The Intergovernmental Dynamics of Land Use Law in the United States

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I. Introduction to Land Use Law in the United States

In the United States, land use law is generally controlled by state and local governments, with limited influence or control by the federal government. The bulk of the federal involvement, as will be highlighted later, focuses on environmental considerations, with the local governments controlling the very basic yet powerful decisions with respect to how land uses are allocated and regulated. The current system of land use control in the U.S. is relatively new compared to those of our European counterparts. In fact, it was not until 1916 that the nation’s first comprehensive zoning ordinance was adopted by the City of New York. As described below, this was followed by model federal policies that were distributed, but not enacted into law, yet these policies shaped the early regulatory regime for land use control in the U.S. and still influence the design and implementation of most land use laws today. This chapter concludes with the proposition that to meet present sustainability demands, the fragmented system of U.S. land use control and land resource allocation must be better managed. This will require leadership at all levels of government and a commitment to building trust and relationships that will enable shifting between levels of government when it comes to determining the level most appropriate to control decision making on specific issues.

A. Early History

To best understand the development of land use regulation in the United States, the colonial era perspective and the content of the U.S. Constitution is important. The U.S. Constitution was drafted by state-selected delegates and was signed by them in 1787. It created a national government—one of delegated powers, limited to those specifically included in the Constitution. Notably, the full police powers of the states were not delegated to the federal government. The principal power given to the federal government that affects private land use is the authority to

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1 Patricia E. Salkin is Dean and Professor of Law of Touro Law Center. Special thanks to Daniel Gross, Esq. for his assistance. This article draws upon the author’s previously published article (with permission), “The Quiet Revolution and Federalism: Into the Future,” 45 John Marshall L.Rev.253 (2012).

2 See, Nolon and Salkin, Land Use Law in a Nutshell (West 2006). “As happened in England after the great fire of 1666, the march of unwanted land uses uptown precipitated a crisis leading to the creation of a Commission which recommended stricter land use controls to protect the City’s economy, private property values, and public health and safety.”

3 This section appears in, Nolon and Salkin, Land Use and Sustainable Development Law: Cases and Materials, 8th ed. (West 2012)
regulate interstate commerce, under Article I, § 8 of the U.S. Constitution. Article VI of the Constitution grants the federal government the power to enter into international treaties that legally bind federal, state, and local governments in the United States. It is under this authority that the United States has entered into many bilateral, regional, and international agreements that promote resource conservation and prevent environmental pollution.

The Tenth Amendment of the U.S. Constitution reserves to the states all powers not delegated by the Constitution to the federal government; this power protects states against encroachments by Congress that are not within its delegated authority. The weight of legal and political opinion holds that this allocation of power in the federal republic leaves the states in charge of regulating how private land is used, subject to additional federal regulation protecting interstate commerce or enforcing an international treaty. This concept of dual sovereignty is dynamic and leaves room for flexibility in responding to challenges at the state and federal level, with tensions resolved by the U.S. Supreme Court.

B. The Modern Era of Land Use Control in the U.S.

Prior to the twentieth century, local land use planning as we know it did not exist; urban settlers and developers shaped the landscape through their “own sweet will,” and restrictive covenants, common law nuisance, and limited municipal action promoting safety—such as fire and building codes—were all that limited the improvement and development of land. In partial reaction to this uncoordinated and sometimes undesirable haphazard development that resulted in various economic impacts, municipal governments began to institute land use controls, such as zoning.

Zoning originated from the protests of New York City merchants concerned with the proximity of factories to their retail establishments. These local merchants had what they believed to be a serious problem—one which affected their welfare, although not so much their health or safety—these merchants were losing business. During the early twentieth century, clothing factories were located as close to their main buyers [i.e. merchants] as possible to reduce their costs, notably transportation. When the factories let out for the day (or during lunch time) factory workers would leave their factory, adding to the congestion of the already crowded city streets. More importantly to the merchants, these factory workers were not only congesting streets, but driving away business. The merchants believed that keeping these factories—and factory workers—so close to the stores was “distasteful, unaesthetic, and unconducive to the image that merchants were attempting to foster.” When the merchants attempted to move their stores, and leave areas inhabited by these pesky neighbors, the factories “in perverse obedience to what seemed to be an inevitable economic logic, followed them.” Eventually, in 1907, the Fifth Avenue Association—made up of these merchants—was formed to address the factory problem.

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The Association struggled with a solution to the factory problem for years, before approaching the Manhattan borough president in 1911. The borough president subsequently appointed a Fifth Avenue Commission—mostly made up of the Fifth Avenue Association—to study the problem. The solution the Commission came up with “was to limit the heights of buildings in the Fifth Avenue area. . . . Buildings should be limited to a height of 125 feet, on the theory that this particular height would make [factory] construction uneconomical without hampering [the merchant’s] retail activity.” Soon after, contemporary reformers saw the good that this idea could provide for smarter growth in all throughout a city that was inundated with new citizens every day.

Cumulatively, this led to the enactment of the New York City Zoning Resolution of 1916. The Resolution contained three provisions with three sets of restrictions for building within the city: use restrictions, bulk restrictions and administrative restrictions. The use restrictions separated city land into four districts: residential, business, unrestricted, and undetermined. These designations prohibited incompatible uses from locating within districts. The bulk restrictions instituted prohibitions on the height and size of buildings according to their use districts. This included five levels of height districts, each of which “limited the height of the building at the street line to a varying multiple of the street width.” Finally, the administrative restrictions of the Resolution contained enforcement provisions, including a Board of Standards and Appeals (who heard appeals from zoning restrictions); and a Board of Estimate (who would amend the code when necessary). Eventually, in 1920, this Resolution would be upheld by New York’s highest court—The Court of Appeals—as a proper exercise of the state’s police power.

The New York Zoning Resolution was the catalyst for a larger movement by local governments across the country to control the development of land within their jurisdiction. The Resolution recognized that certain land uses were incompatible with, and should be separated

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10 Stanislaw J. Makielski, Jr. The Politics of Zoning: The New York Experience 40 (Columbia Univ. Press, 1966) (“The borough presidents and the local and specialized interest groups all left their imprint on the final form of the Zoning Resolution of 1916. If it unlikely that the Reformers could have achieved zoning without considering borough and local interests.”)
11 About Zoning, New York City Dep’t of City Planning (2011), http://www.nyc.gov/html/dcp/html/zone/zonehis.shtml. See also Stanislaw J. Makielski, Jr. The Politics of Zoning: The New York Experience 7 (“New York City’s Zoning Resolution of 1916 was a major innovation in municipal public policy. It was the product of municipal reform, a set of responses to complex economic and social problems, and the claims of local and special interests.”)
12 “Undetermined” was left for future determination, although it was generally believed that it would be used mostly for industrial activities. Stanislaw J. Makielski, Jr. The Politics of Zoning: The New York Experience 36 (Columbia Univ. Press, 1966).
15 The Board of Estimate also had to abide by the “Twenty Percent Rule” where, if twenty percent of property owners affected by a change in the zoning code objected to the change, the Board was required to pass an amendment to the zoning code unanimously, rather than by a simple majority. Stanislaw J. Makielski, Jr. The Politics of Zoning: The New York Experience 37 (Columbia Univ. Press, 1966).
from, one another quickly caught on with other states. Within five years of the passage of New York’s Zoning Resolution, “roughly twenty states had authorized some or all municipalities to pass comprehensive zoning ordinances,”17 and within ten years that number doubled, resulting in vast increases in the number of local zoning ordinances.18

By the end of the 1920’s, nearly 800 municipalities nationwide had adopted land-use measures.19 In response to phenomena, as well as public health concerns about urban-dwellers in unzoned cities, and the belief that homeownership would have economic and social benefits, the United States Department of Commerce created two committees.20 One committee would draft a model zoning and planning act, and the other would draft a state housing code—each of these would be influenced by the New York Zoning Resolution.21

1. The Standard State Zoning Enabling Act and the Standard City Planning Enabling Act

The first committee would go on to draft the Standard State Zoning Enabling Act (SZEA) in 1924, with a revised version being published in 1926.22 The SZEA “was intended to delegate the state’s police power to municipalities to remove any question over their authority to enact zoning ordinances.”23 The SZEA was adopted by all fifty states,24 and scholars continue to document the profound and lasting impact that the model planning and zoning enabling acts have had on current state and local land use regulatory regimes. The SZEA provided a blueprint for local municipalities to enact zoning laws, by attempting to create a system where localities could regulate the land uses within their jurisdiction while also balancing the property rights of landowners.25 The SZEA further showed municipalities how to enact and amend zoning

18 Michael Allan Wolf, The Zoning of America: Euclid v. Ember 29 (Univ. Press of Ks, 2008). Interestingly, one of the key planners who worked on the New York City Zoning Controls would go on to draft similar ordinances in Dallas, Atlanta, Providence, Columbus and the suburban Cleveland area. Id at 28-29.
20 This effort was spearheaded by then Secretary of Commerce and future U.S. President, Herbert Hoover. See, Wolf, The Zoning of America: Euclid v. Ambler at 29.
22 Wolf, The Zoning of America: Euclid v. Ambler 30 Include a link to the Act
23 Stuart Meck, Paul Wack & Michelle J. Zimet, Zoning and Subdivision Regulations in The Practice of Local Government Planning 344 (“The SZEA contained procedures for establishing and amending zoning ordinances, and it authorized a temporary zoning commission in the municipality to recommend to the local legislative body district boundaries along with the proposed written text of the ordinance; the zoning commission was to go out of existence after the initial ordinance was enacted. Appeals in connection with enforcement of the zoning code were to be heard by a board of adjustment created by the SZEA. The board was an independent body given the authority to grant variances . . . and allow special exceptions . . . in a zone when certain criteria were shown to be satisfied.”)
25 Advisory Committee on Zoning, Department of Commerce, Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (Rev. 1926), available at http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf (Model Act was published in 1924 by the Advisory Committee on Zoning, Department of Commerce, revising the act in 1926.) Note that a second model act, “A Standard City Planning Enabling Act” was publish in 1928, yet was never as popular as the Scea, likely because it gave less authority to planning authorities. Steven D. Villavaso, Planning Enabling Legislation in Louisiana: A Retrospective Analysis, 45 Loyola Law Review 655, 658 (1999) (citations omitted).
ordinances, as well how to authorize a zoning commission to propose the proper legislation for zoning.26

The Standard City Planning Enabling Act (SCPEA) was drafted in 1928 as a companion piece to the SZEA. The primary purpose for the SCPEA was to develop a “master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission’s judgment, bear relation to the planning of the municipality.”27 The SCPEA was further intended to “transform the process of land division from one that merely provided a more efficient and uniform method for selling land and recording . . . land to one in which local governments could control urban development.”28

Each of these model acts offered a uniform national framework for local land use planning, which heavily influenced, though did not require, further state and local actions. By 1930, 47 states had adopted zoning enabling legislation.29 Thirty five states had adopted enabling legislation based on the SZEA,30 and ten states had used the SCPEA.31 Today, the enabling legislation in nearly every state reflects the influence of either the SZEA or the SCPEA.32

2. Home Rule Authority

In addition to the powers that have been delegated to local governments through state statutes, localities may also possess zoning power through “home-rule” laws. Home rule refers to the division of power between state and local governments, specifically the ability of the local government to legislate without needing prior permission from the state government; however the exact allocation of home rule power varies greatly from state to state.

