# NEW DIRECTIONS IN FEDERAL LAND USE LEGISLATION

BY WILLIAM K. REILLY*

In the days when the environment was coming into its own as a major area of public concern in the United States, Dennis O'Harrow attempted to draw the implications of the environmental movement for an area of long-standing interest to planners. He wrote:

> I see a great national program mounted against water pollution. I hear a hue and cry against air pollution. . . . But I see no comparable concern over our pollution of the land—which is really the scarcest of the three basic resources of human life.
>
> The solution is simply stated, but not easily carried out. We need a national land use policy for all land, urban and non-urban, a policy with teeth in it, a policy laid down by Congress and administered by the White House, using all the tools and every governmental power in the Federal arsenal. Similarly, State and local governments will need to use all their powers—the police power, the power of eminent domain, and the taxing power. The time for half measures is past.[1]

O'Harrow's observation was perceptive for, at the time he wrote, urban planners rarely identified a convergence of interest with environmental objectives. The 1960's, a decade that began with enthusiasm and ended in dashed hopes for many social planners, encom-

* Executive Director, Task Force on Land Use and Urban Growth, sponsored by the President's Citizens' Advisory Committee on Environmental Quality; Senior Staff Member, Council on Environmental Quality (on leave of absence since July, 1972). A.B., Yale University, 1962; LL.B., Harvard University, 1965; M.S., Urban Planning, Columbia University, 1970.

1. U.S. DEP'T OF AGRICULTURE & U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, REPORT OF THE PROCEEDINGS OF THE CONFERENCE ON SOIL, WATER AND SUBURBIA 106 (1968).

passed rising environmental expectations that did not fade with the decade, but grew stronger and contributed to several notable legislative breakthroughs. The new laws which the environmental awareness brought about were not only pollution control measures but extended to such issues as coastal zone protection, power plant siting, scenic area preservation and highway planning. The concern with protecting environmental values in land underlay the enactment of several state laws which have been referred to as a "quiet revolution in land use control,"[2] a revolution that has returned land use regulatory power to the several states. Now this revolution has reached Washington where the Senate has passed legislation which would fundamentally alter governmental relationships regarding land use planning and regulation in the United States.[3] Objectives which writers on urban and social problems have long advocated, but which the constituency for planning and housing has never been able to effectuate, stand a fair chance of achievement under the environmental aegis, as O'Harrow apparently anticipated.

This paper will examine the rationale and the historical antecedents behind current efforts to enact national land use policy legislation. It will analyze the land use policy measure under consideration. It will draw some conclusions about what we may reasonably expect from such legislation, recognizing that many important land use objectives will still remain to be achieved after national land use policy legislation is enacted.

## I. The States as Agents of Revolution?

Perhaps one reason the land use revolution has been quiet is that its objective is modest: the transfer of power to regulate the use of privately owned land from local to state control when regional or state interests are affected by the use to which land is put. Local authority over land use, most commonly exercised through zoning and subdivision regulations under police powers delegated by states to municipalities, townships, and in a few states to counties, has become so well entrenched that proposals to transfer any portion of such authority are viewed as an intrusion of the unfamiliar into a field

2. F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (Council on Environmental Quality 1971).

3. S. 632, 92d Cong., 1st Sess. (1971). The version of the Bill that passed the Senate can be found in 118 Cong. Rec. 15,278-84 (daily ed. Sept. 19, 1972).

where the key players are known and the interests understood. The prospect for different kinds of decisions where the perspective, incentives and responsibilities are supra-local is quite real and is thought to justify significant expectations. This, at least, is the theory behind the movement to enact a federal program which would provide financial assistance to states which undertake to affect land use decisions of regional impact. The Land Use Policy and Planning Assistance Act passed by the Senate, and the analogous Bill reported favorably by the House Committee on Interior and Insular Affairs,[4] but which failed to pass the House of Representatives in the 92nd Congress, would have authorized a new federal grant-in-aid program to states which assert control, directly or concurrently, with their local governments, over "areas of critical environmental concern," "areas impacted by key facilities" (major projects which induce urban growth and development with supra-local impact), and all large-scale development however defined. Although the provision is confusing in the Senate Bill, the states also would apparently be required to provide a method for assuring that "development of regional benefit" (*i.e.*, for which there is a regional need) is not excluded or unduly restricted by local governments. A state which develops a land use program, approved after annual federal reviews, would be entitled to continued financial support under the new federal program, and would be assured that federal agencies would not act inconsistently with the state land use program except under extraordinary circumstances. It seems useful to place the new Bill, with which citizen environmental groups, Governors and many other organizations and observers are in substantial accord, in context, for the Bill's objectives and relationship to existing federal planning programs have not been sufficiently understood.

## II. Federal Efforts to Encourage Sound Land Use

In one sense, it is not surprising that federal policy makers should evidence uncertainty when confronted by a proposal to reform governmental power relationships with respect to privately owned land. The federal government itself has remained largely aloof from this field which, unlike air and water pollution, does not cross state boundaries.

---

4. H.R. 7211, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 1306, 92d Cong., 2d Sess. (1972).

However, since its establishment the federal government has been in the land business. Debates continued throughout much of the 19th century over the terms at which public lands were to be made available to westward moving settlers, and whether the proper objective in land disposal should be the encouragement of early settlement (as Jefferson held) or the generation of federal revenue (as Hamilton believed).

### A. *The Zoning Act: Federal Influence by Example*

In this century federal attempts to affect the use of privately owned land have taken three forms. The first and perhaps most successful federal initiative was taken when the United States Department of Commerce commissioned and then published the Standard State Zoning Enabling Act.[5] The Zoning Act, first released in 1922, was the work of an Advisory Committee on Zoning to the Secretary of Commerce, Herbert Hoover. Secretary Hoover conceived of the project as responding to "the greatest social need of the country—more and better housing."[6]

The Act established the framework whereby states would grant their local governments the police powers to regulate the use of privately owned land. The model to which the drafters gave statutory expression, and a federal imprimatur, was one of local authority to allocate land into districts where certain kinds of development were prohibited as undesirable. The governmental relationship envisioned by the Act was one of virtually autonomous local governments going their own way with the full blessing of state government, the state having legislated its own neutrality in the Zoning Act.[7]

This made considerable sense in 1922. Good government forces, which saw the city as the natural focus of most of their progressive reforms, sought building codes to protect health and safety, and tended to identify state intervention in city affairs as officious. The battles against anti-city "special legislation" enacted by rural dominated state legislatures, and the movement for city self-government via "home rule" influenced the urban reformers, who responded by

5. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926).

6. S. TOLL, ZONED AMERICAN 201 (1969).

7. For a more detailed analysis of the Standard Zoning Enabling Act see AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE xi-xiv (Tent. Draft No. 2, 1970).

inventing zoning and convincing the Commerce Department that it should support a land use control process in which the city was dominant and the state removed.

