DEALING WITH DYSFUNCTION IN THE NATION'S INCREASINGLY OBSOLETE SYSTEM FOR LAND USE MANAGEMENT:

Guidance From The Past for State-Coordinated Planning and Decision-Making

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Abstract

Urban sprawl, socioeconomic segregation, ecological neglect, environmental injustice, and unequal allocation of public services – these all illustrate some of the unfortunate consequences of America's unguided and uncoordinated land use system. Since the initial adoption of the current system for land use planning and control, massive industrialization, population growth, urbanization, and technological advancement, have occurred across the nation. However, our land use system remains unreformed and thus incapable of addressing the immediate and future obstacles that arise in an ever evolving nation.

This analysis of land use governance in the United States examines the dysfunctions and impacts of the nation's locally-dominated land use system, and explores how an historical attempt to enact national land use policy legislation could offer a pragmatic solution to improve the planning and control of our human and land resources in the challenging years to come. Part I analyzes the development and function of the current U.S. land use system. Part II analyzes the dysfunctions of uncoordinated and unguided land use decision-making. Finally, Part III explores how a modified version of the national land use legislation proposed by Senator Henry M. Jackson over 40 years ago could beneficially reform the current dysfunctional land use system in order to achieve far better management of the nation's land resources.

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Introduction

The United States has a total land and water area of approximately 2.4 billion acres.[1] It has a population of more than 313 million people[2] with over 80% living in urban land areas.[3] The current U.S. land use system yields dominion over the land use patterns of these constantly developing areas to the more than 29,000 unguided, uncoordinated, and parochially independent local government bodies.[4] This obsolete system of land use governance has and will continue to plague generations of Americans with the consequences of local

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[1] The CIA World Factbook provides the total land and water area of all the 50 states and District

[2] The U.S. Census Bureau counted the total population to be 308,745,538 people as of April, 2010 and estimates a current population of 313,406,956 people. U.S. Census Bureau, State & County QuickFacts, USA, http://quickfacts.census.gov/qfd/states/00000.html (last updated Jan. 17, 2012, 4:42 PM); U.S. Census Bureau, U.S. and World Population Clocks, http://www.census.gov/main/www/popclock.html (last visited Apr. 22, 2010).

[3] U.S. Census Bureau, 2010 Census Urban Area FAQs, Urban Area Delineation Results, http://www.census.gov/geo/www/ua/uafaq.html (last revised Mar. 26, 2012, 8:51 AM).

Urban land is generally defined as densely developed territories, encompassing residential, commercial, and other nonresidential urban land uses. It consists of urban areas with a population density of at least 50,000 people, and urban clusters with a population density of at least 2,500 people. U.S. Census Bureau, *supra*, Urban and Rural Definition.

[4] The U.S. Census counted 29,517 places in 2010. U.S. Census Bureau, 2010 Census Gazetteer Files, Places, http://www.census.gov/geo/www/gazetteer/gazetteer2010.html (last revised Mar. 26, 2012).

autonomy land use planning and control, including but not limited to urban sprawl, socioeconomic segregation, and ecological neglect.[5] Though these consequences are nationally pervasive, there causes can be addressed through coordination at the state government level.

The authority to plan for and regulate the use of land originates from the state police power. Though all 50 states have in some form delegated this authority to their respective local governments, a strong resurgence in the voice of the state governments over land use planning and control would result in more rational decision-making and patterns of land use. One mechanism to encourage the states to assert their inherent authority is national land use legislation, proposed to encourage the several states to develop coordinated systems for land use governance and establish substantive policy goals and standards for their respective localities. This thesis advocates such national land use legislation, based on the once proposed but rejected National Land Use Policy Act, as a means of coordinating land use and land use governance patterns and the reducing 29,000+ uncoordinated jurisdictions to 50 coordinated state jurisdictions, while accommodating the numerous competing interests that exist on the federal, state, and local level.

[5] Jerold S. Kayden, *National Land-Use Planning in America: Something Whose time has Never Come*, 2 Wash. U. J.L. & Pol'y 445, 446-47 (2000).

Chapter I:
The U.S. Land Use System

A. Historical Development

The U.S. land use system is based on the English system, as it existed during the creation of to our nation.[6] After a short flirtation with communal ownership, the system of governance began with the concept of strong private property rights, only limited by the common law doctrines of trespass and nuisance.[7] From the start, this system resembled the current land use system where "[R]egulation of land use in the United States occurs almost exclusively at the local level."[8] It stems from the well-recognized view that local governments are intimately familiar with local circumstances.

In 1928, Hebert Hoover's Department of Commerce proposed the Standard City Planning Enabling Act ("SCPEA") as model legislation for the states to authorize local land use planning.[9] The language of SCPEA expressed

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[6] John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 Pace Envtl. L. Rev. 821 (2006).

[7] *See id.*

[8] Daniel J. Curtin, Jr., Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. Envtl. Aff. L. Rev. 325, 332 (2005).

[9] Daniel R. Mandelker, John M. Payne, Peter W. Salsich, Jr. & Nancy E. Stroud, *Planning and Control of Land Use Development: Cases and Materials* 34 (LexisNexis 7th ed. 2008).

that "[A]ny municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan…"[10] The Department of Commerce also published the Standard State Zoning Enabling Act of 1926 ("SZEA") as model legislation for the states to authorize local land use control.[11] Though a few states already had a system for local land use governance,[12] most states delegated their police power authority to conduct land use planning and/or regulation to their local government bodies after motivation from the model language of SCPEA and SZEA.[13]

Land use planning is the process of assessing and determining the best future uses of a geographic land area, based on a comprehensive consideration of different social, economic, and environmental factors.[14] Land use plans serve to guide government bodies in exercising their land use control authority in the public interest.[15] Government bodies exercise land use control by way of direct regulation of land uses through government legislation such as zoning ordinances

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[10] U.S. Dep't of Commerce, Advisory Comm. on City Planning And Zoning, A Standard City Planning Enabling Act § 2 (1928), American Planning Association, http://www.planning.org/growingsmart/enablingacts.htm [hereinafter *SCPEA*].

[11] Mandelker, Payne, Salsich & Stroud, *supra* note 9.

[12] The Village of Euclid, Ohio established a zoning plan for regulating and restricting land uses in 1922. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380 (1926).

[13] Nolon, *supra* note 6, at 849.

[14] Kayden, *supra* note 5, at 446-47.

[15] *Id.* at 447.

and other regulations, and through the adjudication of land use permits and other control devices.[16]

All fifty states have adopted zoning enabling statutes, using SZEA as a guide, to authorize their local governments to regulate land use.[17] SZEA's language provides that "[S]uch regulation shall be made in accordance with a comprehensive plan…"[18] SCPEA's model language, however, did not mandate the development of comprehensive plans, but made them optional.[19] Each state's planning enabling statute determines whether or not local governments are required to establish comprehensive plans and ensure that land use regulations are consistent with such plans. Therefore, each state varies in the degree of significance given to the comprehensive plan when enacting and evaluating land use regulations.[20]

Comprehensive plans, sometimes known as general or master plans, establish a long-term general plan for the future development of all the geographic

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[16] *See id.*; Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 27; Nolon, *supra* note 6, at 830.

[17] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 220.

[18] U.S. Dep't of Commerce, Advisory Comm. on City Planning And Zoning, A Standard State Zoning Enabling Act § 3 (1926), American Planning Association, http://www.planning.org/growingsmart/enablingacts.htm [hereinafter *SZEA*].

[19] U.S. Dep't of Commerce, SCPEA, *supra* note 10, § 2 n.7 (" This act is an enabling act and permits municipalities to avail themselves of the powers conferred by the act if they so wish. It does not impose such powers or duties upon them. It does not impose the creation of city planning commissions throughout the State by mandate of the legislature").

[20] Curtin & Witten, *supra* note 8, at 333.

areas of a locality.[21] Comprehensive plans generally address different types of land uses or zoning plans, public services, transportation, housing, and business, social and environmental concerns.[22] They provide detailed planning procedures, requirements, objectives, goals, and policies to be implemented through local government regulation of land use.[23] Many local governments are comprised of multiple agencies that concentrate on issue-specific aspects of developing a community. Comprehensive plans are a means of unifying and giving perspective and scope to the regulatory activities of these agencies, allowing for the "coordinated, adjusted, and harmonious development of the city…"[24] They serve to apply the collective values of a citizen community to the process of deciding how to developed the physical community.[25] Furthermore, comprehensive plans empower citizens to participate in determining the quality of their future communities by providing a situational foundation, goals, and a basis for decision-making; thus, allowing citizens to make informed choices or to hold their local governments to agreed upon communal aspirations.[26]

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[21] Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154, 1155 (1955).

[22] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 26, 28; *see* Cal. Gov't Code § 65302; R.I. Gen. Laws § 45-22.2-6 (1956).

[23] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 27.

[24] Haar, *supra* note 21, at 1155 (citing Pa. Cons. Stat. § 9166 (1938)).

[25] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 29.

[26] Raymnd J. Burby & Peter J. May, Making Governments Plan 18 (The Johns Hopkins University Press 1997).

In the early nineteenth century, local governments were considered purely creatures of the state, with no meaningful regulatory power besides that delegated by the state.[27] Though, still technically creatures of the states, most local governments have been given broad "home rule" authority to adopt land use controls "to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants."[28] Under home rule, local governments are able to establish their own powers for enacting and implementing legislation, are no longer governed by the precise terms of express state legislation, and are only limited in that their actions may not conflict with general or preemptive state laws.[29] The extent of home rule authority differs from state to state, and is the most commonly used argument in opposing state proposals to mandate comprehensive planning by their

[27] This concept, known as Dillon's rule, emphasizes that "local governments possessed only those powers that could be traced to specific and express delegations from the state [enabling statutes]." David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2285 (2003).

[28] Nolon, *supra* note 6, at 849; *see* Mass. Gen. Laws ch. 40A § 1A (1977); *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 364 (2003) ("The Home Rule Amendment granted cities and towns 'independent municipal powers which they did not previously inherently possess' to adopt, amend, or repeal local ordinances or bylaws 'for the protection of the public health, safety and general welfare")(quotation omitted); *see also* Fla. Stat. § 166.021(1) (2011) (municipal governments have power of the state to act for municipal purposes).

[29] Nolon, *supra* note 6, at 849; Barron, *supra* note 27, at 2291.

local governments.[30] Nevertheless, the underlying doctrinal structure of state delegated authority to plan and regulate land use still remains.[31]

B. Authority for Land Use Planning and Control

The authority of the several states to regulate land use derives from their inherent sovereign police powers.[32] This police power gives plenary state government authority to tax, take property by eminent domain, and enact and enforce regulations with the purpose of protecting the health, safety, welfare, and morals of its citizens.[33] The police powers are reserved to the several states pursuant to the Tenth Amendment of the United States Constitution, and they allow state governments to regulate land use when such regulation is reasonably related to public welfare.[34] Though the states have delegated their police power authority to their respective local governments, this in no way diminishes the power of the state governments to exercise authority over land use.[35]

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[30] John R. Nolon, Accommodating Home Rule in State Land Use Reform, The Growing Smart Working Papers Rep. No. 462/463 2 (American Planning Association 1996).

[31] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 220; U.S. Dep't of Commerce, SZEA, *supra* note 18, at 1 (the local government power to zone is derived from the state constitution or a state statute).

[32] Nolon, *supra* note 6, at 827.