In terms of land use, home rule law provides most municipalities with the specific authority to adopt comprehensive plans and zoning ordinances to ensure health, safety, and welfare. As such, it is widely accepted that modern land use controls are promulgated by localities on their own initiative based on a local planning process designed to address what may be characterized as matters of local concern.

3. Efforts at Land Use Reform in the 1970s Focused on De-Localization

While it is widely accepted that modern American land use controls are promulgated by localities on their own initiative based on a local planning process designed to address what may be characterized as matters of local concern, the perception of local exclusivity in land use control was met with an increasing interest by regional and state governments who began exercising controls over local land use by the 1970s, due in large part to the belief that the local political process that controls land use decision making is incapable of providing outcomes that address challenges that span across municipal boundaries and therefore demand a greater than local view.

This phenomenon of de-localization in land use controls was first recognized by Fred Bosselman and David Callies in their seminal report for the Commission on Environmental Quality, *The Quiet Revolution in Land Use Control.*[^33] In this report, Bosselman and Callies found that land use in the United States, dominated by a local government decision making process, had developed into a “feudal” system, where municipalities decided land use issues for their own egocentric benefit, increasing their tax base and alleviating their perceived social problems.[^34] The report explained that locally dominated systems provide municipal officials with a paltry incentive to consider the land use needs of the nearby communities, or even the regions the municipal governments were a part of.[^35] This self-protecting behavior by the localities was noticed by state and regional authorities, who began to encroach upon municipal land use authority.

These new regional initiatives addressed issues of larger geographic significance, such as environmental and pollution concerns,[^36] and nationwide, states began to realize the impact local land use decisions were having environmentally, socially and economically. It became apparent that the impact of local land use regulations knew no political boundaries. A number of regional

[^33]: Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control* (Commission on Environmental Quality 1971)
[^34]: “It has become increasingly apparent that the local zoning ordinance, virtually the sole means of land use control in the United States for over half a century, has proved woefully inadequate to combat a host of social problems of statewide significance, social problems as well as problems involving environmental pollution and destruction of vital ecological systems, which threaten our very existence.” Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control* 1 (1971)
[^35]: Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control* 3 (1971) (“The comprehensive planning envisioned by zoning’s founders was never achieved, in part because the growing interrelatedness of our increasingly complex society makes it impossible for individual local governments to plan comprehensively, and in part because the physical consideration of land use, with which zoning was in theory designed to deal, frequently became submerged in petty local prejudices about who gets to live and work where.”)
[^36]: In many instances issues of larger geographical significant may not be addressed by local officials due to the lack of perspective, funding, or support. United States General Accounting Office, ENVIRONMENTAL PROTECTION Federal Incentives Could Help Promote Land Use That Protects Air and Water Quality at 63 (2001), available at http://www.gao.gov/new.items/d0212.pdf. In this Report to Congressional Requestors, the GAO was asked “to examine how (1) state and local transportation and air and water quality officials consider impacts of land use on the environment and (2) federal agencies can help these officials assess land use impacts.” In answering these questions, the GAO came to the conclusion that transportation and environmental officials do not consider the environmental effects of land use because “they are not required to consider these impacts; land use is a local decision and they believe that they have little ability to influence it; and they lack resources, data, and technical tools, such as modeling Capabilities.” *Id.* (at page 2 of PDF, not document).
and statewide statutory models emerged to deal with issues identified as matters of regional or statewide concern. It was this creeping but steady encroachment upon traditional local land use authority which Bosselman and Callies characterized as “the Quiet Revolution.” Since the 1970s, states, and more notably, the federal government, have adopted statutes and initiated programs that have significantly influenced and encroached upon local land use control, setting a stage for an ongoing power struggle for the control of policymaking and decision making when it comes to community planning and the land use regulatory regime.

The federal government in particular, seemingly maintaining a low profile when it comes to usurping local land use control, has probably had the greatest influence on local land use land use control over the last forty years, extending the reach of the Quiet Revolution once led by regional and state governments. In fact, Professor Bosselman remarked six years after the Quiet Revolution was released that Professor Donald Hagman had noted the “quiet federalization” of land use controls. 37 Today, the federal government exerts varying degrees of influence over local land use controls using approaches ranging from incentive based programs, to preemptive legislation and regulation. At one end of this spectrum are legislative and programmatic initiatives that simply serve to provide guidance or perhaps to incentivize or reward certain local land use planning and implementation strategies; and at the other end of the spectrum, new laws have emerged that go beyond mere encroachment on local land use policy, to preemption of local control. Still another set of statutes neither provides incentives nor entirely preempts local control, yet the directive influence exerted in these approaches results in decisions not entirely based upon local desires and plans. Bosselman has also observed that federal programs that construct or pay for the construction of federal facilities strongly influence surrounding land uses as well. 38

Although neither Congress nor the President have articulated a national land use policy to inform local zoning or other land use controls, a de facto, and perhaps ad hoc policy exists that continues to be implemented through numerous laws and incentivized funding programs. 39 Professor John R. Nolon explains that “there is confusion over the role that each level of government should play regarding land-use planning and regulation,” and that to move forward with any meaningful reform there must be a clarification as to the appropriate role for each level of government and how these roles should be coordinated. 40 Professor Bosselman’s admonition from more than three decades again remains true today, “Land use is a changing and

37 Bosselman, Feurer and Richter, FEDERAL LAND USE REGULATION (Practising Law Institute 1977) at 1(Noting that “This was not the result of any organized campaign to involve the federal government more closely in the way the nation’s land is used. Rather, the federal involvement has been incremental—as specific problems have attracted attention, specific programs have been created to deal with them”).

38 Bosselman, Feurer and Richter, FEDERAL LAND USE REGULATION (Practising Law Institute 1977) (“Federal programs affect the use of land in a variety of ways: 1. They directly regulate the use that may be made of land; 2. They fund state or local programs of land use regulations; 3. They require the preparation of plans to guide future land uses; 4. They construct, or pay for the construction of, facilities that use land and that may strongly influence surrounding land uses; and 5. They provide a variety of stimulants and depressants to various segments of the economy that influence the way private users of land behave.” at 1-2.)


controversial area of the law, in which federal policy could move in one of several different directions in the coming years. We are left with a complex patchwork of both direct and indirect regulations and policies at all levels of government challenging the traditional notion of local land use control.

4. Regionalism Efforts Begin to Take Hold

As noted, during the 1970s and 1980s, several states began examining and implementing new strategies to encourage regional growth management. Some states required that regional impacts be evaluated as part of the local planning process, and that local plans be consistent with neighboring jurisdictions as well as with those of regional entities which are responsible for reviewing the local plans. Vermont, as well as Rhode Island, require by statute a certification process that local plans are consistent with regional and state plans. Additionally, Vermont’s Land Use and Development Act, commonly known as Act 250, requires special procedures for the approval of projects with regional impacts.

In addition to the concept of regionalism contained within a local land use planning scheme, some states have created regional entities designed to specifically protect significant cultural, natural or environmental resources. In 1990, for example, Massachusetts passed the Cape Cod Commission Act. Motivated by the desire to prevent unwanted big box developments, and to increase open space throughout Barnstable County, the Commission was authorized to work with the region's fifteen towns and was given the responsibility of preparing a regional land use plan. The Commission is also tasked with approving development proposals that have regional impacts, which requires it to weigh the benefits of the proposed development against expected negative impacts.

Another example regularly given in planning literature as a model for regional land use control is the Adirondack Park Agency (APA), which was established by the New York State Legislature in 1971 as an independent state agency to conserve, protect, preserve and develop the park and forest preserve lands which now amount to six million acres of land filled with unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological, and natural resources. The APA legislation directs the agency to develop and implement a regional land use and development plan for the park, which is spread over 12 counties and 105 town and village governments. The APA has been cited as unusual in that it seeks to represent a statewide constituency, while in effect creating a regulatory agency to oversee the use of land and development in a specific region of the state. Control is divided between the APA and local governments, which can assume jurisdiction for certain regional land use decisions if the APA approves their local land use programs. The APA always has jurisdiction over projects of parkwide significance, and local governments have jurisdiction over purely local decisions.

41 Bosselman, Feurer and Richter, FEDERAL LAND USE REGULATION (Practising Law Institute 1977) at 7.  
42 Note: This section is reprinted from Nolon and Salkin, Climate Change in a Nutshell (West 2011).  
43 24 V.S.A. § 4350; R.I. GEN. LAWS § 45-22.2-9  
44 10 V.S.A. §§ 6001 et seq.
A number of states have updated their planning laws over the past few years to require local comprehensive plans to address regional issues and intergovernmental planning. Additionally, smaller states such as Delaware and New Jersey have created state planning maps that identify the growth policies that should be encouraged in specific areas. In addition to these efforts, incentives for intergovernmental planning have played an important role in encouraging regional cooperation. In some states, available grants and funding are increased for cooperative planning projects. Colorado has taken an even stronger approach towards regional planning: its Heritage Communities Grant Program provides funding only for joint municipal efforts. Authorizing local governments to enter into tax sharing agreements has also provided incentives for municipalities to work together in planning for services and facilities.

