

NEW COMMUNITIES: IN SEARCH OF CIBOLA— SOME LEGISLATIVE TRAILS

WILLIAM A. MURRAY*

Rising metropolitan population, central city decay and suburban sprawl have long led urban observers to advocate the development of new communities both to syphon off increasing population and to create new urban forms. The ideal new community "is supposed to be an independent, self-sufficient community out in the hinterland and it is to have all the advantages of the metropolis and none of the disadvantages."¹ No American new community development, however, has fulfilled this concept, to the dismay of some commentators.² New community projects that have been undertaken are having significant difficulties; the recession coupled with inflation has caused many to come to a standstill.³

The evolving concept of American new communities⁴ is that of a

* A.B., MacMurray College, 1970; J.D., Washington University, 1976.

1. W. WHYTE, *THE LAST LANDSCAPE* 13 (1968). The term "new community" will be employed for the developments that are the subject of this note. Other terms used to denote a new community are "new town," "planned community," or "planned residential development."

2. See Alonso, *The Mirage of New Towns*, 19 PUB. INTEREST 3 (1970); Downie, *The 'New Town' Mirage*, 214 NATION 617 (1972).

3. See generally HOUSING & DEV. REP. 120:0011-:0012 (reference file, 1975); *Can 'New Towns' Survive the Economic Crunch?*, BUS. WEEK, Feb. 10, 1975, at 43; *A New Town's Future Shock*, NEWSWEEK, Feb. 24, 1975, at 10; *New Towns in Trouble*, TIME, Mar. 24, 1975, at 70; *Why "New Towns" Are Running Into Trouble*, U.S. NEWS & WORLD REP., Sept. 9, 1974, at 60.

4. An Englishman, Ebenezer Howard, is credited with originating the new community movement with his book, *TOMORROW: A PEACEFUL PATH TO REVOLUTION*, first published in 1898. It was revised and republished in 1902. See E. EICHLER & M. KAPLAN, *THE COMMUNITY BUILDERS* 2 & n.2 (1967) [hereinafter cited as EICHLER & KAPLAN]. The publication is now E. HOWARD, *GARDEN CITIES OF TO-MORROW* (MIT Press ed. 1965). Howard believed a combination of town and country living was the best type of environment and called this the Garden City. *Id.* at 45-46, 51. The basic principles of

“multi-purpose development offering most opportunities and advantages found in any fully developed city or town.”⁵ The large-scale new community “attempts to reflect the full diversity of urban life, providing a mixture of jobs, housing, and recreation which will appeal to the widest possible range of people.”⁶ New community developments include satellite communities, new town-in-towns, small town growth centers, and free standing communities.⁷ The new community concept, however, does not encompass developments such as retirement communities, recreational communities or typical suburban subdivisions.⁸

Howard's notion were single ownership of the town by the developer with the land being leased, industry located on the outskirts, a permanent green belt to limit expansion, a population optimum with a range of incomes, use of rents to pay financing and maintain the community, a town center (but not as a central business district), and the provision for other new communities. *Id.* Howard tested his theories by founding the developments of Letchworth and Welwyn Garden City in England. His primary achievement, however, is a marked influence on those who have followed. See EICHLER & KAPLAN, *supra*, at 2-4; J. JACOBS, *LIFE AND DEATH OF GREAT AMERICAN CITIES* 18 (1961).

5. DeLucia, *New Communities and Small Town America*, 4 *URBAN LAW* 734, 735-36 (1972) [hereinafter cited as DeLucia]. Specific characteristics include: (1) development by a single or unified management under a comprehensive and inclusive plan calling for staged development; (2) development pursuant to the highest principles of urban design with balanced land use and proper space-population densities; (3) development with economies of scale and financial viability; (4) geographic and social identity; (5) provision for a full range of housing, primary employment opportunities and commercial activities, public facilities and community services, and cultural amenities; (6) provision for local government and citizen participation. See *id.* at 736; cf. Nicoson, *Institutional Innovation in New Towns: The Dual Developer Concept*, 4 *FORDHAM URBAN L.J.* 65, 65 n.1 (1975) [hereinafter cited as Nicoson].

6. Comment, *Democracy in the New Towns: The Limits of Private Government*, 36 *U. CHI. L. REV.* 379, 379-80 (1969) [hereinafter cited as Comment, *Democracy in the New Towns*].

7. DeLucia, *supra* note 5, at 735. A satellite new community is one that is developed on the suburban fringe of a metropolitan area within commuting distance of existing employment centers. A new-town-in-town development is in an existing major urban center on either an existing large vacant site or previously cleared site (large-scale urban renewal project). The growth center concept consists of expanding an existing community either on the fringe of a metropolitan area or in a rural area. The free standing new community is one that is developed in a completely rural area where urbanization is not present on or near the site. The free standing community is probably most near a new community in the purest sense. See text at note 1 *supra*. The new-town-in-town will not be discussed in this note. For a discussion of this type of development see H. MIELDS, *FEDERALLY ASSISTED NEW COMMUNITIES: NEW DIMENSIONS IN URBAN DEVELOPMENT* 154-84 (1973) [hereinafter cited as MIELDS].

8. These developments are often misunderstood or mistakenly called new communities, particularly by the developer who hopes to use the favorable connotations to attract residents. See DeLucia, *supra* note 5, at 735. They are not new communities because they serve only a single purpose or attempt to attract only a certain type of resident. See generally STATE OF NEW JERSEY, DEPT OF COMMUNITY AFFAIRS, DIV. OF STATE & REGIONAL PLANNING, *NEW COMMUNITIES SECTION, NEW COMMUNITIES POLICY AND DEVELOPMENT IN THE UNITED STATES: A FIFTY STATE SURVEY* 3-4 (The state new

During the 1960's sophisticated attempts at new community development⁹ were undertaken, the more famous being Irvine Ranch, California; Reston, Virginia; and Columbia, Maryland.¹⁰ At that time neither the federal government nor the states had official programs for new communities.¹¹ These developments demonstrated the new community to be a vast, expensive undertaking necessitating a great deal of planning and decisionmaking. The federal government and various states have responded to the new community movement by enacting legislation either encouraging, facilitating or regulating their development. This Note will outline several problem areas of new communities and examine federal and state programs concerning their development.

communities section that conducted the survey and prepared the report was established in May, 1972. The probable date of the report is sometime thereafter) [hereinafter cited as NEW JERSEY STUDY].

9. For a discussion of forerunners to new communities in the United States, including company towns, garden cities, greenbelt towns, and large-scale suburban developments, see EICHLER & KAPLAN, *supra* note 4, at 14-21; Repts, *Public Enterprise and New Towns: An American Tradition Revisited*, in THE CONTEMPORARY NEW COMMUNITIES MOVEMENT IN THE UNITED STATES 23-30 (1974) [main publication hereinafter cited as CONTEMPORARY]; C. STEIN, TOWARDS NEW TOWNS FOR AMERICA (1969); Berger, *New Communities in the United States—A Survey*, 46 ST. JOHN'S L. REV. 694, 695-97 (1972) [hereinafter cited as Berger]; Krooth, *Control of Land Use in the United States: Statutory Developments and the Case of New Communities*, 4 URBAN LAW. 519, 527 (1972); Mayer, *Greenbelt Towns Revisited*, 24 J. HOUSING 12-26, 80-85, 151-60 (1967); Mullarkey, *The Evolution of a New Community: Problems of Government*, 6 HARV. J. LEGIS. 462, 463-68 (1969) [hereinafter cited as Mullarkey]; Comment, *New Community Development Districts: A Proposal to Aid New Town Developers*, 9 HOUSTON L. REV. 1032, 1042 (1972) [hereinafter cited as Comment, *New Community Development Districts*]; Note, *New Community Development*, 11 WASHBURN L.J. 227, 230-31 (1971) [hereinafter cited as Note, *New Community Development*].

10. For a general discussion of these three communities see G. BRECKENFELD, COLUMBIA AND THE NEW CITIES 132-51, 168-231 (1971). Irvine Ranch is unique because the site was originally a Spanish land grant. The Irvine family, fearing their land, which is southeast of Los Angeles in Orange County, would eventually become engulfed in the Los Angeles suburban sprawl, decided to urbanize by utilizing the best planning efforts possible. See N. GRIFFIN, IRVINE—THE GENESIS OF A NEW COMMUNITY (1974) [hereinafter cited as GRIFFIN]. Reston is located in Fairfax County, Va., and actually can be described as a "satellite" new community in the Washington, D.C. metropolitan area. It was begun in 1962 with a projected population of 70,000. 3 HUD CHALLENGE No. 8, at 14 (1972). Columbia, in Howard County, Md., is situated between Baltimore and Washington. Residents began moving into Columbia in 1967. Population projections called for 110,000 by 1981. HOWARD RESEARCH & DEV. CORP., VISITOR'S GUIDE TO COLUMBIA 4 (1971).

11. Irvine, Reston, Columbia and other ventures caused great interest in the new community concept. The literature of the 1960's was replete with recommendations for government involvement in building new communities. See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 149-58, 161-62, 167 (1968); *Symposium—New Towns Development*, 1965 WASH. U.L.Q. 1-104.

I. PROBLEMS OF NEW COMMUNITY DEVELOPMENT

The developer of a new community, whether a public or private sponsor,¹² will encounter four major areas of planning and decisionmaking. The degree of accuracy and foresight exercised at the outset of the project will influence the ultimate shape and success of the community. A new community developer therefore needs adequate *financing* to acquire land, retire debt and provide site improvements and community infrastructure. *Site selection* is an important component of the land assembly problem. The developer wants to *maintain control* over the progress of the community to assure the fulfillment of the community plan, which raises the problem of *how the new community is to be governed*.

A. Financing Considerations

The financing of new communities may be broken down into four stages: land acquisition, installation of infrastructure (site development), construction, and marketing.¹³ Land acquisition is a major hurdle in the development of a new community. The site usually involves more than 2000 acres;¹⁴ land assembly entails problems of buying on a piecemeal basis and negotiating with "hold-out" landowners who are aware of other sales.¹⁵ The prospective purchaser must have financing, or at least be able to procure financial assistance, to allow acquisition of as much of the designated site as possible. If the developer has to encumber the site to secure money borrowed for purchasing, his costs will then include interest and mortgage payments that may begin before any income is generated by subsequent development and sales.

12. Most new community developers can be characterized as private and profit-oriented. Kaplan, *The Roles of the Planner and Developer in the New Community*, 1965 WASH. U.L.Q. 88, 89 [hereinafter cited as Kaplan]. Most attempted to limit activities to land acquisition, planning and site development. Lots were generally sold to builders, and profits therefore were mainly derived from land appreciation resulting from the "community image." *Id.* at 90. See also Berger, *supra* note 9, 698-99.

13. See Berger, *supra* note 9, at 701-04. See generally Comment, *New Community Development Districts*, *supra* note 9, at 1037-39.

14. Keegan & Rutzick, *Private Developers and the New Communities Act of 1968*, 57 GEO. L.J. 1119, 1121 (1969) [hereinafter cited as Keegan & Rutzick]. It has been estimated that land assembly costs constitute 20% of the total cost of a new community. Golany, *New Communities in the United States: Assessment and Potential*, in CONTEMPORARY, *supra* note 9, at 1, 11 (1974).

15. See Berger, *supra* note 9, at 700-01 (describing the land assembly process and the problems of inflated prices, holdouts, "cloak-and-dagger" methods, and demands of landowners and attributing the compounding nature of these problems to the lack of the power of eminent domain, utilized by many English developers). The acquisition of the site for Columbia, Md. (approximately 15,000 acres) required 165 transactions. See G. BRECKENFELD, *supra* note 10, at 224-47.

After site acquisition, capital is necessary to complete the planning for the community, including the formulation of economic models and physical designs.¹⁶ Front end investment is also necessary for site improvements such as water and sewer facilities and streets.¹⁷ Insufficient "front" money will immediately create financial difficulties.¹⁸ Either outside investors must provide capital or loans must be secured using the land as collateral. If the developer initially mortgaged the land for acquisition, this option may be foreclosed.

Once there are adequate site improvements, the developer can then initiate the construction process. The initial building is usually residential¹⁹ and the developer may undertake the construction himself or sell parcels to homebuilders. At this stage the developer also has the added costs of providing community facilities, such as schools and police and fire protection.²⁰ Sales are often needed to generate capital for provision of these items.

A final cost which the developer must consider is the marketing of the community. A sales force must be hired and a marketing program initiated.²¹ This is necessary whether or not the home construction was undertaken directly by the promoter. Attracting commercial and industrial residents and additional homebuilding activities is dependent upon the developer's initial ability to bring residents to the community.²²

16. The design includes subdividing the site into neighborhoods or villages, town centers, greenbelt, open spaces and recreational areas. Kaplan, *supra* note 12, at 95-96. For a review and presentation of new community plans see AMERICAN INSTITUTE OF ARCHITECTS, *NEW TOWNS IN AMERICA, THE DESIGN AND DEVELOPMENT PROCESS 14-39* (1971) [hereinafter cited as *DESIGN & DEV.*]. Economic models can be found in S. WEISS, *NEW TOWN DEVELOPMENT IN THE UNITED STATES: EXPERIMENT IN PRIVATE ENTREPRENEURSHIP 52-78* (1973) [hereinafter cited as *WEISS*].

17. See Comment, *New Community Development Districts*, *supra* note 9, at 1041, 1046-50. This would assume that local governments or special districts do not provide such services. See J. CLAPP, *NEW TOWNS AND URBAN POLICY 135* (1971) [hereinafter cited as *CLAPP*].

18. Keegan & Rutzick, *supra* note 14, at 1127.

19. *Id.* at 1121. Subsequent commercial development is then more feasible and the land more valuable. *Id.* at 1122; cf. GRIFFIN, *supra* note 10, at 34.

20. See, e.g., 2 HOUSING & DEV. REP. 94 (1974).

21. New community marketing programs have utilized such techniques as "we will buy your old house" clauses in sales agreements. See *New Towns*, ARCHITECTURAL RECORD 106 (Dec. 1973).