A key assumption of the zoning process was fixity. The city was seen as a forum in which certain land uses were *per se* incompatible and, hence, were to be confined to discrete physical districts. These districts were to be subject to uniform regulations with respect to, *inter alia*, height, bulk and setback, according to the familiar principle of uniform treatment for essentially similar uses. An assumption implicit in a zoning process administered by the city (or town, township or other local government to which the state delegated police powers to regulate land use) was the adequacy of the city's territorial jurisdiction to influence change. For change is what gave rise to the need for zoning—change toward ever higher buildings and the change of shopping and residential areas into industrial quarters.[8] However, the system was designed according to a model of incremental, lot-by-lot, building-by-building change. Although it was suggested that states might wish to allow cities to anticipate expansion by controlling growth in unincorporated areas which would eventually be annexed, no mechanism for either reconciling the divergent land use plans of neighboring municipalities or for giving expression to regional interests was provided. This, then, was the system which nearly all states, in a remarkably short period of time, enacted into law.

As early as 1937, a critique of the municipal planning and zoning process was offered by a committee reporting to the President. The National Resources Committee observed that "[n]ew methods of transportation have made unprecedented urban decentralization possible. The scale of the interior planning of our cities, however, has not been changed to conform with the new mobility."[9]

### B. *The Federal Carrot for Planning: The 701 Program*

In 1954, Congress authorized a program of "Urban Planning Assistance"[10] in accordance with a finding by the President's Advisory Committee on Government Housing Policies and Programs that local

---

8. *See* S. TOLL, *supra* note 6, at chs. 2-3.

9. NATIONAL RESOURCES COMM., REPORT ON OUR CITIES—THEIR ROLE IN THE NATIONAL ECONOMY 47 (1937).

10. Housing Act of 1954 §§ 701-03, 40 U.S.C. §§ 460-62 (1964), *as amended*, 40 U.S.C. §§ 460-62 (1970).

planning was not being performed adequately, particularly in smaller jurisdictions.[11] The House Report on the new measure emphasized its relationship to slum clearance:

> Your committee believes that the problem of eliminating urban slums and blight, while national in scope, is essentially a local problem. . . . Federal assistance is justified only if the community is willing to face up to the problem of neighborhood decay and to undertake programs directed to its prevention. . . . The local program must provide for utilizing appropriate private and public resources and must include an official plan of action for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods. . . .[12]

The 701 program,[13] as it has come to be known, was originally intended to help smaller urban communities develop "plans to correct poor environmental urban conditions . . . ."[14] and to aid "official State, metropolitan or regional planning agencies to perform planning work in metropolitan and regional areas."[15] The type of planning to be supported was to include "surveys, land-use studies, urban renewal plans, technical services, and other planning work. Grants would not be made for planning specific public works."[16]

The 701 program has served as the principal source of federal financial support for comprehensive planning, evolving over the years in response to new priorities and changing planning theory. Areas impacted by approved new communities, areas disrupted by the closing or expansion of federal installations, interstate regional commissions and economic development districts all have been added as eligible grantees. Councils of government, whose functions are perhaps most comprehensive, have been heavily supported by the program. From an initial funding level of one million dollars in matching grants in 1955, the program had expanded by Fiscal Year 1972 to

---

11. H.R. REP. No. 1429, 83d Cong., 2d Sess. 1, 26 (1954).

12. *Id.* at 24-26.

13. Housing Act of 1954 §§ 701-03, 40 U.S.C. §§ 460-62 (1970), *amending* 40 U.S.C. §§ 460-62 (1964).

14. *Hearings on H.R. 5240 Before the Subcomm. of the House Comm. on Appropriations*, 84th Cong., 1st Sess., pt. 2, at 1376 (1955).

15. S. REP. No. 1472, 83d Cong., 2d Sess. 91 (1954).

16. *Id.*

$50 million with a two-thirds federal contribution formula. The earlier emphasis on public developmental planning and land use planning, particularly to avert blight in small communities, has broadened to include planning for human resources, fiscal planning and the preparation of regulatory and administrative measures.[17]

After 1968, comprehensive plans prepared with 701 program assistance were required to contain a "housing element" taking into account

> all available evidence of the assumptions and statistical bases upon which the projection of zoning, community facilities, and population growth is based, so that the housing needs of both the region and the local communities . . . will be adequately covered in terms of existing and prospective in-migrant population growth.[18]

In 1971, the President proposed a further broadening of the program to support state and local government efforts to upgrade their overall management capabilities to handle the new responsibilities to be delegated with federal revenue sharing.[19] The Administration proposed to double the amount of money available under the program.

Both the planning agency grantees and the federal funding agency have moved away from the earlier land use orientation (as the planning profession itself has) and have increasingly emphasized budgetary planning, information systems management and data collection and analysis. Although the program began simply without detailed constraints, in recent years some grant recipients have conveyed the impression that federal scrutiny has been intrusive, and that the housing element requirement has come to prevail over all others in the minds of officials of the Department of Housing and Urban Development when reviewing applications for funding.

Nevertheless, the 701 program, more than any other federal activity, has contributed to the training and development of the urban planning profession. And it has supported comprehensive planning, serving to lessen somewhat the imbalance that has had the designers

---

17. For an account of the evolution of federal planning aids and requirements see McGrath, *Planning for Growth*, in HOUSE COMM. ON BANKING AND CURRENCY, PAPERS SUBMITTED TO SUBCOMM. ON HOUSING PANELS ON HOUSING PRODUCTION, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, 92d Cong., 1st Sess., pt. 2 (Comm. Print 1971).

18. Housing and Urban Development Act of 1954 § 701, 40 U.S.C. § 461 (1970), *amending* 40 U.S.C. § 461 (1964).

19. S. 1618, 92d Cong., 1st Sess. §§ 201-13 (1971).

of roads, sewers and airports determining the shape of our cities, too often leaving the comprehensive planners to smooth out the resulting rough spots.

### C. *Federal Planning Requirements: The Sticks in the Planners' Arsenal*

The potential of federal programs and activities to disrupt local plans was recognized at least as early as 1949 when federally supported urban redevelopment plans, typically prepared by semi-autonomous urban renewal authorities, were required to be consistent with general plans prepared by local planning agencies.[20] During the following two decades, the conditions of eligibility for federal financial assistance under several programs were altered to exact a greater planning effort on the part of recipient governments. With the Housing Act of 1961,[21] the federal government broadened its concern to areawide planning, making eligibility for federal grants for the acquisition of open space dependent upon a determination that the funds are "needed . . . as part of the comprehensively planned development of the urban area."[22]

Subsequently, nearly every major housing and transportation bill has added planning requirements. During the 1960's, the federal government became more directive, edging steadily towards encouragement of interlocal cooperation, regional coordination and metropolitan government as responses to the realization that neither housing markets nor labor supply could any longer be regarded as purely local problems. Among the objectives sought in the federal planning legislation of the 1960's were the establishment of coordination among local governments, the avoidance of waste and duplication in federal investments through better communication to federal agencies about the nature of regional or metropolitan needs and the subordination of functional or public works planning activities to comprehensive areawide planning objectives. It is difficult to find observers of the planning process who believe that these objectives have been achieved. For, despite repeated Congressional declarations of support for plan-

20. Housing Act of 1954 §§ 701-03, 40 U.S.C. §§ 460-62 (1964), *as amended*, 40 U.S.C. §§ 460-62 (1970).

21. Housing Act of 1961, § 703, 42 U.S.C. § 1500(b) (1964), *as amended*, 42 U.S.C. § 1500(b) (1970).

22. *Id.*

ning, the regional planning institutions brought into being largely by federal initiative were without legal authority to work their will, without power to approve or disapprove local or state agency proposals, and without authority to regulate the use of land even where decisions of regional impact were involved. That they were free to make comments directly to federal granting agencies regarding the merits of local applications for funding was partially vitiated by the predominance of local executives among the boards of regional planning agencies. As a result of the impotence of advisory regional planning agencies, the regional interest has remained without an effective advocate, and authentic supra-local planning has been frustrated.