[33] *Euclid*, 272 U.S. at 387, 395; *see* Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County's Police Power and Its Comprehensive Plan-California's Experience*, 6 Vt. J. Envtl. L. 31, 34-35 (2005).

[34] U.S. Const. amend. X; *see* Nolon, *supra* note 6, at 827.

[35] Nolon, *supra* note 6, at 821.

Notwithstanding the extremely broad nature of the state police power, its exercise is still subject to Congress's exercise of its enumerated powers under Article I, § 8 of the Constitution.[36] The federal government is authorized to regulation land use through its constitutional power to spend and regulate interstate commerce.

C. Federal Regulation Affecting Land Use

The federal government's power to regulate private land use is not exercised in the general sense of proscribing specific uses for specific parcels of land. Rather, current federal laws indirectly regulate land use by regulating the affects of certain land uses, through issue-specific statutes such as the Clean Air Act ("CAA"),[37] Clean Water Act ("CWA"),[38] and the Endangered Species Act ("ESA").[39] This, however, is not the extent of federal regulation permitted by the Constitution. The federal government has substantial power under the Commerce and Spending Clauses to encourage the states to prescribe and provide for procedural and substantive land use goals.[40] Therefore, an examination of the scope of federal authority to regulate in the areas of land use is merited.

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[36] *Id.* at 827.

[37] Clean Air Act ("CAA") §§ 101 et seq., 42 U.S.C. §§ 7401 et seq. (1990).

[38] Clean Water Act ("CWA") §§ 101 et seq., 33 U.S.C. §§ 1251 et seq. (1972).

[39] Endangered Species Act ("ESA") §§ 101 et seq., 16 U.S.C. §§ 1531 et seq. (1988); *see* Nolon, *supra* note 6, at 826, 838.

[40] *N.Y. v. U.S.*, 505 U.S. 144, 149 (1992).

1. The Scope of Federal Authority

The U.S. Supreme Court (the "Court") broadly interprets the federal government's power to regulate land use under the Commerce and Spending Clauses of the Constitution. Under the Commerce Clause, the Court allows for federal regulation in matters of trade, navigation, and public welfare that had an affect on two or more states.[41] Under the Spending Clause, the Court allows for expansive federal regulation by defining public welfare as a living concept that evolves through time.[42]

However, the Court has recently rejected congressional attempts to regulate noneconomic intrastate activities when there was only a tenuous or hypothetical connection to interstate commerce.[43] In *U.S. v Lopez*, the Court held statutes such as the Gun-Free School Zones Act of 1990, which prohibited the possession of a gun within 1,000 feet of a school, to be beyond the scope of the commerce power.[44] The Court reasoned that the statutes were noneconomic in their nature, meaning they did not involve the production, distribution, or exchange of goods and services, or activities pursued for the purpose of such activities.[45] It further reasoned that the statute only had attenuated and

[41] Nolon, *supra* note 6, at 825.

[42] *See Helvering v. Davis*, 301 U.S. 619, 641 (1937).

[43] *See U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000).

[44] *Lopez*, 514 U.S. at 567.

[45] Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 393 (2005).

speculative affects on interstate commerce, which was not enough to justify federal intervention of the sovereignty of the states.[46]

Notwithstanding this limitation on the federal power to regulate interstate commerce, there are only infrequent occasions where federal legislation has been struck down on Commerce Clause grounds.[47] In the area of federal environmental regulation, when ambiguity arises as to whether the regulated activities fall within the scope of the commerce power, the courts have uniformly rejected Commerce Clause challenges.[48] For example, the U.S. Court of Appeals has upheld challenges to the ESA by finding that such regulation "prevents the destruction of biodiversity and thereby protects the current and future interstate

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[46] *Id.*

The Court found that Congress' evidence showing that guns in schools could disrupt the education process, thereby reducing the number of educated youth coming out of the schools, thereby reducing the productivity of the workforce, which would have affects on interstate commerce, did not establish a sufficient nexus to interstate commerce. *Lopez*, 514 U.S. at 556.

[47] Adler, *supra* note 45, at 394.

[48] *Id.* at 405.

In the case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corp. of Engineers,* the Supreme Court resolved the issue of whether CWA regulation could reach an isolated intrastate waters by defining the term navigable waters under the act to exclude such waters. The Court refused extend its analysis to the constitutionality of regulation if Congress were to explicitly legislate for the purposes of regulating isolated water purely in one state. 531 U.S. 159 (2001).

commerce that relies upon it,"[49] and that it "regulates and substantially affects commercial development activity which is plainly interstate."[50]

The Court has also limited the spending power by establishing specific factors to be considered in determining the constitutionality of conditional federal grants. It requires that the conditions further the general welfare, that they be unambiguous, that they be germane to the conditioned spending, that they do not induce unconstitutional actions by the states, and that the conditions do not coerce the states into compliance.[51] Under the concept of coercion, the Court determined that when a federal spending statute goes beyond inducement and reaches the level of compulsion, a question of degree, such statute violates the sovereignty of the states.[52] Coercion may stem from the amount of money at stake as well as the manner in which the conditions interfere with state sovereignty.[53]

However, as with the commerce power, the courts have been reluctant to strike federal programs for going beyond the spending power.[54] For example, when a state fails to develop a State Implementation Plan ("SIP") in accordance with the CAA, the statute authorizes significant sanctions including the loss of

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[49] *Nat'l Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053 n. 14 (D.C. Cir. 1997).

[50] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067 (D.C. Cir. 2003).

[51] *S. Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

[52] *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); *see Dole*, 483 U.S. at 211 (finding that the state's choice to reject the national drinking age, which would result in it loosing 5% of its federal highway funding, did not reach the level of coercion).

[53] Adler, *supra* note 45, at 440.

[54] Adler, *supra* note 45, at 441.

federal highway funds.[55] In examining the coercive nature of a statute, the courts "focus not on the alleged impact of a statute on a particular state program but whether Congress has directly compelled the state to enact a federal regulatory program."[56] Federal spending programs that provide funding support for the states to adopt federal requirements, sometime termed reimbursement spending, does not raise the same constitutional questions of germaneness and coercion.[57]

Accordingly, the federal government has broad authority to regulate land uses that affect interstate commerce and establish non-coercive spending programs to encourage specific land use and land use governance patterns.

2. Indirect Federal Land Use Regulation

The federal government mandates land use planning and control through multiple mechanisms. Some mechanisms involve direct federal regulation of land use,[58] while the majority of these mechanisms involve indirect pressures on land use decision, where federal regulation address specific issues of national concern with indirect affects on land use. Generally, federal regulation focuses on

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[55] 42 U.S.C. § 7509.

[56] Adler, *supra* note 45, at 448 (quoting *Mo. v. United States*, 918 F. Supp. 1320, 1328 (E.D. Mo. 1996), *vacated*, 109 F.3d 440 (8th Cir. 1997)).

[57] Adler, *supra* note 45, at 452.

[58] For example, under the Federal Land Policy and Management Act ("FLPMA"), the Bureau of Land Management is responsible for land use planning of federally owned land. 42 U.S.C. §§ 1701 et seq. (1976). Under the Energy Reorganization Act of 1974, the Nuclear Regulatory Commission has exclusive authority to site, license, and regulate nuclear power plants. 42 U.S.C. §§ 5841 et seq. (1986).

controlling the affects of specific land uses, and thus has indirect implications on land use without directly controlling the use of land.[59]

Indirect federal regulation is pervasive in areas of national concern, including environmental regulation, transportation policy and finance, and housing and economic development.[60] However, the system for indirectly regulating land use is administered through fragmented government agencies primarily focused on distinct areas of national concern. The result is "a patchwork of laws, institutions, and actions…that do not assemble into a coherent, comprehensive approach" to proactively prevent the issues from arising.[61]

Nevertheless, there is something to be learned from the indirect legal mechanisms used by the federal government to address the affects of national land use planning and management. Our numerous federal environmental statutes use a variety of legal mechanisms for the protection of the natural and human environment, such as establishing objective goals, providing financial incentives, and setting requirements for assessment and collaboration.

Objective Goals. Federal laws that address specific environmental issues generally include an objective land use component. For example, the CAA provides for the implementation of transportation control measures ("TCM") to address significant impacts of mobile sources on air quality.[62] The policy goals to

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[59] *See* Kayden, *supra* note 5, at 446.

[60] *Id.*

[61] *Id.*

[62] 42 U.S.C. § 7408.

limit such impacts are aimed at increasing the efficiency of our transportation facilities and services and controlling the demand on our transportation system.[63] The CAA gives states the option to adopt, and in some cases requires,[64] TCMs in their SIPs. Section 108 of the CAA provides a nonexclusive list of sixteen TCMs, that the state can choose to include in their SIPs, including mixed-use zoning, employer-based transportation management programs, area-wide rideshare incentives, improved public transit, bicycle and pedestrian programs, accelerated retirement of vehicles, and parking management.[65] The act also requires the Environmental Protection Agency ("EPA") to develop information on TCMs that can be used by local officials, private employers, and other public sector decision makers to assess the applicability of different strategies for addressing impacts on air quality form mobile sources.[66] The significance of this mechanism for affecting land use decisions is that Congress established a national policy objective – reducing air pollution through TCMs – based on a national interests – better air quality, but left the choice of how to implemented the policy to the states, with guidance from EPA. This mechanism allows the states and their

[63] Environmental Protection Agency, Office of Air and Radiation No. 400-R-92-006, *Summary* Transportation Control Measure Information Documents 1 (1992), *available at* http://www.epa.gov/otaq/stateresources/policy/transp/tcms/summary.pdf.

[64] 44 U.S.C. §§ 7511a(d)(1)(A) and 7512a(b)(1)(A) require nonattainment areas that are classified as serious areas for ozone and carbon monoxide to implement TCMs.

[65] 42 U.S.C. § 7408.

[66] 42 U.S.C. § 7408(f); EPA, TCM Information Documents, *supra* note 63.

localities to adopt regulatory standards specific to their diverse circumstances and interests.

Financial Incentives. Some federal laws provide financial incentives for the preparation of plans that direct land use decision-making. The Coastal Zone Management Act ("CZMA") provides financial grants to coastal states to prepare and manage programs with the purpose of preserving, restoring, and developing their coastal areas.[67] CZMA conditions the federal funds on the adequacy of the state program, which is determined based on the program's adherence to federal requirements of: matching state contributions; assessment of affected areas; establishment of a government structure for implementation; defining permissible uses; planning to control or mitigate impacts; ongoing coordination with local, regional, and interstate plans; and control of land and water uses through state regulation, state standards for local regulation, or state administrative review of land use decisions.[68] The act also places conditions on how allotted federal funding may be used.[69] With the CZMA, Congress established a reimbursement program, where federal funding is provided to support states that choose to protect their coastal areas through adherence to federal requirements.

Assessment. The requirement to assess the foreseeable land use impacts of particular programs or projects can be found in statutes such as NEPA. Many times, the result of impact assessments can have dramatic affects on land use

[67] Coastal Zone Management Act ("CZMA") §§ 101 et seq., 16 U.S.C. §§ 1451 et seq. (1990).

[68] *Id*. § 1455(d).

[69] *Id*. § 1455a(c).

decisions. In essence, NEPA requires that all purposed "major federal actions significantly affecting the quality of the human environment" have an environmental impact statement ("EIS").[70] Federal agency actions are often closely woven into nonfederal actions, thus federal action has a broader impacts than those stemming solely form federal projects. EISs are meant to assess the environmental impacts of a proposed action, its unavoidable affects on the environmental, any alternatives to the proposed action, the relationship between its short-term and long-term advantages and disadvantages, and what resource would be permanently committed in the implementation of the proposed action.[71] NEPA requires appropriate consideration for the value of and impacts on unquantifiable environmental amenities before a federal agency can take discretionary action. Although NEPA is advisory in nature, the EIS process has given transparency to the affects of proposed actions, thus cultivating informed public participation, which has lead to the cancelation and modification of proposed actions that would have significant negative impacts on our environment.

