Constitution. The courts have interpreted this power broadly to include the regulation of matters affecting two or more states regarding trade, and navigation, with appropriate regard for the welfare of the public. After adopting the National Environmental Policy Act of 1969,[11] Congress passed a number of federal laws that regulate private land use and business activity related to interstate commerce. These

10. *Ibid.*
11. 42 U.S.C. §§ 4321 *et seq.* (2004).

include the Clean Water Act of 1972,[12] the Coastal Zone Management Act of 1972,[13] the Endangered Species Act of 1973,[14] and the Comprehensive Environmental Response, Compensation and Liability Act of 1980.[15]

Article I, § 8 of the Constitution also gives Congress the power to raise revenue by taxation and to spend those resources for the public good. There was a vigorous debate at the time the Constitution was drafted regarding the breadth of this power to spend "to provide for the general welfare of the United States."[16] The debate continued into the 20th century when Congressional spending programs aimed at addressing the problems of the Great Depression were challenged. In upholding the constitutionality of the Social Security Act, the U.S. Supreme Court held that the federal power to spend was extremely broad.[17] The Court based its decision on the fact that the states, acting independently, could not deal effectively with problems such as relief for the elderly and unemployed. It defined the power to spend for the general welfare with these words: "Nor is the concept of general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the time."[18] Today, federal spending programs are used to provide incentives to state and local governments and private landowners to achieve environmental objectives that promote the general welfare of the nation in a time of heightened concern over critical environmental troubles.

Article VI of the Constitution grants the federal government the power to enter into international treaties that legally bind federal, state, and local governments in the U.S. Under this authority, the United States has entered into many bilateral, regional, and international agreements that promote resource conservation and prevent environmental pollution.[19] An example of how a treaty may change the application of land use law is found in the expropriation provisions of the North American Free Trade Agreement (NAFTA). NAFTA allows foreign investors to arbitrate their

12. 33 U.S.C. §§ 1251 *et seq.* (2004).
13. 16 U.S.C. §§ 1451 *et seq.* (2004).
14. 16 U.S.C. §§ 1531 *et seq.* (2004).
15. 42 U.S.C. §§ 9601 *et seq.* (2004).
16. U.S. CONST. Art. I, § 8, cl. 1.
17. *Helvering* v *Davis* [1935] 301 U.S. 619.
18. *Ibid.* at 641.
19. *See* Celia Campbell-Mohn et al (eds); *Environmental Law: From Resources to Recovery* (West) (1993) 99-106.

claims that local, state, or federal laws constitute prohibited takings of investor property, using standards and adjudicatory forums quite different from those otherwise provided under domestic law.[20]

The Tenth Amendment of the U.S. Constitution reserves to the states all powers not delegated by the Constitution to the federal government. This power protects states against encroachments by Congress that are not justified by the power delegated to the federal government. The concept of dual sovereignty is dynamic and leaves room for flexibility in responding to challenges at the state and federal level, with tensions resolved by the U.S. Supreme Court. Under Article VI of the Constitution, the laws and treaties of the United States are declared to be the supreme law of the land.

The power to control private land use is part of the states' police power, and it is regarded as a reserved power of the states, subject to Congress's power to regulate interstate commerce. Early attempts by the federal Environmental Protection Agency to reduce air pollution by intervening in local development matters were recognized as a threat to the power of the states to control land use, secured by the Tenth Amendment. Such concerns led to the 1977 amendments to the Clean Air Act, which stated that "[n]othing in this Act constitutes an infringement of existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use."[21] In 2001, the efforts of the Army Corps of Engineers to prevent the construction of a landfill by a consortium of municipalities in the Chicago area were struck down by the U.S. Supreme Court. The Court held that the Army Corps lacked jurisdiction under the Clean Water Act to regulate development of intrastate, non-navigable waters solely on the basis of the presence of migratory birds.[22]

The powers of the federal and state governments to regulate private matters such as trade and land use are limited by property and personal rights protected by the Constitution. The Fifth Amendment of the U.S. Constitution prohibits the federal govern-

20. *See* Vicki Been, "Will International Agreements Trump Local Environmental Law?" [2003], *in* John R. Nolon (ed), *New Ground: The Advent of Local Environmental Law* (Environmental Law Institute) at 73.

21. 42 U.S.C. § 7431 (2004).

22. *Solid Waste Agency of N. Cook County* v *U.S. Corps of Eng'rs* [2001] 531 U.S. 159, 171.

ment from taking title to property from private persons unless it is for a public purpose and only if just compensation is paid.[23] The Fourteenth Amendment incorporates Fifth Amendment guarantees and applies them to the states and their municipalities. Thus, states and their municipal corporations are prohibited from adopting land use regulations that deprive any person of property without due process of law or from denying any person equal protection of the law.[24] Land use regulations that deny private property owners all use and enjoyment of their land, or that fail to accomplish a legitimate public purpose, are considered "regulatory takings."[25] Courts will require governments that effect regulatory takings to compensate the private landowners under the takings clause of the Fifth Amendment. Most state constitutions have similar takings clauses.

The U.S. Constitution also protects individual freedom of speech, the right to assemble, and to worship.[26] These constitutionally protected freedoms limit local land use regulations that are aimed at the content of signs, modes of personal expression in the adult entertainment business, gatherings on land otherwise open to the public, and construction of houses of worship and their related activities. Land use regulations that affect these individual freedoms do not enjoy the usual presumption of constitutionality that courts otherwise afford local laws.

These guarantees limit governmental land use authority. They require courts to strike down land use laws that are unreasonable or arbitrary, that fail to accomplish a legitimate public purpose, or that create land use categories that discriminate between classes of landowners unless those categories serve a legitimate public purpose.

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23. "No person. . .shall be. . .deprived of. . .property without due process of law; nor shall private property be taken for a public purpose, without just compensation." U.S. CONST. amend. V.

24. *See Chicago, Burlington & Quincy R.R. Co.* v *City of Chicago* [1897] 166 U.S. 226 . . . .

25. *See* John R. Nolon, "Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases" [1992], 8 J. Land Use & Envtl. Law 1, at 23-44.

26. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble. . . ." U.S. CONST. amend. I.

5. 19th Century Land Use

During the 1800s, building on private lots in urban areas to respond to market demand again caused a tangle of construction, poor traffic circulation, inadequate waste disposal, and overcrowding. The spread of diseases such as tuberculosis and cholera was a result of these conditions, as were serious fires in 1828 and 1835 in New York City. As modern industrial cities emerged during the 19th century, the negative effects of uncontrolled urbanization became clear.