Beginning in 1962, federal highway legislation established the "Triple C" requirement[23] that expenditure of highway construction funds in urban areas in excess of 50,000 population be approved only upon a finding that proposed projects "are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities. . . ."[24] This provision put the Bureau of Public Roads (now the Federal Highway Administration [FHWA]) into the planning business and occasioned a substantial increase in funding support for planning, with funds from FHWA for comprehensive transportation planning approximately equalling section 701 funding levels. The metropolitan transportation planning agency was not always the same as the general planning entity, although FHWA grantees were encouraged to cooperate with the planning activities of areawide and local comprehensive planning agencies—an arrangement that at least in its early days led to the graduation of countless metropolitan highway plans into regional plans as the more savvy and experienced highway planners overwhelmed the regional planners.

A particularly significant federal planning encouragement was contained in section 204 of the Demonstration Cities and Metropolitan Development Act of 1966,[25] which required review by a metropolitan planning agency of applications for federal funding for hospitals, airports, libraries, water supply and distribution facilities, sewerage

23. Federal Aid Highway Act of 1962 § 9(a), 23 U.S.C. § 134 (1964), *as amended*, 23 U.S.C. § 134 (1970).

24. *Id.*

25. Demonstration Cities and Metropolitan Development Act of 1966 § 204, 42 U.S.C. § 3334 (Supp. V, 1969), *as amended*, 42 U.S.C. § 3334 (1970).

facilities, waste treatment works, highways, transportation facilities, and water development and land conservation projects. Pursuant to this requirement, and to a later parallel requirement of the Intergovernmental Cooperation Act of 1968,[26] the Bureau of the Budget (now the Office of Management and Budget) issued Circular A-95.[27] Circular A-95 implements the laws by defining the federal programs subject to the review and comment of planning agencies, the procedures for designating state, regional and metropolitan "clearinghouses," and the methods for obtaining review and comment by the areawide agency or clearinghouse of applications for federal assistance.

The procedure grew out of a recommendation of the Advisory Commission on Intergovernmental Relations in 1961.[28] The Commission had

> noted repeated instances where an official of a political subdivision in a metropolitan area learn[ed] through the newspapers of a Federal grant for a hospital, sewage treatment plant or other large physical facility in a neighboring subdivision. Quite often recriminations follow[ed] regarding the need for improved interchange of information and improved coordination in planning for governmental facilities in the metropolitan area. The Commission believe[ed] that considerations of economy alone . . . demand[ed] a firm requirement for full exchange of information within metropolitan areas prior to sizable Federal contributions for physical facilities in the area.[29]

Although federal support for planning had increased through the years, Congress concurred in the conclusion that the planning effort being supported was directed too heavily toward meeting specific functional planning requirements, and had not resulted in effective overall planned development. Moreover, only a few metropolitan areas were found to have "developed arrangements to effectively coordinate actions to implement local planning."[30]

---

26. Intergovernmental Cooperation Act of 1968 § 401, 42 U.S.C. § 4231 (Supp. V, 1969), *as amended*, 42 U.S.C. § 4231 (1970).

27. Bureau of the Budget Circular No. A-95 (July 24, 1969), *revised in* Office of Management and Budget Circular No. A-95 Revised (Feb. 9, 1971).

28. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, REPORT ON GOVERNMENTAL STRUCTURE, ORGANIZATION AND PLANNING IN METROPOLITAN AREAS (1961).

29. *Id.* at 49.

30. S. REP. No. 1439, 89th Cong., 2d Sess. 17 (1966).

Nevertheless, in neither the Demonstration Cities Act nor the Intergovernmental Cooperation Act did the Congress confront directly the facts that not only is the local perspective typically limited by the size of the jurisdiction, but the economic and political incentives under which most American cities operate are counter-regional. Whether the immediate interest is the attraction of revenue-generating industry, or "preserving the character of the neighborhood," the wisest course for the municipality is "beggar thy neighbor."

A statement of minority views took exception to the committee report's claim that the new procedure would help bring together the "many divergent public bodies in metropolitan areas":

> It is suggested that one of the reasons for this legislation is the complexity of metropolitan government and the multiplicity of political jurisdictions and agencies involved. We do not find anything in the bill that would lessen the complexity or reduce the number of jurisdictions.[31]

The signatories to the minority statement perhaps had overheard talk about regional "institution-building" through the new procedure, for they went on to add that if the proposal was really designed to encourage a dilution of local authority, the Bill would be even more objectionable.

The question of whether to give planning agencies (albeit not regional ones) real power to veto projects found inconsistent with comprehensive plans was later raised in the Senate in a provision of the Intergovernmental Cooperation Act—the other legislative parent of Circular A-95—which would have conditioned federal support for most public works activities upon certification, not merely comment, by the governing body of the general local government that the project was consistent with its planning objectives.[32] The measure, however, was dropped at the request of the Johnson Administration.[33]

According to the Report of the Senate Committee on Government Operations, section 401(b) of the Intergovernmental Cooperation Act[34] was to require

---

31. *Id.* at 35.

32. S. 561, 89th Cong., 2d Sess. § 503 (1966).

33. See the statement by Harold Seidman, Ass't Director, Bureau of the Budget, in *Hearings on S. 561, H.R. 6118, H.R. 10212, H.R. 11863, H.R. 12896, H.R. 17955 Before a Subcomm. of the House Comm. on Gov't Operations,* 89th Cong., 2d Sess. 311 (1966) [hereinafter cited as *Hearings on S. 561*].

34. 42 U.S.C. § 4231(b) (1970).