Collaboration. Most federal environmental statutes encourage or require collaboration with affected federal agencies, states and their localities, and private parties during the decision-making process. For example, when the roadblock prohibition on development or use of the critical habitat of an endangered species

[70] National Environmental Policy Act ("NEPA") § 102, 42 U.S.C. § 4332 (1975).

[71] *Id.* § 4332(c).

conflicts with other national interests, the ESA allows public and private parties to work together to develop conservation plans.[72] The ESA further provides for collaboration with the states through cooperative agreements,[73] collaboration among federal agencies through required consultations to ensure agency action is not likely to jeopardize the continued existence of a species,[74] and collaboration on the international level to encourage and support foreign programs that protect endangered species.[75]

A good demonstration of how these mechanisms work together exists in the Intermodal Surface Transportation Efficiency Act of 1992 ("ISTEA"), which added planning requirement conditions to the apportionment of federal highway funds.[76] ISTEA requires the designation of Metropolitan Planning Organizations ("MPOs") which, in collaboration with the states, are required to prepare long-term transportation plans that would encourage efficient surface transportation systems "while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning

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[72] 16 U.S.C. § 1539.

Conservation plans provide for the overseeing, planning, and monitoring of permitted land uses that may negatively affect endangered or threatened species or their critical habitats, while still advancing the ESA's goal of conserving such species. *Id.*

[73] *Id.* § 1535.

[74] *Id.* § 1536.

[75] *Id.* § 1537.

[76] Intermodal Surface Transportation Efficiency Act of 1992 ("ISTEA"), 23 U.S.C. §§ 101 et seq. (as amended June 6, 2008).

processes…"[77] ISTEA also requires the development of statewide transportation plans and transportation improvement programs ("TIPs"), consistent with MPO long-term transportation plans.[78] It requires transportation plans to identify existing interstate and intrastate transportation facilities and assess for mitigation the potential environmental impacts of planned activities.[79] It includes a significant requirement that such transportation plans conform with SIP requirements for nonattainment areas, thus calling for coordination among the MPOs, TIPs, states, and the state agencies that regulate air quality.[80] Furthermore, ISTEA requires that MPOs consult with state and local agencies with authority over land use management, natural resources, environmental protection, conservation, and historic preservation in developing a long-term transportation plan.[81]

ISTEA establishes the objective goal of reducing the significant contributions to air pollution from mobile sources and sets out procedural strategies to be used by the states to achieve this goal. It requires long-term planning, through the assessment of current uses and the impacts of planned future uses, and requires collaboration among the states, their metropolitan

[77] *Id.* § 134.

[78] *Id.* § 135.

[79] *Id.* § 134(i)(2).

[80] *See Id.* § 134(i)(3).

[81] *Id.* § 134(i)(4).

regions, and localities, to address area specific and environmental concerns.[82] Finally, ISTEA incentivizes adoption by the states by making the above federal requirements conditions for federal highway funding. However, even though ISTEA demonstrates the ability of the federal government to enact legislation that requires land use planning for pertinent interests, it only addresses environmental concerns and is not in itself planning legislation.[83]

D. State Land Use Control

The authority for land use planning and control is reserved to the several states to exercise pursuant to their sovereign police power.[84] Traditionally, all of the states have delegated this authority to their local governments. This delegation of authority has materialized into a pattern of land development "controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others."[85] Recognition of the gaps in regulation, in regards to the extra-local impacts of the locally dominated system of land use governance, has prompted some states to reassert their interest and regulatory authority over

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[82] It should be noted that ISTEA requires consideration of ecological impacts, but does not mention the impacts of transportation development on social equity, infrastructure capacity, or the quality of life in the human environment generally. *See id*. §§ 101 et. seq.

[83] *See* Adler, *supra* note 45, at 450; Kayden, *supra* note 5, at 446.

[84] U.S. Const. amend. X.

[85] Council on Environmental Quality, GPO Stock No. 4111-0006, The Quiet Revolution in Land Use Control 12 (Dec. 1971), *available at* http://www.eric.ed.gov/PDFS/ED067272.pdf.

land use planning and control. However, the states range in their allocation of land use control authority between the state and local governments.

1. State Land Use Planning

In six states, the state government exercises extensive dominion over land use regulation.[86] These states have established state land use plans, which include substantive goals to address statewide interests and require compliance with such goals in local comprehensive planning and land use control.[87] Seventeen states have delegated strong home rule authority to their local governments.[88] Generally, these state governments only exercise a role in land use planning through their delegation and establishment of the scope of local land use authority, though many limit local land use control through preemptive issue-specific measures.[89] The remaining twenty-seven states fall in between where state land use plans serve as guidance for their local governments or are developed to encourage specific state interests such as grown management or natural resource conservation.[90]

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[86] These states include HI, OR, RI, VT, WA, and WI. David D. Foster & Anita A. Summers, *State Executive/Legislative and Judicial Activities and the Strength of Local Regulation of Residential Housing*, The Urban Lawyer v. 40, No. 1, 2, 4-5 (American Bar Association Winter, 2008).

[87] *See* Or. Rev. Stat. § 197.175 (1999).

[88] These states include AL, AK, AR, ID, IN, IA, KS, KY, LA, MS, MO, ND, OK, PA, and SD. Foster & Summers, *supra* note 86, at 3-5.

[89] Nolon, *supra* note 6, at 831-33; *see* Mass. Gen. Laws ch. 40A § 1A.

[90] Foster & Summers, *supra* note 86, at 3-5; *see* Fla. Stat. § 187.101 (1985).

Statewide land use planning goes beyond the tradition of authorizing or mandating local comprehensive planning.[91] State land use plans can establish mandatory standards or serve as guidance for decision-making in state, regional, and local planning and other agencies.[92] In both cases, local comprehensive plans are required to be consistent with the state plan; however, they vary in how those state policies should affect the implementation of a comprehensive plan.

In the few cases where state governments exercise dominant control over land use, state plans include or provide for specific land use control requirements, which are required to be addressed and implemented through local comprehensive plans and land use regulations.[93] Where local comprehensive plans are silent on a particular issue, the state requirements are used as a concomitant law.[94] On the

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[91] Kayden, *supra* note 5, at 468.

[92] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 40.

[93] Kayden, *supra* note 5, at 469;

For example, Oregon's Comprehensive Land Use Planning legislation, created the Land Conservation and Development Commission ("LCDC"), authorized to adopt, enforce, and amend statewide planning requirements and goals. Or. Rev. Stat. § 197.225. Furthermore, Oregon's legislature has established specific statutory requirements for address specific statewide planning goals. *Id.* §§ 197.125-728. The LCDC regulation establishing statewide planning goals lists fourteen objectives including, citizen involvement, forest lands, air, water, and land resources quality, economy of the state, housing, and energy conservation, among others, as well as specific coastal statewide planning goals. Or. Admin. R. 660-015-0000 et seq. (2008).

[94] Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, The Urban Lawyer v. 35, No. 1, 110 (American Bar Association Winter, 2003).

other hand, in cases where state plans serve as guidance for local land use planning and control, the consistency determination takes a holistic approach and does not examine whether the local plan is consistent with particular state plan requirements.[95]

2. Regional Planning

Additionally, states may establish, require, or authorize the formation of regional plans and planning agencies to plan for and regulate land uses in specific geographical regions that encompass more than one local government jurisdiction.[96] Generally, designated regions share common social, geographic, economic, and transportation characteristics.[97] Regional planning bodies in some states have land use control authority, while others serve as venues for communication, collaboration, and education for the local governments within the region.[98]

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[95] *Id.* at 109.

For example, Florida's Local Government Comprehensive Planning Act of 1975 required the enactment of comprehensive plans at the state and local levels of government. Fla. Stat. §§ 163.3167, 186.007. The state land use plan serves as a guide for the development and implementation of the regional and local comprehensive plans, and addresses twenty-seven goals including conservation, economic opportunities, elderly concerns, education, housing, social welfare concerns, agriculture, and energy. Fla. Stat. §§ 187.101, 187.201.

[96] Kayden, *supra* note 5, at 471.

[97] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 45.

[98] Nolon, *supra* note 6, at 837.

Nevertheless, even with substantive goals and strong regulatory requirements, state and regional plans cannot "create balanced and orderly development patterns within a legal system that is disorganized at its base."[99]

E. Local Government Control of Land Use

As previously noted, local government control of land use is the dominant model across the nation. Local government authority to conduct land use planning and control stems from the state's delegation of its police power.[100] Therefore, local governments have the power to regulate land use for the purpose of protecting the public health, safety, and welfare of their residents.[101] Underpinning this delegation of power is the application of the subsidiarity

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For example, New Yorks' Adriondack Park Agency Act established the agency to preserve the park's resources as a matter of state, regional, and local concern. N.Y. Exec. Law § 803 (1984). It requires the Adriondack Park Agency to develop a plan with policies and objectives to be achieved and specific regulations for the types and intensity of uses permitted. *Id.* §§ 805-806. Massachusetts' Cape Cod Commission Act established the Commission and provided it with planning and regulatory authority over developments of regional impact in the Cape Code region for the purpose of conserving the natural coastal, wildlife, and water resources, preserving historical, cultural, and recreational values, and balancing economic development with such values, among other things. 1989 Mass. Laws ch. 716 et. seq. (1990). Minnesota charges its Metropolitan Councils with developing metropolitan plans and reviewing local comprehensive plans for consistency with the metropolitan plan and other local comprehensive plans. Minn. Stat. §§ 473.175 (2007).

[99] Nolon, *supra* note 30, at 4.

[100] Nolon, *supra* note 6, at 821.

[101] Curtin, *supra* note 33.

principle, where regulation is exercised at the lowest level of government that can best achieve the policy objectives.[102] Local government officials are believed to be intimately familiar with local circumstances and to have a greater stake in the economic and social quality of the community.[103] Land use governance on the local level is contended to promote democratic citizenship, efficiency in the allocation of public services, and a sense of community among residents.[104]

Local governments are argued to be the best venue to induce active public participation in land use decision-making because the costs of participation – time, energy, and money – are much lower in smaller units of government.[105] Citizens feel their participation will make significant differences in policy determinations and regulatory decisions at lower levels of government.[106] It is also argued that local autonomy promotes the efficient provision of public services because local decisions react to and match specifically to local conditions and preferences.[107] Further support lies in the idea that the existence of multiple localities in an area allows for easy relocation, thereby, allowing residents to choose from different localities offering different taxes, services, and regulation.

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[102] Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 Va. L. Rev. 1331, 1340-41 (1997).

[103] Nolon, *supra* note 6, at 853.

[104] Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1123 (1996).

[105] *Id.*

[106] *Id.* at 1124.

[107] *Id.*

Finally, it is argued that local governments are "place-based polities," organized based on residency, that regulate a community.[108] These communities are made up of people with shared concerns, values, and history. People within these communities interact with each other in their everyday lives, and thus are more likely to encourage other community members to participate in local decisions.

Local government control over land use is a prime application of the subsidiarity principle as reflected by the benefits of local government autonomy in land use decision-making; however, there is a downside when local governments are left to their own devices. The severity of negative impacts of runaway local autonomy differ based on how much autonomy is given the to local governments by their states.