This led to the birth of a movement of regulation of building construction and location to prevent overcrowding, facilitate the fighting of fires, and forbid unsavory or dangerous land uses in or near residential neighborhoods. During this period, municipalities were given the power to regulate private activity to protect public health and safety. This "police power" was used to prevent the spread of disease and the outbreak of fire. In 1866, the New York state legislature adopted the Metropolitan Health Act, and its cities began to exert regulatory influence over unsanitary conditions on privately owned property.[27]

This move toward regulatory intervention occurred in the U.S., as it did in England, concurrently with the adoption of building regulations of a variety of types, including the regulation of height and location and some regulation of uses that were obnoxious to nearby residential owners or the public in general. In 1915, for example, the U.S. Supreme Court upheld a regulation by the City of Los Angeles to prevent the operation of a dangerous brick kiln within a part of the city.[28]

6. The Modern Era of Zoning

Following the Great Depression and World War II more was needed in developing American communities.[29] In New York City, particularly, Fifth Avenue merchants were upset with the encroachment of other land uses, such as garment factories and offices, into their high-end retail neighborhood. There was broad sentiment that the City was becoming too densely settled, largely because of the spread of skyscrapers. In 1913, the City appointed

27. *See* Rutherford H. Platt; *Land Use and Society: Geography, Law, and Public Policy*, *supra, note* 6, at 105.

28. *Hadacheck* v *Sebastian* [1915] 239 U.S. 394.

29. *See* Newman F. Baker; *Legal Aspects of Zoning* (University of Chicago) (1927). *See generally*, Seymour I. Toll; *Zoned American* (Grossman) (1969).

a commission which was told to investigate a completely new idea: the division of the city into land use districts.

Based on the commission's recommendations, the nation's first comprehensive zoning ordinance was adopted by New York City in 1916. It divided the City into multiple land use districts, or zones. These districts allowed private landowners to use their land only for the purposes permitted in the applicable district. This protected Fifth Avenue retailers, for example, from the incursion of garment factories—an industrial use—in that retail zone.

This concept spread quickly. By the mid 1920s, nearly 400 local governments had adopted comprehensive zoning laws. Their authority to do so was granted by enabling acts adopted by their state legislatures. In the U.S., virtually all 50 states have adopted this method of land use regulation; their legislatures have passed relatively similar zoning enabling laws that delegate the authority to municipalities to regulate private land uses.

. . . .

Planning and zoning enabling laws specifically authorized municipal governments to control the use of the land by adopting land use plans and creating zoning districts. In most states, zoning regulations must conform to the locality's land use plan. In each zoning district, various building construction rules are established. These limit, for example, the heights and sizes of buildings and the amount of the building lot that can be built upon. Within each zoning district, each parcel of land is assigned at least one as-of-right land use, while permitting accessory uses typically associated with those principal uses. Variances of the standards may be awarded when landowners can prove that the zoning standards impose unnecessary hardships. Uses that do not conform to newly adopted zoning regulations may continue but may not be expanded or enlarged.

State enabling laws also authorized localities to create administrative and quasi-judicial agencies to review and adjudicate proposals for land development and petitions for relief from zoning regulations. Planning boards or commissions were established in most communities to review and approve individual development proposals. Zoning boards of appeal were created to hear applications to reverse adverse determinations of zoning enforcement officials or for relief from the strict application of zoning standards where they create unnecessary hardships regarding unique parcels of land. These agencies are required to hold public hearings

on most proposals and petitions, to provide notice to affected parties of the hearings, to hold meetings open to the public, and to ensure that their voting members have no conflicts of interest that prevent their decisions from being objective.

The most controversial aspect of zoning was that it prohibited private landowners from using their land for activities of their own choosing. Building construction limits were firmly established and accepted under prior state and municipal law. But taking away the right of a private landowner to use his or her land to meet market needs was a new idea and more controversial.

In the state of Ohio, the constitutional authority of the Village of Euclid to adopt and enforce use limitations was challenged by Ambler Realty Company.[30] Ambler claimed that separating uses through zoning districts accomplished no legitimate governmental purpose and, on its face, was unconstitutional. The plaintiff's technical claim was that zoning violated its constitutional right to due process: to be protected from arbitrary or unreasonable laws which did not further a legitimate public purpose.

The U.S. Supreme Court disagreed. In 1926, it handed down its decision in *Euclid v. Ambler Realty Co.*,[31] holding that the separation of land uses among zoning districts did accomplish a legitimate public purpose, using nuisance limitations on private property use as an analogous doctrine. The Court reasoned that the effect of zoning was to create land use standards that protected neighbors from nuisance-like use of nearby land. Thereafter, establishing zoning districts that carefully prescribed authorized land uses within each zone became the principal method of controlling private land use in the interest of building communities that were safe and economically efficient. Following this decision, the adoption of uniform building and use standards within various land use districts became known as "Euclidian Zoning."[32]

This system relied on local governments to make land use decisions. The role of the state was to establish the scope of local land use authority. Interestingly, during the early part of the 20th century, the role of the federal government was generally irrelevant to the creation of cities and towns and the control of private land use. The federal influence on metropolitan development

30. *See Euclid* v *Ambler Realty Co.* [1926] 272 U.S. 365.

31. *Euclid* v *Ambler Realty Co.* [1926] 272 U.S. 365.

32. *See* Charles Haar and Jerold Kayden (eds); *Zoning and the American Dream: Promises Still to Keep* (1989).

began in earnest in 1934 with the adoption of the National Housing Act, which established a system of mortgage insurance through the Federal Housing Administration. In 1937, Congress created the public housing program, using its power to tax and spend to grant subsidies to local housing authorities to build low-income housing. In quick succession, it used this same authority to create the urban renewal program, offering planning and building grants to local urban renewal agencies, to subsidize housing conservation and rehabilitation, encourage the adoption of local housing codes, provide funds to non-profit housing companies for moderate- and middle-income housing, and eventually, in 1974, to provide block grants to localities, large and small, for community development activities.[33]

By the 1970s, state courts had determined that private nuisance actions were not competent, in the context of nuisance actions brought by a few affected landowners, to resolve regional air and water pollution problems resulting from commercial and industrial activities.[34] In response, Congress began a decade-long effort of adopting federal laws to control land, air, and water pollution, using its power under the interstate commerce clause. Curiously, this legislative initiative did not involve local governments or engage their potential to alter land development activities under their delegated land use authority.

At the inception of this era of federal environmental law-making, there was a reexamination of the wisdom of having delegated such extensive authority for controlling private land use to thousands of local governments in the 50 states, each making its own rules in the absence of any set of guidelines established by the states or the federal government.[35] Critics wondered how regional and statewide interests could be protected when local land use authority was confined to the borders of individual municipalities. Further, there were concerns that the delegation of land use power to localities was an ineffective method of controlling the underlying regional and national causes of environmental damage.[36]

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33. *See* John R. Nolon, "Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances" [1982], 14 Urb. Law. 249, at 253-257.