> that all viewpoints—national, regional, State, and local—shall, to the extent possible, be fully considered and taken into account in planning Federal or federally assisted development programs and projects. Regional, State, and local government objectives shall be considered and evaluated within a framework of national public objectives, and available projections of future national conditions and needs of regions, States, and localities shall be considered in plan formulation, evaluation, and review.[35]

In his statement in support of the reported Bill, Senator Muskie, who had introduced the legislation, declared:

> It [the Bill] recognizes that the economic and social development of our Nation, our strength in world affairs, and the success of many recently enacted domestic programs depend in large degree on the sound and orderly development of our urban communities. It builds on the theory that such development can best be accomplished first by maximizing the benefits of Federal programs to meet urban needs, and second, by encouraging the States and localities to develop comprehensive planning and programming to take full advantage of these benefits.[36]

This was a heavy load of hopes and expectations that the new process was to bear. How, in fact, has it borne up?

Circular A-95 provides what little muscle there is in metropolitan and regional planning. It permits planners to be heard, not just by the functional program agencies at the state or local level, but also at the federal agency level with regard to funding specific projects. It represents a significant elevation of the comprehensive planning function, and it may one day be regarded in retrospect as a transitional mechanism leading toward effective regional coordination or even to metropolitan government.

As in the case of the 701 program, the A-95 process has enjoyed steady accretions as year by year more A-95 agencies have been designated and more federal programs have been added to those which are subject to the requirement of obtaining review and comment "for the purpose of assuring maximum consistency . . . with State, regional and local comprehensive plans."[37]

---

35. S. REP. No. 1456, 90th Cong., 2d Sess. 18 (1968).

36. See the statement by the Hon. Edmund S. Muskie, Senator from Maine, in *Hearings on S. 561* at 499.

37. Office of Management and Budget Circular No. A-95 Revised 5 (Feb. 9, 1971).

Originally excluded from coverage under A-95, federal housing assistance programs were added in 1971. In 1969, direct federal construction activity, such as that conducted by the Corps of Engineers and the General Services Administration, was also added. A recent notable addition to A-95 is a requirement that civil rights aspects of applications for federal assistance be considered and made subject to review and comment.[38] This provision was a partial response to concerns of center city minority leaders that suburban dominance in councils of government might lead to exclusionary abuse of the procedure in some areas.

Two annual reviews, by the Office of Management and Budget, of the procedures established to implement the parallel planning requirements of the Demonstration Cities Act and the Intergovernmental Cooperation Act have noted "improved interlocal communication, cooperation, and coordination."[39] The agency also reported that the percentage of all reported reviews recommending project changes, *i.e.*, criticizing an application by a local government, special district or functional agency, went from five per cent in 1968 to 18 per cent in 1969.[40] This is an indication that such agencies may have displayed more courage than one might have expected considering the predominance of local political barons on the executive board of the typical areawide planning agency.

Undoubtedly, the cumulative effect of federal incentives for state, regional and metropolitan planning has been significant. As of the summer of 1971, the results of two decades of federal planning legislation included an increase of active planning professionals from 248 to more than 6,200, the growth in recognized graduate planning schools from 12 to 42, the formation of more than 200 metropolitan planning agencies and regional councils, and the preparation of 4,000 local comprehensive development plans.[41] To the extent that the quality of plans is high, federal planning assistance and requirements can be given credit.

However, there is a widespread belief among students of the planning process that planning has received less than a fair shake in the

38. Office of Management and Budget Circular No. A-95 Revised (Transmittal Memo. No. 2, Mar. 8, 1972).

39. BUREAU OF THE BUDGET, SECTION 204—THE FIRST YEAR 6 (1968).

40. BUREAU OF THE BUDGET, SECTION 204 OF THE DEMONSTRATION CITIES AND METROPOLITAN DEVELOPMENT ACT OF 1966: TWO YEARS EXPERIENCE 9 (1970).

41. McGrath, *supra* note 17, at 959.

United States. Even defenders of the 701 program and the A-95 process concede the ineffectual nature of much advisory planning, review and comment, and take refuge in the "institution-building" potential of these programs. One authority has written:

> Planning theory and techniques have been evolving at a far faster rate during the past twenty years than the political institutions that might benefit most from planning, and neither the general public nor the vast majority of local political leaders have been able to assimilate the content of planning as an evolving field or to accommodate its offerings. As a general consequence of this generation-lag of public understanding behind the evolution of urban planning, the nation is being deprived of major resources in planning techniques and information which could be used to improve its ability to conduct essential public business and provide a basis for anticipating future problems and opportunities inherent in national growth. . . .
> . . . [Planning] might offer substantial benefits to the nation in the growth years ahead if it were actually tried. . . .[42]

Something, clearly, has not worked. Comments are made, papers generated, and circulars and regulations complied with, yet close observers of the process do not believe that planning in most areas is particularly comprehensive. They do not see local development activity as being well distributed from a regional or metropolitan point of view; nor do they see federal agency activities as coordinated. One could cite examples of local actions, many with federal financial support, taken in disregard of local comprehensive plans and without any concern for regional impact. Two recently documented case histories, discussed below, suffice to make the point.

In 1969, the Board of Supervisors of Fairfax County, a fast-growing Washington, D.C. suburban area, adopted a master plan developed by the county planning staff. The plan was developed with the financial assistance of the Department of Housing and Urban Development under the 701 program.[43] The adopted master plan anticipated a low-density holding zone for a sub-watershed where development was to be deferred for at least five years.[44] The holding zone was

42. *Id.* at 948.

43. M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 250 (1971).

44. This case history has been reported in POPULATION REFERENCE BUREAU, SUBURBAN GROWTH—A CASE STUDY (Population Bull. Vol. 28, No. 1, 1972).

proposed in order to avert continuation of patterns of sprawling development that had characterized much of the county for two decades. It was feared that an immediate go-ahead to development in the particular outlying corner of the county would impose heavy public service costs upon the county and would inevitably lead to scattering, precluding later implementation of plans for satellite clusters.

While the planners were proceeding with the development of the comprehensive plans, a sanitary district, which had been organized by a group of developers and owners of undeveloped property, devised a sewer plan which was based on a far higher population projection for the area than the planning agency accepted, and which would serve many more than the planned number of residents in the holding zone. The sewer plan was actually approved by the Board of Supervisors at the same meeting as the holding zone. The sewer, of course, induced heavy development of the area—development accommodated by frequent rezonings which one supervisor was later quoted as having justified on the ground that, after all, "the sewer is there."[45] Waste treatment facilities and interceptor sewers to which the new sewer was connected were financed in part by grants from the Federal Water Quality Office.[46]

The selection of a site for a new Los Angeles airport, projected to be the largest in the country in passenger volume by 1980, offers a second illustration of planning in actual operation.[47] In this instance, a site proposal developed by the Los Angeles Department of Airports was approved after a 23-day review by the city planning agency. The county regional planning commission took six months before finding the project consistent with regional planning for the county. The commission then found it necessary to study the likely impact of the decision, acknowledging in its subsequent application for federal planning help that airport impacts upon vegetation, hydrology, climate, wildlife, air quality, noise levels and water quality of the region were undetermined. The commission apparently did not consider it necessary to explain its earlier acquiescence in the airport site selec-

45. *Id.* at 16-17.