Though the states have generally delegated home rule authority too their local governments, they range in the degree of autonomy given to local decision-making through varying consistency requirements in enabling statutes and/or state land use planning statutes. A number of states mandate the development of local comprehensive plans in their enabling statutes or state land use plans. These states take the "plan as law" approach, in which comprehensive plans are given dispositive significance in the establishing and evaluation of local land use regulations, and sometimes state regulations.[109] Therefore, land use regulations

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[108] *Id.* at 1126.

[109] Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, The Urban Lawyer v. 41, No. 3, 547-48, 556 (American Bar Association Summer, 2009).

found to be in conflict with the comprehensive plan are deemed ultra vires.[110] These states are generally referred to as "plan states."

A larger number of states conditionally mandate local planning, dependent on whether a local planning agency or commission has been established pursuant to the local government's home rule authority.[111] Generally, these states give some significance to the comprehensive plan in the evaluation of land use regulation, and are commonly classified as taking a "planning-as-a-factor view."[112] However, the courts in these states interpret comprehensive plans as advisory in nature with no force of law.[113]

The smallest group of states take what is commonly referred to as the "unitary view," in which the states authorize but do not require local land use planning.[114] Under this approach, local governments are not required to develop a comprehensive plan, and if one is voluntarily adopted, the plan has little to no legal significance in the establishing and evaluation of land use regulations.[115] These states are referred to as "non-plan states" and were for long the majority in the range of local autonomy.[116] The consequences of local government autonomy

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[110] *Id.* at 556.

[111] *Id.* at 547; *see* Mass. Gen. Laws ch. 40B § 5 (1972).

[112] *Id.*

[113] Edward J. Sullivan, *Comprehensive Planning*, The Urban Lawyer v. 36, No. 3, 544-45 (American Bar Association Summer, 2004).

[114] Sullivan, *supra* note 109, at 547-48.

[115] Sullivan, *supra* note 113, at 541.

[116] *See* Sullivan, *supra* note 109, at 547-48.

are exasperated where there is laxity in holding local governments to binding principles, as is the case with non-plan states.

1. Plan States

In plan states, planning enabling statutes require all the local governments to develop comprehensive plans. These comprehensive plans have the force of law and are used as the standard for conducting land use control activities and evaluating the rationality of such activities..[117] One of the most important aspects of a state mandate to plan is the requirement of consistency.[118]

The consistency doctrine professes the need for both horizontal and vertical consistency in comprehensive planning. Horizontal consistency requires that the plan be internally consistent among its various elements.[119] For instance, a land use plan that provides for unlimited population growth in a particular should not be contradicted by a transportation element that does not provide for the transportation needs of the increased population.[120] Elements of a

[117] Sullivan & Michel, *supra* note 94, at 107-08.

[118] *Id.* at 107.

[119] Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. Envtl. Aff. L. Rev. 583, 594 n. 37 (2001); *see* Cal. Gov. Code § 65300.5 ("the general plan and elements and parts thereof comprised an integrated, *internally consistent* and compatible statement of policies…"); Fla. Stat. § 163.3177 (requires consistency among mandated and optional elements of comprehensive plan).

[120] This was the case in Calaveras County, CA, where the land use plan for the county allocated over 250,000 acres to the development of single-family residential units, but the circulation (or transportation) plan specifically notes that funding for road construction and modification is

comprehensive plan that are found to be inconsistent with the plan are invalid and must be brought into compliance with the consistency requirements.[121]

Vertical consistency requires that regulatory land use controls be consistent with the comprehensive plan.[122] Regulatory controls are generally consistent with a comprehensive plan if they further and do not obstruct the objectives and policies of the plan.[123] For instance, a plan element that calls for the phasing out of a particular non-conforming use should not be contradicted by an ordinance that permits expansion of such non-conforming use.[124] Regulatory

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unavailable for the foreseeable future. *Concerned Citizens of Calaveras Cnty. v. Bd. of Supervisors*, 166 Cal.App.3d 90, 100-102 (1985). There, the court invalidated the circulation element of the plan. *Id.* at 103.

[121] *See* Cal. Gov. Code § 65754.

[122] Witten, *supra* note 119; *see* Cal. Gov. Code § 65860 ("County or city zoning ordinances shall be consistent with the general plan of the county or city…"); Fla. Stat. § 163.3202 ("each municipality shall adopt or amend and enforce land development regulations that are consistent with and implement their adopted comprehensive plan").

[123] *See* Cal. Gov. Code § 65860 ("A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met: (1) the city or county has officially adopted such a plan. (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan").

[124] *See Gateway Se. Props. Inc. v. Dep't of Cmty. Affairs, Town of Medley*, 960 So. 2d 771, 772 (Fla. Dist. Ct. App. 2007).

controls that are not vertically consistent with the comprehensive plan are invalid.[125]

The requirement of consistency in local comprehensive planning not only gives discernable guidance to the local agencies charged with implementing the plan through regulatory controls, but also guides the courts in adjudicating whether a particular regulation is arbitrary and thus, ultra vires.[126] Since local regulation must be in furtherance of the health, safety, welfare, and morals of the community, and comprehensive plans constitute a culmination of these community values, the courts can more easily determine whether a local action is within the delegated police power, or has a rational basis, by looking to see if it is in accordance with the plan.[127] "Where a community, after careful and deliberate review of the present and reasonably foreseeable needs of the community, adopts a general development policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served."[128]

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[125] Some states consider land use regulations that are inconsistent the comprehensive plan to be void ab initio, or invalid when passed. *See Lesher Comm'ns, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 541 (1990). In other states, land use regulations challenged for being inconsistent with the comprehensive plan are invalidated by the court upon a finding of inconsistency. *See Keene v. Zoning Bd. of Adjustment*, 22 So. 3d 665, 673 (Fla. Dist. Ct. App. 2009).

[126] Haar, *supra* note 21, at 1157-58.

[127] *Id.*

[128] *Udell v. Haas*, 21 N.Y.S.2d 463, 470 (1968).

Mandated consistency in comprehensive planning provides rationality to land use decision-making and ensures that "the public welfare is being served and that zoning does not become nothing more than just a Gallup poll," which is the unfortunate circumstance non-plan states.[129]

2. Non-Plan States

In non-plan states, the local governments have discretion in deciding whether or not to develop comprehensive plans.[130] If a local government were to voluntarily adopt a comprehensive plan, such plan would generally not have the force of law, and thus would not require consistency from local land use regulations.[131] For multiple reasons, this is a legal conundrum. Without a comprehensive plan to guide local government control of land use or a mandate for horizontal and vertical consistency, the result is uncoordinated land use decision-making based on purely fiscal motivation and political whim. Planning is a means of identifying community values and a comprehensive plan translates those values into objective goals and standards.[132] It is difficult to perceive how local decision makers can truly regulate land use in furtherance of the public

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[129] *Udell*, 21 N.Y.S.2d at 469.

Though the court espouses the benefits of a comprehensive plan and the need for consistency with a comprehensive plan, it confounds the zoning plan at issue in the case with an all encompassing comprehensive plan, which may include a zoning plans as an element. *See id.*

[130] Witten, *supra* note 119, at 596.

[131] *Id.*

[132] Witten, *supra* note 119, at 593; Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 29.

welfare without holistically considering community values.[133] It is even more difficult when local decision makers can regulate land use in ways that conflict with the goals established to promote those community values.

Furthermore, the courts in non-plan states defer significantly to the judgments of the local government bodies. Land use decisions are given every presumption of reasonableness and are only held invalid if found to be arbitrary or substantially unrelated to promoting public health, safety, or welfare.[134] However, unlike in plan states where the rationality of a regulation is determined by its consistency with the comprehensive plan, in non-plan states, local governments need to do very little to defend against a claim of arbitrary decisionmaking. "If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control."[135] Local governments are given extremely broad deference and in most cases can show a rational basis for their decisions by providing some type of analytical support.[136]

It can be argued that in cases where the local residents vote on land use decisions, they are voting based on their true interests, which reach beyond the

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[133] "[M]any local officials...who administer zoning have little, if any, training or education in the subject. In addition, the constant turnover in office impedes the building up of any reservoir of knowledge and experience over a period of time." James A. Coon, Sheldon W. Damsky & Dianne L. Rosen, *The Land Use Recodification Project*, 13 Pace L. Rev. 559, 573 (1993).

[134] *Nat'l Amusements, Inc. v. City of Boston*, 560 N.E.2d 138, 140-41 (Mass. App. Ct. 1990).

[135] *Euclid*, 272 U.S. at 388 (emphasis added).

[136] *Nat'l Amusements*, 560 N.E.2d at 141.

fiscal interest of the locality. However, without a plan, voters have no formulated vision for the future – a plan comprised of their collective interests – to look to. The logic of self-interest suggests that even when voters may want to make the best decision for the general public, without communication about overall interests and a collective action to assert such interests, individual self-interest, which is usually fiscally motivated, is the default form of expression.[137] Furthermore, because voters are generally voting to approve or deny land use decisions presented to them and framed for them by local government officials, whose obligation to consider peripheral interests is limited and relatively unchecked, the voters are generally uninformed of the extra-local impacts of such decisions.[138] Consequently, local residents participating in what they perceive to be democratic processes truly do not have a voice in the future of their communities.[139]

Without mandated comprehensive plans that require local governments to comprehensively consider different interests when exercising their land use authority, significant problems arise. Land use decisions are made based on expediency, tradition, short-term economic concerns, crisis situations, and political whim.[140] For example, in Massachusetts, it appears that local

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[137] John O'Looney, Economic Development and Environmental Control 29 (Quorum Books, 1995).

[138] Briffault, *supra* note 104, at 1149.

[139] Witten, *supra* note 119, at 599.

[140] *See* 116 Cong. Rec. S1757, 1790 (Jan. 29, 1970) (statement of Rep. Jackson).

governments may adopt and amend zoning classifications conditioned upon the payment of money or the completion of specific public improvements.[141] In *Durand v. IDC Bellingham, LLC*, the Massachusetts Supreme Judicial Court upheld a town's decision to rezone a parcel of land in exchange for a payment of $8 million into the town's general fund – in essence "illegal contract zoning."[142] The court rationalized the decision by deferring to town's findings and upheld the rezoning as a reasonable exercise of the police power.[143] The problem with

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[141] Curtin & Witten, *supra* note 8, at 336-37.

[142] *IDC*, 793 N.E.2d at 369.

Local governments are authorized to require dedications from an application as a condition for issuing a land use permit. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987). Such conditional dedications are referred to as exactions, and they are required to have an "essential nexus" to a legitimate state interests and be directly proportional to the harm created by the permitted use. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 390 (1994).

[143] *IDC*, 793 N.E.2d at 369. The town had previously tried, though unsuccessfully, to rezone the parcel, and the only change in circumstance for the decision at issue was the $8 million. *See id.* at 361. The court properly stated that an otherwise valid rezoning would not be deemed invalid because the decision was encouraged by a voluntary public benefit; however, in this case the $8 million was not an added public benefit, but the fundamental reason for the rezoning. *See id.* at 369. The court improperly deferred to the towns inaccurate interpretation of its police power authority. *See id.* Under the court's reasoning, there is no circumstance in which money exchanged for rezoning would be considered "contract zoning," unless the money was paid first. But even in that case, the same reasoning could be used to rationalize the decision. The court draws an arbitrary line between a promise - "if you change the zoning classification, I will pay you" - and a conditioned requirement - "I will pay you to change the zoning classification." Both are bargained-for exchanges, and thus, unconstitutional bargaining of the police power. *See Stone*

allowing this mechanism of land use control is that local governments tend to consider the "extraneous considerations" as a public benefit in pursuit of public welfare, rather than ensuring that the actual land use decision itself is in the furtherance of the public welfare.

