
FEDERAL AGENCY—LOCAL GOVERNMENT LAND USE NEGOTIATIONS: VULNERABILITIES OF THE FEDERAL BARGAINING POSITION

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The federal government owns nearly one third of all property in the United States,¹ with many parcels located in or adjacent to urban or rural communities. The activities conducted by federal agencies on these lands can lead to conflicts between a federal agency attempting to implement a national program² and a local government seeking to pro-

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1. Currently, federally-owned property includes some 705 million acres of surface onshore lands and an estimated 560 million acres of sea floor on the Outer Continental Shelf to a depth of 200 meters. In addition, the federal government owns about 66 million acres of reserved mineral interests in private or state owned lands. The total acreage of federal ownership has not changed much in the past two or three decades, other than in Alaska. There, grants of federal land to the state under the Statehood Act and to natives in Alaska under the Alaska Native Claims Settlement Act have reduced federal ownership by about 80 million acres over the past twenty years. Hagenstein, *The Federal Lands Today: Uses and Limits*, in *RETHINKING THE FEDERAL LANDS* 74, 76 (S. Brubaker ed. 1984). One of the more controversial issues relating to these lands is whether federal agencies have a duty or "public trust" to conserve and enhance natural resources. See generally Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 *IOWA L. REV.* 631 (1986).

2. See, e.g., Jampoler, *The Navy as Neighbor*, *PROCEEDINGS U.S. NAVAL INST.* 51

tect a uniquely local concern.³

(Sept. 1982) (detailing a local government's opposition to a military housing project); Dobbs, *Battling Over Access in the Shrinking West: Private Owners Block Users of Public Land*, Washington Post, June 23, 1987, at A3, col. 1; Trumbull, *Suit Seeks Removal of Cross at Honolulu's Marine Base*, N.Y. Times, Sept. 30, 1986, at A28, col. 5; Kramer, *Forest Service Site Violates County Zone Code*, Steamboat Pilot (Colorado), Jan. 30, 1986; *Rise in Marijuana on U.S. Land*, N.Y. Times, Dec. 13, 1984, at A26, col. 6. This Article focuses on the direct federal activities on federal lands, rather than on commercial enterprises carried out on federal property. For a discussion of the latter topic, see Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653 (1985). The leading case on state authority over nonfederal activities on federal lands is California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987).

Nearly every day federal agency land managers make important decisions which have potential spillover effects on local communities. Such decisions include, but are not limited to, whether to locate a hazardous waste storage facility near a community population center; whether to use the federal eminent domain power to condemn private property thereby displacing families or local businesses; whether to expand the use of a federal prison or military brig to include a larger number of serious offenders; whether to control mosquitoes which breed on federal property and what type of chemicals, if any, should be used to control mosquitoes, vectors and other pests; whether to allow or deny the expanded use of a federal air field to include civilian as well as federal aviation operations; whether to construct large scale employment centers which would greatly increase vehicle traffic in a geographic area; whether to change federal air field flight patterns or increase flight operations thereby creating noise impacts on a greater number of community residences; whether to allow or deny access to federal lands for recreational use; whether to limit access to aggregate sources on federal property where local aggregate supplies have become depleted; where to locate and under what conditions to operate military artillery and bombing ranges; where to locate ammunition storage facilities; whether to demolish or rehabilitate an older, possibly historically-significant, building; what level of protection should be given to archaeological sites or historic districts; what volume of water should be removed from underground water sources; whether to dam up a river thereby inundating valuable agricultural or historic property and reducing the flow of sand and sediment necessary for beach replenishment; whether to conduct activities which would damage the habitat of wildlife designated by state or federal agencies as endangered, threatened, or otherwise protected; what level of treatment will be provided for sewage generated on federal lands; whether to locate mobile home parks or multiple-family housing units near community single family residential neighborhoods; whether to support state, local or federal law enforcement efforts to control the flow of illegal aliens across federal property; whether to support or discourage state plans for the construction of major highways across federal property; what controls will be placed on the sale and distribution of alcohol on federal lands; what controls will be placed on the sale and distribution of "adult literature"; and what construction and design standards will be applied to buildings and other structures on federal property.

While this Article focuses on lands owned by the United States, similar problems occur in dealing with activities on native american lands. Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond* Washington Department of Ecology v. EPA, 14 ECOLOGY L.Q. 69 (1987).

3. The existence of conflicts between federal agencies and local governments is common. See L. BROWN, *MANAGING CONFLICT AT ORGANIZATIONAL INTERFACES*

This Article examines the negotiating position of federal agencies in their confrontations with local governments over the uses of federal property. The interaction between federal agencies and communities is more accurately characterized as a negotiation process, rather than a legal process. The latter concept implies reliance on substantive law (the "merits" of a case) and on procedural law (the legally-imposed principles of fair play). But, conflicts between local governments and federal agencies over federal land use are most often resolved in the broader public or political area of negotiation, which includes but is not limited to legal rules. Law in this context is often an important

(1983). Conflicts can be expected where government establishes jurisdictional boundaries between units of government. Murphy, *Jurisdictional Boundaries and Areawide Decision Making*, in URBAN PROBLEMS AND PUBLIC POLICY 19 (R. Lineberry & L. Masotti eds. 1975). Due to certain customs developed within our federal system each political unit views itself as competing with other governmental organizations. D. ALLENSWORTH, *THE POLITICAL REALITIES OF URBAN PLANNING* (1975); Susskind, *Citizen Participation and Consensus Building in Land Use Planning*, in THE LAND USE POLICY DEBATE IN THE UNITED STATES 183 (J. de Nevville ed. 1981). One important reason for this competition is the fact that each governmental entity has a different view of what is in the best interest of the public. See Harvey, *Uses and Limits of the Federal Lands Today*, in RETHINKING THE FEDERAL LANDS 108, 110-14 (S. Brubaker ed. 1984).

Of course, local governments enter negotiations with the Federal Government with a well-established history of land-use control authority. See P. GOIST, *FROM MAIN STREET TO STATE STREET: TOWN, CITY, AND COMMUNITY IN AMERICA* (1977); INTRODUCTION TO PLANNING HISTORY IN THE UNITED STATES (D. Krueckeberg ed. 1983); Gerckens, *Historical Development of American City Planning*, in THE PRACTICE OF LOCAL GOVERNMENT PLANNING 21 (S. Frank ed. 1979); Myers, *Community-Relevant Measurement of Quality of Life: A Focus on Local Trends*, 23 URB. AFF. Q. 108 (1987). But, local government land use planning has had to overcome certain inherent weaknesses, including "the chumminess, informality, and dealmaking qualities of local government." Rose, *New Models for Local Land Use Decisions*, 79 NW. U.L. REV. 1155, 1171 (1985). The effectiveness of local land use control can be increased by a local government's adherence to the principles of comprehensiveness, adequate communication of intentions, well-defined goals and commitment to decisive management action. Rider, *Local Government Planning: Prerequisites of an Effective System*, 18 URB. AFF. Q. 271 (1982).

Naturally, if a community could regulate its property in isolation, local values and traditions could be protected. However, with the rapid growth of suburbs after World War II nearly all communities have dealt with the spillover impacts from neighboring communities and from state and federal lands. See generally, R. PLATT, *INTERGOVERNMENTAL MANAGEMENT OF FLOODPLAINS* (1980); Corrie, *An Assessment of the Role of Local Government in Environmental Regulation*, 5 UCLA J. ENVTL. L. & POL'Y 145 (1986); Stonecrush, *Local Policy Analysis and Autonomy: On Intergovernmental Relations and Theory Specifications*, 5 COMP. URB. RESEARCH 5 (1978); Walker, *Intergovernmental Relations and the Well-Governed City: Cooperation, Confrontation, Clarification*, 75 NAT'L CIVIC REV. 65 (1986).

tool of the negotiators,⁴ but the parties may rely on various negotiating strategies to further their interests.⁵

In this larger bargaining environment, the federal government is not always the dominant party. Many local governments, like other special interest groups in the nation, have learned to exploit the erosion of the federal agencies' preemptive powers which occurred during the 1970's. During that decade, Congress passed legislation concerning intergovernmental consultation and environmental protection which restricted or conditioned the federal government's use of its land resources. These and other statutes increased outside access to government decisionmaking and established a public policy of greater disclosure of federal agency information. While these statutes alone may not significantly curtail federal agency discretion, their use by special interest groups in the negotiating process can have a marked impact on the exercise of federal authority.

4. During the 1970's, for example, public interest groups succeeded in attracting the attention of federal agencies through court actions. L. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982). This litigation often sharply focused the conflicting public policy concerns in land use control. W. ROSENBAUM, *ENVIRONMENTAL POLITICS AND POLICY* (1985). In any event, environmental law suits brought by interest groups, including local governments, redefine federalism in the United States. See L. LAKE, *ENVIRONMENTAL REGULATION: THE POLITICAL EFFECTS OF IMPLEMENTATION* 7-37, 83-123 (1982).

5. To appreciate the nature of this haggling between federal agencies and local governments, one must first consider the role of municipalities and other community-level governments in the American political system. S. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC* (1987); Gittel, *The American City: A National Priority or an Expendable Population*, 24 *URB. AFF. Q.* 13 (1985); Long, *The Citizenships: Local, State and National*, 23 *URB. AFF. Q.* 4 (1987) (arguing for a stronger role for cities as advocates for citizen rights). Most political scientists consider local governments to be important participants in public policy formulation. One commentator suggested that intergovernmental relations between the federal government and the state and local governments form a "fourth branch" of government. Edner, *Intergovernmental Policy Development: The Importance of Problem Definition*, in *PUBLIC POLICY MAKING IN A FEDERAL SYSTEM* 149 (C. Jones & R. Thomas eds. 1976). In their unique political role, local governments often act as special interest groups in their efforts to control federal agency decisionmaking. Of course, federal agencies frequently respond to any outside pressure by adopting similar pressure-group tactics in guarding their agency mission. Freeman, *Bureaucracy in Pressure Politics*, in *BUREAUCRATIC POWER IN NATIONAL POLITICS* 23 (F. Rouke ed. 1965). See also R. DENTON & G. WOODWARD, *POLITICAL COMMUNICATION IN AMERICA* 98-136 (1985) (discussing conflicts between public agencies and interest groups). Of course, not all commentators agree that important public policy decisions should be made through the political process. See, e.g., Dennis & Simmons, *From Illusion to Responsibility: Rethinking Regulation of Federal Lands*, in *CONTROVERSIES IN ENVIRONMENTAL POLICY* 65 (S. Kamieniecki, R. O'Brien & M. Clarke eds. 1986).

The focus of this Article is on the federal government's vulnerabilities when it attempts to preempt or override local community concerns. While the Article should give local governments a clearer view of how to engage a federal agency in the negotiating process, the author does not advocate local control of federal land. Rather, the author believes that increased understanding of land use conflict resolution will lead to decisions more closely approximating the public need. This Article should aid federal officers in identifying the risks of taking an unyielding position when confronted by local community leaders. In practice, the federal government is seldom able to utterly preempt or exclude local governments from federal land use decisions affecting a local community. In fact, a federal officer who espouses a contrary view will ultimately lose credibility within his agency and with others outside his organization. This loss of credibility will impair the officer's subsequent ability to play a significant role in the land use decisionmaking process.

This Article first describes the legal principles which have historically governed the control of private and public land use in the United States. These rules of law are changing because of the increased pressures along jurisdictional boundaries between local governments and other governmental entities, such as neighboring local governments, and state and federal lands. A hallmark of the judicial and legislative changes to the traditional rules of law is the emphasis on making government agencies more responsive to public interests.⁶

Notwithstanding this obligation to the public, public officials are players in a competitive bargaining environment which often sharply penalizes them for open and conciliatory conduct. But, an analysis which focuses solely on the moral or ethical consequences of a decision is as limited as one which examines only the applicable rules of law. In practice, the federal agency expects the officer to be an advocate for the interests of his agency in an atmosphere of intense political bargaining with local governments and other special interest organizations. Sup-

6. For a general discussion of the dilemmas facing a federal agency decisionmaker, see Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978). The reluctance of public officials to share or disclose information has been referred to as a hallmark of land use decisionmaking. Ingram, *Information Channels and Environmental Decision Making*, 13 NATURAL RESOURCES J. 150 (1973). Of course, there is general agreement that government ought to be responsive to the people. There are, however, wide-ranging views about how that responsiveness ought to occur. See Saltzstein, *Conceptualizing Bureaucratic Responsiveness*, 17 AD. & SOC'Y 283 (1985).

posedly, adversarial debate will produce a result which is in the best interest of the public.

This Article will accent the vulnerabilities of federal agencies in their negotiations with local governments over land use issues. Among those vulnerabilities is the failure of key federal decisionmakers to appreciate the nature of the competitive negotiating environment in which they operate. A federal officer who focuses exclusively on the legal or ethical aspects of a conflict may be disadvantaged in influencing the final outcome of the solution. This discussion will also pinpoint for local governments the chinks in the federal armor and may lead to the recognition of opportunities for leverage in the negotiating process.

I. LOCAL GOVERNMENT LAND USE LAW: ROOTS OF THE COMMUNITY BARGAINING POSTURE

Any discussion of federal-local land use conflicts must first survey the rules of law associated with both local land use regulations and the federal preemptive power. While municipal officials are well acquainted with local government land use control law, they are usually unfamiliar with the federal constitutional and statutory law. Similarly, a federal officer well-versed in federal legal practice may be unaware of the local government legal tradition. In this author's opinion, the failure of officers on both sides to understand the law in its historical context will cause an imbalance in the discussions preceding a federal land use decision.

For example, legal limitations under federal law may be used by local governments to restrict the federal government's ability to dominate the negotiating process. Federal statutory law obligates federal agencies to disclose certain government information and to cooperate with local governments. A local government which fails to recognize the requirements of these federal laws may too easily concede to a federal agency position.

Another reason to understand the other side's legal tradition is to anticipate the public posturing of the other side. Public agencies often use rules of law to defend their position or to influence public opinion. An important factor in any intergovernmental negotiation is the potential influence of the general public. At the beginning of any bargaining, the public agency negotiator should determine which aspects of the negotiation may cause outsiders such as the public to favor one side. In land use conflicts between federal agencies and local governments, the federal government may be vulnerable, given the strong tradition of

local control of land use in the United States. Perceptive local leaders, aware of the public's traditional reliance on local government control of land and of its unfamiliarity with federal concerns, may successfully manipulate public opinion to their advantage.

A discussion of federal agency-local government land use controversy must review the well-established principles associated with municipal zoning and land use planning.⁷ Both state and federal courts recognize the tradition of community land use control, based on the police powers reserved by the states under the United States Constitution. This legal tradition has created a perception that counties and municipalities are in a better position to regulate those aspects of land use associated with the public health, safety, welfare, and morals. Additionally, local governments have learned to solve interjurisdictional conflicts within their states under state statutory law and state court judicial precedent. Although federal law may preempt these local and state laws, a local government official's familiarity with these legal rules will influence his private and public negotiating positions. Any federal land manager who wants to control controversial activities on federal property, but fails to appreciate local government legal and political tradition, risks making damaging errors of judgment in the negotiation process.

A. *The Tradition and Practice of Local Government Land Use Planning and Control*

Historically, local governments were responsible for land use control of private land in the United States. Despite recent attempts by the states and the federal government to regulate private land,⁸ local gov-

7. While this section relies heavily on appellate court decisions to define the tradition of local government land use control, the reader should remember that not all courts are impressed by arguments asserting historical or traditional governmental functions. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Thus, the more successful use of the tradition argument may be in the political arena, instead of in the courts.

8. The environmental movement of the 1970's brought with it an effort to shift control over land development to the states. Hawaii enacted state land-use control legislation in 1961 and a few other states followed during the early 1970's. Two commentators characterized this development as a "quiet revolution" in land-use control. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971). See also R. HEALY & T. ROSENBERG, *LAND USE AND THE STATES* (2d ed. 1979); RABE, *FRAGMENTATION AND INTEGRATION IN STATE ENVIRONMENTAL MANAGEMENT* (1986); DeGrove & Stroud, *State Land Planning and Regulation: Innovative Roles in the 1980s and Beyond*, *LAND USE L. & ZONING DIG.*, Mar. 1987, at 3;

ernments continue to exercise a predominant role. One reason for the continued reliance on local control of real property is the belief that any decision to restrict the use of private property should provide individual landowners with a meaningful opportunity to state their concerns about government control. Advocates of continued local control assert that landowners' most effective participation in the decisionmaking process is at the local level.⁹

The traditional method to limit the use of land is through zoning

Knapp, *Self-interest and Voter Support for Oregon's Land Use Controls*, 53 J. AM. PLAN A. 92 (1987); Renz, *The Coming of Age of State Environmental Policy Acts*, 5 PUB. LAND L. REV. 31 (1984). Many states have limited state environmental land-use control statutes for sensitive areas such as wetlands and floodplains. *E.g.*, ARIZ. REV. STAT. ANN. §§ 45-2341 to -2367 (Supp. 1985) (floodplains); FLA. STAT. ANN. §§ 403.916-932 (West 1986) (wetlands); IOWA CODE ANN. §§ 455B.261-.281 (West Supp. 1985); N.J. STAT. ANN. § 13.9A (West 1979) (wetlands).

Only four states, Hawaii, Florida, Oregon and Vermont, now have state land-use control programs that cover more than environmental problems. In *Healy & Rosenberg, supra*, at 7-10, the authors list four reasons for state assumption of control over land use.

1. Many land-use problems spill across the boundaries of local governments.
2. Often, there are conflicts between the interests of a community and the interests of a larger and broader jurisdiction.
3. Many local governments in undeveloped areas of a state or region lack effective land use control.
4. State investments in public works projects have an important influence on local and regional land development.

Of course, local governments bitterly oppose state involvement in land use control. See F. POPPER, *THE POLITICS OF LAND-USE REFORM* (1981).

In addition to state involvement, Congress proposed but failed to adopt a National Land Use Policy Act in 1975. The most active involvement of the federal government in land use planning at this time is in the planning requirements under the National Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1985). See Eichenberg & Archer, *The Federal Consistency Doctrine: Coastal Zone Management and New Federalism*, 14 *ECOLOGY L.Q.* 9 (1987).

9. See J. BALDWIN, *ENVIRONMENTAL PLANNING AND MANAGEMENT* (1985) (advocating continued local control because it allows the greatest opportunity for citizen participation); Johnson, *Citizen Participation in Local Planning*, 2 *GOV'T & POL'Y* 1 (1984); Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 *CALIF. L. REV.* 837 (1983). But, there are those who contend that land use planning and control should be more centralized. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 *ME. L. REV.* 261 (1984); Hicks, *National Urban Land Policy: Facing the Inevitability of City and Regional Evolution*, in *URBAN LAND POLICY FOR THE 1980'S* 21 (G. Lefcoe ed. 1983). But the traditional wisdom is that fragmented policymaking is an important ingredient of American political philosophy. Ingram & Ullery, *Policy Innovation and Institutional Fragmentation*, 8 *POL'Y STUD. J.* 664 (1980); Sabatier & Peckey, *Incorporating Multiple Actors and Guidance Instruments into Models of Regulatory Policymaking*, 19 *AD. & SOC'Y* 236 (1987). See also Kelly,

ordinances.¹⁰ These locally enacted laws establish the authorized uses of property and the physical configuration of development within a community's boundaries. The community's authority to pass such ordinances is based on the police power delegated to local governments by the states.¹¹ Each state has a statute that establishes the substantive limits and procedural requirements for local government regulation of private property.¹²

During the initial years of local government zoning and land use control, there was considerable concern whether zoning laws were constitutional.¹³ Early courts held that a government's limitation of a pri-

Planning vs. Democracy, LAND USE L. & ZONING DIG., Jul. 1986, at 3 (discussing the pros and cons of public participation in the land use planning process).

The law is seldom clear concerning which level of government should make important land use decisions. One example of this is the present struggle over the control of hazardous wastes and other environmental pollutants. Schwenke, Walls & Lockett, *Local Control of Hazardous Waste Through Land Use Regulation*, 21 REAL PROP. PROB. & TR. J. 603 (1986); Comment, *An Assessment of the Role of Local Government in Environmental Regulation*, 5 UCLA J. ENVTL. L. & POL'Y 145 (1986).