46. ENVIRONMENTAL PROTECTION AGENCY, PROJECT REGISTER 122 (Dec. 31, 1971).

47. This illustration is based upon an analysis contained in CENTER FOR STUDY OF RESPONSIVE LAW, POWER AND LAND IN CALIFORNIA I-V-17 to 40, II-VII-71 to 116 (Prelim. Draft of the Rep. on Land Use in the State of Cal. 1971).

tion as not inconsistent with regional planning, given the very significant, basic questions which had not yet been studied.

The Southern California Association of Governments (SCAG), the A-95 agency, was consulted about the consistency of the Airport Department's site decision four months after the decision had been announced. The occasion for consulting SCAG was the A-95 review requirement applicable to the Airport Department's request for federal funds for advance land acquisition. SCAG did not except to the proposal, but did recommend further planning studies. Reportedly, SCAG had never made a recommendation against funding of an application for federal aid under A-95.[48] One reporter concluded: "To take on the Department of Airports, SCAG would have had to step way out of its league."[49]

There is no reason to believe that these two examples are atypical of the way major, development-inducing public works decisions are made. The continued predominance of the public works planners over the comprehensive planners, the local boosters over the regional planners, the immediate and local economic advantage over the long-run and metropolitan interest, taken together with the repeated federal investments and declarations of faith in planning, have contributed to a belief that we have tried regional planning and it has failed.[50] In fact, the federal government, properly declining to impose metropolitan government from the top down, has seemed to be flirting with it, nurturing inclinations toward it and lending its moral support to regionalization. But, in most areas, neither center city minority leaders nor suburban mayors see advantages in metropolitan government. Perhaps concepts such as efficiency, coordination, avoidance of duplication and waste, and better intergovernmental communication are without widespread compelling appeal. Or perhaps yet another governmental device—an unfamiliar one at that—is simply not welcome where it promises no tangible, desired benefit.

In any event, the constituency for federal planning programs has always had a large contingent of mayors and local planning and renewal officials to whom local autonomy and home rule were hard-won victories against rural-oriented states. The very groups that were

48. *Id.* at I-V-38.

49. *Id.*

50. For a critique of regional planning see Address by R. Babcock, *Let's Stop Romancing Regional Planning*, University of Notre Dame, Feb. 16, 1972.

fighting for a direct federal-local relationship, a means of bypassing states considered insensitive to the urban crisis in the 1960's, could hardly have been expected to want to surrender certain of their powers over land use to governmental entities further removed than they from their problems.

### III. The Environmental Movement and Planning

An ally of extraordinary power recently has entered the battle for more effective planning. The environmental movement, born of solid American ancestry in 19th century naturalism, revived after a long sleep by the idealism of the 1960's and tempered by a string of battles against the public works agencies, has matured during the past few years. The concern for the environment has achieved significant legislative reforms at all levels of government in a very short period of time. The ecological perspective holds that unless we can view proposals as they affect the whole, we will be unable to develop and use resources wisely—an outlook that makes environmentalism a natural ally of comprehensive planning. The infusion of substance, of tangible environmental advantages that are pursued through planning, elevates planning and gives it meaning and purpose in the eyes of those to whom it may once have been abstract and neutral. Saving the bay, the beaches or the mountains from impairment by inappropriate development can rally support for regional planning of a sort that citizens believe will demonstrate the wisdom of resource conservation.

Undoubtedly, the convergence of planning objectives and environmental objectives is not complete. Planners typically are trained to accommodate and shape development and redevelopment. Environmental groups in many parts of the country are taking a skeptical view of urbanization and are attempting to restrict and even halt urban growth.[51] In the process of resisting new development, however, environmentalists are asking the kind of questions that planning agencies ought to have been raising in the course of reviewing project proposals submitted pursuant to Circular A-95. The National Environmental Policy Act (NEPA),[52] has profoundly altered the planning process by permitting citizen groups, public interest lawyers and public environmental agencies to have access to the thinking behind

51. For accounts of current attitudes toward urban growth in the United States see *The Land Use Battle That Business Faces*, Business Week, Aug. 26, 1972, at 44; *Banning the Boom*, Newsweek, Aug. 21, 1972, at 40; *The Great Wild Californiated West*, Time, Aug. 21, 1972, at 15.

developmental proposals and to compel proponent agencies to deal publicly with real planning issues. Section 102(2)(C) of NEPA[53] requires proponents of major federal actions significantly affecting the quality of the human environment to set forth in a "detailed statement" by a "responsible official" an account of the anticipated impact on the environment, adverse impacts, alternatives that have been considered and forseeable long-term effects asssociated with the proposed action. The questions posed by NEPA, of course, are similar to those posed by the planning process. Any plan rests upon an implicit resolution of choices involving long and short-term considerations, resource conservation and exploitation, and upon an analysis and rejection of alternatives. However, NEPA requires that these formerly implicit considerations be made explicit and public. Moreover, the Act has the effect of placing the proponent agency in the position *vis-a-vis* the public of advocate for its proposal, justifying it and taking responsibility for it. The questions posed by NEPA must be asked in reference to an imminent decision, often in the glare of public scrutiny and controversy.

NEPA has changed the ground rules for major public works planning and for the planning of other large urban developments in which there is any federal involvement. The guidelines affecting federal agency implementation of NEPA give a broad reading, supported by several court decisions,[54] to federal actions deemed to require impact statements.[55] Since actions potentially subject to the statement requirement include federal insurance, licenses, permits and grants, NEPA reaches many of the important state and local decisions, such as federally assisted highway and airport projects, bridges over navigable interstate waters, insured housing projects and new communities, oil refineries, power plants and other industrial projects sited on waterways subject to federal jurisdiction.[56]

---

52. National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970).

53. *Id.* § 4332(2)(C). *See also* 36 Fed. Reg. 7724-29 (1971).

54. *See, e.g.*, Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C. 1971); Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).

55. For a discussion of the breadth of activities that have been reached under § 102(2)(C) of NEPA, including programs in which federal involvement may be minimal or under authority of laws passed long before environmental policies were enunciated, see COUNCIL ON ENVIRONMENTAL QUALITY, THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 224-30 (1972).

56. 36 Fed. Reg. 7724-29 (1971).

NEPA focuses attention on issues involved in major developmental decisions that formerly had often been disposed of without effective public involvement. On the one hand, pre-NEPA critics of proposals could be stilled by referring them to a plan approved some time previously and clearly indicating heavy industry, a highway interchange or an airport in the area—at least if the planners had the foresight to anticipate it. On the other hand, a hasty rezoning intended to accommodate a use altogether unanticipated in a plan was entitled to the same legislative presumption of validity and protection from scrutiny as a long-standing classification. In either event, the plan was a formality and the officially sanctioned use was accorded considerable advantages. As a result, official choices affecting major developmental proposals frequently were inexpert, loosely justified and offered without a need to persuade that alternative means of dealing with developmental needs and resource protection had been exhaustively explored.