The absence of established planning goals also makes it difficult to establish priorities among land uses, which results in conflicting regulations.[144] Public interest has grown to encompass a huge variety of competing land use interests including ecological, housing, open space, economic development, historical preservation, and aesthetics. Many times, a particular interest makes the headlines and land use decisions are made without regard for other valid interests that may be affected.[145] For example, the goal of providing low to moderate-income housing may be accomplished through the addition of higher density development. However, high-density development would result in increases in wastewater nutrient levels beyond the carrying capacity of the local water resources. This was the circumstance under the Massachusetts Anti-Snob Zoning Act.[146]

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v. State of Mississippi, 101 U.S. 814, 820 (1879). The dissenting Justices rightly noted "[T]here can be no doubt that were IDC Bellingham to default on its promise, the town would be left with a questionable contract claim based on a sale of its police power in reliance on a promise…It was a sale of the police power because there is nothing in the record to legitimize the $8 million offer…" *IDC*, 793 N.E.2d at 371.

[144] Witten, *supra* note 119, at 598.

[145] *Id.* at 600.

[146] *Id.* at 598-99.

The hastened, untenable, and incoherent fashion of local land use decision-making in non-plan states only supports the need for holistically defined and prioritized policy objectives enforced through comprehensive plans. However, the problems resulting from local land use decision-making conducted in a vacuum, though more severe in non-plan states, also exist in plan states.

The Act provides for comprehensive permits for development projects that include affordable housing, in lieu of otherwise required separate approvals from local agencies charged with carrying out the city's varying interests. Mass. Gen. Laws ch. 40B § 21. The Act mentions no requirement for assessment or consideration of foreseeable external impacts. *See* Mass. Gen. Laws ch. 40B §§ 20-23.

Chapter II:
Problems With The Current U.S. Land Use System

A. Local Decisions with Extra-local Impacts

Whether or not a state mandates planning and/or establishes statewide policy goals, most local land use decisions are still made without consideration of the external impacts on regional, statewide, and national interests.[147] The relatively exclusive control of land use by local governments has resulted in decision-making based entirely on the parochial interests of those within the local boundary.[148] But as articulated by Justice Rehnquist, "the imaginary line defining a city's corporate limits cannot corral the influence of municipal actions."[149] It is unreasonable to believe that the external impacts of local government decisions can be address with our current model of local autonomy.[150] The issue is further

[147] Witten, *supra* note 119, at 298.

[148] Briffault, *supra* note 104, at 1132.

[149] *Id.*

[150] *Id.* at 1133.

This is not to say that local governments do not have the power to collaborate with other localities or regional bodies. State enabling statutes may give local governments the option to conduct inter-local joint planning, or require local governments give notice to their neighboring localities if they choose to adopt a comprehensive plan. *See* Minn. Stat. § 473.858 (2007) (requiring six month review period for other local and metropolitan governments to analyze and comment on a proposed comprehensive plan). However, such requirements are the exception and not the rule.

exasperated when considering the consequences of aggregated local policies a region, state, or the nation.[151]

For the most part, local governments depend on municipal revenue, primarily the local tax base, to fund municipal services and facilities such as schools, libraries, police and fire departments, parks, recreation and open spaces, social services, and infrastructure, among other things.[152] Most states have enacted caps, or incremental limits, on property taxes, thus forcing local governments to primarily consider fiscal gain when exercising their land use control authority.[153] Therefore, it is foreseeable that local governments would use their land use authority as a means of raising revenue, and use that revenue for exclusively local purposes.[154] This fiscally based regulatory control model,

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[151] Briffault, *supra* note 104, at 1133.

[152] *Id.* at 1134.

[153] John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 Harv. Envtl. L. Rev. 1, 17 (2006).

For example, Massachusetts limits the total assed taxes within a municipality to no more than 2.5% of the value of all real and personal property that is subject to taxation. Mass. Gen. Laws ch. 59 §21C (2007). Due to this structure, local governments receive better fiscal benefits through the promotion of land uses that would significantly raise the value of property, such as the development of large single-family homes as opposed to more affordable apartment complexes. *See* Nolon, *supra*.

[154] Briffault, *supra* note 104, at 1134.

absent a hierarchical directive, results in land use decisions that favor immediate potential economic gain over the protection of natural and social resources.[155]

In some instances, local governments regulate land use development with a cursory or illusory analysis of the negative environmental and social impacts of the development.[156] For example, Cowlitz County in the State of Washington granted a permit for the construction of a coal export terminal in Longview, WA.[157] Construction of the terminal was expected provide for the annual transport of over five million tons of coal from the Powder River Basin, on trains through the Columbia Gorge, to be loaded onto ships bound for Asia.[158] Cowlitz

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[155] Jane Silberstein & Chris Maser, Land Use Planning for Sustainable Development 23 (Lewis Publishers 2000).

[156] *Id.*; Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 Cornell L. Rev. 158, 160 (2001).

This is not to say that there are no local governments that regulate land use for the protection of environmental interest. Localities spanning the nation have, on their own initiative, enacted regulations specifically for the protection of natural resources such as viewsheds, wetlands, watersheds, and wildlife habitats, or have included environmental protection provisions in their comprehensive plans. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365, 372 (2002). However, such practices are the exception and not the rule.

[157] Earthjustice, Coalition Challenges Permit Allowing Dirty Coal Export to Asia from WA Port, Press Room (Dec. 13, 2010), http://earthjustice.org/news/press/2010/coalition-challenges-permit-allowing-dirty-coal-export-to-asia-from-wa-port.

[158] *Id.*

It was later revealed that though the permit applicant's proposal stated that the terminal's shipping capacity would be 5 million tpy, there were undisclosed plans to expand that capacity to

County struggles with low revenue and high unemployment rates, so the county commissioners rubberstamped the permits that would result in the creation of more than 150 jobs.[159] However, the commission failed to consider the affects of increased coal mining, air and water pollution from coal dust lost over hundreds of miles of train transport, and containership transport to Asia, on human health and the environment.[160]

Additionally, zoning regulations that favor the strict separation of uses result in force fragmented development, where the places where people live and

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60 million tpys. Earthjustice, Proposal for Longview Coal Export Terminal Returns, Blog (Feb. 28, 2012, 10:37 AM), http://earthjustice.org/blog/2012-february/proposal-for-longview-coal-export-terminal-returns.

[159] *See* Earthjustice, *supra* note 157.

[160] *See id.*

Permits were also required from the state and federal government. Washington requires a shoreline use permit to disturb the marine life off of its coasts. Wash. Rev. Code § 90.58.140 (2012). A NPDES permit was required pursuant to the CWA. 33 U.S.C § 1342. Environmental impacts would have to be considered under the State Environmental Policy Act ("SEPA"); however, the county commission is in no way bound by the findings of those analyses. *See* Wash. Rev. Code § 43.21C.030 (2010). After significant public outcry from the community, the proposal was withdrawn; however, permit applications for a new terminal were submitted in Whatcom County, WA in early 2011, and a renewed proposal for the terminal in Longview was submitted in February 2012. *See* Earthjustice, *supra* note 158.

work continue to grow further apart.[161] This separation of uses is reflected through urban sprawl and results in towns that are reliant on the automobile with devastating environmental and emotional consequences.[162] Urban sprawl is further exacerbated by local parochial NIMBY (not in my back yard) concerns, which push developers to fringe areas communities with relaxed land use controls, as well as by local individual low-density zoning, parking, and growth management programs.[163] The consequences of sprawl are "quality of life" issues such as the lack of walkability in our urban environments, extensive parking lot landscapes, the loss of places friendly to children and the elderly, and the loss of nearby open space and wildlife habitat.[164] Further consequences include the diversion of human and government resources, which contributes to deteriorating economic and living conditions in core urban areas, enormous infrastructure costs, increased greenhouse gas emissions, and a staggering dependence on fossil fuels.[165]

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[161] Braham Boyce Ketcham, *The Alexandrian Planning Process: An Alternative to Traditional Zoning and Smart Growth*, The Urban Lawyer v. 41, No. 2, 340 (American Bar Association Spring, 2009).

[162] *Id.* at 341.

[163] Edward H. Ziegler, *The Case for Metropolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, The Urban Lawyer v. 41, No. 1, 150 (American Bar Association Winter, 2009); Garnett, *supra* note 156, at 163.

[164] Ziegler, *supra* note 163, at 152-53.

[165] *Id.* at 154-56.

In other instances, local governments may regulate land use in a way that benefits only an affluent minority of the population and creates negative social impacts.[166] Local governments use their regulatory powers to attract new residents and uses that would add more to the tax base than they would cost in local services.[167] However, accompanying this pattern of land use governance are regulations that work to exclude residents and uses that would cost more in local services than they would contribute to the tax base.[168] This was the case in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* ("*Mt. Laurel*"), where the local government's regulation of land use in effect prevented various categories of persons from living in the township because of their limited income and resources.[169] This resulted in the inadequate provision of housing in

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[166] Briffault, *supra* note 104, at 1134; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985, 1988 (2000).

[167] Briffault, *supra* note 104, at 1134.

[168] *Id.*

[169] *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 67 N.J. 151 (1975). Mount Laurel land use regulations required minimum lot sizes and minimum floor areas for the new developments that would "realistically allow only homes within the financial reach of persons of at least middle income." The regulations prohibited the development of townhouses, apartments, and mobile homes. A few planned unit development ("PUD") projects were approved by the Mt. Laurel government; however, they had provisions significantly limiting the number of units with more than one bedroom and the number of school-aged children that could reside in the units. Furthermore, the regulations required developers to pay for the impact on public schools if they

the township for poor minority groups as well as "young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted…"[170] There, the court noted that regulatory scheme was not adopted with the intent of excluding those residents for discriminatory reasons, which would be unconstitutional, but found that the township's regulation of land use with the intent and result of economic discrimination was also not a proper exercise of its police power.[171]

Other state courts are not as receptive to challenges to exclusionary zoning regulations, and continue to defer to local government decisions where some rational basis can be shown.[172] For example, in *Johnson v. Town of Edgartown*, the court held a minimum three-acre lot-size requirement to be valid based on the town's assertion that higher density development would result in nitrogen being released from individual septic systems at levels that exceed the carrying capacity

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chose to construct a multi-family development to house more than .3 school children per unit – which may have been an illegal. *Id.*

[170] *Id.* at 159.

[171] *Id.* at 170, 188. The Court essentially articulated a right to fair housing under the New Jersey Constitution, and thus interpreted the Mt. Laurel government's scheme for regulating housing to be beyond it police power authority. *Id.* at 174.

[172] David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, The Urban Lawyer v. 41, No. 4, 794-95 (American Bar Association Fall, 2009) (eighty percent of Bedford, NY is zoned with four-acre minimum lot sizes, and some areas in Marin County, CA require five-acre minimum lot sizes).

of the town's water supply.[173] There, the court noted that the evidence convey that a two-acre lot size would be sufficient to protect the water source, but did not require any rational basis for the addition of an extra acre.[174] Land use controls that work to exclude certain uses displace those uses to other localities, and the result is much worse when the practice spreads across a region.[175]

A long history of local governments exercising their land use authority this way has lead to "an urban America characterized by unequally funded schools, interminable traffic jams, inadequate affordable housing, economic development far from potential employees, endless suburban sprawl [and its environmental consequences], and an increasing fear of people who live in neighborhoods different from one's own."[176] The regulatory scheme practiced by these local governments reinforces inequalities in the cost and quality of local services, which results in a decline in the overall economic and social health of entire regions, states, and the nation.[177]

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[173] *Johnson v. Town of Edgartown*, 425 Mass. 117, 124 (1997).