10. For general surveys of the law of zoning and land use control, see D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* (2d ed. 1985); P. ROHAN, *ZONING AND LAND USE CONTROLS* (1987); N. WILLIAMS, *AMERICAN LAND PLANNING LAW* (1974). Several issues associated with the jurisprudence of land use law are considered in Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319.

11. Government regulation of land use and development is effected through an exercise of the police power. The police power includes the inherent regulatory powers of sovereign governments. The United States Constitution divided these powers between the Federal Government and the states. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Supercade Cherry Hill, Inc. v. Borough of Eatontown*, 178 N.J. Super. 152, 428 A.2d 530 (1981); *Metzelbaum, History of Zoning*, 9 CASE W. RES. L. REV. 36 (1957).

12. All fifty states have zoning enabling legislation which grants authority to municipalities. Most of the zoning enabling statutes adopted prior to 1924 were based on the New York General City Enabling Act of 1917. After 1924, states modeled zoning enabling acts on the Standard State Enabling Act, which was published by the United States Department of Commerce in 1923. These state statutes delegate the zoning power to local governments. Courts held that it is fundamental that state legislatures delegate to municipalities police powers related to local governmental functions. *E.g.*, *Stucki v. Plavin*, 291 A.2d 508 (Me. 1972); *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 543 P.2d 173 (1975); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970).

13. The early state cases which considered the constitutionality of zoning are collected in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-93 (1926). See also *Baker, Zoning Ordinance*, 11 IOWA L. REV. 152 (1926); Note, *Constitutionality of Zoning*, 72 U. PA. L. REV. 421 (1924); Comment, *The Constitutionality of Zoning Laws*, 32 YALE L.J. 833 (1923); Comment, *Municipal Zoning*, 19 MICH. L. REV. 191 (1920).

vate landowner's use of his property went beyond the police power and was an unconstitutional deprivation of property. In 1926, however, the United States Supreme Court, in *Euclid v. Ambler Realty Co.*,¹⁴ upheld the zoning ordinance of Euclid, Ohio, a small Cleveland suburb. Subsequent federal and state courts have affirmed the rule that local governments may impose reasonable restrictions on private property.¹⁵

In addition to zoning laws, most communities develop master plans or comprehensive plans.¹⁶ Under such plans, communities develop an overall scheme for the future physical use of all private and public land within their political boundaries.¹⁷ Planning includes the consideration of the competing immediate and future needs of the community, with a strategy for resolving conflicts and satisfying future demands.¹⁸

14. 272 U.S. 365 (1926).

15. See generally, Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). For a discussion of the winning arguments in *Euclid*, see Fluck, *Euclid v. Ambler: A Retrospective*, 52 J. AM. PLAN. A. 326 (1986); Tarlock, *Euclid Revisited*, LAND USE L. & ZONING DIGEST, Jan. 1982, at 4.

16. Many jurisdictions use the terms master plan and comprehensive plan interchangeably to mean a local land development plan setting forth objectives, policies and standards to guide public and private development of land within its planning jurisdiction. See Mandelker & Netter, *A New Role for the Comprehensive Plan*, LAND USE L. & ZONING DIGEST, Sept. 1981, at 5; Mendelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Morris, *The Master Plan and Its Derivatives in the United States*, 19 REAL PROP. PROB. & TR. J. 563 (1984). Those states distinguishing master plans from comprehensive plans do so on the basis of the policy concerns of the jurisdiction. See *Theobald v. Board of County Comm'rs*, 644 P.2d 942 (Colo. 1982); P. ROHAN, ZONING AND LAND USE CONTROLS § 37.01 (1987).

17. While zoning laws generally apply only to private property, the comprehensive planning process considers all real property, public and private, within the jurisdiction. See A. CATANESE & T. SNYDER, INTRODUCTION TO URBAN PLANNING (1979); Rosenberry, *Master Plans and Local Land Use Regulation*, 2 ZONING & PLANNING L. REP. 113 (1979); Topping, *Consolidating Plans and Regulations*, LAND USE L. & ZONING DIGEST, July 1982, at 4.

18. Since World War II, there has been an upsurge in demands on the available land and natural resources, putting stress on planners and on political relationships. Jackson, *Land Use in America: The Dilemma of Changing Times*, in LAND USE ISSUES OF THE 1980's 18 (T. Carr & E. Duensing eds. 1983). Community planners must work with competing social values and interests. This has caused a continuous search by professional planners for an analytical framework under which they can achieve effective comprehensive planning. Hoch, *Doing Good and Being Right: The Pragmatic Connection in Planning*, 50 J. AM. PLAN. A. 335 (1984); Marcuse, *Professional Ethics and Beyond: Values in Planning*, 43 J. AM. INST. PLANNERS 264 (1976); Wood, *Planning, Justice and the Public Good*, in PLANNING THEORY: PROSPECTS FOR THE 1980's 68 (P. Healey, G. McDougall & M. Thomas eds. 1982). Some suggest that the task of resolving conflicting social values is beyond the capacity of even the most experienced planners. Planners, of course, disagree and point to many benefits associated with their

In many areas, community planning is the catalyst which promotes cooperation among conflicting interests.¹⁹ In some states, local plan-

professional training. Compare I. BRACKEN, *URBAN PLANNING METHODS: RESEARCH AND POLICY ANALYSIS* 12 (1981); Self, *Is Comprehensive Planning Possible and Rational?*, 2 *POL'Y & POL.* 193, 195 (1974); Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Review: The Case Against*, 9 *URB. L. ANN.* 69, 75-76 (1975), with Kmiec, *The Role of the Planner in a Deregulated World*, *LAND USE L. & ZONING DIGEST*, June 1982, at 4; Moore, *Why Allow Planners to Do What They Do? A Justification From Economic Theory*, 44 *J. AM. INST. PLANNERS* 387 (1978); Rider, *Local Government Planning: Prerequisites of an Effective System*, 18 *URB. AFF. Q.* 271 (1982); Schon, *Some of What A Planner Knows: A Case Study of Knowing-in-Practice*, 48 *J. AM. PLAN. A.* 351 (1982).

An author recently criticized many planners for their overly narrow perspective of the issues involved in their planning decisions. In J. FABOS, *LAND-USE PLANNING: FROM GLOBAL TO LOCAL CHALLENGE* 3-7 (1985), the author urged land-use planners to consider at least four factors as part of the planning process:

1. the number of people affected,
2. the number of localities affected,
3. the potential for cumulative effect of the action, and
4. whether a regional, national or international issue is involved.

For an article considering the relationship between planners and politicians, see Baer, *Urban Planner: Doctors or Midwives?*, 37 *PUB. AD. REV.* 671 (1977).

19. The ability of planners to anticipate and solve problems is essential to the planning process. While anticipatory and integrated planning is the ideal, the failure to resolve jurisdictional disputes undermines many planning efforts. The need for greater interaction and cooperation between government organizations is necessary for effective planning. One author sought to apprise his fellow planners of their responsibilities beyond the borders of their own planning area.

The cumulative effects of millions of local actions often have regional and to some degree national and global consequences. If this is true, how can local need be met in a responsible manner, so as to minimize the negative consequences of our actions? Local land-use planners are wise to adopt the attitude that while they act locally they learn to think globally. The forces of decentralization, the increased involvement of the public in land-use decision making, all suggest the importance of local planning. But at the same time local planners have to understand that the development of every acre of productive agriculture land decreases that resource base nationally and internationally. . . . Land use planners have not yet succeeded in responding to this broader concern, especially at the local planning level.

J. FABOS, *LAND-USE PLANNING: FROM GLOBAL TO LOCAL CHALLENGE* 188-89 (1985).

Of course, there are disadvantages such as delay, increased costs, and hidden agendas associated with cross-border joint land use planning. See, Thurow & Vranicar, *Procedural Reform of Local Land-Use Regulation*, in *LAND USE ISSUE OF THE 1980'S*, 190, 192-95 (T. Carr & E. Duensing eds. 1983). Notwithstanding these hurdles, there are methods of opening up the channels of communication to resolve important land use issues. See C. PATTON & D. SAWICKI, *BASIC METHODS OF POLICY ANALYSIS AND PLANNING* (1986); T. SULLIVAN, *RESOLVING DEVELOPMENT DISPUTES THROUGH NEGOTIATIONS* (1984); *SUCCESSFUL NEGOTIATIONS IN LOCAL GOVERNMENT* (N.

ning is mandatory.²⁰ In those jurisdictions, once a community adopts a plan, any subsequent changes in the zoning laws must be consistent with the comprehensive plan.

B. *Special Concerns of Local Governments in Land Use Regulation*

The scope of local government planning and land use control in each community depends on the elected officials' perception of the public need within the scope of the police power. Where these public officials legislate land use restrictions based on a reasonable exercise of the police power, state and federal courts uniformly uphold their actions.²¹

A local government's regulation of land uses within its borders often falls within one or more of the following special areas of community concern. Local governments regulate to protect public health,²² imple-

Huelsberg and W. Lincoln eds. 1985). *But see Zimmerman, Solving Local Government Problems by Pragmatic Action*, 12 CURRENT MUN. PROBS. 39 (1985).

Another difficulty associated with efforts to solve policy disputes in the planning process is that the key players often have incompatible academic training. Urban planners, political scientists, sociologists, lawyers, engineers, all learn different approaches to problem solving. This complicates the effort to reach a resolution of any issue. *See, e.g., Alterman & MacRae, Planning and Policy Analysis: Converging or Diverging Trends*, 49 J. AM. PLAN. A. 200 (1983).

20. Most state zoning enabling acts provide that zoning must be "in accordance with a comprehensive plan." Many state courts, however, fail to give this requirement its literal meaning. Thus, courts have held that a municipality satisfies the statute if its land use regulation is rational, even though the local government does not have, in some "physical form," a comprehensive plan. *E.g., Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984); *Kozesnick v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957). The first significant break with this interpretation came in an Oregon case, *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973). The *Fasano* court held that any zoning change must be consistent with the comprehensive plan.

Several states now mandate comprehensive planning by state statute and many also require that zoning be consistent with the plan. *E.g., CAL. GOV'T CODE § 65860(a)(ii)* (Deering Supp. 1986); *N.J. STAT. ANN. § 40:55D-62* (West Supp. 1986). At least one strong justification for mandatory comprehensive planning and a consistency requirement is that they ensure due process and equal protection considerations in the land use decisionmaking process. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 74 (Minn. 1984); *J. DIMENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980).

21. *E.g., Supercade Cherry Hill, Inc. v. Borough of Eatontown*, 178 N.J. Super. 152, 428 A.2d 530 (1981).

22. *People v. Sojourners Motorcycle Club*, 134 Ill. App.3d 448, 480 N.E.2d 840 (1985) (upholding regulation of private indoor clubs which served alcohol); *State v. Larson*, 292 Minn. 350, 195 N.W.2d 180 (1972) (finding that regulation of mobile homes to prevent unsanitary conditions was valid exercise of police power).

In recent years, a major public health concern of local communities has been the storage and disposal of hazardous waste. Tonn, *500-Year Planning: A Speculative Prov-*

menting various requirements to admit adequate light and air²³ and prohibiting the construction of residential dwellings in industrial areas.²⁴ Moreover, local governments act to promote public safety,²⁵ for example, by regulating the existence of open pits in residential areas,²⁶ the location of gasoline stations,²⁷ and development in floodplains.²⁸ The government may also protect public morals²⁹ by controlling adult entertainment.³⁰ Governments may also use land use control for aesthetic purposes³¹ to regulate outdoor advertising³² and the location of

ocation, 52 J. AM. PLAN. A. 185 (1986) (raising issue of the long-term risks associated with the presence of hazardous substances in our communities); Comment, *Local Zoning of Hazardous Waste Facilities*, ZONING & PLAN. L. REP., Dec. 1984, at 86.

23. E.g., *Gorieb v. Fox*, 274 U.S. 603 (1927); *Prah v. Maretti*, 108 Wis.2d 223, 321 N.W.2d 182 (1982).

A current problem involving light and air is the effort of local governments to accommodate solar energy systems. Many communities amended their zoning ordinances to provide for this new use. See G. HAYES, *SOLAR ACCESS LAW* (1979); Lungren, *Solar Entitlement: A Proposed Legislative Model*, 4 J. ENERGY & POL'Y 171 (1983); Osofsky, *Solar Building Envelopes: A Zoning Approach for Protecting Residential Solar Access*, 15 URB. LAW. 637 (1983).

24. E.g., *Grubel v. MacLaughlin*, 286 F. Supp. 24 (D.V.I. 1968); *Roney v. Board of Supervisors*, 138 Cal. App.2d 740, 292 P.2d 529 (1956).

25. E.g., *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Lindsey v. City of Fayetteville*, 256 Ark. 352, 507 S.W.2d 101 (1974); *Monaghan v. Town of North Reading*, 7 Mass. App. Ct. 922, 389 N.E.2d 786 (1979).

26. *Consolidated Rock Products Co. v. City of Los Angeles*, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

27. E.g., *V.S.H. Realty, Inc. v. Zoning Bd. of Review*, 390 A.2d 378 (R.I. 1978).

28. E.g., *Dur-Bar Realty Co. v. City of Utica*, 57 App. Div. 2d 51, 394 N.Y.S.2d 913 (1977), *appeal denied*, 42 N.Y.2d 960, 398 N.Y.S.2d 146, 367 N.E.2d 652.

29. E.g., *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954) (finding that construction of houses on pilings could provide opportunity for immoral conduct of youth); *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911) (much quoted case mentioning potential for immoral conduct in the vicinity of billboards).

30. See *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984); *Christy v. City of Ann Arbor*, 625 F. Supp. 960 (E.D. Mich. 1986); *Brown v. Pornography Comm'n*, 620 F. Supp. 1199 (E.D. Pa. 1985); Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 BUFF. L. REV. 1 (1977); Note, *Municipal Zoning Restrictions on Adult Entertainment*, 58 IND. L.J. 505 (1983); Note, *Regulating Pornography Through Zoning: Can We "Clean Up" Honolulu*, 8 U. HAWAII L. REV. 75 (1986); Note, *Zoning and the Suppression of Free Speech*, 15 GOLDEN GATE U.L. REV. 216 (1985).

31. See *Members of City Council v. Taxpayers of Vincent*, 466 U.S. 789 (1984); *McDonald v. State*, 693 S.W.2d 660 (Tex. Ct. App. 1985) (upholding community's right to regulate the accumulation of weeds, rubbish and debris on private property); A. DAWSON, *LAND-USE PLANNING AND THE LAW* (1982); Cortonis, *Law and Aesthetics:*

junkyards.³³ Communities may act to preserve property values and neighborhood character³⁴ by imposing minimum lot size requirements³⁵ and by protecting the historic character of certain districts.³⁶ In addition, to ensure the availability of public services,³⁷ the commu-

A Critique and a Reformulation of the Dilemmas, 80 MICH. L. REV. 355 (1982); Melnick, *Protecting Rural Cultural Landscapes: Finding Value in the Countryside*, 2 LANDSCAPE J. 85 (1983); Smardon & Felleman, *Visual Resource Management*, 9 COASTAL ZONE MGT. J. 211 (1982); Zieghler, *The Quiet Revolution in Visual Resource Management: A View from the Coast*, 9 ZONING & PLAN. L. REP. 17 (1986).

Not all courts are ready to accept aesthetic justification alone to support a zoning ordinance. Many courts and commentators found aesthetic judgments too subjective to carry the burden of showing detriment to the public interest, or to overcome constitutional vagueness problems. *E.g.*, *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. Ct. App. 1984); *White Advertising Metro, Inc. v. Zoning Hearing Bd.*, 453 A.2d 29 (Pa. Commw. Ct. 1982); Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977).

32. The business of outdoor advertising dates from the early 1880's. Under the common law, advertising signs considered offensive or dangerous were controlled under the law of nuisance. Prohibitory local ordinances became common in the 1890's, when billboard advertising became so aggressive and its methods so crude that some government regulation was considered necessary. The decision generally credited with having the greatest influence in convincing courts to uphold billboard ordinances was *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913). In a 124 page opinion, the Missouri Court discussed the evolution of the law and found a sufficient public purpose for the control of billboard size, height, and location. *Id.* at 942. For more recent discussions of billboard control, see Crawford, *Control of Signs and Billboards*, in ZONING AND PLANNING LAW HANDBOOK 129 (1982); Mandelker & Reiman, *The Billboard Ban: Aesthetics Comes of Age*, LAND USE L. & ZONING DIGEST, Nov. 1979, at 4. *See also* *Supersign of Boca Raton v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985) (upholding ban on advertising displayed from watercraft for purposes of safety and aesthetics).

33. *E.g.*, *Radcliff v. City of Berwyn*, 129 Ill. App. 3d 70, 472 N.E.2d 98 (1984); *State v. Jones*, 53 N.C. App. 466, 281 S.E.2d 91 (1981); Note, *Municipal Regulation of Junk Yards*, 12 SYRACUSE L. REV. 79 (1960).

34. *E.g.*, *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35, 43 (1972).

35. *See* *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (preservation of open space and protection against urban sprawl are sufficient grounds to uphold large-lot requirements); *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 410 A.2d 1138 (1980); *Gignoux v. Village of Kings Point*, 199 Misc. 485, 99 N.Y.S.2d 280 (1950); Becker, *Police Power and Minimum Lot Size Zoning*, 1969 WASH. U.L.Q. 263 (1969); Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969). In recent years, the courts have given greater scrutiny to large lot zoning practices because of their exclusionary effect. *E.g.*, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Application of Wetherhill*, 45 Pa. Commw. 303, 406 A.2d 827 (1979).

36. *E.g.*, *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

37. The leading case which defines the proper scope of municipal growth control

nity may impose a moratorium on development in remote areas. Finally, a local government may preserve natural resources³⁸ by protecting farmland from urban development³⁹ and wetlands from elimination.⁴⁰

C. *Governmental Immunity from Municipal Zoning Ordinances*

A local government's authority to regulate land use frequently conflicts with the efforts of superior government bodies to develop their land within or near the local government's borders. Courts have developed an entire body of law in response to the conflict between the city's right to control community development and the state's right to develop and use land for the benefit of the entire state. Traditionally, courts applied one of three tests to resolve the controversy: the eminent domain test,⁴¹ the superior sovereignty test,⁴² and the governmental-proprietary test.⁴³ These tests provide that an intruding government which has the power of eminent domain, is higher in the governmental hierarchy, or is exercising a governmental function enjoys judicial immunity from zoning ordinances unless an express legislative directive to the contrary exists. The general rule which emerges from these tests is that superior government entities are immune from zoning controls.

Within the last decade or so, several state courts became dissatisfied with these traditional single-factor tests. A number of courts now re-

ordinances is *Golden v. Ramapo Planning Bd.*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972).

38. See A. DAWSON, *LAND-USE PLANNING AND THE LAW* 97-117 (1982); U.S. WATER RESOURCES COUNCIL, *REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD LOSSES* (1982); Blackwelder, *Creative Zoning for the Environment Emerges in Florida*, 59 FLA. B.J. 17 (1985); Kusler, *Regulating Sensitive Lands: An Overview of Programs*, in *LAND USE ISSUES OF THE 1980's* 128 (J. Carr & E. Duensing eds. 1983).

39. *E.g.*, *Hopewell Township Bd. of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337 (1982).

40. *E.g.*, *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

41. *E.g.*, *O'Connor v. City of Rockford*, 3 Ill. App.3d 548, 279 N.E.2d 356 (1972); *State ex rel Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960).

42. *E.g.*, *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (1963); *Mayor of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977).

43. *E.g.*, *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972); *Gedney Ass'n v. State Dep't of Mental Hygiene*, 112 Misc.2d 209, 446 N.Y.S.2d 876 (1982). The criteria for distinguishing a governmental from a proprietary function were discussed in Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316, 318 (1961).

solve state-local government land use conflicts through a balancing test.⁴⁴ The leading case upholding the balancing test is the decision in Florida of *Hillsborough Association for Retarded Citizens v. City of Temple Terrace*.⁴⁵ After analyzing the three traditional approaches to governmental immunity, the court adopted a test which balanced the public interests. The Court stated:

The adoption or the balancing of interests test will compel governmental agencies to make more responsible land-use decisions by forcing them to consider the feasibility of other sites for the facility as well as alternative methods of making the use of the proper site less detrimental to the local zoning scheme.