In some ways NEPA is similar to federal legislation on regional planning. Section 102 (2) (C) of NEPA does not prohibit substantive choices any more than does section 204 of the Demonstration Cities Act. It merely asks that proposals and alternatives be illuminated through a process of review and comment that elicits views of responsible expert agencies. Yet environmentalists have been merciless in forcing strict compliance by federal agencies with the NEPA process, appealing and winning judicial vindication of their demands that, regardless of the agencies' positions, they employ interdisciplinary planning,[57] fairly assess alternatives[58] and give appropriate agencies sufficient opportunity for review of proposed actions.[59] As of August, 1972, over 200 legal actions to enforce federal agency compliance with the provisions of NEPA had been recorded.[60]

The success of the new procedure is due largely to the environ-

57. Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).

58. Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C. 1971); Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).

59. Upon the advice of General Counsel, the Secretary of Transportation reconsidered his decision to approve the proposed site location for the new Los Angeles International Airport discussed in the text at 43. What the regional planning agencies could not themselves assume by way of comprehensive analysis, NEPA, as interpreted by the Department of Transportation, thus equipped them to undertake.

60. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 55, at 249.

mental lawyers. They took NEPA seriously and invested their energies in making it an effective law—the far-reaching effects of which even its legislative authors probably did not anticipate. As a result, for practical purposes, the burden of public persuasion is now placed on the proponents of developmental projects with the implicit suggestion: "You're the one who wants to alter the status quo; you justify your action to us now and don't refer us back to a plan that nobody understood or took seriously when it was prepared five years ago or revised yesterday."

Although this new attitude may offend by its acceptance of "ad hockery," the simple fact is that the procedure reflects a more realistic understanding of the way major development is sited. No one any longer expects comprehensive plans to detail precisely the nature and location of new development. The vast majority of large-scale projects are, and always have been, accommodated by rezoning. In fact, progressive elements in the planning profession have moved away from the preoccupation with colored maps showing various use districts because that approach failed to reflect the more sophisticated social dynamics, the mixed uses and variegated possibilities that give distinctiveness and life to a community. The tradition embodied in the A-95 procedure of requiring planning agencies to take the initiative to explain whether a proposed public works project is consistent with regional planning in practice meant that the planning agency really was obligated only if it found the project inconsistent. Then the burden of detailing its critique was imposed, a burden made heavier by the absence in many areas of a comprehensive regional or metropolitan plan to rely on for clear support. The era of positive planning, of active governmental intervention aimed at getting the best in new development and not just in preventing the worst through minimum standards and negative constraints, is brought nearer by the NEPA process with its implicit question: "What is in this proposed project for the public?" NEPA has given planners a new tool and set an important precedent for federal intervention and detailed review of federally supported state, local and private decisions.

## IV. Planning and National Land Use Policy Legislation

Many significant land use bills owe their existence to a crisis. The Land Use Policy and Planning Assistance Act of 1972,[61] which passed

61. S. 632, 92d Cong., 1st Sess. (1971). *See* note 3 *supra.*

the Senate by a vote of 60 to 18 on September 19, 1972, and then died in the 92nd Congress, drew strength from the experience of officials in the Executive Branch and in Congress of resisting a local proposal to site an airport adjacent to the Big Cypress swamp in Florida. The federal efforts to deter the Dade County Port Authority from going ahead with a project that would have stimulated considerable urbanization in the swamp, with foreseeable damage not only to the swamp itself but also to the nearby Everglades National Park, which required a steady flow of water from the swamp to sustain its ecology, required a sorting out at the federal level of values and opinions regarding the land use decisions of lower level governments. The aggressive intervention on the part of two federal agencies and the White House to relocate the airport accomplished its purpose but left an impression that something was wrong. Procedures for relating the planning decisions of the local airport authority to the plans of other state and local agencies in Florida were defective. Methods for coordinating the activities of federal agencies supporting public works in the area were inadequate. The power of the airport sponsor to take an action potentially damaging to regional interests in preserving a unique environmental asset was practically unchecked.

Senator Jackson, author of section 102 (2) (C) of NEPA, introduced a bill in 1970,[62] designed to respond to the deficiencies he perceived as a result of the Miami Jetport affair, and several months later the President proposed a National Land Use Policy Act[63] as part of his 1971 legislative program for the environment. The original Jackson Bill would have provided federal funds to states for planning and classifying land use according to several uses including residential, commerical, industrial, agricultural, transportation and recreational.[64] The Bill was simple and, over several months, stimulated a growing familiarity with land use issues, particularly among national environmental groups.

---

62. The bill to provide for a national land use policy was a proposed amendment to the Water Resources Planning Act, 79 Stat. 244 (1965), *as amended*, 82 Stat. 935 (1968) in S. 3354, 91st Cong., 2d Sess. (1970); this was later reintroduced as S. 632, 92d Cong., 1st Sess. (1971).

63. The bill proposed by the President in his 1971 Message to Congress on the Environment was S. 992, 92d Cong., 1st Sess. (1971); H.R. 7211, 92d Cong., 1st Sess. (1971).

64. S. 3354, 91st Cong., 2d Sess. §§ 402-03 (1970).

An initial venture, the legislation did not explicitly attempt to alter the complex institutional relationships that stood in the way of land use reform, relationships between state and local governments and between various state public works agencies. Lands located within an "incorporated city which has exercised land use planning and authority," including some growing urban areas where land use problems are most acute, were excluded from coverage under the Jackson Bill.[65] The notion of classification of areas according to a single, dominant use was unsophisticated in an era when zoning had had its requiem, and mixed uses had come to be highly regarded by planners. Finally, the Bill lacked a social dimension, and failed to prescribe a method to assure that, in addition to protecting some areas against inappropriate development, other areas would be required to accept regionally needed development.

During the summer of 1970, the Council on Environmental Quality (CEQ) published its first annual report on the quality of the environment, as required by NEPA, and included a substantial chapter on land use.[66] Essentially, the chapter acknowledged the complicity of federal programs in exacerbating effective local planning, and distinguished three principal deficiencies in existing local land use control arrangements. First, according to the CEQ analysis, environmental values are often sacrificed because local governments either: (1) fail to appreciate the effects of their decisions upon an ecological system only part of which lies within their boundaries, or (2) realizing an area's environmental significance, nevertheless prefer the tax rateables new development would bring over preservation. Second, social and fiscal pressures felt at the local level make it as difficult to site certain kinds of development as to prevent development in environmentally critical areas, even though a clear regional need for the development may be indisputable. Third, large public works projects, often federally assisted airports and highways, have a disruptive effect upon local planning by inducing overwhelming and ill-considered secondary development in their surrounding areas. The National Land Use Policy Bill proposed by the Administration in early 1971 was designed to deal with these principal issues.

Relying upon the analysis in the CEQ Report, and borrowing heavily from concepts contained in the Tentative Draft of the American

65. *Id.* § 406.

66. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 55, at 165-97.