22. "The strategy of most community developers is to retain and develop as much of the land which is zoned or planned for such high intensity uses as industrial parks, shopping centers, or apartments." Keegan & Rutzick, *supra* note 14, at 1128. "Unfortunately, the developer may find that sales or flow from commercial property, the high profit items, are among the last sources of sales or rental revenue and contribute little to the urgent cash flow problems he experiences in [the] early years. . . ." *Id.* at 1128 n.4,

The financial planning of a new community is vital to its success. Even in the more affluent 1960's, the new community developers found that economic feasibility was a sensitive component of development. Initial funding was often inadequate, necessitating a constant search for new capital or new financially viable partners.²³

B. Site Selection

"Site selection is the initial and perhaps the most critical decision in the development of a new town community, since the character and location of the site will in large part determine the success of the new town enterprise."²⁴ The site selection decision must reflect the balancing of land availability, susceptibility to physical development, potentiality for attracting residents and formidability of existing governmental units that have jurisdiction over the site. The developer must also consider whether to opt for an open or developed site.²⁵

A developer seeking profit will probably select a location that will easily attract residents and commercial activity, resulting in a community more like a new suburb. Land costs, however, will be higher due to greater site accessibility and to existing growth potential.²⁶ Acquisition

quoting Wendt, *Large-Scale Community Development*, 22 J. FINANCE 238 (1967).

To market the new community to commercial users the developer may have to offer "a variety of inducements and subsidies—including leases for \$1 a year of undeveloped sites—'by applying rents and land sale prices at lower than market sales,' and by building 'shell' buildings on speculation to lease to clients." Meyer, *New Town Looks for Industry*, Washington Post, Jan. 10, 1972, § A, at 6.

23. For example, the developer of Reston was forced to relinquish control over the project to the Gulf Oil Corp. which had invested about \$15 million in the venture. Similarly, Columbia secured financial support from Connecticut General Life Insurance Co. but had to give the insurance company a one-half interest in the development. See *Two Pioneers*, 3 HUD CHALLENGE No. 8, at 14-15 (1972). A drop in sales during the economic recession also caused Columbia to experience difficulty meeting payments to Connecticut General and necessitated a refinancing agreement between the developer and the insurance company. See *Can 'New Towns' Survive the Economic Crunch?*, BUS. WEEK, Feb. 10, 1975, at 43-44. See generally David, *The Development Process*, in DESIGN & DEV., *supra* note 16, at 94.

24. Mandelker, *Some Policy Considerations in the Drafting of New Towns Legislation*, 1965 WASH. U.L.Q. 71 [hereinafter cited as Mandelker]. Accord, CLAPP, *supra* note 17, at 118; Gladstone, *The Economic Success of New Towns*, in DESIGN & DEV., *supra* note 16, at 97.

25. An open site, relatively free from uses other than agricultural, may be cheaper than a site with scattered existing development which may require negotiation with current residents regarding their relocation. See generally Mandelker, *supra* note 24, at 75.

26. Here the developer must choose between expensive land near current growth areas, hoping to be more than competitive with typical suburban developments, and less expensive sites farther out, hoping the community image and lower price will act as the population magnet. A further consideration would be to seek a location near a segment of

costs, however, may be reduced if the developer can find a site under single ownership.²⁷

The developer must also consider the attitudes of existing local governments and area residents before investing in a particular site. Growth control practices of local governments may be at odds with a new community development; area residents may be unwilling to bear the financial burdens of a new community.²⁸ To accommodate these attitudes, the developer may be required to negotiate local approval of the development²⁹ which may conflict with his desire to control the project.

C. Development Control

The development plan is an essential part of the new community project and is often formulated to reflect market potential.³⁰ Land values as well as land use are therefore dominant influences on the plan.

the interstate highway system or commuter rail service. Park Forest South, Ill., is near the Illinois Central commuter system. See Mandelker, *supra* note 24, at 76.

27. St. Charles, Md., in the federal program (see note 59 *infra*) is exemplary. The developer was able to purchase an 8000-acre site for \$13 million from a builder experiencing financial difficulties. Stuart, *St. Charles, Maryland*, in CONTEMPORARY, *supra* note 9, at 125, 126-27.

28. Reston encountered the growth control sentiments of Fairfax County through sewer permit denials. *New Towns*, ARCHITECTURAL RECORD 110 (Dec. 1973). See also Willmann, *Reston Counts 22,000 Residents and Seeks Its Planned Concept*, Washington Post, Apr. 28, 1973, § E, at 17.

The local sentiment of no growth may be formidable enough to reject the proposal for a new community. Loudoun County, Va. (adjacent to Fairfax County), displeased with earlier subdivision developments and the costs of services, rejected a new town proposal submitted by Levitt, Inc. The developer sued, but the County prevailed at the trial. The developer abandoned its appeal and submitted a new proposal, which was also rejected. Subsequent amended proposals have met the same fate. See Washington Post, Mar. 3, 1972, § A, at 1, 20; *id.*, Apr. 20, 1972, § G, at 1, 3, 8; *id.*, Aug. 3, 1972, § B, at 1, 7; *id.*, Feb. 14, 1973, § C, at 10; *id.*, May 11, 1973, § A, at 26; 2 HOUSING & DEV. REP. 172 (1974).

29. See note 35 *infra*; Comment, *New Community Development Districts*, *supra* note 9, at 1039. On the other hand, the benefit that a new community can bring to a locality could be a useful bargaining tool. See Cunningham, *Jonathan, Chaska, Minnesota*, in CONTEMPORARY, *supra* note 9, at 109, 110 (1974) (discussing the spillover effect of the ideas employed by a new community on neighboring communities). Columbia had a similar effect on Howard County. R. BROOKS, *NEW TOWNS AND COMMUNAL VALUES, A CASE STUDY OF COLUMBIA, MARYLAND* 42 (1974).

30. Kaplan, *supra* note 12, at 94-95. The development plan is usually implemented in stages. One section is planned and constructed. Other sections are then developed based on the success of the initial stages. Cf. WEISS, *supra* note 16, at 21 (discussing other development strategies). As an economic instrument, "the plan offers [a] means to assure (and insure) consumers that their investment will be protected and that they will be able in time to 'trade-up' on equity—a very important factor on the purchase of a new home in a New Community." Kaplan, *supra* note 12, at 95.

The development program should be general and flexible to adapt to problems and alternatives that may arise.³¹ New community developments, however, have been criticized for being nothing more than well-planned suburbs.³²

The development plan is also a political instrument. "Success . . . will depend to a large extent on whether the developer can obtain certain concessions from state and local government"³³ regarding land use and construction regulations, location and timing of public facilities and roads, and financial arrangements for providing such facilities.³⁴ Conflicts may arise between the developer and local governments that have general jurisdiction over the proposed site³⁵ as to the types of controls that should be placed on the development in terms of planning and development review.³⁶

Development control over the area adjacent to the new community is also of concern to the developer.³⁷ The developer may be able to exert

31. Kaplan, *supra* note 12, at 97.

32. *See id.* at 95-96, 99. The difference between suburbs and new communities, perhaps, emanates from the fact that planning and development in the latter are overseen by one authority while in the former the interrelation is more diffuse. *See CLAPP, supra* note 17, at 5-6. Nevertheless, the similarity should not be unexpected. "[S]ince the features of most new towns are aimed at suburbanizing population, the contrast places greater emphasis upon the planned new town as opposed to the unplanned suburban development. The major point of the developer's promotion appears to be that since the new town is 'planned' these features will be instituted." *Id.* at 110.

33. Keegan & Rutzick, *supra* note 14, at 1145. Once the developer and the governing jurisdictions come to terms the developer has a definitive roadmap[,] . . . the plan protects the project from meddling political gamesmen. . . .

Where public officials are more receptive to the projected New Community, the plan serves a different political function. . . . [T]he developer and the local officials jointly use the plan as a means of boosting the attributes of the area.

Kaplan, *supra* note 12, at 95. *See generally* Christensen, *Land Use Control for the New Community*, 6 HARV. J. LEGIS. 496 (1969).

34. The St. Charles development company made arrangements with the county government to allow planned unit development (PUD) zoning, a classification not previously available in the county. *See* Washington Post, July 29, 1972, § F, at 2. The PUD concept is the basis for most new community planning. *See generally* Rivkin, *Planned Unit Development: The Building Block of New Towns*, in DESIGN & DEV., *supra* note 16, at 74; Comment, *New Community Development Districts*, *supra* note 9, at 1036, 1039-41.

35. In Columbia, the developer lobbied the county government to pass a new town zoning ordinance. In return the County required the developer to support growth control, to bear costs of public facilities, and to "guarantee" that certain revenue return to the County. R. BROOKS, *supra* note 29, at 58, 65-70.

Even after the initial zoning is approved, the possibility still exists that it will be amended to restrict the development. *See, e.g.*, Huth, *Howard County Boom: Malignant or Benign?*, Washington Post, Sept. 19, 1972, § C, at 1, 6.

36. *See* Mandelker, *supra* note 24, at 81-82, 86.

37. *Id.* at 74-75. One expensive option of the developer would be to leave his outer

some control over these fringe areas through the use of options or easements, but problems have already arisen in some new communities. These conflicts may, however, be due to the locational decision of the developer.³⁸

The new community developer traditionally has sought to "privatize" the planning process, attempting to deal only with governmental entities. Once residents begin to move in, however, they may attempt to influence the development of the new community, a possibility the developer should consider in formulating plans for control of the community project.

D. *Government of New Towns*

Since most new community development has been undertaken by the private sector, government of the community has attracted much attention.³⁹ The developer's decisions are interrelated with the problem of development control. Governance may be provided by private government, incorporation, or by the existing local government within whose jurisdiction the project is to be located. New communities can also be viewed as "laboratories for democracy," for experimenting with new forms and processes of local government designed to broaden and

holdings undeveloped. If the new community incorporates, some control might be effected through extraterritorial planning and zoning, should the legal powers be available. In the alternative, as part of the community approval negotiations with the county, the developer might seek to have the public authority control the fringe areas.

38. The developer of Columbia was quite concerned about the Washington, D.C., and Baltimore sprawl encroaching on the community borders. G. BRECKENFELD, *supra* note 10, at 317. Some commercial developments have appeared outside the community. A study of the county in which Columbia is situated produced some interesting results. See Qadeer, *Local Land Market and a New Town: Columbia's Impact on Land Prices in Howard County, Maryland*, 40 J. AM. INST. PLANNERS 110 (1974). The study found that the County population had increased by 36,150 (71%) between the 1960 and 1970 censuses. Columbia's population was 8,815. The study surveyed land prices of 1964 and 1969—before and after Columbia began. The latter was selected because by then the "initial shock" over land prices had eroded. *Id.* at 113. The empirical findings demonstrated that the new community had caused land prices to increase and had deflected the demand for rural residential land and subdivisions to areas removed from Columbia. A moat of low values developed around the community. Public facilities and accessibility were not pervasive land influences. *Id.* at 122. "Columbia did not create concentric-radial patterns of land value gradients. Its influence as a land bank, circumscribed by the demand preference was more visible." *Id.* Finally the report cautioned that the findings should be viewed as informed speculation.

39. See R. HANSON, *NEW TOWNS: LABORATORIES FOR DEMOCRACY* (Report of the Twentieth Century Fund Task Force on Governance of New Towns, 1971) [hereinafter cited as HANSON]; Berger, *supra* note 9, at 705-08; Mullarkey, *supra* note 9; Comment, *Democracy in the New Towns*, *supra* note 6; Note, *New Community Development*, *supra* note 9.

strengthen citizen participation,⁴⁰ although that is rarely an initial motivation.⁴¹ "In search of economic feasibility, [however,] American new community developers have tended to privatize planning and governance and to postpone citizenship for their residents until economic success is in sight."⁴²

The prevalent form of private government in the new communities is the "homes association," or a variation of it.

The association owns and manages open spaces and common property conveyed to it by the developer and performs various services for the lot owners. The individual lot owner and his family have the right to use the association's property, and the owner has a vote in the association's affairs; in return, he and his family are obligated to pay the association's assessment and to abide by its rules.⁴³

The homes associations of Reston and Columbia⁴⁴ have established a system of government by contract.⁴⁵

The type of government chosen during the development stages of a new community project may seriously affect the success of the project.⁴⁶ One major criticism of the private government approach is the

40. HANSON, *supra* note 39, at 8-9.

41. "Implicit in the conventional wisdom about new towns is the idea that planning and development come first, democracy later." *Id.* at 12-13.

42. Godschalk, *Reforming New Community Planning*, 39 J. AM. INST. PLANNERS 306 (1973). "In selecting a new town site, the developer must consider carefully whether he can form a governmental structure of his choice. That will depend upon state law, the system of local government in the jurisdiction where the property lies, and the readiness of that jurisdiction to accede to the developer's wishes." Berger, *supra* note 9, at 705-06.

43. Comment, *Democracy in the New Towns*, *supra* note 6, at 383.

The homes association is a favored device for the organization of subdivisions. Pre-existing local governments tend to approve of it because the association performs municipal-type services, assures that common open spaces will be permanent, and guarantees that maintenance will be paid by the benefited properties, rather than from public funds. The developer favors the homes association because it permits him to maintain a large portion of control during the development period, while allowing him gradually to develop residential participation and responsibility, so that he may eventually withdraw from the project, confident that his community-building reputation will not be injured by the future disintegration of his work.

Id. at 383-84. See also Note, *New Community Developments*, *supra* note 9, at 231-32.

44. See Comment, *Democracy in the New Towns*, *supra* note 6, at 387-95. See also Berger, *supra* note 9, at 706-08. Columbia, which is being developed as a cluster of villages, also has been utilizing village associations. See generally R. BROOKS, *supra* note 29, at 124-45.

45. Comment, *Democracy in the New Towns*, *supra* note 6, at 382-83.

46. For a scenario illustrating a number of problems related to poor developer-resident relations see Kraemer, *Developing Governmental Institutions in New Communities*, 1 URBAN LAW. 268-70 (1969). See also Comment, *New Community Development Districts*, *supra* note 9, at 1045-46.

degree of control which the developer might potentially gain.⁴⁷ Some contend that a private government is so close to a municipal corporation that it presents serious constitutional problems.⁴⁸ Developers, on the other hand, feel that if they do not retain control of the community, the project will fail.⁴⁹

New communities are rarely incorporated at the beginning and in most cases could not be incorporated under applicable state laws.⁵⁰ Even though a developer may form a private government for internal management of the community, cooperation with county government may be necessary to stage development.⁵¹ Another possibility for governing the new community is to allow annexation of the new community by an existing municipality. The initiative for annexation can come from either the developer, the new community residents, or an existing gov-

47. See, e.g., Kraemer, *supra* note 46, at 273-76.

48. The private government has been criticized as violating the principle of "one man, one vote." Voting in the homes association is one unit, one vote. A challenge could be based on *Avery v. Midland County*, 390 U.S. 474 (1968), and *Marsh v. Alabama*, 326 U.S. 501 (1946). See Nicoson, *supra* note 5, at 75-76; Comment, *Democracy in the New Towns*, *supra* note 6, at 402-05.