In addition to incentives and planning requirements, however, technical assistance to local governments engaged in joint planning has also proven to be especially useful. A few states have recognized that they can play an integral role in regional planning efforts by functioning as a sort of moderator. In Pennsylvania, for example, the Governor's Center for Local Government Services provides professional help to local governments involved in coordinated planning dispute resolution. And in Colorado, municipalities have access to a statewide list of alternative dispute resolution professionals to help with glitches in the cooperative planning process. Under New York’s popular Quality Communities and Shared Services programs, only municipalities planning and working cooperatively are eligible to receive state funding.

Today, much of the regional planning taking place across the United States is a result of the work of approximately 400 Metropolitan Planning Organizations, or MPOs. Federal transportation law requires state, county, and local governments to create MPOs in metropolitan areas with a population of 50,000 or more. MPOs are charged with developing transportation improvement plans, which guide the expenditure of federal surface transportation funds. Among other functions, MPOs are also charged with considering local land use planning as they create their transportation plans. This federal law attempts to achieve both vertical integration—at the federal, state, and local level—and horizontal integration, for example, between the EPA and the federal DOT. Within metropolitan areas, MPOs provide an opportunity for local governments and state agencies to coordinate land use planning and regulation (which dictates where people live and at what densities) and transportation planning (which must accommodate the population as it grows and resettles on the landscape).  

II. The Role of State Government in Land Use

A. Sources of Authority

As noted earlier, under the United States Constitution, the federal government has only limited powers, meaning it may only exercise those powers which are specifically granted to it in the Constitution. Specially, the X Amendment’s “reserve clause” holds that all powers not given to the federal government in the Constitution are reserved for the states. Among those powers

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45 See, Nolon and Salkin, Climate Change in a Nutshell (West 2011).
not listed in the Constitution are the oft-mentioned “police powers” which affect the health, safety, and welfare of residents, leaving that to the states.

Constitutions of all fifty states authorize state government to adopt laws which enforce the police power of the states—protecting the health, safety, and welfare of its citizenry. Zoning and other land use tools are among the most widely accepted legislative and regulatory tools of state police power.

Despite the broad grant of power this may appear to give states, land use planning is traditionally delegated, legislatively, to localities due to the traditional belief that land use and zoning is primarily a matter of local concern.

B. State Preemption of Local Land Use Laws

However, that’s not to say that states are complete non-actors in land use. State governments may also play a significant role, through statutes and other regulations, in limiting local control over land use. States governments may be particularly active in limiting locality’s autonomy when it comes to land use which have state-wide applications, in areas such as natural resource development, agriculture, infrastructure, and housing for certain populations.

For example, states are particularly active in regulating natural resource development and extraction, particularly in regarding to mining and drilling. In many states, a state government agency would instead be charged with administering laws and regulations involving mining. This agency would likely be empowered with the regulatory power to approve permitting for mining in a way that could infringe on a local governments ability to prohibit mining in their jurisdiction.

Similarly, agriculture land use regulation may be preempted by the state government in order to limit local regulation. Techniques such as passing statewide laws which charge a government agency with permitting agricultural uses, as well as “right-to farm” laws which protect farmers from nuisance lawsuits when farming tasks become inconsistent with a developing community. Finally, a number of states have passed laws which protect group-homes from local land use regulations, including the siting and construction of these homes.

C. State Planning

In addition to preempting local land use in certain areas, many states also engage in state level land use planning. State level land use planning, or “state planning,” is planning by the state government which is mostly concerned with broad land use issues that have statewide implications, such as economic development, environmental issues, infrastructure and housing, and coordination among different municipalities.

State planning came onto the scene during the early twentieth century—around the same time as modern land use controls. In the 1930s and 1940s, state planning was promoted and incentivized by the federal government, which sought professional state planning boards in consideration for federal financial assistance. This movement disappeared by the early 1950s, as
the belief that localities were the best authorities to make land use decisions gained general acceptance. However, as The Quiet Revolution Report revealed, a number of states quietly began taking a proactive approach to land use planning again in the 1950s and 1960s.

1. Smart Growth Emerges

Following unsuccessful attempts to address the inefficiencies of the system of land use control – beginning in the 1960s with an effort to promote regionalism, a movement in the 1970s to shift to a national land use policy, and a desire in the 1980s to promote intergovernmental coordination in land use planning and decisionmaking - “smart growth” emerged in the 1990s as a lightening rod focusing attention on creative ways to rethink and redefine our almost century old system. The recognition that traditional Euclidean Zoning was inadequate to address the sustainable development, or “smart growth” concerns of states caused it to fall out of favor, as it inadvertently encouraged “sprawl,” and significantly affected the environment—degrading natural resources and agricultural land. Cumulatively, this change led to a movement across the states to modernize their outdated planning and zoning enabling acts. Smart growth can best be defined as a series of principles that include, among other things, mixed land uses, preservation of open space, choice in transportation options and a focus on re-energizing communities for growth and infill. Other principles include creating communities where residents can walk to town (“walkable communities”), maintaining or creating distinctive communities with a “sense of place,” and encouraging community involvement in development decisions. An overriding theme in the smart growth movement is that no one approach works best for every region and community, and as a result each locality has taken varied approaches to designing and implementing new land use systems to produce more favorable land sustainability patterns.

From 1991 to 2001, smart growth legislation was introduced and implemented at all levels of government. During this time, seventeen governors passed nineteen executive orders on planning and smart growth and more than 2000 land use or planning law bills were introduced in statehouses across the country, with approximately twenty percent being enacted into law. The movement may have peaked in 2001 when twenty-seven governors initiated planning and smart growth proposals. Some of this activity can be traced to the modernization efforts initiated by the American Planning Association through the publication of the Growing Smart Legislative Guidebook. Although a number of governors continue to list smart growth actions among their initiatives in the early part of the Twenty-First Century, framing sustainable development purely around smart growth may have proven to be short-lived at both the federal and state levels as grant programs and new smart growth initiatives have diminished in number and size. Furthermore, while ballot initiatives in support of smart growth were popular in 2000, by 2007

46 See, Salkin, Land Use, Ch. 16 in Dernbach, Stumbling Towards Sustainability, ELI (20 ).[Note: Much of this paragraph is excerpted from this chapter.]
47 See, Patricia Salkin, “From Euclid to Growing Smart: The Transformation of The American Local Land Use Ethic Into Local Land Use and Environmental Controls,” 20 Pace Evtl. L. Rev. 109 at 118 (Spring 2002).
the pendulum has swung in the opposite direction with a series of ballot initiatives designed to promote anti-zoning, anti-land use and anti- eminent domain agendas.

Strong evidence of continuing interest and active implementation of smart growth principles and strategies at the local government level (although not always labeled “smart growth”) exists. Perhaps this is attributed to the trickle-down effect of policies and programs adopted earlier. Furthermore, social equity issues are finally being linked to land use planning and land use controls, and there is a growing realization that to most effectively deal with many of the challenges presented by climate change, sustainable land use policies are the key. These two major issues provide an opportunity to also address a missing ingredient to success – better integrated cooperation and coordination between and among all levels of government.

Updated state planning mechanisms allow states to articulate policy and goals not only for the state government, but also for mechanisms of the state government such as municipalities and regional authorities. Additionally, effective state planning can coordinate policy through government and agencies at all levels, to ensure that land use is done efficiently and effectively, and further ensure that the goals of the state and locality are realized. By utilizing state planning, all aspects of localized land use planning—economic development, infrastructure, public welfare, and natural resources, to name a few—may be coordinated to ensure that local land use policies are implemented in a manner that is consistent with state and regional goals and policies.49

States can play a powerful supporting role in land use planning by providing technical assistance to municipalities through their state planning mechanisms. They may dispatch technical assistance teams to directly assist municipalities, publish handbooks or guides for local governments, develop and distribute sample laws and agreements for municipalities to use, hold trainings to provide municipal officials with smart growth strategies. Additionally, technological advancement has made the propagation and disbursement of these state-endorsed land use techniques more readily available to localities.50

III. The Role of Federal Government in Land Use

A. Sources of Authority

As discussed, the American federal system generally permits state and localities to define their own specific land use planning policies and goals. However, the federal government is not devoid of the ability to influence local land use planning.

In addition to Article IV reviewed in Section I, all land use regulations are subject to Fifth Amendment scrutiny. The Fifth Amendment, which encompasses due process and takings

49 American Planning Association, Growing Smart Legislative Guidebook, Section 4-201, available at: http://www.planning.org/growingsmart/guidebook/four01.htm#4101
provisions, may invalidate land use regulations if they deprive a person of a property unless due process of law is provided to the aggrieved party; and second, government may not take private property unless it is for a public use and just compensation is paid. Further, Article I, § 8 of the Constitution, known as the “Commerce Clause,” may affect private land use that affects interstate commerce. As one Supreme Court Justice noted in a concurring opinion, the Commerce Clause allows the Federal Government to enact even “an extraordinarily intrusive program of federal regulation and control of land use . . ., activities normally left to state and local governments.” The Federal Government may even impact state and local land use laws incidentally though the dormant Commerce Clause, which restricts states and localities from enacting legislation which affects commerce—even if Congress has not legislated in that area.52

B. Federal Preemption of State and Local Land Use Laws

While there is no federal comprehensive land use plan or land use regulatory program per se, over time the federal government has assumed an increasing role in the area of land use planning, despite its traditional dominance by state and local governments. There have been attempts at instituting an articulated federal land use policy, but that legislation—known as the National Land Use Policy Act (NLUPA)—was swiftly defeated.

