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THE QUIET REVOLUTION AND FEDERALISM: INTO THE FUTURE

PATRICIA E. SALKIN*

The innovations wrought by the “quiet revolution” are not, by and large, the results of battles between local governments and states from which the states eventually emerge victorious. Rather, the innovations in most cases have resulted from a growing awareness on the part of both local communities and statewide interests that states, not local governments are the only existing political entities capable of devising innovative techniques and governmental structures to solve problems such as pollution, destruction of fragile natural resources, the shortage of decent housing, and many other problems which are now widely recognized as simply beyond the capacity of local governments acting alone.¹

I. INTRODUCTION

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

This phenomenon of delocalization in land use controls was first recognized by Fred Bosselman and David Callies in their seminal report for the Council on Environmental Quality, *THE*

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1. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 3 (President's Council on Environmental Quality, 1971) [hereinafter *THE QUIET REVOLUTION*].

QUIET REVOLUTION IN LAND USE CONTROL.² In this report, Bosselman and Callies found that land use in the United States, dominated by a local government decision-making process, had developed into a “feudal” system, where municipalities decided land use issues for their own egocentric benefit, increasing their tax base and alleviating their perceived social problems.³ The report explained that locally dominated systems provide municipal officials with a paltry incentive to consider the land use needs of the nearby communities, or even the regions where the municipal governments were located.⁴ This self-protecting behavior by the localities was noticed by state and regional authorities, who began to encroach upon municipal land use authority.

These new regional initiatives addressed issues of larger geographic significance, such as environmental and pollution concerns,⁵ and nationwide, states began to realize the impact local land use decisions were having environmentally, socially, and economically. It became apparent that the impact of local land use regulations knew no political boundaries. A number of regional

2. *Id.*

3. *Id.*

It has become increasingly apparent that the local zoning ordinance, virtually the sole means of land use control in the United States for over half a century, has proved woefully inadequate to combat a host of problems of statewide significance, social problems as well as problems involving environmental pollution and destruction of vital ecological systems, which threaten our very existence.

Id. at 3.

4. *Id.* at 1.

The comprehensive planning envisioned by zoning’s founders was never achieved, in part because the growing interrelatedness of our increasingly complex society makes it impossible for individual local governments to plan comprehensively, and in part because the physical consideration of land use, with which zoning was in theory designed to deal, frequently became submerged in petty local prejudices about who gets to live and work where.

Id. at 2.

5. In many instances, issues of larger geographical significance may not be addressed by local officials due to the lack of perspective, funding, or support. U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL PROTECTION: FEDERAL INCENTIVES COULD HELP PROMOTE LAND USE THAT PROTECTS AIR AND WATER QUALITY 63 (Oct. 2001), available at <http://www.gao.gov/new.items/d0212.pdf>. In this Report to Congressional Requestors, the GAO was asked “to examine how (1) state and local transportation and air and water quality officials consider impacts of land use on the environment and (2) federal agencies can help these officials assess land use impacts.” *Id.* at Highlights. In answering these questions, the GAO came to the conclusion that transportation and environmental officials do not consider the environmental effects of land use because “they are not required to consider these impacts; land use is a local decision and they believe that they have little ability to influence it; and they lack resources, data, and technical tools, such as modeling capabilities.” *Id.*

and statewide statutory models emerged to deal with issues identified as matters of regional or statewide concern. It was this creeping but steady encroachment upon traditional local land use authority which Bosselman and Callies characterized as “the Quiet Revolution.” Since the 1970s, other states, and more notably, the federal government, have adopted statutes and initiated programs that have significantly influenced and encroached upon local land use control. This has set a stage for an ongoing power struggle for the control of policymaking and decision making when it comes to community planning and the land use regulatory regime.

The federal government in particular, seemingly maintaining a low profile when it comes to usurping local land use control, has probably had the greatest influence on local land use control over the last forty years, extending the reach of the Quiet Revolution once led by regional and state governments. In fact, Professor Bosselman remarked six years after *THE QUIET REVOLUTION* was released that Professor Donald Hagman noted the “quiet federalization” of land use controls.⁶ Today, the federal government exerts varying degrees of influence over local land use controls using approaches ranging from incentive based programs, to preemptive legislation and regulation. At one end of this spectrum are legislative and programmatic initiatives that simply serve to provide guidance or perhaps to incentivize or reward certain local land use planning and implementation strategies; and at the other end of the spectrum, new laws have emerged that go beyond mere encroachment on local land use policy, to preemption of local control. Still another set of statutes neither provides incentives nor entirely preempts local control, yet the directive influence exerted in these approaches results in decisions not entirely based upon local desires and plans. Bosselman has also observed that federal programs that construct or pay for the construction of federal facilities strongly influence surrounding land uses as well.⁷

6. FRED P. BOSSELMAN, DUANE FEUER & TOBIN M. RICHTER, *FEDERAL LAND USE REGULATION 1* (1977) (noting that “[t]his was not the result of any organized campaign to involve the federal government more closely in the way the nation’s land is used. Rather, the federal involvement has been incremental—as specific problems have attracted attention, specific programs have been created to deal with them.”).

7. *Id.* at 1-2.