Our burgeoning population and the rapidly diminishing available land make it all the more important that the use of land be intelligently controlled. This can only be done by a cooperative effort between interested parties who approach their differences with an open mind and with respect for the objectives of the other.⁴⁶

44. See Note, *Governmental Immunity From Zoning*, 22 B.C.L. REV. 783 (1981). The Ohio Supreme Court joined several other states in adopting the balancing test in *Brownfield v. State*, 63 Ohio St.2d 282, 407 N.E.2d 1365 (1980).

45. 322 So.2d 571 (Fla. App. 1975), *aff'd*, 332 So.2d 610 (Fla. 1976). See also *City of Ames v. Story County*, 392 N.W.2d 145 (Iowa 1986).

46. 322 So.2d at 578-79. In Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 883-84 (1971), the author listed some fundamental considerations which a court might use in resolving conflicts between a local zoning ordinance and a government agency's proposed land use:

1. Is there any statutory guidance as to which interest should prevail?
2. Do the zoning ordinance and any other manifestation of the local planning process comprehend alternative locations for the particular facility?
3. Did the superior governmental unit consider alternative locations for the facility?
4. What is the scope of the political authority of the governmental unit performing the function relative to the body instituting the zoning ordinance?
5. Did a government unit of "higher" authority such as a state-wide planning commission provide independent supervisory review of the proposed facility?
6. How essential is the facility to the local community? To the broader community?
7. How detrimental is the proposed facility to the surrounding property?
8. Did the governmental unit make reasonable attempts to minimize the detriment to the adjacent landowners' use and enjoyment of their property?
9. Did the ordinance provide the adversely affected landowners an opportunity to present their objections to the proper nonjudicial authorities?

II. FEDERAL POWER TO PREEMPT STATE AND LOCAL REGULATION OF FEDERAL REAL PROPERTY: ROOTS OF THE FEDERAL BARGAINING POSTURE

In conflicts arising along the boundaries between local and federal property, however, courts refuse to use the balancing test employed in state-local conflicts. The general rule is that a federal agency completely preempts local regulation of federal land. A federal agency's authority to preempt local land use regulation emanates from several clauses in the United States Constitution. The most comprehensive federal power in this regard is the Doctrine of Exclusive Legislative Jurisdiction, derived from article I, section 8, clause 17 of the Constitution. Courts hold that this doctrine precludes a state from regulating activities on federal land.⁴⁷ Many federal agencies including the Department of Defense, however, have adopted policies that disfavor the special status of exclusive legislative jurisdiction.⁴⁸ Consequently, federal agencies often administer land unprotected by the Doctrine of Exclusive Legislative Jurisdiction and must rely on other constitutional powers to preempt local regulation. Among the protective powers which the federal government has asserted are the judicial doctrines associated with the Supremacy Clause⁴⁹ and Property Clause.⁵⁰

47. *E.g.*, *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973). The most complete study of the origins, judicial interpretation, and legislative use of the "exclusive legislation" clause is now thirty years old. INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART I: THE FACTS AND COMMITTEE RECOMMENDATIONS (1956); INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION (1957). Subsequent analyses of this constitutional provision have drawn heavily on the study by the Interdepartmental Committee. *Adjustment of Legislative Jurisdiction on Federal Enclaves, Hearings on S.815 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. (1963); Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55 (1976); Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Note, *Federal Enclaves—through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754 (1964); U.S. DEP'T OF JUSTICE, *FEDERAL LEGISLATIVE JURISDICTION: A REPORT PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION* (1969).

48. The Department of the Army's policy is that exclusive legislative jurisdiction should not be acquired except in extraordinary circumstances. *Army Regulation*, No. 405-20 (Aug. 2, 1973); Interview with Gordon Hobbs, Real Estate Assistant, Office of the Secretary of the Army, Department of the Army (Feb. 6, 1986).

49. U.S. CONST. art. VI, cl. 2.

50. U.S. CONST. art. IV, sec. 3, cl. 2.

It is essential that a local government preparing to bargain with a federal agency understand these federal preemptive powers. Local community leaders should know that federal power over federal land emanates from several different constitutional clauses that determine the scope of federal authority. The accurate identification of the source of federal power, along with any legislative, executive, or judicial limitation, is critical in gauging the strength of the federal position.

A. *Acquisition of "Exclusive Legislation" by the United States*

The United States can acquire exclusive legislative jurisdiction, or "exclusive legislation", under article I, section 8, clause 17 of the Constitution which states:

The Congress shall have power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular states, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Initially, the courts held that the United States could acquire this exclusive legislation only when it purchased real property with the consent of a state.⁵¹ Subsequent courts, however, held that the same authority could be obtained through a state cession of legislative control to the United States or by a federal reservation of jurisdiction when it admitted a state to the Union.⁵²

An important principle of exclusive legislation is the axiom that once the federal government has this authority a state may not unilaterally recapture legislative control.⁵³ Of course, Congress may conclude that

51. In 1875, a Wisconsin court in the case of *In re O'Connor*, 37 Wis. 379 (1875), found that the United States failed to obtain exclusive legislative jurisdiction where the state legislature ceded jurisdiction to the United States but the federal government did not "purchase" the land within the meaning of clause 17. The court found the "act or cession by the legislature is void. For it is not competent for the legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States, for the specific purposes contemplated by the Constitution." *Id.* at 387.

52. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).

53. *In re Ladd*, 74 F.2d 31 (C.C.D. Neb. 1896), where the State of Nebraska unconditionally ceded exclusive jurisdiction over two military installations, the state legislature was powerless to subsequently amend its cession law to enforce the state's intoxicating liquor law on those two federal properties.

A similar result occurred in the case of *United States v. Heard*, 270 F. Supp. 198

all or a portion of the federal exclusive legislative jurisdiction should be retroceded to a state or to the states.⁵⁴ Moreover, the United States may lose its exclusive legislation when it transfers ownership or control over the federal land to a non-federal owner.⁵⁵

B. *Federal Power to Preempt State and Local Government Regulation under the Doctrine of Exclusive Legislation*

As early as 1845, the Supreme Court stated that when the federal government obtains exclusive legislative authority "the national and municipal powers of government of every description, are united in the Government of the Union."⁵⁶ Traditionally, this authority absolutely barred states and local governments from exercising police power or other legislative authority over exclusive jurisdiction property.⁵⁷ In *Western Union Telegraph Co. v. Chiles*,⁵⁸ the Supreme Court defined the limits of state power over federal land cloaked with legislative jurisdiction.

(W.D. Mo. 1967). In that case, the State of Missouri, in 1929, unconditionally ceded jurisdiction to the United States over federal installations. Then, in 1957, the State amended its cession statute to provide: "but the jurisdiction ceded to the United States continues no longer than the United States owns the land and uses the same for the purposes for which they were acquired." The State acquired the land in 1922 for the operation of a veterans hospital, but by the time of trial in 1967 it was in use as a job corps center. The court properly held that the 1957 amendment was unsuccessful in recapturing the legislative jurisdiction.

54. From time to time, Congress returned all or a portion of its legislative control to the states when it believed that the operation of federal exclusive legislative authority caused injustice. See Act of 21 January 1871, 16 Stat. 399 (returning legislative jurisdiction over a disabled soldiers' home to a state, so residents of the home could vote in a local election).

55. In *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946), the United States acquired legislative jurisdiction over a building which it later sold to a private party under an installment-sales contract. Even though the fee title remained in the United States, the Court concluded that because the government abandoned control over the property jurisdiction terminated.

56. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845).

57. A complete cataloguing of all the restraints against state and local government regulation over exclusive legislative jurisdiction property is beyond the scope of this Article. A few examples include exclusion of authority to tax, *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); inapplicability of state fair trade acts, *Sunbeam Corp. v. Horn*, 149 F. Supp. 423 (S.D. Ohio 1955); and inapplicability of local professional licensing laws, *Lynch v. Hammock*, 204 Ark. 911, 165 S.W.2d 369 (1942).

58. 214 U.S. 274 (1909) (holding that Virginia law which penalized telegraph messengers for failure to deliver messages failed to apply within the borders of the Norfolk Navy Yard, which was under exclusive legislative jurisdiction of the United States).

[The Norfolk Navy Yard] is one of the places where the Congress possessed exclusive legislative power. It follows that the laws of the State of Virginia . . . cannot be allowed any operation or effect within the limits of the Yard. The exclusive power of legislation necessarily includes the exclusive jurisdiction . . . It is of the highest public importance that the jurisdiction of the state should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress.⁵⁹

1. *The Extraterritoriality Principle under the Doctrine of Exclusive Legislative Jurisdiction.*

The decision of the United States Supreme Court in *Collins v. Yosemite Park and Curry Company* illustrates this traditional notion of complete exclusion under the Doctrine of Exclusive Legislative Jurisdiction.⁶⁰ In *Collins*, the Court considered the enforceability of California's liquor laws within the borders of Yosemite National Park, an area under exclusive legislative jurisdiction. The State sought to control the sale of alcohol and beverages by park concessionaires. The Supreme Court considered the argument that the twenty-first Amendment to the United States Constitution gave California sufficient authority to regulate alcohol anywhere within the state. Traditionally, states wielded considerable power under the twenty-first Amendment. In *Collins*, however, the Court found that the Doctrine of Exclusive Legislative Jurisdiction limited the state's legislative authority. The Court held:

The lower court was of the opinion that though the [Twenty-first] Amendment may have increased "the state's power to deal with the problem, it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the Twenty-first amendment.⁶¹

Courts have applied this extraterritoriality rule to bar state and local land use control over exclusive legislation property.⁶² Illustrative is the

59. *Id.* at 278. See also *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 532 (1885).

60. 304 U.S. 518 (1938).

61. *Id.* at 538.

62. *Oklahoma City v. Sanders*, 94 F.2d 323, 327-29 (10th Cir. 1938). In this case, the Tenth Circuit considered the issue whether municipal ordinances requiring construction licenses, bonds, and building inspections were applicable to a federal low-cost housing project on "exclusive legislation" property. The court found the local government was utterly excluded from imposing its ordinances on the federal government. *Id.* at 327-29.

opinion of the United States Attorney General⁶³ considering whether the Virginia State Board of Harbor Commissioners could require the Navy to submit for review its plans for the construction of a cofferdam. The Attorney General found that the federal government possessed exclusive legislative jurisdiction over the property, giving the Navy "absolute and paramount" authority. Consequently, the Navy was not obligated to cooperate with or obtain the approval of the state agency.

2. *Possible Exceptions to the Extraterritoriality Principle.* In most cases holding that the Doctrine of Exclusive Legislative Jurisdiction preempts local law, the local law conflicted with a federal activity or policy. While the courts in such cases often refer to the federal-state conflict, the Doctrine of Exclusive Legislative Jurisdiction fails to require proof of any interference with federal function. The language of clause 17 lacks an express condition that the authority of the United States is preemptive only if there is a conflict.

Thus, a corollary issue is whether the clear absence of a conflict waives the application of the extraterritoriality principle. Apparently, the Supreme Court adopted this position in *Howard v. Commissioners of Louisville*.⁶⁴ In that case, the Court upheld a municipal annexation of exclusive legislation property where the federal government failed to object to the annexation. The Court found no interference between the City's annexation and the activities carried out on the federal property. In rejecting the application of the traditional extraterritoriality rule, the Court stated:

A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States . . . The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.⁶⁵

63. 24 Op. Att'y Gen. 50, 51 (1902). The State Board of Harbor Commissioners sought to enjoin federal development until it approved the Navy's plans. The Attorney General stated that when Virginia consented to the Navy's purchase of the Norfolk Navy Yard, the State acknowledged that the federal government would determine what was in the public's interest thereafter. *Id.* at 51.

64. 344 U.S. 624 (1953).

65. *Id.* at 626-27. See also *Kansas City v. Querry*, 511 S.W.2d 790 (Mo. 1974) (upholding Kansas City's annexation of Richards-Gebaur Air Force Base).

In 1970, the Supreme Court reaffirmed *Howard* and applied it without dissent in *Evans v. Cornman*, 398 U.S. 419 (1970). The Court in *Cornman* held that the property constituting the National Institutes of Health, which the court explicitly declared to be

Since *Howard* many courts have sought to qualify the extraterritoriality doctrine, especially where no clear conflict exists.⁶⁶ In *Brandenberg Telephone Co. v. South Central Bell Telephone Co.*,⁶⁷ the Kentucky Supreme Court decided whether the State could regulate the telephone services provided to an exclusive legislation federal installation. The federal facility expressed no preference for service between two competing telephone companies.⁶⁸ Subsequently, the State acted to place the federal facility within the service area of one of the companies.⁶⁹ The ousted firm contended that the State lacked jurisdiction over the federal land and that the federal government should choose between the two services.⁷⁰ The Kentucky court held that, absent any objection by the federal agency, the State was free to treat the federal property as "that of any private property owner."⁷¹

One problem with *Howard* and its progeny is that the courts fail to consider the potential for *future* conflict where the state or local government acts with respect to federal land. A recent Sixth Circuit decision involving the same issue considered by the Supreme Court in *Howard* recognized this potential for interference. In *United States v. McGee*,⁷² the court considered the Air Force's challenge to the annexation of Wright-Patterson Air Force Base by Dayton, Ohio. The Doctrine of Exclusive Legislative Jurisdiction protected the base. The

"exclusive legislation" property, *id.* at 420, did not cease to be a part of Maryland when the State ceded jurisdiction over the property to the United States. Consequently, the Court held that persons who resided upon that property could not be denied the right to vote in Maryland on the ground that they were not residents of that State. The Court's holding overturned a long line of precedent which had relied on the extraterritoriality rule, collected in Annot., 34 A.L.R.2d 1193 (1954).

Notwithstanding *Howard* and *Cornman*, it is unclear whether the Court repudiated the extraterritoriality principle. Ten years after *Howard*, the Supreme Court in dictum recited approvingly the extraterritoriality rule. *Paul v. United States*, 371 U.S. 245, 263 (1963) (Dictum). See also *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973).

66. *E.g.*, *United States v. City of Bellevue*, 474 F.2d 473 (8th Cir. 1973); *First Hardin Nat'l Bank v. Fort Knox Nat'l Bank*, 361 F.2d 276 (6th Cir. 1966); *Bartsch v. Washington Metro. Area Transit Comm'n*, 357 F.2d 923 (4th Cir. 1966); *Economic Dev. & Indus. Corp. v. United States*, 546 F. Supp. 1204 (D. Mass. 1982); *Board of County Comm'rs v. Donoho*, 144 Colo. 321, 356 P.2d 267 (1960).

67. 506 S.W.2d 513 (Ky. 1974).

68. *Id.* at 516.

69. *Id.* at 515.

70. *Id.* at 516.

71. *Id.*

72. 714 F.2d 607 (6th Cir. 1983).

district court found that the "potential for friction" between the base and Dayton justified overruling the annexation.⁷³ The *McGee* court noted:

Annexation of the Wright-Patterson Air Force Base would create a real danger that a future board of city commissioners might pass ordinances that interfere with the base's essential task of national defense and create friction between city and military officials. The fact that the present board of commissioners apparently has agreed not to interfere with the functioning of the base is not relevant to this consideration.⁷⁴

Nevertheless, the *Howard* decision suggests that a local government may proceed where its plans do not interfere with federal policy. The local planning agency may even seek the cooperation and assistance of the federal government. But, federal officials may view such joint planning and cooperation efforts as interfering with their decisionmaking authority or as foreshadowing a future intent by the city to enforce the objectives of the local comprehensive plan. This perception may lead federal land managers to assert federal preemptive power under the Doctrine of Exclusive Legislative Jurisdiction or under one of the other constitutional powers.

III. OTHER FEDERAL POWERS WHICH MAY PREEMPT LOCAL REGULATION OVER FEDERAL LAND NOT PROTECTED UNDER THE DOCTRINE OF EXCLUSIVE LEGISLATIVE JURISDICTION

As previously noted, not all federal property in urban areas is protected by the Doctrine of Exclusive Legislative Jurisdiction. Concerning these non-exclusive legislation lands, the United States has successfully invoked other constitutional doctrines to limit or exclude state and local regulation. Among the powers recognized by the courts to limit local regulation are the doctrines emanating from the Supremacy Clause and the Property Clause.

A. *Federal Preemption under the Supremacy Clause*

Article VI, clause 2 of the United States Constitution declares that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land."

73. *Id.* at 609.

74. *Id.* at 612-13.

In *McCulloch v. Maryland*,⁷⁵ Chief Justice Marshall found within this constitutional provision the authority of the federal government to conduct its affairs free from state interference. The Chief Justice said:

[T]he government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.⁷⁶

In defining the reach of the Supremacy Clause, Chief Justice Marshall stated that it applies to both express and implied powers. He described these implied powers as follows:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional.⁷⁷

This Doctrine of Federal Supremacy limits the application of state and local laws which interfere with the federal government's ownership and use of non-exclusive legislation real property. In *Fort Leavenworth Railroad v. Lowe*,⁷⁸ the Supreme Court recognized the Supremacy Clause as an independent means by which to shield federal land from state police power and other legislative authority. The Court stated:

Where, therefore, lands are acquired in any other way by the United States within the limits of state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them . . . public buildings are erected for the uses of the general government, such buildings . . . will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law

75. 17 U.S. (4 Wheat.) 316 (1819).

76. *Id.* at 405-06.

77. *Id.* at 421.

78. 114 U.S. 525 (1885).

with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.⁷⁹

Before applying the Doctrine of Federal Supremacy to preempt local regulation, however, a court may require a showing that the local law interferes with the federal ownership and use of the land. In *Stewart v. United States Postal Service*,⁸⁰ a federal district court in California considered whether the federal Postal Service was obligated to comply with the City of Saratoga's zoning laws. The property in question was not shielded by the Doctrine of Exclusive Legislative Jurisdiction. Although the Postal Service modified its construction plans to comply with many of the City's requirements, it fell short of the full compliance expected of a non-federal entity. The court found "that the Supremacy Clause obviates the need for compliance where the ordinances conflict with federal laws. Since the functions of the Postal Service are hampered by compliance with such local zoning requirements, the Postal Service need not comply with Saratoga's local ordinances."⁸¹

A similar result occurred in *Town of Middletown v. United States Postal Service*,⁸² where the town required the federal Postal Service to acquire land development permits and other approvals prior to clearing non-exclusive legislation land for a post office. As in *Stewart*, the court in *Town of Middletown* found that the Supremacy Clause preempted local zoning control. The court stated:

[u]nless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state regulation, the federal function must be left free from such regulation. In the case at bar, the Township of Middletown has not brought to this court's attention any evidence of congressional intent to subject federal instrumentalities such as the Postal Service to local zoning regulations.⁸³

79. *Id.* at 539. See also *Ohio v. Thomas*, 173 U.S. 276 (1899).

The Supreme Court in *Hancock v. Train*, 426 U.S. 167 (1976), followed the holding in *Fort Leavenworth Railroad*. In *Hancock*, the Court found that without a clear and unambiguous congressional waiver, a state could not seek an injunction against a federal activity conducted on federal property, where the federal agency failed to obtain a state air quality permit.

80. 508 F. Supp. 112 (N.D. Cal. 1980).

81. *Id.* at 116.

82. 601 F. Supp. 125 (D.N.J. 1985).

83. *Id.* at 127.

In contrast to these post office cases is the decision of the Alaska Supreme Court in *Mobil Oil Corp. v. Local Boundary Commission*.⁸⁴ That court considered whether the 23 million acre Naval Petroleum Reserve No. 4 was within the political boundary of Alaska's North Slope Borough for the purposes of zoning and land use planning. The court noted that the federal government lacked exclusive legislative jurisdiction over the property. Upholding a lower court decision to allow the land to be included within the Borough's jurisdiction, the Alaska Supreme Court stated, "the superior court properly concluded that the record evidence of the Reserve's importance to the substantive lifestyle of area residents showed inclusion of the tract to be desirable for integrated local government so that it might fall within the new borough's planning and zoning power."⁸⁵ In *Mobil Oil*, as distinguished from the postal service cases, there was no showing of a present conflict with a federal activity. Moreover, the court found that the inclusion of the land within the Borough furthered an important governmental purpose: integrated planning.