34. *Boomer* v *Atlantic Cement Co.* [N.Y. 1970] 257 N.E. 2d 870.

35. In 1972, there were about 38,500 general purpose local governments. *See* U.S. Census Bureau, Preliminary Report No. 1: The U.S. Census of Governments, <http://www.census.gov/govs/www/cog2002.html>.

36. Fred Bosselman and David Callies; *The Quiet Revolution in Land Use Control* (Council on Environmental Quality) (1972) at 1.

Two responses followed. First, attempts were made to limit local control through preemptive measures, regional land use agencies, state directives, and other approaches. Local control of private land use began to be limited by state and federal laws adopted to deal with the negative effects of land use that were beyond the control, competence, or concern of local governments. Although these limitations on local control in a few states are noteworthy, they are not widespread and have not disturbed the primary reliance on municipal control in the U.S. land use system.

Second, many state legislatures gave greater power and flexibility to local governments to respond to development pressures. So-called "neo-Euclidian zoning" techniques such as planned unit development districts, floating zones, special use permits, and others evolved at the local level.[37] These allowed local governments more flexibility in locating development in appropriate places. In the modern era, additional techniques have been authorized such as the purchase of development rights, the transfer of development rights, and the recreation of traditional neighborhood districts to give even greater authority to local governments to marshal the forces of development and arrange buildings appropriately on the land.

These responses—the minimal erosion of local land use discretion and the delegation of additional and flexible authority—are evidence that the traditional land use system is evolving.[38] It is interesting and instructive to examine how the federal and state governments have respected the centuries-old tradition of municipal control while at the same time confronting new challenges. The influential book *Land Use in America*[39] begins its agenda for land use in the 21st century with two critical recommendations. First, it states that "[l]ocal governments must take the lead role in securing good land use. Initiatives in land use planning and growth management need to be anchored in a community-based process that develops a vision for the future." Second, "State governments must help local governments by establishing reasonable ground rules and planning requirements . . . and providing leadership on matters that affect more than one

37. *See* John R. Nolon; *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth* (Environmental Law Institute) (2001) Chapters 6-8.

38. *See* Charles M. Haar, "The Twilight of Land-Use Controls: A Paradigm Shift?" [1996], 30 U. Rich. L. Rev. 1011 at 1038.

39. Henry L. Diamond and Patrick F. Noonan; *Land Use in America: The Report of the Sustainable Use of Land Project* (Island Press) (1996).

local jurisdiction."[40] It is in the details of the limitation and expansion of local control that the ability of law to meet the changing exigencies of society is evident.

7. Limits and Influences on Local Land Use Control

The seeds of the movement to limit and reshape local control were planted in the 1930s as planners dealt with the spread of land development beyond the borders of cities and urban villages.[41] After World War II, the search began for a higher level of government or administrative unit to define regional land use needs and shape development to meet them. The reformists of the 1970s called for state growth management laws, for regional governments to ensure that regional land use interests are met, and for further limits on local control of certain natural resources such as coastal areas and wetlands.

(1) Regional Planning and Control

From its inception, the U.S. land use system has encouraged voluntary, grassroots approaches to intermunicipal and regional planning. The Standard City Planning Enabling Act, promulgated by the Hoover Commission in 1928, provided for regional planning by authorizing local planning commissions to petition their state's governor to establish a regional planning commission and to prepare a master plan for the region's physical development. Provisions were included in the planning enabling act for communication between the regional and municipal planning commissions with the objective of achieving a certain degree of consistency between local and regional plans.[42] In 1968, the Douglas Commission—the National Commission on Urban Problems—appointed by President Johnson, issued its report, *Building the American City*, which reinforced regional planning. The Commission recommended that each state create a state agency for land use planning and prepare state and regional land use plans. The White House staff refused to accept the report.[43] A federal statute, the National Land-Use Planning Act, that would have provided a framework for federal, state, regional, and local

40. *Ibid* at 99-103.

41. *See* Douglas R. Porter (ed); *State and Regional Initiatives for Managing Development: Policy Issues and Practical Concerns* (Urban Land Institute) (1992) at 3.

42. *See* Edward M. Bassett; *The Master Plan* (Russell Sage Foundation) (1938).

43. *See* P.L. 92-463, Federal Advisory Committee Act, H. REP. No. 92-1017 (April 25, 1972).

land use planning was vigorously debated in the early 1970s, but was not adopted.[44]

These examples illustrate that regional consciousness has been part of the land use system and regularly reaffirmed since the early days of American zoning. Much of the United States, at one time or another, has been brought within the jurisdiction of some form of voluntary regional planning organization due to a variety of influences. The most powerful of these forces was the promise of funding for regional efforts under housing, water, transportation, and other public works grant programs of the federal government. Predominant among the organizations formed were voluntary, area-wide regional councils of government, multistate river basin compacts, and regional economic development and transportation organizations.

Three examples of responses to the need for extra-municipal land use control are the Adirondack Park Agency, the Oregon Growth Management Act, and Envision Utah. Each took a different strategic approach.

(a) Regulatory Regionalism: In 1971, New York state legislature enacted the Adirondack Park Agency Act to focus the responsibility for land planning in one state agency and to provide a continuing role for local government.[45] The legislature found that the preservation of the park's resources was a matter of state, regional, and local concern. The nearly 2.5 million acres in the park that are owned by the state are protected from misuse by appropriate provisions of the state constitution.[46] In order to protect the area of the park that is privately owned, the state legislature created the Adirondack Park Agency (APA) and adopted the Adirondack Park Land Use and Development Plan in 1973.

The state statute creating the APA sets out the development plan in some detail. It requires the APA to prepare and file an official map, which is given specific planning and regulatory effects. The plan and map divide land within the park into several

44. *See*, Margaret Weir, "Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land-Use Planning Legislation, 1970-1975," *in* Robert Fishman (ed); *The American Planning Tradition: Culture and Policy* (Johns Hopkins University Press) (2000) at 193.

45. N.Y. EXEC. LAW §§ 801-819 (Consol. 2004).

46. N.Y.S. CONST. art. XIV,§ 1.

designated land use classifications.[47] The act describes the character of each classification, the policies and objectives to be achieved in the area, and the types and intensity of uses permitted. The APA has jurisdiction to review and approve all critical regional projects defined by their location in a critical environmental area or their impact as determined by their size and intensity of use. The APA may also review and approve other regional projects in any land use area not governed by an approved and validly enacted or adopted local land use program. It is directed to consult and work closely with local governments and county and regional planning agencies as part of the ongoing planning process, and is empowered to review and approve or disapprove local land use plans. Once a local plan is approved, the locality assumes authority for reviewing and approving all but critical regional land use activities within its borders.

