# FEDERAL CLEAN AIR ACT AUTHORITY FOR LAND USE PLANNING, COORDINATION, AND CONSISTENCY

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# Abstract

To effectively address the negative impacts of climate change in the United States, Americans will have to change their way of living. Specifically, Americans must begin driving less to reduce the amount of greenhouse gas emissions released into the atmosphere from automobiles. The only way for Americans to drive less is for state and local governments to change their patterns of land development and create more pedestrian-friendly communities. These types of communities will become most achievable when state and local governments make a habit of engaging in planning, coordination, and consistency in land use development. Because state and local governments have not taken these steps on their own, the federal government must compel state and local governments to take necessary action. The Clean Air Act provides an ideal framework for the federal government to require state and local governments to engage in land use planning, coordination, and consistency. Unfortunately, many people believe that Section 131 of the Clean Air Act, entitled Land Use Authority, prohibits the federal government from getting involved in local land use regulation. This thesis demonstrates, however, that Section 131 only prohibits the federal government from interfering with local land use siting and zoning decisions. Thus, the federal government can, and should, exercise authority to compel state and local governments to engage in planning, coordination, and consistency in land use regulation.

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# Introduction

The climate is changing, yet Americans are not. There is much, however, that Americans could do to cope with the extraordinary impacts of climate change, and to lessen its driving anthropogenic forces. Substantial evidence indicates that daily use of gas-guzzling vehicles to commute from suburban residences to urban business centers is one of the United States' primary contributors to global climate change.[1] Despite this fact, the amount of time that Americans spend in cars is expected to continually increase.[2] To reduce the amount of time that Americans spend in cars, state and local governments will inevitably have to change their approach to land development and encourage different travel patterns.[3] Yet, many local governments resist making these changes.[4] State governments could step into the breach, requiring municipalities to adhere to certain planning standards,[5] but almost all state governments avoid taking this step in order to respect the traditional role of local governments in

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[1] *See* John R. Nolon, *Land Use for Energy Conservation and Sustainable Development: A New Path Toward Climate Change Mitigation*, at manuscript 4–5 (forthcoming).

[2] *Id.*

[3] *See id.* at manuscript 6 (arguing that changes in local land use plans and regulations can reduce "the number of vehicle trips and vehicle miles travelled").

[4] *See id.* (stating the need for these changes suggests that local governments are not already making these changes on their own).

[5] *See* Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583, 593 (2001).

regulating land use.[6] In sum, when facing significant ongoing changes to its natural environment, American society has thus far failed to address the challenge by acknowledging the threat of climate change and adapting their behavior accordingly.[7]

If the United States is to combat climate change, Americans must change the way that they govern, as well as the way that they live. One step in this process should require local governments to create land use plans intended to discourage personal automobile use and thereby reduce vehicle miles traveled ("VMTs").[8] It is not enough that local governments develop these plans, however, but they must also be compelled to make all subsequent land use decisions

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[6] *See* Daniel J. Curtin & 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, 335 (2005).

[7] *See id*. (explaining how many local governments regulate land in a way that does not require plans of any kind, including plans to reduce air pollution); Nolon, *supra* note 1, at manuscript 6 (proposing steps that local governments should—but have not—take to reduce climate changing air emissions); *see also* NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 523–29, 545, 549 (MIT Press 2008) (noting that the United States has failed to implement successful controls of vehicle miles traveled under the Clean Air Act, has not enacted comprehensive climate change legislation, and has failed to join the Kyoto Protocol which is the primary international approach to addressing climate change).

[8] *See* Nolon, *supra* note 1, at manuscript 6.

consistent with this plan.[9] Finally, local governments should be required to develop and implement this plan in coordination with other government bodies that also play a role in land development.[10]

Because many state and local governments have not been inclined to take this comprehensive planning step on their own, it is likely that federal force will be necessary to compel such action.[11] The Clean Air Act (the "CAA") may provide just such a legal tool.[12] The CAA, however, includes a little known provision that some believe prohibits the CAA from being used to interfere with local land control.[13] Section 131 of the CAA, entitled Land Use Authority, states

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[9] *See* Witten, *supra* note 5, at 596–97 (discussing the negative consequences of local governments regulating land use without doing so consistently with an overarching land use plan).

[10] Nolon, *supra* note 1, at manuscript 22–23. These government bodies include the surrounding local governments, metropolitan planning organizations that function at a regional level, and occasionally state and federal authorities. *Id.*

[11] *See* Rachael Rawlings & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 CORNELL J.L. & PUB. POL'Y 335, 362–67 (2010); Morgan E. Rog, Note, *Highway to the Danger Zone: Urban Sprawl, Land Use, and the Environment*, 22 GEO. INT'L ENVTL. L. REV. 707, 726–27 (2010).

[12] *See* Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L.J. 159, 196–99 (2009); Michael T. Donnellan, Note, *Transportation Control Plans Under the 1990 Clean Air Act as a Means for Reducing Carbon Dioxide Emissions*, 16 VT. L. REV. 711 (1992); Rawlings & Paterson, *supra* note 11, at 373; Rog, *supra* note 11.

[13] 42 U.S.C. § 7431 (2006); *see* Shannon Brown, Note, *A Fly in the Ointment: Why Federal Preemption Doctrine and 42 U.S.C. § 7431 Do Not Preclude Local Land Use Regulations Related*

that "Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use."[14] The meaning of this section has significant implications for whether the CAA might be used to change the current nature of local land use regulation.

Unfortunately, Section 131 is ambiguous.[15] The CAA does not define the term "land use," yet land use encompasses a broad variety of activities.[16] Decisions regarding siting a building on a specific parcel of land, the types of uses to allow in a specific area of a city, and whether to create a plan for the development of a city over the next twenty years can all be encompassed by the term "land use."[17] The intended meaning of "land use" in Section 131 could, consequently, be narrowly or broadly construed. Despite this, when Section 131 was added to the CAA as part of the 1990 Amendments, the provision received little notice or discussion at the time—and that fact has remained true ever since.[18] The goal of this thesis, therefore, is to determine the types of land use activities

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*to Global Warming*, 23 REGENT U. L. REV. 239, 258–260 (2010–2011); Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 456 (2000).

[14] 42 U.S.C. § 7431.

[15] *See infra* notes 150–79 and accompanying text.

[16] *Id.*

[17] *See infra* notes 278–310 and accompanying text.

[18] *See infra* notes 131–94 and accompanying text.

prohibited by Section 131, and what land use activities the federal government may still be able to influence.

This thesis concludes that Section 131 of the CAA does not prohibit the federal government from requiring that state or local governments develop detailed land use plans aimed at reducing VMTs.[19] Furthermore, through employing the cooperative federalism model already developed in the CAA, the statute strikes a balance between requiring state and local governments to modernize their usual approach to land use development while respecting the traditional role of local authority in land use planning.[20] Because Section 131 does not prohibit the federal government from requiring state or local planning, or land use decision making consistent with those plans, the CAA can and should be used as the federal incentive that requires an approach to land use regulation that will reduce VMTs.[21]

Chapter 1 of this thesis provides background information about climate change and the role that "sprawl" development and VMTs have played in the phenomenon.[22] Then, Chapter 2 explains the relationship between the CAA and land use planning today, and explores the meaning of Section 131.[23] Chapter 3 describes the current state of land use planning in the United States, and the

[19] *See infra* notes 324–53 and accompanying text.

[20] *See infra* notes 117–24 and accompanying text.

[21] *See infra* notes 354–62 and accompanying text.

[22] *See infra* Chapter 1.

[23] *See infra* Chapter 2.

different impacts that Section 131 could have on land use planning depending on its interpretation.[24] Finally, Part IV argues that Section 131 does not prohibit the federal government from using its authority under the CAA to require state or local governments to create land use plans designed to reduce VMTs, and make decisions consistent with those plans.[25] This would be an important first step towards reducing overall VMTs, and curbing the threat of climate change.

[24] *See infra* Chapter 3.

[25] *See infra* Chapter 4.

# Climate Change and the Problem of Sprawl Development

## The Reality of Climate Change

The global climate is changing, largely as a result of human activity that releases greenhouse gases ("GHGs")[26] into the atmosphere.[27] The United States is one of the largest emitters of GHGs,[28] and American dependence on "instant personal mobility via the [single occupant automobile]" is one of the primary sources of GHG emissions nationwide.[29] GHGs are emitted though the combustion of fossil fuels during automobile usage, and then build up in the atmosphere causing the greenhouse effect.[30] The changing climate resulting from

[26] Massachusetts v. EPA, 549 U.S. 497 (2007) (stating that EPA has accepted that man-made greenhouse gas emissions cause climate change); *see* ASHFORD & CALDART, *supra* note 7, at 545; Donnellan, *supra* note 12, at 711. GHGs include carbon dioxide, ozone, methane, chlorofluorocarbons, nitrous oxide, and other gases. Donnellan, *supra* note 12, at 711–12.

[27] Donnellan, *supra* note 12, at 711–12, Nolon, *supra* note 1, at manuscript 2.

[28] Rawlings & Paterson, *supra* note 11, at 341 (stating that the United States represents only 5% of the world's population, but produces roughly 25% of the world's GHG emissions).

[29] *See* Donnellan, *supra* note 12, at 711; Nolon, *supra* note 1, at manuscript 4–5.

[30] Donnellan, *supra* note 12, at 711–12. The greenhouse effect refers to the buildup of GHGs in the atmosphere which interferes with the usual process of heat leaving the earth's atmosphere. The GHGs absorb heat energy before it reaches outer space, trapping the heat in the atmosphere, raising global temperatures. *Id.*

the greenhouse effect threatens to increase sea levels, cause irreversible damage to ecosystems, significantly reduce winter snowpack, increase the ferocity of weather related events like hurricanes and earthquakes, and escalate the spread of disease.[31]

Climate change is not only predicted, however, but it is happening.[32] In 2007, the Intergovernmental Panel on Climate Change (IPCC) released its "Fourth Assessment Report" stating the global temperatures and sea levels have already risen dramatically.[33] Also in 2007, the Environment Maryland Research & Policy Center released a report stating that in the United States temperatures have hit an historic high.[34] There is increasing evidence that the greenhouse effect has increased the number and severity of extreme weather events,[35] reduced water

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[31] Massachusetts v. EPA, 549 U.S. 497, 521–22 (2007); *see* U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 9 (2009) [hereinafter GLOBAL CHANGE REPORT].

[32] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [hereinafter IPCC REPORT]; ENVIRONMENT MARYLAND RESEARCH & POLICY CENTER, THE CARBON BOOM: STATE AND NATIONAL TRENDS IN CARBON DIOXIDE EMISSIONS SINCE 1990 4 (2007); *available at* http://www.environmentmaryland.org/sites/environment/files/reports/Carbon-Boom.pdf, [hereinafter CARBON BOOM REPORT].

[33] IPCC REPORT, *supra* note 32, at 26; *see* Nolon, *supra* note 1, at manuscript 2.

[34] CARBON BOOM REPORT, *supra* note 32. The prior nine years were in the top twenty-five warmest years for the contiguous United States. *Id.*

[35] Rawlings & Paterson, *supra* note 11, at 388.

supply in some regions,[36] degraded fresh water fish habitat,[37] increased frequency and intensity of heavy downpours,[38] reduced snow cover,[39] and caused rising sea levels that have begun consuming coastal lands in states such as Massachusetts and California that could cause hundreds of millions of dollars in property damage.[40] All of these changes will continue, and have dramatic effects on "human health, water supply, agriculture, coastal areas, and many other aspects of society and the natural environment."[41] In short, climate change "has been carefully documented and is now widely accepted by a growing number of respected institutions and agencies."[42]

Though there are many GHGs contributing to the greenhouse effect,[43] by far the most prevalent and problematic in the United States is carbon dioxide ("$CO_2$").[44] In 2009, $CO_2$ represented 83% of total U.S. GHG emissions,[45] which is

[36] GLOBAL CHANGE REPORT, *supra* note 31; *see* Nolon, *supra* note 1, at manuscript 3.

[37] GLOBAL CHANGE REPORT, *supra* note 31; *see* Nolon, *supra* note 1, at manuscript 3.

[38] GLOBAL CHANGE REPORT, *supra* note 31; *see* Nolon, *supra* note 1, at manuscript 3.

[39] GLOBAL CHANGE REPORT, *supra* note 31; *see* Nolon, *supra* note 1, at manuscript 3.

[40] Massachusetts v. EPA, 549 U.S. 497, 521–22 (2007); GLOBAL CHANGE REPORT, *supra* note 31; *see* Nolon, *supra* note 1, at manuscript 3.

[41] Nolon, *supra* note 1, at 3.