[174] *Id.* at 123.

[175] Briffault, *supra* note 104, at 1134.

American metropolitan areas are overwhelmingly segregated by socioeconomic class, with the highest concentration of a particular economic class, the underclass, living almost exclusively in dilapidated rental housing in rundown neighborhoods. Papke, *supra* note 172, at 788.

[176] Gerald E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763, 1764 (2002); *see* Garnett, *supra* note 156, at 161-62.

[177] Briffault, *supra* note 104, at 1136-37.

The extra-local impacts on natural resources are prominent and generally originate from the same types of land use throughout the nation. Accordingly, the national government has asserted its preservation interests through indirect federal regulation of land use; though, other consequences are still completely within the sphere of local control.[178] The extra-local social impacts reflected in most urbanized areas, are more difficult to address at a high level because the demographic, cultural, and economic make up is specific to each locality, and the resulting inequalities originate from a complex combination of sources.

It must be recognized that "laws and regulations actually do more than determine how land is to be used and arranged, they actually structure the ways in which people, as social groups, related to each other."[179] Even if local governments did recognize the external social, environmental, and economic affects of their decision-making, the current land use system makes it difficult for

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[178] "There is no effective way as yet, other than land use control, by which you can intercept runoff and control it in the way that you do a point source." 117 Cong. Rec. 38825 (Nov. 2, 1971 (statement of Sen. Muskie).

"While a general plan or a zoning ordinance is not commonly considered equivalent to a smokestack or a tailpipe, development patterns wield tremendous influence over the transportation choices people make, the vehicles miles they travel, and therefore, the emission of greenhouse gases." Henry Stern, *A Necessary collision: Climate Change, Land Use, and the Limits of A.B. 32*, 35 Ecology L.Q. 611, 611 (2008).

[179] Ketcham, *supra* note 161, at 341 (quoting Lynda H. Schneekloth, Current Forms of Practice and Application, in Advances in Environment, Behavior and Design 307, 318 (Erwn H. Zube & Gary T. Moore eds. 1987)).

local governments to choose to control the extra-local impacts at the expense of potential immediate economic benefits.[180]

B. Absence of State Guidance

State governments theoretically have broad authority to enact policies to guide and prescribe land use decision-making throughout their state and its localities; however, most states do not assert this authority.[181] Generally, state governments do not exercise their land use planning and control authority because of strong political resistance based on the traditional idea that land use is an 'inherently' local affair.[182] Certainly, non-plan states fall into this category, but so do plan states with weaker state-to-local planning consistency requirements.

Comprehensive plan mandates, based on SCPEA, are procedural and informational, with any substantive requirements being voluntarily incorporated

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[180] Briffault, *supra* note 104, at 1136; Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289, 299 (2011) ("Traditional land use law provides no mechanism through which to force local governments to consider these external or underrepresented interests"); Rachael Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 Cornell J.L. & Pub. Pol'y 335, 354 (2010) (Where a local government attempts to address climate change through stricter regulations, it absorbs the costs while all communities reap the benefits, including increases in development opportunities absconding from such strict regulations).

[181] Lesley R. Attkisson, *Putting A Stop to Sprawl: State Intervention As A Tool for Growth Management*, 62 Vand. L. Rev. 979, 995 (2009).

[182] Mandelker, Payne, Salsich & Stroud, *supra* note 9, at 38; Nolon, *supra* note 30, at 2.

by each state.[183] States with strict prescriptive requirements usually have strong land use objectives enforced through review and approval requirements, sanctions for noncompliance, and financial and technical assistance for planning by local governments.[184] Other states with moderate prescriptions have less extensive land use objectives with modest enforcement of mandated consistency for certain state objectives and review of local plans by regional agencies.[185] They may provide financial and technical assistance to local governments for planning, but have limited state oversight and sanctioning ability.[186] Finally, some states rarely enforce state objectives, and have little oversight, no sanctions, and no financial support for local government planning.[187]

Numerous state delegations of land use planning and control authority do not place significant constraints on local government land use decision-making, and whatever state oversight exists is exercised in a generally unspecific hortatory fashion that lacks regulatory teeth. Variations in forcefulness of prescription and review standards exercised in differing state are reflected in the quality of local government planning and regulation in those respective states.[188]

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[183] Henry Stern, *A Necessary Collision: Climate Change, Land Use, and the Limits of A.B. 32*, 35 Ecology L.Q. 611, 616 (2008).

[184] Burby & May, *supra* note 26, at 10.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

Political culture plays a significant role in impeding state efforts to require local compliance with state policy guidelines. Attempts to require local governments to include state objectives in their comprehensive plans, especially objectives that may curtail favored development, receive strong objection from local governments, developers, and associated industries.[189] States with less prescriptive requirements, or none at all, are also hesitant to assert such authority where it would conflict with public sentiment.[190] The fact that some individuals generally like the sprawl lifestyle has state governments skeptical of imposing statewide land use policies to curb or eliminate sprawl development.[191] For example, our nation still holds fast to the vision of the American dream – "suburban home ownership and a life away from the perceived corruption and filth of inner cities."[192] Therefore, the states must overcome significant political pressure in order to protect statewide interests through the exercise of their land use control authority.[193]

C. Uncoordinated Regulation in All Levels of Government

Do land use controls really protect the public health, safety, and welfare, if they are purely fiscally motivated? If they lead to socioeconomic inequality and sprawl? As previously discussed, the absence of comprehensive plans and their

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[189] Stern, *supra* note 183, at 617.

[190] Attkisson, *supra* note 181, at 996.

[191] *Id.*

[192] *Id.*

[193] *Id.*

consistency requirements leads to uncoordinated regulation on the local government level. Local land use controls may conflict, overlap, and/or leave gaps not only in the regulation of different types of land uses, but also in the delegation of authority to different local bodies.[194] However, this lack of coordination is not confined to the local government level.

When the states do adopt legislation with preemptive affects on land use control, such action usually stems from the accrual of a particular matter of statewide concern.[195] Much like the local governments with home rule authority, this impulsive and unplanned regulatory pattern of governance lacks coherence and coordination.[196] Separate state agencies with regulatory control over the environment, agriculture, transportation, economic development, housing development and finance, coastal areas, and urban revitalization, to name a few, prescribe and enforce land use controls fragmented from each other.[197] State agency land use regulations may be conflicting, overlapping, and/or redundant, with no government body charged with coordinating enforcement or connecting state initiatives to local land use policies.[198] Failure on the part of the state governments to cooperate with local governments and to account for local policies regarding other affected land uses leads to nothing by dysfunction.[199]

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[194] Witten, *supra* note 119, at 598.

[195] Nolon, *supra* note 30, at 4.

[196] *Id.*

[197] *Id.* at 5

[198] *Id.*

[199] Nolon, *supra* note 153, at 17-18.

Many of the above state programs, however, are developed in response to federal government programs that require, incentivize, or preempt state action.[200] But, the policy objectives of these federal programs that affect land use are, yet again, reactions to crises or the capricious popularity of particular issues.[201] The federal agencies charged with implementing national policy objectives have conflicting, overlapping, and possibly excessive regulations that often lead to over allocation of resources and inordinate burdens being placed on persons subject to such regulations.[202] Furthermore, failure on the part of the federal government to coordinate with state and local governments when taking federal action proves to be an inefficient and ineffective waste of public resources with unintended and

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[200] Nolon, *supra* note 30, at 5.

[201] *Id.* at 6.

[202] The Administrative Procedures Act and NEPA, requires federal agencies to consult affected agencies when taking action, but such consultations are undirected, informal, and strictly procedural. *See* 5 U.S.C. §§ 500 et seq. (1999); 42 U.S.C. § 4321 et seq..

The affects of uncoordinated regulation are exemplified in one of the nations first major environmental battles. In *Tennessee Valley Authority v. Hill*, the TVA, a federal agency, began construction on the Tellico Dam and Reservoir Project on the Little Tennessee River, the only known habitat for the endangered species, the snail darter. Congress appropriated funds to TVA for the project, which would not only construct the dam but would flood 16,500 acres of farmland including a native American burial ground, despite the fact that Section 7 of the ESA prohibits federal actions that would result in the destruction or modification of the critical habitat of an endangered species. Even though the ESA works primarily as a 'roadblock statute,' significant complication arose from the fact that the dam construction was close to completion before the conflict emerged. *T.V.A. v. Hill*, 437 U.S. 153 (1978).

unanticipated impacts.[203] Single-issue, top-down federal actions often frustrate the land use plans and policy objectives of local governments, each dealing with a unique geography, environment, demographic, political history, need for economic development.[204]

The result of this lack of coordination on all levels of government is often incessant, indeterminate litigation on both sides of every issue affecting land use. There is limited opportunity for balancing, compromising, or mitigating foreseeable harms, and the courts have no guidance for prioritizing or harmonizing the conflicting issues that come before them.

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[203] Nolon, *supra* note 153, at 17.

In *Lucas v. South Carolina Coastal Council*, that state adopted legislation prohibiting development within a distance from the shoreline, pursuant to CZMA. However, the only effective means for development in the prohibited areas was through federal and state funded property insurance programs designed to encourage growth, development, and tourism. 505 U.S. 1003 (1992).

[204] Nolon, *supra* note 153, at 18.

Chapter III:
A National Catalyst for State Land Use Planning and Coordination

"Intelligent land use planning and management provides the single most important institutional device for preserving and enhancing the environment, for ecologically sound development and for maintaining conditions capable of supporting a quality life and providing the material means necessary to improve the national standard of living."[205] This statement, made by Senator Henry M. Jackson to the 91st United States Senate reveals that the same goals our nation is striving towards today, were recognized by the Senator and his supporters over 40 years ago.

Land use control issues exist at every level of government; however, local governments still wield prevalent control over the quality of life of current and future generations of Americans. Leaving the localities to their own devices has proven to have significant repercussions for the environmental, social, and economic interests of the localities, their regions, their states, and the nation. Obviously, there is a national interest in natural resource preservation, adequacy of public services, poverty alleviation, public health, environmental justice, and economic development, among other concerns, even though their emanation is most visible on the local level. Therefore, the federal government has a

[205] 116 Cong. Rec. S1757-58.

responsibility to develop and administer national land use policies to guide the land use decisions that cause and affect these issues.[206]

From 1970 to 1974, attempts were made to enact national land use legislation by Senator Jackson, who introduced Senate bill 3354, the National Land Use Policy Act ("NLUPA"), as "the next logical step [after NEPA] in our national effort to provide a quality life in a quality environment for present and future generations of Americans."[207] The Senator promoted NLUPA as a starting point for achieving horizontal and vertical consistency and coordination between the multitudes of government actors that exercise control over land use decision-making.[208] This paper proposes

NLUPA was a magnanimous attempt to limit the unanticipated and unintended consequences of an uncoordinated system of land use control. However, its focused was solely on procedural and informational concerns,

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[206] *Id.* at S1758.

[207] *Id.* at S1757.

