ADDRESSING THE ISSUE OF THE ECONOMIC IMPACT OF REGIONAL MALLS IN LEGAL PROCEEDINGS*

*MICHAEL FIX***

I. INTRODUCTION

The advent of suburban shopping centers and regional shopping malls has transformed both the location and scale of American retailing enterprises. Over the past two decades, shoppers have purchased goods with increasing frequency in suburban and exurban centers.[1] Until recently, the size of these commercial clusters consistently grew as the strip shopping center evolved into the regional mall, which in turn evolved into the superregional mall.[2]

As suburban shopping centers and malls began to proliferate, a parallel decline in retail sales occurred in central cities and their cen-

---

* This paper was prepared under contract between the Urban Institute and the Department of Housing and Urban Development. The paper was presented in December, 1979 at the Shopping Centers, U.S.A. Conference, jointly sponsored by the Center of Urban Policy Research of Rutgers University and the Department of Housing and Urban Development.

** Research Associate, Urban Institute, and member of the Washington, D.C. Bar; B.A. Princeton University, 1972; J.D. University of Virginia, 1977. The author would like to thank Thomas Muller of the Urban Institute for his guidance and assistance in the research and writing of this paper.

1. *See* Weaver and Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URBAN L. ANN. 57, 59-60 (1977).

2. *See* T. Muller, Regional Malls and Central City Retail Sales—An Overview 11 (Dec. 13, 1979) (Urban Institute—prepared for Shopping Centers, U.S.A. Conference) [hereinafter cited as Muller].

tral business districts.[3] Simultaneously, the cities suffered such injurious effects as reduction of tax revenues, diminution of retail employment opportunities, and limitations on the variety of consumer goods available, as well as the flight of professional services to the suburbs.[4] Some assert that each of these problems is in part attributable to the intense economic competition between stores in the central city and the suburbs.

Until 1958, malls captured less than five percent of all shopper good sales.[5] In the 1980's, however, one out of every three dollars spent on department store merchandise will be spent in a mall.[6] Furthermore, although malls are increasing their share of all retail sales, their overall sales of goods declined from 14.8 percent in 1972 to 13 percent in 1979.[7] In part, this decline has resulted from the slow growth in disposable personal income, which has increased at a rate of only two percent annually since 1972.[8]

In the last decade, increased construction of regional malls has filled a number of major urban markets to full capacity while occasionally over saturating others. As a result, shopping mall analysts and developers believe that the greatest potential for further development of regional malls is in regions surrounding small cities, the so-called "mid-markets" serving populations of approximately 150,000 people.[9] This shift from the larger, more saturated urban markets may have significant legal implications.

To an even greater extent than before, struggles surrounding the development of malls will prove to be interjurisdictional. The operation of regional malls can cause competitive injuries to merchants in other jurisdictions, away from the development site. Under such circumstances, local governments, forced to bear the economic brunt of

3. *See* Weaver and Duerksen, *supra* note 1.

4. F. Spink, Jr., Downtown Malls: Prospects, Design, Constraints, at 1 (Dec. 13, 1979) (Urban Institute—prepared for Shopping Centers, U.S.A. Conference) [hereinafter cited as Spink].

5. *See* Muller, *supra* note 2, at 7-11.

6. *Id.* at 8.

7. *Id.* at 10.

8. *Id.* at 10-11.

9. *See* Spink, *supra* note 4, at 5. The author reached this conclusion regarding the potential for "mid-market" development from two analyses. *See* Engelen, *What is the Future of Downtown Retailing in Middle America?*, 38 URBAN LAND No. 9, at 5 (Oct. 1979); Schwartz, *The Middle Market: An Idea Whose Time Has Come*, 38 URBAN LAND No. 9, at 6 (Oct. 1979).

new development, may be unable to properly protect their businesses. Zoning, the legal device most often used to regulate such developments, will not always be an available remedy;[10] therefore, new strategies founded on other legal bases must develop.

The regional retail competition brought about by the proliferation of suburban malls has forced lawyers and policy makers to confront a range of previously unaddressed questions: 1) whether an economic impact ratonale should be used to safeguard the fiscal well-being of urban areas from competition by regional malls; 2) whether the adoption of such a rationale would constitute an unprecedented preference for the economic vitality of one economic area over another; and 3) whether it would advance the welfare of the larger population.

This paper will describe the use of federal and state regulations to protect older urban areas from fiscal damage purportedly inflicted by the development of regional shopping malls. Specifically, the three sections of this paper will explore: the use of conditions imposed on federal grants; state and federal environmental review requirements; and state land use and environmental laws, as instruments for impeding or halting the development of regional shopping malls.

II. Conditions Imposed on Use of Federal Funds

A. *Restrictions on the Use of Federal Funds: Federal Economic Development Acts*

Both Congress and agency rulemakers have placed numerous constraints on the use of federal funds which could restrict their use in the development of regional shopping malls.[11] Several federal programs contain funding restrictions which apply to both private and public recipients. For example, the Public Works and Economic Development Act,[12] the Appalachian Regional Development Act,[13] and

10. For a detailed treatment of the use of zoning to regulate competition, see Weaver and Duerksen, *supra* note 1. The authors note some problems with using zoning to briefly regulate shopping malls. First, one obvious problem is that municipalities lack jurisdiction to interfere with adjacent communities. Second, many cases state that the use of zoning to control competition is impermissible. The authors do argue, however, that zoning for such purposes is desirable as well as justifiable. *Id.* at 65.

11. *See* notes 12-15 and accompanying text *infra*.

12. 42 U.S.C. §§ 3121-3246h (1976). The Act's implementing regulations are found at 13 C.F.R. § 309.3(a)-(i) (1980). The following are examples of restrictions on federal funds found under the Economic Development Act (EDA) regulations:

> EDA will not extend financial assistance which will assist establishments relocating from one area to another. . . .

the loan and grant programs of the Farmers' Home Administration[14] (FMHA) and the Department of Housing and Urban Development[15] are among the federal programs with such funding limitations. Although the purpose behind these funding restrictions was originally to control interregional industrial and commercial movement,[16] a

a) "Relocation" means the transferring of jobs from one area to another with EDA assistance. "From one area to another" means from one labor area of the country to another labor area of the country. However, projects relocating within a labor area and resulting in the loss of existing jobs are not eligible to receive EDA financial assistance. . . .

c) Jobs may be transferred by

1) Closing an establishment in one area and opening a new establishment in another area, or

2) Expanding an existing establishment in a new area and reducing the number of jobs in the original location or in any area where the expanded establishment conducts operations. . . .

e) EDA financial assistance is not prohibited for the expansion of an existing business entity through the establishment of a new branch, affiliate, or subsidiary which will not result in an increase in unemployment in the area of the original location or in any other area where such entity conducts business operations. However, EDA will not extend financial assistance if the Secretary has reason to believe that such branch, affiliate, or subsidiary is being established with the intention of closing down operations of the existing business entity in the area of its original location or in any other area where it conducts such operations. . . .

Id.

13. 40 U.S.C. App. §§ 101-405, *terminated in part*, Oct. 1, 1979 (1976 & Supp. III 1979). Subsection 224(b), *terminated* Oct. 1, 1979, had provided:

No financial assistance shall be authorized under this act to be used (1) to assist establishments relocating from one area to another; (2) to finance the cost of industrial plants, commercial facilities, machinery, working capital, or other industrial facilities or to enable plant subcontractors to undertake work theretofore performed in another area by other subcontractors or contractors. . . .

14. 7 U.S.C.A. §§ 1921-1995 (Supp. III 1979). The Farmers' Home Administration aids in implementing numerous grant programs contained in the above cited statutes.

15. The Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5319 (1976 & Supp. III 1979), which provides:

No assistance may be provided under this section for projects intended to facilitate the relocation of industrial or commercial plants or facilities from one area to another, unless the Secretary finds that such relocation does not significantly and adversely affect the unemployment or economic base of the area from which such industrial or commercial plant or facility is to be relocated.

Id. § 5318(i) (Supp. III 1979).

16. For an example of congressional consideration of the regional struggles, see H.R. REP. No. 51, 89th Cong., 1st Sess. 5, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1373, 1375-77.

policy product of the sunbelt-frostbelt political struggles, they also apply to interregional relocation of major retail outlets.