Although never adopted, the National Land Use Policy Act (NLUPA) was originally introduced in 197053 with the intent of supplementing and enhancing the coordination of government action at the state level. The legislation would have created a federal agency to ensure that all other federal agencies were complying with state plans, and it would have provided incentives for states to create similar agencies to coordinate with their local municipalities. States would have been eligible to receive federal funding, and the proposal would have created a national data system for state and local governments use to engage in more sophisticated land use planning—conditioned on the state creating a land use plan. These state plans were meant to operate as evolving blue prints, allowing “broad local input and constant revision as more was known and as conditions changed.” Together, these provisions of NLUPA would have resulted in coordination and integration, lessening conflicts and confusion among the land use authorities at the federal, state and local levels.58

Despite the name of the act, which implies that the federal government would have even stronger powers of influence over local land use planning, the proposed legislation did not give the federal government the express authority to plan or regulate land use and development. Instead, it was meant to ensure a more collaborative process between the federal, state and local governments in land use planning and development.

58 Id. at 522.
Even though NLUPA ultimately failed to pass, the federal government has still been able to increase its role in land use planning by passing a number of federal laws and agency regulations which limit or preempt some aspect of land use planning. This complex, and piecemeal set of laws do not reflect a national land use strategy but instead affect other areas of the law which may or may not have an apparent connection to land use. These federal laws were drafted to affect a number of areas, such as the environment, human rights, and infrastructure development.

1. Environmental Laws

Although environmental law has a long and complex history with its early federal origins tracing back to the Presidency of Theodore Roosevelt (1901-1908), modern federal environmental law came of age in a flurry during the 1970’s due to a mix of political, social and economic changes. Before that time, states were primarily responsible for dealing with the environmental issues, allowing some states to engage in a “race to the bottom” environmental policy out of concerns that over-regulation and harsh environmental compliance penalties within their borders would have an exclusionary effect on business and economic development. Not surprisingly, this dangerously lax environmental regime led to a number of problems including pollution, conservation issues, and urban sprawl. Enhanced media coverage provided a first-hand look at environmental tragedies like the Cuyahoga River in Cleveland catching fire, the Santa Barbara Oil Spill of 1969, and Lake Erie being declared “dead.” These events, combined with writings like Rachel Carson’s *Silent Spring,* demonstrated a rapidly growing public awareness of the linkages between an unhealthy environmental policy and the dangers it presents to the public health. This new environmental awareness spread across the country and eventually turned into discontent before the federal government took notice, entering into “a remarkable burst of legislative activity in the 1970s.” Through the enactment of several new environmental statutes and regulations, the federal government emerged as the dominant government protector and regulator of the environment, and many of the resulting environmental statutes continue to significantly influence and impact local land use controls.

63 See generally, Keith H. Hirokawa, Sustaining Ecosystem Services through Local Environmental Law, 28 PACE ENVIRONMENTAL LAW REVIEW 760 (2011) (discussing the divergence between federal pollution control and local land use).
64 Philip K. Berke, Timothy Beatley, and Bruce Stiftel, Environmental Policy in The Practice of Local Government Planning 172.
The National Environmental Policy Act (NEPA) was born out of the above referenced growing concern that our nation’s environment was being given secondary consideration to economic and social factors in public decision making. Supporters envisioned that this legislation’s legacy would establish a Council on Environmental Quality (CEQ), placing an environmental advisor in close proximity to the President. NEPA, enacted “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment,” and to “promote efforts which will prevent or eliminate damage to the environment,” requires agencies, usually federal but also state and local whenever a federal link is present, to assess the environmental impacts of any proposed actions. In effect, “NEPA set forth a framework for considering the environmental impacts of certain government decision making,” although it does not require specific results. NEPA requires the preparation of an environmental impact statement for proposals which involve first, “major Federal actions” which second, “significantly affecting the quality of the human environment.” Major federal action is generally considered to include “projects and programs entirely financed or partly financed, assisted, conducted, regulated or approved by federal agencies.” Under this section, NEPA applies to state and local government projects that rely on federal approval.

Although not specifically targeting local land decision making the federal model has been closely replicated by more than a dozen states which have adopted “mini-NEPAs.” Guidelines issued by the CEQ in 1971 and again in 1973 showed states how to administer a mini-NEPA program, and much like the federal statute, these regulations were largely imitated by states.

Until the passage of many of these mini-NEPAs, zoning boards were guided by the typically narrow range of interests and standards set forth in the local zoning plans. The mini-NEPAs provided local zoning authorities with the “revolutionary” discretion to deny, condition, or otherwise mitigate the adverse impacts of land use developments, occasionally even where the proposed development otherwise met local zoning restrictions. Some believe that the

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68 P.L. 91-190; 83 Stat. 852.
71 83 Stat. 852.
72 83 Stat. 852.
74 42 USC 4332 (2)(C).
75 40 CFR 1508.18
76 Maryland Conservation Council, 808 F.2d 1039 (4d Cir. 1986).
administration of mini-NEPAs has disrupted local discretion where the environmental lens has conflicted with the objectives of a locally-tailored comprehensive development scheme.  

b. The Fire Island National Seashore Act of 1964

Only a handful of federal laws impose specific zoning standards on local governments. One of these is the Fire Island National Seashore (FINS) Act of 1964, which created the first national park in New York aiming to protect the “gemlike” beaches and sand reefs that run along the south shore of Long Island from real estate development, road construction, and shoreline erosion. Unlike most other National Parks, Wildlife Refuges, and other protected federal lands, however, the Fire Island National Seashore created a framework that was intended to allow limited private development along with the preservation of natural resources and public recreational opportunities.

To accomplish the goals of the Fire Island National Seashore Act, Congress granted to the Secretary of the Interior broad powers over Fire Island, including over the local land use authorities originally in place over Fire Island. The Secretary has authority to acquire property in the area, through purchase or condemnation, “‘improved property,’ zoned in a manner not ‘satisfactory to the Secretary,’ or which had been ‘subject to any variance, exception, or use that fails to conform to any applicable standard contained in regulations [issued by] the Secretary.” The Secretary also has the power to “issue regulations . . . specifying standards that are consistent with the purposes of this Act for zoning ordinances which must meet his approval,” and is required to review local zoning ordinances to determine whether the local ordinances comply with federal regulations. The Secretary is prohibited from approving any zoning ordinances or amendments to zoning ordinances which are adverse to the purpose of the Act.

c. The Coastal Zone Management Act of 1972

The Coastal Zone Management Act (CZMA) was initially enacted in 1972 setting forth the national Coastal Zone Management Program, administered federally by the Department of

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85 However, in drafting the Act, “Congress carefully avoided interfering with the power of the municipalities on the Seashore to enact zoning ordinances or grant zoning variances.” See, Biderman 497 F.2d 1141, 1144 (2d Cir. 1974).
86 Biderman 497 F.2d 1141, 1144 (2d Cir. 1974) (quotations omitted)
87 78 Stat. 930.
88 78 Stat. 930; 16 USC 459e
Commerce under the direction of the National Oceanic and Atmospheric Administration (NOAA) and at the state level by an agency designated by each state or territory. The purpose of the CMZA was to increase state involvement in efforts by the federal government to protect the coastal zone. The Act was a response to a growing concern that the nation’s coasts were becoming polluted due to the “piecemeal development of coastal ecosystems without an overall strategy for comprehensive coastal management.” Following on the heels of the defeat of the National Land Use Policy Act (discussed above), some of the supporters felt the CZMA should have been part of a larger national land use management initiative. Perhaps the CZMA was successfully enacted – partly due to the fact that it both aided development while preserving the environment. The Act’s purpose, in part, “to encourage and assist states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible development…” provides the opportunity for states to work with local governments to achieve a shared land use vision for the coastline and coastal resources.

Pursuant to the Act, the National Oceanic and Atmospheric Administration provides states with funds necessary to enhance their waterfronts. States then are authorized to allocate a portion of the grants to local governments or area-wide agencies, a regional agency, or an interstate agency. With the federal funding flowing to the states, state governments typically re-grant dollars to local governments for a variety of land use planning and zoning initiatives including: development of local land use plans, feasibility and natural features studies, drafting of related provisions in local zoning ordinances, and waterfront redevelopment studies. In order for local governments to access the federal pass-through dollars for the development of local waterfront revitalization plans from their respective states, they must agree to follow the federally-approved state coastal policies and to have their local plans reviewed and approved for such, by the state government. While local governments maintain some level of flexibility in the design of the local waterfront plan, and must ensure consistency with future local land use regulations, the fiscal “carrot” and federal control rests in the required constituency with the federally approved state policies.

d. The Clean Water Act of 1972

95 Coastal Zone Management Act of 1972, as amended 1980, Sec. 303 (PL 92-583).  
97 16 U.S.C. 1455 a(e).  
Enacted in 1972, the Clean Water Act’s (CWA) primary objective was to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” The CWA had two stated goals: (1) eliminate “the discharge of pollutants into the navigable waters” by 1985, and (2) provide “for the protection and propagation of fish, shellfish, and wildlife” and “recreation in and on the water” by 1983.

The federal permitting process—overseen by both the Army Corp of Engineers and EPA—has significant implications for proposed development under consideration by local land use authorities who must be mindful during land use decision making.

The CWA indirectly affects local land use planning in its regulation of “point source” runoff through the EPA’s administration of the CWA’s National Pollutant Discharge Elimination System (NPDES) program. Point sources are defined as “discernible, confined and discrete conveyance” which includes pipes, ditches, containers, landfill collection systems, and vessels which can or may discharge storm water runoff. The NPDES program is initially administered by the EPA until the state successfully applies to supervise the program and is accepted as a suitable supervisor of the NPDES program, based on criteria established by the federal government. The NPDES program effects local land use planning by treating communities as polluters and requiring local municipalities to implement and oversee “a storm water management program . . . [which] reduce[s] the discharge of pollutants . . . to the maximum extent practicable.” In order to receive a permit under the NPDES, local municipalities must prepare a plan to reduce stormwater pollution that includes the adoption of land use control local ordinances and other restrictions that determine the collection, transmission, and treatment of storm water runoff from new and ongoing development.