49. See Kraemer, *supra* note 46, at 273-74.

In other instances, the new residents moving into developer (corporate) controlled communities eventually take control, and interfere with the developer's plans, in order to reduce their (the new residents') expenses and to achieve the benefits accruing to the first group of people to arrive. Sometimes the early residents act to keep out other population groups. They may achieve this aim by incorporating the community and thereby gaining control over planning, land use, and financial policy, or simply by harassing the developer.

Id. at 273. This conflicts with the purpose of the new community to provide a social and economic mixture. See also HANSON, *supra* note 39, at 40-47. "Most new town citizens feel that, compared to inner city life, the benefits of new town life far outweigh the detriments of a short-term undemocratic government." Note, *New Community Development*, *supra* note 9, at 245.

50. See Comment, *Democracy in the New Towns*, *supra* note 6, at 384 n.32. One such community is Reston, in Fairfax County, Va. The prohibition on incorporation preserves the tax base for the urban county. See HANSON, *supra* note 39, at 47-48. See also Mullarkey, *supra* note 9, at 472-75. Some of the advantages of incorporating the new town are to give the community a district identity, to replace an inadequate county jurisdiction over the town, to protect the community from annexation by another municipality seeking to add to its tax base, to employ public financing devices, and to utilize municipal police powers. The disadvantages most notable are municipal debt ceilings and limitations on the use of aesthetic restrictions. See generally HANSON, *supra* note 39, at 49-50; note 133 *infra*.

51. "Both Reston and Columbia are unincorporated subdivisions, and both depend . . . in different degrees, upon county government for zoning and public services." Comment, *Democracy in the New Towns*, *supra* note 6, at 386. It is also questionable whether county governments are adequate to govern a new community. HANSON, *supra* note 39, at 36. From the county's viewpoint, however, it is interesting to note that "Columbia's fiscal impact on Howard County has been highly beneficial, generating more revenue than expenditures." *Id.* at 49.

ernment.⁵² The prospects for annexation are greatest with the satellite or growth center type project.

II. THE FEDERAL APPROACH

The first major piece of federal new communities legislation was Title IV of the Housing and Urban Development Act of 1968.⁵³ Title VII of the Housing and Urban Development Act of 1970⁵⁴ supersedes Title IV and is intended to facilitate and promote new community development by directing financing assistance in the form of guarantees on debt obligations, interest grants and loans, special planning grants and loans, public service grants, technical assistance and demonstration projects.⁵⁵ Title VII assistance is available to both public and private developers,⁵⁶ and establishes the New Community Development Corporation within the Department of Housing and Urban Development (HUD) to direct the federal program.⁵⁷ To receive aid under the Act, a potential developer must file an application demonstrating eligibility under the standards of Title VII and HUD-issued regulations.⁵⁸

By 1974, seventeen communities had been approved by HUD for

52. See HANSON, *supra* note 39, at 50.

53. New Communities Act of 1968, 42 U.S.C. §§ 3901-14 (1970). For a discussion of events leading to the passage of Title IV see EICHLER & KAPLAN, *supra* note 4, at 165; Berger, *supra* note 9, at 708-09; Boykin & Brincefield, *The Federal New Communities Program: The Legislation, Processing and Documentation*, 4 URBAN LAW. 189, 190 (1972) [hereinafter cited as Boykin & Brincefield]. A basic premise of Title IV was "that the private development sector had adopted . . . a land development and marketing technique through which large profits were potentially realizeable." Clapp, *Potentially "Counter-Intuitive" Elements in Federal New Communities Legislation*, 9 SAN DIEGO L. REV. 70, 70-71 (1971) [hereinafter cited as Clapp]. See also Haar, *New Financing . . . for Planned Communities*, 47 TITLE NEWS, Nov. 1968, at 2; Keegan & Rutzick, *supra* note 14, at 1121-22.

54. Urban Growth and New Community Development Act of 1970, 42 U.S.C. §§ 4501-32 (1970).

55. See U.S. DEPT OF HOUSING & URBAN DEV., *OUTLINE OF NEW COMMUNITIES ASSISTANCE PROGRAMS 1* (1971). See generally 1970 U.S. CODE CONG. & AD. NEWS 5589-90.

56. 42 U.S.C. §§ 4511(f), 4512(c)-(e), 4513(b) (1970).

57. *Id.* § 4532, as amended, (Supp. IV, 1974). See generally MIELDS, *supra* note 7, at 40-55, 58-76; Boykin & Brincefield, *supra* note 53; Clapp, *supra* note 53; Krooth, *supra* note 9.

58. 42 U.S.C. § 4513 (1970). The history of the HUD regulations for Title VII illustrates the confusion that has existed in the federal new communities program. The regulations for the 1968 Act are still being published. See 24 C.F.R. § 31 (1975). Draft regulations for Title VII were issued for comments and suggestions on July 31, 1971. 36 Fed. Reg. 14205 (1971). Final regulations, however, are not yet published. Reference to the regulations in this Note will be to the revised draft regulations and cited as 24 C.F.R. § 720 (proposed).

participation in the new communities program.⁵⁹ Most were initiated by private concerns, the major type of development being the satellite new community. This is probably a result of limited federal involvement, which left the challenge of attracting residents, industry and commercial activities to the developer.⁶⁰ Private developers under the federal program, however, are better prepared with respect to planning their communities than their predecessors.⁶¹ Involvement of public agencies as

59. The federal government made five commitments for financial assistance under the 1968 Act. Jonathan, Minn., located 20 miles southwest of Minneapolis, received an initial guarantee of \$21 million for debt obligations to cover the first 10 years of development. The project began in 1968 and is expected to house 50,000 persons after 20 years. HUD NEWS No. 70-79 (Feb. 13, 1970). St. Charles Communities, Md., 25 miles southeast of Washington, D.C., received a \$24 million guarantee. Developers were planning a community of 75,000 at the end of the 20-year development period. HUD NEWS No. 70-492 (July 1, 1970). Park Forest South, Ill., 30 miles south of Chicago, forecasted a population of 110,000 within 15 years of development. It is adjacent to a prior venture of Park Forest which developed during the post-WWII housing boom. The federal debt guarantee was for \$30 million. HUD NEWS No. 70-499 (July 1, 1970). Maumelle, Ark., 12 miles northwest of Little Rock, received a federal guarantee of \$7.5 million to foster its development toward a population goal of 45,000 at the end of a 20-year period. HUD NEWS No. 70-926 (Dec. 19, 1970). Flower Mound New Town, Tex., lies between Dallas and Fort Worth, 4 miles from the area's new regional airport. The federal government committed itself to a debt guarantee of \$18 million. The 20-year development period plans to end with a population of 60,000. HUD NEWS No. 70-927 (Dec. 19, 1970).

Title VII Communities include two new-town-in-town projects which are not within the scope of this Note. The other communities are Riverton, N.Y.—9 miles south of Rochester with a projected population of 27,000, 3 HUD CHALLENGE, Aug., 1972, at 21; Gananda, N.Y.—12 miles east of Rochester with a projected population of 82,000, HUD NEWS No. 72-208 (April 7, 1972); The Woodlands, Tex.—28 miles north of Houston with a projected population of 150,000, 3 HUD CHALLENGE No. 8, at 18 (1972); Harbison, S.C.—8 miles northwest of Columbia with a projected population of 23,000, HUD NEWS No. 72-557 (Oct. 4, 1972); Soul City, N.C.—in a rural part of the state near the Virginia border (Warren County) with a projected population of 44,000, HUD NEWS No. 72-395 (June 30, 1972); San Antonio Ranch, Tex. (approval was conditional on positive environmental determinations)—20 miles northwest of San Antonio with a projected population of 88,000, HUD NEWS No. 72-131 (Feb. 28, 1972) (final approval was not given, HOUSING & DEV. REP. 27 (1975) (reference file); see note 105 *infra*); Shenandoah, Ga.—35 miles south of Atlanta with a projected population of 70,000, HUD NEWS No. 73-63 (Feb. 16, 1973); Newfields, Ohio—7 miles northwest of Dayton with a projected population of 40,000, HUD NEWS No. 73-372 (Nov. 15, 1973); Beckett, N.J.—in the southern part of the state with a projected population of 60,000, Trevino, *The New Communities Program*, 5 HUD CHALLENGE No. 5, at 22 (1974). Compare these approvals with the fact that by May, 1972, 52 applications and pre-application proposals had been submitted. See DeLucia, *supra* note 5, at 738.

60. *E.g.*, St. Charles Communities, Md., which is relying on "the rapid growth of the Metropolitan Washington area, and eventual construction of an outer beltway and south-east corridor highway network to spur economic activity." HUD NEWS No. 70-492 (July 1, 1970).

61. Federal regulations expand eligibility criteria to include elements of social planning to ensure that the project goes beyond that of a residential subdivision. See, *e.g.* 24 C.F.R. §§ 720.6, 720.7 (proposed). Indeed, new communities as a whole are better than less-

direct sponsors was encouraged as a means of using techniques not available to private developers.⁶² Title VII has been criticized, however, because it does not directly authorize the use of government powers in land assembly and acquisition.⁶³ While Title VII theoretically places a prospective public developer in the position of a competitor with private developers, this has not occurred.⁶⁴ The federal program has experienced great difficulties, and HUD is not currently accepting new applications.⁶⁵ The problems are primarily financial, but observers have also cited poor planning and management of the communities, maladministration of the federal program, and the economic recession of the 1970's.⁶⁶ For the federally-approved new communities, the primary concern of HUD is whether foreclosure is necessary.⁶⁷

planned conventional suburbs. See Zehner & Marans, *Residential Density, Planning Objectives and Life in Planned Communities*, 39 J. AM. INST. PLANNERS 337 (1973). Another study, however, based on a rating of services by residents, concluded that "[n]ew communities receiving assistance under the Federal . . . program have . . . not performed consistently better than new communities which have not received Federal assistance." CENTER FOR URBAN AND REGIONAL STUDIES, UNIVERSITY OF NORTH CAROLINA, *EVALUATION OF NEW COMMUNITIES, SELECTED PRELIMINARY FINDINGS* 25 (1974) [hereinafter cited as *EVALUATION OF NEW COMMUNITIES*]. It is quite plausible though that the residents have greater expectations for the federally-backed developments. The study did find better performance in meeting the needs of minority and low-income residents, and in providing recreation, schools, shopping and health care. *Id.* at 25-26.

62. The major advantage to using public agencies as direct sponsors over private developers is that public initiative and control would be directly involved by providing "a means by which states or localities could directly initiate new town development of a type and location consistent with publicly established goals for the community," in the phases of initiation, planning and disposition. Clapp, *supra* note 53, at 82. For a discussion of the different types of public agencies that could be employed see *id.* at 84-87.

63. *Id.* at 84.

64. The public agency would be in a better bargaining position than the private developer both in terms of land assembly (use of eminent domain) and in attracting commercial and industrial activities by being able to offer locations in the new community at a lower price. See *id.* at 87. Actually the public and private developer would do better to work together as a "combination of public power structure in coordinated support of the imaginatively creative initiative of private enterprise." Golany, *supra* note 14, at 11. See also Nicoson, *supra* note 5; notes 166-194 and accompanying text *infra*.

65. Financial problems of the new communities had been predicted. Rodwin & Susskind, *The Next Generation of New Towns*, in *DESIGN & DEV.*, *supra* note 16, at 126. It is estimated that 30% of the federal new communities will fail. 1 U.S. DEPT OF HOUSING & URBAN DEV., *EVALUATION OF THE NEW COMMUNITIES PROGRAM 9* (1975) [hereinafter cited as *HUD EVALUATION*]. A moratorium on the processing of applications went into effect on Jan. 14, 1975. 2 HOUSING & DEV. REP. 896 (1975). No new commitments were being forecasted for upcoming years. *Id.* at 938.

66. See HOUSING & DEV. REP. 120:0011-:0012 (reference file, 1975); *Can 'New Towns' Survive the Economic Crunch?*, BUS. WEEK, Feb. 10, 1975, at 43-44. The problems of Jonathan were also aggravated by the death of its promoter. *A New Town's Future Shock*, NEWSWEEK, Feb. 24, 1975, at 10.

67. An internal HUD report in 1974 recommended an end to the federal program. 2

A. *Financing the Federal New Communities*

The federal program provides for guarantees on the obligations incurred by the developer to facilitate the use of the corporate bond market, obtain lower interest rates or longer maturities on loans, and obtain financing without being required to enter profit-sharing agreements with lenders.⁶⁸ These guarantees are also applicable to site development costs and "may be particularly advantageous for the developer who already owns a site."⁶⁹ Interest loans are authorized for these costs but are limited to fifteen years.⁷⁰ The loans, however, are not to be used by HUD as an additional aid source unless guarantees are insufficient or the developer seeks them as an alternative to guarantees.⁷¹ The new community also requires basic public services dealing with education, health and safety.⁷² Public service grants are available to

HOUSING & DEV. REP. 688 (1974). See also 3 HOUSING & DEV. REP. 774-75 (1976).

68. 42 U.S.C. § 4514(a) (1970). Public agencies are not eligible for these guarantees if the income from their obligations are exempt from federal taxation. *Id.* If not exempt, a public agency can apply for interest grants equal to 30% of the interest paid on the obligations. *Id.*, as amended, (Supp. IV, 1974). See 1970 U.S. CODE CONG. & AD. NEWS 5589; note 23 and accompanying text *supra*.

The guarantees are viewed as being necessary "to correct possible capital market imperfections . . . because funds are not being channeled into their most productive uses." HUD EVALUATION, *supra* note 65, at 13, 13-16. "The guarantee makes financing easier to obtain by shifting all risk and monitoring responsibility to the Federal Government." *Id.* at 15.