Restrictions on the use of federal monies under the economic development acts fall into two primary categories. First are those restrictions that prohibit the use of grant funds to support proposals which would lead to the transfer of any employment or business activity from one area to another.[17] Second, other restrictions prevent the use of federal support for projects which would lead to increased "availability of services or facilities" in the area "when there is not sufficient demand for such goods, materials, commodities, services, or facilities to employ the efficient capacity of existing competitive, commercial or industrial enterprises, . . ."[18]

There are two principal rationales for invoking these restrictions. The first reason is employment related: federal funds must be withheld from projects which could cause relocation of firms from one area to another, thereby resulting in increased unemployment.[19] The second reason is market related: government policy attempts to keep excess supply in check. Accordingly, the federal government denies support to projects which might cause an oversupply of manufactured or saleable goods within a particular market area.[20]

Under competitive market conditions, the development of regional shopping malls on the urban fringe and the concurrent transfer of sales from city to mall stores may have a number of adverse employment-related effects. First, a decline in sales can result in a reduction of retail employment within the urban center. Next, since malls are arguably more labor efficient than downtown retail stores, retail employment within the regional labor market may drop as well.[21] Fi-

17. *See* 13 C.F.R. § 309.3 (1980).

18. *Id.* § 309.2.

19. *See, e.g., id.* § 309.3(b), (c)(1), (2). Note that the language of these regulations neatly fits intraregional as well as interregional shifts. The regulations are applicable, for example, to the relocation of a national chain department store from the central business district of an aging metropolitan area to a mall in the surrounding suburbs.

20. *Id.* § 309.2.

21. *See* Peirce and Hagstrom, *White House Goes Downtown With its Shopping Center Policy*, 11 NAT'L J. 1943 (Nov. 17, 1979) [hereinafter cited as Peirce & Hagstrom]. In their article on the Carter Administration urban policy, the authors noted the comments of the assistant secretary of HUD, Robert C. Embry. The assistant secretary, in examining problems caused by mall development, stated that "[r]egional shopping centers . . . frequently take retail jobs away from poor people who depend on public transit, which often does not serve suburban and rural locations." *Id.* at 1944.

nally, reduced urban employment may result in the displacement of urban employees, as many central city retail workers earn only the minimum wage and have little incentive to commute to new, suburban locations.[22] As a result, if conditions exist such that an urban market is in jeopardy, proper regulation of the disbursement of federal funds can help prevent such injuries.

Federal aid also may be withheld from proposed projects when the resulting relocation of firms might produce an excess of supplied goods.[23] Oversupply prevents existing commercial enterprises from operating at an efficient capacity. The regulations, then, link the denial of federal aid to market conditions, whenever there may be an excess of supply over the existing demand.

Recently, in *Mayor of Cumberland v. Daniello*,[24] the City of Cumberland, Maryland attempted to protect its local businesses through the use of these two types of federal funding restrictions. The city filed suit in the federal district court for Delaware, seeking to enforce restrictions found in the FMHA grant program for Community Water and Waste Disposal Facilities. These provisions were applicable to a water main network that would run to a proposed regional mall. The city claimed that the primary user of the completed water main network would be the mall, rather than the rural residents.[25] The city's attorney argued that the federally funded project would cause a damaging shift of business and employment away from the city, and to the planned regional mall in outlying Lavale, Maryland.[26] In addition, he asserted that construction of the proposed mall would result in undesirable competition with merchants in downtown Cumberland for retail sales. There would also be an increase in shopper goods where the demand for them was insufficient. The court, however, failed to reach the merits of the case, both because the plaintiffs voluntarily sought dismissal and because the water main network was completed before trial.[27] Although the ef-

22. *See* note 21 and accompanying text *supra*. *See also* Muller, *supra* note 2, at 18-20.

23. *See* note 20 *supra*.

24. No. 79-104 (D. Del., filed Feb. 28, 1979) (dismissed voluntarily on plaintiff's motion).

25. Complaint at 2, Mayor of Cumberland v. Daniello, No. 79-104 (D. Del., filed Feb. 28, 1979).

26. *Id.* at 10.

27. *See* note 24 *supra*.

fort failed, *Daniello* illustrates the potential use of federal funding restrictions to protect existing business districts.

The effect of employing such restrictions on federal economic development monies to regulate economic development is consistent with other initiatives by the Carter Administration. The White House's Community Conservation Guidance memorandum[28] has defined three circumstances requiring the preparation of urban impact analyses. Authorization for such analyses exists whenever the development of a regional mall likely will cause either a "signficant loss of aggregate jobs" or a "significant loss of employment opportunities for minorities," or will have "a significant adverse impact on future cost and availability of retail goods and services" within the central city.[29]

President Carter's Community Conservation policy and the federal assistance programs and economic development acts discussed herein raise similar complex economic questions. Determining market size, the efficient capacity of existing commercial enterprises, and the economic and employment impacts of relocating enterprises all require difficult, speculative, and expensive analyses, the performance of which may extend beyond the ability of some lawyers and judges.[30]

Indeed, the problems raised by the above mentioned regulations apply generally to the rapidly proliferating number of laws which mandate impact assessment. How accurately can we forecast the future effects of developments in dynamic market and environmental conditions? What level of resources should private and public agen-

28. The White House, Community Conservation Guidance, Memorandum to All Agencies (Nov. 26, 1979) [hereinafter cited as White House Guidance]. This document was circulated to the federal agencies for the purpose of providing implementing procedures with respect to several of President Carter's policy initiatives, including his "urban" policy.

> The primary objective of the guidelines . . . is to encourage, through appropriate Federal, state and local action, the targeting of limited resources in the redevelopment and/or development by the private sector of older commercial areas. In order to accomplish this, they are aimed at discouraging major federal actions that will directly lead to construction of those . . . large commercial developments that clearly . . . weaken existing communities, particularly their established business districts. . . .

Id. at 6.

29. *Id.* at 7 n.(c).

30. *See, e.g.*, Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (a study of the use and application of economic theories in the legal system). A reading of this article indicates the tremendous complexity involved in integrating legal and economic analysis.

cies devote to knowing the future, and how certain can we be of those results?

It is misleading to suggest that the conditions which attach to the receipt of federal economic development monies will aid city administrators or attorneys opposing the development of regional malls. Although use of federal economic development loans and grants for the construction of malls may increase in the future, particularly in the rehabilitation of central business districts,[31] suburban regional shopping malls rarely employ such funds.[32] Further, other federal funds most relevant to the development of regional malls, including those disbursed under the Department of Transportation's Federal Highway Assistance Program (FHAP)[33] and the Environmental Protection Agency's Construction Grants Program (CGP),[34] contain no comparable funding restrictions in their implementing regulations.

The absence of such constraints in these acts is not surprising. The construction of highways, highway exchanges, wastewater treatment plants, and water and sewer lines might lead to the transfer of population and development from one area to another. Imposing constraints on FHAP and CGP projects could impede the operations of both programs as few grants would be immune from long, expensive legal challenges. A number of the components of President Carter's urban policy, however, among them the White House Community Conservation guidelines, have been designed to place all federally funded projects under scrutiny to determine their economic impact on central cities.[35]

B. *Restrictions on the Use of Federal Funds: President Carter's Urban Policy*

In December, 1979, the Carter Administration issued its Community Conservation policy,[36] creating a number of new obligations for federal agencies. These obligations arise when any agency official

31. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PRESIDENT'S NATIONAL URBAN POLICY REPORT 73-75 (1978).

32. Interview with Dr. Thomas Muller, Principal Research Associate, the Urban Institute, Washington, D.C. (Nov. 11, 1979).

33. 23 U.S.C. §§ 101-155 (1976 & Supp. III 1979).

34. Clean Water Act Amendments of 1977, 33 U.S.C. § 1281a, 1294-97 (Supp. III 1979).

35. White House Guidance, *supra* note 28, at 3.

36. *See* note 28 and accompanying text *supra*.

considers an action leading directly to the construction of large developments which would "clearly and demonstrably weaken existing communities, particularly their established business districts."[37]

The Community Conservation policy requires that federal agencies prepare urban impact analyses whenever:

1) a formal request has been submitted by the chief elected official of a central city or suburb with an existing commercial district;[38]
2) a "federal action" under the National Environmental Policy Act of 1969[39] (NEPA) is pending;[40] and
3) the federal action is likely to lead to "a large commercial development inside or outside the boundaries of the affected community."[41]

The urban impact analysis determines the consequences, both positive and negative, of pending federal action on the existing business districts of communities potentially affected by a proposed development. The analysis explores the long-term effect of the federal action upon both the specific location of the proposed development and surrounding metropolitan areas.[42] Further, the analysis is available to other communities, presumably including aging, neighboring cities economically threatened by the action. Should an analysis reveal "significant negative impacts," such as reductions in aggregate and minority employment opportunities, the fiscal tax base, or the availability of retail goods or services, the federal agency is to "consider appropriate modifications or mitigating options consistent with relevant statutes, the Agency's mission and the President's rational policies."[43]

The Community Conservation program represents a logical extension of the urban policy of the Carter Administration. One objective of that policy is to insure that federal programs are coherent and do

37. White House Guidance, *supra* note 28, at 6.

38. *Id.* at 7 n.(a).