(b) Urban Growth Boundaries: The Oregon growth management statute, adopted in 1973, creates a state agency known as the Land Conservation and Development Commission (LCDC), articulates a number of statewide land use planning goals, requires local governments to adopt comprehensive plans that contain urban growth boundaries, and requires local plans to be approved by the Commission.[48] The statute also created the Metropolitan Service District (Metro) to supervise the intermunicipal urban growth boundary in the greater Portland area. In 1979, the statute was amended to create the Land Use Board of Appeals (LUBA) to review local land use decisions.[49]

Goal 14 of the Oregon growth management statute—the urbanization goal—classifies land into three categories: rural, urbanizable, and urban.[50] Rural lands are agricultural, forest, or open space lands, or other land suitable for sparse settlement, with few public services. Urbanizable lands are to be contained within an urban growth boundary and are deemed suitable for future urban uses: lands that can be served by infrastructure and that are needed for the expansion of an urban area. Urban areas are within or adjacent to existing cities with concentrations of population and supporting public facilities and services. The stat-

47. *See Helms* v *Reid* [1977] 394 N.Y.S.2d 987, 90 Misc.2d 583 (holding that the division of lands in the Park into land use classifications was valid under the state constitution).

48. OR. REV. STAT. §§ 197.005 *et seq.* (2004).

49. *See* OR. REV. STAT. §§ 197.540, 197.830 -197.845 (2004).

50. OR. ADMIN. R. 660-015-0000(14) (2004).

ute provides for the orderly conversion of rural land to urban, based on the consideration of a number of factors including the need to accommodate population growth through the provision of housing, jobs, and infrastructure.

(c) Voluntary Intermunicipal Strategies: With few exceptions, regional bodies in the U.S. have stopped far short of preemptive land use planning and regulation. They have become, however, effective vehicles for communication, education, collaboration, and networking. Among their most significant contributions is the effect they have of educating local land use officials.[51] In these regional bodies, local representatives learn about the common problems and interdependence of localities that share economic or housing markets or that have regulatory power over regional river basins and watersheds that cannot be protected without intermunicipal cooperation.

Envision Utah is a network of interest groups working at the regional level along a 100-mile corridor running north and south of Salt Lake City.[52] It comprises 88 local governments and 80 percent of the state's population. Assisted by state grants, Envision Utah is a nongovernmental alliance with significant private funding. Envision Utah conducted extensive opinion surveys of residents who demonstrated a strong preference for walkable, transit-oriented development, infill strategies, and redevelopment of urbanized portions of the region. Based on grassroots-derived implementation strategies, the state legislature passed the Quality Growth Act in 1999, established a commission, and charged it with assisting local governments with grants and technical assistance. The commission is also responsible for coordinating the work of six state agencies. Envision Utah developed a toolbox of techniques that can be used by local governments and intermunicipal councils to create their own visions and implement the regional vision.

(2) Federal Environmental Control of Private Land Use

The federal environmental legal system was created in the late 1960s, beginning with the National Environmental Policy Act and followed rapidly by the Clean Air Act, the Clean Water Act, and a dozen other federal laws designed to prevent and clean up

51. *See* Nelson Wikstrom, *Councils of Governments: A Study of Political Incrementalism* (Burnham) (1977) at 131.

52. *See* Envision Utah, *at* <http://www.envisionutah.org>.

the pollution caused by the private sector and left unabated by the land use control system driven by local governments.[53] The signature approach of these federal laws is to create standards for pollution or protection that cannot be exceeded and to provide stiff criminal and civil penalties for violations.

Federal agencies are charged with the responsibility of enforcing these standards, and citizens are authorized to sue polluters under these statutes as well. The emphasis of federal environmental law is on the central role of the federal government as the standard-setter and steward of a healthy environment. This focus all but obscures the importance of the role of local governments in land use control and environmental protection. Federal agencies have successfully reduced pollution that emanates from "point sources," such as smokestacks and water pipes. However, most environmental damage today is caused by "nonpoint source" pollution that results from land uses that are the legal responsibility of municipal governments. Federal attempts to influence local land use control in the interest of abating nonpoint source pollution have been thwarted by a variety of legal, political, and practical obstacles.

(3) Federal and State Incentives, Assistance, Guidance, and Requirements

Federal and state legislatures have adopted a number of initiatives that encourage and influence local governments to regulate private land use. Under the National Flood Insurance Program of 1968,[54] the federal government provides private property owners insurance against damage caused by flooding, but only if local governments adopt and enforce building construction regulations in federally-designated flood plains. Congress established land use policies for land development in coastal areas under the Coastal Zone Management Act of 1972.[55] It provides planning grants to states which in turn grant funds to localities to adopt coastal development plans and adopt regulations that comply with the federal and state coastal protection principles.

One interesting attempt to require localities to adopt environmental legislation is seen in the Phase II Stormwater regulations

53. *See* Celia Campbell-Mohn et al (eds); *Environmental Law: From Resources to* Recovery, *supra*, *note* 19.

54. 42 U.S.C. §§ 4001 *et seq.* (2004).

55. 16 U.S.C. §§ 1451 *et seq.* (2004).

issued by the federal Environmental Protection Agency (EPA).[56] Stormwater runoff control is crucial to the success of the federal Clean Water Act. It is one of the most serious causes of water pollution in the U.S, exceeding in many locales the contamination caused by sewage and industrial facility discharges. EPA, pursuant to its authority under the Clean Water Act, promulgated regulations establishing its Stormwater Management Program, which regulate municipalities that operate storm sewer systems, as do most U.S. municipalities of any size. These federal regulations require affected municipalities to implement a stormwater management program as a means to control polluted discharges from their stormwater systems: a form of point source regulation.

To ensure that these municipalities meet federal clean water standards, EPA set forth six minimum control measures that municipalities must meet, including programs to address stormwater runoff from construction sites and post-construction land uses. These regulations effectively direct municipalities to adopt procedures and regulations that affect private sector construction and development and that mitigate nonpoint source pollution. Local governments are required, for example, to adopt erosion and sediment control laws, to establish site plan review procedures for projects that will impact water quality, to inspect construction activities, and to adopt enforcement measures. Localities must adopt laws resulting in improved clarity and reduced sedimentation of local water bodies, and demonstrate increased numbers of sensitive aquatic organisms in their waters. Post-construction runoff controls are also required for development and redevelopment projects. Redevelopment is defined to include any change in the footprint of existing buildings that disturbs greater than one acre of land.