B. *Federal Preemption under the Property Clause*

Article IV, section 3, clause 2 of the United States Constitution provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The Supreme Court interpreted this clause in *Kleppe v. New Mexico*,⁸⁶ which involved actions by the State of New Mexico to remove wild burros from non-exclusive legislation land administered by the Department of the Interior. Congress gave the Secretary of the Interior authority, under the Wild Free-Roaming Horses and Burros Act,⁸⁷ to protect "all unbranded and unclaimed horses and burros on public lands of the United States." The Supreme Court found that the New Mexico Livestock Board's entry onto public lands and its removal of wild burros interfered with the duties of the Secretary of the Interior under the Wild Free-Roaming Horses and Burros Act. A unanimous Court found that the Property Clause pre-

84. 518 P.2d 92 (Alaska 1974).

85. *Id.* at 99.

86. 426 U.S. 529 (1976). *See also* United States v. Moore, 640 F. Supp. 164 (S.D.W.Va. 1986) (conflict over a state's authority to spray pesticide on Department of Interior lands).

87. 16 U.S.C. §§ 1331-1340 (1985).

empted the State from controlling wild horses and burros on public land. The Court held:

While Congress can acquire exclusive or partial jurisdiction over lands within a state by the state's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent to cession a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws.⁸⁸

Under the Supreme Court's holding in *Kleppe*, it is clear that Congress can preempt local land use controls over all federally-owned lands. Although *Kleppe* involved land administered by the Department of the Interior, courts have applied the Property Clause power to lands controlled by the Postal Service,⁸⁹ the Department of Energy,⁹⁰ and the Department of Defense.⁹¹

IV. FEDERAL STATUTES RESTRICTING THE EXERCISE OF THE FEDERAL PREEMPTIVE POWER

Twenty years ago, the largely unchallenged preemptive power of the United States ensured the dominance of the federal government. Within the last two decades, however, Congress passed several statutes that eroded some of the previously invincible federal authority. The

88. 426 U.S. at 539, 542-43. For a discussion of the case law which describes the limits of local regulation of federal activities on federal land, see *Don't Tear it Down, Inc. v. Pennsylvania Ave. Corp.*, 642 F.2d 527, 533-36 (D.C. Cir. 1980). While federal agencies may have broad discretion to regulate uses of public lands, *Organized Fishermen of Florida v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985), not all federal concerns will preempt local land use control, *Guschke v. City of Oklahoma City*, 763 F.2d 379 (10th Cir. 1985) (holding that federal licensing of amateur radio operators did *not* preempt local zoning restrictions on the height of radio antennas in residential areas).

89. *United States v. Gliatta*, 580 F.2d 156 (5th Cir.), *cert. denied*, 439 U.S. 1048 (1978).

90. *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983).

91. *Economic Dev. & Indus. Corp. v. United States*, 546 F. Supp. 1204 (D. Mass. 1982).

The *Kleppe* decision in 1976 reawakened the academic community's interest in the Property Clause. For the most recent addition to an assemblage of law review articles on the subject, see Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C.L. REV. 617 (1985).

use of these new laws by local governments can have a significant impact on the intergovernmental bargaining process.

The applicable federal statutes establish both substantive and procedural requirements on federal land use, including obligations to be compatible with local environmental or land use standards. This section will examine the courts' interpretation of several of these federal laws. A more detailed consideration of the National Environmental Policy Act (NEPA)⁹² and the Intergovernmental Cooperation Act⁹³ follows in subsequent sections.

A. *Federal Laws Which Limit Federal Government Control of Activities on Federal Lands*

Where federal property is under the exclusive legislative jurisdiction of the United States or otherwise protected by the Constitution, state and local land use laws generally do not apply. In some cases, however, Congress has enacted federal land use control, natural resource protection and pollution control statutes which apply to federal activities and may be enforceable through citizen suit provisions by local governments. Examination of such statutes illustrates the limitations on the exercise of the federal preemptive power.⁹⁴ These statutes include: the Clean Air Act,⁹⁵ the Federal Water Pollution Control

92. 42 U.S.C. §§ 4321-4347 (1977); *see supra* notes 110-147 and accompanying text.

93. 31 U.S.C. § 6506 (1983); *see supra* notes 148-201 and accompanying text.

94. For a discussion of four federal environmental laws which restrict federal preemptive power, *see Breen, Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,326 (1985). *See also* McSarrow, *The Department of Defense Environmental Cleanup Program: Application of State Standards to Federal Facilities after SARA*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10120 (1987); Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10,114 (1987); Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government*, 17 RUTGERS L.J. 123 (1986). Other federal laws include the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e (1985); the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1985); the Forest and Rangeland and Renewable Resources Act, 16 U.S.C. §§ 1600-1687 (1985); the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501-3510 (1985); the Federal Land Policy and Management Act, 43 U.S.C. §§ 1700-1784 (1986); Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 1428(h), 71 ENV'T REP. (BNA) 6041, 6058 (1986). *See also* Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (1977) (floodplains); Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (1977) (wetlands).

95. The Clean Air Act, 42 U.S.C. § 7418(a), provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the

Act,⁹⁶ the Resource Conservation and Recovery Act,⁹⁷ the Noise Control Act,⁹⁸ the National Historic Preservation Act,⁹⁹ the Coastal Zone

discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.

See 58 Op. Comp. Gen. 244 (1979) (holding the Air Force liable for payment of permit fee to municipal air pollution control authority).

96. The Federal Water Pollution Control Act, 33 U.S.C. § 1323(a), provides: Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

See *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985).

97. The Resource Conservation and Recovery Act, 42 U.S.C. § 6961, states: Each department, agency, instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

See *California v. Walters*, 751 F.2d 977 (9th Cir. 1984); *Meyer v. United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986).

98. The Noise Control Act, 42 U.S.C. § 4903(b), provides: Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the emission of noise, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

99. The National Historic Preservation Act, 16 U.S.C. § 470f, 470h-2(f), states: The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.

Management Act,¹⁰⁰ and the Farmland Protection Policy Act.¹⁰¹

These and other similar federal statutes illustrate Congress' willingness in specific areas of state and local concern to require federal compliance with state or local laws, or consultation with state or local agencies. The development of these inroads into federal authority, however, has been gradual and remains limited in scope. In enforcing these statutes, the courts are generally reluctant to divest the Federal Government of its authority, unless the congressional intent is clear and unambiguous. An example of the development and judicial interpretation of such waivers of federal preemptive power is found in the history of the Clean Air Act.

B. *Judicial Interpretation of Congressional Waivers of Federal Preemptive Powers*

When Congress passed the 1955 forerunner of the Clean Air Act, it lacked provisions regarding federal compliance.¹⁰² In 1959, Congress amended the Clean Air Act to ensure that federal facilities cooperate

Prior to the approval of any Federal undertaking which may directly and adversely affect a National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmarks.

See Bell, *Protecting the Built Environment: An Overview of Federal Historic Preservation Law*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,354 (1985).

100. The Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), states:

Each Federal agency conducting or supporting activities affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

See Kuersteiner & Sullivan, *Coastal Federalism: The Role of the Federal Supremacy Doctrine in Federal and State Conflict Resolution*, 33 JAG J. (1984).

101. The Farmland Protection Policy Act, 7 U.S.C. § 4202, provides:

(a) The Department of Agriculture, in cooperation with other departments, agencies, independent commissions, and other units of the Federal Government, shall develop criteria for identifying the effects of Federal programs on the conversion of farmland to nonagricultural uses.

(b) Departments, agencies, independent commissions, and other units of the Federal Government shall use the criteria established under subsection (a) of this section, to identify and take into account the adverse effects of Federal programs on the preservation of farmland; consider alternative actions, as appropriate that could lessen such adverse effects; and assure that such Federal programs, to the extent practicable, are compatible with State, unit of local government, and private program and policies to protect farmland.

See Department of Agriculture Implementing Rule, 7 C.F.R. § 658 (1986); Schnidman, *The Evolving Federal Role in Agricultural Land Preservation*, 18 URB. LAW. 423 (1986).

102. Pub. L. No. 984-159, 69 Stat. 322 (1955).

with air pollution control agencies “to the extent practicable and consistent with the interests of the United States and within any available appropriations.”¹⁰³ The 1963 amendments to the Act retained this language, but required federal facilities to obtain permits from the Secretary of Health, Education, and Welfare in those cases where air pollution might endanger human health or welfare.¹⁰⁴ In 1970, Congress completely revised the Clean Air Act to require that federal facilities comply with all “[f]ederal, state, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.”

The Supreme Court construed this 1970 revision in *Hancock v. Train*.¹⁰⁵ In *Hancock*, the Attorney General of Kentucky sued several federal agencies to enforce federal compliance with the state air pollution permit program. The Supreme Court found that while the Clean Air Act required federal agencies to comply with state and local air pollution standards, the law did not mandate federal compliance with state permit statutes.

Because of the fundamental importance of . . . shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when . . . there is “a clear congressional mandate” [and] “specific congressional action” that makes this authorization of state regulation “clear and unambiguous.”¹⁰⁶

The *Hancock* Court held that the citizen suit provision of the Clean Air Act provided the only remedy for states or local governments seeking to control federal facilities or enforce state requirements. Permit requirements, which are outside the scope of the citizen suit section, could not be used to impair federal functions.

A year after the Court’s decision in *Hancock*, Congress amended the Clean Air Act to make it clear that federal facilities must comply with state record keeping, reporting and permit requirements.¹⁰⁷ Notwithstanding this congressional action, the courts have continued in the spirit of *Hancock* to narrowly construe congressional waivers of federal power under other federal laws. Consequently, recent cases have held

103. Pub. L. No. 86-365, 73 Stat. 646 (1959).

104. Pub. L. No. 88-206, 77 Stat. 392, 399 (1963).

105. 426 U.S. 167 (1976).

106. *Id.* at 179.

107. Pub. L. No. 95-95, § 116, 91 Stat. 685, 711 (1977) (codified at 42 U.S.C. § 7418 (1983)).

that the Resource Conservation and Recovery Act does not require federal agencies to pay damages under state law for the cost of cleaning up hazardous waste spills,¹⁰⁸ nor does it subject the United States to criminal prosecution for violation of state law.¹⁰⁹

While such court interpretations still shield federal facilities from many state and local laws, the ability of local governments to attract the attention of a federal agency is far greater than it was two decades ago. At the very least, a local government may more easily obtain an explanation from a federal agency for an action that violates the express policy of Congress favoring compatibility with certain state and local laws. These explanations can thereafter be challenged through the political process.

V. FEDERAL AGENCY AND LOCAL GOVERNMENT COOPERATION
UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT:
OPPORTUNITY FOR LOCAL GOVERNMENTS TO
OBTAIN FEDERAL GOVERNMENT
LAND USE INFORMATION AND TO PARTICIPATE IN THE
DECISIONMAKING PROCESS

Among the most important federal statutes which give local governments an opportunity to influence federal land use decisions is the National Environmental Policy Act (NEPA).¹¹⁰ Passed by Congress in 1969, NEPA established a procedure for environmental planning which has significantly changed federal agency decisionmaking.

The heart of NEPA is the environmental impact statement, which the statute requires for all proposals for a major federal action significantly affecting the quality of the human environment.¹¹¹ The NEPA impact statement must discuss the environmental effects¹¹² of any federal action covered by the statute and set forth any alternatives to the

108. Florida Dep't of Env'tl. Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985).

109. California v. Walters, 751 F.2d 977 (9th Cir. 1984).

110. 42 U.S.C. §§ 4321-4347 (1977). For an overview of the history and judicial interpretation of NEPA, see Murchison, *Does NEPA Matter? An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557 (1984). See also Comment, *NEPA Violations and Equitable Discretion*, 64 OR. L. REV. 497 (1986) (discussing use of injunctions against federal agencies for non-compliance with NEPA).

111. 42 U.S.C. § 4332(2)(C) (1977).

112. See 40 C.F.R. § 1508.8 (1985).

proposed action.¹¹³ Once it determines that the situation requires an environmental impact statement, the federal agency must identify and evaluate environmental impacts wherever they may occur. Thus, a proposal of an action on federal property could lead to the federal agency's consideration of that proposal's effects beyond the boundary of the federal land.¹¹⁴

To further implement the Act, Title II of NEPA created the Council on Environmental Quality (CEQ) in the Executive Office of the President. As a result of authority granted by an executive order, CEQ adopted regulations which implement NEPA.¹¹⁵ In addition to requiring compliance with the CEQ regulations, the Act requires all federal agencies to conform their regulations and practices with NEPA.¹¹⁶

In many ways, the NEPA review process is similar to the planning carried out by urban communities prior to significant changes in land use.¹¹⁷ The scope of NEPA, however, is far narrower than the planning functions carried out by many local governments. Unlike local government planning, which involves continuous and comprehensive review and analysis, the preparation of an environmental impact statement by a federal agency occurs infrequently and resolves only a narrowly-defined need.

Notwithstanding these differences, NEPA does provide local government officials with opportunities to discover federal agency actions and to provide comments concerning the impacts of the projects.¹¹⁸ This Article will highlight only those aspects of NEPA that affect the duty

113. The "alternatives" requirement is the heart of the environmental impact statement. Under this requirement federal agencies must consider whether they can carry out their proposed action in a less environmentally damaging manner and whether alternatives exist that make the action unnecessary. The "alternative" requirement is a troublesome issue for federal agencies and courts. For a more detailed consideration of this issue, see Chamousis, *The National Environmental Policy Act of 1969: What "Alternatives" Must an Agency Discuss?* 12 COLUM. J.L. & SOC. PROBS. 221 (1976).

114. See, e.g., *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972), discussed *infra* at notes 131-135 and accompanying text.

115. 40 C.F.R. §§ 1500-1508 (1985).

116. 42 U.S.C. § 4331(b) (1977).

117. CEQ regulations list the matters that an impact statement should address. The federal agency must identify all direct and indirect effects of the proposed federal action. "Effects includes ecological . . . aesthetic, historic, cultural, economic, social, or health." 40 C.F.R. § 1508.8 (1985).

118. While NEPA has been an important tool of specific interest groups seeking to influence federal agency decisions, some groups advocate increased use of such substantive laws as the Federal Water Pollution Control Act and the Clean Air Act to challenge federal actions. Trubeck & Gillen, *Environmental Defense II: Examining the*

of federal officials to cooperate with local governments. A local government's skillful use of NEPA may be an important tool in bringing a reluctant federal agency to the bargaining table.

A. *The Threshold Determination under NEPA*

NEPA provides that federal agencies must prepare environmental impact statements on "proposals for . . . major federal actions significantly affecting the quality of the human environment."¹¹⁹ This statutory language determines whether an impact statement is required. The question of whether a federal agency must prepare an impact statement at a particular time is known as the "threshold" determination under NEPA.¹²⁰

As a general matter, a federal agency must first determine whether its activity is a proposal¹²¹ of an action.¹²² If the activity is only in the conceptual stage, NEPA may not require an environmental impact statement. After the agency decides it has a specific proposal of an action, the agency must then determine if the effects on the human environment¹²³ are significant.¹²⁴

An important threshold issue here is the extent to which land use plans and zoning ordinances, containing the community's definition of a quality environment, conflict with federal proposals. The court in *Maryland-National Capital Park and Planning Commission v. United States Postal Service*,¹²⁵ considered the effect of local government policy on a federal facility. *Maryland-National* involved a Postal Service plan to build a bulk mail center in a Washington, D.C., suburb. The

Limits of Interest Group Advocacy in Complex Disputes, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 195 (B. Weisbrod ed. 1978).

119. 42 U.S.C. § 4332(2)(C) (1977).

120. For a discussion of the threshold duty to prepare an impact statement, see McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801 (1977). For a critical analysis of the threshold issue problem, see Baum, Canary, Reeve & Scott, *Negative NEPA: The Decision Not to File*, 6 ENVTL. L. 309 (1976); Comment, *Environmental Law: Progress Toward A Coherent Standard for the "Threshold Determination"*, 54 WASH. L. REV. 159 (1978).

121. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

122. See, e.g., *Laine v. Weinberger*, 541 F. Supp. 599 (C.D. Cal. 1982).

123. See, e.g., *City of Rochester v. United States Postal Service*, 541 F.2d 962 (2d Cir. 1976).

124. See, e.g., *River Road Alliance v. Corps. of Engineers*, 764 F.2d 445 (7th Cir. 1985).

125. 487 F.2d 1029 (D.C. Cir. 1973).

Postal Service submitted its construction plans for local review and comment in accordance with a federal consultation statute.¹²⁶ After receipt of the local government's comments, the Postal Service proceeded with construction, failing to comply with several important community concerns.¹²⁷

During the planning, the Postal Service prepared a preliminary environmental assessment and concluded that there was no need for an environmental impact statement. After the local government agency found that the Postal Service refused to implement the community-recommended changes, it brought an action to enjoin the completion of the bulk mail facility until an environmental impact statement was prepared. The local government claimed that the Postal Service plans violated the community's environmental quality standards and thus significantly affected the quality of the human environment.¹²⁸

In resolving the claim of the local government, the court in *Maryland-National* found that the Postal Service must achieve the policy goals of NEPA in cooperation with state and local governments.¹²⁹ Concerning the threshold issue under NEPA, the court concluded:

[When] the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny. . . . [NEPA's] policies cannot be taken as effectuated by local land use control, where the proposal of the Federal Government reflects a distinctive difference in kind from the types of land use, proposed by private and local government sponsors, that can

126. The Postal Service referred its project plans to the National Capital Planning Commission for comments pursuant to 40 U.S.C. § 71d, which provides for "comprehensive planning and orderly development of the National Capital." The Commission consulted with "the appropriate planning agency having jurisdiction over the affected part of the environs," which was the Maryland-National Capital Park and Planning Commission. That commission adopted a resolution disapproving the Postal Service preliminary master plan for the bulk mail facility. The Maryland-National Commission found that the proposed project had certain undesirable effects, including inadequate provision for the control of storm-water and oil run-off, increased traffic in the area, and "visual and aesthetic detriment" caused by the facility's location in a greenbelt. The Commission found that these problems violated the county zoning ordinance which designated the area for "high quality industries on campus-like settings." 487 F.2d at 1032-33.

127. The Postal Service refused to relocate the building on the property in order to limit the intrusion into the greenbelt. While the Postal Service proposed an impoundment system to control storm-water run-off, they concluded that the effective control of oil run-off was impossible. *Id.* at 1034.

128. *Id.* at 1035-37.

129. *Id.* at 1036.

fairly be taken as within the scope of local controls.¹³⁰ Thus, unless the federal action is in harmony with local land use, it is likely that the action will frustrate the goals of NEPA.

The court in *Groton v. Laird*¹³¹ considered this conflict between a planned federal project and local policy. *Groton* involved a plan to build a 300-unit military family housing complex in the Town of Groton, Connecticut. The Navy had experienced a shortage of affordable housing for its families in the affluent community of Groton. After consultation with local planning officials, the Navy selected property approved in the community ordinance for multi-family dwellings. After residents living near the site became aware of the Navy's plans, they complained that the project would change the character of the neighborhood. As a result of this community concern, local officials opposed the project. Failing to obtain certain concessions, the local officials sued the Navy for failure to prepare an environmental impact statement. To prove "significant impact", the Town of Groton claimed that the Navy exceeded the density limitations and minimum set-back requirements under the local ordinance.