[42] *Id.*; *see* John R. Nolon, Mitigating Climate Change Through Biological Sequestration: Open Space Law Redux, 31 Stan. Envtl. L.J., at manuscript 9–10 (forthcoming).

[43] *See* Donnellan, *supra* note 12, at 711.

[44] *See* Nolon, *supra* note 1, at manuscript 2.

only expected to rise.[46] A large portion of the U.S. $CO_2$ emissions result from the American dependence on automobiles.[47]

**The Relationship Between Climate Change and Vehicle Miles Traveled**

Transportation is one of the main drivers of GHG emissions in the United States.[48] Nearly 33% of $CO_2$ emissions in the U.S. come from transportation activities, and nearly 65% of this number "resulted from gasoline consumption for personal vehicle use."[49] This statistic is not surprising in light of how much Americans drive. Americans owned 100 million more vehicles in 1996 than in 1970.[50] What's more, in 1996 Americans drove roughly 4100 miles more per year than in 1970.[51]

This common measure of automobile usage—vehicle miles traveled ("VMTs")—cannot be attributed to population growth alone.[52] Only 13% of the increase in VMTs in the U.S. can be attributed to population growth, as VMTs

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[45] U.S. ENVTL. PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2009, at ES-6 (2011) [hereinafter EPA GHG INVENTORY].

[46] *See* IPCC REPORT, *supra* note 32, at 44; Rawlings & Paterson, *supra* note 11, at 339.

[47] *See* Nolon, *supra* note 1, at manuscript 4 (stating that personal vehicle use is "one of the main drivers of greenhouse gas emissions and thus climate change" in the U.S.).

[48] *Id.*

[49] EPA GHG INVENTORY, *supra* note 45, at ES-8; Nolon, *supra* note 1, at manuscript 4.

[50] Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679, 692 n. 97 (1999.

[51] *Id.*

[52] Nolon, *supra* note 1, at manuscript 4–5.

have increased three-times faster than population between 1980 and 2007.[53] More accurately, the rise in VMTs is due to surging use of the personal automobile, which increased by 39% from 1990 to 2009.[54] This number will only continue to rise; by 2055 VMTs will exceed 7 trillion miles which is three-times higher than the 3 trillion miles traveled in 2006.[55]

Each additional VMT releases more GHG emissions into the atmosphere; causing climate change.[56] In that vein, creating a less car-dependent society is absolutely essential to climate change mitigation.[57] In fact, "[a]ccording to the Presidential Climate Action Project, "the [g]reatest potential for reducing greenhouse gas emissions and imported petroleum is to reduce vehicle miles traveled—the miles Americans drive each year."[58] The need to reduce VMTs,

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[53] Keith Bartholomew & Reid Ewing, Address at the 87th Transportation Research Board Annual Meeting: Land Use—Transportation Scenario Planning in an Era of Global Climate Change (Nov. 5, 2007); Nolon, *supra* note 1, at manuscript 4–5.

[54] EPA GHG INVENTORY; *supra* note 45, at 2–21; Nolon, *supra* note 1, at manuscript 5.

[55] AM. ASS'N OF STATE HIGHWAY AND TRANSP. OFFICIALS, FUTURE NEEDS OF THE U.S. SURFACE TRANSPORTATION SYSTEM 18 (2007); Nolan, *supra* note 1, at manuscript 5.

[56] Rawlings & Paterson, *supra* note 11, at 361; John A.T. Canale, Note, *Putting the Pieces Together: How Using Cooperative Federalism Can Help Solve the Climate Change Puzzle*, 39 B.C. ENVTL. AFF. L. REV. 2, manuscript 4 (forthcoming 2012).

[57] Nolon, *supra* note 1, at manuscript 22.

[58] Nolon, *supra* note 1, at manuscript 22, *citing* PRESIDENTIAL CLIMATE ACTION PROJECT, PRESIDENTIAL CLIMATE ACTION PROJECT PLAN § 7:6 (2007), *available at* http://www.climateactionproject.com/docs/PCAP_12_4_2007.pdf.

however, is not new. Since the 1970 amendments to the Clean Air Act (the "CAA"), policymakers have repeatedly identified the need to reduce the amount that people drive personal automobiles in order to curb air pollution.[59] Nevertheless, Americans have continued their dependence on the automobile, and VMTs have continued to rise.[60]

**Figure 1: Air Pollution from Automobiles**[61]

This picture of the hazy air quality of a typical commuter highway demonstrates the severity of the harmful air emissions released by automobiles.

[59] *See e.g.* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 246–50 (1999) (outlining the history of attempts to reduce transportation related air pollution caused by VMTs under the CAA); Robert E. Yuhnke, *The Amendments to Reform Transportation Planning in the Clean Air Act Amendments of 1990*, 5 TUL. ENVTL. L.J. 239, 241–46 (explaining how the CAA has continually tried to reduce air pollution from transportation sources by reducing VMTs).

[60] *See supra* notes 52–55 and accompanying text.

[61] *Six Vehicles That are Exempt From Smog Certification*, CARSDIRECT, (June 4, 2010), http://www.carsdirect.com/car-maintenance/6-vehicles-that-are-exempt-from-smog-certification.

Reducing VMTs has not been possible, however, because efforts to reduce VMTs have not been paired with efforts to change the way that land is developed.[62] People do not often drive for the sake of driving, but rather because it is the most convenient, or the only, way to get from their home to the places they need to go.[63] Current land development patterns that separate where people live from where people work, and where people entertain themselves guarantee that people will largely maintain their current driving habits.[64] Thus, to reduce VMTs, and mitigate climate change, it will be necessary to change the way and the extent that land is currently developed.[65]

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[62] *See* Nolon, *supra* note 1, at manuscript 22–23 (implying that changing land use regulation, which has not happened yet, will reduce VMTs); Rawlings & Paterson, *supra* note 11, at 361–62 (arguing that federal involvement in land use regulation will force the necessary changes, that have not occurred yet, to reduce VMTs); Rog, *supra* note 11, at 726–27 (stating that federal involvement in land use regulation, as opposed to local control, will help reduce VMTs); Philip E. Rothschild, *The Clean Air Act and Indirect Source Review: 1970–1991*, 10 UCLA J. ENVTL. L. & POL. 337, 345–46 (1992) (stating that the CAA was amended in 1977 in response to local and state resistance to changing their method of land use regulation).

[63] *See* SMART GROWTH TASK FORCE, INST. OF TRANSP. ENG'RS, SMART GROWTH: TRANSPORTATION GUIDELINES 30 (2003) (demonstrating that people will choose to travel by means other than an automobile when land is developed densely enough that people are able to travel by other means).

[64] *See* ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY 6–8, 2nd ed. (ABA 2010).

[65] *See id.*

**Rising VMTs are a Product of Sprawl Development**

People who live in cities drive 20% to 40% less than people who live in suburban neighborhoods.[66] Despite this fact, local governments largely continue to develop land in a method that separates various land uses and disperses where people live from where people work, and where people entertain themselves. This has been labeled, in general "urban sprawl," or sprawl development.

**Figure 2: Sprawl Development**[67]

(Blue Ash, OH)

This image depicts the sprawling suburban municipality, Blue Ash, Ohio. It is clear from the image that automobile transportation is the only realistic method of leaving the residential neighborhood.

[66] REID EWING ET AL., GROWING COOLER: EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 2, 9 (2008)

[67] *The Queen City from the Sky—Aerial Photos from Nov. 8, 2008*, QUEEN CITY DISCOVERY: EST. 2007, (Nov. 9, 2008), http://queencitydiscovery.blogspot.com/2008/11/queen-city-from-sky-aerial-photos-from.html.

*Sprawl Development Defined*

The Pennsylvania Supreme Court defined "sprawl" as the term "used to describe development that is an inefficient use of land (i.e. low density); constructed in a 'leap frog' manner in areas without existing infrastructure, often on prime farmland; auto dependent and consisting of isolated single use neighborhoods requiring excessive transportation."[68] Other definitions of sprawl development refer to being low-density, dispersed, poorly planned and automobile dependent.[69]

Though today sprawl development is often used as a negative term, at its inception national leaders promoted sprawl development as the ideal method of escaping the turpitude of life in the decaying cities.[70] As a result, between 1950 and 1985, eighteen of the twenty-five largest cities in the United States

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[68] In re Petition of Dolington Land Group, 839 A.2d 1021, 1029 n.8 (Pa. 2003), *quoted in* FREILICH, *supra* note 64.

[69] *See e.g.*, LINCOLN INSTITUTE OF PUBLIC POLICY, ALTERNATIVES TO SPRAWL 4 (1995); ANTHONY FLINT, THIS LAND: THE BATTLE OVER SPRAWL AND THE FUTURE OF AMERICA 28–29 (2006).

[70] DAVID OWEN, GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY 36, 107–09 (2009) (citing Henry Ford and Frank Lloyd Wright as early supporters of the development of suburban neighborhoods that now epitomize sprawl development).

experienced population decreases, and by 1990 the majority of Americans had moved to sprawling suburban neighborhoods.[71]

*Causes of Sprawl Development*

Two of the primary causes of sprawl development were the popularization of Euclidean zoning, and the promotion of the automobile as the ideal form of transportation.[72] Euclidean zoning[73] provided local governments with the mechanism for separating various land uses, and promoting the single-family home as the ideal residence to escape the drudgery of city life.[74] The federal government fostered increased use of automobiles by developing extensive interstate highway networks.[75] Easily accessible roadways and new zoning techniques provided both the means and the mechanisms for local governments to create sprawling suburban communities.

Once Americans had the means of travelling outside of cities with ease, areas that had previously been inaccessible became available for development.[76]

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[71] See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 4 (1985); Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 166–67 (1998).

[72] Rog, *supra* note 11, at 709–12.

[73] *See infra* notes 221–34 and accompanying text for an explanation of Euclidean zoning.

[74] *See* Rog, *supra* note 11, at 711–12.

[75] *Id.*

[76] *See* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Capacity*, 68 FORDHAM L. REV. 57 (1999).

Americans could travel to work from outside of the cities without the constraints of public transportation.[77] Therefore, Americans no longer needed to live where they worked. At the time, it seemed sensible to use zoning mechanisms to develop residential neighborhoods that were isolated from employment and recreation centers because the assumption was that people would prefer to commute to these places using automobiles.[78] As development outside of cities increased, people's pattern of moving away from this development and commuting via automobile continued. This cycle created the sprawling suburban communities present today.[79]

*Detrimental Impacts of Sprawl Development*

As many observers have noted, sprawl development and suburban living creates a way of life that requires daily use of the automobile to accomplish routine tasks that previously were done by foot.[80] This has resulted in the dramatic

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[77] *See* Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1535 (1996).

[78] *See* Buzbee, *supra* note 76, at 60.

[79] *See id.* at 65. As people moved outside of cities, new suburban communities developed around them, and this compelled people to again move outside of these areas away from the development, beginning the cycle again. In addition, as people moved outside of the cities there was less incentive or resources available for government to invest in the urban centers. Therefore, the cities continued falling into disrepair, and even move people began moving outside of the cities, thus increasing the rate of development outside of cities.

[80] *See* Catherine J. LaCroix, *Land Use and Climate Change: Is it Time for a National Land Use Policy?*, 35 ECOLOGY L. CURRENTS 124, 125 (2008).

increase in VMTs noted above, and the associated rise in GHG emissions.[81] Sprawl development is also associated with several other negative changes; including (1) lost resources associated with deterioration of the existing built environment; (2) loss and degradation of sensitive land areas like wetlands, historic areas, and natural resources; (3) fiscal insolvency due to decreased tax bases in many areas; (4) loss of agricultural and open space; and (5) mortgage foreclosure and real estate collapse due to deterioration and lack of investment in traditionally low- and moderate-income urban areas.[82] Though many of these problems could be addressed through a different approach to development, this thesis focuses exclusively on changing development patterns to reduce VMTs.[83]

**Coordinated Development: An Alternative to Sprawl Development**

One development approach that many scholars and planning practitioners advocate as an alternative to sprawl development is a coordinated approach to land development called "coordinated development."[84] Coordinated development

[81] *See supra* notes 26–65 and accompanying text.

[82] *See* FREILICH, *supra* note 64, at 8.

[83] This thesis does not suggest that changing the state and local approach to land development will alleviate all problems caused by the sprawl development that already exists. Changing land use development patterns is only one factor—albeit an important factor—in a complex array of issues involved with reducing currently existing sprawl development. Successfully stopping future sprawl development, and reducing already existing sprawl development, will require a far more holistic approach than simply focusing on land use development. This approach must address the economic, social, and cultural patterns that have developed since the advent of the automobile.