The CWA further affects local land use planning by its regulation of “nonpoint sources,” which include certain agricultural uses and the maintenance of water structures, such as dams, maintenance of ponds, irrigation ditches, or drainage ditches. Under the CWA, nonpoint sources were left to the States to regulate. Despite giving the states this regulatory authority, the federal government influences state regulation through the use of federal initiatives. These federal initiatives include: state-based waste treatment management practices in their state; federal funding for states to develop state management plans regarding nonpoint source
management;\textsuperscript{112} the Coastal Zone Management Act; and a requirement for states to identify and rank waters based on the severity of the pollution.\textsuperscript{113}

e. The Endangered Species Act of 1973

The Endangered Species Act (ESA) was enacted in 1973 by Congress, upon finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”\textsuperscript{114} Overseen by two federal agencies - the National Fish and Wildlife Service (NFWS), and the National Oceanic and Atmospheric Administration (NOAA), provisions of the ESA attempt to promote cooperation between the federal government and states because the states have a “close working relationships with local governments . . . and are in a unique position to assist the Services in implementing all aspects of the Act.”\textsuperscript{115} Notably, Section Six of the ESA expressly authorizes the NFWS or NOAA to enter into cooperative agreements with states.\textsuperscript{116} Moreover, states are financially incentivized into entering into cooperative agreements with the federal government.\textsuperscript{117} However, to enter into such an agreement, the state must “establish[] and maintain[] an adequate and active program for the conservation of endangered species and threatened species.”\textsuperscript{118}

The ESA prohibits the “taking” of any endangered species.\textsuperscript{119} This broad “taking” language includes habitat modifications of the endangered species that actually injures or kills the species due to the significant impairment of breeding, feeding or sheltering lands.\textsuperscript{120} State, local and private entities are subject to the take prohibitions of the ESA. The Act applies to all lands in the United States, whether they are state-owned, municipality-owned, or privately owned.\textsuperscript{121} A “taking” under the ESA influences land use development, both privately and in all levels of government.\textsuperscript{122} Under this language, the ESA restricts the development of land in any manner that could significantly impair the recovery of an endangered species, unless the developer can obtain a permit issued by a federal agency.\textsuperscript{123} Further, at least in part, the ESA’s review process affects local land use and planning because it replaces local discretion in certain land use matters with the discretion of a federal agency in to determine the relationship between the survival of the species and the land use proposal.\textsuperscript{124}

\begin{itemize}
\item[\textsuperscript{112}] 33 USC 1251(a)(7); 12 Vermont Journal of Environmental Law 455, 466 (2011)
\item[\textsuperscript{113}] 33 USC 1251(a); 12 Vermont Journal of Environmental Law 455, 474 (2011); Scott v. City of Hammond, 741 F.2d 992, 996-98 (7th Cir. 1984)
\item[\textsuperscript{114}] PL 93–205; 87 Stat. 884.
\item[\textsuperscript{116}] 87 Stat. 889.
\item[\textsuperscript{117}] 16 USC 1535(d)(2).
\item[\textsuperscript{118}] 87 Stat. 890.
\item[\textsuperscript{119}] 16 USC 1538(a)(1)(B)-(C).
\item[\textsuperscript{120}] 16 USC 1532(19); Babbit, 515 US 687 (1995)
\item[\textsuperscript{121}] 16 USC 1538; Gibbs v. Babbitt, 214 F.3d 483 (4d Cir. 2000)
\item[\textsuperscript{123}] 16 USC 1539(a)(2)(A)
\item[\textsuperscript{124}] 16 USC 1539(a)(2)(A)(i)-(iv).
\end{itemize}
2. Human Rights Laws

a. Housing Act of 1954 and the HUD 701 Program

The federal government had been giving funding to state and local governments for the redevelopment projects dating back to the New Deal. However, the Section 701 Program, included in the Housing Act of 1954, gave land use planning “official recognition under the national urban policy umbrella.” The Section 701 Program, commonly known as the HUD 701 Program, authorized comprehensive land planning assistance to state and local public agencies, and further sought to promote comprehensive planning for land use development by encouraging local governments to establish and improve planning techniques. Specifically, these local comprehensive plans were required to use a specific pattern of land use design, decided by the federal government, which coordinated with circulation, public facilities, and housing.

To qualify for federal funding, local governments had to adopt comprehensive plans that addressed certain techniques, notably land use. Localities could receive funding for up to two thirds of the total of the planning work, and up to seventy five percent in areas where development was deemed significant for national growth and development. The 701 Program proved to be immensely popular, issuing funds for close to thirty years. During that time, thousands of local governments participated in the program, adopting what was referred to as “701 plans.” This marked a significant beginning of federal influence in land use planning, as over time, additional planning incentive programs have been issued by the federal government aimed at similar comprehensive planning goals.

b. The Fair Housing Act Amendment of 1988

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126 68 Stat. 590.
128 40 USC 461(c) (1982)
130 Philip R. Berke, Integrating Bioconservation and Land Use Planning 10 Vt. J. Envtl. L. 407, 418 (2009);
In 1988, Congress amended the Fair Housing Act for the specific purpose of “prohibiting local governments from applying land use regulations in a manner that will . . . give disabled people less opportunity to live in certain neighborhoods than people without disabilities.”

Almost twenty-five years after the enactment of the Fire Island National Seashore Act (discussed above), this statute boldly on its face took on local land use control, this time for the purpose of ensuring civil rights.

The Fair Housing Act Amendments (FHAA) broadened the definition of unlawful discrimination, providing that “discrimination includes a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling,” as well as the failure to implement various building standards to multifamily dwellings. House Reports which accompanied the FHAA stated that the “the prohibition against discrimination against those with handicaps appl[ies] to zoning decisions and practices,” and that it was further meant to “prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.”

Consequentially, the FHAA has impacted local government decision making in the land use context by requiring reasonable accommodations and the granting of exceptions and variances where regulations would prohibit disabled persons from having an equal opportunity to live in a certain community. The FHAA further “provide[s] a vehicle for plaintiffs to challenge provisions of local zoning ordinances,” and courts have held that the statute prohibits discriminatory land use restrictions by municipalities, even where such actions are “ostensibly authorized by local ordinance.”

Additionally, under the FHAA, local governments must contribute to the enforcement of matters usually covered by a state or local building code. The Secretary of HUD can “encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C) [of the Act], and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).”

C. The Americans with Disabilities Act of 1990

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137 102 Stat. 1620–21.
138 102 Stat. 1621
140 H.R. Rep. 100-711, at 2185.
142 Salkin, American Law of Zoning 3:5
144 102 Stat. 1621. The standards included in paragraph (3)(c) are those mentioned supra concerning building standards making the dwelling more accessible to an individual confined to a wheelchair.
The Americans with Disabilities Act (ADA or Act) was enacted by Congress in 1990\textsuperscript{145} to ensure that individuals with disabilities have equal access to facilities and activities alike.\textsuperscript{146} The ADA prohibits discrimination against individuals with disabilities\textsuperscript{147} in any “public service, program, or activity,”\textsuperscript{148} including land use planning. Under the ADA, state and local governments must make a reasonable accommodation for individuals with disabilities. Although the language of the statute does not specifically indicate that it applies to local land use planning and regulatory decision making, the Department of Justice made it clear in early guidance documents that the Act did indeed apply to local land use regulations.\textsuperscript{149} This interpretation was later reiterated by a number of federal circuit courts.\textsuperscript{150} Like the FHAA, the ADA not only mandates local land use regulatory compliance with federal rules for a specified segment of the population, but it also provides a vehicle for enforcement through the federal courts.

D. The Religious Land Use and Institutionalized Persons Act

In 2000 Congress passed, and President Clinton signed, the Religious Land Use and Institutionalized Persons Act (RLUIPA).\textsuperscript{151} Designed in part to eliminate discrimination in the

\textsuperscript{145} P.L. 101-336; 104 Stat. 327
\textsuperscript{146} H.R. Rep. 101-485 at 304 (1990). The Committee on Education and Labor submitted a report along with their affirmative vote in favor of the ADA. The Committee state that:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

\textit{Id.} Outlining how individuals with disabilities were treated, the report stated that:

(1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;

(2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;

(3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;

(4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and

(5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

\textsuperscript{147} 104 Stat. 329.
\textsuperscript{148} 42 USC 12,132.
\textsuperscript{150} See, e.g., \textit{Innovative Health Systems, Inc. v City of White Plains}, 117 F.3d 37 (2d Cir. 1997). See also, \textit{Regional Economic Community Action Program, Inc. v City of Middletown}, 294 F.3d 35 (2d Cir. 2002)(“...a proper reasonable accommodation might assert that the zoning authority should have waived or modified its rule against elevators in residential dwellings to permit those who need them to use them and thereby have full access to and enjoyment of residences there.”) and \textit{Oconomowoc Residential Programs v City of Milwaukee}, 300 F.3d 775 (7th Cir. 2002) (a variance from the City zoning ordinance restricting group homes from operating within 2500 feet of each other is a reasonable accommodation under both the ADA and the FHAA).
land use regulatory context, Section 2 provides in part, “no government shall impose or
implement a land use regulation in a manner than imposes a substantial burden on the religious
exercise of a person, including a religious assembly or institution, unless the government
demonstrates that . . . [the regulation] is in furtherance of a compelling governmental interest.”

The Act also prohibits governments from treating religious groups on “less than equal terms”
with non-religious groups, and local governments are prohibited from zoning out religious
uses.

In an introduction to an Albany Law School Government Law Review Symposium on
this issue, along with co-author Amy Lavine we explained:

For all of RLUIPA’s noble intentions, and despite its drafters’ belief that it does not
give religious groups “immunity” from zoning laws, the statute can potentially be
invoked to shield religious organizations from valid concerns about development patterns and
community character. It has been relied on, for example, by a church seeking to use
its land for outdoor concerts, and by another wishing to erect an electronic billboard
not permitted by the local sign code. Big box churches and houses of worship
seeking to build entertainment facilities, rehabilitation centers, offices, and other
auxiliary uses have also sought the protections of the statute, sometimes with success.