69. Keegan & Rutzick, *supra* note 14, at 1125. Theoretically if the site was already owned and unencumbered, guarantees would be used to raise funds for development rather than retire debt from land acquisition. One of the more financially successful developments, Irvine Ranch (*see* note 10 *supra*), began as an 83,000 acre site free from mortgage debt. A former Spanish land grant agricultural holding, the developer "had substantial liquid assets from agricultural operations which supported initial planning and development efforts." GRIFFIN, *supra* note 10, at 34.

Land assembly for Park Forest South occurred in the 1950's. The federal guarantees obtained were to be used for health, education and environmental purposes. K. CONNELL, REGIONAL NEW TOWNS AND INTERGOVERNMENTAL RELATIONS 48, 52 (1972) [hereinafter cited as CONNELL].

70. 42 U.S.C. § 4515 (1970). "A new community developer will undertake improvements on an acquired site in the form of basic facilities, amenities, and personal investments. A large subdivider may make some of these same improvements, but the new community developer normally makes all three types, in larger amounts, and at an earlier stage of development." Keegan & Rutzick, *supra* note 14, at 1127.

71. Boykin & Brincefield, *supra* note 53, at 193. This would seem to contradict congressional expectations. 1970 U.S. CODE CONG. & AD. NEWS 5589.

72. See 24 C.F.R. §§ 720.8(g), 720.10(c)(3), (e), (f) (proposed). "The educational system has often been viewed as a critical component in the success or failure of a new community." EVALUATION OF NEW COMMUNITIES, *supra* note 61, at 10.

meet 100% of the costs for up to three years, but the grants are limited to public entities.⁷³

These assistance provisions were designed to facilitate the initial financing arrangements and thus allow development leading to the marketing phase. The developer would then begin to generate the cash flow needed to continue development. Unfortunately, this has not been the case. Originally HUD recommended a program of ten new communities annually,⁷⁴ but Title VII funding was insufficient for such a program. The primary assistance has been guarantees for developer debt obligations. The HUD budget request for fiscal year 1972 "did not include funding for new programs authorized by the legislation."⁷⁵ Congress, however, did appropriate \$5 million for special planning grants. The Office of Management and Budget (OMB) impounded the funds and HUD did not seek their release.⁷⁶ By 1975, the guarantees issued amounted to \$336 million.⁷⁷ Yet costs for building a single new community of 70,000 are estimated to be \$1.5 billion.⁷⁸

Since the various avenues of financial assistance were limited, developers in the federal program had to seek funding for development and services elsewhere.⁷⁹ Developers have complained that the procedures and requirements for obtaining federal assistance are overly burdensome.⁸⁰ Criticism has also been directed at the administration of the program by HUD.⁸¹

73. 42 U.S.C. § 4516 (1970). See Krooth, *supra* note 9, at 530 (on the weakness of the provision). Developers of federal new communities resorted to creating subsidiary companies or special improvement districts to provide utility services. MIELDS, *supra* note 7, at 87. For a summary of the basic and supplementary grants which had been extended to the federal new communities through September, 1974, see HUD EVALUATION, *supra* note 65, at 95-99.

74. MIELDS, *supra* note 7, at 25.

75. U.S. GENERAL ACCOUNTING OFFICE, GETTING THE NEW COMMUNITIES PROGRAM STARTED: PROGRESS AND PROBLEMS 3 (1974) (report to Congress) [hereinafter cited as GAO REPORT].

76. *Id.* at 4.

77. Hill, *New Towns, Old Problems*, St. Louis Post-Dispatch, Feb. 18, 1975, at 1D. Not all of the federally-approved communities are using the guarantees. The communities being developed by the State of New York are not; Harbison and San Antonio Ranch cannot because the project agreements have not been finalized; and Beckett does not intend to use this mechanism. HUD EVALUATION, *supra* note 65, at 16.

78. Hill, *supra* note 77. This breaks down into \$700 million for mortgage loans for 20,000 dwelling units, \$400 million for capital outlay, public services and buildings, and another \$400 million for industrial and commercial development.

79. 2 HOUSING & DEV. REP. 94 (1974).

80. *Id.*

81. Complaints include an understaffed HUD office for administering the program,

By 1974, it became quite evident that the federally-approved new communities were experiencing major financial difficulties both in meeting debt obligations⁸² and in implementing development.⁸³ At the same time, the General Accounting Office (GAO) was studying the federal program, and its report disclosed deficiencies by HUD in approving developments.⁸⁴ The report focused on problems other than the criticisms of the developers. The report found that the financial difficulties of the federal new communities were the result of poor planning by the developers⁸⁵ and acceptance of incomplete and inadequate feasibility studies during the application process by HUD.⁸⁶

When the GAO report was published, the future of several of the communities in the federal program was in doubt. Focus in the federal program was no longer directed at initiating new projects, but rather on how to prevent defaults and foreclosures,⁸⁷ a problem further aggravated by the prospect of federal government foreclosure on collateral that was insufficient to cover the amount guaranteed.⁸⁸

the cutback on low-income housing assistance, impoundment of funds, and an attempt to turn the program into a demonstration. *New Towns*, ARCHITECTURAL RECORD 87 (Dec. 1973). New community advocates charged that HUD was ambivalent toward the program and did not attempt coordination with other federal agencies. Hill, *supra* note 77.

82. The number of applicants to the program was also declining. This was attributed to the questionable amount of federal commitment, a "cumbersome" environmental review procedure, and the lack of federal help in creating employment opportunities in the communities. 2 HOUSING & DEV. REP. 17 (1974). Various communities were experiencing an "alarming cash-flow problem," *id.* at 404-05, and this continued into 1975. *Id.* at 1239 (1975). Park Forest South was informed to increase its equity or face a foreclosure. 3 HOUSING & DEV. REP. 66-67 (1975). By the end of 1975, eight were "either in or facing serious cash-flow shortages." *Id.* at 440.

83. HOUSING & DEV. REP. 120:0012 (reference file, 1975). See, e.g., BUS. WEEK, Feb. 10, 1975, at 43 (discussion of The Woodlands' development problems).

84. GAO REPORT, *supra* note 75, at iii-iv. The study reviewed the projects of Jonathan, Park Forest South, Flower Mound and Riverton.

85. *Id.* at ii-iii, 14-23. The primary planning deficiency was inadequate market forecasts. Those submitted were outdated and incomplete. The study concluded it was too early to accurately predict the effect of this action but did note that sales were below anticipated levels. *Id.* at 22-23.

86. *Id.* at iii, 24-31. In addition to being outdated, the GAO found that the Jonathan financial feasibility study encompassed only half of the projected development period and that the Park Forest South projections were unrelated to the development plan. The studies were not prepared in accordance with HUD regulations. *Id.* at 26.

87. The government was attempting to prevent the defaults by encouraging new investors to be brought in or by selling the project. 3 HOUSING & DEV. REP. 67 (1975). With the possibilities of foreclosure increasing, HUD began to seek proposals for private contract managers. The communities of Gananda and Park Forest South were having difficulties securing new capital and therefore were likely candidates. *Id.* at 354.

88. Federal guarantees were not adequately protected "because HUD accepted as collateral (1) real property that was not properly valued and (2) items that would have little

Various steps have been taken to improve the federal program. HUD has revised the proposed regulations for Title VII.⁸⁹ The GAO report recommended reevaluation of the financial feasibility of the projects including revision of original development plans.⁹⁰ New communities have been given consideration in the Housing and Community Development Act of 1974.⁹¹ Consideration also has been given to modifying the financial arrangements between developers and the federal government.⁹²

It is not yet clear whether the financial problems of the new communities can be alleviated. Much will depend on whether the development process can be given enough impetus to generate sufficient cash flow. The current financial crisis, however, has done little to stimulate the residential and commercial growth of the communities.⁹³ It may be that "the wonder is not that the program may flounder but that anyone thought it could be implemented at all."⁹⁴

of no value." GAO REPORT, *supra* note 75, at iv. Park Forest South property was overvalued by \$3.4 million. *Id.* at 37. Valued as collateral figures were nonconstruction and general overhead costs. *Id.* at 39. The GAO also criticized HUD for not requiring the communities to periodically revise financial projections so that the agency could be fully cognizant of the ongoing financial setbacks. *Id.* at iii, 32-35.

89. See Letter from David C. Nimmer, HUD New Communities Admin., to William A. Murray, Sept. 19, 1975, on file with the *Urban Law Annual*.

90. GAO REPORT, *supra* note 75, at iv.

91. The funds appropriated under the Act for community development block grants were to include 2% to be placed in a special fund for use in new communities. *Id.* at 4. See 42 U.S.C. § 5307(a)(1) (Supp. IV, 1974); 24 C.F.R. § 570.403 (1975). HUD received \$20 million in block grants for new communities. Eligible communities, however, made applications for grants totalling \$108 million. 3 HOUSING & DEV. REP. 115 (1975).

92. Initial considerations were to allow defaults, supplement the guarantees, or expand the guarantees. 2 HOUSING & DEV. REP. 405 (1974). The communities of Jonathan, St. Charles and Riverton had to be helped by making, or arranging for, interest payments of \$1,855,000. Four million dollars of additional loan guarantees were made to Riverton. *Id.* at 697.

93. The GAO concluded that to give the federal program an adequate emphasis, increased guarantees, provisions for land acquisitions grants, financial incentives for state and local government support, and tax incentives to encourage businesses and industries to locate in new communities, were necessary. GAO REPORT, *supra* note 75, at v.

94. Rabinovitz & Smookler, *Rhetoric Versus Performance: The National Politics and Administration of U.S. New-Community Development Legislation*, in NEW TOWNS: WHY—AND FOR WHOM? 93, 111 (1973). The authors were very skeptical of the prospects of success of the federal program because it had poor political support, too little was known about the type of development, and its goals were too varied and conflicting. *Id.* at 95. One observer felt that the only issue that can be evaluated concerning new communities and the federal program "is whether a debt guarantee program works." 2 HOUSING & DEV. REP. 94 (1974).

B. *The Federal Program and Other Considerations of the New Community Process*

Aside from the assistance provisions, Title VII provides little substance regarding other problems of new community development. The statute expresses only general goals and purposes.⁹⁵ Arguably, it is HUD's duty to see that problems of site selection, development control and new community government are overcome during application review, approval and the subsequent project agreement.⁹⁶ The adequacy of the regulations and the criteria provided, however, may yet be difficult to determine in view of the financial difficulties of the approved projects. Many have not progressed to a stage sufficient to determine if the particular guidelines are effective. Either the communities are still in an embryonic stage or the development process is lagging.⁹⁷

1. Site Selection

The location of a federal new community, in the first instance, is the choice of the developer. "[T]he effectiveness of the . . . program is left to the developer's ability . . . to assemble sites of sufficient size . . . in a location which satisfies the proposal evaluation requirements."⁹⁸ "No minimum or maximum . . . physical site area is prescribed . . ., but its size must be significant in comparison with existing development or communities in the area in which it is located."⁹⁹ Accessibility to various transportation facilities is necessary¹⁰⁰ and consideration of the existing development in the area must be reflected.¹⁰¹ In addition the developer

95. 42 U.S.C. § 4511 (1970).

96. *Id.* §§ 4513, 4527. The application process averages about 18 months and is criticized "by some developers as too costly on time schedules, particularly in situations where substantial land acquisition has occurred and holding costs are heavy." CONNELL, *supra* note 69, at 11. After HUD's commitment has been accepted by the applicant, a project agreement is drafted and executed. Under the agreement the developer is bound to a "best efforts" commitment that the development will be fulfilled. See MIELDS, *supra* note 7, at 72-74.

97. See, e.g., *A New Town's Future Shock*, NEWSWEEK, Feb. 24, 1975, at 10 (Jonathan had only 2,106 residents by this time).

98. Clapp, *supra* note 53, at 75. Closely related to the fact that site selection is a unilateral decision is the importance of secrecy in land assembly. See note 15 *supra*. See also, Franklin, *The Client Is the Community*, in DESIGN & DEV., *supra* note 16, at 105. HUD is not required to find alternative sites for new community projects. *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *modified*, 502 F.2d 43 (5th Cir. 1974).

99. 24 C.F.R. § 720.6(c)(1) (proposed). "Size and boundary determination may be influenced by the existence of natural features, political boundaries and existing development." *Id.*

100. *Id.* § 720.6(c)(2).

101. *Id.* § 720.6(c)(3).

must demonstrate the "suitability of the site for the proposed uses" in light of the physical characteristics of the site.¹⁰²

The locational decision is reviewed by HUD in adjudging economic feasibility. Different criteria are used depending upon whether the proposal is for a high¹⁰³ or low¹⁰⁴ growth rate area. The new community developer is also required to submit an environmental impact statement with the application.¹⁰⁵

The site selection decision incorporates the element of regional planning. "The area in which the new community is to be situated must be covered by a comprehensive areawide plan."¹⁰⁶ Any review required by state and local governments must be obtained by the developer.¹⁰⁷ A-95 review must also be undertaken,¹⁰⁸ and if feasibility studies draw

102. *Id.* § 720.8(a).

103. *Id.* § 720.11(a). Criteria include economic and population growth, supply and demand for land, housing supply, and market demand. *Cf.* Mandelker, *supra* note 24, at 74. "The amount of growth that will occur in the region as a whole places an absolute upper limit on potential absorption." Watson, *Phasing Growth: How Fast? Where Next?*, in *DESIGN & DEV.*, *supra* note 16, at 87.

104. 24 C.F.R. § 720.11(b) (proposed). The essential criteria are employment base and commitments by industry and government public works projects to the proposed community.

105. *Id.* § 720.20(c). The statement is to be updated periodically with new information or substantial project changes. *Id.* § 720.20(c)(3). New communities offer an opportunity to comprehensively plan for development giving due weight to environmental protection. *See, e.g.,* Everhart, *New Town Planned Around Environmental Aspects*, 43 *CIVIL ENGINEERING* No. 9, at 69 (1973) (discussing the open space and hydrology design of The Woodlands with regard to such factors as wildlife protection and pollution control). *See generally* MIELDS, *supra* note 7, at 69-71.

While the environmental impact statements have been cursory at best, a required report did lead to the eventual withholding of approval for San Antonio Ranch which was to be located over the underground water source for the San Antonio metropolitan area. HUD approval was contingent upon additional study and implementation of pollution control measures to protect the water supply. HUD NEWS No. 72-131 (Feb. 28, 1972). The County and environmental groups filed suit to block the project and failed. *See* Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), *modified*, 502 F.2d 43 (5th Cir. 1974); *The Big Troubles at San Antonio Ranch*, BUS. WEEK, Nov. 3, 1973, at 78-80. Final federal commitment to the community was never given. Development has progressed with private financing. 3 HOUSING & DEV. REP. 775 (1976). The irony is that the area was already under growth pressure and "uncontrolled" development may be more serious than growth by a project such as the new community. *See* U.S. DEPT OF HOUSING & URBAN DEV., FLOWER MOUND NEW TOWN, DENTON COUNTY, TEXAS (EIS) (1971).