Law Institute's Model Land Development Code,[67] the Administration Bill provided for a grant-in-aid to states in order to assist them in reforming land use regulatory procedures. Specifically, states were to be required, as a condition of federal financing, to identify and regulate the use of their "areas of critical environmental concern," defined to include the coastal and Great Lakes zone, shorelands of major rivers and lakes, floodplains, scenic and historic districts, other rare or valuable ecosystems, and areas rendered hazardous to development (*e.g.*, by seismic activity or subsidence).[68] States were to have a method for assuring that "development of regional benefit," which affects the constituents of more than one local government, is not unduly restricted or excluded by local governments.[69] And states were to identify and control their "areas impacted by key facilities," defined to include major airports, highway interchanges and recreational developments.[70] The legislation also would have required states to control large-scale development.[71]

Three methods of acceptable state "control" were prescribed: (1) direct and exclusive state land use regulation, (2) concurrent state-local regulation as is provided for in most state coastal wetland protection laws, and (3) state prescription of land use criteria and standards subject to local implementation and judicial enforcement.[72]

In early 1971, the Administration submitted amendments intended to assure that the location and design of major airports, highways, highway interchanges and parks were subject to the state land use programs, and that state land use agencies share authority with public works agencies over these decisions.[73]

As passed by the Senate, the Land Use Policy and Planning Assistance Act is a compromise between the planning emphases of the Jackson Bill and the regulatory orientation of the Administration Bill. It requires states to develop first a comprehensive planning proc-

---

67. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE, *supra* note 7.

68. S. 632, 92d Cong., 1st Sess. § 501(e) (1971).

69. *Id.* § 303. *See* note 3 *supra.*

70. *Id.*

71. *Id.*

72. *Id*

73. Letter from Rogers B. Morton (Secretary of the Interior) to Wayne N. Aspinall (Chairman, House Comm. on Interior and Insular Affairs), Feb. 8, 1972.

ess involving data collection, information analysis, demographic projections, etc.,[74] and then a selective regulatory program for critical areas and issues.[75]

Unfortunately, the Senate Bill fails to include development of regional benefit in its operative requirements. However, the measure does refer to development of regional benefit in its definitional section and in provisions relating to federal agency review of state programs, suggesting the possibility of an oversight in the more important operative language. The Senate Bill also fails to specifically mention airports, highways and parks as key facilities, although power plants are included. In other important respects (with the exception of sanctions originally proposed as phased reductions of up to 21 per cent of a state's entitlement to highway, airport, and land and water conservation funds in the event of a failure by a state to comply with the new land use program within five years of enactment), the Senate Bill is substantially similar to the earlier Administration measure.

The Bill is premised upon a distinction between land use decisions of regional or state impact which are to be elevated to state agency control, and decisions of purely local impact which are not intended to be affected by the legislation. Far from an effort to scrap our existing land use control system and start anew, the Bill represents an attempt to conserve the best features of local control by disencumbering local governments of decisions which threaten to overwhelm and discredit them. The implicit judgment of the legislation is that the local perspective is often limited, and that local development-dependent revenue collection systems are counter-regional, necessitating that a broader population be represented in decision-making affecting land use allocations of regional significance. Although local planning and implementation may remain intact, major development decisions are to be subject to state veto.

The word "regional" is used here loosely. In fact, the reliance upon the state to make land use decisions of supra-local impact is more a lawyer's than a regional planner's choice. Nothing about the states assures that they will embrace regional ecological systems or distinct areas of housing and labor supply. Rather, it is the fact that states have effective powers to regulate, to tax and, if necessary, to condemn that distinguish them from more rationally organized, if practically

74. S. 632, 92d Cong., 1st Sess. § 302 (1971).

75. *Id.* § 303. *See* note 3 *supra.*

impotent, planning entities. Thus, the Bill represents a decision finally to break with the long federal tradition of support for purely advisory planning. For better or worse, the entity with the power is now to be asked to make the key planning decisions.

Like NEPA, the land use Bill is process-oriented legislation. It does not prescribe substantive directives on the use and abuse of land. The Bill would not say to the state "Thou shalt not develop thy wetlands," but rather that states shall have a method of control over land use in areas of critical environmental concern "where uncontrolled development could result in irreversible damage to important historic, cultural, or aesthetic values. . . ."[76] The Bill does not instruct states not to develop within so many feet of the coastline (as Norway prescribes), but merely requests states to identify and control land use in the shorelands of rivers, lakes and streams, beaches and dunes, coastal wetlands and other lands inundated by the tides.[77] The legislation puts faith in a better decision-making procedure to get a better result. The issue is worthy of some analysis, for it was the subject of considerable Senate controversy in debate on the Bill.[78]

There is always danger that any mere procedure may be exploited once the old players become comfortable with the new rules. Environmentally unpopular decisions have been held up for more extended review required by environmental legislation, only to eventually go forward with their deleterious effects unchanged once these effects had been disclosed and alternatives considered on the record. Undoubtedly, the temptation is strong, particularly among those who participated in the battles for better pollution control laws, to try to repeat their achievements in the field of land use. In fact, Senator Muskie, author of air quality and water quality legislation, led the fight in the Senate to insert substantive directives in the land use Bill.

There are three reasons why federal land use legislation should reject substantive directives or standards. First, the essential objective in the field of land use is institutional reform. Decisions are being made by local governments not because they have not been told that wetlands are ecologically significant and should be protected, but because localities have other, more compelling (financial), reasons for developing such areas. Second, political realities of the sort that have

76. S. 632, 92d Cong., 1st Sess. § 501 (1971).

77. *Id.*

78. 118 CONG. REC. 15,162-64 (daily ed. Sept. 18, 1972).

delayed land use reforms for several years will be more difficult to overcome if substantive objectives are more detailed and federal intrusion into the review of specific developmental decisions of lower-level governments is made necessary. Third, there is a fundamental difference between air and water quality planning, on the one hand, and land use planning, on the other. It is possible to set ambient air quality or emission standards with precision (so many parts of x pollutant per million) but the analogy to that approach in the land use field would probably be unsuccessful (*e.g.*, compaction allowable in x type of area to y tons per square foot). There is a relative simplicity about our expectations regarding air and water that allows us to measure degradation in terms of disruption of straightforward processes.

What certitudes we can muster about the proper functioning of natural processes in land fail as we enter the built environment where the object is precisely to intrude development (which the less thoughtful environmentalist sometimes analogizes to pollution) sensitively into nature, reorganizing natural characteristics in harmonious and humanly satisfying ways. As a result of the complexity of this exercise, land use standards are invariably expressed not as simple injunctions but as principles for use: "houses shall be sited in such a way as to be substantially indistinguishable from the river," or "waterfront development permits shall be limited to those uses which require or depend upon a waterfront site," or "buildings constructed within the historic district shall be of a style, bulk and height similar to or compatible with the historic buildings." Such principles of use become more vague and less helpful as they are applied more generally without regard for the specific characteristics of an area. The vagueness of such principles, and the differences of interpretation to which they would be subject, should suggest the inappropriateness of making them standards for a federal reviewing agency to apply in determining the adequacy of a state's land use program.