[84] *See e.g.* Nolon, *supra* note 1, at manuscript 22–23; Rawlings & Patterson, *supra* note 11, at 362.

occurs when land use planning is organized by bringing together local authorities, regional authorities, and occasionally state and federal authorities to develop plans designed to meet the collective interests of the group.[85]

In the case of transportation planning, coordination helps reduce VMTs by facilitating planning changes on both the local and regional level.[86] Coordinated development encourages local governments to allow high-density development in places where regional transportation authorities plan to build transportation infrastructure.[87] In addition, this coordination informs regional transportation authorities about where local governments plan to allow high-density development, so the regional transportation authorities can plan to build their transportation infrastructure in those areas.[88] Mass transit services become more feasible when local authorities allow high-density development.[89] Furthermore, high-density development is more attractive to local governments if they know that mass transit services will be available to the development.[90] Enabling and

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[85] Nolon *supra* note 1, at manuscript 22–23. This could also be called a "multi-scaler" approach to land use development.

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See id.* at 22.

[90] *See* FREILICH, *supra* note 64, at 116 (stating that transportation has the most profound influence on land use patterns and the rate of growth); Harry W. Richardson & Peter Gordon, *The Implications of the Breaking the Logjam Project for Smart Growth and Urban Land Use*, 17 N.Y.U. ENVTL. L.J. 529, 550 (2008) (observing the relationship between land development and

encouraging high-density development through facilitating coordinated development is one of the most effective ways of reducing VMTs.[91]

Coordinated development approaches have proven very successful for land use planning efforts in Germany and Switzerland.[92] In Germany, the government develops a program establishing regional land use priorities, and each province must develop a comprehensive land use development plan that is subject to review by the federal government.[93] Similarly, in Switzerland the federal government is authorized to issue land use regulations, which divide responsibilities for land use development among different levels of the Swiss government.[94] Primary tenets of the Swiss system include consulting between the various levels of government, regular reporting between the various levels of government about the current land use situation, and the elaboration of plans over specific policy areas.[95] Coordinated development approaches allowed Germany

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transportation development). One reason for this is that public transportation allows local governments to make less parking available to high-density development projects.

[91] *See* Nolon, *supra* note 1, at manuscript 22. "Studies [show] that increased population density decreased automobile ownership and the number of [VMTs]. 'Doubling the population density of a community could reduce per-family driving by as much as 20 to 30 percent.' 'One study found that at high density, levels of 10,000 to 50,000 people per square mile, half of all trips were not by automobile, and walking and bicycling increased significantly.'" *Id.*

[92] *See Rog*, *supra* note 11, at 723–25.

[93] *Id.* at 723.

[94] *Id.* at 724.

[95] *Id.*

and Switzerland to become paradigms of sustainable development, and avoid many of the sprawl development problems currently faced in the United States.[96]

Coordinated development strategies are not a novel concept to land use planners or planning in the U.S.,[97] but it has never been widely adopted.[98] Nevertheless, coordinated development offers an attractive alternative to sprawl development by requiring that plans be developed with the input of local, regional, and state authorities, and that decisions be made consistent with those plans.[99] Such a development approach is likely to encourage the coordination of high-density development with mass transit development, which in turn will greatly reduce VMTs.[100]

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[96] *Id.* at 720.

[97] *See* Martin R. Healy, *National Land Use Proposal: Land Use Legislation of Landmark Environmental Significance*, 3 B.C. ENVTL. AFF. L. REV. 355, 355–56(1974) (encouraging Congress to pass the National Land Use Policy Act which would have implemented a coordinated and cooperative approach to land use planning in the U.S.).

[98] *See* Nolon, *supra* note 1, at manuscript 23 (explaining that coordination is called for to a limited extent by federal law which requires some state and regional transportation planning, but does not include extensive land use planning as part of this duty).

[99] *See id.*

[100] *See id.* at 22–23.

# The Clean Air Act and Land Use Regulation

The Clean Air Act (the "CAA") is the current federal mechanism for regulating GHGs, and improving air quality.[101] If the federal government is going to use a current statute as the mechanism for changing land use patterns to improve air quality—and begin responding appropriately to climate change—such an action would likely have to be authorized under the CAA.[102] It is therefore necessary to explore how the CAA works, and what its relationship is to land use regulation.

**The Clean Air Act: An Overview**

The CAA, in its current form, was adopted in 1970 in response to the "growth in the amount and complexity of air pollution brought about by . . . the increasing use of motor vehicles, [which] has resulted in mounting dangers to the public health and welfare."[103] Since its enactment, the CAA has been substantially amended twice; in 1977 and in 1990.[104] The CAA targets different sources and

[101] Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[102] See 42 U.S.C. § 7401 (stating that the purpose of the CAA is to address the nation's air pollution); Massachusetts v. EPA, 549 U.S. at 528, 532 (concluding that pursuant to the CAA, the Environmental Protection Agency had the authority to regulate GHGs, a form of air pollution).

[103] 42 U.S.C. § 7401(a)(2).

[104] *See* ASHFORD & CALDART, *supra* note 7, at 345.

types of pollution by granting the Environmental Protection Agency ("EPA") broad authority to implement programs aimed at reducing air pollution.[105]

*General Structure of the CAA*

The CAAs general approach to curbing air pollution is described as "cooperative federalism."[106] The federal and state governments cooperate with one another to develop plans and programs to improve air quality within the states.[107] Specifically, EPA sets nationwide pollution standards to ensure ambient air quality—National Ambient Air Quality Standards ("NAAQS")—that are safe for public health.[108] EPA can then delegate authority to the states to develop State

[105] Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 STAN. L.J. 283, 287 (2010).

[106] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384–87 & n.35 (2005); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1197–99 (1995); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 302–03 (2011); Rog, *supra* note 11, at 726–27.

[107] *See* Ostrow, *supra* note 106 (citing the CAA as a statute that requires states to implement programs according to federal guidelines); Rog, *supra* note 11, at 726–27 (stating that cooperative federalism under the CAA requires federal-state collaboration to improve air quality).

[108] 42 U.S.C. § 7409 (2006); *see also* Donnellan, *supra* note 12, at 721–22. NAAQS are set for each "criteria pollutant" regulated under the CAA. There are currently six criteria pollutants, carbon monoxide, lead, nitrous oxides, ozone, particulate matter, and sulfur dioxide. Air Pollution Control Orientation Course, *Criteria Pollutants*, U.S. EPA (Mar. 30, 2012), http://www.epa.gov/apti/course422/ap5.html. Furthermore, in 2007, the Supreme Court held that the EPA had the authority under the CAA to regulate carbon dioxide and other GHG emissions if

Implementation Plans (SIPs) designed to achieve a level of pollution equal to, or below the NAAQS.[109] SIPs that meet federal standards are approved by EPA and have the force of federal law.[110] This system balances the competing interests of state and federal authorities by giving both entities regulatory power while ensuring that multiple interests are considered and addressed.[111] States retain flexibility to address air pollution in ways the meet local needs, while meeting federal standards that ensure public health.[112]

Title I and Title II of the CAA deal most directly with regulating air pollution emissions.[113] Title I predominantly addresses air pollution from stationary sources, while Title II addresses air pollution from mobile sources.[114]

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EPA made a finding that these emissions endanger public health or welfare. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Subsequently, in 2009 the EPA issued a final endangerment finding stating that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG. 66496 (Dec. 15, 2009). The endangerment finding mandates that EPA regulate GHGs. *See* Richardson, *supra* note 105, at 293.

[109] 42 U.S.C. § 7410; *see* Adler, *supra* note 59, at 234–35; Donnellan, *supra* note 12, at 723–74.

[110] Natural Res. Def. Council v. South Coast Air Quality Mgmt. Dist., 694 F. Supp. 2d 1092, 1096 (C.D. Cal. 2010).

[111] *See* 42 U.S.C. §§ 7408–10 (2006); Ostrow, *supra* note 106, at 302–03.

[112] *See* Ostrow, *supra* note 106, at 302–03.

[113] 42 U.S.C. §§ 7401–7590.

[114] *Id.*

Stationary sources are sources of pollution emissions that stay in one place, such are factories.[115] Alternatively, mobile sources are pollution-emitting entities that travel, such as cars and trucks.[116]

*Coordinated Development Under the CAA*

Because the CAA already adopts a cooperative federalism model with the SIP process—federal, state, and local governments working together—the CAA provides an ideal framework in which to foster coordinated development of land use planning.[117] Through creating the SIP, and fulfilling SIP requirements, different government entities with different primary concerns are already working together.[118] Cooperative federalism is also advantageous in that it allows each level of government to maintain its traditional role and function.[119]

Land use decisions made through this model—pursuant to plans created cooperatively by all interested government entities—would likely better accommodate the diverse needs of entire regions rather than just one municipality.[120] Local governments would still make day-to-day, individual land

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[115] *See id.* § 7411(a)(3); Canale, *supra* note 56, at manuscript 5.

[116] *See id.* § 7550(2); Canale, *supra* note 56, at manuscript 5.

[117] *See* Rawlings & Paterson, *supra* note 11, at 373–78; Rog, *supra* note 11, at 726–27.

[118] *See* Ostrow, *supra* note 106, at 302–03; Rawlings & Paterson, *supra* note 11, at 373–78; Rog, *supra* note 11, at 726–27.

[119] *See* Ostrow, *supra* note 106, at 302–03; Rawlings & Paterson, *supra* note 11, at 373–78; Rog, *supra* note 11, at 726–27.

[120] *See* Nolon *supra* note 1, at manuscript 22–23.

use and regulatory decisions.[121] Yet, local government would no longer be able to ignore the unique and regional concerns of other areas in the state, because the decisions would have to be consistent with the overarching land use scheme that the state and regional entities were involved with creating.[122] Furthermore, states would be responsible for ensuring that land use plans are designed to meet air quality standards through the oversight of the federal government in the SIP process.[123] Thus, requiring that states and local governments create development plans, and make decisions consistent with those plans, as part of the SIP process might be one way of using cooperative federalism to promote coordinated development in the land use process.[124]

*The CAA and Land Use Regulation*

Though Title II is the primary mechanism for regulating emissions from automobiles, Title I includes provisions that encourage states and local governments to adopt land use patterns and transportation control measures

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[121] *See* Ostrow, *supra* note 106, at 302–04 (asserting that under a cooperative federalism model states, and the locales within the state, will still be able to tailor regulation to unique conditions and individual needs); Rog, *supra* note 11, at 727 (explaining that under a cooperative federalism land use model states would still retain their focus on local concerns).

[122] *See* Rog, *supra* note 11, at 728–29 (implying that federal oversight of local land use regulation would foster sustainable land use and development patterns for an entire region, rather than allowing self-serving, unmitigated outward expansion by local governments).

[123] *See* Rawlings & Paterson, *supra* note 11, at 376–78.

[124] *See* Ostrow, *supra* note 106, at 302–04; Rawlings & Paterson, *supra* note 11, at 375–78, Rog, *supra* note 11, at 726–27.

("TCMs") that will reduce VMTs.[125] In order to receive certain federal highway grants, states must "include in their SIPs a calculation of vehicle emissions reductions which, in combination with stationary source emissions limitations," will result in NAAQS compliance.[126] This indirect source review *requires* developing transportation control plans, which may include TCMs.[127] In fact, certain nonattainment areas are *required* to include TCMs designed to reduce VMTs.[128] Amongst the available TCM regulatory options are those that directly implicate land use development: (1) ordinances to facilitate non-automobile travel; (2) local ordinances applicable to new shopping centers, special events, and other centers of vehicle activity, and (3) new construction of paths, tracks, or other areas designed solely for pedestrian or other non-motorized means of transport.[129] In response to fear that this indirect source review would infringe on the traditional role of state and local governments over land use regulation, Congress included Section 131—entitled Land Use Authority—in the 1990 CAA Amendments.[130]

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[125] 42 U.S.C. § 7408(f)(1)(A).

[126] Donnellan, *supra* note 12, at 727.

[127] *See id.* at 726–29.

[128] *Id.* at 727–28.

[129] *See id*. at 726–29, 726 n.127.

[130] *See* Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335, 342 (2010).

**Section 131: Land Use Authority**

Section 131 of the CAA was enacted in response to fear by local and state governments that the federal government would use its authority under the CAA to usurp their traditional authority over land use regulation.[131] These concerns were not entirely unfounded.

*History of Section 131*

Beginning in 1970, "the CAA [took] and aggressive policy towards [land use regulation]."[132] Section 110 of the CAA originally "required SIPs to include all measures necessary to meet the NAAQS, *including land use and transportation controls*."[133] This provision meant that EPA could not approve SIPs that did not contain such measures, and required EPA to issue Federal Implementation Plans ("FIPs") that did contain specific land use and transportation controls if states failed to do so.[134]

These invasive provisions of the CAA were met with backlash at almost every level. In fact, states employed multiple stall tactics to avoid complying with the requirement for land use and transportation control provisions in their SIPs.[135] Because of state resistance and the strong public backlash against Section 110, the

[131] *See infra* notes 132–49 and accompanying text.