States, too, adopt laws that direct and influence local land use regulation. Nebraska state law requires that local governments adopt comprehensive land use plans before they are legally able to adopt any type of zoning regulation.[57] Under Minnesota law, local land use plans must contain a component regarding local open space protection.[58] The Minnesota state government assists its localities in land use regulation by providing them with model ordinances regarding the creation of urban growth boundaries, creating agricultural protection zones, and subdivision ordinances

56. 40 C.F.R. §§ 9, 122, 123, and 124. *See* 64 Fed. Reg. 68,722 (December 8, 1999).
57. NEB. REV. STAT. §. 23-114.03 (2004).
58. MINN. STAT. ANN. §§ 422.351, 473.145 (West 2004).

that encourage sustainable development.[59] In Massachusetts, the state legislature has created a university-based program for providing technical assistance and training to local land use officials.[60] Under California's Environmental Quality Act, local governments must prepare an environmental impact report on any project that may have a significant impact on the environment.[61]

The Illinois legislature adopted the Local Planning and Technical Assistance Act in 2002. The law's purpose is to provide technical assistance to local governments for the development of local planning ordinances, promote and encourage comprehensive planning, promote the use of model ordinances, and to support planning efforts in communities with limited funds.[62] The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to be used by local governmental units to "develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations. . .that promote and encourage the principles of comprehensive planning."[63] A particularly important tool is found in § 25, which sets forth the specific elements that must be included in a plan for it to qualify for grant money.[64] The Local Planning and Technical Assistance Act does not mandate comprehensive planning. However, the grant money provides a strong incentive for communities to engage in planning.

(4) State and Federal Preemption of Local Control

State and federal legislatures have adopted a few laws that fully or partially preempt local control of private land uses. Under the Telecommunications Act of 1996, for example, the federal government preempts local regulation of the location of cellular transmission facilities when those regulations are based on concerns over public health threats caused by the transmission of radio frequency emissions.[65] Localities are allowed to impose conditions on the location of such facilities based on aesthetic grounds, however. This is an example of partial preemption. Similarly, the

59. *See* <http://www.mnplan.state.mn.us/pdf/2000/eqb/ModelOrdWhole.pdf>.

60. *See* The Center for Economic Development, University of Massachusetts at Amherst, <http://www.umass.edu/larp/outreach_programs.html>.

61. CAL. PUB. RES. CODE §§ 21000 *et. seq.* (Deering 2004).

62. 20 ILL. COMP. STAT. ANN. 662/5 (2004).

63. *Ibid.* 662/15.

64. *Ibid.* 662/25(a)(1) -(10).

65. 47 U.S.C. § 377 (2004).

Federal Aviation Act of 1958 preempts local regulation of federally approved flights, but not the height of airport buildings.[66] The Federal Fair Housing Act and its amendments prohibit localities from enforcing land use regulations that deny handicapped persons equal opportunity to use and enjoy the built environment.[67]

Another federal statute, the Religious Land Use and Incarcerated Persons Act (RLUIPA), partially preempts local land use control.[68] It prevents federal, state, and local governments from imposing or implementing land use regulations in a manner that imposes a substantial burden on religious exercise. RLUIPA applies to local land use decisions that involve individualized assessments of proposals by religious institutions for a variety of permits and approvals. It requires local governments to implement land use regulations in a manner that treats religious assembly or institution on equal terms, is nondiscriminatory, and does not exclude or unreasonably limit religious assembly.[69] When religious institutions bring a credible case of discrimination, the locality must demonstrate that its regulation furthers a compelling governmental interest and is the least restrictive measure of furthering that interest.

States adopt similar laws that preempt local action. The Colorado Land Use Act, for example, lists 21 areas of state interests, such as mineral exploitation, wildlife habitat areas, and flood hazards, and requires that, when localities regulate regarding such interests, they must follow state guidelines.[70] The New York Padavan Law mandates that local governments not deny applications by state-licensed non-profit housing providers to establish group homes for developmentally disabled individuals in single-family zones.[71] New York law also provides for a state-controlled siting process for deciding on the location of electrical generation plants that preempts local control of them.[72]

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66. 49 U.S.C. § 40101 (2004).

67. 42 U.S.C. § 3604 (2004).

68. 42 U.S.C. § 2000cc (2004).

69. *Ibid.*

70. COLO. REV. STAT. §§ 24-65.1-201 – 24-65.1-204 (2004)

71. N.Y. MENTAL HYG. LAW § 41.34 (McKinney 2004).

72. N.Y. PUB. SERV. LAW art. X. *See Citizens for Hudson Valley* v. *New York State Bd. on Elec. Generation Siting and Envtl.* [3d Dep't. 2001] 281 A.D. 89, 723 N.Y.S.2d 532.

8. Expanding and Enhancing Local Control

By the middle of the 20th century, local zoning, subdivision, and site plan regulations had become traditional components of the land use system. Then, as the post-World War II building boom occurred, legislatures in many states began to give their local governments authority to adopt more complete, flexible, and diverse land use laws. They have been aided by liberal interpretations of delegated powers by state courts. Using these powers, localities in the U.S. have created two recent and dramatic movements: smart growth and local environmental protection.

(1) Smart Growth Strategies

Smart growth is offered as a solution to the problems of urban sprawl, the deterioration of older cities and villages, and the failure of new development to create quality neighborhoods and to preserve natural resources. It provides a popular label for a growth strategy that addresses current concerns about traffic congestion, disappearing open space, nonpoint source pollution, the high cost of housing, increasing local property taxes, longer commutes, and the diminishing quality of community life. Under many suburban zoning laws and subdivision regulations, the densities and design features of traditional neighborhoods found in older urban areas can no longer be replicated.[73] Smart growth calls for a new type of land development pattern, one that is more concentrated, affordable, environmentally sensitive, and that creates a quality of neighborhood in which residents feel comfortable living.[74]

Smart growth also calls for the identification and preservation of critical environmental areas before land development occurs. By identifying critical environmental areas and protecting them via regulations and acquisition programs, communities can better define where to locate the development needed to accommodate population increases. The sustainable development movement taught that development and conservation are mutually supportive. Proper land conservation increases the quality of life, protects needed natural resources, stabilizes property values, and provides recreational and tourism benefits. Proper development,

73. Jonathan Barnett, "What's New About New Urbanism?, *in* Congress for the New Urbanism; *Charter of the New Urbanism* (McGraw-Hill) (2000) at 5.

74. *See* Congress for the New Urbanism, *About New Urbanism,* at <http://www.cnu.org/about/index.cfm>.

for its part, takes development pressures away from critical environmental areas, provides tax resources for municipal services, and can provide financial resources for land conservation.