106. 24 C.F.R. § 720.13(d)(1) (proposed). "The comprehensive plan . . . must . . . be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other plans and activities [of the area]." *Id.*

107. *Id.* § 720.13(e). One criticism leveled at the HUD review process was that the state review for Park Forest South (Ill.) was incorporated after the preliminary HUD review had occurred, defeating the review purpose. CONNELL, *supra* note 69, at 52.

108. 24 C.F.R. § 720.20(a) (proposed). "[A]ttachment A, Part I of the Office of

upon or affect other "clearinghouse jurisdictions," concurrent reviews from the respective A-95 agencies are required.¹⁰⁹

Neither the statute nor the regulations, however, require the developer to own or control the potential site. Presumably no developer would undertake the costly application process¹¹⁰ without control over the site, but this problem was specifically identified by the GAO, which recommended that HUD "require that all developers either own or control all project land before project agreements are signed."¹¹¹ The developer of Flower Mound, Texas, did not own or control in any way 2000 acres included in the projections for the development submitted to HUD and upon which approval was based.¹¹² This, of course, may have a significant bearing on the project's feasibility.

The projects that have been approved are primarily satellite communities. The only free standing project that has been approved is Soul City, North Carolina.¹¹³ The statute and the regulations make no provision for "direct means by which the federal government or any other level of government can directly influence the supply of land for new town development in desired locations."¹¹⁴ HUD, however, has not emphasized any type of new community other than the satellite project because of "unique problems . . . that increase costs . . . and

Management and Budget Circular A-95 . . . requires that any organization undertaking to apply for assistance under programs subject to the Circular notify the appropriate clearinghouse(s) for the area in which the project is located of its intent to apply for assistance for the purpose of affording the clearinghouse(s) and interested agencies in the area an opportunity to comment on the proposed project." *Id.*

109. *Id.* § 720.20(b). The A-95 review has been credited with raising some of the environmental problems in the federal new communities. See Underhill, *New Communities Planning Process and National Growth Policy*, in CONTEMPORARY, *supra* note 9, at 32, 43.

110. St. Charles spent over \$1.5 million preparing its application. Stuart, *supra* note 27, at 126. But see MIELDS, *supra* note 7, at 67 (costs range from \$250,000 to \$500,000). Another "cost" of the application process is the filing fees with HUD. The fees in the draft regulations for Title VII were criticized as too high, especially for public or nonprofit developers. See Beckman & Finsen, *Urban Growth Legislation: The Federal and State Response—1971, 1973* URBAN L. ANN. 149, 175. The current fees and charges include \$10,000 (nonrefundable) for an eligibility application, a commitment charge based on the amount of the guarantee, a guarantee fee of 3% of the principal, and an annual fee based on the guarantee principal. See 24 C.F.R. §§ 720.30-.34 (proposed).

111. GAO REPORT, *supra* note 75, at iv.

112. *Id.* at iii.

113. Soul City is being developed because "we must look at rural economic development as a means of dealing with the problem of housing." McKissick, *The Free-Standing New Town: New Options?*, in ARE NEW TOWNS FOR LOWER INCOME AMERICANS TOO? 19, 20 (1974). See also *Soul City's Need Is Green Power*, BUS. WEEK, Jan. 17, 1970, at 106.

114. Clapp, *supra* note 53, at 75.

risks."¹¹⁵ While it has been argued that politics may influence the location of a federal new community,¹¹⁶ the major factor is probably economic potential. This goes against the purposes of the statute¹¹⁷ but, considering the funding inadequacy, is not unexpected.¹¹⁸ The considerations specified in the HUD regulations, though general, seem to be secondary.¹¹⁹ "In the early approvals, little emphasis was placed on the requirement that the developer demonstrate local government support for the project."¹²⁰ Disputes have arisen between some developers and existing localities, and HUD has now recognized that this problem requires careful attention.¹²¹

2. Development Control

The project agreement between the Secretary and the developer of the new community requires that the development proceed according to the plans approved.¹²² This is necessary to assure that the requisite elements of a federal new community will be forthcoming. "[S]ignificant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services" is required.¹²³ A federal new community must also specifically provide for the inclusion of low and moderate income persons.¹²⁴ These elements and the general desire of the developer to

115. GAO REPORT, *supra* note 75, at ii. Project agreements contain more stringent requirements for developments that are not satellite communities. For example, of the \$14 million in guarantees to be given Soul City, only \$5 million were given for the first three years. The remainder was contingent upon showing HUD that employment opportunities were created, funds for sewer and water facilities were available and streets were in. A satellite development, however, usually received the entire guarantee amount. *See id.* at 12.

116. *See A Firmer Foundation for New Towns*, BUS. WEEK, Jan. 9, 1971, at 22. Alleged political connections were instrumental in the conditional approval of San Antonio Ranch by HUD. *See The Big Troubles at San Antonio Ranch*, BUS. WEEK, Nov. 3, 1973, at 78.

117. *See* 42 U.S.C. § 4501 (1970) (to encourage rational and efficient urban growth).

118. Clapp, *supra* note 53, at 76; *accord*, Rodwin & Susskind, *supra* note 65, at 126.

119. *See* Pillorge & Brents, *The Design Process: Step by Step*, in DESIGN & DEV., *supra* note 16, at 56, 57 (discussing the developer's reasonable rate of return).

120. MIELDS, *supra* note 7, at 78.

121. *Id.* *See, e.g.*, Meyer, *County Coolness Imperils New Town*, Washington Post, Jan. 10, 1972, § A, at 1, 7 (local and state reservations about St. Charles Communities, Md.).

122. 24 C.F.R. § 720.22 (proposed).

123. *Id.* § 720.6(e). For the innovative record of the federal new communities see HUD EVALUATION, *supra* note 65, at 75-86.

124. 42 U.S.C. § 4513(a)(7) (1970). *See* Lamont, *HUD and New Towns*, in ARE NEW TOWNS FOR LOWER INCOME AMERICANS TOO? 9, 16 (1974). *See also* Gans, *The Possibilities of Class and Racial Integration in American New Towns: A Policy-Oriented Analysis*, in NEW TOWNS: WHY—AND FOR WHOM? 137-54 (1973).

control the progress of the community, mean that careful consideration must be focused on how the new community sponsor is to direct development.

The regulations do not specify precisely what arrangements the applicant must make with local jurisdictions. Presumably these will be worked out during the preapplication review stages.¹²⁵ The developer is required to seek "adoption and implementation of the latest nationally recognized . . . regulations, or State or local codes,"¹²⁶ for application to the new community. In view of the lack of federal input in this area, usually a local matter, this aspect of new communities should be addressed by the states.¹²⁷

3. New Community Governments in the Federal Program

The extent of development control the federal developer retains may well influence the method by which the new community is to be governed. The federal program requires no specific method of government of the new community. States that have enacted legislation concerning new community developments have recognized the need for guidance.¹²⁸ HUD regulations do provide some general direction and favor general purpose units of government over special districts for the provision of government and public services.¹²⁹ Such services, however, may be provided by existing governments.¹³⁰ The regulations recognized the private form of government preferred by the developers.¹³¹ If that is the method the developer intends to pursue, "provision should be made . . . for orderly transfer of such function to an appropriate governmental unit at the earliest appropriate time."¹³²

The form of government in federal new communities has varied.

125. 24 C.F.R. § 720.7 (proposed). The federally-approved community of Jonathan had to deal with 21 levels of governmental jurisdictions. *See* Cunningham, *supra* note 29, at 111.

126. 24 C.F.R. § 720.13(f) (proposed).

127. *See* notes 144-55 and accompanying text *infra*.

128. *See* Mullarkey, *supra* note 9, at 472.

129. 24 C.F.R. § 720.13(a) (proposed).

130. *Id.* Developers usually have not been able to rely on one governmental entity to supply the services. EVALUATION OF NEW COMMUNITIES, *supra* note 61, at 27.

131. 24 C.F.R. § 720.13(b) (proposed). The homes association, despite basic objections to their method of operation, have been a noteworthy feature of new communities. EVALUATION OF NEW COMMUNITIES, *supra* note 61, at 27.

132. 24 C.F.R. § 720.13(b) (proposed). "Federal policy should be seriously concerned with the internal governance and should carefully monitor developer's uses of home owners associations." EVALUATION OF NEW COMMUNITIES, *supra* note 61, at 29. The study recommends that alternative forms of governance should be used whenever possible. *Id.*

Some, such as Park Forest South, Illinois, have incorporated.¹³³ Still others are being developed under private government, ultimately to be annexed to an existing political subdivision.¹³⁴ The choice of new community government probably reflects the plans of the developer regarding services to be rendered and maintenance and development control of the project. These considerations are particularly evident in Jonathan, Minnesota, which became part of an existing community by persuading the town of Chaska to annex the new community site.¹³⁵ The development corporation relinquished powers over development control in return for "an existing taxing authority and . . . governmental structure to support public facilities"¹³⁶

Whatever form of government that the new community desires to undertake, federally-approved new community programs must show the means by which citizen participation will be incorporated in the development process.¹³⁷ The manner by which citizen involvement is to occur is left to the developer. It is likely that the degree of citizen participation will depend on what issues arise affecting the community.¹³⁸

133. Incorporation occurred in 1967, before the community became part of the federal program. CONNELL, *supra* note 69, at 48-49. The difficulty encountered with this approach was that the community had a meager tax base and a small amount of bonding power. "[I]ts principal revenues [came] from permit and other fees, primarily paid by the developer . . . since most of the property tax revenues . . . go to the school district." Bryan, 'Main Street' Revived in Midwest New Town, 29 J. HOUSING 282, 287 (1972). See also note 50 *supra*.

134. E.g., Harbison, which is to be a large-scale addition to Columbia, S.C. Mields, *The Federal New Communities Program: Prospects for the Future*, in NEW TOWNS: WHY—AND FOR WHOM? 81, 85 (1973).

135. See Bryan, *New Town/In Town; New Town/Out of Town*, 29 J. HOUSING 119, 123 (1972).

136. *Id.* at 125. Chaska received a broadened tax base with prospects of well-planned development over which it could exert power to protect its interests. The city also became eligible for assistance under the federal program. "In addition, the corporation itself has given the city underwriting guarantees for bond issues to extend roads and utilities well in advance of development." *Id.* The Jonathan arrangement has been described as a "constant but healthy tension between patriots of Chaska and those involved with the development." Cunningham, *supra* note 29, at 109. There have been some disagreements between the newcomers and the natives. See CONNELL, *supra* note 69, at 29-31. A major point of friction was economic rather than racial integration. *Id.* at 34-35.

Irvine Ranch incorporated in 1972 under the threat of annexations by neighboring jurisdictions which would have splintered the community. See Godschalk, *supra* note 42, at 312.

137. 24 C.F.R. § 720.13(c) (proposed).

138. One study concluded that an active community is facilitated by a community crisis, members that are activists, acquisition of political resources by the residents, formation of a cohesive community-wide group, citizens recognizing themselves as a

III. STATE NEW COMMUNITIES LEGISLATION

While federal legislation has been directed primarily at financial assistance, some states have enacted statutes addressed to special problems that new community developments create. Title VII opened the possibility of state legislation to enable a state agency, public development corporation, local government subdivision, or related public authority, to embark on new community development.¹³⁹ The states also have the choice of authorizing agencies to conduct projects in and provide support for new community developments.¹⁴⁰

Legislation in the states has not been uniform. State participation is seen as being necessary for intergovernmental coordination, for allocation of state resources and for the establishment of governmental structures at the local level which will provide legal powers and techniques for areawide "planning and zoning, housing finance, industrial development, code standardization, . . . annexation procedures, . . . highway construction, etc."¹⁴¹ Generally, "states have not played active roles in the financing or building of New Communities, despite evidence indicating an increasing interest in this area."¹⁴²

Kentucky, Ohio, Tennessee and Florida have enacted somewhat comprehensive legislation regarding new communities, while Alaska provides for a related concept of development cities. Some states have recognized new community development by allowing developers to use existing techniques of land improvement.¹⁴³ New York State authorized

basic interest, a pluralistic governance system, open planning processes, or public access to information and skills. See Godschalk, *supra* note 42, at 312. Citizen participation has been found to be at a minimum level. EVALUATION OF NEW COMMUNITIES, *supra* note 61, at 28.

139. 42 U.S.C. § 4513(b) (1970).

140. Godschalk, *supra* note 42, at 315 n.8. The state could directly aid a new community by locating government offices or educational institutions in the community as was done at Irvine (University of California-Irvine) and Park Forest South (Governor's State University). Reston, Va. is the home of the National Geological Survey (federal agency). See generally NEW JERSEY STUDY, *supra* note 8, at iii-iv.

141. DeLucia, *supra* note 5, at 743. See also Keegan & Rutzick, *supra* note 14, at 1146-47. "In the new community area, [however,] many states face a policy vacuum; they have yet to make basic choices about their role in development guidance." Godschalk, *supra* note 42, at 314.

In terms of governmental structure, it has been suggested that "[t]he state should not provide rigid systems for new-town governance and participation." HANSON, *supra* note 39, at 22. Rather the state should provide for citizen input into the planning process, public review of plans, and guidelines for home owners associations so that they are "not mere facades for continued corporate control of new-town affairs." *Id.* See also MIELDS, *supra* note 7, at 50-51 (identifying governmental problems of new community developers).

142. NEW JERSEY STUDY, *supra* note 8, at iii.

143. The Arizona General Improvement District should be contrasted with the special

the building of new communities by the state's urban development corporation. Others have given new communities nominal recognition in legislation generally directed at urban problems. Many states have indicated an interest in making new communities a part of the state program of urban development, but have not gone beyond studying the concept.¹⁴⁴

A. Kentucky

In 1970 Kentucky enacted legislation¹⁴⁵ authorizing the creation of new community districts with general governmental powers to promote private new community developments.¹⁴⁶ To organize as a district, a nonprofit membership corporation must file a petition with the county court in which the district is to be located.¹⁴⁷ The petitioner must control

district approach that has been popular with new community developers. See Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 URBAN LAW 185 (1973). Two of the most noted special districts are the Estero Municipal Improvement District for Foster City, Cal., and the Reedy Creek Improvement District for the growth spawned by Disneyworld in Florida. See *id.* at 225; Nicoson, *supra* note 5, at 80-81; Comment, *New Community Development Districts*, *supra* note 9, at 1058-62.