After amendments were made, but before it could be brought for a vote on the Senate floor, S. 3354 was placed on hold. Identical legislation, S. 632, was introduced the following year, and was amended to incorporate S. 992, the Nixon administration's bill, to create the Land Use Policy and Planning Assistance Act of 1972. The amended S. 632 passed in the Senate by a vote of 60-18; however, the House version of the bill, H.R. 7211, never reached the floor for debate. In 1973, S. 268, which was identical to the amended S. 632, was introduced by Senator Jackson. After significant amendments, S. 268 passed the Senate, but was again defeated in the House. Jayne E. Daly, *A Glimpse of the Past – A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, 1995 Pace L. Rev. 25 (1995).

[208] 116 Cong. Rec. S1758-59.

without providing for the establishment of objective national priorities for land use planning and control.[209] It is true that coordination and cooperation are needed in the land use system in order for the U.S. to progress efficiently, effectively, competently, and legitimately into the future. However, the nation is at a tipping point, not only with respect to the global climate, but to our social structure, which is collapsing with the increasing gap in wealth distribution and declining access to public services. Land use controls have a direct impact on the direction our nation will take, and we need to decide as a nation whether we want to plan to live a little more sustainably or continue into ever-worsening battle over resources.

NLUPA's procedural framework for land use control, with the addition of substantive, objective national priorities, is proposed here as a favorable approach to bettering the collective environmental, social, and economic quality of life of current and future generations in the U.S.

A. The NLUPA Framework[210]

The design of the National Land Use Policy Act was administratively and politically strategic in that it was expounded as a procedural mechanism for coordinated land use governance that did not institute substantive restrictions on the ability of state and local governments to plan for their particularized interests.

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[209] Kayden, *supra* note 5, at 448.

[210] This section discusses the NLUPA framework under the pretense of enacted legislation. Specific references to "NLUPA" in this section are cited to S. 268, though they generally refer to S. 3354, S. 632, and S. 268 cumulatively.

In his introduction to the bill, Senator Jackson emphasized two major concerns: (1) the lack of horizontal coordination among the various agencies with jurisdiction over issues that affect land use and their endorsement of inconsistent uses of the same land resources; and (2) the lack of vertical coordination in the land use decision-making process and the consequent unaccounted for extra-local impacts.[211] NLUPA addresses these inefficiencies through its enumeration of a coordinated land use system and its provision of financial and technical assistance for states to plan in the holistic interest of their citizens and natural resources.

NLUPA encourages the several states to exercise their constitutional responsibilities for coordinated planning and managing of their land base through three material objectives: (1) a grant-in-aid program to help states improve their systems for land use planning and management; (2) procedural requirements to guide the development of state land use programs and plans; and (3) creation of the Office of Land Use Policy Administration (the "Land Use Administration" or the "LUA") to administer and enforce the grant-in-aid program and the procedural requirements of NLUPA.[212]

NLUPA requires the Land Use Administration to assess the nation's land use resources and develop a Federal Land Use Information Data Center, with

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[211] 116 Cong. Rec. S1758-59.

[212] S. 268, 119th Cong. §§ 201, 301 et seq. (1973).

NLUPA was proposed as an amendment to the Water Resources Planning Act, 42 U.S.C. § 1962, and thus would have expanded the the authority of the Water Resources Council. 116 Cong. Rec. S1761.

optional regional branches, to compile data on plans involving the federal government, state and local plans, and data on past, present, and projected land use patterns.[213] The information data center is required to be accessible to all levels of government agencies concerned with land use planning and management and to the public.[214] The availability of easily accessible land use information serves as a means of horizontally and vertically coordinating land use decisions among the different levels of government.[215] NLUPA requires the LUA to produce biennial reports on land resource, uses, and current and emerging problems of land use.[216] Furthermore, it provides for the interchange of information and personnel between the LUA and other federal agencies, and encourages the LUA to provide technical assistance to approved state programs through contracts, grants, and other arrangements.[217]

NLUPA provides initial grants to the states for the performance of statewide land use planning processes.[218] It designates such funds to enable the states to assess and inventory their natural and public resources and needs, provide for technical assistance and training for the development and implementation of state and local land use programs, and establish a planning

[213] S. 268, 119th Cong. § 202.

[214] *Id.*

[215] *Id.*

[216] *Id.* § 503.

[217] *Id.* §§ 504-505.

[218] *Id.* § 302.

agency as the primary authority responsible for administration of the state land use program.[219]

In order to continue its funding eligibility, a state must developed an adequate state land use program to be implemented either through local government decisions adopted pursuant to standards established by the state and subject to state administrative review, or through direct state land use planning and regulation.[220] Pursuant to NLUPA, an adequate state land use program must include implementation measures to ensure consistency with the program, compliance with federal pollution control laws, and dissemination of information to appropriate local decision-makers.[221] Notably, NLUPA requires the methods for implementing the state land use programs to encourage the exercise of land use control authority by local governments.[222]

NLUPA's framework outlines a unique system for federal, state, regional, and local government bodies, and their constituents, to establish and implement land use plans in a manner that is consistent, coordinated, and considerate of diverse public interests.[223] It employs top-down checks to abate collectively harmful affects, and the subsidiarity principle to accomplish autonomous and truly rational decision-making, galvanized at the local level.

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[219] *Id.*

[220] *Id.* § 303.

[221] *Id.* § 303(a).

[222] *Id.* § 303(b)

[223] *See* Daly, *surpa* note 207, at 26.

Prior to approving a state land use program, the Land Use Administration is required to not only evaluate the adequacy of the program's compliance with NLUPA, but also solicit the views and recommendations of other federal agencies principally affected by the state plan.[224] If the LUA determines that a state program is ineligible or finds grounds for withdrawal of a state's funding eligibility, it is required to deny funding requests upon a consistent finding by a hearing board.[225]

Most critically, NLUPA requires all federal agencies to comply with the official planning standards of each state. This is an extraordinary re-defining of the land use power of the states, where even the federal government would be, in all but exceptional circumstances, subordinate to official decisions of the state. All federal activities, proposed to be conducted in an area subject to a state land use plan, to be consistent with the approved state plan, incorporating state-coordinated, regional, and local plans for that area as well.[226] Thus, not only do federal projects themselves need to be consistent with the plans, but any federal agency approval, permitting, funding, or support of proposed projects that have significant land use implications must be consistent with the plans.[227]

In proposing NLUPA, Senator Jackson challenged the nation to move beyond land use governance patterns exercised in a geographic or issue specific

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[224] S. 268, 119th Cong. § 305.

[225] *Id.*

[226] *Id.* § 306.

[227] *Id.*

vacuum, and/or in response to a "the crisis of the moment."[228] He sought to provide for sustainable patterns of development through coordination and comprehensive planning.[229] Unfortunately, despite gaining significant support, the thrice-proposed National Land Use Policy Act was discounted, rejected, and subsequently exchanged for a patchwork of laws that do not assemble to competently and rationally guide the nation's government bodies through competing interests and anticipated and unanticipated future circumstances.[230]

B. The NLUPA Framework and Potential Improvements via the Addition of National Priorities

Had NLUPA been adopted, our land use system, and with that America as a whole, would look and function much differently.[231] Since NLUPA's failure in the House of Representatives, there have been no new attempts to enact national land use legislation at the federal level.[232] However, the discussion continues because there is general agreement, at all levels of government and in the private sector, that the current U.S. land use systems needs reform.[233] The question being, how?

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[228] *See* Daly, *surpa* note 207, at 62.

[229] *Id*. at 62-63.

[230] *Id*. at 57.

[231] John R. Nolon, *Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina*, 13 Pace Envtl. L. Rev. 685, 718 (1996).

[232] Daly, *surpa* note 207, at 26.

[233] *Id.*

National land use legislation, based on the framework of NLUPA, with the addition of national priorities, is hereby proposed as national land use policy and priorities legislation ("LUPP" or "LUPP legislation"), designed to encourage more coordinated and comprehensive land use planning and management by the state governments. The national priorities, to be enumerated in LUPP or established by the Land Use Administration pursuant to LUPP, would comprise of issues of national concern to be addressed through state land use programs. For example, national priorities may include:

- socioeconomic desegregation;
- poverty alleviation;
- community interaction and involvement;
- adequate housing;
- rational distribution of employment opportunities;
- reducing infrastructure maintenance costs;
- reducing VMTs;
- conservation of agricultural and open space;
- protection of ecological resources;
- promoting renewable over fossil fuel energy;
- and other issues of national concern.

Unlike the customary federal attempts to indirectly regulate land use, LUPP is not single-issue oriented. It pulls together the issues affecting land use already being addressed, though currently in fragments, by other federal agencies, such as the Departments of Agriculture,[234] Energy,[235] and Housing and Urban Development,[236] and the Federal Emergency Management Agency,[237] to name a

[234] 7 U.S.C. §§ 1010 et seq. (1981).

[235] 42 U.S.C. §§ 5841.

[236] 24 C.F.R. §§ 0 – 4100 (2003).

few, in addition to newer initiatives, like those in the American Recovery and Reinvestment Act of 2009.[238]

The transcendent aspect of LUPP is the advancement of national priorities, while leaving the determination of the best methods for implementing those priorities to the state land use programs. In regards to the national priorities, states would only be required to establish or adjust land use plans and regulations to address the enumerated interests, or to develop criteria and standards to be implemented by local land use plans and regulatory controls. State governments' exercise of their inherent land use planning and control authority provides the foundation for LUPP's employment of a particular mix of cooperative federalism and subsidiarity principles.

This scheme for implementing national priorities on the state and local levels of government is not new; however, it is generally exercised to address single-issue objectives, like balanced protection and development of coastal areas pursuant to the CZMA,[239] or transportation control measures pursuant to the

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[237] 42 U.S.C §§ 1521 et seq.

[238] The Act indirectly affects land use through its provision of funding for programs such as community health centers, infrastructure investment in transportation, public services, environment, government facilities, renewable energy, housing, and small businesses. Recovery.gov, Track the Money, http://www.recovery.gov/Transparency/fundingoverview/Pages/fundingbreakdown.aspx (last visited Apr. 30, 2012).

[239] 14 USC § 1451.

CAA.[240] Generally, state agencies are created to implement federal directives, such as the California Coastal Commission and its local coastal programs, which were established pursuant to CZMA.[241] Similarly, state and local planning agencies must be created or must make accommodations to carry out the broad-issue-based substantive and procedural land use planning and control requirements pursuant to LUPP.[242]

Some state governments have an established regulatory structure for land use planning that can incorporate the federal requirements of LUPP, but many states will need to create the entire program framework on the state, local, and possibly regional levels of government. Therefore, the grant program must be flexible and situation-specific in its distribution of funds to the states that chose to adopt its requirements.

LUPP is not intended to throw more regulations into the hodgepodge of rights and obligations of government bodies, the public, the landowners, and/or developers. Rather, it establishes procedural requirements and substantive goals for our government bodies in exercising their land use decision-making authority. Even though significant resources would be required to develop the national and state planning programs, they will in the end make the land use decision-making process more coordinated, efficient, informed, and better equipped to respond to unanticipated predicaments.

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[240] 42 USC § 7408.

[241] *See* Cal. Pub. Res. Code §§ 30002, 30300 (1981).

[242] *See* S. 268, 119th Cong. § 302(b).

C. Implementation Improved State-Level Land Use Planning[243]

The implementation of the national land use legislation proposed here is a legally and politically feasible catalyst for improving state-level land use planning. LUPP upholds the sovereign authority of the states to regulate land use in the interest of the public welfare of their residents, by conforming to the constitutional interpretations of federal and state authority in the area of land use. LUPP encourages the states to comply with federal coordination and consistency requirements and mechanisms by instituting a federal funding "carrot." Furthermore, LUPP does not restrict state and local autonomy in the exercise of their police power to regulate land use. Therefore, LUPP has the ability to accommodate the interests of both supporters and critics of land use reform.