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152 42 USC 2000cc(a)(1).
153 42 USC 2000cc(b)
154 Id.
159 See, e.g., Rocky Mountain Christian Church v. Bd. of County Comm’rs, No. 06-cv-00554-REB-BNB, 2008 U.S.
(questioning whether a church could build a theater and banquet space rentals); City of Hope v. Sadsbury Twp.
161 See Calvary Temple Assembly of God v. City of Marinette, No. 06-c-1148, 2008 U.S. Dist. LEXIS 55500, at *1
(E.D. Wis. July 18, 2008); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008); Men of
6, 2006); New Life Ministries v. Charter Twp. of Mt. Morris, No. 05-74339, 2006 U.S. Dist. LEXIS 63848, at *2
163 See, e.g., Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 647 (10th Cir. 2006) (involving a
church operated day care); DiLaura v. Ann Arbor Charter Twp., 30 F. App’x 501, 503 (6th Cir. 2002) (involving the
use of a house as a religious retreat for a Catholic organization); Sisters of St. Francis Health Servs. v. Morgan
County, 397 F. Supp. 2d 1032, 1036 (S.D. Ind. 2005) (involving a religious hospital); Life Teen, Inc. v. Yavapi
establishment of a youth camp affiliated with a Catholic organization); Greater Bible Way Temple v. City of
Jackson, 733 N.W.2d 734, 737 (Mich. 2007) (involving the establishment of an apartment complex by a religious
organization).
These types of land uses, whether religious or not, raise legitimate concerns among local governments and nearby property owners, and while they may not always be “compelling,” requiring them to pass strict scrutiny can seem to give religious organizations an unfair advantage in the land development process. RLUIPA also imposes a federal standard on an area of law that has traditionally been local in nature; indeed, few things are more local than decisions affecting communities’ growth and development. The threat of RLUIPA litigation and the costs that it entails, however, give local governments a strong disincentive to impose limitations on development projects proposed by religious groups, even where they might conflict with long term plans and legitimate community concerns.

Since the enactment of the statute, the floodgates have burst open with litigation in attempts to clarify RLUIPA’s statutory ambiguities. The statute, for example, defines “religious exercise” to include “[t]he use, building, or conversion of real property for the purpose of religious exercise,” and the courts have struggled to demarcate the point at which a house of worship’s accessory facilities lose their religious qualities. The courts have also had to decide whether the term “land use regulation”—defined to include zoning and landmarking laws—applies to such things as building code requirements, open space plans, and the use of eminent domain. RLUIPA’s substantial burden provision, however, has caused the most disagreement among the courts, as the statute fails to define the phrase. This has resulted in an inconsistent application of the statutory standard across the country, and combined with the fact-intensive inquiries conducted by most courts, RLUIPA’s prohibition on substantial burdens has seemed, at times, to cause unpredictable results.

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165 See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347-48 (2d Cir. 2007) (finding the expansion of a religious school to be a “religious exercise” where the facilities were to be used primarily for religious education, but questioning whether the construction of recreational facilities or a headmaster’s residence as part of a religious school would fall within RLUIPA’s protections); Mintz v. Roman Catholic Bishop, 424 F. Supp. 2d 309, 318 (D. Mass. 2006) (“Of course, every building owned by a religious organization does not fall within this definition. Buildings used by religious organizations for secular activities or to generate revenue to finance religious activities are not automatically protected.”).

167 See, e.g., Second Baptist Church v. Gilpin Twp., 118 F. App’x 615, 617 (3d Cir. 2004) (holding that a mandatory sewer connection ordinance was not subject to RLUIPA); Beechy v. Cent. Mich. Dist. Health Dep’t, 475 F. Supp. 2d 309, 318 (D. Mich. 2006) (“Of course, every building owned by a religious organization does not fall within this definition. Buildings used by religious organizations for secular activities or to generate revenue to finance religious activities are not automatically protected.”).

168 See Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217 (PGS), 2007 WL 2904194, at *8 (D.N.J. Oct. 1, 2007) (holding that a township open space plan is a land use regulation subject to RLUIPA).
169 See St. John’s United Church of Christ v. City of Chi., 502 F.3d 616, 641-42 (7th Cir. 2007) (concluding that the taking of religious property was not subject to RLUIPA); Albanian Associated Fund, 2007 WL 2904194, *8 (holding that although the condemnation could not be challenged under RLUIPA, the implementation of the land use plan under which the condemnation was initiated did fall within the scope of RLUIPA).
171 See id. at 228-34.
There is little doubt that RLUIPA has had profound impacts on land use planning and control. According to a recent report issued by the U.S. Department of Justice, in the first ten years since RLUIPA was enacted, the Department opened 51 investigations against communities, filed seven lawsuits, participated in ten amicus briefs to defend the constitutionality of the statute, and has collected millions of dollars in damages against violators.\textsuperscript{172}

Professor Marci Hamilton explains that this statute is yet another example in the federalism paradigm furthering the notion that Congress is good and the states are bad, and she asserts that this perspective must be re-examined.\textsuperscript{173} She argues that from a federalism perspective, Congress should have asked the following questions prior to passing the measure: what is the degree of interference with state and local law; what are the purposes and aspirations of state and local laws affected by the federal law; why is it that local land laws differ in their treatment of religious landowners; given the interconnectedness of all members of a community covered by a master zoning plan (a reality that comes out once one analyzes even a single zoning plan), what was the likely impact of privileging religious land uses vis-à-vis all other land uses, including residential uses; and have any states experimented with a regime like RLPA/RLUIPA, giving religious entities special privileges in the land use process, and if so, what was the result.\textsuperscript{174} Professor Hamilton’s call for greater empirical evidence to justify federal preemptive or curtailing legislation on the local land use regulatory regime is equally applicable to the other statutes discussed in this article.

2. **Infrastructure and Energy Laws**

   a. **The Telecommunications Act of 1996**

      Congress enacted the Telecommunications Act of 1996 (TCA)\textsuperscript{175} with the intent of reducing the effect that disparate or piecemeal local land use regulation had upon the broad implementation of a wireless communications network.\textsuperscript{176} Upon signing the law, President

\textsuperscript{172} United States Department of Justice, Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act, 5-6 Sept. 22, 2010.
\textsuperscript{173} Marci A. Hamilton, “Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act,” 78 Ind. L.J. 311 (2003) (“Part of the blame for the anemic congressional response to the Court’s federalism cases—as well as the academics' and the press's impassioned, negative responses—must be laid at the feet of a paradigm of a congressional-state relationship that has outlasted its usefulness.” at 328; “The RLPA/RLUIPA legislative history illustrates that the states are assumed to be bad constitutional actors—a handful of claims is sufficient for Congress to proceed to interfere significantly in a quintessentially local arena and for it to claim a “massive” record of state misconduct. Moreover, members of Congress attach little to no value to having fifty discrete states independently pursuing the public good.” at 353 ).
\textsuperscript{175} P.L. 104-104; 110 Stat. 56.
\textsuperscript{176} H.R. Rep. 104-204(I) at 47; H.R. Rep. 104-204(I) at 104, stating, The Committee [on Commerce] finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, and at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in
Clinton stated that the legislation was “revolutionary” and that it would “bring the future to our doorstep.”\textsuperscript{177} The impetus for the new law came from the industry who argued that such action was needed to promote greater competition.\textsuperscript{178}

The TCA preempts state and local zoning and land use regulations “that materially limits transmission or reception by satellite earth station antennas or imposes more than minimal costs on users of such antennas . . . unless the promulgating authority can demonstrate that such regulation is reasonable.”\textsuperscript{179} Characterized by one court as a “refreshing experiment in federalism,”\textsuperscript{180} whether Congress, and the Federal Communications Commission (FCC) have achieved the proper balance of authority may elicit different responses from the various stakeholder interests.

Among other things, the TCA prohibits local governments from completely banning wireless towers within their jurisdiction,\textsuperscript{181} prohibits discriminatory or preferential zoning by the local government in favor of one provider over another where substantially the same services are provided,\textsuperscript{182} and forbids localities from banning the siting of radio towers based upon environmental factors, such as radio frequency emissions.\textsuperscript{183} Further, the TCA requires local land use boards and commissions to make a timely response to applications and requires that any denials must be in writing and “supported by substantial evidence contained in the written policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

\begin{itemize}
  \item Carol A. Goforth, “A Bad Call: Preemption of State and Local Authority to Regulate Wireles Communication Facilities on the Basis of Radio Frequency Emissions,” 44 N.Y. L. Sch. L. Rev. 311 (2001). One can’t help but wonder whether following the events of September 11, 2001 the federal actions described in this Section might have been justified under the banner of homeland security as opposed to pro-business competitiveness.
  \item 47 CFR 25.104(a). Reasonable means that the local regulation has “clearly defined health, safety or aesthetic objective[s] that [are] stated in the text of the ordinance” and does not unduly burden access to satellite service. 47 CFR 25.104(a).
  \item Town of Amherst 173 F.3d 9, 17 (1st Cir. 1999).
  \item Under the anti-discrimination provision of the TCA, many circuit courts, with the exception of the fourth circuit, “are willing [to] sic find a violation based on specific zoning decisions alone. These circuits hold that a local zoning authority runs afoul of the statute if its enforcement of local requirements creates ‘significant gaps’ in service coverage.” Patricia Salkin, American Law of Zoning § 25:3 (West, ed. 5) (2011). In some circuits, if any provider offers cellular service in the area in question, then a cap of coverage will not be found, where as other circuits will find a violation if the provider has a gap in its own service network. \textit{Id.} Once this gap has been shown, the provider must then make a showing of the necessity and intrusiveness of the proposed tower. \textit{Id.}
  \item 110 Stat. 152; 47 U.S.C.A. § 322(c)(7)(B)(iv). The Committee on Commerce felt that not only would local RF restrictions impede progress of a nationwide network, but this impediment would serve no rational purpose, as “local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence.” H.R. Rep. 104-204(I) at 105.
\end{itemize}
record.” The statute further mandates that decision makers must render a decision in a reasonable time period.

Although a powerful limitation on complete local land use control when it comes to the siting of wireless facilities, the TCA leaves intact the ability of local governments to control other aspects related to the siting and characteristics of the towers within their jurisdiction such height, location (so long as gaps in service are addressed) and visual impacts.