The federally-approved new community of The Woodlands, Tex., is being developed under a series of water districts. A different district is to be used for each phase of development. The philosophy underlying this arrangement is that the existing district would not be burdened with expenditures for the entire project, just its particular segment. See Mitchell, *supra*, at 185, 227. The Texas district is called a Municipal Utility District. Observers, however, feel that it is not the most appropriate vehicle for facilitating new community development. See Nicoson, *supra* note 5, at 81-82; Comment, *New Community Development Districts*, *supra* note 9, at 1073, 1076.

144. *E.g.*, Florida has conducted a study under the Environmental Land and Water Management Act, FLA. STAT. ANN. § 380.09 (1974). See ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, *NEW COMMUNITIES: A TOOL TO IMPLEMENT A POLICY FOR THE MANAGEMENT OF GROWTH* (1973). See also NEW JERSEY DEPT OF COMMUNITY AFFAIRS, *ANOTHER WAY: CLUSTERING, PLANNED UNIT DEVELOPMENTS, NEW COMMUNITIES* (undated); D. POWELL, *NEW COMMUNITIES FOR PENNSYLVANIA?* 31-32 (1970) (encouraging heavy state involvement).

145. KY. REV. STAT. ANN. §§ 108A.010-.130 (Baldwin 1975). The statute became effective on June 18, 1970, prior to the enactment of Title VII.

146. *Id.* § 108A.010. The statute provides that size, location and accountability criteria must be met. Consideration must be given to state and regional planning and coordination with other activities in the vicinity of the district. *Id.*

The creation of a new community district has been undertaken by the federally-approved new community of Gananda without a state statute for new communities. The Gananda district is a special purpose district, however, and was established by two municipalities located within the development area. See HUD NEWS No. 72-208, at 3 (April 7, 1972). The Kentucky statute allows creation of a general purpose district. See notes 152-53 and accompanying text *infra*.

147. KY. REV. STAT. ANN. § 108A.020 (Baldwin 1975). Membership in the corporation must be available for all present and future adult residents of the district, and income and assets must be used for the development of the new community.

75% of the land to be included in the district, which must comprise at least 1000 contiguous acres, and the petition must be accompanied by "a statement of the criteria for a development plan."¹⁴⁸

Approval of the petition by the county court occurs after a public hearing.¹⁴⁹ Once the petition is approved, the Governor appoints the initial governing body, a board of commissioners.¹⁵⁰ The length of the term of the board of commissioners is to be set forth in the petition.¹⁵¹ The Act provides that the new community district "shall be a public body corporate and political subdivision . . . to function as a municipal corporation,"¹⁵² which has general police power and authority to create an independent school district.¹⁵³ Thus an approved district in Kentucky would be well on the way to meeting the requirements for federal assistance. Local approvals, development controls, and the government structure would be established or easily imposed by the development corporation.

148. *Id.* § 108A.030.

149. *Id.* § 108A.050. The state should perhaps establish minimum development standards. Public scrutiny should be greater if public financing mechanisms are delegated to the district to protect against abuse of public credit and to promote social and economic goals. "*Private developers . . . should not be given public powers through control of special districts or other public corporations that might permit them to exploit bonding powers for their own interests.*" HANSON, *supra* note 39, at 21.

150. KY. REV. STAT. ANN. § 108A.060 (Baldwin 1975); *cf.* Note, *New Community Development*, *supra* note 9, at 248-49 (first mayor and city council members are appointed by state commission).

151. KY. REV. STAT. ANN. § 108A.090 (Baldwin 1975). The initial commissioners do not have to be residents of the district, but will be replaced by elected representatives who must be residents of the district, *id.*, thus giving the residents eventual control of the community. *Cf.* note 132 and accompanying text *supra*. One commentator suggests that a public agency would be a convenient entity to serve as the transitional government of the new community during the planning phase of the project. The board of the agency would serve as public trustees in an advisory capacity to the developer. HANSON, *supra* note 39, at 9.

152. KY. REV. STAT. ANN. § 108A.110 (Baldwin 1975).

153. *Id.* §§ 108A.110(1) (tax and police powers), (2) (school districts). The authority to create an independent school district is conditioned upon the acquiescence of the present county board of education during the petition approval stage. *See id.* § 108A.050. Existing school districts and new communities sometimes find themselves in disagreement. For a discussion of the "vexing" school problem in Park Forest South, Ill., see Bryan, *supra* note 133, at 287. The provision for educational facilities has been a troublesome aspect of new community development. Many children attend schools outside the community, school construction lags, financing is difficult, and there have been few innovations. *New Towns Don't Meet Residents' Needs*, 89 THE AMERICAN CITY No. 7, at 65 (1974).

It is also important to give the new community general powers rather than express powers. *See* HANSON, *supra* note 39, at 11. If the statute lists powers explicitly, the possibility exists that courts will narrowly construe the grant. *See generally* D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 95-98 (2d ed. 1971).

In addition to specifying a governmental structure, the Kentucky legislation provides several specific tools to aid the new community. Approval of the petition serves as an adoption of the development criteria contained in it, and this becomes "the planning intent of the county for the use of land within the district and [exempts it] from all housing restrictions and building codes in order to promote innovation and experimentation."¹⁵⁴ The district is also given condemnation power over land in the district for public uses such as schools and open space, but not for residential or commercial purposes.¹⁵⁵ While the Act provides that the district is to be initially managed by the board of commissioners, procedures for the eventual incorporation of the district are included.¹⁵⁶ Finally, the statute provides for the annexation of additional territory to the district.¹⁵⁷ If the area is unincorporated, approval of 51% of the registered voters of the area to be annexed is required.¹⁵⁸ An incorporated area can be annexed by agreement between its legislative body and the new community board of commissioners.¹⁵⁹

Despite the existence of this legislation, Kentucky has not become deeply involved in new communities. Funding is one problem,¹⁶⁰ but use of the Kentucky statute may also be limited because the initiative must come from nonprofit corporations, a restriction which excludes the typical private developer.¹⁶¹ One proposal in Midland, Kentucky, developed by the Midland Community Development Authority and a

154. KY. REV. STAT. ANN. § 108A.070(1) (Baldwin 1975). "No land within the new community district shall be used except in accordance with a development plan." *Id.* § 108A.070(2).

155. *Id.* § 108A.070(3). The significance of this is that up to 25% of the land initially in the district does not have to be controlled by the petitioning corporation. *Id.* § 108A.030(1). This could aid land assembly to some extent, and aid the protection of the fringe of the community. See notes 37-38 and accompanying text *supra*.

The act also provides for condemnation procedures. "[N]o award of compensation shall be increased by reason of any increase in the value of real property caused by the actual or proposed acquisition or the use or disposition of the new community district of any other real property for public purposes." *Id.* § 108A.080. See Mandelker, *supra* note 24, at 79.

156. KY. REV. STAT. ANN. § 108A.130 (Baldwin 1975). Incorporation can occur after the population reaches 3000. The existence of the district ends upon incorporation.

157. *Id.* § 108A.120.

158. *Id.* § 108A.120(1).

159. *Id.* § 108A.120(2).

160. NEW JERSEY STUDY, *supra* note 8, at 27.

161. There are some exceptions. The federally-assisted new community of Harbison, South Carolina, is being developed on land owned by the United Presbyterian Church, which has formed the nonprofit Harbison Development Corporation. See HUD News No. 72-557, Oct. 4, 1972.

consortium of private interests, is being implemented.¹⁶² The planned project is to be located in eastern Kentucky and is intended to be a part of the Appalachian development program¹⁶³ "to provide technical training for the labor surplus and promote development of recreational facilities and location attractions to draw industry."¹⁶⁴ An application was submitted to HUD seeking guarantees for \$15 million but was never approved.¹⁶⁵ Unless the federal moratorium on new developments is lifted and funding authorized, it is doubtful that the Kentucky statute will be utilized.

B. Ohio

In 1972, Ohio enacted new communities legislation to promote proper development and encourage the "initiative and participation of private enterprise in such undertakings."¹⁶⁶ The legislation empowers county commissioners to create a new community authority upon petition by a prospective developer.¹⁶⁷ The petition must be endorsed by a "proximate city"¹⁶⁸ and accompanied by proposed land use regulations, economic studies, a preliminary environmental impact statement, and a

162. See Langendorf, *The United States Experience: Introduction*, in *NEW COMMUNITIES: A TOOL TO IMPLEMENT A POLICY FOR THE MANAGEMENT OF GROWTH* 59, 60-61 (1973).

163. J. PRESTRIDGE, *CASE STUDIES OF SIX PLANNED NEW TOWNS IN THE UNITED STATES* 49 (1973). See also Sullivan, *Regional Planning and Economic Dispersal Programs in Great Britain: The Elusive Goal of "Balanced Growth,"* 23 *STAN. L. REV.* 903 (1971) (Appalachia development strategy).

164. J. PRESTRIDGE, *supra* note 163, at 49. See also Langendorf, *supra* note 162, at 60.

165. See MIELDS, *supra* note 7, at 28-29 (table).

166. OHIO REV. CODE ANN. § 349.02 (Page Supp. 1976). The legislation comprises §§ 349.01-.16, and took 13 redrafts. It was subject to heavy lobbying. Huber, *The Role of Government: State*, in *NEW COMMUNITIES: A TOOL TO IMPLEMENT A POLICY FOR THE MANAGEMENT OF GROWTH* 101, 102 (1973).

167. OHIO REV. CODE ANN. § 349.03(A) (Page Supp. 1976). A developer may be a private corporation, municipality, or county. *Id.* § 349.01(E). If the developer is a private concern, it must own or control "through leases of at least [75] years duration; options, or contracts to purchase, the land with a new community district." *Id.* The municipality or county developer must own the land or be able to acquire it through "voluntary acquisition or condemnation in order to eliminate slum, blighted, and deteriorated or deteriorating areas." *Id.*

168. A "proximate city" is:

any city that, as of the date of filing of the petition . . . , is the most populous city of the county in which the proposed new community district is located, is the most populous city of an adjoining county if any portion of such city is within five miles of any part of the boundaries of such district, or exercises extraterritorial subdivision authority . . . with respect to any part of such district.

Id. § 349.01(M). This provision was included because local governments feared a loss of resources to new community developments. Huber, *supra* note 166, at 102.

planned program of community development.¹⁶⁹ If the board determines, after public hearing, that the proposal would be "conducive to the public health, safety, convenience and welfare" and that the petition is in proper order, the board will declare that a new community authority be organized.¹⁷⁰ Failure of any proximate city to concur with the proposal will bar consideration of the petition.¹⁷¹ The authority's continued existence is also conditioned upon receiving a Title VII commitment for financial assistance within two years of the county board's decision.¹⁷²

The Ohio legislation is directed at the management problems of the new community. The authority is to be directed by a board of trustees, whose selection "is deemed to be a compelling state interest."¹⁷³ The statute provides for the composition of the board, terms of the trustees, and minimum criteria for the selection of successors.¹⁷⁴ The authority is endowed with general powers necessary for carrying out the development of the project.¹⁷⁵ The board, however, has only those powers specifically granted, and the existing powers of cities, counties and townships are superior.¹⁷⁶ Any police powers of the authority are

169. OHIO REV. CODE ANN. §§ 349.03(A)(1)-(8) (Page Supp. 1976). The development area is to be called a new community district and must include at least 1000 acres.

170. *Id.* § 349.03(A). If the board fails to make these findings, the petition must be rejected.

171. *Id.*

172. *Id.* § 349.03(C).

173. *Id.* § 349.04.

174. Citizen members are to be appointed to represent present and future residents. The developer appoints an equal number of members to represent its interests and local government is also represented. The initial board is to be organized by the county creating the authority. Appointed citizen members are to be replaced by elected representatives. Developer members are to be replaced by elected citizens in accordance with a time-population plan to be developed by the county organizational body. The local government representative is to be replaced by an elected citizen after the new community attains 75% of its projected population. *Id.* See Nicoson, *supra* note 5, at 77. The act has been hailed as one which recognizes the needs and interests of developers, residents, and local government. Godschalk, *supra* note 42, at 310. "The concept is that in large scale development there are two interests that develop." Huber, *supra* note 166, at 101. These are the private and community interests, and the latter are often secondary. Ohio attempts to formulate the community interest from the outset. *Id.*

175. The powers are similar to those of the typical private developer of a new community. This general grant includes ability to acquire property, engage in planning, provide community services and conduct land improvements. OHIO REV. CODE ANN. § 349.06 (Page Supp. 1976).

176. *Id.* § 349.05. Thus, the authority "shall have no power or authority over zoning or subdivision regulation, provision of fire or police protection, or, unless such services cannot be obtained from other existing political subdivisions, water supply or sewage treatment and disposal." *Id.*

subordinate to conflicting powers of existing municipalities.¹⁷⁷ The developer, therefore, must rely on local government to secure the prerequisites of federal approval. The federal government, however, may find that these procedures for public control over the developer further the purposes of Title VII without excessive federal involvement.

The statute recognizes the need for financing mechanisms. The authority is empowered to make development charges similar to those employed by the "private government" arrangement of many new communities,¹⁷⁸ and may issue bonds and notes for the costs of land acquisition and the construction of community facilities.¹⁷⁹ The authority also has the power to impose an income tax assessment.¹⁸⁰ Procedures for dissolution are provided, and portions of the new community district may be annexed by a municipal corporation.¹⁸¹

Ohio's statute delegates financing powers to the authority while requiring the authority to obtain federal guarantees,¹⁸² and dictates the government structure. In return for powers given the authority, local governments have power over the authority through land use controls. Site selection control is given to "proximate cities" and the county through the petition approval process.

Two new community developments in Ohio are worth noting. The first, Oak Openings, near Toledo, was in the planning stage before the state legislation was enacted.¹⁸³ The community is sponsored by the county urban renewal agency.¹⁸⁴ The project failed to receive assistance under Title IV, and later, under Title VII.¹⁸⁵ The new community is in a

177. *Id.*

178. *Id.* § 349.07. The development charge is comparable to the typical property tax assessment. *See id.* § 349.01(L).