39. 42 U.S.C. §§ 4321-4347 (1976).

40. White House Guidance, *supra* note 28, at 7 n.(a).

41. *Id.* at 7 n.(b).

42. *Id.* at 7. The White House Guidance provides that the preparation of community impact analyses will be coordinated with the NEPA environmental impact procedures, 40 C.F.R. §§ 1500.1-1508.27 (1980), and with the urban impact analyses of the OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-95. White House Guidance, *supra* note 28, at 8-9. This process avoids needless duplication.

43. White House Guidance, *supra* note 28, at 8.

not adopt conflicting strategies toward reviving the nation's older urban commercial districts.[44] The policy requires that federal agencies analyze the urban and community impacts of all major federal initiatives, including the economic effect that federally subsidized projects have on local governments.[45]

The policy was implemented primarily via several Executive Orders issued on August 16, 1978.[46] The orders mandated, among other things, development of a cogent process for analyzing the urban and community impact of all major federal initiatives.[47] In addition, the Executive Orders required that central business districts be given primary consideration in the location of new federal facilities.[48] And to create a coherent policy, an Interagency Coordinating Council was to be created, comprised of heads of major federal agencies involved in the implementation of federal urban and regional policy. The mission of the Council is to work to conserve and strengthen America's communities.[49]

When the President issued these orders, opponents of the Community Conservation guidelines claimed that they unjustifiably expanded government power.[50] These claims were inaccurate, as the policy did not represent an unparalleled extension of government economic authority by either state or federal standards. Clearly, however, a number of federal economic development acts require the withholding of federal support from developments which would result in a damaging shift of business away from older urbanized areas.

---

44. *Id.* at 1-3.

45. *Id.* at 3. Specifically, the Guidance notes that:

> Several agencies, consistent with the thrust of the President's Executive Order 12,074 [43 Fed. Reg. 36875 (1978)], have agreed to subject their major programs and activities to community impact analyses prior to initiating them in order to avoid inadvertent possible negative impacts on cities and their residents. . . .

Id.

46. The Executive Orders, issued on August 16, 1978, were as follows: Exec. Order No. 12,072, 43 Fed. Reg. 36869 (1978); Exec. Order No. 12,073, 43 Fed. Reg. 36873 (1978); Exec. Order No. 12,074, 43 Fed. Reg. 36875 (1978); Exec. Order No. 12,075, 43 Fed. Reg. 36877 (1978).

47. Exec. Order No. 12,074, 43 Fed. Reg. 36875 (1978), at § 1-1.

48. Exec. Order No. 12,072, 43 Fed. Reg. 36869 (1978), at § 1-103.

49. Exec. Order No. 12,075, 43 Fed. Reg. 36877 (1978), at § 1-201.

50. *See* Peirce and Hagstrom, *White House Goes Downtown with its Shopping Center Policy*, 11 NAT'L J. 1943, 1943 (1979). The article notes that the principal critics, developers, and merchants considered the Guidance an unlawful federal intervention into local land use decisions.

The restraints found in the economic development acts resemble those of the Community Conservation policy. Neither proposes to create a federal veto over planned regional shopping malls. The regulations of the economic development acts attempt only to limit subsidization of private investment rather than restrict private initiatives, irrespective of the interregional or intraregional impact. Similarly, the Community Conservation guidelines only limit federal support for malls which would "clearly weaken established business districts."[51]

There are, however, some minor but noteworthy distinctions between the restrictions imposed by the economic development regulations and the Community Conservation guidelines. For example, the federal economic development funds apparently can be withheld on the basis of an *a priori* prediction of their economic effects.[52] Thus, even without an actual evaluation of the economic consequences of a development, the federal government will withhold monies if such expenditures might have a profound, deleterious effect on a city. By contrast, the Community Conservation policy restrictions are more limited, requiring the preparation of an impact analysis before withholding funds.[53] Further, review of the analysis, for the purposes of restricting federal funds, must occur before the issuance of a grant. Once the government makes the grant, an impact analysis is superfluous.[54]

---

51. *See* White House Guidance, *supra* note 28, at 6. It is noteworthy that these limitations on federal funding do *not* mandate the cutting off of federal funds; the administering agency may still fund a project which conflicts with the Guidance guidelines.

52. *See e.g.*, United States Department of Transportation, Urban Policy to Guide Highway Decisions (Nov. 29, 1979) (Press Release). A number of administrative actions which occurred before the Community Conservation program anticipated the policies embodied in the White House Guidance. For example, in November, 1979, the Secretary of Transportation announced that federal funding had been disapproved for a 13.5 mile stretch of interstate highway intended for suburban Dayton, Ohio, because the proposed road would conflict with the President's Urban Policy by taking jobs and business away from the city. *Id.*

53. White House Guidance, *supra* note 28, at 8. The Guidance states:

> 3) If the community impact analysis demonstrates that significant negative consequences will result from the pending federal action, the federal agency responsible for the action should consider modifications. . . .

Id.

54. *See* note 49 *supra*. No statutory provision, nor the Guidance itself, provides for post-grant impact analysis. Thus, once the funds have been allocated, presumably all objections to the project should already have been raised.

The stringency of federal policies in the regulation of malls pales in comparison to the regulatory authority exercised by a number of states. Recognizing the serious social, economic, and environmental consequences of large-scale developments, these states have enacted laws providing tighter regulation of regional and superregional malls than any current or pending federal law or policy.[55] For example, the Vermont legislature adopted Act 250,[56] which authorizes regional review and permit requirements for proposed developments of greater than ten acres.[57] This example illustrates that several states specifically have envisioned and addressed the problems caused by unregulated mall development. State control over malls, therefore, is to date more direct than federal regulations.

In addition to land use controls which can be extended to mall development, a number of states, like the federal government, require environmental impact analyses of the economic effects of large-scale commercial developments on central cities.[58] In light of these controls, the urban conservation policy of the Carter Administration can be seen as consistent with other regulations presently in force; the guidelines, however, pose one problem—they may be only duplicative of current impact evaluation requirements.

Although the Community Conservation program advanced by President Carter may not represent a significant expansion of executive authority, in some ways its promulgation was unusual. Use of Executive Orders and interagency memoranda distinguish it from other legislatively created forecasting requirements.[59] This form of executive action may raise certain legal difficulties. Without undertaking a major study of the constitutional basis for a president to implement this urban policy through executive initiatives, a few observations should be made regarding the use of this political strategy.

During a period of strong antiregulatory sentiment, even rules aimed only at federal executive agencies could fail to clear legislative hurdles, and might thus require summary action on the part of the

55. *See, e.g.*, notes 155-59 and accompanying text *infra*.

56. VT. STAT. ANN. tit. 10, §§ 6001-6089 (Supp. 1980). The statute was first enacted in 1969 to become effective on April 4, 1970. Its purpose is to protect the environment by regulating land use and growth. *Id.* § 6001.

57. *Id.* § 6001.

58. *See, e.g.*, notes 106-09, 134-36 and accompanying text *infra*.

59. *See* notes 61-63 and accompanying text *infra*.

executive. Thus, the promulgation of the urban policy by Executive Orders and the Community Conservation guidelines by interagency memoranda fits neatly within a political tradition of relying on executive action to create programs which would likely meet with substantial congressional opposition.[60] In the instant case, opposition to the President's program most likely will derive from a collective antipathy to new federal regulations *per se* rather than from disagreement with the goal of increasing the degree of consistency among federal programs.

The selection of Executive Orders as the mechanism for implementing President Carter's urban policy may also be otherwise explained. The approach adopted by the policy consists of mandates "which are directed to, and govern actions of, government officials and agencies"[61] rather than orders directed at private citizens. Additionally, the objectives of the President's urban policy can be seen as an extension of prior legislative enactments. In that light, the policy appears consistent with clearly stated legislative action in two areas: first, the importance of determining in advance the primary and secondary impacts of federal actions; and second, the importance of strengthening urban economies. The latter has been the objective of a wide range of economic and social programs enacted over the past several decades, among them the Housing and Community Development Act of 1974[62] and the Economic Opportunity Act of 1964.[63] In a sense, then, the President's Urban Conservation policy can be seen as an attempt to preserve Congress' past financial investment in the nation's central cities.

---

60. *See generally* Fleishman and Aufses, *Law and Order: The Problem of Presidential Legislation*, J. L. & CONTEMP. PROB. 38 (1976); Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44 (1964).