Once municipal growth areas have been designated, local governments have a number of strategies to choose from in order to direct development into such areas. The following illustrative list is drawn from strategies local governments are authorized to use in New York State, and is representative of local powers in most populous states:

- *Higher Density Districts*: In a designated growth zoning district, the density of development can be increased as a matter of right. Municipalities can use their traditional zoning authority to create mixed-use neighborhoods with bulk, area, and use provisions that create the type of compact development pattern envisioned by the smart growth concept. Such districts provide sufficient density of mixed-use development to support the transportation and transit services needed to increase pedestrian traffic and reduce car travel.
- *Bulk and Area Requirements*: A designated growth zoning district can contain bulk, area, and parking provisions that encourage types of development that support smart growth principles. By establishing setback lines that require buildings to be brought up to the sidewalk and by requiring parking and garages in the rear, pedestrian use of streets can be encouraged and an attractive neighborhood design created. The number of parking spaces required can be fewer if real prospects of transit services exist. Design amenities such as front porches and traditional architectural styles can be included in the zoning provisions. In some parts of these designed zoning districts, narrower streets can be specified to discourage traffic and ease pedestrian use.
- *Incentive Zoning*: Significant waivers of zoning requirements can be offered to developers, including increasing the density of development allowed, as a method of directing larger-scale development into designated growth areas.[75] Developers can be encouraged to provide public amenities such as transportation, parks, affordable housing, social service centers, or other infrastructure in exchange for the waivers.
- *Special Permits*: Larger-scale developments providing for mixed uses may be approved by special permits issued by the planning board or other administrative body. This prac-

75. N.Y. TOWN LAW § 261-b (McKinney 2004); N.Y. GEN. CITY LAW § 81-d (McKinney 2004); N.Y. VILLAGE LAW § 7-703 (McKinney 2004).

tice has been followed for decades by municipalities as a method of combining land uses in designated planned unit or planned residential zoning districts.[76]

- *Floating Zones*: Large-scale developments can be permitted by amending the zoning code to provide for a special use zone, such as a mixed-use development district, that can be affixed to a large area upon the application of all or a majority of the landowners. That application, if successful, results in the amendment of the zoning map to redistrict the subject parcels and permit the new use.[77]
- *Generic Environmental Impact Statements*: When any of these techniques is used to create a designated growth area, a generic environmental impact statement can be prepared that identifies negative environmental impacts and provides for their mitigation.[78] When this happens, it is possible that developers of individual projects will not be required to prepare lengthy and costly environmental impact studies. This alone can provide a powerful incentive for developers to concentrate their projects in designated development areas.
- *Transfer of Development Rights*: State law allows New York municipalities to establish transfer of development rights programs that concentrate development in receiving districts and provide for the transfer of development rights from sending districts.[79] In smart growth terms, the receiving district is the designated growth area and the sending area is a conservation or natural resource protection area.
- *Intermunicipal Agreements*: In New York, local governments have been given liberal legal authority to cooperate in the planning and zoning field.[80] Through intermunicipal agreements, they can designate shared or interlocking growth districts that create real market opportunities and a complementary range of housing types, retail services, office buildings, and needed amenities. This important technique is used most often when several communities share a transportation corridor.

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76. N.Y. TOWN LAW § 274-b (McKinney 2004); N.Y. GEN. CITY LAW § 27-b (McKinney 2004); N.Y. VILLAGE LAW § 7-725-b (McKinney 2004).

77. In *Rodgers* v *Village of Tarrytown* [N.Y. 1951] 96 N.E.2d 731, municipalities in New York learned that they have the authority to create novel zoning devices such as the floating zone to achieve the most appropriate use of land.

78. See N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.10 (2004).

79. See N.Y. TOWN LAW § 261-a (McKinney 2004); N.Y. VILLAGE LAW § 7-701 (McKinney 2004); N.Y. GEN. CITY LAW § 20-f (McKinney 2004).

80. N.Y. TOWN LAW § 284 (McKinney 2004); N.Y. GEN. CITY LAW § 20-g (McKinney 2004); N.Y. VILLAGE LAW § 7-741 (McKinney 2004).

(2) Urban Revitalization and Community Building

A critical focus of smart growth strategies is to reverse the trend of "out migration" of affluent households from existing cities and urban areas and to aid their revitalization. This problem has been addressed aggressively by the federal government, using its spending power to provide grants to local governments and institutions. In the 1960s, Congress created the urban renewal program as the initial response to the question of how to accomplish urban revitalization. For a decade and a half, the federal Department of Housing and Urban Development awarded urban renewal planning and project grants to local urban renewal agencies to plan and execute slum clearance and redevelopment programs. States cooperated by passing laws enabling cities to establish urban renewal agencies and industrial development agencies empowered to enter into contracts with the federal government and issue municipal bonds to finance their activities.

The questionable results of slum clearance and redevelopment came under fierce attack in the late 1960s. The critics held that urban renewal fostered segregation, removed historic buildings, dislocated the urban poor, and wasted government resources. With the passage of the Housing and Community Development Act of 1974,[81] federal urban renewal planning and project grants were folded into the special revenue sharing formula of the Community Development Block Grant program. Under this program, localities were authorized to continue their urban renewal programs if they wished, or to use the federal dollars for a much broader array of activities, such as street improvements, sidewalk repair, and housing rehabilitation grants, which were more popular with local citizens.[82]

A more recent attempt to encourage development in urban areas and prevent urban sprawl is brownfield redevelopment. In many communities, former industrial properties blight the landscape and remain unrealized economic opportunities. Generally known as brownfields, these properties are abandoned, idled, or under-used industrial and commercial facilities where redevelopment is complicated because of the existence of hazardous or toxic

81. 42 U.S.C. §§ 5301 *et seq.* (2004).

82. *See* John R. Nolon, "Reexamining Federal Housing Programs in a Time of Austerity: The Trend Toward Block Grants and Housing Allowances" [1982], 14 Urb. Law. 249.

substances in the soil or ground water. Nationwide there are over 450,000 brownfields.[83]

Developers are often reluctant to purchase and redevelop brownfields because of the liability that may be imposed upon them under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[84] CERCLA and similar laws adopted by many states impose strict liability upon an owner or operator of a site where contamination is present, regardless of whether that person caused the pollution. Consequently, a developer could be liable for millions of dollars of remediation costs simply by purchasing a site with hazardous contamination. This potential liability causes most brownfield sites to lie fallow. As a means to encourage the redevelopment of brownfields, a number of states have enacted statutes to reduce liability and have created programs that provide financial incentives to redevelopers.

Brownfield redevelopment is an important smart growth technique for a variety of reasons. First, by remediating contaminated properties, the environmental threat presented by these sites is reduced or eliminated, thereby protecting the health of the community. Second, when redeveloped, the formerly abandoned sites generate tax revenue for the community. Third, by developing brownfield sites, which are typically located in more urbanized areas, some development pressure is removed from outlying greenfields. Fourth, communities can use brownfields to meet various planning objectives such as the creation of affordable housing or additional commercial development.