After reviewing the Town's claim, however, the court in *Groton* found that the Navy's project was compatible with the local land use plan since "the navy project involves essentially the same use of Bailey Hill as that envisaged by the Town."¹³² Moreover, the court found that NEPA failed to protect Groton's density restrictions as an environmental concern. The *Groton* court stated:

[NEPA] is not designed to enshrine existing zoning regulations on the theory that their violation presents a threat to environmental

130. *Id.* at 1036-37. The court also considered whether a federal agency project's full compliance with local land use plans created a presumption of no significant impact. While the court refused to find a presumption, it agreed that conformity with the local policies would be an important factor in determining "significance." *Id.*

In deciding whether the bulk mail facility had the required "significant impact," the court found the potential for harm created by oil run-off of greater impact than the visual effect of the facility. *Id.* at 1038-41. In order to determine significance in NEPA cases, the court adopted a four-part test. The court stated:

First, did the agency take a "hard look" at the problem, as opposed to bald conclusions, unaided by preliminary investigation? . . . Second, did the agency identify the relevant areas of environmental control? . . . Third, as to problems studied and identified, does the agency make a convincing case that the impact is insignificant? . . . If there is impact of true "significance" has the agency convincingly established that changes in the project have sufficiently minimized it?

Id. at 1040.

131. 353 F. Supp. 344 (D. Conn. 1972).

132. *Id.* at 350.

values. NEPA may not be used by communities to shore up large lot and other exclusionary zoning devices that price out low and even middle income families.¹³³

In this author's opinion the court held for the Navy in *Groton* because of the *exclusionary purpose* of the Town's zoning ordinance.

In addition, the Navy did make a considerable effort to consult with local officials and to accommodate many of the community's demands. Early in the planning process the parties held regular meetings.¹³⁴ As a result of the consultation with the community leaders, the Navy agreed to several changes in its project, including paying for the construction of a new water delivery system, providing additional recreational areas within the project, redesigning of rear yards, modifying the storm drainage system and reducing the total acres used for the project.¹³⁵

B. *Local Government Standing to Sue Under NEPA*

When a local government sues a federal agency under NEPA, a court will grant standing on the basis of claims of harm to the municipal environment.¹³⁶ In the leading case of *City of Davis v. Coleman*¹³⁷ the local government challenged the failure of the Department of Transportation to prepare an environmental impact statement on a highway interchange located near, but outside, the City. The purpose of the interchange was to provide highway access which would stimulate industrial development. State law imposed a duty on the City to develop and enforce environmental standards. The court in *Coleman*

133. *Id.*

134. *Id.* at 347.

135. *Id.* at 350. In both *Groton* and *Maryland-National* the federal property at issue was *within* the political boundary of the complaining local governments. In the case of some federal installations, the federal property may be outside the borders of the neighboring city or town. In those cases, the local governments may be unable to rely on local zoning ordinances in fashioning a NEPA case. This and other factors led some communities to seek the annexation of federal property. See *United States v. McGee*, 714 F.2d 607 (6th Cir. 1983).

136. *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972). For a general discussion of the law of standing, see *Animal Lovers Volunteer Ass'n v. Weinberger*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 20,697 (9th Cir. 1985); *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985); Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. ENVTL. L. & LITIGATION 65 (1986); Note, "More Than an Intuition. Less Than a Theory": *Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564 (1986).

137. 521 F.2d 661 (9th Cir. 1975).

found that the City of Davis had standing because of its state statutory responsibility and because of the effect of the proposed federal project on the community's water supply and controlled growth plan.

Cases following *Coleman* have held that local governments have standing when the proposed federal action conflicts with the local comprehensive plan¹³⁸ or imposes an economic loss.¹³⁹

C. *The Opportunities for Local Governments to Participate in Federal Agency NEPA Decisionmaking*

In the *City of Davis v. Coleman*, the court noted that the federal government's failure to prepare an impact statement would deprive Davis of the "opportunity to participate in the administrative decision making process."¹⁴⁰ State law required the City to develop and adopt a comprehensive land use plan. The court held that if the federal government denied the City of Davis the right to comment on the proposed federal action, it could impair the community's planning responsibilities and objectives.

Concerning the local government's opportunity to comment on a major federal action, the court noted that NEPA requires "the comments and views of the . . . local agencies" to accompany the federal proposal through the agency review process.¹⁴¹ The general policy of NEPA to broaden the scope of relevant data in federal decisionmaking buttresses NEPA's participation requirement. NEPA states:

All agencies of the Federal government shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental deci-

138. *City of Rochester v. United States Postal Service*, 541 F.2d 967 (2d Cir. 1976); *American Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983).

139. *Town of Orangetown v. Gorsuch*, 544 F. Supp. 105 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 29 (2d Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *Conservation Council of N.C. v. Foehlke*, 435 F. Supp. 775 (M.D.N.C. 1977).

140. 521 F.2d at 670-72.

141. 42 U.S.C. § 4332(2)(C) (1977). The opportunity for comments from outside the federal agency is an important part of the NEPA "full disclosure" process. CEQ regulations interpreted the commenting requirement by providing for comment periods. 40 C.F.R. § 1503.1(a)(3), (4) (1985). Those submitting comments are encouraged to make their comments as specific as possible. 40 C.F.R. § 1503.3(a) (1985). Although the statute and regulations do *not* require comments on a federal agency's decision not to prepare an impact statement, the courts have found that agencies *may* request comments in these cases. *Township of Parsippany-Troy Hills v. Costle*, 503 F. Supp. 314 (D.N.J. 1979), *aff'd*, 639 F.2d 776 (3d Cir. 1980).

sion arts in planning and in decision-making which may have an impact on man's environment; . . . [The agencies must] insure that presently unquantified environmental amenities and values . . . be given appropriate consideration in decision-making along with economic and technical considerations.¹⁴²

This statutory language imposes a duty on federal agencies to consult with experts and government agencies having information relevant to the agency's action.¹⁴³ In *McDowell v. Schelsinger*¹⁴⁴ the court found that the federal government violated the "systematic, interdisciplinary approach" requirement of NEPA by failing to consult with the local government on the closure of a military installation. The Air Force in *McDowell* had a "close-hold" decisionmaking procedure. As a consequence, the United States did not solicit the comments of the local government and was unaware of important environmental consequences which would result from the federal action. The court found that this kind of secrecy in agency decisionmaking "runs counter to the thrust of NEPA . . . [which] contemplates that decisions with environmental effects be made in cooperation with state and local governments and concerned public and private organizations."¹⁴⁵

142. 42 U.S.C. § 4332(2)(A)-(B) (1977). It is unclear whether these two paragraphs, preceding the paragraph requiring an impact statement, impose a duty on the federal agencies separate from the responsibility to file an impact statement. See *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

143. See *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975); *Simmans v. Grant*, 370 F. Supp. 5, 18-20 (S.D. Tex. 1974).

144. 404 F. Supp. 221.

145. *Id.* at 252 n.43. See also *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976); *Chelsea Neighborhood Ass'n v. United States Postal Service*, 389 F. Supp. 1171 (S.D.N.Y.), *aff'd*, 516 F.2d 378 (2d Cir. 1975).

Within the last decade, many states have adopted environmental review procedures similar to NEPA. CEQ was concerned that a federal agency's preparation of an impact statement could be duplicative of state-level environmental reviews. The CEQ regulations now authorize federal agencies to cooperate with state and local agencies to reduce duplication between NEPA, and state and local requirements. 40 C.F.R. § 1506.2(a) (1985). This cooperation should cover joint research and studies, planning activities, and public hearings so that one document will satisfy both federal and state laws. *Id.*

Another opportunity for a local government to participate in the NEPA environmental review process is provided under CEQ's "cooperating agency" regulation. 40 C.F.R. § 1501.6 (1985). The express purpose of this rule is to "emphasize agency cooperation early in the NEPA process." State and local agencies having environmental review responsibilities may seek designation as a "cooperating agency". 40 C.F.R. § 1508.5 (1985). As a cooperating agency, a local government agency could participate with the "lead" federal agency in defining the scope of the environmental assessment and may assist in the drafting of the impact statement. 40 C.F.R. § 1501.6 (1985).

In addition to the federal agency's responsibility to consult with local governments in environmental decisionmaking, the Council of Environmental Quality requires the impact statement discuss "possible conflicts between the proposed action and the objectives of Federal, Regional, State, and local . . . land use plans, policies and controls for the area concern."¹⁴⁶ In order to adequately satisfy this requirement, federal agencies must consult with local governments concerning community comprehensive plans and zoning ordinances.

VI. THE DUTY TO COOPERATE AS FOUND IN THE INTERGOVERNMENTAL COOPERATION ACT OF 1968 AND EXECUTIVE ORDER 12,372

Another federal law which opens up the Federal Government's decisionmaking process is the Intergovernmental Cooperation Act of 1968.¹⁴⁷ The passage of that Act and NEPA indicates Congress' intent to require greater disclosure of information by federal officials. In many respects, the Intergovernmental Cooperation Act provides even greater leverage over federal agencies than does NEPA. But, local governments should distinguish the Intergovernmental Cooperation Act from Executive Order 12,372 signed by President Reagan on July 12, 1982.¹⁴⁸ Although that Order, which addresses intergovernmental relations, contains many features useful to local governments, it is less comprehensive than the Act. A local government's strongest position would be to advocate the full implementation of the Act.

A. *The Intergovernmental Cooperation Act of 1968*

With the rapid proliferation of federal grants in the 1960's and early 1970's, local governments found that they had limited power to control, or even to learn about federal projects that might affect the com-

146. 40 C.F.R. § 1502.16(c) (1985). An earlier version of the CEQ Regulations required federal agencies to discuss any conflict or inconsistency. "Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation." 40 C.F.R. § 1500.8(a)(2), *reprinted in* 38 Fed. Reg. 20,550, 20,553 (1973).

A recent decision determined that a federal agency is within its authority to give a local government the opportunity to select among the alternatives available after the environmental review process. *Britt v. United States Army Corps of Eng'rs*, 769 F.2d 84 (2d Cir. 1985).

147. 31 U.S.C. § 6506 (1983).

148. *See infra* note 116 and accompanying text.

munity.¹⁴⁹ Since different agencies developed federal assistance programs and direct federal projects in a piecemeal manner they were often duplicative or conflicting. For example, a state highway department could receive federal money to build an urban freeway through land that another state or federal agency expected to use for a different purpose.

The Advisory Commission on Intergovernmental Relations was the first to significantly analyze the problem.¹⁵⁰ The Commission reviewed forty-three federal programs that had a direct impact on local government organization and planning. Among the important recommendations to come out of the study were the following:

1. The Congress and appropriate executive agencies should require federal decision-makers to consider local comprehensive planning in their development of urban projects.¹⁵¹
2. The Congress and executive branch of the federal government should implement coordinating procedures to promote a unified urban development policy.¹⁵²

149. See generally, Mogulof, *Metropolitan Councils of Government and the Federal Government*, 7 URB. AFF. Q. 492 (1972). Between 1955 and 1975, federal assistance to local, regional, and state agencies or organizations increased from \$3 billion to \$52 billion. Walker, *A New Intergovernmental System in 1977*, PUBLIUS, Winter 1978, at 104. In many cases, the recipients of these intergovernmental grants were not general-purpose governments but new, single-purpose, specialized agencies beyond the control of more traditional state and local elected officials and planners. According to one estimate, over 1800 special purpose local agencies appeared between the mid-1960's and late 1970's. *Id.*

150. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPACT OF FEDERAL URBAN DEVELOPMENT PROGRAMS ON LOCAL GOVERNMENT ORGANIZATION AND PLANNING (1964) [hereinafter 1964 ACIR Report]. See also, *Metropolitan Planning: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Relations*, 88th Cong., 1st Sess. 5250 (1963); *Role of the Federal Government in Metropolitan Areas: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 87th Cong., 2d Sess. 19,906 (1962). For a historical survey of federal-urban government relations, see J. SUNDQUIST & D. DAVIS, MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL (1969); C. VAN HORN, POLICY IMPLEMENTATION IN THE FEDERAL SYSTEM: NATIONAL GOALS AND LOCAL IMPLEMENTATION (1979).

151. 1964 ACIR Report, *supra* note 150, at 34-37. The Commission found that the success of a federal program depended, in part on how effectively it interrelated with other local activities and services. The more reasonable approach to achieve this interlocking relationship was through the early coordination between federal, state and local planners. *Id.*

152. *Id.* at 37-39. The 1964 ACIR Report stopped short of recommending that all federal projects be consistent with local comprehensive planning as a condition to fed-

Four years after this study, Congress declared a national policy of intergovernmental coordination, cooperation, and decentralized decisionmaking in the Intergovernmental Cooperation Act of 1968.¹⁵³ That Act's purpose was to promote "sound and orderly development of urban and rural areas."¹⁵⁴ Congress directed the President to "prescribe regulations governing the formulation, evaluation, and review of United States Government programs and projects having a significant impact on area and community development."¹⁵⁵ The Act identified seven community objectives which a federal agency should consider as it plans and develops projects:¹⁵⁶

1. appropriate land uses for housing, commercial, industrial, governmental, institutions, and other purposes;
2. wise development and conservation of all natural resources;
3. balanced transportation system;
4. adequate outdoor recreation and open space;
5. protection of areas of unique natural beauty and historic and scientific interest;
6. properly planned community facilities; and
7. concern for high standards of design.

Congress also established a policy that "to the extent possible, all National, Regional, State, and local viewpoints shall be considered in planning development programs and projects of the United States Government."¹⁵⁷

The House Report accompanying the Intergovernmental Cooperation Act of 1968 suggested that the primary concerns of the legislators were:

1. to improve the operation of the federal system in an increas-

eral approval. However, the Commission cited the success within the District of Columbia, where federal law required that all federal projects be consistent with the local comprehensive plan. *Id.*

153. 31 U.S.C. § 6506 (1983). The House and Conference Committee reports preceding the passage of the Act are reprinted in 1968 U.S. CODE CONG. & AD. NEWS 4220-4252. The Intergovernmental Cooperation Act of 1968 considers the coordination of both federal assistance programs and direct federal development and activities. An in-depth review of the federal assistance programs is beyond the scope of the Article. Complete analysis of the impact of federal assistance activities in local jurisdictions has been studied intensively by the Advisory Commission of Intergovernmental Relations.

154. 31 U.S.C. at 6506(a).

155. *Id.* at 6506(b).

156. *Id.*

157. *Id.* at 6506(c).

ingly complex society,¹⁵⁸

2. to achieve the fullest cooperation and coordination of activities among various levels of government,¹⁵⁹ and
3. to strengthen state and local government.¹⁶⁰

B. *Office of Management and Budget Circular A-95*

The Intergovernmental Cooperation Act of 1968 obligated the President to establish regulations governing the formulation, evaluation, and review of federal projects significantly affecting area and community development.¹⁶¹ From 1969 to 1982, the President fulfilled his statutory responsibility by promulgating the Office of Management and Budget Circular A-95.¹⁶² Circular A-95 established a four part program which detailed the consultation requirements of any applicant for federal assistance, mandated that federal agencies planning any direct federal development coordinate with state and local governments, provided governments with an opportunity to review various federal formula grant programs, and encouraged consistency among federal assisted planning programs.¹⁶³

The purpose of Part II of Circular A-95 was "to assure maximum feasible consistency of federal developments with state, area-wide, and

158. H.R. REP. NO. 1845, 90th Cong., 2d Sess. 1, *reprinted in*, 1968 U.S. CODE CONG. & AD. NEWS 4220, 4220-21.

159. *Id.*

160. 1968 U.S. CODE CONG. & AD. NEWS at 4228. A 1984 letter report by the General Accounting Office suggests another justification for the Act. General Accounting Office, B-146,285, GGD-85-2, Issues Concerning Implementation of a Revised Process for Intergovernmental Review of Federal Programs (Oct. 17, 1984) (finding intergovernmental cooperation is necessary to protect the vast investments of the federal government in its own development activities).

161. 31 U.S.C. § 6506(b) (1983).

162. Office of Management and Budget Circular A-95, *reprinted in* 41 Fed. Reg. 2052 (1976). Circular A-95 was first issued on July 24, 1969, and was revised at regular intervals between that date and the last revision in 1976.

163. For the history and criticism of Circular A-95, *see* OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-95: AN ASSESSMENT (1978); M. MOGULOF, GOVERNING METROPOLITAN AREAS: A CRITICAL REVIEW OF COUNCILS OF GOVERNMENT AND THE FEDERAL ROLE (1971); Gordon, *Office of Management and Budget Circular A-95: Perspectives and Implications*, PUBLIUS, Winter 1974, at 45; Rothenberg, *Regional Coordination of Federal Programs: Has the Difficult Grown Impossible*, 4 J. POL'Y ANALYSIS & MGMT. 1 (1984); Russo, *In Search of Intergovernmental Coordination: The A-95 Project Notification and Review System*, PUBLIUS, Spring 1982, at 49; Steinman, *The A-95 Review Process: Suggestions for a New Perspective*, STATE & LOCAL GOV'T REV., Jan. 1982, at 32.

local plans and programs.”¹⁶⁴ In order to achieve “maximum feasible consistency,” A-95 placed the following duties on federal agencies:

1. To consult with State and local representatives “at the earliest practicable stage in project or development planning” concerning the relationship of the federal project to the development plans and programs of the area in which the project is located.¹⁶⁵
2. To assure that any federal plan or project was compatible with state, area-wide, and local development plans identified in the course of consultations. The agency was obligated to explain, in writing, any incompatibility to the appropriate state or local governments.¹⁶⁶
3. To enter into agreements with state and local governments to establish procedures for ongoing coordination between federal and non-federal planning.¹⁶⁷

Although Circular A-95 failed to fulfill its potential, it reduced some duplication, encouraged project coordination, and provided a vehicle for the expression of local opinion.¹⁶⁸ Despite these achievements, however, Circular A-95 was plagued by numerous problems.¹⁶⁹ Dur-

164. Office of Management and Budget Circular A-95, Part II, I.b., *reprinted in* 41 Fed. Reg. 2056 (1976).

165. *Id.* at 2.a.(1). The Circular identified nine categories for comments and recommendations from state and local governments:

1. consistency with state, area or local comprehensive planning;
2. extent to which the project duplicated other projects or activities;
3. extent to which the project contributed to achievement of state, area, and local policies relating to natural and human resources and economic and community development;
4. impacts on the environment;
5. effects on energy resources;
6. extent of displacement caused by project;
7. relationship to and consistency with coastal zone management plans;
8. effects on patterns of settlement; and
9. extent of impact on central cities, older suburban cities and other communities.

166. *Id.* at 2.a.(2).

167. *Id.* at 5.c.

168. Rothenberg, *Regional Coordination of Federal Program*, 4 J. POL'Y ANALYSIS & MGMT. 1 (1984).

169. For various opinions concerning the failure of Circular A-95, see the sources cited in note 163. Irene Fraser Rothenberg in her article, *supra* note 168, listed the following weaknesses in the A-95 process:

1. Some state and local governments submitted poor quality comments, lacking analysis and documentation of potential impacts. In those jurisdictions, federal officials placed little emphasis on complying with the Circular, thereby demoralizing the state and local governments and causing even more perfunctory subsequent reviews.
2. The poor quality of state and local government comments was attributed, in part,

ing 1977 and 1978, the Office of Management and Budget studied the Circular A-95 process¹⁷⁰ and identified its shortcomings. One important finding of the study was that federal agencies frequently ignored the Circular. In many cases, federal agencies simply did not notify state and local governments of projects that affected their community.¹⁷¹ Even when the federal agency notified the community, the agency often had already committed itself to the development, providing state and local governments with little opportunity to influence the project. Generally, the federal agencies were uninformed about their responsibilities under the Intergovernmental Cooperation Act and under Circular A-95.¹⁷²

C. *Executive Order 12,372*

1. *The Reagan Administration Policy of Deregulation and the Demise of Circular A-95.* A continuous process of self-study and evaluation during the 1970's identified several problems with the A-95 process. When President Reagan entered office in 1981, revised Circular A-95 was ready for publication. However, the new administration felt that a more dramatic shift in the intergovernmental consultation process was necessary. Consequently, it provided new direction under Executive Order 12372, of July 12, 1982.¹⁷³

to the lack of state agency and local government resources necessary to conduct thorough reviews. Many review organizations lacked adequate personnel and financial assets.

3. A-95 burdened state and local government review personnel with commenting on many noncontroversial projects. The consideration of a large volume of less important federal projects severely restricted the time which could have been spent on the most troublesome programs.