61. *See* White House Guidance, *supra* note 28, at 1-2. One objective of the guidelines was to coordinate federal agencies without creating "new regulations or additional bureaucracy." The concept was to streamline the review and decisionmaking process. An underlying thesis of these guidelines is that some federal actions have caused unplanned urban sprawl. The process requires a more self-conscious assessment of the impact of federal programs on urban areas in an attempt to restore them.

62. 42 U.S.C. §§ 5301-5319 (1976 & Supp. III 1979).

63. 42 U.S.C. §§ 2808-2815 (1976 & Supp. III 1979).

III. Analyzing the Impact of Regional Malls on Central Cities—The Use of State and Federal Environmental Impact Statement Laws

A. *NEPA and Economic Impact*

With the passage of NEPA in 1969, Congress acknowledged the importance of anticipating the wide range of primary and secondary environmental impacts which flow from governmental actions.[64] NEPA requires that any federal agency undertaking a major project prepare a detailed statement of projected environmental effects whenever the quality of the human environment may be significantly affected.[65] Since its enactment, fifteen states have passed "little NEPA's" requiring the preparation of environmental impact statements for developments of various types and sizes.[66] These state statutes are analogous to NEPA and impose similar responsibilities upon state governments.

The history, purpose, effect and problems of the federal act and its state counterparts have been documented fully and frequently.[67]

---

64. *See* Caprio, *The Role of Secondary Impacts Under NEPA*, 6 ENVT'L AFF. 127 (1977). The author discusses the history of NEPA, noting that aside from the obvious primary impacts which NEPA sought to address, secondary impacts caused by federal actions were also to be measured. Her view is consistent with the declaration of policy of § 101(a) of NEPA, 42 U.S.C. § 4331(a) (1976), which states:

> Recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, [Congress] declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare. . . .

Id. See also F. ANDERSON, NEPA IN THE COURTS (1973).

65. 42 U.S.C. § 4332(2)(C) (1976).

66. *See* D. MANDELKER AND R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 1101 (1979).

67. *See generally* F. ANDERSON, NEPA IN THE COURTS (1973); Friedman, *National Environmental Policy Act of 1969: The Brave New World of Environmental Legislation*, 6 NAT. RESOURCES J. 44 (1973); Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295 (1973); Tjossem, *Environmental Policy Acts: Analysis and Application*, 10 WILLAMETTE L.J. 336 (1974); *Symposium—The National Environmental Policy Act of 1969*, 10 IDAHO L. REV. 116 (1973); Note, *Environmental Law—The National Environmental Policy Act of 1969*, 18 LOY. L. REV. 717 (1972); Note, *NEPA, The Supreme Court, and the Future of Environmental Litigation*, 10 SW. U. L. REV. 403 (1978).

Those efforts will not be duplicated here. Rather, the problem here is to determine to what extent federal and state environmental impact statement (EIS) requirements have been interpreted as requiring fiscal and economic analyses for developments likely to have a regional economic effect. More particularly, the question is: When must an EIS include data on the potential effects of a regional mall upon a central business district within the same consumer market area?

The EIS requirement typically arises in administrative and legal controversies when a party either contests the need for or the adequacy of a prepared EIS. The issue of extrajurisdictional fiscal impacts, that is, the impact of proposed malls on neighboring jurisdictions, usually falls within the latter category.

An application for a federal permit, license, or grant can trigger federal environmental review requirements.[68] The scope of review of an applicant's project may extend beyond consideration of strictly physical environmental effects. Thus, for example, to obtain a Section 404 wetlands permit,[69] an applicant may find that evaluation of the regional fiscal impact of his proposed commercial development must be included in an EIS.[70] The requirement and need for submitting an EIS on regional *fiscal* effects of a large-scale project, however, remains less clear and less widely accepted than the need for the EIS when the potential *physical* consequences of a development could be significant.

When the federal and state EIS requirements were written, the drafters apparently considered them distinct from the economic and fiscal impact analyses already accomplished by other methods.[71] In

68. *See* note 64 *supra*. *See also* Dye, *Federal Environmental Law: An Early Warning Guide for General Practitioners*, 31 MERCER L. REV. 737 (1980); Note, *Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements*, 13 U. MICH. J.L. REF. 367 (1980).

69. A wetlands permit is required under the Clean Water Act Amendments of 1977, 33 U.S.C. § 1344 (Supp. III 1979).

70. When § 1344 was amended in 1977, the Army Corps of Engineers lost its exclusive administrative powers under this section. Congress granted the EPA concurrent regulatory powers. Thereafter, the EPA promulgated regulations at 40 C.F.R. § 230.1 (1980) which give teeth to the § 404 wetlands permit requirements. With the EPA's involvement, the likelihood increases that an EIS may be required for a development. *See* PRACTISING LAW INSTITUTE, note 129 *infra*, at 314-15.

71. *See, e.g.*, NEPA, § 102(2), 42 U.S.C.(2), which states:

all agencies of the Federal Government shall . . . .

(B) identify and develop methods and procedures, . . . which will insure that

addition, since NEPA's enactment, some legal quarters have forcefully opposed the introduction of economic issues into the environmental review process.[72] Some courts, for example, have ruled that injuries to a plaintiff's economic interest do not fall within the purview of NEPA.[73] Thus, a claimant pleading *only* economic injury will be found to have no injury "within the zone of interests protected by NEPA."[74] Moreover, courts will dismiss or weigh accordingly claims of environmental harm which are incidental to, or which cloak underlying economic motives.[75]

Nevertheless, when economic injury is attributable to physical environmental impacts, the EIS requirement can be triggered.[76] Further, the effect of growth, which is a secondary impact, may have

---

presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations. . . .

72. *See* notes 73-75 and accompanying text *infra*.

73. *See, e.g.*, Como-Falcon Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979) (holding that a proposal to establish a job corps center on a former college campus raised only social and economic issues, and thus was not within the purview of NEPA); Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978) (holding that the EIS requirement was not triggered merely because the decision to reduce forces at a military base would have a socio-economic impact on the community by eliminating some jobs); Township of Dover v. United States Postal Serv., 429 F. Supp. 295 (D. N.J. 1977) (holding that a relocation of postal facilities which threatened only economic harm did not fall within the zone of interest protected by NEPA).

74. Clinton Community Hosp. Corp. v. Southern Md. Medical Center, 374 F. Supp. 450 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir. 1975), *cert. denied*, 422 U.S. 1048 (1975).

75. First Nat'l Bank of Homestead v. Watson, 363 F. Supp. 466 (D. D.C. 1973). *Accord*, National Ass'n of Gov't Employees v. Rumsfeld, 413 F. Supp. 1224 (D. D.C. 1976), *aff'd sub nom.* National Ass'n of Gov't Employees v. Brown, 556 F.2d 76 (D.C. Cir. 1977). In *National Ass'n*, the district court noted the relationship between economic motives and underlying harm:

> This is not to say that the effects on socio-economic factors play no role in environmental decisionmaking under the NEPA procedures. . . . Their role however is limited, and is significant only in conjunction with primary environmental impacts. *Socio-economic, or secondary effects alone are not protected by NEPA.*

413 F. Supp. at 1229. (Emphasis added).

76. *See, e.g.*, Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2nd Cir. 1975) (holding that socio-economic factors may be considered so long as ecological considerations assume the primary cause for triggering the EIS requirement). *Cf.* Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (holding that NEPA does not apply to economic disruptions in the absence of injury to the environment in the traditional sense).

similar implications, requiring the filing of an EIS.[77] In fact, the EIS preparation regulations issued by the Council on Environmental Quality (CEQ)[78] expressly raise the fiscal issues triggered by growth.[79] The regulations mandate EIS preparation even where the primary impact of the proposed development alone would not.[80] Under the regulations, an EIS must be prepared whenever a project may result in changed patterns of social and economic activities.[81]

In most instances the physical aspects of growth cannot be separated from its fiscal aspects, namely, the changes in patterns of economic activity referred to in the CEQ regulations.[82] Growth in one area may increase tax revenues and service costs, and may lead to economic decline in nearby localities. Outlays for the construction of new infrastructure accompany shifts in the character of communities. These shifts result in the commitment of scarce local resources over extended periods of time. Accordingly, most courts and commentators recognize that the fiscal impacts of population growth, particularly the effect of proposed development on the cost and provision of utilities and services, are necessary components of many environmental impact statements.[83]

---

77. *See generally* Caprio, *supra* note 64. *See also* Comment, *Socioeconomic Impacts and the National Environmental Policy Act of 1969*, 64 GEO. L.J. 1121 (1976).

78. The Council on Environmental Quality was established under NEPA, § 202, 42 U.S.C. § 4342 (1976). The Council is part of the Executive Branch. Its duties include reviewing federal government programs designed to further NEPA's goals. After appraising these programs, the Council makes recommendations to the President regarding implementation and alteration of such programs. *Id.* §§ 202, 204(3), 42 U.S.C. §§ 4342, 4344(3) (1976).