(3) The Advent of Local Environmental Law

Slowly, during the past 30 years, local governments have developed a new body of local regulations designed to protect natural resources and prevent environmental pollution.[85] Today one can point to thousands of local laws that protect forests, freshwater and tidal wetlands, ridgelines, stream banks, vegetative cover, viewsheds, watersheds, wildlife habitats, and other natural resources that are threatened by land development. Equally numerous are local laws that prevent environmental contamination, notably nonpoint sources of water and air pollution that escape

83. *See* U.S. Environmental Protection Agency, *Cleanup*, *at* <http://www.epa.gov/ebtpages/cleanup.html>.

84. 42 U.S.C. §§ 9601 *et seq.* (2004).

85. *See* John R. Nolon, "In Praise of Parochialism: The Advent of Local Environmental Law" [2002], 26 Harv. Envtl. L. Rev. 363.

regulation under the Clean Air Act and the Clean Water Act enacted by the federal Congress. Local laws now regulate stormwater runoff, soil erosion, and surface water sedimentation in an attempt to prevent further environmental degradation at the local level and to preserve the quality of community life.

. . . .

Contemporary local environmental laws take a number of forms. Environmental objectives can now be found in local comprehensive plans, the boundaries of conservation zoning districts can be drawn to correspond to and protect watershed areas, environmental standards can now be found in subdivision and site plan regulations, and localities can adopt stand-alone environmental laws to protect particular unique and threatened natural resources.[86] The clear purposes of these laws are to control nonpoint source pollution and preserve natural resources from the adverse impacts of land development. Although the majority of U.S. communities have not adopted numerous and sophisticated local environmental laws, the increasing number of these laws, in the aggregate, constitutes a significant body of land use practice.

9. Exploring Municipal Authority to Control Private Land Use

Determining whether local governments in any particular state have the authority to adopt innovative land use laws of the type illustrated above requires a careful reading of the sources of delegated authority to control land use and an understanding of the rules of interpretation of these statutes in each state. Some state statutes and courts have adopted rules of strict construction, narrowly interpreting local power; others have interpreted the express, implied, and home rule authority of their municipalities more broadly.

In most states, it is understood that municipalities have no inherent powers but exercise only that authority expressly granted or necessarily implied from, or incident to, the powers granted to them by their state legislatures. The express authority to adopt land use plans and zoning regulations is delegated to local governments in most states through planning and zoning ena-

86. Several hundred of these local laws are available on Gaining Ground Information Database, prepared and maintained by the Land Use Law Center, *at* <http://landuse.law.pace.edu/SPT/SPT—Home.php>.

bling acts. Many states have supplemental acts delegating land use authority to municipalities, such as the power to adopt subdivision and site plan regulations or to adopt transfer of development rights programs or protect particular environmental features such as wetlands, shorelines, and river corridors.

Land use enabling laws can be broadly construed to empower localities to adopt innovative and flexible land use regulations. One of the purposes of local zoning laws is to provide for "the most appropriate use of land," a broad objective indeed.[87] This phrase was contained in the original model zoning enabling act and is found in the law of most states.[88] State statutes may require all land use regulations, including zoning, subdivision and site plan regulations, and all other regulations affecting the use of private land, to conform to a comprehensive plan.[89] In North Carolina, the state legislature adopted a legislative rule of broad construction of powers delegated to local governments.[90] Prior to that time, the courts had strictly construed specific grants of authority to local governments. A Raleigh, North Carolina, requirement that a developer create open space in a subdivision and convey title to it to a private homeowners' association was upheld using the legislative rule of broad construction.[91] The New York statute delegating the power to adopt comprehensive plans states that local plans may have elements dealing with agricultural uses, cultural resources, coastal and natural resources, and sensitive environmental areas.[92] This at least implies that local land use regulations can be adopted to advance the "environmental elements" of a local comprehensive plan.

87. N.Y. TOWN LAW § 263 (McKinney 2004); N.Y. VILLAGE LAW § 7-704 (McKinney 2004).

88. U.S. Department of Commerce, A Standard State Zoning Enabling Act, § 3 (1926), reprinted in Edward H. Ziegler, Jr. (ed); *Rathkopf's The Law of Zoning and Planning* (West) (2003) Volume 5, Appendix A. *See, e.g.*, CONN. GEN. STAT. § 8-2 (2003).

89. N.Y. TOWN LAW § 272-a(2)(b) (McKinney 2004); N.Y. VILLAGE LAW § 7-222 (2)(b) (McKinney 2004); N.Y. GEN. CITY LAW § 28-a(3)(b) (2004).

90. N.C. GEN. STAT. § 160A-4 (2004) (stating that "[i]t is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . ..").

91. *River Birch Assocs.* v *City of Raleigh* [N.C. 1990] 388 S.E.2d 538, 542-44.

92. N.Y. TOWN LAW § 272-a (McKinney 2004); N.Y. VILLAGE LAW § 7-222 (McKinney 2004); N.Y. GEN. CITY LAW § 28-a (McKinney 2004).

In most states, home rule authority is delegated to localities, giving them broader authority to adopt laws that affect local property, affairs, and government so long as those laws do not conflict with general or preemptive state laws. States utilize a variety of methods to grant home rule powers to their localities.[93] In most states, home rule authority is contained in the constitution. This authority, in some states, is self-executing and enables localities to adopt land use laws; in others, it requires the state legislature to adopt a home rule law and to delegate self-regulatory powers within a defined range of interests. Home rule provisions in state constitutions and statutes can delegate broad self-government authority or provide a rather narrow range of local legislation under home rule power. Where municipalities enjoy home rule authority, they may be able to exercise land use authority flexibly, outside the prescriptions and constraints of the zoning enabling laws. In other states, courts hold that localities must control private land use activity through discrete land use enabling laws and are limited to the techniques and procedures prescribed by them. At a minimum, local home rule power authorizes localities to legislate regarding their own property, affairs, and government, except where general or preemptive state laws operate. In nearly all states, home rule authority is not deemed to prevent the state from legislating regarding legitimate state interests by guiding, directing, or preempting local land use control.

The South Dakota Constitution, for example, provides that "[a] chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state . . . . Powers and functions of home rule units shall be construed liberally."[94] In Illinois, the constitution states that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare."[95] The California Constitution provides that a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[96]

93. *See* Daniel R. Mandelker, *Land Use Law*, 5th edition (LexisNexis Matthew Bender) (2003) § 4.24.