The Energy Policy Act of 2005 (EnPA) affects local land use planning in communities by allowing the use of eminent domain to obtain a right of way for the siting of electric transmission facilities and by giving the federal government extensive control over the interstate siting of such facilities. Specifically, the Federal Energy Regulatory Commission (FERC) can issue construction permits for interstate transmission facilities in areas the Secretary of Energy has designated as “national interstate electronic transmission corridors,” preempting the local siting process by giving FERC the exclusive authority to site electric transmission lines and interstate natural gas pipelines, storage facilities and terminals. Although a company seeking to place transmission lines must abide by state and local zoning ordinances, where there is a conflict between the ordinances and the FERC regulations, the FERC requirements will

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184 110 Stat. 151; 47 U.S.C.A. § 322(c)(7)(B)(iii). This standard requires that the local authority must base their decision on less that a preponderance of the evidence, but more than a scintilla. Salkin at § 25:4. Under this standard, “generalized [aesthetic] concerns of citizens are, standing alone, not substantial evidence.” Id.

185 110 Stat. 151; 47 U.S.C. § 332(c)(7)(B)(ii). The Federal Communications Commission (“FCC”) issued new rules, effective November 18, 2009, establishing deadlines for state and local governments to act on wireless tower siting with respect to applications involving personal wireless services covered by Section 332(c)(7) of the Telecommunications Act. That section “includes commercial mobile service, unlicensed wireless service and common carrier exchange services.” Section 332(c)(7) requires state or local government to act on a wireless tower siting request “within a reasonable amount of time.” The FCC’s new rules now provide the following time periods for action by a state or local government: “(1) 90 days from submission of the request for collocations; and (2) 150 days from submission of the request for all other wireless facility siting applications.” If there is a failure to timely act, an applicant can file a claim for relief in court within 30 days of the failure to act. Timeframes may be extended by mutual consent of the parties. A party whose application has been pending for longer than those time periods as of November 18, 2009, “may, after providing notice to the relevant state or local government, file suit under Section 332 if the state or local government fails to act within 60 days from the date of such notice. The notice provided to the state or local government must include a copy of the FCC’s declaratory ruling.” See, *Petition for Declaratory to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd. 13994(2009).


188 119 Stat. 947; 16 U.S.C.A. § 824p(b). A corridor is designated based upon a study, conducted once every three years, by the Secretary. the Secretary may “designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.” , the Secretary may consider, among other factors, the economic development and vitality of the area and the effects unreasonably priced energy will have on such an economic setting, as well as the economic growth in the area and the affect that a limited supply of energy will have on such growth. 16 U.S.C.A. § 824p(a).

189 AES Sparrows Point LNG LLC, 470 F.Supp.2d 586 (D.Md. 2007).

190 See 16 USC 824(p)(a) and 15 USC 717b-1(b). Note that this does not include wind energy facilities.
prevail. EnPa also grants operators of interstate energy transmission facilities the authority to obtain the right of way on private land. Where the facility operator cannot come to terms with the land owner to obtain the right of way to construct or modify the transmission facility, the operator may initiate eminent domain proceedings in court. By exercising this right, local land use plans and zoning regulations are further preempted.

The area of federal energy policy in general presents unique challenges in the land use context as the desire to take advantage of more renewable energy sources, such as wind and solar, rely on the willingness of local governments to modify zoning ordinances and land use regulations to permit the siting of such uses. While a number of state governments have preempted local zoning control when it comes to the siting of large scale wind energy facilities, it remains unknown whether the federal government will assert a more aggressive regulatory role in terms of land use preemption in the future.

E. Increasing Trend of Federal Influence

The federal government has continued to take notice of the importance of the land use regulatory regime, control or influence over which may be integral to the accomplishment of various policies and goals. This reality is manifested a growing number of programs enacted by federal agencies that seek to influence local land use decision making through the use of a variety of tools and techniques including fiscal incentives such as grants. Equally strong, however, is the reality that certain agencies, such as the Department of Defense discussed below, can make decisions about the siting or removal of federal installations that could have profound economic impacts on communities. When these decisions are based in part on local land use regulatory regimes, the federal government can significantly influence changes in the local regime. While most of the federal programmatic activity is uncoordinated and initiated soley by the individual agency, several of these programs have been developed and administered through a collaborative and comprehensive effort between multiple federal agencies who strive to fulfill a unitary purpose. What follows is a brief overview of some of the more significant programmatic influences on local land use controls.

1. The Department of Defense

The Department of Defense (DoD) owns several thousand buildings and facilities throughout the United States, which cumulatively involve over 30 million acres of land. Despite being one of the largest landholders in the United States, DoD is not often considered in the context of local land use planning and control yet its influence, particularly when it comes to the economic impact on local communities is immense. DoD has expressed concerns that “the encroachment of civilian land use activities too near and installation negatively affect DoD
missions and operations, expose the public to potential health and safety risks, and become a national defense issue.” As a result, with the cyclical Base Realignment and Closure (BRAC), many localities find themselves with inadequate land use regulations to prevent a base closure and/or to deal with the sudden disappearance of DoD’s presence.

Through its Office of Economic Development (OED), DoD offers the opportunity to engage in Joint Land Use Studies (JLUS). JLUS is a basic collaborative planning process funded by DoD whereby Department representatives and the local government identify encroachment issues around a military base and subsequently the local government updates its zoning and land use regulations to address these concerns. JLUS are aimed at promoting “cooperation in land use planning between the military and civilian communities as a way to reduce adverse impacts on both military and civilian activities.” DoD is also authorized to enter into agreements with local governments to restrict incompatible land uses close to military installations. While DoD does not encroach upon local land use control in the traditional sense, the reality is that the consequences of failure to address DoD needs in local land use regulations could have devastating economic impacts for its host communities.

2. The Environmental Protection Agency

The Environmental Protection Agency was established in 1970, and was meant to establish and enforce environmental standards, monitor and analyze the environment, and assist state and local government in controlling pollution. The EPA has plainly noted that it “recognizes that land use planning is within the authority of local governments,” yet it further notes that “land use planning plays a critical role in state and local activities to both mitigate greenhouse gases and adapt to a changing climate.” The Agency has noted that “[a]lthough land use planning is an integral responsibility of local governments, state-level policies and support for local efforts . . . are critically important.” As will be discussed below, the EPA funds a variety of programs that may influence local land use planning.

3. The Department of Housing and Urban Development


Office of Economic Adjustment, Practical Guide to Compatible Civilian Development Near Military Installations, V-19


Santicola, Encroachment: Where National Security, Land Use, and the Environment Collide 2006-JUL Army Law. 1. DOD may also enter into these agreements with private entities as well.

Tara A. Butler, “Strategies to Encourage Compatible Development Near Military Installations,” 28 Zoning and Planning Law Report (July 2005) (“Despite its strong interest in preserving its military installations, the federal government does not pass and enforce laws that ban development near them. The most valuable contribution the federal government provides to prevent encroachment is to offer policy guidance and financial assistance to states and localities to promote joint compatible land-use planning conducted by the local community in cooperation with the local military installation.”)


64 Fed.Reg. 68761, Dec. 8, 1999


In the 1930’s Congress established both the Federal Housing Administration and the Public Housing Administrations as separate federal agencies which dealt with homeownership and low-income rental assistance. These federal agencies began to shift their focus to urban development and “to address the multiple problems of people living in the nation’s burgeoning cities that had grown rapidly and haphazardly in the first half of the 20th Century,” Congress passed the Housing Act of 1949. The centerpiece of this act was the so-called “slum clearance” program, which authorized federal funding to local land use authorities for the acquisition, demolition and redevelopment of blighted areas, and further established a direct relationship between local municipalities and what would soon be the Department of Housing and Urban Development.

In the 1950’s and 1960’s, HUD’s focus on urban development was broadened. As discussed above, in 1954 the HUD 701 Program provided federal funds for urban planning, land use studies, surveys and other local land use plans to promote the healthier growth and redevelopment of population centers. In 1991, the Kemp Commission, appointed by Secretary Jack Kemp, released a report, “Not in My Backyard: Regulatory Barriers to Affordable Housing,” which launched an attack on local land use controls as a leading cause of increased housing costs. In addition to the creation of a clearinghouse on regulatory barriers to affordable housing, in 1994 as part of HUD’s Affordable America’s Affordable Communities Initiative, the Department launched a "Bringing Homes Within Reach Through Regulatory Reform" program, “designed to encourage some 25,000 local government officials and community leaders throughout the country to work together to identify solutions to the housing affordability challenge.” Zoning tools viewed as exclusionary were the target of this effort. In 1966, the federal government enacted the Model Cities program which gave funding to municipalities for the implementation of five-year comprehensive plans for cities. The program, administered through HUD, “required local citizen participation in the preparation and implementation of the five-year comprehensive plans for each designated city…” Recognizing the intersection of affordable housing and local land use planning and regulatory controls, HUD continues to provide incentive based funds based in part by localities comprehensive planning of development.

209 68 Stat. 640. This was included in the Housing Act of 1954 (68 Stat. 590, PL 560)
4. The Department of Transportation

The Department of Transportation (DOT) was created by Congress in 1966,\(^\text{215}\) to ensure “a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people.”\(^\text{216}\) The federal transportation planning infrastructure, which includes DOT’s Federal Highway Administration (FHA) have specific, statutorily defined land use planning requirements,\(^\text{217}\) which includes consulting with local land use planning authorities.\(^\text{218}\) This further reflects DOT’s enabling legislation, which recognizes that it is in the national interest to encourage the growth of a safe national transportation infrastructure that will further “foster economic growth and development within and between States and urbanized areas.”\(^\text{219}\) Transportation regulations are intended “to be consistent with local comprehensive land use planning and urban development objectives.”\(^\text{220}\)

5. Inter-Agency Collaboration

As previously noted, for the most part the federal agencies engage their own independent relationship with local governments over the aspects of land use regulatory control relevant only to the individual agency’s mission. More recently, several agencies have collaborated, pooling fiscal and programmatic resources to promote greater sustainability through an intergovernmental partnership aimed at influencing local land use planning and control behaviors. The Partnership for Sustainable Communities (PSC) was founded in 2009 by the Secretaries/Administrator of HUD, DOT, and EPA to enable more prosperous communities.\(^\text{221}\)

Under the Partnership, each of the agencies uses federal grants and programs to further their shared interests in the form of programs which affect the sustainability of towns, cities and regions.\(^\text{222}\) Additionally, the PSC has removed regulatory and policy barriers that, if in place,

\(^{215}\) About DOT, DOT [http://www.dot.gov/about.html]
\(^{216}\) About DOT, DOT [http://www.dot.gov/about.html]
\(^{217}\) See 23 USC 134-35; 23 CFR 450
\(^{218}\) See 23 USC 134(g), 134(i)(4); 23 USC 135(f)(2)(D)
\(^{219}\) 23 USC 134(a)(1).
\(^{221}\) A year of Progress for American Communities, Partnership for Sustainable Communities 2, October 2010, available at [http://www.epa.gov/smartgrowth/pdf/partnership_year1.pdf].
\(^{222}\) Each member agency has a specific role to fill in order for the comprehensive venture to be a success. HUD’s role is to provide resources to assist in the implementation of sustainable development, DOT utilizes funding to integrate transportation in ways which “directly support” sustainable communities, and the EPA uses funding and resources to provide technical assistance to communities implementing sustainable planning, as well as assisting in the development of “environmental sustainability metrics and practices.” Notice of Funding Availability (NOFA) for HUD’s Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program, Department of Housing and Urban Development, 6 (Docket No. FR-5396-N-03).
would impede the goals of the partnership. Finally, the PSC is guided by six “livability principles” which guide the goals and funding allocation of this partnership. The PSC provides this assistance in the form of various federal programs and initiatives. These programs include the Transportation Investment Generating Economic Recovery (TIGER) program, the Sustainable Communities Regional Grant program, and the Smart Growth Implementation Assistance program. Each of these programs includes provisions affecting the control of land use and zoning by local and state governments.