[132] Adler, *supra* note 59, at 246.

[133] *Id*. at 246–47.

[134] *See id*. at 247. For example, one FIP required gasoline rationing in California. *Id.*

[135] *See id.* State stall tactics included constantly changing their SIPs, entering into SIP litigation, and resisting compliance with SIP requirements. *Id.*

requirement that SIPs include land use and transportation controls was removed from the CAA as part of the 1977 Amendments, and replaced with a recommendation that states do so.[136] In addition, the 1977 CAA Amendments prohibited direct inconsistencies between long-range transportation plans and SIPs; but did not require consistency.[137]

By 1990 Congress had to acknowledge that the CAA was not stringent enough to bring states in compliance with NAAQS.[138] Congress sought to reassert federal control over transportation planning and development as one method of forcing states to come into compliance with NAAQS.[139] Instead of avoiding direct conflicts, transportation plans were now required to affirmatively conform to SIPs.[140] Additionally, the 1990 Amendments required that certain municipalities with sufficiently unhealthy levels of ozone and carbon monoxide, with a population greater than 200,000, "ensure that future [land] development assumptions are consistent with the transportation system alternatives under consideration."[141] In other words, after 1990 the CAA required coordinated

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[136] *See* Philip E. Rothschild, *The Clean Air Act and Indirect Source Review: 1970–1991*, 10 UCLA J. ENVTL. L. & POL. 337, 345–46 (1992)

[137] Bartholomew, *supra* note 12, at 196.

[138] *See id*.; Yuhnke, *supra* note 59, at 244–46.

[139] *See* Bartholomew, *supra* note 12.

[140] *See id.* at 196–97; Adler, *supra* note 59, at 248–50; Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 URB. LAW. 589, 624–25 (1993).

[141] Bartholomew, *supra* note 12, at 198.

planning between land use and transportation authorities, and decision making consistent with this planning, in certain areas of the country.[142]

This shift requiring that land use decision making be made consistent with transportation planning imposed a new affirmative obligation on local governments.[143] Prior to the 1990 CAA Amendments, local governments only had to avoid direct conflicts with transportation plans, which allowed local governments to take no action so long as they weren't aware of any conflicts between transportation plans and their land use decisions.[144] After the 1990 Amendments were adopted, however, local governments had to educate themselves about the requirements of relevant transportation plans and act to ensure that all decision making was consistent with those plans.[145] Thus, the consistency requirement of the 1990 CAA Amendments imposed an affirmative obligation on affected local governments.[146]

These requirements had potentially dramatic implications for authority over land use regulation,[147] and Congress feared a public and political backlash

[142] *See id.* at 198–99.

[143] *See id.*

[144] *See id.* at 196.

[145] *See id.* at 196–99.

[146] *See id.*

[147] *See* Bartholomew, *supra* note 12, at 197–98.

similar to that experienced after the 1970 CAA Amendments.[148] In order to alleviate any concerns that the public, and local governments, had about federal infringement on local land use authority, Congress included Section 131 in the 1990 CAA Amendments.[149]

*Meaning of Section 131*

Section 131, entitled Land Use Authority, states that "Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use."[150] The precise activities that are prohibited under this statute entirely depend on the definition of the term "land use," which is not defined in the CAA.[151]

Because the exact definition of "land use," as used in Section 131, is not clear from the statute itself, it is necessary to look at the legislative history of this provision to determine how Congress intended the term "land use" to be interpreted.[152]

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[148] *Cf.* Adler, *supra* note 59, at 249–250 (noting the history of serious political resistance to federal requirements that states and localities fundamentally change their approach to land use decision making, which is a significant contributor to Congress being unwilling to force such changes).

[149] *See* H.R. REP. NO. 101-490, pt. 1, at 406 (1990).

[150] 42 U.S.C. § 7431 (2006).

[151] 42 U.S.C. § 7602 (2006).

[152] NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:1 (West 2011).

**Legislative History of Section 131**

The House of Representatives' Committee on Energy and Commerce added Section 131 to the 1990 CAA Amendments.[153] The Report on the 1990 CAA Amendments from the Committee on Energy and Commerce stated that Section 131 was added in response to the amended requirements for SIPs.[154] Depending on the air quality in a particular state, the SIPs may have to include "measures involving land use requirements."[155]

In order to alleviate any concerns of local governments that this requirement might provoke, Section 131 was added to reaffirm the role of local governments in making land use decisions.[156] Specifically, Section 131 was added to the statute to do the following:

> New section [131] clarifies that if land use requirements are necessary to meet the requirements of the Clean Air Act, nothing in the Act should be construed to affect State laws regarding the appropriate entities to adopt and implement such land use requirements. Its purpose is to preclude any inference that the Clean Air Act by its terms, as amended by this bill, authorizes air pollution control agencies to override individual project-specific land use decisions made by a city or county.[157]

The first sentence in this explanation of Section 131 simply reiterates that States can delegate authority over land use regulation to local governments and the CAA does not change this.[158] This is merely an issue of identifying the proper decision

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[153] H.R. REP. NO. 101-490.

[154] *See id.* at 406.

[155] *Id*.

[156] *See id.*

[157] *Id*.

[158] *See id*.

maker in the field of land use regulation, and not a substantive point. The second sentence is more substantive in nature, and makes explicit that Section 131 only prohibits the federal government from mandating "project-specific" land use decisions.[159] In other words, Section 131 affirms that whichever entity a State has authorized to make project-specific land use decisions—usually local governments—prior to the 1990 CAA Amendments, is still the entity that will make project-specific land use decisions after the 1990 CAA Amendments.[160]

Finally, by unambiguously stating that land use requirements may be necessary parts of SIPs, this statement about the meaning of Section 131 recognizes that the federal government is authorized under the CAA to engage in other types of land use regulation.[161] Thus, Section 131 reaffirms three points: (1) the CAA provides authority for the federal government to command some land use regulations; (2) the land use regulations made by the federal government cannot be "project-specific" land use decisions; and (3) the CAA does not change state laws that delegated project-specific land use decisions to local or county governments.[162]

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[159] *See* H.R. REP. NO. 101-490, at 406.

[160] *See id*.

[161] *See id*.

[162] *See id.* This paragraph in the report from the House of Representatives' Committee on Energy and Commerce is one of only two specific references to Section 131 in the entire legislative history of the 1990 CAA Amendments. The only other reference was from Congressman Moorhead, in which he stated that "its [sic] correct that the bill contains an amendment which

***Legislative History of the 1990 CAA Amendments***

Though there is only one reference that is specifically relevant to interpreting Section 131 in the legislative history of the 1990 CAA Amendments, there are several references in the legislative history to local governments and land use more generally that illuminate how Congress intended Section 131 to be interpreted.[163] Throughout the discussions of the 1990 CAA Amendments, Congressmen and witnesses expressed three primary concerns regarding local governments and land use: (1) local flexibility; (2) the need for plans; and (3) the need for consistency.[164]

First, substantial concern was expressed that state and local governments retain flexibility over land use regulation.[165] The legislative history indicates that

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retains the traditional rights of local governments in land-use decision. [sic]" 136 CONG. REC. H12,848–01 (daily ed. Oct. 26, 1990) (statement of Rep. Carlos J. Moorhead). Because this statement does not add any explanation to the specific meaning of "land use" in Section 131, the report from Energy and Commerce is the only specific guidance available about how Congress intended "land use" to be interpreted.

[163] *See generally*, 136 CONG. REC. H12,911-01 (daily ed. Oct. 26, 1990); 136 CONG. REC. S16,877-04 (daily ed. Oct. 27, 1990); 136 CONG. REC. S16,895-01 (daily ed. Oct. 27, 1990).

[164] *See* 136 CONG. REC. S16,877-04 (statement of Sen. Steven D. Symms) (stating that flexibility is necessary, but that local government actors have asked for federal legislation mandating stringent controls over local action); 136 CONG. REC. S16,895-01 (statements of Sen. Max. Baucus and Sen. Harry Reid).

[165] *See* 136 CONG. REC. S16,895-01 (statements of Sen. Max. Baucus and Sen. Harry Reid) (stating that history has demonstrated the need to stricter controls, but that local governments must

there was consensus that state and local governments should be able to choose the specific land use measures and controls that they would incorporate because state and local governments had the most information about local circumstances.[166] In addition, it was important that local and state governments have flexibility to choose the lowest-cost land use control, or at least an approach that fit within the state or local budget.[167] Other concerns included not wanting to stifle local innovation, and ensuring that local governments could control their own destinies.[168] Ultimately, safeguarding local and state government flexibility was the primary concern of Congress as regards local governments and land use regulation.[169]

Second, there was substantial acknowledgment among witnesses and Congressmen alike that the land use planning process was an important part of efficient and successful land use, transportation, and pollution regulation.[170]

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retain discretion to choose the least-cost, and most appropriate mechanisms for their circumstances).

[166] 136 CONG. REC. H12,911-01 (statement of Rep. Michael Oxley) (stating that local governments are the appropriate government entity to handle local environmental issues); 136 CONG. REC. S16,877-04; *see* 136 CONG. REC. S16,895-01.

[167] 136 CONG. REC. E3,712-02 (daily ed. Nov. 2, 1990) (statement of Rep. John D. Dingle).

[168] *Id*; *see also* 136 CONG. REC. H2,915-01 (daily ed. May 23, 1990) (statement of Rep. Thomas J. Bliley).

[169] *See e.g.* 136 CONG. REC. H2,915-01; 136 CONG. REC. S16,895-01; 136 CONG. REC. E3,712-02.

[170] *See* H.R. REP. NO. 101-490, pt. 3, at 9 (1990); *Alternative Fuels, Hearing Before the Subcomm. on Envtl. Prot. of the S. Comm. on Env't and Pub. Works*, 101st Cong. 136 (1990) (statement of

During subcommittee hearings, witness testimony emphasized the need for land use planning to be integrated with transportation planning, and for coordination of planning to be strengthened.[171] It was emphasized throughout the hearings in both the Senate and the House of Representatives that local planning efforts were necessary for improving transportation systems and improving air quality.[172] Even many local government officials expressed these concerns to Congress and asked for a federal mandate to require necessary planning.[173] Thus, not only was Congress aware of the need for local and coordinated land use planning, but they were explicitly asked to mandate such activities.[174] Furthermore, the need for land use planning was made so explicitly to Congress that had they intended to prohibit the federal government from requiring such planning, then they likely would have done so unambiguously in Section 131.

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James J. MacKenzie, Senior Assoc., Climate, Energy, and Pollution Program, World Res. Inst.) [hereinafter *Alternative Fuels Hearing*]; *The Impact of Air Quality Regulation on Federal Highway and Transit Programs, Hearing Before the Subcomm. on Investigations and Oversight of the H. Comm. of Pub. Works and Transport.*, 101st Cong. 222, 224 (1989) (statement by the American Planning Association on the Clean Air Act Amendments of 1989) [hereinafter *Highway and Transit Hearing*].

[171] *Highway and Transit Hearing*.

[172] *See id*.; *see also Alternative Fuels Hearing*.

[173] 136 CONG. REC. S16,877-04 (daily ed. Oct. 27, 1990) (statement of Sen. Steven D. Symms) (stating that local government actors have asked for federal legislation mandating stringent controls over local action).

[174] *Id.; Alternative Fuels Hearing; Highway and Transit Hearing*.

Finally, it was well understood that the planning process would be meaningless without requirements that decisions be made consistent with such planning.[175] State and local government associations expressed broad support to Congress for requiring conformity with plans.[176] More importantly, several committees in Congress specifically expressed the need for consistency between transportation plans and land use plans.[177] Ultimately, the CAA Amendments of 1990 did include consistency requirements to some extent.[178] Accordingly, maintaining local government flexibility in decision making, while acknowledging the importance of land use planning, and maintaining consistency with those plans were all important factors to the local government and land use provisions of the 1990 CAA Amendments.[179]

*Section 131 Commentary*

In addition to the legislative history of Section 131 and the 1990 CAA Amendments, commentary from legal scholars also informs the interpretation of

[175] H.R. REP. NO. 101-490, pt. 3, at 6.

[176] *See* 136 CONG. REC. H2,771-03 (daily ed. May 23, 1990) (statements of Rep. John. D. Dingle and Rep. Glenn M. Anderson).

[177] H.R. REP. NO. 101-490, pt. 3, at 6; *see Alternative Fuels Hearing*.

[178] *See infra* notes 195–208 and accompanying text.

[179] *See* H.R. REP. NO. 101-490, pt. 3, at 6, 9; *Highway and Transit Hearing; Alternative Fuels Hearing; see also* 136 CONG. REC. H12,911-01 (daily ed. Oct. 26, 1990); 136 CONG. REC. S16,877-04 (daily ed. Oct. 27, 1990); 136 CONG. REC. S16,895-01 (daily ed. Oct. 27, 1990).