79. *See* 40 C.F.R. §§ 1500.1-.14 (1980).

80. *Id. See also* City of Rochester v. United States Postal Serv., 541 F.2d 967 (2nd Cir. 1976); Prince George's County, Md. v. Holloway, 404 F. Supp. 1181 (D.D.C. 1975); McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975). In these cases, where federal actions resulted primarily in lost employment opportunities, the courts required EIS's prepared.

81. 40 C.F.R. § 1508.8 (1980). *But cf.* City of Davis v. Coleman, 551 F.2d 661 (9th Cir. 1975). In *Davis*, the court noted the limitations of the federal EIS requirement. It stated that NEPA requires preparation of a detailed EIS for all major federal actions significantly affecting the quality of the human environment. *Id.* at 673, *citing* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

Davis states the general view regarding the EIS requirement: look to primary environmental impacts. It appears that the CEQ guidelines give the EIS requirement an even broader reach.

82. *See* 40 C.F.R. § 1508.8 (1980).

83. *See, e.g.*, Hanly v. Mitchell (Hanly I), 460 F.2d 640 (2nd Cir.), *cert. denied*,

Interestingly, however, most court decisions considering the secondary-impact-of-growth issue only indirectly address the adequacy of or necessity for an EIS. These cases state that growth-induced effects on public services are one of several physical consequences of development.[84] They focus on the negative results of sudden growth, such as congested secondary roads and crowded classrooms, ignoring the underlying causes of such results, such as an inadequate local revenue base.[85]

---

409 U.S. 990 (1972) (holding that "environmental considerations" extend beyond air and water pollution). In *Hanley I*, the court noted:

> The National Environmental Policy Act contains no exhaustive list of so-called 'environmental considerations,' but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. . . . The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, over-burdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the "profound influences of . . . high-density urbanization [and] industrial expansion. . . ."

Id. at 646-47.

See also Como-Falcon Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979). In *Como-Falcon*, the district court discussed the categories and factors which must be considered under NEPA:

> In other cases courts have similarly found that impacts on an urban environment must be considered under NEPA. The environmental concerns courts have expressed in these cases may be classified into four somewhat overlapping categories. The first regards what might be termed health and public safety. Courts have examined a project's potential effect on the quality of air and water, the noise level of the community, and the capacity of existing or proposed sewage and solid-waste disposal facilities. Relevant as well is whether the project will affect the local crime rate, present fire dangers, or otherwise unduly tap police and fire forces in the community. The second category involves consideration of the project's impact on social services, such as the availability of schools, hospitals, businesses, commuter facilities, and parking. Apart from its impact on a community's services, a project may alter the character of the area in which it locates—the third category. Conformance to local zoning ordinances, harmonization with proximate land uses, and a blending with the aesthetics of the area are concerns relevant to this category. The final category involves consideration of the project's impact on the community's development policy. Relocation of a federal facility from a downtown to a suburban location, for example, might contribute to urban blight and decay. Neighborhood stability and growth are values which have been found to be cognizable under NEPA.

Id. at 859. *See also* Monarch Chem. Works v. Exon, 466 F. Supp. 639 (D. Neb. 1979) (an EIS must consider the impact of a major federal action upon the local tax base as a legitimate environmental concern).

84. *E.g.*, Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

85. *Cf.* Monarch Chemical Works v. Exon, 466 F. Supp. 639 (D. Neb. 1979) (not-

This reliance on linking fiscal effects to the physical consequences of development can be found elsewhere in NEPA litigation. In *City of Rochester v. United States Postal Service*,[86] the United States Court of Appeals for the Second Circuit found that the transfer of a regional postal facility from downtown Rochester, New York, to a neighboring suburb might cause a suburban migration of up to 1,400 postal employees, and a concomitant loss of jobs for inner-city residents.[87] The court noted that transfer of the facility could ultimately lead to . . . "economic and physical deterioration in the (downtown Rochester) community."[88] Abandonment of the main post office could contribute to an "atomosphere of urban decay and blight."[89]

Perhaps the most significant finding by the *Rochester* court was that the preliminary assessment of the scope of an EIS regarding the Post Office transfer was inadequate.[90] The EIS addressed only the impact of the transfer on the suburb, while failing to consider its effect on the City of Rochester. As a consequence of this deficiency, the court held that the economic impact on the abandoned jurisdiction must be considered along with the environmental impact on the site surrounding the future development.[91] The court recognized the interrelationship between the economic and environmental impacts

---

ing that the loss of local tax revenue *was* an important consequence to be considered in evaluating new developments under an EIS).

86. 541 F.2d 967 (2d Cir. 1976).

87. *Id.* at 973.

88. *Id.*

89. *Id.* Specifically, the court noted:

> The transfer of 1,400 employees alone could have several substantial environmental effects, including (1) increasing commuter traffic by car between the in-city residents of the employees and their new job site . . . (2) (a) loss of job opportunities for inner-city residents who cannot afford or otherwise manage, to commute by car or bus to the [Henrietta] site, or (b) their moving to the suburbs, either possibly leading 'ultimately (to) both economic and physical deterioration in the (downtown Rochester) community,' . . . . [citation omitted] and (3) partial or complete abandonment of the downtown [facility] which could, one may suppose, contribute to an atmosphere of urban decay and blight making environmental repair of the surrounding area difficult if not infeasible.

Id.

90. *Id.*

91. *Id.* Despite the considerations alluded to in the *Rochester* opinion, the court barred plaintiff's claim for an injunction. The court applied the doctrine of laches because the new Henrietta mail facility was 18% completed. *Id.* at 979. For discussion and analysis of the *Rochester* case, see Case Note, 6 FORDHAM URB. L.J. 169 (1977).

of new developments, and that the effects of the development were felt beyond the construction site.

This aspect of *Rochester* can be extended and applied to the economic issues raised by the siting of regional shopping malls. Malls inflict competitive injuries on merchants in other jurisdictions beyond the range of immediate environmental harm and outside the area of analysis typically covered by an EIS. Under the *Rochester* analysis, the coverage of an EIS should include geographically remote jurisdictions in which environmental damage, in the form of urban blight, might arise as a result of economic injury.

In another case, *Dalsis v. Hills*,[92] a federal district court in New York granted standing to a group of downtown merchants for the purpose of bringing an action under NEPA. The merchants petitioned for the drafting of an EIS regarding a proposed downtown mall. Although the merchants would be in direct competition with the new mall, the court found their allegation that they were seeking to "avert blight and deterioration" of the central business district of the town to fall within the zone of interests protected by the act.[93] The additional, well-grounded allegation of environmental degradation created a sufficient claim to grant standing to those whose financial interests would otherwise have placed them outside the scope of NEPA's protection.[94]

Dalsis is interesting for another reason. Unlike most other cases addressing secondary impacts of developments, the project in *Dalsis* was a privately financed commercial venture. In the other cases, the developments at issue were being built by and for the federal government. Even in *Dalsis*, however, the applicability of the EIS requirement was contingent upon some contact with the federal government. *Dalsis* involved two major federal actions. First, HUD granted its approval of an urban renewal project, knowing that a private developer would build a shopping mall.[95] Next, the federal government funded the demolition of substandard buildings on the proposed

92. 424 F.2d 784 (W.D.N.Y. 1976).

93. *Id.* at 786.

94. *Id.* at 786-87. The court noted that the merchants would be affected economically, but also found that they were not merely using the EIS requirement as a shield against competition. *Id.* The potential injury to the central business district was not speculative, and thus provided a basis for the merchants' standing.

95. *Id.* at 787-88.

site.[96] Apparently, then, so long as a significant nexus exists between privately financed projects and prior federal efforts, the "major federal action" designation of *Dalsis* applies. Extending this rationale to shopping mall developments would subject them to EIS requirements.[97]

It appears, therefore, that the economic impact of the development of a regional mall could trigger the drafting of an EIS under federal law. There are, however, many conditions to be met before a petition for an EIS can succeed. To begin with, there must be a "major federal action" which will foreseeably lead to growth.[98] The construction of interchanges off a highway built wholly or partially with federal funds, a federally assisted extension of water and sewer lines, any direct federal or state grant involving at least in part federal funds, and even the grant of water quality or wetlands permits constitute possible "major federal actions."[99]

Next, some tie must exist between the alleged economic injury and the potential physical environmental effects of the project.[100] A party seeking an EIS must amply demonstrate that the development may result in substantial harm such as congested streets, unmaintained public buildings, overcrowded classrooms, and decaying infrastructures, all the tangible products of insufficient services or inadequate funding.[101] Further, as a result of the *Rochester* decision, the locus of

96. *Id.*

97. The *Dalsis* court found that the urban renewal project leading to the development of the mall was a major federal action within the meaning of NEPA. It further stated that the private developer was subject to the EIS requirement through its relationship with HUD and the other government funding involved in the projects. The court, however, denied the requested injunction because it found no irreparable harm would be caused by the mall. *Id.*

98. *E.g.*, Metlakatla Indian Community v. Adams, 427 F. Supp. 871 (D.D.C. 1977). *Metlakatla* states the standard test which serves as a predicate to successful petitioning for an EIS: There must be a major federal action which significantly affects the quality of the human environment. *Id.* at 874.