94. S.D. CONST. art. IX, § 2.

95. Ill. CONST. art. 7, § 6.

96. CAL. CONST. art. 11, § 7.

The home rule provisions of Article IX of the New York Constitution and legislation passed pursuant to it give local governments broad home rule powers.[97] The state legislature implemented Article IX with the enactment of the Municipal Home Rule Law (MHRL), the provisions of which are to be "liberally construed."[98] Under the MHRL, localities are given the authority to adopt laws for "the protection and enhancement of [their] physical and visual environment."[99] In *Ardizzone v. Elliot,*[100] the court stated that the municipality had the "power to regulate the freshwater wetlands within its boundaries under the Municipal Home Rule Law."[101]

10. Fragmentation and Integration

Under the modern American land use system, land ownership is held subject to the regulations of federal, state, and local governments. According to the U.S. Census Bureau, there are about 39,000 governments that have or can be given authority to regulate private land use.[102] In some areas, land developers must receive a permit to build near wetlands from the U.S. Army Corps of Engineers, the state department of environmental protection, and a local wetlands commission or planning board. In others, developers must comply with local erosion control regulations, meet state water quality standards, and comply with federal stormwater regulations. Other examples of overlapping regulations that protect watersheds, habitats, surface waters, and other resources abound.[103]

There are certain inefficiencies that result from the current duplication of effort, undue costs and delays that are imposed on some developments, and there is confusion about what are the appropriate roles. Since the federal government first regulated the habitats of endangered species, for example, states and local gov-

97. *See* N.Y. CONST. art. IX.

98. N.Y. MUN. HOME RULE LAW § 51 (McKinney 2004).

99. *Ibid.* § 10(1)(ii)(a)(11).

100. 550 N.E.2d 906 (N.Y. 1989).

101. *Ibid.* at 908.

102. In addition to the federal government and 50 state governments, there are 38,971 general purpose local governments: 3,034 county governments, 19,431 municipal governments, and 16,506 township governments. A large percentage of these general purpose governments have some power to regulate private land use. *See* U.S. Census Bureau, Preliminary Report No.1: The 2002 Census of Governments, *available at* <http://www.census/gov/govs/www/cog2002.html>.

103. *See* Peter A. Buchsbaum, "Permit Coordination Study by the Lincoln Institute of Land Policy" [2004], 36 Urb. Law. 191.

ernments were slow to enter the field of habitat protection. State power over property and land use, however, is complete and comprehensive. Once states enter the field, the topic becomes biodiversity protection and their power to regulate extends far beyond the protection of federally listed threatened or endangered species. The same can be said for watershed planning and management, wetland protection, and natural resource protection of all types.

Although confusing in some cases and onerous in others, this duplicative jurisdiction is not altogether a bad thing. In New York, the state regulates wetlands that are larger than 12.4 acres. In many New York communities, the proper protection of the local environment can require the regulation of much smaller wetland areas, such as vernal pools, which are critical to the survival of certain species in the community. Federal wetland control is limited to wetlands connected to interstate or navigable waters. State and local interests may dictate the regulation of wetlands that are located in areas beyond the geographical reach of federal law. Local, state, and federal interests are not the same, and regulations that protect these interests must differ to some degree. Leaving this land use system flexible to respond to regional conditions allows citizens and their elected legislators to continue to adapt the system to meet their unique and changing conditions.

This is not to say, however, that the parts of the system could not be better linked or coordinated. The federal government has adopted a cooperative method of working with states on some environmental and land use issues such as coastal protection, stormwater management, and point source pollution. States are encouraged by some federal regulations to develop their own permitting systems for polluters and by some federal spending programs to involve local governments in protecting coasts, preventing the development of areas prone to natural disasters, limiting stormwater runoff, and reducing the pollution of navigable waters. Within the U.S. system of dual sovereignty and cooperative federalism more of this type of integration and cooperation is merited and should be encouraged.

11. Conclusion

Local governments, empowered and guided by their states, have considerable authority to effect comprehensive and complete solutions. If properly guided and assisted, they can create strong local communities, while meeting regional and statewide needs.

They can become effective partners of the federal government in protecting federal waters, the air, and other matters of interstate importance.

Many states draft model local land use and environmental laws that localities may be allowed or required to adopt. State agencies provide technical assistance to municipalities regarding the adoption and enforcement of these models and sponsor educational programs to encourage more local governments to become involved. Some states also provide incentives, such as bonus eligibility points for discretionary grant programs to local governments that have adopted effective land use and environmental laws.

The federal government can encourage states to delegate authority to promote smart growth and protect natural resources to local government by sponsoring the preparation of model state acts that enable municipalities to adopt flexible and innovative land use laws. It was the model act promulgated by the U.S. Department of Commerce in the 1920s that led to the rather rapid adoption of state zoning enabling acts and of local zoning ordinances. Providing federal funding to support the emerging efforts of states to prepare smart growth policies and plans helps create a framework for state and local action to protect environmental resources in critical areas.

Further efforts in this direction are warranted. Federal and state funding also can be provided for the identification of critical watersheds, habitats, and forests and the development of local inventories of natural resources. With federal support, states can encourage local governments to create natural resource inventories and protect critical environmental assets by providing financial incentives to localities that comply with state smart growth programs. Federal and state incentives can also be provided to facilitate efforts to link transportation planning with intermunicipal land use planning. To the extent that the federal government builds on state and local action, its legal and geographical influence is broadened.

Beyond these municipally focused initiatives, additional strategies for integrating governmental land use regulations are possible. These include coordinated project review and joint permitting systems between the federal and state agencies, delegation of the administration of federal wetland, stormwater, and habitat permitting authority to state governments, and, importantly, the cross certification of compatible state and federal land

use plans and programs. This coordinated approach to land use regulation was evident 30 years ago in the Coastal Zone Management Act of 1972 under which federal incentives for state and local cooperation were applied. This cooperative approach is repeated in the Disaster Mitigation Act of 2000, a federal law that requires states, in conjunction with their localities, to create and submit plans for more intelligently regulating development in disaster prone areas and which rewards those that cooperate with enhanced eligibility for federal disaster relief payments.[104]

Although the U.S. land use system is fragmentary and still uncoordinated in many respects, it shows signs of coherence. Further integration of the system can be achieved by focusing on and reinforcing the role of municipalities. United States law and practice emphasize the role of local government in land use control for a number of important reasons. First, it is the historical approach, emanating from the medieval municipal corporation and surviving today, despite many attempts to loosen the local grip. Second, local economic markets and environments differ—they are not easily susceptible to generic statewide and national solutions. Third, local citizens and politicians are intimately familiar with local circumstances and have a great stake in economic success and protecting the quality of community life. Fourth, emphasizing a strong local role organizes state and federal political, legal, and financial energies by giving them a focal point.

Respecting the role of municipalities in land use and environmental regulation reminds policymakers that conditions and interests differ greatly from place to place. It suggests, too, that the legal system must remain open to invention. As Justice Brandeis observed over 70 years ago, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[105] By enabling, encouraging, guiding, and directing local government experimentation in land use matters, the 50 states empower thousands of local partners in society's perpetual search for the creation of livable, affordable, and environmentally sound communities.

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104. P.L. 106-390 (Oct. 30, 2000).

105. *New State Ice Co.* v *Liebmann* [1932] 285 U.S. 262, 31 (Brandeis, J., dissenting).