Section 131.[180] The consensus among the few legal scholars who have explored the meaning of Section 131 is that it does not prohibit the federal government from engaging in all forms of land use regulation under the authority of the CAA.[181] Though Section 131 clearly places limits on the role of the federal government in land use regulation, legal scholars are divided as to the contours of those limits.[182]

Some scholars take an expansive view of the limits that Section 131 of the CAA places on federal land use authority.[183] Though the statute in no way references planning, Professor Jerold S. Kayden believes land use planning,

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[180] *See* SINGER & SINGER, *supra* note 152, at § 45.13 (implying that many sources outside the legislative history, including the research of others, are relevant to statutory interpretation).

[181] *See e.g.*, Peter A. Buchsbaum & Thomas C. Shearer, *Report of the Subcommittee on Federal Regulation of Land Use*, 26 Urb. Law. 831, 837 (1994); Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 456 (2000); John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Control*, 23 PACE ENVTL. L. REV. 821, 827 (2006).

[182] *See e.g.*, Buchsbaum & Shearer, *supra* note 181 (suggesting that Section 131 does not significantly alter the land use regulation authority already present under the CAA); Kayden, *supra* note 181 (arguing that Section 131 places broad prohibitions on authority to regulate land use under the CAA); Nolon, *supra* note 181 (bypassing the analysis regarding the prohibitions of Section 131).

[183] *See* Kayden, *supra* note 181; Shannon Brown, Note, *A Fly in the Ointment: Why Federal Preemption Doctrine and 42 U.S.C. § 7431 Do Not Preclude Local Land Use Regulations Related to Global Warming*, 23 REGENT U. L. REV. 239, 258–260 (2010–2011).

among other forms of land use regulation, are implicitly limited by Section 131.[184] Similarly, Shannon Brown believes that Section 131 poses a "formidable obstacle" to federal regulation of land use—specifically federal overrides of local land use ordinances.[185] More commonly, however, legal scholars do not delve into the actual meaning of Section 131, but rather take for granted that Section 131 includes broad limitations on the power of the federal government to regulate land use.[186]

Alternatively, many scholars argue that Section 131 leaves the door open for the federal government to play a significant role in land use regulation and policy.[187] In reporting for the Subcommittee of Federal Regulation of Land Use, attorneys Peter A. Buchsbaum and Thomas C. Shearer stated that, despite Section 131, "CAA restrictions . . . are likely to have significant . . . land-use implications and could be a future 'sleeping giant' of land-use and growth-management policy."[188] Subsequent scholars have reiterated that, even accounting for the limitations of Section 131, the CAA potentially allows for broad regulation of

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[184] *See* Kayden, *supra* note 181.

[185] *See* Brown, *supra* note 183.

[186] *See* Adler, *supra* note 59, at 248–49; Klass, *supra* note 130, at 342; Jerrold A. Long, *Sustainability Starts Locally: Untying the Hands of Local Governments to Create Sustainable Communities*, 10 WYO. L. REV. 1, 16–17 (2010); Nolon, *supra* note 181.

[187] *See* Bartholomew, *supra* note 12, at 198; Buchsbaum & Shearer, *supra* note 181.

[188] *See* Buchsbaum & Shearer, *supra* note 181.

land use by the federal government.[189] In fact, the reach of Section 131 is considered to be so limited by some that after the enactment of the 1990 CAA Amendments "many had hoped that the CAA[]'s restrictive conformity requirements would lead to 'tighter coordination of land use and transportation planning to promote development patterns that require less travel.'"[190] In other words, many scholars not only believe that the limitations imposed on federal land use control by Section 131 are limited, but also that the CAA *can* be used to attain greater coordination and consistency between transportation and land use planning.[191]

Thus, the legal scholarship on the meaning of Section 131 is divided, yet clearly Section 131 does not prohibit all federal forms of land use regulation.[192] Rather, the federal government's land use authority is limited to some extent; the contours of that limitation being still unclear.[193] Though the bulk of legal

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[189] *See* Bartholomew, *supra* note 12, at 198.

[190] *See id. quoting* ARNOLD M. HOWITT & ELIZABETH M. MOORE, LINKING TRANSPORTATION AND AIR QUALITY PLANNING: IMPLEMENTATION OF THE TRANSPORTATION CONFORMITY REGULATIONS IN 15 NONATTAINMENT AREAS 80 (1999); Michael R. Yarne, *Clean Air Act-Urban Development: Conformity as Catalyst:* Environmental Defense Fund v. EPA, 27 ECOLOGY L.Q. 841, 843 (2000).

[191] *See* Bartholomew, *supra* note 12, at 198; Buchsbaum & Shearer, *supra* note 181; Yarne, *supra* note 190.

[192] *See e.g.* Adler, *supra* note 59, at 248–49; Bartholomew, *supra* note 12, at 198; Kayden, *supra* note 181.

[193] *See e.g.* Adler, *supra* note 59, at 248–49; Bartholomew, *supra* note 12, at 198; Kayden, *supra* note 181.

scholarship has failed to analyze the precise scope of Section 131 meaningfully, both a narrow and broad view of the limitations imposed by Section 131 are advocated to some extent.[194] Therefore, it is necessary to look to other forms of clarification to determine the precise meaning of Section 131.

**Current Planning and Consistency Requirements Under the CAA**

Another helpful approach to determining the activities that Section 131 prohibits is to consider the activities that the CAA already requires or authorizes.[195] Presumably, Congress would not specifically authorize or require activities that are prohibited by Section 131 as infringements on local land use authority.[196]

*Planning and Coordination Requirements*

The CAA requires that extensive planning take place in certain nonattainment areas.[197] Through incorporating the requirements of the Intermodal Surface Transportation and Efficiency Act ("ISTEA"), and relevant subsequent legislation,[198] the CAA requires these nonattainment areas to engage in land use

[194] *See e.g.* Adler, *supra* note 59, at 248–49; Bartholomew, *supra* note 12, at 198; Kayden, *supra* note 181.

[195] *See* SINGER & SINGER, *supra* note 152, at § 45:5.

[196] *See id.*

[197] 42 U.S.C. § 7501 (2006).

[198] ISTEA was adopted by Congress in 1991, one year after Congress passed the 1990 CAA Amendments. The legislation known as ISTEA expired in 1997, at which time ISTEA was replaced by the Transportation Equity Act for the 21st Century ("TEA-21"). When TEA-21 lapsed

planning.[199] Specifically, when developing plans to bring nonattainment areas into compliance with NAAQS, state and local officials must develop this plan in coordination with "the continuing, cooperative and comprehensive transportation planning process required under" ISTEA, and vice versa.[200]

Development of the transportation plan that is incorporated into the CAA process of nonattainment areas requires consultation with "state and local agencies responsible for land use management . . . ."[201] Additionally, when

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in 2003 it was replaced by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"). Though SAFETEA-LU expired in 2009, Congress has continued to renew its funding formulas, and is expected to begin developing a replacement bill during the 2012 legislative session. *See* TRANSPORTATION FOR AMERICA, TRANSPORTATION-101: AN INTRODUCTION TO FEDERAL TRANSPORTATION POLICY 5–6, 18 fig.1.1, 22 (2011). All of these bills have similar provisions regarding land use planning, coordination, and consistency. *See* U.S. Dep't of Transp., *A Guide to Metropolitan Transportation Planning Under ISTEA*, NATIONAL TRANSPORTATION LIBRARY BUREAU OF TRANSPORTATION STATISTICS (Apr. 5, 2012), http://ntl.bts.gov/DOCS/424MTP.html; U.S. Dep't of Transp., *TEA-21: A Summary—Protecting Our Environment*, FEDERAL HIGHWAY ADMINISTRATION (Apr. 5, 2012), http://www.fhwa.dot.gov/tea21/sumenvir.htm#planning; U.S. Dep't of Transp., *A Summary of Highway Provisions in SAFETEA-LU*, FEDERAL HIGHWAY ADMINISTRATION (Apr. 5, 2012), http://www.fhwa.dot.gov/safetealu/summary.htm. For the sake of interpreting Section 131, which was passed in 1990, this thesis focuses exclusively on ISTEA. It is important to note, however, that the analysis would be similar under any of these laws.

[199] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134 (2008).

[200] *See* 42 U.S.C. § 7504.

[201] 23 U.S.C. § 134(i)(4)(A).

enacted in 1991, these transportation plans were required to account for the effect that transportation development will have on land use and development decisions, and be consistent "with the provisions of all short- and long-term land use and development plans."[202] Thus, land use considerations are already part of the mandatory transportation planning that must occur in conjunction with developing SIPs in nonattainment areas under the CAA.[203]

It is clear then that the CAA already requires coordinated planning among local, regional, and state government actors.[204] This planning and coordination has direct and tangible impacts on land use regulation and decision making.[205]

*Consistency Requirements*

The CAA also requires that decisions be consistent with plans. Consistency is required in the entire SIP process, and as established above, this already includes direct and indirect impacts on land use regulation.[206] Specifically, the 1990 CAA Amendments require that all state transportation

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[202] *See* 23 U.S.C. § 134 (f)(4) (1991); Buchsbaum, *supra* note 140, at 625. These provisions have since been changed. 23 U.S.C. § 134. There is no indication, however, that these changes were the result of a conflict with Section 131.

[203] *See* 23 U.S.C. § 134; 42 U.S.C. § 7504.

[204] *See* 23 U.S.C. § 134; 42 U.S.C. § 7504.

[205] *See* TRANSPORTATION FOR AMERICA, *supra* note 198, at 17 (discussing the critical link between land development and transportation).

[206] *See generally*, 42 U.S.C. § 7410; *see also supra* notes 125–30 and accompanying text, notes 197–205 and accompanying text.

plans be consistent with SIPs, and that certain nonattainment areas make future land development assumptions consistent with the transportation plans being developed.[207] Thus, not only does the CAA currently require land use planning to some extent, but there are also requirements that local land use regulations be consistent with these plans.[208]

[207] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134.

[208] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134.

# Land Use Regulation: Why Planning Requirements Will Make a Difference At the Local Level

If Section 131 of the CAA does not prohibit the federal government from requiring state or local governments to develop land use plans designed to reduce VMTs, and regulate land use consistently with those plans, then exercising this authority as part of the SIP process could dramatically change the approach to land use regulation throughout the United States.[209] To understand the implications of such a requirement, it is necessary to first understand the current status of land use regulation.

**Land Use Regulation**

Land use regulation is lawmaking that decides what certain pieces of land can be used for to accomplish the policy goals of certain government actors.[210] Because it is believed that people most directly connected with the land in question best make land use decisions, land use regulation is traditionally administered at the local level by municipal or county governments.[211] As previously stated, local governments have no legal obligation to coordinate land

[209] *See infra* notes 233–61 and accompanying text.

[210] *See* PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, CH. 1, INTRODUCTION AND USERS GUIDE, § 1.02[1] (LexisNexis Matthew Bender 2011).

[211] *See* LaCroix, *supra* note 80, at 125.

use regulation or development with their neighbors.[212] As a result, a region's development is often disjointed and uncoordinated.[213] Furthermore, local governments have no incentive to make decisions for the benefit of the entire region, but rather have every incentive to make self-serving land use decisions.[214]

Though land use is now considered a local concern, the 10th Amendment of the United States Constitution actually reserves authority over land use regulation for the states.[215] Local governments are only able to exercise land use authority because the relevant state governments delegated that power to them.[216] As such, states can take back all authority to govern land use regulation, or could modify the delegation of power to local governments.[217] Thus, traditionally

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[212] *Id.*

[213] *See id.*

[214] FREILICH ET AL., *supra* note 64, at 12.

[215] U.S. CONST. amend. X (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

[216] John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 377–78 (2002). All legal authority for local governments to regulate land use must be derived from the enabling statutes passed at the state level. *Id.*

[217] John R. Nolon, *Golden and its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENVTL. L. REV. 757, 758 (2006) (implying that states can reverse the delegation of land use authority by stating "the state's failure to reclaim some of their authority" is one of the greatest problems with addressing sprawl today). States can repeal or amend the enabling legislation that gives local governments' authority over land use, thereby changing the delegation of land use authority to local governments.

authority over land use regulation involved a combination of state and local actors.[218] The federal government, however, had no role.[219] Because of the quintessential role of local governments in land use regulation, any attempt by the federal government to intervene into this realm and force coordination has been attacked as a violation of state police power.[220] Federal land use regulation is not entirely unprecedented, however, and will be discussed in more detail below.