In a later case, S.W. Neighborhood Assembly v. Eckhard, 445 F. Supp. 1195 (D.D.C. 1978) the same district court set out criteria for determining whether a particular federal action is "major." The factors that must be considered include: 1) the amount of federal funds spent; 2) the number of people affected; 3) the amount of time consumed; and 4) the extent of government planning. *Id.* at 1199.

99. *See generally* Brown, *Applying NEPA to Joint Federal and Non-Federal Projects*, 4 ENVT'L AFF. 81 (1975); McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEXAS L. REV. 801 (1977).

100. *See* notes 73-76 and accompanying text *supra*.

101. *E.g.*, City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir.

the potentially injured party seeking the EIS need not be the area adjacent to the development site. The EIS might have to include a separate jurisdiction within the same consumer market area, if decay in that jurisdiction may be the result of the planned action.[102] Finally, under the *Dalsis* reasoning, the competitive posture of opponents to the mall does not deny them standing to sue so long as they can make a credible claim of physical deterioration.[103]

Other problems remain for parties who hope to use NEPA to inhibit mall development. Some courts have held that developments which do not *per se* cause growth (dams for example) are immune from claims that their construction will lead to increased population pressures.[104] Thus, the foreseeability of population growth brought about by the construction of malls may require substantiation.

The conduct of third parties, including state, local and regional officials who have review power over a development, may influence the extent to which courts acknowledge the foreseeability of growth. The greater the number of intervening parties, such as zoning boards and regional planning commissions, the more speculative the growth potential may be, since widespread participation may indicate widespread resistance. Under these circumstances, courts are less likely to call for the preparation of an EIS.

In summary, the effort to obtain an order calling for a federal EIS to evaluate the economic impact of regional shopping malls on central cities may require that a maze of conditions be traversed. Courts have simplified the path through that maze by a number of recent decisions, among them, *Dalsis* and *Rochester*.

B. *State Environmental Impact Requirements and Economic Impact*

While many state environmental impact review statutes simply restate federal objectives, some impose additional or independent standards for evaluating the effects of large-scale developments.[105] An example would be the New York Environmental Quality Review

1976). *But see* Township of Dover v. United States Postal Serv., 429 F. Supp. 295 (D. N.J. 1977), which explains *Rochester*, pointing out that the economic impacts were only incidental to environmental consequences. *Id.* at 297.

102. *See* notes 86-91 and accompanying text *supra*.

103. *See* notes 92-94 and accompanying text *supra*.

104. *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).

105. *See* notes 106-127 and accompanying text *infra*.

Act[106] and the regulations promulgated thereunder.[107] This section will examine the use of the New York statute in prompting an analysis of the economic need for regional shopping malls within a designated consumer market area.

In 1975, the New York legislature passed the broad environmental conservation act, requiring an EIS for every state and local agency action which might have a significant effect on the environment.[108] The statute defined "action" as including projects directly undertaken by an agency, activities involving the issuance of a law, permit license or certificate, and procedures for making policy and regulations.[109]

Pyramid Co. of Utica[110] provides some insight into the New York EIS requirements and their applicability to regional shopping malls. In 1978, the Commissioner of the State Department of Environmental Conservation initially considered an application by the Pyramid Company to build a mall in the Utica suburb of New Hartford.[111] The Commissioner rejected the application and denied the necessary permits. He found, consistent with the New York law elaborating the requirements of the environmental impact statement, that there was

106 N.Y. ENVIR. CONSERV. LAW §§ 8-0101 to 0117 (McKinney Supp. 1980).

107. 6 N.Y. CODES, RULES & REGS. §§ 617.1-618.2 (1979).

108. *See* 6 N.Y. CODES, RULES & REGS. § 617.1(d), which states:

> It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should be given appropriate weight with social and economic considerations in public policy, and that those factors be considered together in reaching decisions on proposed activities. Accordingly, it is the intention of this Part that a suitable balance of social, economic and environmental factors be incorporated in the planning and decision-making processes of State, regional and local agencies. It is not the intention of the [State Environmental Quality Review Act] SEQR that environmental factors be the sole consideration in decision making.

For a general discussion of the history of the Act, see Comment, *The New York State Environmental Quality Review Act: An Overview and Analysis*, 41 ALBANY L.J. 293 (1977) For a more recent analysis of the development of the New York EIS requirement, *see* Booth and Nichols, *The Uniform Procedures Act: Toward a Comprehensive Permit Review System for the Department of Environmental Conservation*, 44 ALBANY L.J. 542 (1980). For a study of early implementation of the New York EIS requirement, see CORNELL UNIV. DEP'T OF CITY AND REGIONAL PLANNING, SEQR—IS IT A SUCCESS STORY? (1978).

109. N.Y. ENVT'L CONSERV. LAW § 8-0105(4) (McKinney Supp. 1980).

110. N.Y. Dep't of Envt'l Conserv. No. 633-19-5-002 (June 22, 1979).

111. Pyramid Co. of Utica, N.Y. Dep't of Envt'l Conserv. No. 633-19-0073 FWW (Mar. 17, 1978).

an insufficient demonstration of public need for the mall.[112]

In June, 1979, the Commissioner finally approved the application of the Pyramid Company to build the 850,000 square foot mall.[113] He approved the permits for three reasons: First, the economic need for the mall counter-balanced its competitive impact on surrounding shopping areas, including downtown Utica.[114] Second, efforts undertaken by the developer were successful in averting environmental harm.[115] Finally, no feasible alternative site was available.[116] Once satisfied that economic and environmental harm to the neighboring areas would be minimal, the Commissioner permitted controlled development.

After the decision in the *Utica* case, New York law apparently required that the contents of an EIS must consider, *inter alia*, whether sufficient consumer demand exists in the market area to support a regional shopping mall. Under state law, then, the issue of unsatisfied market demand could be interpreted as being preeminently important under the following analysis: Economic need, as advanced in the *Utica* decision, focuses on an unmet demand leakage from the market caused by the unavailability of goods. Unsatisfied demand may justify the development of a regional mall irrespective of the resulting fiscal impact on city merchants and the city economy. Evidence of substantial unmet demand, however, typically illustrated by market leakage, often indicates minimal potential competitive injury.

Following the *Utica* decision, the New York Department of Environmental Conservation held hearings regarding the development of another proposed regional shopping mall, this one to be located in the town of Henrietta, on the outskirts of Rochester.[117] In *Miracle Mile Associates & Town of Henrietta (Marketplace Mall)*, the City of Rochester submitted a memorandum of law in opposition to the project, claiming that the applicant's EIS was "legally deficient" and

112. *Id.*

113. Pyramid Co. of Utica, N.Y. Dep't of Envt'l Conserv. No. 633-19-5-002 (June 22, 1979).

114. *Id.* at the Hearing Officer Report and Final EIS 46-49.

115. *See* D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION at 54-55 (Supp. 1980). The author discusses the application of the New York environmental conservation statute by both agencies and the courts.

116. *Id.*

117. Miracle Mile Assoc. & Town of Henrietta (Marketplace Mall), N.Y. Dep't of Envt'l Conserv. No. UPA 828-09-0002 (Dec. 6, 1979).

"substantively defective."[118] It further argued that the EIS failed to adequately discuss the need for the proposed mall and its social and economic impacts upon the City of Rochester and the region.

The city's memorandum relied on two economic studies which concluded that the proposed mall would not generate new sales but would merely transfer sales from existing locations.[119] The studies found that the net effect of the proposed mall would be the creation of surplus department store space without any substantial increase in sales; thus, no market need for the project could be demonstrated.[120] Consequently, the city asserted that the *Utica* rationale was applicable, and recommended withholding permission to develop the proposed mall.[121] Despite the city's arguments, however, the Commissioner handed down a favorable decision regarding construction of the Marketplace Mall.[122] He approved all relevant state permits and found the project's environmental impact statement sufficient.