4. State and local reviews were meaningful only if there was an established policy or comprehensive development plan. Many governmental units, however, lacked these policies and plans. Consequently, the participation of the governments in those situations was limited.

170. OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-95: AN ASSESSMENT (1978).

171. *Id.* at 7.

172. *Id.* at 12. The study recommended changes to the A-95 process to assure greater federal agency compliance. The following were among the "options for action":

1. establish internal audit procedures within each agency to monitor compliance with A-95; and
2. provide funding for a broad information and training program to instruct federal officials concerning their intergovernmental coordination responsibilities.

173. Exec. Order No. 12,372, 3 C.F.R. 1972 (1983), *reprinted in* 31 U.S.C. § 6506 App. at 288-89 (1983), *as amended by* Exec. Order No. 12,416, 3 C.F.R. 186 (1984),

The Reagan Administration had pledged to reduce federal interference and to restore power to local elected authorities. The new administration correctly found that the existing A-95 process was highly bureaucratic and burdensome.¹⁷⁴ Executive Order 12372 satisfied the Reagan Administration's commitment to "removing unnecessary prescriptiveness and letting state and local officials design and operate—without federal interference—systems that are responsive to their priorities."¹⁷⁵

2. *Executive Order 12372.* Executive Order 12372 shifted the initiative for establishing review procedures and priorities to the states and local governments. Under the new system, each state would design its own system for coordination with federal agencies.¹⁷⁶ The President directed that once a state adopts a system of consultation, federal agencies should "utilize the state process to determine official views of State and local elected officials."¹⁷⁷

reprinted in 31 U.S.C. § 6506 (Supp. 1986). The recommendation to alter the A-95 process arose from the Vice President's Task Force on Regulatory Relief in 1982. *Office of Management and Budget, Report to the President on Executive Order 12,372: Intergovernmental Review of Federal Programs* (1985). For an analysis of Executive Order 12,372 and its impact on intergovernmental cooperation, see *Advisory Commission on Intergovernmental Relations, Bulletin No. 82-3, Intergovernmental Consultation Changes Provide Opportunities* (1982); *Council of State Planning Agencies, The Promise of Partnership: A Status Report on Implementation of the President's Intergovernmental Consultation Initiative* (1984).

174. One estimate concluded that A-95 had created "a staggering paperwork burden costing over \$50 million each year—with little positive return to State and local governments and their citizens." General Accounting Office, B-146,285, GGD-85-2, *Issues Concerning Implementation of a Revised Process for Intergovernmental Review of Federal Programs 2* (Oct. 17, 1984).

175. *Executive Order 12,372, Revised Procedures for Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 41* (1983) (statement of Joseph R. Wright, Jr., Deputy Director of the Office of Management and Budget). See also *Office of Management and Budget Circular No. A-95: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess.* (1982).

176. Exec. Order No. 12,372, *supra* note 173, § 2.

177. Following the publication of the Executive Order, the federal agencies worked together for several months to develop consistent regulations to implement the Order. These regulations were published on June 24, 1983. 48 Fed. Reg. 29,096-29,414 (1983). The regulations are similar for all twenty-three agencies which were subject to the Executive Order. Within these regulations, each agency listed those activities and projects which it considered eligible for review and comment by state and local governments. The lists submitted by a few agencies indicate the intent to cooperate with local governments during the planning phase of federal project development. Following are exam-

Even though the Order shifted initiative to the states, the Reagan Administration emphasized that federal agencies were not relieved of their intergovernmental coordination responsibilities. The Office of Management and Budget (OMB) announced that the Order required that the federal government regulate itself to be responsive to state and local government.¹⁷⁸ The OMB emphasized that federal agencies should accept the recommendations of state and local officials or explain their reasons for refusing to do so.¹⁷⁹

To implement this policy, section 2 of the Order placed several responsibilities on federal agencies. First, the Order required federal

ples of the eligible federal activities given for some federal agencies with real property holdings in urban communities:

Veterans Administration, 48 Fed. Reg. 36,103 (1983).

1. Acquisition of real property for national cemeteries and medical facilities.
2. Major utility modernization that may require new primary sources.
3. Major buildings demolition projects.
4. Building additions.
5. New structures.

Department of Defense, 48 Fed. Reg. 29,140, 29,142 (1983).

1. Installation comprehensive master planning (including Natural Resource Plans and Air Installation Compatible Use Zone Studies).
2. Military construction and family housing.
3. Real property acquisition and disposal.
4. Substantial changes in existing use of installations.
5. Floodplain management and wetlands protection.

Department of Justice, 48 Fed. Reg. 29,248 (1983).

1. Construction projects such as correctional institutions and detention centers.
2. Construction of border patrol stations.

National Aeronautics and Space Administration, 48 Fed. Reg. 29,339 (1983).

1. New or expanded buildings or utility systems on NASA installations.
2. Revised site or operating plans at NASA field centers.

Postal Service, 48 Fed. Reg. 29,370, 29,376 (1983).

1. New facility construction, owned or leased.
2. Expansion of an existing facility.
3. Purchase or lease of an existing building if a new or substantially enlarged occupancy is involved.
4. Real property disposal.
5. Other postal facility actions that might directly affect state or local community plans.

This listing of program areas by the federal agencies evoked a sharp response from the states and local governments. State officials interpreted the Executive Order as giving them the primary role in determining program coverage. *See, Executive Order 12,372, Revised Procedures for Evaluation, Review, and Coordination of Federal and Federally-Assisted Programs and Projects: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 176-78 (1983)* (statement of Constance Lieder, Secretary of State for Planning, Maryland); General Accounting Office, B-146285, GGD-85-2, Issues Concerning Implementation of a Revised Process for Intergovernmental Review of Federal Programs 3-6 (Oct. 17, 1984).

178. Office of Management and Budget, Report to the President on the Implementation of Executive Order 12,372, Intergovernmental Review of Federal Programs 1 (1985).

179. *Id.*

agencies to communicate with state officials early in the program planning cycle to explain specific plans and actions.¹⁸⁰ Moreover, the Order urged each federal agency to accommodate state and local elected officials' concern with proposed federal financial assistance and direct federal development.¹⁸¹ Finally, in those cases where the concerns of the State and local elected officials cannot be accommodated, federal officials should explain the basis for their decisions.¹⁸²

Notwithstanding this strong statement of federal agency responsibility, the President exempted certain federal actions from the Order.¹⁸³ These exceptions included: proposed federal legislation, regulations, and budget formulation; classified programs or activities where formal consultation would endanger national security; programs and activities administered by federally-recognized Indian tribes; and research and development activities not affecting state and local governments.

3. *Federal Compliance under Executive Order 12,372.* Although the Order was a strong policy statement regarding federal agency compliance,¹⁸⁴ there is little reason to believe that federal agencies will voluntarily increase their coordination with state and local governments. One reason is that the Reagan Administration policy intentionally eliminated the previous federal intergovernmental cooperation procedures, in order to reduce administrative burdens on local and state governments.¹⁸⁵ Another reason is that the Order gave states broad discretion to fashion whatever comment procedures they believed were necessary to satisfy state policies and priorities. In most cases, the state procedures are much less onerous than the former A-95 requirements.¹⁸⁶ Consequently, the procedural responsibilities of the federal

180. Exec. Order No. 12,372, *supra* note 173, § 2(b).

181. *Id.* at § 2(c).

182. *Id.* The Director of the Office of Management and Budget also felt that changing the presidential policy from an OMB circular to an Executive Order would increase federal agency compliance. Office of Management and Budget, Report to the President on the Implementation of Executive Order 12,372, Intergovernmental Review of Federal Programs 1 (1985).

183. Office of the Press Secretary of the President, Fact Sheet of Executive Order on Intergovernmental Review of Federal Programs (1982).

184. See text accompanying note 178.

185. See text accompanying note 174.

186. See generally Council of State Planning Agencies, *The Promise of Partnership: A Status Report on Implementation of the President's Intergovernmental Consultation Initiative* (1984). In addition to the particular procedures adopted by a state, the state's political configuration and administrative capacity can play an important role in the level of federal compliance.

agencies have decreased. This relaxing of procedures decreased agency familiarity with intergovernmental responsibilities.¹⁸⁷

In the past, state and local agencies had at least one ally when they encountered poor federal compliance. Under Circular A-95, the Office of Management and Budget played an active role in overseeing the entire intergovernmental coordination process. It often intervened in cases of federal agency noncompliance.¹⁸⁸ Since the publication of the Executive Order, however, the Office of Management and Budget announced its intention to reduce its oversight role.¹⁸⁹ Each federal agency is now separately responsible to police its compliance with Executive Order 12372.

4. *Whether Executive Order 12,372 Embodies all the Statutory Requirements of the Intergovernmental Cooperation Act of 1968.* Executive Order 12372 states that it is based on the authority under “the Constitution and Laws of the United States of America, including section 401(a) of the Intergovernmental Cooperation Act of 1968.”¹⁹⁰ Although the Executive Order cites the Act, it fails to expressly state whether it intends to satisfy all the statutory requirements of that or any other act. Since the Executive Order relies largely on state government implementation, it is unclear whether the Order embodies the entire Intergovernmental Cooperation Act.

For example, the Act states that “all National, Regional, State, and local viewpoints shall be considered in planning development programs and projects of the United States Government.”¹⁹¹ This language suggests that federal agencies must take the initiative in considering, if not soliciting, the viewpoints of other governmental bodies. By contrast, the Executive Order delegates to the states the authority to design the consultation process and to identify the matters to be coordinated.¹⁹²

187. Interview with Bruce McDowell, formerly with the Advisory Commission on Intergovernmental Relations, in Washington, D.C. (May 13, 1986).

188. Interview with Walter Grozek, Senior Management Analyst, Office of Management and Budget, in Washington, D.C. (May 23, 1986).

189. Memorandum from Harold I. Steinberg, Associate Director for Management, Office of Management and Budget, To Interested Federal, State and Local Officials (Jan. 28, 1983). Since the publication of Executive Order 12,372, the Office of Management and Budget has deleted its Intergovernmental Affairs Division, which had consisted of approximately twenty people. Interview with Walter Grozek, Federal Agency Liaison, Office of Management and Budget, in Washington, D.C. (May 23, 1986).

190. Exec. Order No. 12,372, *supra* note 137, preamble.

191. 31 U.S.C. § 6506(c) (1983).

192. Exec. Order No. 12,372, *supra* note 173, § 2.

In exercising this duty under the Order, a state may limit the scope of its cooperation procedures. If a federal agency relies solely on the state process, it may fall short of the requirement under the Intergovernmental Cooperation Act to consider "all viewpoints."

In a question and answer statement,¹⁹³ the Office of Management and Budget addressed the relationship between Executive Order 12,372 and the Intergovernmental Cooperation Act. One question asked whether the states must establish a consultation process. In answering this question, the Office of Management and Budget said that if a state lacks an official consultation process, federal agencies should still consider the views of state and local governments as required by the Intergovernmental Cooperation Act; however, the agencies need not accommodate the recommendations of state and local governments as required under the Executive Order.¹⁹⁴

Another procedure adopted by the Executive Order suggests that the order may not be as comprehensive as the act. In an effort to streamline the review process, the Executive Order designated the states as the single point of contact for all official views transmitted to the federal agencies.¹⁹⁵ While these state single-point-of-contact agencies need not be the only channel of communication, the Order fails to obli-

193. Memorandum from Harold I. Steinberg, Associate Director for Management, Office of Management and Budget, To Interested Federal, State, and Local Officials (Jan. 28, 1983).

194. The testimony of Joseph R. Wright, Jr., Deputy Director of the Office of Management and Budget at a hearing before the Senate Subcommittee on Intergovernmental Relations reaffirmed this position.

I understand another area of concern is whether there will still be adherence to the Intergovernmental Cooperation Act . . . Let me assure you that these consultations will continue. The purpose of the Executive Order and the regulations is to establish a special process whereby state and local governments can take matters of specific concern, channel the comments through a specifically-designated office, and assure that there would be an accommodation or explanation.

Executive Order 12,372, Revised Procedures for Evaluation, Review, and Coordination of Federal and Federally-Assisted Programs and Projects: Hearing Before the Subcomm. on International Relations of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 48-49 (1983).

195. *Id.* In response to question thirty-one of its Questions and Answers Policy Statement, the Office of Management and Budget gave its reasoning for the single point of contact concept.

The intent of the Executive Order is to have states and local governments work out differences so that a single recommendation is communicated . . . Agencies will not be in a good position to accommodate state and local concerns unless the state speaks with one voice in its comments.

Memorandum from Harold I. Steinberg, *supra* note 193.

gate federal agencies either to accommodate or to explain their inability to accommodate views obtained from other sources.¹⁹⁶ This, of course, places local governments at a disadvantage if they are unable to win the support of the state single point of contact.

Of course, many conflicts with federal agencies occur at the local level, rather than at the state level.¹⁹⁷ When the Executive Order was published, local government officials voiced strong opposition to the state-oriented review system.¹⁹⁸ One local government representative stated:

Local governments . . . will pay the price of uncertainty and potential disenfranchisement. Many local governments distrust state government because of its historical neglect of local needs. These localities fear that the State will consult with them only in a perfunctory fashion. They are concerned that States will establish a project review system that provides too short a list of projects subject to review and inadequate notification of affected parties at the local level. Moreover, localities suspect that states will give inadequate weight for local views in developing "a single state view."¹⁹⁹

The Executive Order single point of contact mechanism may impede the Act's requirement that federal agencies consider all views, whether state, regional, or local.²⁰⁰ The Order placed local or area-wide com-

196. *Id.*, Question 48.

197. See generally Office of Management and Budget, Report to the President on Executive Order 12,372, Intergovernmental Review of Federal Programs 2-3 (1985). The Advisory Commission on Intergovernmental Relations concluded that local opinions would be essential for an effective state process.

Local and regional reviews of projects often may have great significance in formulating state comments. Local officials and regional bodies frequently are closer to and more familiar with the intimate details and apparent implications of proposed federal and federally assisted activities as well as related state, local and private sector activities.

Advisory Commission on Intergovernmental Relations, Bulletin No. 82-3, Intergovernmental Consultation Changes Provide Opportunities, at 8 (1982).

198. See 1982 and 1983 Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs, *supra* note 175.

199. Executive Order 12,372, Revised Procedures for Evaluation, Review, and Coordination of Federal and Federally-Assisted Programs and Projects: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 103-04 (1983) (statement of Irving Hand, President, American Planning Association).

200. 31 U.S.C. § 6506(c) (1983). Regardless of its potential benefits for the effectiveness of reviews, the concepts of the "single point of contact" suggests that the Reagan Administration defines decentralization as a process of strengthening states, even if it involves the erosion of local authority. This result violates the Office of Management

ments in an inferior status if they are unable to garner State support.²⁰¹ There is no indication in the Intergovernmental Cooperation Act, however, that Congress intended the President to limit the significance of certain categories of comments.

VII. ETHICAL DILEMMAS FACING THE FEDERAL AGENCY DECISIONMAKER: POTENTIAL FOR INCREASED VULNERABILITY OF FEDERAL AGENCIES

In evaluating the vulnerability of the federal government in negotiations, an appreciation of the ethical dilemmas facing federal officers is important. In public land use negotiations, the federal official who feels a duty to be fair and open may weaken his bargaining position. But, the federal agency negotiator must continually consider the extent to which sharp practices will undermine his bargaining position. Thus, he should consider whether certain types of conduct may subject him to possible disciplinary action, to loss of authority as a negotiator, or to loss of status in the agency.²⁰² Also, the public official must be aware of how the other side, and his superiors, perceive his actions.

This section illustrates the conflicting responsibilities of federal offi-

and Budget's expressed policy of "neutrality" in the intergovernmental consultation process. Memorandum from Harold I. Steinberg, *supra* note 189. See also M. GOODMAN & M. WRIGHTSON, *MANAGING REGULATORY REFORM: THE REAGAN STRATEGY AND ITS IMPACT* (1987) (citing the effectiveness of the plan to limit the federal role in intergovernmental relations).

201. The Advisory Commission of Intergovernmental Relations recommended several ways by which local governments can increase their level of access and participation under the Executive Order:

1. establish policies and plans that are comprehensive, soundly based upon fact, and widely accepted as the basis for local action;
2. build a strong track record of planning and policy continuity to build federal agency confidence;
3. develop good communication with and access to the state single point of contact agency; and
4. work together with state-wide organizations such as a state league of municipalities or similar organizations.

Advisory Commission on Intergovernmental Relations, Bulletin No. 82-3, *Intergovernmental Consultation Changes Provide Opportunities* 12-15 (1982).

202. Another negative consequence from sharp practices is the requirement to pay the opposing party's attorneys fees, when the government official acts in "bad faith." Thus, where a federal agency withholds information from an opposing party in an administrative or judicial action, the federal agency may be liable for the opposing party's attorney fees. See, e.g., *Sierra Club v. United States Army Corps of Eng'rs*, 590 F. Supp. 1509 (S.D.N.Y. 1984) (*Sierra Club III*), *aff'd in part and rev'd in part on other grounds*, 776 F.2d 383 (2d Cir. 1985).

cials. A local government, of course, may gain leverage in the negotiating process when it convinces a federal officer that he is guilty of neglecting an important public or personal duty.

A. *The Federal Official's Dilemmas of Responsibility*

Administrative officers within the various federal agencies make most of the decisions concerning the development and use of federal real property. These people should make choices based on their best assessment of the public interest. However, they are frequently faced with conflicts between competing principles, rules, agreements and ideals that exist in the government and in society.

In analyzing the ethical dilemmas of these federal decisionmakers, the concept of responsibility plays a central role.²⁰³ Responsibility in this context includes the concepts of discretion and accountability. While a federal administrator may be granted considerable discretion or freedom to act on behalf of his agency, he must still answer for his choices to superiors, agency associates, the courts, and the public at large.²⁰⁴

Dilemmas arise for public decisionmakers when responsibilities or obligations conflict or are unclear. Among the potentially competing or ambiguous obligations are express or implied commitments made by the federal officer. For example, an administrative officer may be obligated to fulfill an implied promise to serve faithfully or to be an advocate for his agency's interests. Moreover, the federal official may feel

203. K. ANDERSON, PERSUASION: THEORY AND PRACTICE 323-28 (1971) (arguing that a public official's acceptance of responsibility is a key to unraveling the ethical dilemmas). For a discussion of the many sources of administrative agency responsibility, see J. FLEISHMAN & B. PAYNE, ETHICAL DILEMMAS AND THE EDUCATION OF POLICYMAKERS (1980); Richardson & Nigro, *Administrative Ethics and Founding Thought: Constitutional Correctives, Honor, and Education*, 47 PUB. AD. REV. 367 (1987). There is lack of agreement among land use planners regarding their ethical obligations. See ETHICS IN PLANNING (M. Wachs ed. 1984); Howe & Kaufman, *The Values of Contemporary American Planners*, 47 J. AM. PLAN. A. 266 (1981); Howe & Kaufman, *The Ethics of Contemporary American Planners*, 45 J. AM. PLAN. A. 243 (1979). For an analysis of the conflicts between institutional loyalties and personal moral standards, or private versus public morality, see S. HAMPSHIRE, MORALITY AND CONFLICT (1983); D. JONES, PRIVATE AND PUBLIC ETHICS: TENSIONS BETWEEN CONSCIENCE AND INSTITUTIONAL RESPONSIBILITY (1978).

204. See T. GREENWOOD, KNOWLEDGE AND DISCRETION IN GOVERNMENT REGULATION (1984) (discussing federal agency implementation of congressional policy, the influence of special interest groups, values of federal decisionmakers, and the proper degree of administrative discretion).

committed to abide by certain rules of conduct within his profession, or by agency custom.