The TIGER Program was originally created through the American Recovery and Reinvestment Act of 2009. Administered by the DOT, TIGER grants are for the purpose of improving the nation’s infrastructure. The grants are discretionary, and awarded to local municipalities who submit applications that address both primary and secondary goals under the program, including the sustainability of the project, the economic stimulus of the project, the innovation of the project and the collaborative nature of the project. Although, the selection criteria does not directly call for the revision of local and regional planning, certain aspects of TIGER projects could affect local and state land use regulations and policies requiring localities to indicate a willingness to make changes. Rezoning and variances may, in some instances, be a necessity to satisfy the certain TIGER criteria as a successful applicant must attempt to fully integrate transportation not only in residential neighborhoods and communities, but also integrate the transportation into places of interest, such as places of employment and locations to purchase

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223 Id.
224 Id. at 3. Guiding this partnership are six “livability principles.” The first guiding principle is to develop additional transportation opportunities within a community, reducing greenhouse emissions, reliance on foreign oil, as well as lowering transportation costs. The next principle is to promote the use of equitable and affordable housing, creating such housing in new locations and with increased energy efficiency. The Partnership also strives to enhance economic competitiveness through creating “reliable and timely access to employment centers, educational opportunities, services and other basic needs by workers, as well as expanded business access to markets.” Of particular importance to local government officials is the guiding principle of supporting existing communities. Through this principle, the federal government will fund programs that revitalize communities, such as increasing transportation, mixed use development and “land recycling.” Additionally, the partnership’s livability principles seek to promote the sixth livability principle, to fund programs that value and enhance the unique characteristics of neighborhoods by promoting “healthy, safe, and walkable neighborhoods.” Lastly, the partnership will also strive to coordinate federal funding.

226 http://www.dot.gov/recovery/ost/faq.htm
227 76 Fed. Reg. 38,722. The primary group of selection criteria is composed of long term goals established by the applicant political subdivision. These long term goals include: repairing existing the existing transportation infrastructure, enhancing medium to long term economic competitiveness, increasing the livability of communities through increasing transportation options and access, improving environmental sustainability and improving the safety of the United States transportation system. Inherent in these criteria are the creation of jobs and stimulating the economy, as part of the Obama Administrations broader policy goals. The secondary goals the applicants should emphasize are transportation innovation and collaboration or partnership. Id. at 38723.

228 The impact of land use decisions, regulations and plans have the ability to have a profound impact on many of the selection criteria, such as revitalizing existing and creating new transportation opportunities, as well as promoting environmental sustainability.
commodities.\textsuperscript{229} In addition to transportation integration, local planning may also need to implement a strategy of reducing transportation altogether. This effort would be facilitated by the rezoning of communities on a large scale, breaking from exclusionary methods of contemporary zoning, integrating retail, commercial and other non-residential uses within neighborhoods. Therefore, attempts to win these funds through the competitive bidding process may incentivize more sustainable local land use regulations.

The Partnership also supports the Community Challenge Grants (CCG) program administered by HUD.\textsuperscript{230} The CCG program is aimed at fostering reform and reducing “barriers to . . . affordable, economically vital, and sustainable communities.”\textsuperscript{231} CCG directly impacts and influences land use planning, as it states in the overview on its website that efforts to obtain these grants “may include amending or replacing local master plans, zoning codes, and building codes, either on a jurisdiction-wide basis or in a specific neighborhood, district, corridor, or sector to promote mixed development, affordable housing, the reuse of older buildings and structures for new purposes.”\textsuperscript{232} CCG grants are given out based upon the “six livability criteria” determined by the PSC.\textsuperscript{233} Further, eligibility for funding is conditioned on seven designated activities designated by HUD. These activities directly influence land use planning, as some even include a complete revision of the town’s zoning for mixed use, or altered zoning for the sake of energy or transportation efficiency.\textsuperscript{234}

Another initiative of the PSC is The Sustainable Communities Regional Planning Grant (SCRPG) Program which is administered by HUD, but coordinated in conjunction with DOT and EPA.\textsuperscript{235} SCRPG is aimed at “planning efforts that integrate housing, land use, economic and

\textsuperscript{229} As provided supra, the Notice states, “particular attention will be paid to the degree to which such projects contribute significantly to broader traveler mobility through intermodal connections, or improved connections between residential and commercial areas.” Id. at 38724.

\textsuperscript{230} Formerly, it was operated in conjunction between HUD and DOT.

\textsuperscript{231} http://portal.hud.gov/hudportal/documents/huddoc?id=FY11ComChPlanFAQ.pdf

\textsuperscript{232} http://portal.hud.gov/hudportal/HUD?src=/program_offices/sustainable_housing_communities/HUD-DOT_Community_Challenge_Grants

\textsuperscript{233} See above

\textsuperscript{234} 75 Fed. Reg. 36246. The seven activities designated by HUD include: The first activity provided for is the creation of a master or comprehensive plan that promotes low income housing areas with retail and business uses, as well as “discourage[ing] development not aligned with sustainable transportation plans or disaster mitigation analyses.” Next, the second criterion mirrors the goals of the Partnership, focusing on the alignment of planning and the goals of livability and sustainability. Under the third set of activities, the HUD program calls for a wholesale revision of local zoning, requiring movement towards inclusionary mixed-use zoning as well as using inclusionary and form based codes to promote the interests of fair housing. The grants will also be used to alter zoning codes to increase energy efficiency, affordability and the salubriously of housing options, to create strategies to locate low income housing in mixed-use neighborhoods and transit corridors, and to integrate low income housing into areas with few existing affordable housing options. Lastly, the local government can receive funding by “[p]lanning, establishing, and maintaining acquisition funds and/or land banks for development, redevelopment, and revitalization that reserve property for the development of affordable housing within the context of sustainable development.”

workforce development, transportation, and infrastructure investments.”

Consortiums made up of local governments, regional planning agencies, non-profit organizations, and private industry must be created to receive funding from SCRPG. Again, the program is based on the PSC’s six livability principals. The SCRPG parallels the TIGER program in that there is no mandatory requirement for revision to the local zoning or land use planning of the consortium municipalities seeking the funds, although program criteria make it clear that the localities that are stronger candidates for the grant should demonstrate their willingness to be flexible in terms of land use and planning in its application.

These are not the only programs that operate at the federal level that have the effect, if not the stated goal, of influencing local land use planning and regulatory control. They do provide good representative examples of how federal agencies can, absent preemptive mandates from Congress, have a profound impact on the zoning and land use regulatory regimes.

IV. The Future of Land Use Control in the United States

Today’s sustainability challenges demand a renewed commitment to meaningful interjurisdictional cooperation. Business as usual, with uncoordinated and at times diametrically opposed policies is simply not advantageous for a sustainable future. One current area where this scenario is being played out in the U.S. is the developing policies and regulatory regimes over hydrofracking. Hydrofracking is the process used to extract natural gas from underground rock formations part of the Marcellus Shale. The federal government has announced certain policies with respect to hydrofracking on federal lands, but has left the regulation of these activities on private lands to the states. Litigation continues to make its way through the courts in the U.S. as to whether the regulation of hydrofracking is a land use matter, and hence an issue of local concern and within the purview of local governments to regulate as part of their land use regime; or whether the extraction of natural gas is a matter of statewide concern demanding state-level control. It is no surprise that states have already adopted different policies and approaches with respect to this issue, ranging from prohibiting hydrofracking altogether in Vermont, to striving to enact state regulations balancing the needs and interests of all stakeholders in states like New York (where it has recently been announced that the already four year moratorium on hydrofracking will likely be extended while the state government continues to study the issues).

Perhaps a taxonomy of land uses should be developed that speak to a better way of examining the interdisciplinary dynamics of land use control. It is time to convene a blue ribbon commission to dispassionately explore what types of land uses should best be planned for and regulated at which level of government. Some issues may demand an intergovernmental agenda, and others may better be addressed by a single governmental entity. For example, energy issues—specifically renewable energy, may better be addressed as a national priority with research,

237  Dep’t of Housing and Urban Development, Advance Notice of Requirements for HUD’s Fiscal Year 2011 Sustainable Communities Regional Plan Grant Program, Docket No. FR-5559-N-01, at 4, 5 at 14.
planning and control led by the federal government. Housing issues, however, may be better addressed at the local level. Likewise, the development of a national communications infrastructure, especially in a post-9-11 world may be more appropriately accepted as a national concern, yet the regulation of religious land uses may be better addressed at the local level. A list of the topics to be discussed cannot easily and neatly be placed in the jurisdiction of one level of government over another. Yet, without a unified or clearly articulated and coordinated policy, there is enormous economic cost and delay in protecting the environment and producing a more sustainable land mass for future generations.