The Commission's decision in *Marketplace Mall* established a standard for weighing social and economic impacts of a proposed development in reviewing both an application for permits and an EIS under the New York Environmental Quality Review Act.[123] The Commission refused to give any more than minimal weight to economic impacts where a substantial environmental impact was lacking.[124] Second, the Commission gave heed to the conclusion found in

118. Brief for City of Rochester at 1-10, Miracle Mile Assoc. & Town of Henrietta (Marketplace Mall), N.Y. Dep't of Envt'l Conserv. No. UPA 828-09-0002 (Dec. 6, 1979).

119. *Id.* at 5. The studies were T. Muller, A Critique of the Economic Impacts of the Marketplace Mall (July 25, 1979) (unpublished study), and Real Estate Research Corporation, Statement on the Impact on Rochester CBD Retailing of the Proposed Marketplace Mall (July, 1979) (unpublished study).

120. *See* studies cited *id.*

121. Brief for City of Rochester, *supra* note 118, at 5.

122. Miracle Mile Assoc. & Town of Henrietta (Marketplace Mall), N.Y. Dep't of Envt'l Conserv. No. UPA 828-09-0002 (Dec. 6, 1979).

123. *Id.* at 2. The Commissioner stated that the degree to which social and economic impacts of a proposed development must be considered when reviewing an EIS and permit application "varies directly with the significance of the purely environmental considerations. Thus, the greater the potential adverse economic effect, or the more valuable the affected resources, the greater is the scrutiny which must be brought to bear upon the social and economic factors." *Id.*

124. *Id.*

a report prepared by the hearing officer.[125] The report noted that marketing surveys conducted by the applicant indicated the mall "would be successful and economically viable."[126] Additionally, the report found that the public desired a regional shopping center "both directly and indirectly through government."[127] Finally, the Commissioner ignored the economic hardships suffered by merchants in Rochester, finding such injuries irrelevant to the outcome of the decision. He concluded that "the Department will not impose its judgment in matters which involve open competition in the operation of the free market system of our economy."[128]

By sidestepping the question of the relevance of market need as a

125. Miracle Mile Assoc. & Town of Henrietta (Marketplace Mall), N.Y. Dep't of Envt'l Conserv. No. UPA 828-09-0002 at Hearing Officer Report (Dec. 6, 1979).

126. *Id.* at 56-57.

127. T. Muller, A Critique of the Economic Impacts of Marketplace Mall at 3 (July 25, 1979) (unpublished study prepared to analyze the effects of constructing the new mall).

128. Miracle Mile Assoc. & Town of Henrietta (Marketplace Mall), N.Y. Dep't of Envt'l Conserv. No. UPA 828-09-0002 at 3 (Dec. 6, 1979). In two instances, New York courts have considered the application of the state EIS requirement to economic injuries. In Ecology Action v. Van Cort, 99 Misc. 604, 417 N.Y.S.2d 165 (Sup. Ct. 1979), a New York trial court upheld the interpretations of the EIS requirement given in *Utica* and *Marketplace Mall*. The court held the EIS adequate, finding that although the statute requires consideration of socio-economic factors, its primary purpose is environmental. *Id.* at 614, 417 N.Y.S.2d at 174. In County of Franklin v. Connelie, 95 Misc. 2d 189, 408 N.Y.S.2d 174 (Sup. Ct. 1978), another state trial court reached a contrary result. In *Connelie*, the state sought to transfer a state trooper station to another county. Relying on *Rochester*, the court found the transfer had socio-economic impacts which were environmental effects within the meaning of the statute. *Id.* at 198-99, 408 N.Y.S.2d at 180-81.

Along with New York, Washington is the only other state that has addressed directly whether a state EIS requires consideration of socio-economic impacts on central business districts. In Barrie v. Kitsap County, 93 Wash. 2d 843, 613 P.2d 1148 (1980), the Washington Supreme Court held that an EIS was inadequate because it failed to consider the adverse economic consequences of a rezone in a downtown area. *Id.* at 858, 613 P.2d at 1157. In *Barrie*, Kitsap County rezoned a residential district to a general business classification in order to permit the construction of regional retail shopping mall on the outskirts of Bremerton, Washington. *Id.* at 846, 613 P.2d at 1151. Residents of the rezoned property and Bremerton business interests challenged the rezone, seeking to halt construction of the mall. *Id.* They contended, in part, that the county EIS was inadequate as it failed to discuss the socio-economic impact of the mall on downtown Bremerton. *Id.* at 858, 613 P.2d at 1157. The Washington Supreme Court upheld this claim. *Id.* The court ruled that the state's "little NEPA," WASH. REV. CODE ANN. § 43.21C.030(2)(C)(i), (ii) (West Supp. 1980), required consideration of such economic effects, because the mall could cause the degeneration of the downtown area. Further, the court specifically cited Rochester v.

criterion for approval of regional commercial enterprises, the *Marketplace Mall* decision effectively eliminated market need as a relevant factor for consideration in future cases. In contrast to the *Utica* decision, this decision, and the Hearing Report upon which it was based, equated need with the potential economic viability of the mall. If it was probable that the mall would be profitable, then the existence of a market void, as evidenced by widespread leakage from the consumer market area, was irrelevant. Further, the *Marketplace Mall* decision has negated the importance of the competitive effects of proposed malls on business in the surrounding metropolitan areas. As a result, it appears that New York law only requires a demonstration of potential economic viability for the proposed mall to establish market needs; an examination of the regional network of commercial outlets is unnecessary.

C. *State Land Use and Environmental Laws and Economic Impact*

Within the past decade a number of states have enacted land use and environmental laws which give state and local governments tools for regulating the siting of regional shopping malls.[129] Two principal rationales have been invoked under these acts for questioning the proposed development of malls. The first focuses on site- or pollution-related *environmental* effects of the construction and operation of the project.[130] Site-related impacts include, for example, creation of highway access points for road systems leading to the mall, and disturbance of critical environmental areas. The pollution-related impacts encompass direct and indirect pollution sources, including individual stores within the shopping center, such as dry cleaning

---

United States Postal Serv., 541 F.2d 967 (2d Cir. 1976), discussed *supra*, notes 86-91, to support its holding. 93 Wash. 2d at 858, 613 P.2d at 1157.

Barrie v. Kitsap County most exactly illustrates the potential use of the EIS to regulate the development of regional shopping malls. The *Barrie* Court gave the state EIS requirement a broad construction, but one not necessarily outside the parameters of the statute. Further, *Barrie* demonstrates that although the federal court interpretations of EIS requirements are important, they are not determinative with respect to analogous state EIS requirements. In *Barrie*, the EIS was used effectively to regulate malls without discussing any specific "environmental" effects. The court did not prevent construction, but merely provided safeguards for the protection of the city.

129. *See* Federal and State Environmental and Land Use Considerations for Shopping Centers, in PRACTISING LAW INSTITUTE, SHOPPING CENTERS REVISITED, VOL. 156 at 285-321 (1979). The article discusses the means by which various government bodies regulate mall development.

130. *Id.* at 288-93.

stores, or the center itself, when viewed as a generator of traffic congestion and increased auto emissions.[131]

The second rationale for government regulation of the siting of large-scale commercial development is *economic* and is associated with the social and political objective of mitigating the negative physical impacts of sprawl.[132] Through market analysis, the regulating body can project the regional competitive effects of the new mall and assess the probable impacts in light of the capacity of local governments within the region to adequately develop public services. Decisions are then based, in whole or in part, on the results of that analysis.[133]

Vermont is one state that has interpreted and applied its Land Use and Environmental Law, Act 250,[134] in the above described manner. The 1970 Act was at first basically considered an environmental law. In 1973, however, the Vermont legislature amended it, providing a stronger growth management emphasis to make it more effective in limiting sprawl.[135] The Act vests the state and the nine District Environmental Commissions responsible for implementation with a measure of power unusual by national standards.[136] Each commission has the power of substantive review leading to approval or disapproval of proposed projects.

A recent decision by one of the commissions demonstrates both their power and the applicability of Act 250 to interjurisdictional controversies involving the fiscal impact of outlying shopping malls on central cities. In *Pyramid Co. of Burlington*,[137] a commission denied the applicant company a development permit for a proposed enclosed shopping mall in the Town of Williston, Chittenden County, Vermont. The rejected application, filed in 1977, was for a site located approximately six miles from the central business district of Burlington. The proposal called for two department stores, 80

131. *Id.* at 296.

132. *See, e.g.*, White House Guidance, *supra* note 28.

133. *See, e.g.*, notes 134-47 and accompanyinig text *infra*.

134. VT. STAT. ANN. tit. 10, §§ 6001-6091 (1973 & Supp. 1980).

135. *Id.* § 6043.

136. *Id.* § 6086. This section provides extensive and detailed criteria for evaluating permit applications, and is to be administered primarily by the nine district commissioners provided by § 6026.