**Zoning**

The primary mechanism that local governments use to regulate land use today is zoning.[221] Zoning occurs when a local government, through its legislative process, divides all or some of the land within the municipality into different zones or zoning districts.[222] These zones define the type of uses and structures that can be developed on the land within that zone or district.[223] Zoning is the primary

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[218] *See* Nolon, *supra* note 216; Nolon, *supra* note 181.

[219] *See* Nolon, *supra* note 181.

[220] *See* Buzbee, *supra* note 76, at 99–100. Land use regulation is considered one of a state's police powers. Rohan, *supra* note 210, at § 1.03[2][a]. Police powers are the inherent government authority to regulate private activity in order to protect the health, safety, and welfare of the overall community. *Id.*

[221] *See* William A. Fischel, *Zoning and Land Use Regulation*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 403, 404–05 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000); Buzbee, *supra* note 76, at 98–100.

[222] Rog, *supra* note 11, at 708–09.

[223] *Id*. Zoning requires a written description of those zones, and a map illustrating where the zones are.

regulatory determinant of what a property owner can and cannot do with his or her property.[224] Despite the enormous power that local governments can wield over private property and the future of municipal development, there are very few restraints on how a local government exercises this power, or the breadth of local government authority.[225] Courts give great deference to the zoning decisions of local governments.[226]

Traditionally, zoning is used by local governments to separate different types of uses from one another.[227] For example, residential areas would be grouped together, and located a significant distance away from industrial and commercial areas.[228] The purpose of this design was to protect residences from the harmful effects of industrial uses of land.[229] It is precisely this mechanism of land use regulation that caused the problem of sprawl development discussed in Chapter 1.[230] Though the past two decades have experienced a movement towards

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[224] *See* Fischel, *supra* note 221, at 403–04, 409.

[225] *See* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION: CASES AND MATERIALS 223–4, (Aspen Publishers 2004).

[226] *See id*.

[227] *Id.* at 57. This is called Euclidean Zoning, because it was validated by the Supreme Court in the case Village of Euclid v. Ambler Realty. 272 U.S. 365 (1926). *Id*. at 52–56.

[228] *See* Rohan, *supra* note 210, at § 1.02[1].

[229] *Id*.

[230] *See supra* notes 72–79 and accompanying text.

mixed use development, the majority of zoning laws around the country still require that different uses of land be separated from one another.[231]

Mixed use zoning allows several different uses on the same parcel of land, at higher densities, and encourages development in already developed areas and near transportation corridors.[232] Despite the promise of mixed use zoning for alleviating the negative impacts of sprawl development, it has had a limited impact.[233] The impact of mixed use zoning has been limited because (1) it is not understood the same way by all people seeking to implement it; (2) it has only been implemented in a limited number of places; and (3) the lack of coordination between local governments makes it hard to plan this development in a way that makes sense.[234]

**Plan States vs. Non-Plan States**

Though all 50 states employ some form of zoning to regulate land use, not all states do this in the same way. Despite the importance of planning to both land use and environmental concerns, only some states require that zoning conform

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[231] *See* Rohan, *supra* note 210, at § 1.03[2][a].

[232] *See* FREILICH ET AL., *supra* note 64, at 157–59; 171–73.

[233] *See* FREILICH ET AL., *supra* note 64, at 11–12; Manan M. Yajnik, Comment, *Challenges to "Smart Growth": State Legislative Approaches to Comprehensive Growth Planning and the Local Government Issue*, 2004 WIS. L. REV. 229, 229 (2004).

[234] *See* Richardson & Gordon, *supra* note 90, at 531–30; Yajnik, *supra* note 233, at 258–59; Gabor Zovanyi, *The Role of Initial Statewide Smart-Growth Legislation in Advancing the Tenets of Smart Growth*, 39 Urb. Law. 371, 371 (2007).

with a land use plan, while many states have no requirements that any planning take place prior to adopting regulations governing private (or public) land development.[235] In those states, if planning does take place, there is no guarantee, or even likelihood, that subsequent land use decisions will be consistent with those plans.[236] Furthermore, even when conformity with a land use plan is required, that plan does not necessarily have to be developed in coordination with surrounding governments or regional entities.[237] Thus, federal requirements for planning, consistency, and coordinated development could have substantial impacts for both plan and non-plan states.

*Plan States*

In plan states, all land use regulations enacted by a local government must be consistent with a comprehensive, general, or master plan.[238] This

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[235] Daniel J. Curtin & 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, 331–39 (2005)

[236] *See id*.

[237] *See* Daniel J. Curtin, Jr., *Police Power: The General Plan*, PRACTICING LAW INSTITUTE, REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES, 363–71 (1991) (noting the mandatory elements of the comprehensive plan in California, and that coordination with other government entities was not one of them).

[238] *See id.* at 359. Different states refer to the plan by different terms. Some call the plan a comprehensive plan, some call it a general plan, whereas still others refer to the plan as a master plan. All terms refer essentially to the same type of document. *Id.* This thesis will use the term "comprehensive plan" to refer to all three of these plans.

comprehensive plan is developed by the local government, and is a "big picture," holistic vision of how the municipality will develop in the future.[239]

In plan states, local governments are required by state legislation to create a comprehensive plan, and to keep the comprehensive plan relatively current.[240] The state legislation requiring a plan will usually proscribe a process, and include a list of elements that must be a part of the plan such as transportation facilities, natural resource management, and open space preservation.[241] Furthermore, all of the elements of this comprehensive plan must be horizontally consistent with one another.[242] For example, the vision for developing transportation facilities and affordable housing cannot conflict with the goal of preserving open space or managing natural resources.[243] Finally, the municipality cannot engage in any other land use regulation—adopting zoning, for example—until the comprehensive plan has been completed.[244] All land use regulations adopted after the comprehensive plan has been created must be vertically consistent with every element of that plan.[245] In other words, in a plan state "[t]he propriety of any local

[239] *See* Witten, *supra* note 5, at 593.

[240] *See* Curtin, *supra* note 237, at 359–60.

[241] Witten, *supra* note 5.

[242] *See* Curtin, *supra* note 237, at 363, 371–72.

[243] *See id.*

[244] Witten, *supra* note 5.

[245] *See* Curtin, *supra* note 237, at 360.

decision affecting land use and development depends upon consistency with the applicable [comprehensive] plan and its elements."[246]

Given these strict consistency requirements, in plan states "'the [comprehensive] plan is the most important legal planning tool' for the [municipality] . . . [and] is unequivocally the 'constitution for all future development.'"[247] Having a "constitution" to guide all future development often means that development is better conceived, more predictable, and able to achieve long-term community goals and policies by withstanding "knee-jerk" reactions of local decision makers.[248] Because of these benefits, scholars routinely highlight the logic of local governments preparing comprehensive plans, and being required to link those plans to the land use regulations designed to enact the plans.[249] The advantages of functioning in a plan state are so strong, therefore, that whether or not to require local governments to adopt a comprehensive plan and regulate land use consistently with that plan should no longer be debated.[250]

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[246] *Id.*

[247] *See* Curtin & Witten, *supra* note 235, 335.

[248] *See id.*

[249] *See* Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act*, 35 B.C. ENVTL. AFF. L. REV. 217, 254 (2008).

[250] *See id.*

That is not to say that plan states are without problems. Plan states still encounter sprawl development.[251] Though the state enabling legislation requires certain processes and elements are included in a local government's comprehensive plan, coordination with surrounding local governments and regional entities is not necessarily required.[252] The local governments are still functioning as entities unto themselves, without reference to how their development fits within a regional scheme.[253] Therefore, "even plan states need to require more from their local governments."[254] If some forms of land use regulation are not prohibited by Section 131 of the CAA, then the CAA might provide authority for requiring more from local governments in plan states.

*Non-Plan States*

Unlike plan states, non-plan states have no requirement that local governments develop a comprehensive plan.[255] Though some local governments develop comprehensive plans, these plans are not legally binding, and land use

[251] *See* FREILICH ET AL., *supra* note 64, at 8 (noting that urban sprawl is responsible for the rapid loss of farm land in California, which happens to be one of the most notable plan states).

[252] *See* Curtin, *supra* note 237.

[253] *See id.*

[254] *See* Witten, *supra* note 5, at 596.

[255] Curtin & Witten, *supra* note 235, at 334.

regulations do not need to be made consistent with the plan.[256] Instead, zoning, subdivision, and any other land use regulations can be enacted without considering their relationship and consistency to one another, and how they fit into an overall land use vision for the municipality.[257] Land use development in these states is often very unpredictable.[258]

Additionally, without a binding comprehensive plan, inconsistent land use regulations often lead to unintended results—such as sprawl development—and "debates over local government priorities becomes hopelessly confused."[259] These local governments are unable to prioritize land use development that will reduce sprawl, and VMTs, over land use development that will have the opposite impact.[260] Thus, the lack of a binding comprehensive plan, and land use regulations that are consistent with the plan, poses a substantial obstacle to combatting sprawl development in non-plan states.

For the reasons stated above it is clear that many non-plan states could benefit substantially by becoming plan states.[261] Yet, because by definition, non-

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[256] *See* McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1023 (Mass. App. Ct. 2002) (stating that in Massachusetts, a typical example of a Non-Plan State, a master plan has no legal meaning); Curtin & Witten, *supra* note 235, at 336–37.

[257] *See* Witten, *supra* note 5, at 596.

[258] Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 517–18 (2003).

[259] *See* Witten, *supra* note 5, at 596–97.

[260] *See id.* at 597–98.

[261] See Witten, *supra* note 258.

plan states have not taken this leap, it will likely be necessary for an outside, federal authority to impose planning and consistency requirements on non-plan states and compel them to become plan states. If Section 131 of the CAA does not prohibit the federal government from imposing planning and consistency requirements, then the CAA might provide the federal government with authority to do just that.

**Examples of Federal Land Use Control**

Notwithstanding common understanding, federal regulation of land use is not unprecedented.[262] There are many statutes that explicitly or implicitly authorize the federal government to engage in land use regulation.[263] A brief explanation of how the federal government regulates land use through some of these statutes provides insight into how the federal government might regulate land use through the CAA.

*Coastal Zone Management Act*

The Coastal Zone Management Act (the "CZMA") was enacted to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[264]

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[262] *See infra* notes 262–82 and accompanying text.

[263] *Id.* Though this thesis only discusses three of these statutes, there are many more. Federal laws that indirectly affect land use development include the Clean Water Act, the Clean Air Act, and the Endangered Species Act, among others. *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW AND LITIGATION (Thomson Reuters 2011).

[264] 16 U.S. C. § 1452(1) (2006).

States affected by the CZMA are required "to prepare and adopt state plans aimed at furthering the policies of the CZMA."[265] In order to receive certain federal funding, these plans must be comprehensive coastal management programs that meet federal standards.[266] Finally, once a state adopts this comprehensive plan, all local project approvals and land use regulations must be made consistently with that plan.[267] This consistency is also a requirement for the state to receive federal funding under the program.[268] Thus, the CZMA requires that states develop comprehensive plans to manage their coastal zones, and requires that all local land use regulation be consistent with this plan.[269]

*Federal Land Policy and Management Act*

The Federal Land Policy and Management Act ("FLPMA") was enacted "to provide for the management, protection, development, and enhancement of the public lands."[270] Similar to the CZMA, the Bureau of Land Management is required to develop land use plans for the public lands under the agency's

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[265] BLAESSER & WEINSTEIN, *supra* note 263.

[266] 16 U.S.C. § 1454; BLAESSER & WEINSTEIN, *supra* note 263.

[267] BLAESSER & WEINSTEIN, *supra* note 263, at 861–62. Federal agencies that conduct or support activities in a state's coastal zone must ensure that those activities are also carried out in a way that is consistent with the state CZMA plan. *Id.* at 862.

[268] *Id.* at 862.

[269] *See id.* at 860–62.

[270] BUREAU OF LAND MANAGEMENT, THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976: COMMEMORATING 25 YEARS 5 (2001), *available at* http://www.blm.gov/flpma/FLPMA.pdf,

jurisdiction.[271] Furthermore, once the plan is developed, the BLM is required to manage the public lands in a manner that is consistent with the plan.[272] FLPMA, therefore, also imposes planning and consistency requirements on the land use planning process.[273]

*National Flood Insurance Act*

The National Flood Insurance Act established the National Flood Insurance Program ("NFLP") to "promote the public interest by providing appropriate protection against the perils of flood losses" and "encourage sound land use by minimizing exposure of property to flood losses."[274] The NFLP creates a Flood Insurance Rate Map which indicates the special hazard areas and high risk zones for flooding within a community.[275] Local communities are practically obligated to enact land use regulations that will reduce future flood risks attributed to new construction within these flood areas.[276] It is necessary for a local government to enact these regulations for property owners within the community to be eligible to purchase flood insurance.[277] Furthermore, to be eligible for flood insurance, all buildings constructed in the flood zone must be

[271] *See* SELMI & KUSHNER, *supra* note 225, at 418.