Nevertheless, it is true that where specific values or characteristics can be isolated, general directives could be provided: "biologically productive wetlands shall not be destroyed," "earthquake faults and floodplains shall not be developed." Note that it is easier to prescribe universal principles where development of any sort is undesirable. In fact, in those areas subject to the federal government's own direct authority, such as tidal wetlands, beaches and public lands, and where there are local or regional district offices to administer them, such

stringent policies could at least be tried. But it would be a bold act of uncertain consequence for federal law to specifically prescribe in the first major federally inspired land use reform in 50 years, what one level of government shall permit another level of government to allow private landowners to do. Once states have established land use planning and regulatory processes along the lines likely to be required by the federal law, it may be more appropriate to consider specific, substantive directives aimed at preventing irresistible destruction of environmental values.

The fact remains, however, that national land use policy legislation will not assure variety in suburbs, predictability in urbanizing areas, better design of shopping centers, etc. It will not provide states with conservation and development plans. Nor will it resolve the question of how far the public authority may constitutionally go in curtailing the use of privately owned land without running afoul of the Constitution's requirement that governmental takings be compensated.

But the enactment of the Bill, reintroduced in the 93rd Congress, would focus unprecedented attention on these questions, and force a resolution of some of them in each state. By inserting the state into the regionally significant land use decisions, the narrow perspective and the counter-regional incentives which constrain local governments would be reduced. Local control would by no means be undone (indeed, the decentralization that characterizes American land use controls is the envy of some European, particularly French, officials whose system has suffered the opposite emphasis). The clear aim of the legislation is to ask no more of states than that they assert themselves where regional considerations are involved. But that is precisely the Gordian knot that has long needed cutting.

Perhaps most important, a realistic framework for reconciling social and environmental interests is offered in the process which the land use policy legislation would require states to establish. Although the needs of poor people for housing, and the concerns of environmentalists about ecological integrity and aesthetic quality need not conflict, they occasionally do. Superficially this may look like a quality-quantity tension, with those who have the quantity problem pretty well under control turning to quality questions. In fact, the environmental awareness is likely to make possible the enactment of legislation which contains a process for striking down exclusionary land use controls.[79]

79. In a keynote address to the American Society of Planning Officials, Leonard

## V. The New Mood in American Attitudes Toward Urban Development

In recent years, a new attitude toward urban growth has become evident in the United States. This attitude does not accept traditional processes of relatively unconstrained, piecemeal urbanization as entirely desirable or inevitable. Increasingly, new development proposals are measured according to their satisfaction of environmental criteria —what proposed development will generate in terms of additional traffic on the highways, pollution of air and water, erosion and scenic disturbance. To some extent, this attitude reflects sophistication on the part of citizens about the overall, long-term economic impact of development. Immediate economic gains due to job creation and increased purchasing by builders and consumers are being set off against higher public facilities costs for schools, roads, water treatment plants, sewers and human services that new residents will require.

Basically, however, the new attitude toward growth in America is not economically motivated. The new mood appears to be part of a rising emphasis on human values, on the preservation of natural and cultural characteristics that give distinctiveness, charm and desirability to a place as a humanly satisfying environment. The new mood may not be willing to sacrifice an achieved economic status by throwing out existing industry, but in many areas it seems ready to forego a measure of future economic advantage by keeping out new industry, maintaining a stable population, and preserving existing low density and scale.

This new mood can be seen in many parts of the United States, particularly in the most environmentally popular areas. Vermont, Maine, Massachusetts, Delaware, Colorado, Florida, California, Ore-

---

Garment, Special Consultant to the President, referred to publicly assisted housing as one possible example of development of regional benefit. Garment, *The Nixon Revolution*, in PLANNING 1971, at 19 (1971). The environmental parentage of the land use policy bill gave the provision a better chance of enactment than a measure aimed at similar objectives. The latter measure was offered by letter as an amendment to S. 3699, the Housing and Urban Development Act of 1970, from Secretary Romney to Senator Sparkman, Chairman of the Senate Comm. on Housing, Banking and Urban Affairs, dated May 27, 1970. The proposed amendment to S. 3699 would have authorized the Attorney General, after consultation with the HUD Secretary, to bring a civil action against any local government which acted to prevent "the reasonable provision" in undeveloped areas "of low and moderate income housing eligible for Federal assistance in a manner inconsistent with any State or local comprehensive or master plans for such areas." The measure was allowed to die.

gon and Hawaii have experienced broad, state-wide movements concerned with preserving scenic areas, preventing "over-growth," and halting developmental processes that threaten to degrade the environment.[80] In Colorado, Hawaii and Oregon, state officials have begun to consider what the state's optimum population might be, and to reflect on means of assuring that population does not increase beyond a level which land and water resources of the state can support at existing levels of amenity.

The implications of this new attitude cannot be fully appreciated. In some areas the new mood undoubtedly contains an element of exclusionary bias, a hostility to change and to governments which accommodate it. It is clear that actions taken to limit growth in Florida may affect the choices of the citizen of New York or Chicago who intends to retire there, that decisions taken by Delaware to exclude oil refineries could conceivably affect the cost and perhaps even the availability of fuel and energy to the citizens of Philadelphia, that a decision by the people of Boulder to limit population size could possibly raise the cost of housing (by limiting supply), thereby pricing out the poor.

Conversely, the failure of state and local governments to act to preserve their environmental assets can also diminish the choices open to citizens. The subdivision of scenic farmland in California and Pennsylvania, the destruction of coastal wetlands in Louisiana and New Jersey for development, and the loss of historic properties in many areas reduce the environmental satisfactions not only of people in those areas but also of people elsewhere who might settle in or travel to such areas. The unlimited indulgence of everyone's locational and developmental expectations entails the destruction of some of the very values which create the desire to develop in the first place. And the bypassing of places where rehabilitation and redevelopment are badly needed—for example, parts of the central city—entails substantial costs in terms of under-utilized public facilities, duplication of facilities elsewhere and abandonment of properties and people to a depressing future.

The new mood in America carries with it a belief that public

80. For an analysis of the way in which citizens at the local level have succeeded in making the limitation of new development a significant public issue see E. FINKLEN, NONGROWTH AS A PLANNING ALTERNATIVE: A PRELIMINARY EXAMINATION OF AN EMERGING ISSUE (ASPO Planning Advisory Service Rep. No. 283, 1972).

authority should deal with these problems, organize and control growth, subsidize redevelopment and prohibit destruction of environmental values, even by private parties on privately owned land. The new outlook sees a connection between the activities of people and the protection of healthy natural systems, between economics and politics on the one hand, and ecology and human welfare on the other. This is what is distinctively new about this historic moment; it is what removes the concerns of urban growth policy from the realm of planners' formulations to basic issues of broad human consequence that affect where and how well people live. The moment is ripe for attempting to give constructive direction to broad popular attitudes that have only recently appeared. It is hoped that a National Land Use Policy law will be enacted which will give constructive focus to the dynamic new energies that have emerged.