137. Application No. 4C0281, District Envt'l Comm'n No. 4 (Oct. 12, 1978). *See also* Peirce & Hagstrom, *supra* note 21, at 1945.

smaller shops, and 20 restaurants, and was to provide a total of 440,000 square feet of commercial space.[138] As the proposed project involved more than ten acres, the provisions of Act 250 required the developer to obtain a land use permit.[139] Thereafter, the commission held lengthy hearings regarding the project, finding that it failed to conform with four of the ten statutory criteria used to assess the appropriateness of a proposed development.[140]

To a large degree, the *Burlington* decision rested on the issue of the economic impact of the mall on the surrounding region. The commission listed seven separate objections to the mall.[141] First, it would create excessive highway congestion. Second, it would impose an immeasurable burden on the fiscal ability of Burlington to provide municipal services. Third, it would generate additional costs on other related public services. Fourth, it did not comply with any duly adopted capability and development plans under Act 250. Fifth, it would rely on central sewage facilities, coupled with an absence of a capital program or plan in Williston. Sixth, it would cause an excessive and uneconomic demand on the region's highways. And finally, it failed to conform with a duly adopted local or regional plan. As a result, even though the project met all the physical environmental standards, the commission rejected the application for the mall using an economic rationale.

The commission projected little future growth in either population or per capita income in Chittenden County. In addition, it found that construction of a 440,000 square foot mall would result in an oversupply of space in 1978 which would remain unabsorbed five years later.[142] It also found that 40.1 percent of the total sales potential of Burlington merchants, or $25,000,000, would be transferred to the mall if it were completed by 1978.[143] As the assessed value of property is a function of its income or rental value, and as the rental value of shopper space is a function of sales, then a reduction in sales would result in a decline in the assessed value of rental space. The commission concluded that the transfer of retail sales would lead to a

138. Pyramid Co. of Burlington, Application No. 4C0281, District Envt'l Comm'n No. 4 at 1 (Oct. 12, 1978).

139. *Id.*

140. *Id.* at 3.

141. *Id.* at 4.

142. *Id.* at 4-5.

143. *Id.*

ten to fourteen percent reduction in Burlington's property tax base in 1978.[144]

The commission held that the Pyramid Mall would impose an unreasonable burden on Burlington's ability to provide municipal services, noting that projected tax losses would not be accompanied by any significant reduction in the demand for public services.[145] The commission further found that the city was already operating at a staffing level "approximately 15 percent below that of other no-growth cities of similar size in the Northeast."[146]

In light of these circumstances, the commission advanced as a test of reasonableness, "whether a municipality may expect to receive back benefits from the development, either immediate or deferred, which approach its costs."[147] This "unreasonable burden" test is applicable not only to the jurisdiction which has attracted the mall but also to each jurisdiction in the consumer market area which might lose a significant percentage of its retail sales.

The *Burlington* decision is also significant because it extends the rationale that permits may be denied when development imposes economic service costs to situations in which the development erodes the fiscal base of a municipality. Thus, parochial decisions of municipalities which start to accrue windfall tax benefits generated by the construction and operation of a mall cannot determine the fiscal future of other local governments which could be "wiped out" by that decision.

The commission's decision left one important fiscal issue unresolved: Does a development unreasonably burden a community if state assistance, made available because of the project, covers in part the lost local revenues? In the case of the Pyramid Mall, Burlington's impaired ability to meet local education expenses would have been largely offset by increased state aid. As operation of the mall would not have provided significant state revenues to offset the increased

144. *Id.*

145. *Id.* at 8. *See also Peirce & Hagstrom, supra* note 21, at 1945.

146. Pyramid Co. of Burlington, Application No. 4CO281, District Envt'l Comm'n No. 4 at 25 (Oct. 12, 1978). *See* G. Sternlieb, Impact of Pyramid Mall on Burlington's Municipal Fisc (unpublished study at Center for Urban Policy Research, Rutgers Univ.) (Jan. 12, 1978) (analyzing the potential effects of the mall to be constructed by the Pyramid Co. in Williston, Vermont).

147. *See* Pyramid Co. of Burlington, Application No. 4CO281, District Envt'l Comm'n No. 4 at 26 (Oct. 12, 1978).

level of subsidization due Burlington under state education formulas, other municipalities across the state would have received reduced aid.

No municipality involved in the Pyramid Mall case, however, argued that such reduced aid did constitute an unreasonable burden on its ability to provide eduational services. Thus no finding could be made on the matter. The issue remains unresolved under Act 250.

CONCLUSION

Regional malls, which are welcomed by tax-hungry officials, are now vulnerable to challenges made under state and federal regulations based on projected fiscal impact.

The most effective weapon in the legal arsenal of opponents of regional shopping mall development may be the White House Community Guidance regulations.[148] Assuming that the requisite political will exists within a given administration, the Community Conservation directive could easily be used to delay or halt any mall which requires a significant federal action. Moreover, the broad scope of federal highway,[149] water,[150] and sewer construction[151] grant programs may allow the government to exercise control over large-scale commercial developments. Thus, the economic impact reviews prepared by federal officials within the Department of Housing and Urban Development could prove politically, as well as analytically persuasive.

The Community Conservation Guidance review could be available to all existing retail districts, not just to those in central cities and those which are financially distressed. The only type of commercial location definitely outside its prophylactic coverage is the undeveloped suburban or exurban community which proposes to build a shopping mall. Application of the guidelines to inner city malls is unresolved; perhaps a suburban area with a thriving commercial district could trigger an impact assessment for a mall to be built with federal aid in a distressed central city.

One result of the White House directive may be to limit the usefulness of the funding conditions which attach to the economic development acts discussed above. It should be emphasized, however, that

148. *See* note 28 and accompanying text *supra*.

149. 23 U.S.C. §§ 101-155 (1976 & Supp. III 1979).

150. 42 U.S.C.A. § 3102 (1976).

151. *Id.*

where these conditions come into play, they may be interpreted as *prohibiting* the use of federal categorical grant funds to support developments which lead to a decline in employment or a surplus in the availability of retail goods within a given consumer market. This should be contrasted with the White House memorandum which requires that an impact review be performed in response to a properly prepared request, but does not require that the results of the review influence federal action.

The environmental and land use acts discussed herein will provide less certain aid to the opponent of regional shopping malls. Use of the federal EIS requirement[152] to raise the fiscal issues of regional mall development, despite a number of recent decisions,[153] remains largely unexplored legal terrain. At the state level, officials in New York recently made far less effective use of that state's environmental review law in assessing the regional economic impact of shopping malls than they had in prior cases.[154] The recent decisions departed in subtle, but important, ways from earlier rulings which implied that regional demand analyses would be heavily weighted in the approval process for proposed malls.

Although the District Environmental Commission's decision in the *Burlington* decision has been appealed by the applicant to a state district court, it appears at this time that the strongest regulatory mechanism available for raising and deciding mall siting questions on economic issues is Vermont's Act 250.[155] While the fiscal orientation of the Act may make it *sui generis* from a national perspective, Vermont is not alone in having strong statutory authority for regulating regional shopping malls. Other resource-oriented states, principally Hawaii,[156] Florida,[157] Maine[158] and Oregon[159] have enacted state

152. *See* notes 71-104 and accompanying text *supra*.

153. *Id.*

154. *See* notes 106-28 and accompanying text *supra*.

155. *See* notes 134-47 and accompanying text *supra*.

156. HAWAII REV. STAT. §§ 57-1 to -4 (1976 & Supp. 1980). Under this statute, the state legislature has required regional design planning. Each county must develop regional plans protecting the environment by encouraging controlled growth. *Id.* § 57-2.

157. FLA. STAT. ANN. §§ 380.012-.12 (West 1974 & Supp. 1980). The Florida statute creates a state land planning agency to control development with respect to general land use and coastal zone management. *Id.* § 380.032.

158. ME. REV. STAT. ANN. tit. 38, §§ 481-490 (1964 & Supp. 1980). The Maine statute applies, *inter alia*, to developments of all kinds which occupy a land or water

laws which regulate the location of large-scale commercial enterprises with differing levels of precision and stringency.

area in excess of 20 acres. On such developments, construction can not begin until approved by the Board of Environmental Protection. *Id.* § 482(2).

159. OR. REV. STAT. § 447.010-.990 (1979). Oregon has attempted to regulate construction of new developments by use of a permitting process. *Id.* § 447.820. Upon application for a permit to build, the Executive Department will notify all agencies which possibly have an interest in the application. *Id.* § 447.820(3). Thereafter, all interested agencies will notify the department of their requirements, which in turn will be given to the developer. *Id.* § 447.820(4).

NOTES