179. *Id.* § 349.08. This section also details procedures covering issuance of the bonds and the rights and liabilities thereunder. *See also id.* §§ 349.09-.11.

180. *Id.* §§ 349.01(L), .07. *See* Huber, *supra* note 166, at 103; Nicoson, *supra* note 5, at 77-78.

181. OHIO REV. CODE ANN. §§ 349.14 (dissolution), .15 (annexation) (Page Supp. 1976). Since the act does not provide for incorporation, it may be seen as attempting to encourage orderly growth of existing communities. There is evidence of this in the dissolution provisions. The voters in the district must decide the dissolution proposal, and the election can only occur after completion of the development program and discharge of the authority debts. After dissolution, the property of the authority vests in the municipality or county within which it is located. *Id.* § 349.14.

182. The state has even considered the issuing of bonds for new community development. Huber, *supra* note 166, at 104.

183. CONNELL, *supra* note 69, at 43. Title IV did not provide for public developers.

184. *Id.* at 38; Langendorf, *supra* note 162, at 59-60.

185. CONNELL, *supra* note 69, at 42.

predominantly black area, and 80% of the housing is to be federally-subsidized with financing carried out by county bonds.¹⁸⁶ Unless it can qualify under Title VII, development must proceed outside the aegis of the state statute.

The provisions, however, are applicable to the second development, Newfields, near Dayton. A federal guarantee of \$18 million was secured.¹⁸⁷ Newfields will perhaps demonstrate the cooperative efforts encouraged by the Ohio statute:¹⁸⁸ "The developer proposed a 'dual developer', one public and one private, with HUD guaranteeing the bonds of both entities. This is the only form of governance proposed, other than municipal incorporation or annexation, where the developer does not control the entity by majority vote during the early years. The developer retains a minority vote, with the majority exercised by representatives of local governing bodies and private citizens."¹⁸⁹ The Newfields project has demonstrated the utility of the "proximate city" concept. To obtain the approval of Dayton, an agreement was made to allow the proximate city to annex a part of the completed project.¹⁹⁰ Newfields opened in the spring of 1975¹⁹¹ and bears watching because it is the only federal new community being developed under a state statute and could serve as a model for future developments.¹⁹²

186. *Id.* at 38. The project is unique in that it attempts to integrate the area by bringing in whites.

187. HUD NEWS No. 73-372 (Nov. 15, 1973). "Newfields is to be developed over a 20-year period on a 4000 acre site . . . and is expected to accommodate 40,000 persons." *Id.* "The developer is working with the Miami Valley Regional Planning Commission, a pioneer in providing voluntary fair share housing programs, to provide a full range of housing opportunities." *Id.*

188. *See* Huber, *supra* note 166, at 105. The statements of Mr. Huber may be somewhat self-serving in view of the fact that Newfields is being developed by a subsidiary of the Donald L. Huber Development Corp. of Dayton. *See* HUD NEWS No. 73-372 (Nov. 15, 1973).

189. Underhill, *supra* note 109, at 50-51. The "dual developer" concept of Newfields has gained the support of another commentator, *see* Nicoson, *supra* note 5, at 76-80, who sees this partnership as a means of providing capital for the community amenities. *Id.* at 69-71, 76-77. "The authority also has power to lease schools, classrooms, and other educational facilities to local school districts . . ." *Id.* at 77 n.33. An example of this "dual developer" concept also occurred in the new community of Maumelle, Ark. The developer was experiencing difficulties in financing the infrastructure and educational facilities. The Pulaski County Board of Education agreed to operate the school system if the development corporation would construct it. Echeverria, *Maumelle, Arkansas*, in CONTEMPORARY, *supra* note 9, at 138, 138-39.

190. Huber, *supra* note 166, at 102-03.

191. Letter from David C. Nimmer, *supra* note 89.

192. This, of course, assumes that either the federal moratorium is suspended or states become more energetic in promoting new communities.

C. Tennessee

Tennessee initially adopted new communities legislation in 1971, which was repealed in 1974 with the adoption of "The New Community Development Act."¹⁹³ The approach of this Act is much different from that of Ohio or Kentucky. The Act contains a broad range of purposes.¹⁹⁴ A state community development board was established which is attached to the state planning office.¹⁹⁵ The board is empowered to establish minimum standards concerning "the impact of the new community on the natural and social environment of the impacted area."¹⁹⁶ The director of the state planning office is the administrator of the Act,¹⁹⁷ and the board has power to hear appeals from his actions.¹⁹⁸

Prospective public and private developers are required to apply to the director for a project certificate.¹⁹⁹ The application must be accompanied by a general development plan (the development period is restricted to thirty years), evidence of financial commitment, and assurances of intention.²⁰⁰ Impacted local units of government are to be notified and invited to respond.²⁰¹ The director can issue a certificate if,

193. TENN. CODE ANN. §§ 13-1501 to 13-1517 (Supp. 1975).

194. *Id.* § 13-1502. *Cf.* 42 U.S.C. § 4511 (1970) (the purposes of the federal legislation).

195. TENN. CODE ANN. § 13-1504 (Supp. 1975).

196. *Id.* § 13-1505(a). Standards must be issued regarding "governmental service delivery systems" and land use plans, *id.*, but must be uniform in application, taking "proper account of differences in types, sizes, and purposes of such developments." *Id.* § 13-1505(b).

197. *Id.* § 13-1506.

198. *Id.* § 13-1505(d).

199. *Id.* § 13-1507. Only a certified development can utilize the provisions of the Act. *Id.* Some have contended that the state itself should designate a new community site. Mandelker, *supra* note 24, at 72-73. It is not uncommon for the proposed development to encompass property in multiple counties. Harbison, S.C., is located in two counties. HUD NEWS No. 72-557 (Oct. 4, 1972). The single state approval would prevent one county from defeating project approval.

200. TENN. CODE ANN. §§ 13-1507(a)(5) to (8) (Supp. 1975). Conclusive evidence must be presented that the applicant has the legal right to develop the land for which the certificate is sought. *Id.* § 13-1507(a)(4). This would prevent the Flower Mound problem. *See* notes 111-12 and accompanying text *supra*. *But see* Note, *New Community Development*, *supra* note 9, at 246-47 (recommending the creation of a state commission to review and approve new communities).

201. Impacted local units of government are "all local governmental units or agencies which have jurisdiction within ten (10) miles of any certificated area including, but not limited to, municipal governments, county governments, utility districts, industrial development corporations, regional development districts, and planning commissions." *Id.* § 13-1503(k). *See id.* § 13-1507(b). It does not appear that the impacted government can veto the proposal as can a proximate city in Ohio. *See* note 171 and accompanying text *supra*. In some instances there could be numerous "impacted units of local government." For example the property of Irvine Ranch was located within six municipal jurisdictions. GRIFFIN, *supra* note 10, at 56.

after a public hearing, he finds that all legislative and administrative requirements have been met.²⁰² The applicant must own or have options on the land within the area; the area must not be less than 2000 acres; the area must be the proper distance from existing urban areas (depending on population of the urban areas); the proposed development must be environmentally feasible and within the public interest of the general area; and the developer must have made the necessary financial arrangements.²⁰³ Temporary certification may be given for two years if the applicant satisfies all criteria other than those of the general development plan.²⁰⁴

Certification of a new community project protects the area from incorporation, except as provided by the Act, and from annexation.²⁰⁵ The approved general plan is the guide for the development process, and if the plan sets forth planning and zoning regulations or building and construction codes at variance with those of any public body that has jurisdiction over the certified area, the provisions of the plan will control.²⁰⁶ Failure of the developer to act in accordance with the approved plan authorizes the director to initiate proceedings to correct the violation or terminate the certificate.²⁰⁷

When implementing the general plan, the developer is required to submit stage plans which are to be approved by the director. A public hearing must be held if there is substantial variance with the general plan.²⁰⁸ Progress reports are to be filed with the director, who is also

202. TENN. CODE ANN. § 13-1507 (Supp. 1975). This includes having a general development plan approved and the payment of the necessary application fees. The initial application fee is \$500, with the same amount required for amendments to the application or the accompanying documents. *Id.* § 13-1516.

203. *Id.* § 13-1507(c). The provision concerning proximity to existing urban areas resembles the Ohio philosophy of proximate cities to some extent. The new community cannot be within a certain distance of the existing city unless that community consents or there is a "significant barrier" between the old and new such as the Tennessee River. *Id.* § 13-1507(c)(3).

204. *Id.* § 13-1507(d).

205. *Id.* § 13-1508(c). The Tennessee statute can be particularly useful to a developer in making many of the initial arrangements with the state and locality and in securing a temporary certificate. Then, while the site is protected from encroachment, the developer can apply to the federal government for financial assistance. If the federal application is approved, the developer can return to the state for final certification. Furthermore, the temporary certificate can be renewed or extended if "the applicant is proceeding in good faith to prepare a general development plan" as required by the statute. *Id.* § 13-1507(d).

206. *Id.* § 13-1508(d). *See also id.* § 13-1509(a)(5). Recognizing the need for flexibility, the plan is amendable. *Id.* § 13-1509(c).

207. For procedures and remedies see *id.* §§ 13-1508(e), -1513 to -1515.

208. *Id.* §§ 13-1511(a) to (c). Recognizing the standard technique of new community development, the Act provides for incremental implementation.

required to conduct field investigations semiannually and to make his findings public.²⁰⁹ The Act provides that when conflicts arise between the developer and local agencies over land use regulations, the director may be called upon to review the problem and to determine the controlling standards.²¹⁰

The Act also provides for incorporation when the certificated area attains a population of 5000.²¹¹ Prior to that time the area will be governed as provided in the general development plan which involves the residents in the decisionmaking process and allows advisory representation by the local county.²¹² Once incorporated, the city is required to exercise its powers in conformance with the provisions of the general plan and is so restricted until the development is completed or the certificate terminated.²¹³

The Tennessee statute does not provide any means of financing, nor does it delegate any fund raising mechanisms to the district. It does, however, provide a great deal of state and local control over the development activity. The state insinuates itself in site selection and encourages early incorporation and citizen participation. Within general guidelines, development control is given to the developer, who in turn is accountable to the state. The Act is being utilized by the Tennessee Valley Authority for the project of Timberlake, southwest of Knoxville.²¹⁴ An application was filed with HUD but was not approved before the suspension of federal approvals in early 1975.²¹⁵

D. Florida

Florida joined the list of states with new communities legislation with the enactment of the New Communities Act of 1975.²¹⁶ The Act is both a response to an earlier study and a reaction against special legislation for

209. *Id.* § 13-1511(e).

210. *Id.* § 13-1510.

211. *Id.* § 13-1512(a). Incorporation would be initiated by the residents of the area. The development plan, however, may provide for earlier incorporation if the population requirement contained therein will "relate to the population when the community is a fiscally viable unit." *Id.* The minimum requirement is 200 persons. If such a provision is part of the plan, it cannot be amended. Any incorporation must encompass the entire certificated area. *Id.*

212. *Id.* § 13-1509(a)(4).

213. *Id.* § 13-1512(c).

214. Interview with Justin M. Schwamm, Ass't Gen. Counsel, TVA, Oct. 29, 1975.

215. MIELDS, *supra* note 7, at 28-29 (table).

216. FLA. STAT. ANN. §§ 163.601-.633 (Supp. 1976).

special improvement districts.²¹⁷ The Act allows creation of a new community district if necessary to provide "predevelopment capital improvements [such as] water, sewer, road, and drainage systems and community facilities,"²¹⁸ and recognizes that coordination between private enterprise, local government, and the public interest is essential.²¹⁹

The district is to be created by a landowner or private developer petitioning the county in which the majority of the district is to be located.²²⁰ The petitioner is required to obtain approval for development having a regional impact under the Florida Environmental Land and Water Management Act of 1972.²²¹ This brings the state into the review process, and also establishes the standards for development. The area must be at least 1000 acres, 75% of which the petitioner must control or own.²²² The facilities to be developed must be compatible with those already existing, and the developer must comply with state and local government policies regarding the environment and economic development.²²³ The developer must also show a commitment to provide low and moderate income housing.²²⁴

Neighboring local governments and various state agencies are notified of the petition and invited to respond.²²⁵ A public hearing is required, and within 45 days of the hearing the county must enact an ordinance creating a district.²²⁶ If this does not occur, the petition is deemed rejected, although the county can also deny the petition formally.²²⁷ A rejection by either method, however, must be accompanied by a statement of reasons.²²⁸ Only an "unreasonable denial" of the

217. See notes 143-44 *supra*. See also FLA. STAT. ANN. §§ 163.603, .633 (Supp. 1976).

218. FLA. STAT. ANN. §§ 163.602(3), .611 (Supp. 1976).

219. *Id.* § 163.602(2).

220. *Id.* §§ 163.603(12), .611(1)(a). If the proposed district is to be located entirely within a municipality, the petition is to be filed with that entity.

221. *Id.* § 163.611(1)(a). See *id.* § 380.06 (1974), *as amended*, (Supp. 1976).

222. *Id.* § 163.611(2)(d). A district contained entirely within municipalities can be less than 1000 acres.

223. *Id.*

224. *Id.* The housing commitment can range from 5% to 25% of the units planned for the district within the first five years of the development period.

225. *Id.* § 163.611(3).

226. *Id.* §§ 163.611(4), (5).

227. *Id.* § 163.611(5)(a).

228. *Id.*

petition can be appealed to the circuit court.²²⁹ In addition, the district may be excluded by any municipality that has land to be located in the district.²³⁰

The district is to be governed by a five-member board of supervisors, two district citizens appointed by the approving entity and three by the petitioner.²³¹ The petitioner's appointees will be replaced by local government appointed district residents under either a population or development phase plan.²³² The district is endowed with general powers to finance services and facilities, including the power to issue bonds, levy taxes and special assessments, and charge user fees; to use eminent domain power for roads and water and sewer facilities; and to utilize public easements, dedications and reservations already existing in the district.²³³ The district can also provide recreational facilities, fire prevention services, facilities for existing educational and police systems, and public transportation facilities.²³⁴ The district has the authority to act as a redevelopment agency and industrial development authority. The district can ultimately be annexed to an existing municipality or incorporated, and provision is made for enlarging or decreasing the size of the district.²³⁵

Florida has thus legislated with respect to new communities in two ways. Under separate legislation, the proposal must be approved for development. Once approved, the new communities legislation provides a vehicle to facilitate development. The state provides financing mechanisms to assure that the services provided do not burden existing local governments and their constituents.²³⁶ Site selection is reviewed under both statutory schemes. Development control must be worked out with state and local government in the approval process as a development of regional impact.²³⁷ Neither statute, however, deals directly with new community government.