1. Precluding National Infringement on State Sovereignty

The U.S. land use system sets the foundation for how the nation is developed, what necessities and contingences may arise, what natural resources will be maintained, and how we as citizens interact with one another. There is clearly a national interest in the environmental, social, and economic future of our country that must be accounted for at all levels of government. LUPP does not endeavor to expand the federal government's power beyond its constitutional bounds, nor does it seek to invade the sovereignty of the states. Undoubtedly, any federal activity exercised pursuant to LUPP would pose fewer constitutional

[243] This section discusses the implementation of LUPP under the pretense of enacted legislation.

questions than the existing federal statutes with enumerated substantive standards.[244]

Federal activities conducted pursuant to LUPP would not exceed the federal government's power under the Commerce Clause. The historical governance patterns for land use planning and control play a significant role in the deterioration of our national environmental and socioeconomic systems. Indirect federal regulation of environmental issues has been consistently upheld as within Congress's power to regulate interstate commerce.[245] It would be perverse to argue that the affects of exclusionary land use control practices does not also have a substantial affect on interstate commerce. The affects of current land use control practices, including impoverished urban communities, insufficient public facilities and services, and ever expanding metropolitan boundaries as a result of sprawl development, are surely economic in nature, in that they demonstrate the direct, and not attenuated or speculative, affect of land use regulation on interstate commerce.[246] Therefore, the establishing of national priorities does not touch purely intrastate activities in a way that is prohibited by the interpretive principles of the Commerce Clause.

LUPP's provision of incentives to encourage the states to comply with its procedural and substantive requirements in their exercise land use planning and control authority does not exceed the federal government's power under the

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[244] *See supra* Part I.A.1; Kayden, *supra* note 5, at 451.

[245] *See supra* Part I.A.1-2.

[246] *See supra* notes 45-50 and accompanying text.

Spending Clause. The establishment of a state land use plan that complies with the procedural directives and substantive priorities of LUPP is a condition for LUPP funding and the continued receipt of other types of federal funding. Encouraging participant states to set statewide priorities and develop a state land use programs to achieve those, as well as the national priorities, would further the general welfare to a greater extent than playing a zero-sum game with varying interests. Federal funding allocated pursuant to LUPP is in essence, reimbursement spending, and because of the broad-based reach and impacts of land use control, a multitude of existing federal funding schemes may be implicated.[247] However, conditional restrictions on separate funding must be applied carefully since it may be irrational to thwart funding from interests that are in accordance with the objectives of the national planning legislation.[248] LUPP serves to encourage but not compel the states to adopt the federal

[247] *See supra* notes 51, 55-57 and accompanying text.

Conditions may be placed on germane federal grant opportunities in the categories of agriculture, business and commerce, community development, disaster prevention and relief, education, employment, energy, environment, health, housing, social services, recovery act funding, regional development, and transportation.

[248] The proponents of NLUPA specified fragments of federal funding for airport development, highways, and land and water conservation to be conditionally withheld from states with programs found to be ineligible for NLUPA funding. *See* Daly, *surpa* note 207, at 43.

requirements by placing conditions on separate funding programs, in addition to LUPP funding.[249]

Though LUPP implicates numerous policy interests that have an affect on land use, it remains far less intrusive into the sovereignty of the states than the preemptive legislation commonly exercised by our federal government.

2. Maintaining of State and Local Autonomy

The national land use legislation proposed here establishes procedural requirements and substantive priorities to guide the states in their planning and control of land use. Its primary purpose is to serve as an impetus for coordinated state planning and control of land use. Though it technically reforms the current national system of land use governance, the LUPP system mirrors the existing land use system in that it allows the states and their localities to tailor land use controls to their differing concerns and aspirations.

LUPP provides a means of addressing current national concerns and planning for foreseeable complexities that may arise in the future. It requires coherence, collaboration, and consideration of national interest that materialize on the state, local, and regional levels. However, LUPP does not prescribe any

[249] Because LUPP provides financial incentives for the states to voluntarily adopt its requirements, rather than functioning as a command and control statute, it is possible that some states may simply ignore the requirements. However, most states already recognize the need and value of comprehensive planning, and thus would hopefully use LUPP as guidance for developing a coordinated and consistent land use program.

specific regulatory methods for these interests, but rather leaves the implementation strategies to the states and their respective localities.

Additional obligations to address national priorities would most likely be consistent with true statewide and local interests. LUPP's national priorities are meant to reflect aggregate state and local concerns that are prevalent throughout the nation. There may be conflict with local interests that are purely fiscal; however, local governments must plan for and regulate land use "primarily for the living welfare of people and not for the benefit of the local tax rate."[250] Land use planning and control for the purpose of fiscal gain is often not consistent with the obligation to regulate in furtherance of the health, safety, or welfare of the entire community. As previously noted, when fiscal gain is seen as the public benefit derived from a specific exercise of land use regulation, local governments may not ensure that the regulation itself is a proper exercise of the police power.[251] As noted in *Mt. Laurel*, local government decision-making in land use planning and control, without consideration of the extra-local impacts of such decisions, is not a proper exercise of the police power.[252] Proffering the comparable authority of a

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[250] *Mt. Laurel*, 67 N.J. at 188.

It is well-acknowledged that "metropolitan areas often function as interdependent economic regions," and extreme disparities in the economic health of the localities that make up a region only diminishes the overall economy of the region. Briffault, *supra* note 104, at 1137.

[251] *See supra* note 143.

[252] *Mt. Laurel*, 67 N.J. at 177 ("However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So when regulation does have a

state government and its local governments in exercising the police power, intimates that like the state, local governments may not obstruct the general public interest where it far outweighs a narrower interest, or local parochial interests.[253] For local governments and state governments, to truly represent the holistic interests of their residents, they must take into account invaluable non-fiscal interests, and then implement land use controls acclimated to their specific circumstances.

State land use programs would be consistent with the substantive requirement of LUPP through their discretionary and strategic implementation of the national priorities, based on their statewide-prioritized interests. It is true that local governments would be at the mercy of such state discretion, which may range from state preemptive regulation to the mere requirement of consideration; however, LUPP would not afford the states more power than under the current land use system, whether they presently exercise it or not. The omission of substantive national regulatory standards allows the state and local governments to continue to act as the experiment labs for new and innovative land use policy.

The system for land use governance, outlined in the national land use legislation proposed by this thesis, encourages the states to affirmatively exercise their inherent authority to conduct land use planning and management. LUPP

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substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served"); *see supra* note 171 and accompanying text.

[253] *See Euclid*, 272 U.S. at 390; *Mt. Laurel*, 67 N.J. at 177.

acknowledges that the states possess the land use power and that it cannot properly function to coordinate land use decisions without the states' exercise of that power. Therefore, the federal role in the proposed national land use legislation remains secondary to that of the states, as a catalyst and guide for land use planning and control by the state governments.

Conclusion

The U.S. land use system is dysfunctional and increasingly obsolete. Local government bodies that roughly depend on property taxes for their revenue, overwhelmingly implement land use controls with a keen eye toward fiscal gain, and disregard towards other social, environmental, and economic interest. This mechanism of land use control, unchecked by the states, has directly resulted in problems our nation is ill equipped to deal with such as astounding rates of urban sprawl and socioeconomic segregation in our metropolitan areas. Attempts by the state and federal governments to address such issues through issue-specific preemptive regulation has only created an uncoordinated regulatory system that inefficiently utilizes its resources and only addresses the affects and not the causes of such issues. Without a fundamental reconsideration of our interests and the governance mechanisms used to attain those interests, we will soon find ourselves in an inconspicuous civil war over our nation's natural and human resources.

Congress has the capability to encourage a major reformation of the U.S. land use system in a way that will address the current problems of land use control and provide a means of proactively planning for the future. Attempts to excuse the delay on the part of the federal government to exercise these responsive capabilities submit that, unlike other countries that enact national land use legislation, the U.S. is too big and there are no overwhelming national imperatives to force us to act. It is argued that other countries have insufficient resources, military threats, and the challenges of early stage development that

make national land use legislation necessary. But do we want to wait until we're at the point of national crisis to start planning?[254] Or would we rather plan to prevent national crises?

Our national interests are already regulated through other congressional acts. Land use control is a fundamental form of government action that intimately affects every citizen. It only makes sense to incorporate those national interests that we have collectively decided to care about and address through fragmented legislation, into a comprehensive plan that directly control the land uses which made issues of natural resources, housing, economics, public services, education, development, and sustainability national concerns in the first place.

Development of comprehensive plans requires the use of significant time and resources to assess and plan for the geographic, ecological, and demographic lay out of the land, nationally, and within state and local boundaries. Fortunately, federal, state, and local agencies already in existence have been charged with such tasks in their regulation of specific issues that are affected by land use. Furthermore, with the use of innovative technology, this information can be

[254] Many argue that we are already there as a result of sprawl, which created crises in our metropolitan regions by "(1) Weakening the existence of built-up areas; (2) environmental degradation; (3) global warming stemming from overutilization of oil, gas, and carbon-based energy sources; (4) fiscal insolvency, transportation congestion, infrastructure deficiencies, and tax payer revolts; (5) agricultural land conversion; (6) loss of quality of life and sense of place." Robert H. Freilich, Robert J. Sitkowski & Seth D. Mennillo, From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy 22 (American Bar Association, 2d ed. 2010).

aggregated into electronic databases and mapping systems such as the Geographic Information System ("GIS").[255] GIS, or a similar system, can serve as a central data collection and distribution system for all the geographically conveyable information relevant to land use decision and impact analysis.[256] A coordinated and organized database system allows for land use decision-makers to see a truly holistic view of the impacts they need to consider prior to taking action.

With proper guidance, local governments can regulate land use in a way that furthers local, regional, statewide, and national interests, and can become effective partners in matters of interstate importance.[257] "In a fully connected system, the components can be describes as nested into one another, forming a loose network of interdependent parts. They constitute a hierarchical form that enables the system to self-regulate, adapting organically as stresses occur."[258]

LUPP provides a mechanism for achieving a coordinated land use planning and management, shepherded by the state governments, which can feasibly be implemented. LUPP strongly encourages the several states to develop state land use programs by offering federal support through funding, information, and technical assistance. LUPP's requirements guide the development of these

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[255] GIS is a merger of cartography, statistical analysis, and database technology in a system designed to capture, store, analyze, manage, and present geographical data. Geographic Information Systems, http://www.gis.com/ (last visited Apr. 23, 2012).

[256] Florida provides guidelines for the use of geographic information materials for the purpose of planning and regulating land use. Fla. Stat. § 186.803 (1996).

[257] Nolon, *supra* note 6, at 851.

[258] Nolon, *supra* note 153, at 13.

state land use programs and provide for federal oversight to ensure coordination among all the government bodies that exercise land use decision-making authority at all levels government. Finally, LUPP's national priorities operate as insurance against the continuation of current land use governance patterns, which have contributed to the state, regional, and local social, environmental, and economic concerns that are prevalent throughout the nation. The national land use policy and priorities legislation proposed here, is simply a means of bringing together the fragmented land use governance system, providing for coordination in its implementation, and making the objectives and procedures for land use planning and control accessible and pragmatic for decision-makers and the public in order to foster more informed, and thus more coordinated, land use decision-making.