Also, a federal officer may feel responsible to his associates and others.²⁰⁵ Loyalties to agency co-workers, supervisors, or fellow professionals²⁰⁶ may be included among the public decisionmaker's commitments. Of course, the federal officer can also develop loyalties towards a particular urban or rural community, its leaders and elected officials.²⁰⁷ However, these personal associations within the agency and otherwise are distinguishable from the officer's broader duties to the public as a whole.²⁰⁸

The dilemmas which occur among these diverse obligations are not easily resolved. Often, the hard choices resemble several strands of responsibility knotted together.²⁰⁹ Unfortunately, the decisionmaker is

205. See generally, P. FRENCH, *ETHICS IN GOVERNMENT* 124-27 (1983).

206. Professionals in our society have a high degree of autonomy, which can lead to a distortion of behavior when they occupy positions of public responsibility. E. REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 52-53 (1969); Brown, *Ethics and Public Policy: A Preliminary Agenda*, 7 *POL'Y STUD. J.* 132, 133-34 (1978).

207. Some commentators contend that public decisionmaking should be based on "community" needs. For a definition of "community" and the argument that policy-makers must consider community interests, see H. ODEGARD, *THE POLITICS OF TRUTH: TOWARD RECONSTRUCTION IN DEMOCRACY* 147-361 (1971); M. RASKIN, *THE COMMON GOOD: ITS POLITICS, POLICIES AND PHILOSOPHY* (1986); C. RYN, *DEMOCRACY AND THE ETHICAL LIFE: A PHILOSOPHY OF POLITICS AND COMMUNITY* 81-89 (1978); Price, *Community, "Mediating Structures" and Public Policy*, 62 *SOUNDINGS* 369 (1979).

208. In addition to these general categories of responsibility, the public official may feel an obligation to future generations. H. JONAS, *THE IMPERATIVE OF RESPONSIBILITY: IN SEARCH OF AN ETHIC FOR THE TECHNOLOGICAL AGE* 38-46 (1984); Care, *Future Generations, Public Policy, and the Motivation Problem*, 4 *ENVTL. ETHICS* 195 (1982). Of course, personal moral codes, based on religion, philosophy, instinct or tradition, may also restrain actions or decisions. Additionally, one's own desires and career ambitions may influence bureaucratic behavior. F. FISCHER, *POLITICS, VALUES, AND PUBLIC POLICY* (1980).

209. To evaluate competing ethical values, the administrative official must understand the conflict between personal morality and public duty. P. FRENCH, *ETHICS IN GOVERNMENT* 5-14 (1983). Those commentators who have considered the public sector responsibilities describe a system of overlapping, conflicting and competing values. T. COOPER, *THE RESPONSIBLE ADMINISTRATOR: AN APPROACH TO ETHICS FOR THE ADMINISTRATIVE ROLE* 61-93 (1984); Milward & Rainey, *Don't Blame the Bureaucracy!*, 3 *J. PUB. POL'Y* 149 (1983) (claiming that administrative agencies' ethical conflicts are great because they get the "messy" jobs in society). Regrettably, the United States Supreme Court has failed to provide direction helping administrative agencies resolve policy conflicts. See J. ROHR, *ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES* 67-76 (1978). Of course, the values associated with public decisionmak-

forced to act in the face of competing commitments.²¹⁰

1. *The Obligation to the Public Interest.* When a proposed federal action and the legitimate concerns of a local government conflict, the federal decisionmaker must decide what is in the public's interest. The concept of "public interest," however, is often too vague to guide the official's decisions.²¹¹ In a sense, the federal officer's determination of public interest merely reflects the more general battle of ethical dilemmas.

Of course, procedural requirements in the law can increase the likelihood of identifying the common good and in promoting well-reasoned decisionmaking.²¹² Despite these procedural rules, decisionmakers should not always follow the recommendations proffered during the procedural process. Under certain circumstances, public officers are expected to use their discretion to decide that the procedural system has failed to identify the common good. In such cases, the process gives discretion to a public official with a superior understanding of the long-term consequences of a particular alternative.

2. *The Obligation to the Procedural Law.* Despite the skill of many public officials in determining the public interest, they should guard against arrogance. The stated purpose of the procedural guarantees is the protection of those less powerful and less influential in the political process.²¹³ Cities and other local governments fall in this category

ing are constantly changing. See Levine, *The Federal Government in the Year 2000: Administrative Legacies of the Reagan Years*, 46 PUB. AD. REV. 195 (1986).

Despite these difficulties, public officials can learn about the various values underlying the many decisions they make. Anderson, *The Place of Principles in Policy Analysis*, 73 AM. POL. SCI. REV. 711 (1979). They can also learn how to distribute responsibility among the various parties affected by a decision. H. SPIRO, *RESPONSIBILITY IN GOVERNMENT: THEORY AND PRACTICE* 101-04 (1969).

210. Numerous authors have attempted to describe an analytical framework for valuing competing administrative responsibilities. See, e.g., Brown, *Ethics and Public Policy*, 7 POL'Y STUD. J. 132, 135-36 (1978); Fischer, *Ethical Discourse in Public Administration*, 15 AD. & SOC'Y 5 (1983); Yates, *Hard Choices: Justifying Bureaucratic Decisions*, in *PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS* 32 (J. Fleishman, L. Liebman, & M. Moore eds. 1981).

211. See, McEachern & Al-Arayed, *Discerning the Public Interest*, 15 AD. & SOC'Y 439 (1984). An argument can be made that public interest cannot be distinguished from sectional and group interests. M. REIN, *SOCIAL SCIENCE AND PUBLIC POLICY* 98-101 (1976).

212. See generally D. YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 149-79 (1982).

213. The weak political position of local governments is articulated in R. RIPLEY, *POLICY ANALYSIS IN POLITICAL SCIENCE* 74-83 (1985). For a convincing argument

where federal land use decisions affect urban and rural communities. These local units of government depend, to a large extent, on procedural rights for their protection.

Strict adherence to procedural requirements²¹⁴ will result in substantial openness in the decisionmaking process.²¹⁵ Nevertheless, Americans have come to accept withholding of information by government agencies as part of their culture.²¹⁶ While the federal officer may deceive or withhold information in representing his agency, such deception may prove harmful in the long run. Federal officers who lose their reputation for veracity may accomplish less thereafter.²¹⁷

that cities should have at least as much power as private corporations, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

214. For a discussion of the doctrine of procedural democracy, see Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q. 1, 10-13 (1977). But see J. WHOLEY, *EVALUATION AND EFFECTIVE PUBLIC MANAGEMENT* (1983) (downplaying the focus on process, while arguing for a results-oriented public decisionmaking model).

215. One scholar suggested two reasons why government agencies should more freely share their information. First, in countries founded on principles of self-government, the state must share its information to increase the individual's reflective ability to comply with or to disobey the law. Second, man is a rational creature for whom knowledge is an object of delight for the possessor, simply for its own sake. A government that fails to account for our natural curiosity and unlimited interests fails to take into account a potent factor in the nature of its citizens. Bedau, *The Government's Responsibility to Inform the Public*, in *ETHICAL ISSUES IN GOVERNMENT* 221 (N. Bowie ed. 1981). Another writer noted that the concept of informed consent in the practice of medicine could be extended to the area of public decisionmaking. Brown, *Ethics and Public Policy: A Preliminary Agenda*, 7 POL'Y STUD. J. 132, 136 (1978). See also *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (discussing duty of the federal government to disclose information about nuclear weapons testing).

In actual practice, the federal government's efforts to inform public and local governments is not uniform. See R. DENTON & G. WOODWARD, *POLITICAL COMMUNICATION IN AMERICA* 98-136, 327-33 (1985) (discussing the various public agency responses to special interest group pressure); Eisenberg, *Government and the Excluded*, 76 NAT'L CIVIC REV. 374 (1987). Two researchers found that federal agencies' willingness to coordinate with outsiders followed a cyclical pattern. Burns & Mauet, *Administrative Freedom for Intergovernmental Action: A Life-Cycle Interpretation*, 16 AD. & SOC'Y 289 (1984). For a case history of federal agency avoidance of a congressionally mandated disclosure and cooperation requirement, see Morehouse, *The 1962 Highway Act: A Study in Artful Interpretation*, 35 J. AM. INST. PLANNERS 160 (1969).

216. See W. JONES, *SURVIVAL: A MANUAL ON MANIPULATING* (1979). For a general discussion of the use of deception by governmental leaders, see S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 203-19 (1978).

217. One example is former Secretary of State Cyrus Vance, who resigned after his public duty required him to withhold information from the European allies during the Iranian Hostage Crisis. See P. FRENCH, *ETHICS IN GOVERNMENT* 5-14 (1983).

Despite the potential for harm caused by official deception, the barriers to it still seem

On the other hand, valid public interest reasons can justify the withholding of information. Some deception, for example, is necessitated by national security, or in crisis situations.²¹⁸ But even in a legitimate case of national security or similar public interest, public officials should accept the risk of possible injury to intergovernmental relations. The failure to inform property owners or communities of an action which later affects them can lead to a loss of support and cooperation thereafter. Erosion of local support may occur even if the excluded parties are subsequently informed of the public need for the withholding. Clearly, federal officials should consider the long-term consequences²¹⁹ and the gravity of harm to the general public of withholding information.

weak. The reason is that some form of competitive or strategic deception is ingrained in our expectations. Local government officials, for example, may not expect candor from a large federal agency. In fact, local government leaders may relish and gain public popularity by sparring with the federal government. For example, recently state and local leaders gained notoriety by opposing the Federal Government's public lands policies. See W. COONS, *THE SAGEBRUSH REBELLION: LEGITIMATE ASSERTION OF STATES RIGHTS OR RETROACTIVE LAND GRAB* (1981); Shapiro, *Sagebrush and Seaweed Robbery: State Revenue Losses From Onshore and Offshore Federal Lands*, 12 *ECOLOGY L.Q.* 481 (1985).

218. National security is a difficult concept to define. See S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 107-22 (1978); L. BROWN, *REDEFINING NATIONAL SECURITY* (1977); A. COX, *THE MYTHS OF NATIONAL SECURITY* (1975); I. WILL, *THE BIG BROTHER SOCIETY* (1983); McDonald, *The Possibility of Enhancing National Security by Accelerating the Leasing of Federal Lands*, *REV. REGIONAL ECON. & BUS.*, Apr. 1983, at 3; Margolis, *Democracy and the Responsibility to Inform the Public*, in *ETHICAL ISSUES IN GOVERNMENT* 237 (N. Bowie ed. 1981); Wolfers, "National Security" as an Ambiguous Symbol, 67 *POL. SCI. Q.* 481 (1952). The tension between emergencies and information disclosure provides a continuing ethical dilemma.

Important values such as national security or security may be used to justify procedure avoidance. But such justification poses obvious dangers. The claim of an emergency may be used to prevent any thoughtful consideration of the issues at stake. While the claim can be valid, it can also be used to stampede officials and citizens and to limit legitimate objections of opponents.

J. FLEISHMAN & B. PAYNE, *ETHICAL DILEMMAS AND THE EDUCATION OF POLICY-MAKERS* 22 (1980). See also, J. SHAKLAR, *ORDINARY VICES* (1984) (discussing the role of deception in public life).

219. Public officials should consider all long-term consequences of their decisions. A clear appreciation of the consequences of many public agency decisions is problematic today. H. JONAS, *THE IMPERATIVE OF RESPONSIBILITY: IN SEARCH OF AN ETHIC FOR THE TECHNOLOGICAL AGE* 27-31 (1984). One solution to help reduce uncertainty would be an increased effort by all public agencies to implement early, cooperative planning. See H. ODEGARD, *THE POLITICS OF TRUTH: TOWARD RECONSTRUCTION IN DEMOCRACY* 344-55 (1971) (noting that cooperative, comprehensive planning between public agencies represents one of the most difficult tests of ethics in a bureaucracy). For a discussion of the issue of public disclosure in government

3. *The Obligation to Democracy.* One way to resolve the conflicts among policy choices is to make all decisions conform to a theory of democracy.²²⁰ Although democracy is difficult to define, it is generally understood that public decisions in a democratic state should reflect the will of the people. Since an unelected administrative officer can be unresponsive to the individual needs of the voters, the officer is required to comply with certain procedural requirements.²²¹ Although minimum procedures may vary, they often include notice to the af-

development project decisionmaking, see J. SELEY, *THE POLITICS OF PUBLIC-FACILITY PLANNING* (1983).

220. K. ANDERSON, *PERSUASION: THEORY AND PRACTICE* 319-21 (1971) (discussing ethics of decisionmaking in a democracy). A full discussion of the relationship between bureaucratic organization and democratic principles is beyond the scope of this Article. For a more comprehensive analysis, see E. ETZIONI-HALEVY, *BUREAUCRACY AND DEMOCRACY: A POLITICAL DILEMMA* (1983); M. REIN, *SOCIAL SCIENCE AND PUBLIC POLICY* 98-101 (1976); H. SPIRO, *RESPONSIBILITY IN GOVERNMENT: THEORY AND PRACTICE* (1969).

One author identified several reasons why public agencies are reluctant to coordinate their activities with those outside the agency. Among the reasons are the following:

1. Federal agencies tend to act as self-conscious political interest groups.
2. The duties of the agencies are often so narrowly defined as to limit their ability to consider universal principles.
3. Given the jurisdictional authority of the government agencies, it is easy to avoid responsibility.
4. Goals are elusive, and mandates are loose.
5. Important policymaking often occurs in a setting sheltered from political debate and citizen scrutiny when compared with policy making processes involving elected officials.

D. YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 66-100 (1982). See also Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984).

221. In those areas of federal decisionmaking where there is potential for serious impacts on public health, there is growing political pressure for the adoption of a federal right-to-know law. BUREAU OF NATIONAL AFFAIRS, *RIGHT-TO-KNOW: A REGULATORY UPDATE ON PROVIDING CHEMICAL HAZARD INFORMATION* (1985). Others urge expansion of government disclosure requirements in all areas of public policymaking. D. DEMAC, *KEEPING AMERICA UNINFORMED: GOVERNMENT SECRECY IN THE 1980's* 53-72 (1984) (complaining that the Reagan Administration effort to streamline paperwork impairs the public's ability to control the bureaucracy); Swiss, *Holding Agencies Accountable for Efficiency: Learning From the Past Failures*, 15 AD. & SOC'Y 75 (1983). See also Rosenbaum, *The Paradoxes of Public Participation*, 8 AD. & SOC'Y 355 (1976) (discussing the complex social and political issues associated with public participation in government decisionmaking).

One author clearly defined the process of disclosure and coordination under a democratic system:

Workable democracy is achieved in public affairs through the interaction of leaders of different types in strategic positions of influence, who are forced by the interaction process, the complexity of interest involved in a decisionmaking situation, and

affected parties, access to unbiased forums for debate, and provisions for appeal to an independent reviewing body.

the access of nonleaders to their positions to give attention to all the interests in the society.

E. REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 199-200 (1969). There is a danger that the agency will simply ignore excessive input from outsiders because the agency is unable to assimilate it. See De Parle, *Advise and Forget*, *WASHINGTON MONTHLY*, May 1983, at 40 (discussing the lack of impact of the one thousand plus Presidential Commissions). Many agency officials justify their failure to disseminate information on the need to cut back on paperwork.

A common reaction to procedures designed to guarantee fairness is that they are at best a necessary evil, and at worst, "red tape," far more likely to frustrate policy-makers than to improve it. . . . [O]ne reason fairness requirements delay decisions is that they are often met insincerely, and at too late a stage in the decision process. When fair hearing and review requirements are invoked by parties unfairly frozen out of the crucial decision processes, the stage is set for protracted and bitter conflict.

J. FLEISHMAN & B. PAYNE, *ETHICAL DILEMMAS AND THE EDUCATION OF POLICY-MAKERS* 38 (1980). Another writer listed several factors which indicate the willingness of one agency to cooperate with another.

1. Whether the public agency is threatened with the loss of autonomy, resources, or power, which threat can be reduced through cooperation;
2. Whether the decisionmaking agency perceives the outside agency as having prestige and as being effective in its own programs;
3. Whether there is a perception that the two agencies are at least partially interdependent;
4. Whether the rewards accrued from a coordination effort will clearly outweigh the cost to the decisionmaking agency;
5. Whether agency policy is generally supportive of coordination with outside organizations. Halpert, *Antecedents*, in *INTERORGANIZATIONAL COORDINATION: THEORY, RESEARCH AND IMPLEMENTATION* 54 (D. Rodgers & D. Whetten eds. 1982).

Federal agencies frequently find themselves in positions where they need the assistance of local governments. See Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 *LAND & WATER L. REV.* 355 (1985); Pearlman & Waite, *Controlling Land Use and Population Growth Near Nuclear Power Plants*, 27 *WASH. U.J. URB. & CONTEMP. L.* 9 (1984); Sylves, *Nuclear Power Plants and Emergency Planning: An Intergovernmental Nightmare*, 44 *PUB. AD. REV.* (1984). One author provided a five part test of agency moral conduct:

1. Exercise of discretion should serve the public interest.
2. Agency officials should avoid strict adherence to the organizational routines and conventional wisdom of their agencies.
3. Officers must be truthful in all dealings with the public and with the agency. Decisionmakers should comply with the established procedures, which are the single most important source of accountability.
4. Decisionmakers should comply with the established procedures, which are the single most important source of accountability.
5. Officials should avoid accomplishing organizational ends with means that violate the law or undermine citizen trust in government. Warwick, *The Ethics of Administrative Discretion*, in *PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS* 93 (J. Fleishman, L. Liebman & M. Moore eds. 1981). See also R. BELL, *THE*

Of course, such procedural rights are not the only means by which the people express their will in a democratic system. The people elect legislators and executive officers to draft, enact and enforce public laws. Such statutes very specifically direct federal agencies to implement general policies and courses of action,²²² including federal development projects on federal land in urban areas. A local community exercising its full procedural rights can jeopardize these legislatively directed projects. At this juncture, the federal agency decisionmaker faces a dilemma. If he agrees to accommodate the local opinion, the official risks project delay. In some cases, the process leads to debate so intense and prolonged as to make completion of the legislative mandate impossible.²²³ In confronting this dilemma, some officials choose to provide only limited access to the decisionmaking process in order to move forward with the project.

B. *The Dilemma of Choice in Federal Land Use Decisions*

Because of his conflicting responsibilities, the public sector decisionmaker must analyze the values and interests at stake in all matters with which he is concerned. In the area of land use control, the public official's duty is even more difficult because of the nature of the social values at issue.²²⁴ Any particular land use decision may involve eco-

CULTURE OF POLICY DELIBERATIONS (1985) (recommending a "legal culture" to control bureaucratic decisionmaking). See also S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

222. See E. BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW 98-147, 221-47 (1977) (discussing conflicts between public agencies and special interest groups after Congress passes legislation).

223. Some argue that the mandate for "perfect planning" leads inevitably to paralysis of agency action. Behan, *RPA/NFMA—A Time to Punt*, 79 J. FORESTRY 802 (1981). Others find that public involvement in land use planning processes takes decisionmaking improperly away from experienced land managers and gives it to lawyers and others who, together, lack common sense. Fairfax, *RPA and the Forest Service*, in A CITIZEN'S GUIDE TO THE FOREST AND RANGELANDS RENEWABLE RESOURCES PLANNING ACT 205 (W. Shands ed. 1981).

224. See H. JONAS, THE IMPERATIVE OF RESPONSIBILITY: IN SEARCH OF AN ETHIC FOR THE TECHNOLOGICAL AGE (1984); M. REIN, SOCIAL SCIENCE AND PUBLIC POLICY 136-38 (1976); J. PETULA, AMERICAN ENVIRONMENTALISM: VALUES, TACTICS, PRIORITIES (1980); Ezrahi, *The Jensen Controversy: A Study in the Ethics and Politics of Knowledge in Democracy*, in CONTROVERSIES AND DECISIONS: THE SOCIAL SCIENCES AND PUBLIC POLICY 149 (C. Frankel ed. 1976); Manheim, *Ethical Issues in Environmental Impact Assessment*, 2 ENVTL. IMPACT ASSESSMENT REV. 315 (1981). See also Humphrey & Buttel, *The Sociology of the Growth/No-Growth Debate*, in ENVIRONMENTAL POLICY FORMULATION: THE IMPACT OF VALUES, IDEOLOGY AND STANDARDS 125 (D. Mann ed. 1981).

logical and social welfare values, individual rights, aesthetics, historical and cultural perspectives, and similar quality of life values. Due to the complexity of these factors, the potential exists for the personal value judgments of the public official to influence the shape of the ultimate decision.