[272] *See id.*; *see also* 43 U.S.C. § 1732(a) (2006).

[273] *See id.*; *see also* 43 U.S.C. § 1732(a) (2006).

[274] 42 U.S.C. § 4001(c) (2006).

[275] *See* BLAESSER & WEINSTEIN, *supra* note 263, at 862–63.

[276] *Id.*

[277] *Id.*

constructed consistently with the flood-zone land use regulations.[278] The planning required by the NFLP is less obvious, but the federal requirement that local land use regulations be consistent with the federally produced map is similar to the consistency requirements of the CZMA.[279]

It is clear, therefore, that the federal government has enacted several statues that require land use planning and land use regulations consistent with those plans.[280] Moreover, many of these requirements directly impact the land use authority of local governments.[281] Put otherwise, there is substantial precedent for the federal government to exercise land use planning authority in concert with state and local governments in the area of VMT and GHG regulation.[282]

**The Spectrum of Land Use Regulation Potentially Affected by Section 131**

As previously mentioned, the term "land use regulation" includes a wide variety of mechanisms to control land use.[283] Accordingly, very different types of activities could be prohibited by Section 131, depending on how land use was intended to be defined by that provision.[284] It is necessary, therefore, to consider

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[278] *See id.*

[279] *See id*.

[280] *See generally id.*

[281] *See* BLAESSER & WEINSTEIN, *supra* note 263.

[282] *See id*.

[283] *See* SELMI & KUSHNER, *supra* note 225, at 4 (noting the broad variety of land use issues present with land use regulation).

[284] *See* 42 U.S.C. § 7431 (2006); SELMI & KUSHNER, *supra* note 225, at 4.

the different types of land use controls that may be affected by Section 131, depending on the definition of land use.

*All Land Use Regulations*

The most extreme interpretation of Section 131 would suggest that it prohibits the CAA from exerting any influence over any form of land use regulation. This would mean that local governments can completely ignore the requirements of the CAA at all times when establishing land use regulations. Essentially, the reach of the CAA would stop with the state, and neither the federal nor the state governments would be authorized to influence local land use activity for the sake of improving air quality.

*Coordination*

Land use regulation is often a collective endeavor that involves many government entities.[285] Within one municipality there may be a planning board, building inspector, traffic commissioner, zoning board of appeals, and other entities that all are involved in some way on the same project.[286] On a broader level, many projects involve more than one municipality, and region-wide

[285] *See e.g.* Nolon, *supra* note 1, at manuscript 22–23; Rawlings & Patterson, *supra* note 11, at 362.

[286] *See* SELMI & KUSHNER, *supra* note 225, at 29–36 (noting the variety of players involved in the process of land use regulation). *See generally*, DUXBURY, MASS., ZONING BYLAWS (2003) (describing the regulatory land use process in Duxbury, Massachusetts, including the various entities included in that process).

impacts.[287] Therefore, government and agency coordination is one element of land use regulation that might be implicated by Section 131.[288]

*Planning*

The term land use often includes land use planning. As stated above, land use planning occurs when a state or local government develops a plan for future growth and development, including plans that are designed to limit, guide, and manage such growth.[289] Planning can take several different forms, including: (1) comprehensive planning in which a local government develops a more generalized vision for how the municipality will grow; (2) strategic planning in which a municipal planning board or commission develops a strategy for meeting small-scale objectives within pragmatic real-world constraints; and (3) environmental planning in which local governments develop a land use plan to address the unforeseen environmental consequences of the municipality's development.[290] Different governments engage some or all of these planning activities to different extents.[291] As demonstrated, many local governments are not

[287] *See* FREILICH ET AL., *supra* note 64, at 11–12.

[288] *See* 42 U.S.C. § 7431 (2006); Nolon, *supra* note 1, at manuscript 22–23; Rawlings & Patterson, *supra* note 11, at 362.

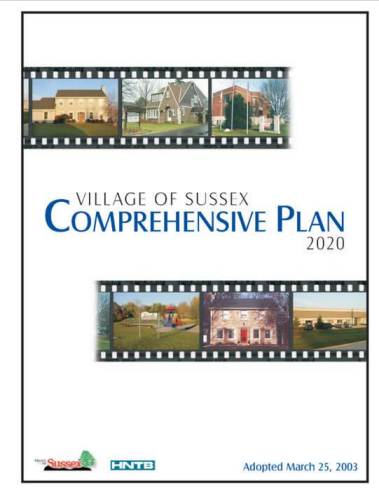
[289] *See* SELMI & KUSHNER, *supra* note 225, at 189.

[290] DAVID WALTERS, DESIGNING COMMUNITY: CHARRETTES, MASTER PLANS AND FORM-BASED CODES 31 (Elsevier Ltd. 2007).

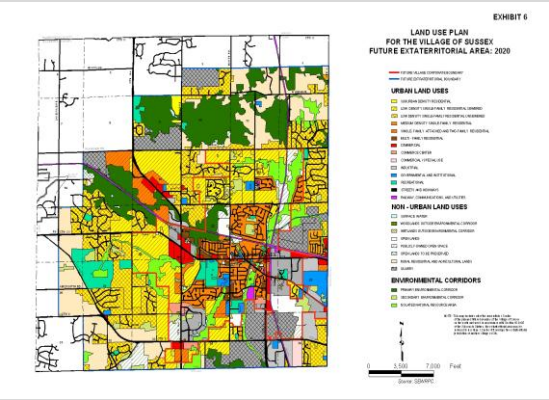
[291] *See* Curtin & Witten, *supra* note 235.

required to, and therefore do not, engage in comprehensive planning.[292] Thus, Section 131 may be interpreted to prohibit the federal government from requiring local or state governments to engage in land use planning.[293]

**Figure 3: Example of Comprehensive Plan and Planning Map[294]**




A Comprehensive Plan for a municipality is a document that outlines the development goals of the municipality over a certain time period, usually 20–30 years. This plan is aspirational, and does not contain legal rules that apply to land right now.




(Map included with Sussex Comprehensive Plan)

All Comprehensive Plans include maps that depict the development goals of the municipality. Unlike the maps below, these maps only depict general areas of the municipality, and not individual parcels of land.

[292] *Id*.

[293] *See* 42 U.S.C. § 7431; Curtin & Witten, *supra* note 235.

[294] *See generally*, VILLAGE OF SUSSEX, WI, COMPREHENSIVE PLAN 2020 (2003), available at http://www.village.sussex.wi.us/documents/SussexComprehensivePlan.pdf.

*Policy Specific Planning*

Even if Section 131 does not prohibit the federal government from requiring local or state governments to engage in land use planning, the federal government may not be able to promote specific policy objectives through this process.[295] Governments can engage in land use planning generally, or they can develop plans aimed at achieving specific policy goals.[296] The plan developed by a particular government entity may be significantly altered if that government entity is required to develop that plan with specific policy goals in mind.[297] For example, the comprehensive plan developed by a local government that is instructed to prioritize increasing affordable housing may look very different from a comprehensive plan developed by that same local government if the local government is required to prioritize preserving open space.[298] States that require local governments to develop comprehensive plans often require those local governments to include, or prioritize, certain policies within those plans.[299] This type of land use planning is more narrowly tailored than simply general planning, and may be prohibited by Section 131.[300]

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[295] *See* 42 U.S.C. § 7431; Witten, *supra* note 5.

[296] *See* Witten, *supra* note 5.

[297] *See id*.

[298] *See id*.

[299] *See id*.

[300] *See* 42 U.S.C. § 7431; Witten, *supra* note 5.

*Zoning*

Enacting zoning ordinances is another activity to which the term "land use" in Section 131 might refer.[301] As previously stated, zoning is traditionally enacted by local legislatures, and establishes which activities and structures are allowed to exist in certain areas—or zones—within a municipality.[302] This is a highly localized decision that requires local legislatures to determine: (1) the types of activities that they want to encourage within the municipality; (2) what specific areas within the municipality are best suited for certain activities and structures; and (3) how best to situate different activities and structures amongst one another.[303] If the federal government were to take this decision making power out of the hands of local governments, it would significantly limit a local government's ability to determine the direction and methods through which the municipality will pursue future development.[304] Federal infringement on the zoning authority of local governments would not only disrupt the federal structure, but would defy the practical notion that regulators are more likely to

[301] *See* 42 U.S.C. § 7431; Rog, *supra* note 11, at 708–09.

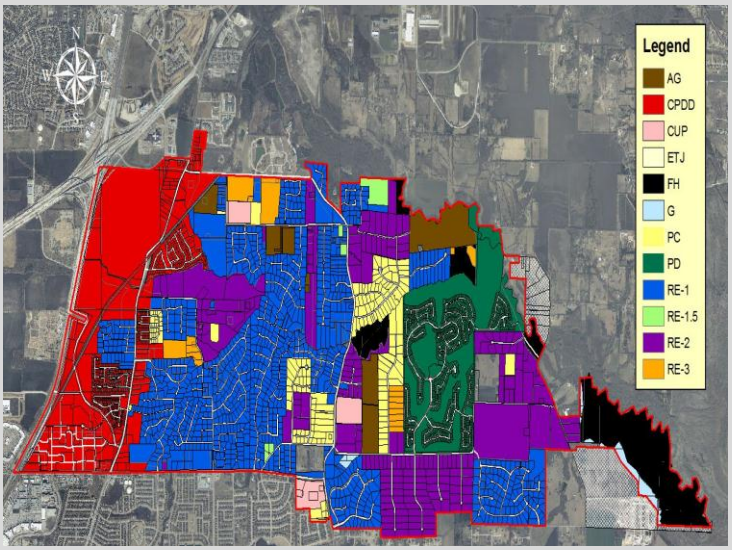
[302] *See* Rog, *supra* note 11, at 708–09.

[303] *See id*.

[304] *See id*.

understand the unique problems associated with land use decisions the "closer" they are to the specific land in question.[305]

**Figure 4: Zoning Map**[306]




(Fairview, TX)

In contrast to the map that accompanied the Comprehensive Plan, this zoning map includes individual parcels of land. By looking at this map, a person can know what uses and structures are currently permitted on specific parcels of land. Instead of being aspirational, these are current legal regulations.

*Siting*

Finally, Section 131 could be interpreted to prohibit the federal government from requiring local governments to make specific land use siting

[305] *See id.* This concept is often referred to as "subsidiarity," which means that decisions should be made by the lowest, smallest, or least-centralized decision maker who is capable of making the decision.

[306] *Zoning Map*, KEEPING IT COUNTRY: FAIRVIEW TEXAS, http://www.fairviewtexas.org/index.asp?Type=B_BASIC&SEC={CA78E281-3380-448B-A25D-C38B46D0CEBE}, (last visited Apr. 11, 2012).

decisions.[307] Land use siting is the act of picking a specific location for a specific project.[308] Once a developer chooses a location for a project, there are often many site-specific approvals that a developer needs to obtain from the local government before moving forward.[309] Therefore, an important part of land use regulation is the act of siting, and issuing all of the site-specific permits that are necessary for developing specific projects.[310]

**Figure 5: Siting Decisions**[311]


(Fairview, TX)

Land use siting involves making decisions about only one parcel of land within a zoning map. Therefore, instead of being concerned with the uses and structures allowed in a specific area, siting is more narrowly confined to the uses and structures appropriate for one parcel of land.

[307] See 42 U.S.C. § 7431; SELMI & KUSHNER, *supra* note 225, at 99–104.

[308] *See* Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, *in* PATRICIA E. SALKIN, TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING 133 (2001).

[309] *Id.*

[310] *See id.*

[311] *Planning Analyses and Support*, MAPPING AND PLANNING SERVICES: PLANNING, GIS, CARTOGRAPHY, http://www.mappingplanning.com/services.html (last visited Apr. 11, 2012).

Given this broad spectrum of land use activities that could be implicated by Section 131, it is necessary to interpret the word land use as used in Section 131 to know precisely which activities the federal government cannot engage in pursuant to the CAA.

## Requiring Comprehensive Planning and Regulations Consistent with Plans Would not Violate Section 131

### Section 131 Prohibits Federal Siting and Zoning Authority Only

Before drawing conclusions about what types of land use activities Section 131 does not include, it is necessary to determine what land use activities are included in the prohibitions of Section 131. To that end, it seems clear that federal interference in specific siting and zoning decisions for a local government is prohibited.[312]

It is beyond question that Section 131 must be read to prohibit the federal government from requiring local governments to site certain projects in certain locations.[313] The legislative history of Section 131 mandates this interpretation.[314] The committee report explaining Section 131 explicitly precludes the federal government from "overrid[ing] individual project-specific land use decisions."[315] Therefore, interpreting Section 131 to prohibit the federal government from interfering with the siting decision of local government is the most obvious interpretation of this provision.[316]

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[312] *See* H.R. REP. NO. 101-490, at 406; *supra* notes 153–79 and accompanying text.