229. *Id.* § 163.611(7). A denial is unreasonable when "the developer has shown by a preponderance of the evidence that creation of the district . . . is necessary to the implementation of permits or approvals for such development previously received by the developer from the county or municipality." *Id.* This is really more analogous to an estoppel.

230. *Id.* § 163.611(5)(b).

231. *Id.* §§ 163.613(1)(a), (2).

232. *Id.* § 163.613(1)(c).

233. *See id.* §§ 163.621, .623-24.

234. *Id.* § 163.622.

235. *Id.* § 163.612.

236. *Id.* § 163.602(2).

237. *See* note 221 and accompanying text *supra*.

E. *Other States*

The preceding statutes are examples of the more comprehensive legislation at the state level. In other states legislative treatment concerning new communities has taken various forms.

1. Alaska Development Cities

The Alaska Legislature provided for the regulation of development cities for "the development of natural resources in isolated and relatively unpopulated areas" under a "policy and procedure" of "planning, financial, and other assistance necessary for encouraging . . . well-planned, diversified and economically sound new cities."²³⁸ The development cities are analogous to company towns, since they are to be initiated by an industrial developer.²³⁹ A development city is incorporated from the outset and must be approved by the Local Boundary Commission or by legislative enactment.²⁴⁰

Under the statute, major economic development must occur within five years²⁴¹ and employment preference must be given to Alaskan residents.²⁴² The initial city council is appointed by the Governor,²⁴³ and transition to local representation occurs after the city has a population of 400.²⁴⁴ The city council can act as its own housing and urban renewal authority,²⁴⁵ and all state agencies are directed to aid a development city.²⁴⁶ Revenue bonds can be issued by the majority of the city council, and the city is entitled to funds from revenue sharing.²⁴⁷

2. Arizona General Improvement Districts

In 1970 the Arizona Legislature enacted a general improvement

238. ALASKA STAT. § 29.18.220, .260 (1975). The pertinent sections are §§ 29.18.220-.460.

239. See *id.* §§ 29.18.240, .260, "The city may not proceed with commitment of funds or formal undertakings for physical development until it has signed contract or contracts for sale of the company's products . . . adequate to sustain an economically viable operation." *Id.* § 29.18.320.

240. *Id.* § 29.18.240. Criteria for rejection of the proposal may be found at § 29.18.290.

241. *Id.* § 29.18.290(d)(1).

242. *Id.* § 29.18.330.

243. *Id.* § 29.18.340.

244. *Id.* § 29.18.400.

245. *Id.* § 29.18.410.

246. *Id.* § 29.18.390.

247. *Id.* §§ 29.18.430, .440.

statute to be utilized by new community developers.²⁴⁸ "The statute permits private developers to establish self-sufficient communities which possess authority comparable to the authority of incorporated municipalities. The district is empowered to issue bonds as needed for services and facilities."²⁴⁹ The district must be at least 4000 acres and can be established after *all* landowners in the proposed area petition the appropriate county board of supervisors.²⁵⁰

The Act also created a state community development council.²⁵¹ Both the county board and state council must approve the petition for the district to be created. The council has jurisdiction over development activities in the district to see that the purposes of the legislation are fulfilled.²⁵²

3. Public Development Corporation

The New York State Urban Development Corporation (UDC) which was created in 1968 has undertaken new community development.²⁵³ The legislation was amended in 1973 to officially encompass this type of project.²⁵⁴ The UDC has extensive powers,²⁵⁵ and has two satellite new

248. ARIZ. REV. STAT. ANN. §§ 11-771 to -771.45 (Supp. 1974). See Schroeder, *Public Regulation of Private Land Use in Arizona: An Analysis of Its Scope and Potential*, 1973 LAW & SOCIAL ORDER 747, 801-02; Comment, *The Arizona General Improvement District Statute: A Vehicle for Planned Community Development*, 1972 LAW & SOCIAL ORDER 264.

The developer of Lake Havasu City, Ariz., formed an irrigation district in 1963 to aid the development process, but this approach can no longer be used because this is not the purpose of an irrigation district. *Scottsdale v. McDowall Mountain Irrigation & Drainage Dist.*, 107 Ariz. 117, 123, 483 P.2d 532, 538 (1971). "This judicial determination had been predicted," and before the decision was rendered, proponents of the irrigation district method were seeking new legislation. The result was the general improvement district statute. See Comment, *The Arizona General Improvement District Statute, supra*, at 266-67.

249. Comment, *The Arizona General Improvement District Statute, supra* note 248, at 264. The purpose of the Act is to provide statutory authority for creating model communities in unincorporated, nonurban areas, by authorizing general improvement districts, eventually to be annexed to an existing city or incorporated. See *id.* at 264-65.

250. ARIZ. REV. STAT. ANN. §§ 11-771.01, .02 (Supp. 1974).

251. *Id.* § 11-771.20.

252. *Id.* § 11-771.21H.

253. N.Y. UNCONSOL. LAWS §§ 6250-85 (McKinney Supp. 1975).

254. See *id.* §§ 6253(16), 6265(b).

255. See Wells, *Compulsory Land Acquisition for New Communities and Redevelopment in Great Britain and the United States*, 6 J. INT'L L. & ECON. 77, 105, 107 (1971): It may (a) borrow up to one billion dollars, (b) exercise the power of eminent domain, (c) plan, build, manage or own schools, factories, housing, or entire towns, (d) form partnerships with public or non-profit developers, and (e) renew or construct projects. It may do all these things with or without local invitation.

town developments outside of Buffalo and Syracuse,²⁵⁶ but it has also experienced financial difficulties.²⁵⁷

The legislatures of Illinois and California have also empowered specific public agencies to carry out the development of new communities. The Illinois Housing Development Authority is authorized to act as a state land development agency to conduct "new community development programs and . . . issue notes and bonds for the financing of land development complying with the requirements for federal guarantees."²⁵⁸ California legislation authorizes a public body to be appointed to serve as a "redevelopment agency"²⁵⁹ for the purpose of undertaking a new community project with authority to function under the statutes applicable to such an entity.²⁶⁰

CONCLUSION

The current state of new community development in the United States raises several questions. First, the status of the new communities in the federal program is unclear. Since the processing of new applications has been suspended for over a year, the federal emphasis has been on alleviating the financial difficulties of the already approved communities. The communities of Harbison, Maumelle, Newfields, Shenandoah, Soul City and The Woodlands can be considered to be in a stable situation.²⁶¹ Other communities are less healthy.²⁶² Flower

Perhaps the most important weapon of the UDC is its power to override local zoning ordinances and building codes

See also K. PARSONS, PUBLIC LAND ACQUISITION FOR NEW COMMUNITIES AND THE CONTROL OF URBAN GROWTH: ALTERNATIVE STRATEGIES (1973) (feasibility study for New York State).

256. These developments are Audubon New Community, located in the suburbs of Buffalo to serve the development of a major state university, and Lysander New Community, located northwest of Syracuse on a site that was originally part of a military ordinance depot. See Brandon, *Integrating Recreation & Open Space Facilities into Urban Development Projects*, 24 SYRACUSE L. REV. 929, 931-32 (1973).

257. See *What's Behind the UDC Debacle*, BUS. WEEK, Mar. 24, 1975, at 118-20.

258. ILL. REV. STAT. ANN. ch. 67, §§ 303, 307.22 (Smith-Hurd Supp. 1976).

259. CAL. HEALTH & SAFETY CODE §§ 33250-54 (Deering 1975).

260. *Id.* § 33021.

261. 3 HOUSING & DEV. REP. 775 (1976). HUD, however, has assumed the payment of interest on debentures on all projects except Soul City and St. Charles. 4 HOUSING & DEV. REP. 99 (1976).

262. Gananda was described as being in "cold storage"; Park Forest South was expected to run out of operating funds by mid-March, 1976; and Jonathan negotiations were setback because the prospective purchaser was unable to formulate enough capital backing. 3 HOUSING & DEV. REP. 775 (1976). HUD has recently approved contracts for "asset managers" to operate developments should foreclosure occur. *Id.*

Mound, Gananda, and Jonathan have been acquired by HUD by deed in lieu of foreclosure.²⁶³ Park Forest South may soon be acquired by HUD.²⁶⁴ The fate of Riverton and St. Charles is not yet clear as negotiations are under way with prospective new owners or investors.²⁶⁵

These facts present a second question of how the present federal program should be developed. The approach that HUD is currently taking is to review each community for its financial viability in light of commitments made by local governments and other federal agencies to the development. In the meantime, HUD has increased its monitoring of the projects' financial affairs and has assumed most interest payments to relieve the projects of some current expenses.²⁶⁶ HUD has emphasized that additional loan guarantees will only be given to financially viable projects.²⁶⁷ For the present, the federal government should continue to focus on those communities currently in the program. The program should be considered a demonstration one, and the types of assistance and funding originally contemplated by Title VII fully implemented and utilized.

Once the communities in the federal program are again stabilized, the question then becomes what should be the role of the federal government in the future. The purpose of the program, to promote methods of orderly urban and economic growth, cannot be criticized. It has been advanced that new communities are a benefit to their residents, neighboring areas and society in general.²⁶⁸ The federal government's involvement is arguably necessary because of the financial needs of such development. The current financial situations of the federal new communities, however, fosters little confidence for developers seeking financial backing. Because of the attendant risks, private investors may want the security of federal guarantees before extending support.²⁶⁹ It is possible that successes in the federal program in the next few years will encourage the development of satellite communities in metropolitan areas without federal backing. Future federal involvement in new

263. See 3 HOUSING & DEV. REP. 990, 1051, 1190 (1976); 4 HOUSING & DEV. REP. 100, 187-88 (1976).

264. 3 HOUSING & DEV. REP. 1190 (1976).

265. Riverton is negotiating with a potential new owner, while St. Charles is seeking an additional loan guarantee based on its ability to increase equity in the project. *Id.* at 775. See also *id.* at 1190. St. Charles received the additional guarantee. 4 HOUSING & DEV. REP. 99-100 (1976).

266. 3 HOUSING & DEV. REP. 1190 (1976); 4 HOUSING & DEV. REP. 99-100 (1976).

267. 3 HOUSING & DEV. REP. 775 (1976).

268. HUD EVALUATION, *supra* note 65, at 65-74.

269. *Id.* at 12-24.

communities, however, should be limited to developments in which the government can contribute more than a loan guarantee, such as free standing or growth center developments.²⁷⁰ Projects might also be developed to utilize federal lands,²⁷¹ possibly in conjunction with other federal programs.²⁷² Additionally, new communities should be located in states that have recognized new communities by providing statutory mechanisms for their development.

The type of statute that should be provided for new communities at the state level is thus in issue. The statutes outlined previously offer concepts that should be incorporated. Initially the state should be made an active participant in the development process. The concept of state review and approval provided in the Tennessee statute should be utilized. This is particularly appropriate since new communities can encompass multiple local jurisdictions. The state should also contemplate commitment of state resources to the development as in Alaska. Since state resources are to be committed, the state should take the initiative in designating the regions in which new communities should be located.

The financial problems associated with new community development are related to this active state role. If the state is to designate areas, then it may be necessary to use eminent domain for land assembly. The state could purchase the land and sell to a private developer with appropriate covenants in a manner in which land assembly for urban renewal has been conducted.

The statute should also provide for a public agency to implement the public aspects of development. It is contemplated that the predominant type of developer would be private. Thus the Ohio and Florida approaches should be considered. The statutory vehicle should be

270. The growth center type development poses an interesting approach to new communities. The major advantage it has is that the infrastructure for services and amenities and an economic base are already present. The major disadvantage is marketing because in theory the development would not be in a metropolitan area. See DeLucia, *supra* note 5, at 734-42. Growth center strategy is a technique employed by the Economic Development Administration, Department of Commerce. See, e.g., GREATER EGYPT REGIONAL PLANNING & DEV. COMM'N, GROWTH CENTER STRATEGY FOR THE GREATER EGYPT REGION—THE MT. VERNON CASE (1975).

271. For example, the Department of Defense has recommended using closed military bases as sites for new communities. 2 HOUSING & DEV. REP. 788 (1974). This notion may at least avoid some land assembly problems and related costs.

272. Recent energy problems coupled with a federal policy to develop national energy resources through use of coal gasification and oil shale processing spurred interest in developing new communities to support and be supported by these activities. See 3 HOUSING & DEV. REP. 440 (1975).

delegated sufficient fund raising techniques and perhaps special condemnation power like that given in the Kentucky and Florida statutes. The state statute should also contemplate the creation of a new community district that could encompass an area larger than the land assembled. The authority would then be able to recoup some of the spillover benefits the development would bring.

The state approval of the development should include the adoption of land use controls and building codes under which the developer wishes to proceed. Negotiation with local governments should be eliminated. The state, however, should provide for input by local governments in the review process and should maintain development monitoring procedures as provided in Tennessee.

The state should also prescribe the composition of the project's *initial* governing body and provide for a transition to membership by the eventual residents. The development should also be endowed with governmental powers analogous to a municipality. Finally provision should be made for a *complete transition* of the authority to a municipality, either by incorporation or annexation depending on the type of development.²⁷³

New communities should not be regarded as a noble experiment that has failed. Columbia, Reston and Irvine demonstrate that development can occur in spite of the risks and problems inherent in the process.²⁷⁴ Given greater support by federal and state governments, new communities may well gain the attention of residential and commercial consumers and investors, ultimately providing a beneficial form for channeling future growth.

273. Obviously the state statute could provide for other aspects of new community development. The foregoing is only intended as a general approach the statute should seek to embody.

274. The populations of Columbia, Reston and Irvine are 38,000, 26,500 and 35,000 respectively. See Columbia Quarterly 1 (Feb. 1976) (data as of Feb. 1, 1976); Reston Today (1975) (fact sheet—data as of Oct. 1, 1975); Letter from Martin A. Brower to *Urban Law Annual*, Mar. 3, 1976, on file with the *Urban Law Annual*.

COMMENTS