Reliance on the personal judgment of the public decisionmaker, though problematic, is an accepted part of the governing process. Analysis cannot go on forever and in the end a choice must be made. Yet the requirement that the decisionmaker consider all reasonable options safeguards against abuse of discretion. This process which forces an administrative officer to uncover alternatives arises from the assumption that an open decisionmaking system will serve the public good.

Responsible public decisionmakers may find an advantage in the testing of logic which occurs in an open forum. Many public officers recognize the need to be separated from illogical positions within their agency. By extending participation in the decisionmaking process beyond the borders of his organization, the administrative official can build confidence in the integrity of the system and in his own fairness and responsibility as a decisionmaker.

VIII. THE POTENTIAL EFFECT OF A LOCAL GOVERNMENT'S SKILLFUL NEGOTIATING EFFORT

Many federal agency officials attach great importance to their duty as agency advocates. As stated in the introduction to this Article, the advocacy role of public institutions, including federal agencies and local governments, is an accepted part of our system of government. We assume that this political haggling between the various units of government leads to policy decisions which satisfy the public need. This section attempts to identify the vulnerabilities of federal agencies in land use controversies with local governments.

A. *Negotiation as the Essence of Local Government—Federal Agency Problem Solving*

Local governments and federal agencies seldom resolve their conflicts in court or in a formal administrative proceeding. More commonly, negotiation resolves the controversy.²²⁵ In negotiations, federal

225. See G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986); P. CULHANE, *PUBLIC LANDS POLITICS: INTEREST GROUP IN-*

agencies may seek to influence the outcome of the negotiations by claiming preemptive authority under the supremacy clause, exclusive legislation clause, or some other constitutional power.²²⁶ The presence of federal power may create the perception that local governments are incapable of stopping the federal government.

Those familiar with the art of negotiation,²²⁷ however, understand

FLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 22-29, 232-46 (1981).

226. *E.g.*, *United States v. McGee*, 714 F.2d 607 (6th Cir. 1983); Jampoler, *The Navy as Neighbor*, PROCEEDINGS U.S. NAVAL INST., Sept. 1982, at 51.

227. For a general discussion of the art of negotiation, see S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION 19-89* (1985); R. KUHN, *DEALMAKER: ALL THE NEGOTIATING SKILLS AND SECRETS* (1988); B. RAMUNDO, *EFFECTIVE NEGOTIATION* (1984) (available from the National Law Center, The George Washington University); Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982). There are several theories of negotiation. The two more prominent, competitive negotiation and problem-solving negotiation, are compared in Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOTIATION J. 179 (1986). The problem-solving theory of negotiation is advocated in the book R. FISHER & W. URY, *GETTING TO YES* (1981). Fisher and Ury describe a principled negotiation process where issues are decided on their merits. The Fisher and Ury approach has five basic themes.

1. Separate the people from the problem. The parties should see themselves as attacking the problem, not each other.

2. Focus on interests not positions. A position is what the party wants. An interest is why the party wants it. Focusing on interests may reveal mutual or complementary interests that will make agreement possible.

3. Invent options for mutual gain. Even if the parties' interests differ, there may be bargaining outcomes that will advance the interests of both.

4. Insist on objective criteria to govern the outcome.

5. Know your best alternative to a negotiated agreement. The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you risk entering into an agreement that you would be better off rejecting or rejecting an agreement that you would be better off entering into.

For other discussions of this problem-solving negotiation theory, see F. JANDT, *WIN-WIN NEGOTIATING: TURNING CONFLICT INTO AGREEMENT* (1985); L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987); Byrnes, *Applying Negotiating Theory to Real-Life Bargaining Situations on the Municipal Level*, 15 J. COLLECTIVE NEGOTIATION PUB. SECTOR 25 (1986); Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984); Straus, *Collaborating to Understand—Without Being a "Wimp"*, 2 NEGOTIATION J. 155 (1986).

Advocates of the competitive theory of negotiation assert that the *Getting to Yes* is naive because it fails to acknowledge that the outcome of bargaining turns on the respective ability of the parties to exert leverage. See White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115 (1984). For the classic competitive or leverage-centered theory of negotiation, see B. RAMUNDO, *EFFECTIVE NEGOTIATION* (1984); T.

that a party's ability to gain an advantage over another is not always directly related to the legal authority possessed by any one party.²²⁸ In fact, a weaker party with an awareness and understanding of the concepts of successful negotiation can gain the advantage over another.

Generally, a skillful negotiator is alert to any advantage which may permit effective exploitation or defense.²²⁹ Of course, one such advantage may be the effective use of legal process. For example, a threat to use a judicial or an administrative dispute-resolution process²³⁰ may lead to consensus. The point is that local governments may have certain situational opportunities which give them special advantage or leverage in dealing with federal agencies.²³¹ Although these advantages do not guarantee the local government's success over the federal gov-

SCHELLING, *THE STRATEGY OF CONFLICT* (1960). For Fisher's rebuttal to the criticism of *Getting to Yes*, see Fisher, *Negotiating Power: Getting and Using Influence*, 27 *AM. BEHAV. SCI.* 149 (1983).

Some students of negotiation theory suggest that negotiations between government organizations traditionally lack adequate consideration of the needs of the citizens, who are third parties to the negotiation process. See L. BACOW & M. WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* 362 (1984); Bish, *Intergovernmental Relations in the United States*, in *INTERORGANIZATIONAL POLICY MAKING: LIMITS TO COORDINATION AND CENTRAL CONTROL* 19 (K. Hanf and F. Scharpf eds. 1978); Pollack, *Reimagining NEPA: Choices for Environments*, 9 *HARV. ENVTL. L. REV.* 359 (1985).

For a review of negotiation in land development disputes, see T. SULLIVAN, *RESOLVING DEVELOPMENT DISPUTES THROUGH NEGOTIATIONS* (1984); Forester, *Planning in the Face of Conflict: Negotiation and Mediation Strategies in Local Land Use Regulation*, 53 *J. AM. PLAN. A.* 303 (1987). Participants in land use control disputes typically view themselves in a competitive bargaining atmosphere, rather than engaged in problem-solving. See S. PLOTKIN, *KEEP OUT: THE BATTLES FOR LAND USE CONTROL* (1986).

228. See Lax & Sebenius, *Interests: The Measure of Negotiation*, 2 *NEGOTIATION J.* 73 (1986); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. ON REG.* 133, 153-54 (1985).

229. X. FRASCOGNA & H. HETHERINGTON, *NEGOTIATION STRATEGY FOR LAWYERS* 11-26 (1984); Goleman, *Influencing Others: Skills are Identified*, *N.Y. Times*, Feb. 18, 1986, at C1, col. 1.

230. Administrative dispute resolution forums are becoming popular in resolving land use disputes. G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1985); Susskind and Ozawa, *Mediated Negotiation in the Public Sector: The Planner as Mediator*, *J. PLAN. EDUC. & RESEARCH*, Aug. 1984, at 5. See also Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *HARV. L. REV.* 668 (1986); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 *HARV. L. REV.* 637 (1976).

231. For a discussion of the techniques and problems of power mobilization, see M. DEVTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973); J. HIMES, *CONFLICT AND CONFLICT MANAGEMENT* (1980); *THE SEARCH FOR COMMUNITY POWER* (W. Hawley & F. Wirt eds. 1974).

ernment, the local government's recognition and skillful use of leverage increases its chances of a favorable result.²³²

In its simplest form, leverage is merely exploitable substantive or procedural advantage. Special advantage or leverage exists when the real or perceived cost of disagreement is so great that the party feeling the disproportionate cost is more easily pressured into agreement.²³³ Obviously, the party with the harder facts is in a better bargaining situation because of the substantive advantage it enjoys. Strength can also be derived from the process associated with the dialogue, including developments in the less formal communications between the parties,²³⁴ and any tacit communication.²³⁵ Another advantage may simply be a

232. R. COBB & C. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972) (classic discussion of the public's influence on "elite decisionmaking"). One author suggested that the absence of power is not necessarily a limiting factor in a party's attempt to influence the outcome of a bargaining situation.

The balance of political power does not necessarily dictate the outcome of informal dispute resolution or consensus-building efforts. There are numerous ways that less politically powerful groups can defend their interests and even dominate what happens at the bargaining table. Coalitions among politically less powerful groups, for example, can alter anticipated outcomes. Groups experienced in face-to-face negotiation, even those with ostensibly less political power, can do surprisingly well if they know how to present and argue effectively for their interests. Effective persuasion, solid information, and a battery of good ideas can equalize the power of all parties in a dispute.

Susskind, *Mediating Public Disputes*, 1 NEGOTIATION J. 117, 118 (1985).

Of course, disputes in the public sector may be difficult to resolve because of the diversity of issues and the impossibility of defining the public good. See H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 257-335 (1982).

233. See S. BACHARACH & E. LAWLER, BARGAINING, POWER, TACTICS AND OUTCOMES (1981); B. RAMUNDO, EFFECTIVE NEGOTIATION (1984); Lax & Sebenius, *Interests: The Measure of Negotiation*, 2 NEGOTIATION J. 73 (1986); Tedeschi & Bonoma, *Measures of Last Resort: Coercion and Aggression in Bargaining*, in NEGOTIATIONS, SOCIAL-PSYCHOLOGICAL PERSPECTIVES 213 (D. Druckman ed. 1977).

234. Bernard Ramundo suggests a global approach to negotiations, where the negotiator uses every contact with the other side to further his position. "Chance" meetings or contacts on other matters, give the negotiator an opportunity to probe the other side's position and to "best orchestrate, manipulate, and exploit apprehension, uncertainty and expectations." B. RAMUNDO, EFFECTIVE NEGOTIATION 66-67 (1984).

235. The skill of interpreting tacit communication is important for the successful negotiator to expose the other side's true intentions or position. For a general discussion of the practice and exposure of deception in society, see D. DRUCKMAN, R. ROZELLE & J. BAXTER, NONVERBAL COMMUNICATION: SURVEY, THEORY AND RESEARCH (1982); P. EDMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS AND MARRIAGE (1985); J. WIEMANN & R. HARRISON, NONVERBAL INTERACTION (1983); Thompson, *Deception and the Concept of Behavioral Design*, in

disparity in the skill level of the respective negotiators.²³⁶ Similarly, a negotiating misstep, such as a premature disclosure of information, may present the other side with an opportunity for a more favorable result.²³⁷ In summary, attention by a local government or federal agency only on the facts or the merits will disadvantage that organization.²³⁸

DECEPTION: PERSPECTIVES ON HUMAN AND NONHUMAN DECEIT 53 (R. Mitchell & N. Thompson eds. 1986).

236. The personality, experience, training, and alertness of the negotiator have a significant impact on the outcome of the bargaining process. See J. KOTTER, POWER AND INFLUENCE 31-51 (1985); H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 119-26 (1982); Fisher & Siegel, *Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?*, 36 CATH. U.L. REV. 395 (1987); Spector, *Negotiation as a Psychological Process*, 21 J. CONFLICT RESOLUTION 607 (1977); Goleman, *Influencing Others: Skills are Identified*, N.Y. Times, Feb. 18, 1986, at C1, col. 1. The teaching of negotiating skills to government and business leaders has become so popular that educational computer software has emerged to help polish bargaining talents. Sandberg-DiMent, *How to Hone Negotiating Skills*, N.Y. Times, Apr. 21, 1985, at F13, col. 1. See also Thornton, *Trial and Error: Courses Hone Government Lawyer's Skills*, Washington Post, Sept. 3, 1986, at A17, col. 2.

237. The study of negotiation as the practice of manipulation and advantage-seeking presents ethical dilemmas for the public sector negotiator. A public official may feel a need to further the principles of democracy. In reality, however, the negotiator who is always fair and open is at a disadvantage in the bargaining process. See text accompanying note 209.

The facts of negotiating life are that puffing, exaggeration, misleading the other side, and even lying are frequently encountered in the behavior of negotiators. The heavy emphasis on the importance of the clever use of ploys in conducting negotiations implies, at the very least, approval of the effort to distract, if not mislead, the other side . . . The failure to note the low level of morality frequently . . . [encountered] at the bargaining table would create a gap in the preparation of the would-be negotiator and leave him exposed in an area where ends tend to justify and dictate the means.

B. RAMUNDO, EFFECTIVE NEGOTIATION 156 (1984). *But see* Lax & Stroud, *Three Ethical Issues in Negotiation*, 2 NEGOTIATION J. 363 (1986).

Of course, the public official is always constrained in his use of deception by the standards of conduct within the official's agency or organization. Recently, there has been a greater effort within the federal government to establish higher standards of personal conduct for public decisionmakers. If an official bargaining on behalf of a local government is not inhibited by a similar code of conduct, there may be an imbalance at the negotiating table. See A. NEELY, ETHICS-IN-GOVERNMENT LAWS: ARE THEY TOO "ETHICAL"? (1984). If the negotiator is a lawyer, the Code of Professional Responsibility influences his role in the negotiation process. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

238. One especially powerful tool of local governments is the discovery and exploitation of any federal agency action which is in violation of the agency's own rules and regulations. See Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEX. L. REV. 1 (1985). It is fairly common for cities to hire a Wash-

B. *Situational Opportunities Which Allow Local Governments to Gain Negotiating Leverage Over Federal Agencies*

1. *Audience Scrutiny.* In negotiations between local governments and federal agencies, the size of the audience and its consequent scrutiny may affect federal agency decisionmaking.²³⁹ The larger the exposure of the negotiations to outsiders, the greater the probability of the federal official being inhibited in his actions. By using such tactics as a press conference²⁴⁰ or correspondence with key congressional representatives, local governments may influence the outcome of the bargaining.²⁴¹ In addition, a local government may gain leverage by combining allies. Thus, where other local governments, the state, or special interest groups share a community's concerns, the federal agency is forced to play to a larger audience and may be more conciliatory in its decisionmaking.

2. *Careerism.* Careerism, the desire of decisionmakers to advance their careers by receiving high marks from their superiors, is a factor that local government negotiators may use to their advantage.²⁴² Careerism becomes a factor when the federal officer's conduct is exposed to a larger audience which includes his superiors. The public official whose career interests are thus engaged may react either by fighting harder or by becoming reluctant to take chances to avoid fatal mistakes. The local government may gain an advantage if it exploits the

ington lobbyist to represent them in federal matters. Pelissero & England, *State and Local Governments' Washington "Reps": Lobbying Strategies and President Reagan's New Federalism*, 19 ST. & LOCAL GOV'T REV. 68 (1987).

239. See generally S. FRANTZICH, *WRITE YOUR CONGRESSMAN: CONSTITUENT COMMUNICATIONS AND REPRESENTATION* (1986); R. RIPLEY & G. FRANKLIN, *CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY* (1980); Forester, *Questioning and Organization Attention: Toward a Critical Theory of Planning and Administrative Practice*, 13 AD. & SOC'Y 161 (1981). For an example of how much exposure a federal agency decisionmaking process can receive, see L. BACOW & M. WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION 195-247* (1984).

240. See D. GRABER, *MASS MEDIA AND AMERICAN POLITICS* (1980).

241. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 17 (1982). Audience manipulation is a common tactic of negotiation. In most cases, it must be endured because a reaction to it may be counterproductive. One defense, however, is to claim bad faith because of the other party's attempts to bargain through pressure tactics rather than on the merits. Further, negotiating positions can be hardened or scheduled meetings rescheduled to demonstrate the counterproductiveness of a resort to this tactic. See B. RAMUNDO, *EFFECTIVE NEGOTIATION* 169 (1984).

242. See generally, B. RAMUNDO, *EFFECTIVE NEGOTIATION* 59-62 (1984); J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 130 (1975).

situation where the federal officer is inhibited by his exposure. By understanding careerism, a local government may gain an advantage by contacting the federal decisionmaker's superior. This tactic may induce favorable action in the negotiating process.

3. *Linkage*. An important advantage to a local government is the opportunity to link a specific issue to another aspect of the relationship.²⁴³ While many federal agencies are relatively independent, they often must rely on the continuing support of local governments. For example, in the area of land use control, federal agencies increasingly depend on local governments to restrict private development near the boundary of federal land.²⁴⁴ These aspects of the local government-federal agency relationship give local governments leverage in negotiating a reduction or elimination of development on federal property.

In a California case, a local government requested that a federal agency comply with local building code regulations in the construction of family housing on federal property.²⁴⁵ The federal agency initially refused to comply with the local ordinance, claiming immunity under the Supremacy Clause.²⁴⁶ However, the federal family housing project depended on the local government approval of sewer hookups.²⁴⁷ When the community linked the issue of building code compliance with the sewer hookup approval, the local government was able to exert considerable leverage over the federal decisionmakers.

4. *Victim Role Playing*. Often a less powerful party can turn its weakness into a significant advantage. For example, the heavy-handed use of federal power may be self-defeating when the local government plays the role of the victim to an influential audience.²⁴⁸ The key for

243. See R. COBB & C. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 112-24 (1972); Bacharach & Lawler, *Power Dependence and Power Paradoxes in Bargaining*, 2 NEGOTIATION J. 167 (1986).

244. E.g., Hiscock, *Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority*, 7 J. ENERGY L. & POL'Y 35 (1986); Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355, 391-93 (1985); Pearlman & Waite, *Controlling Land Use and Population Growth Near Nuclear Power Plants*, 27 WASH. U.J. URB & CONTEMP. L. 9 (1984); Smollar, *Bullet Train Seen Threat to Marine Base: Reports Say Route Would Disrupt Training at Camp Pendleton*, L.A. Times, Jan. 20, 1984, at I28, col. 1.

245. Jampoler, *The Navy as Neighbor*, PROCEEDINGS U.S. NAVAL INST., Sept. 1982, at 51.

246. *Id.*

247. *Id.*

248. See B. RAMUNDO, EFFECTIVE NEGOTIATION 41-42, 139-40 (1984). Defenses to the victim-playing ploy are suggested in Kuechle, *Negotiating With an Angry Public*,

local governments is to assure enough publicity to generate audience pressure. The objective of victim role playing is to get the federal agency to be especially accommodating of the local government's needs.

5. *Divide and Conquer.* The federal government is especially susceptible to the exploitation of differences between federal agencies²⁴⁹ or between individuals within the agency.²⁵⁰ In such cases, a local government may gain leverage by recruiting allies from other agencies or from individuals within the agency. This tactic is simplified by the existence of disgruntled agency employees. As public organizations, federal agencies are especially vulnerable to the cultivation of allies by local governments.

CONCLUSION

Although it appears that federal agencies have exclusive control over activities on federal property, there are legal, ethical, and political bargaining factors which limit the discretion of federal decisionmakers. These restrictions may be especially significant in those cases where federal activities conflict with local community concerns. In many such situations, federal law now directs federal land managers to recognize and address conflicts with local governments. Moreover, the ethical posture of the particular federal officer, who may feel the need to be democratic or fair, can play an important role in determining the strength of the federal power.

Federal law and the ethical tendencies of the federal officer are only two of many factors which may influence the final federal position. In practice, federal agency land use decisions evolve from intra-agency

1 NEGOTIATION J. 317 (1985). To counter the potential for public pressure through victim role playing, many private and public agencies created public relations departments. See Hart, *Public Relations for Public Approval*, URBAN LAND, Feb. 1986, at 19; Palmer, *Uncle Sam's Ever-expanding P.R. Machine*, Wall St. J., Jan. 10, 1985, at 26, col. 3.

249. The tactic of pitting one federal agency against another is common where the land use dispute involves environmental values. E.g., *Fritiofson v. Alexander*, 772 F.2d 1225, 1227-34, 1247 (5th Cir. 1985); Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1 (1985).

250. See S. TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 27-29, 93-166 (1984) (discussing the impact on federal agency decisionmaking of the NEPA interdisciplinary approach requirement). The divide and conquer ploy is discussed in B. RAMUNDO, EFFECTIVE NEGOTIATION 171-73 (1984).

and inter-organizational negotiations. In this bargaining arena, federal agencies are extremely vulnerable to pressure from an outside special interest group, such as a local government. The degree of influence which a local government asserts over a federal agency is directly related to the local government's skillful exploitation of these federal agency vulnerabilities.