[313] *See* 42 U.S.C. § 7431 (2006); Gerrard, *supra* note 308.

[314] *See* H.R. REP. NO. 101-490, at 406.

[315] *Id*.

[316] *See id*.

Furthermore, it is unlikely that Congress intended to give the federal government authority under the CAA to override local zoning decisions.[317] The legislative history is replete with statements about preserving flexibility at the local level, and ensuring that local governments can determine the most appropriate and cost effective methods of achieving the goals established under the CAA.[318] Furthermore, the committee report explaining Section 131 disclaims any attempt to change the entity currently responsible for adopting and implementing land use regulations, and local governments are almost always the entity that adopts and implements zoning regulations.[319] Therefore, Section 131 should be interpreted to prohibit the federal government from overriding or requiring specific zoning regulations in a municipality, as well as local government siting decisions.[320]

Finally, the term "land use" as used in Section 131 likely prohibits the federal government from developing plans for local governments.[321] Federal development of local land use plans would significantly diminish the flexibility of local governments to choose the development path best suited for their needs; a significant concern expressed in the legislative history.[322] Therefore, Section 131

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[317] *See supra* notes 163–79 and accompanying text.

[318] *Id.; see* SELMI & KUSHNER, *supra* note 225; Rog, *supra* note 11, at 708–09.

[319] *See* H.R. REP. NO. 101-490, at 406; *supra* notes 157–62 and accompanying text.

[320] *See* H.R. REP. NO. 101-490, at 406; *supra* notes 157–62 and accompanying text.

[321] *See supra* notes 163–79 and accompanying text.

[322] *See id.*

should be interpreted to prohibit the federal government from developing land use plans for local governments, requiring that local governments adopt specific zoning regulations, or requiring certain project-specific citing decisions.[323]

**Section 131 Does Not Prohibit Planning, Coordination, and Consistency Requirements Under the CAA**

Just as it is clear the Section 131 was intended to prohibit the federal government from interfering with local zoning and siting decisions, it is equally clear that the prohibitions in Section 131 are limited to local siting and zoning decisions.[324]

First and foremost, interpreting Section 131 to prohibit all forms of land use regulation is both unrealistic, and unsupported by the statute and legislative history.[325] Section 131 was enacted specifically because Section 110 of the CAA might have indirect impacts on local land use regulation and planning.[326] Furthermore, the CAA already requires that local governments work with transportation authorities and develop plans that influence land use regulation.[327] Finally, prohibiting the federal government from exerting any influence—even indirect influence—over land use regulations would make achieving the goals of

[323] *See* H.R. REP. NO. 101-490, at 406; *supra* notes 153–79 and accompanying text.

[324] *See* H.R. REP. NO. 101-490, at 406; *supra* notes 153–79 and accompanying text, 195–208 and accompanying text.

[325] *See* 42 U.S.C. § 7431 (2006); H.R. REP. NO. 101-490, at 406; *supra* notes 157–62 and accompanying text.

[326] *See* H.R. REP. NO. 101-490, at 406.

[327] *See supra* notes 195–208 and accompanying text.

the CAA nearly impossible.[328] Therefore, it is highly unlikely that Congress intended Section 131 to prohibit the federal government from exerting any influence whatsoever over land use regulation.[329]

Furthermore, if Section 131 could be interpreted to prohibit the federal government from compelling local government agencies to coordinate with any other government entity—local, state, or regional—then the CAA would currently be in violation of Section 131.[330] The CAA already requires coordination between local governments and regional transportation planning authorities.[331] Additionally, there is no indication in the legislative history of Section 131 that coordination between government entities was considered when developing Section 131.[332] Because all elements of a statute should always be construed to be legal, if possible, it is unlikely that Congress intended Section 131 to prohibit the federal government from requiring coordination between local governments and other entities.[333]

Similarly, Section 131 should not be interpreted to prohibit the federal government from requiring local governments to develop land use plans, and

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[328] *See supra* notes 125–30 and accompanying text.

[329] *See* 42 U.S.C. § 7431; H.R. REP. NO. 101-490, at 406; *supra* notes 195–208 and accompanying text.

[330] *See supra* notes 195–208 and accompanying text.

[331] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134 (2008).

[332] *See supra* notes 131–94 and accompanying text.

[333] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134; SINGER & SINGER, *supra* note 152, at § 45:5.

regulate land consistent with those plans.[334] In fact, the CAA already requires land use planning and consistency because of the compliance requirements with transportation planning.[335] Furthermore, requiring local governments to engage in land use planning would not significantly limit the flexibility of local governments to choose appropriate development paths.[336] This is so because planning imposes a procedural rather than substantive requirement on local governments.[337] Local governments can still create any plan that they choose, as long as land use regulations are consistent with the plan once it is in place.[338] Finally, requiring local governments to plan does not override decisions that local governments may make regarding zoning, or project-specific siting.[339] Local governments would still develop their own plans, create their own zoning, and make all the siting decisions for specific projects.[340] Therefore, Section 131 was not intended to be understood to prohibit the federal government from requiring

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[334] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134; SINGER & SINGER, *supra* note 152, at § 45:5.

[335] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134.

[336] *See supra* notes 163–79 and accompanying text; *supra* notes 289–94 and accompanying text.

[337] *See* Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593; *supra* notes 163–79 and accompanying text.

[338] *See* Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593.

[339] *See* Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593; *supra* notes 289–310 and accompanying text.

[340] *See* Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593; *supra* notes 289–310 and accompanying text.

local governments to engage in land use planning, and regulating land use consistently with those plans.[341]

Even if the federal government required local governments to prioritize certain policy initiatives when creating their plans—such as reducing VMTs—this planning would still not be prohibited by Section 131.[342] As with general planning, the CAA already requires policy driven planning by requiring that local governments work with transportation planning entities to coordinate transportation plans with local land use policies.[343] The CAA is, in essence, prioritizing developing transportation policies that reduce air pollution over other policies.[344] Thus, it is unlikely that Section 131 was intended to prohibit the federal government from requiring local governments to develop comprehensive land use plans that prioritize policies designed to reduce air pollution over other policies.[345] Reducing VMTs within a municipality would be one such policy.[346]

Even if Section 131 were interpreted to prohibit the federal government from requiring that local governments develop comprehensive land use plans, and

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[341] *See* 42 U.S.C. § 7431 (2006); Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593; *supra* notes 150–208 and accompanying text.

[342] *See* 42 U.S.C. § 7431; *supra* notes 295–300 and accompanying text.

[343] *See* 42 U.S.C. § 7504 (2006); 23 U.S.C. § 134 (2008).

[344] *See* 42 U.S.C. § 7504; 23 U.S.C. § 134.

[345] *See* 42 U.S.C. §§ 7431, 7504; 23 U.S.C. § 134; *supra* notes 295–300 and accompanying text.

[346] *See* Curtin, *supra* note 237, at 359–60; Witten, *supra* note 5, at 593; *supra* notes 295–300 and accompanying text.

adopt regulations consistent with those plans, the federal government still may be able to accomplish these ends. Section 131 only prohibits the federal government from interfering with local or county land use decisions, and does not reference state governments.[347] Land use authority, however, is ultimately vested in the states, and not local or county governments.[348] In other words, local governments are creatures of the state, and have no inherent authority of their own.[349] States have supreme authority over land use regulation, and Section 131 does not prohibit the federal government from affecting this authority.[350] So, if the federal government cannot require that local governments create land use plans to reduce VMTs, it could require that state governments develop land use plans to reduce VMTs statewide. The states, then, could create this plan and require local governments to comply with its provisions, or could delegate this responsibility to the local level. Either way, similar ends would be accomplished.[351]

The above analysis of the legislative history of Section 131 and the current provisions of the CAA clearly demonstrate that the restrictions in Section 131 are limited to federal authority to create local land use plans themselves, require specific zoning regulations, or make project-specific siting decisions.[352] Thus,

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[347] 42 U.S.C. § 7431.

[348] *See supra* notes 215–20 and accompanying text.

[349] *See id.*

[350] *See* 42 U.S.C. § 7431, *supra* notes 215–20 and accompanying text.

[351] *See* 42 U.S.C. § 7431; *supra* notes 215–20 and accompanying text.

[352] *See supra* notes 312–23 and accompanying text.

Section 131 of the CAA in no way prohibits the federal government from requiring that local governments develop comprehensive land use plans, in coordination with other interested government entities, and enact land use regulations that are consistent with the comprehensive plan.[353]

### The CAA Should Require Local Land Use Planning, Coordination, and Consistency to Reduce VMTs

Not only can the federal government claim authority under the CAA to require local land use planning, coordination, and consistency, but the federal government should exercise this authority to force reduction of VMTs. As discussed in Chapter 1, the continued increase in VMTs is directly related to the pattern of sprawl development that is still the primary development model for local governments.[354] People continue to spend significant time in their cars because local governments continue to develop in a manner that separates residential uses from commercial and retail uses.[355] This development model forces people to drive to a distant location anytime they need something that they do not have at home.[356]

One of the fastest ways to reduce VMTs—and therefore cut GHG emissions—is to change the way that land is developed on a local level.[357] This

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[353] *See supra* notes 324–53 and accompanying text.

[354] *See supra* notes 48–83 and accompanying text.

[355] *See id.*

[356] *See id.*

[357] *See supra* notes 26–65 and accompanying text.

will require local governments to create plans for how they will develop in the future in a manner that will reduce VMTs.[358] These plans must be developed in coordination with other interested government entities, to mitigate the local government instinct to make entirely self-serving decisions.[359] Finally, local governments must be forced to heed these plans, by enacting land use regulations that are consistent with these plans, or else these plans will have a severely limited impact.[360] These steps are not only appropriate, but they are necessary if the Unites States is to make a meaningful reduction in VMTs.[361] The CAA offers

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[358] *See supra* notes 84–100 and accompanying text.

[359] *See id.*

[360] *See id.*; *supra* notes 235–61 and accompanying text.

[361] *See supra* notes 26–100 and accompanying text, notes 235–61 and accompanying text. This thesis has determined that Section 131 does not prohibit the federal government from requiring planning, coordination, and consistency in land use regulation under the authority of the CAA. Further research is necessary, however, to determine whether this is a realistic method of requiring state and local governments to engage in coordinated land use planning with regulations that are consistent with those plans. This research should include the legal and political realities of bringing this goal to fruition. Not only is it necessary to examine more closely the legal requirements of the CAA, and the individual states, to determine what it would look like for the federal government to try to implement land use planning, coordination, and consistency requirements, but further research about the current political climate of state and local governments is necessary to determine whether such requirements would be tolerated. At the very least, though, this thesis has demonstrated that Section 131 does not prohibit from the federal government from attempting to implement land use planning, coordination, and consistency requirements.

an ideal framework for implementing these requirements because the cooperative federalism model strikes a balance between respecting the traditional role of state and local authority in land use regulation, while ensuring that state and local governments begin responding appropriately to the threats of climate change.[362]

[362] *See supra* notes 106–24 and accompanying text.

# Conclusion

This thesis began with the bold statement that, although the climate is changing dramatically, Americans are not responding appropriately. The goal of this thesis has been to debunk the myth that the federal government does not have authority under the CAA to force local government to make the necessary changes to land use regulation that would enable Americans to drive less.

It is true that Section 131 of the CAA—entitled Land Use Authority—could be interpreted to prohibit the federal government from exercising land use authority under the CAA. Analyzed in its terms and context, however, Section 131 has quite a different intended function and meaning. The term "land use" covers a broad array of activities, and pinpointing the specific activities that are implicated by Section 131 is necessary to understanding the limits of federal authority over local land use decisions. The legislative history of Section 131 and current requirements of the CAA establish clearly that Section 131 only applies to federal involvement in project-specific siting decisions, local zoning decisions, and federal development of local land use plans. Conversely, there are several land use activities that are not implicated by Section 131, including requiring that local governments (1) make their own comprehensive land use plans, (2) coordinate with other governments during the development of these plans, and (3) make all subsequent land use regulations consistent with these plans. Furthermore, the federal government can require that, when developing these

comprehensive land use plans, local governments prioritize reducing VMTs to improve air quality over other policy goals.

Coordination between interested government entities, comprehensive planning, and land use regulations consistent with those plans are necessary if the goal of reducing the nation's driving mileage, and thereby decreasing the release of climate changing GHGs into the atmosphere, is to be realized. Only under these circumstances will substantial reductions in VMTs be feasible, and Americans can begin the inevitable and necessary battle against this major driver of anthropogenic climate change.