Federal programs affect the use of land in a variety of ways: 1. They directly regulate the use that may be made of land; 2. They fund state or local programs of land use regulations; 3. They require the preparation of plans to guide future land uses; 4. They construct, or pay for the construction of, facilities that use land and that may strongly influence surrounding land uses; and 5. They provide a variety of stimulants and depressants to various segments of the economy that influence the way

Although neither Congress nor the president have articulated a national land use policy to inform local zoning or other land use controls, a de facto, and perhaps ad hoc policy exists that continues to be implemented through numerous laws and incentivized funding programs.⁸ Professor John R. Nolon explains that “there is confusion over the role that each level of government should play regarding land-use planning and regulation[,]” and that to move forward with any meaningful reform there must be a clarification as to the appropriate role for each level of government and how these roles should be coordinated.⁹ Professor Bosselman’s admonition from more than three decades ago again remains true today: “Land use is a changing and controversial area of the law, in which federal policy could move in one of several different directions in the coming years.”¹⁰ We are left with a complex patchwork of both direct and indirect regulations and policies at all levels of government challenging the traditional notion of local land use control.

This Article offers an examination of the federal role in land use planning and regulation set in the context of varying theories of federalism by presenting a historical and modern overview of the increasing federal influence in local land use planning and regulation, specifically highlighting how federal statutes and programs impact local municipal decision making in the area of land use planning. Part II provides a brief introduction into theories of federalism and their application to local land use regulation in the United States. Part III provides a brief overview of federal legislation in the United States which affected local land use across three time periods: first, legislation that existed before the publication of *THE QUIET REVOLUTION*; second, legislation that emerged a quarter century after the publication of *THE QUIET REVOLUTION*; and third, more recent federal programmatic and legislative approaches. Part IV provides analysis of the future of federalism in land use regulation, noting the increasing trend of the federal programmatic influence and the potential future influence on local land use controls. The Article concludes with a warning to local governments to be vigilant and to rethink the paradigm of land use regulation to regain control in certain areas

private users of land behave.

Id.

8. See Patricia E. Salkin, *Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 (2001) (discussing many early attempts at federal control and highlighting the influence over local land use control during the Clinton-Gore Administration).

9. John R. Nolon, *Paradigms of Positive Change: Reordering the Nation’s Land-Use System*, in *PLANNING REFORM IN THE NEW CENTURY* 3, at 5 (Daniel R. Mandelker ed., 2005).

10. BOSSELMAN, FEURER & RICHTER, *supra* note 6, at 7.

to prevent further encroachment by the federal government into matters of local concern.

II. THEORIES OF FEDERALISM AND LOCAL LAND USE CONTROLS

States have the power to enact land use and zoning restrictions pursuant to their police power.¹¹ State legislatures have routinely delegated this authority to local political subdivisions, resulting in hundreds and in some cases more than a thousand local land use plans and policies enacted in a given state.¹² This decentralized process, in the absence of federal law, has provided the opportunity for flexibility, innovation, and experimentation, not often experienced in other countries where the land use regulatory regime is centralized in a federal government.¹³ While THE QUIET REVOLUTION exposed an increasing feeling that many land use matters were not necessarily purely matters of local concern, but rather matters of regional and state concern, there has been a growing parallel shift in the increasing influence by the federal government over matters once viewed as purely local in the field of land use control. This changing dynamic may best be viewed through the lens of federalism theory to ascertain whether this evolving relationship is healthy.

Federalism is defined generally as a system of political organization with a central government exercising some level of control over the whole, with smaller units of government exercising control over their limited geographical and subject matter jurisdiction.¹⁴ Thus, “[i]n a federal system, all exercisable

11. PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 2:2 (5th ed. 2011). See, e.g., OHIO CONST. art. 2, § 1 (2011) (vesting legislative power in the “General Assembly”); N.Y. CONST. art. 3, § 1 (2011) (vesting state legislative power in “senate and assembly”); see generally David L. Krooth, *Control of Land Use in the United States: Statutory Developments and the Case of New Communities*, 4 URB. L. 519 (1972) (noting the delegation of actions on land use control to local governments). See also *Allgood v. Tarboro*, 189 S.E.2d 255, 260 (N.C. 1972) (“The original zoning power of the State reposes in the General Assembly”). “Police Power” refers to a state’s ability to restrain the conduct of private individuals in the name of the public welfare. *Milk Control Bd. of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346, 351-52 (1939).

12. SALKIN, *supra* note 11, § 2:2.

13. Rachele Alterman, *A View from the Outside: The Role of Cross-National Learning in Land-Use Law Reform in the U.S.*, in *PLANNING REFORM IN THE NEW CENTURY* 304 (Daniel R. Mandelker ed., 2005).

14. W. BROOKE GRAVES, *AMERICAN INTERGOVERNMENTAL RELATIONS* 4-5 (Charles Scribner’s Sons ed., 1964) (discussing competing understandings of the federal system of political organization). Graves provides:

Federalism has been defined by one writer as a principle of political organization which permits erstwhile independent states to combine under a common central government while retaining some portion of their former power and identity. (citation omitted) Another writer

governmental powers are divided between a national government and several state . . . governments”¹⁵ Federalism in the land use context requires a discussion about the appropriate distribution of decision making between the federal, state, and local governments.¹⁶ For purposes of examining federalism in the context of land use, this Article examines two generally accepted theories: dual federalism and cooperative federalism.¹⁷

A. Dual Federalism

Dual Federalism has been described as a “layer cake model” of federalism.¹⁸ Under this model, the national and state governments are viewed as fully autonomous rivals with competing ideas and strategies.¹⁹ Dual federalism was the theory that guided the American federal system during the first one hundred and fifty years of the country’s existence.²⁰ During this time, the roles of the federal and state governments were based on three guiding principles. First, federal and state governments were to operate exclusively from one another with no overlapping or concurrent jurisdiction.²¹ Second, these respective realms of

defines the term as “an association of states which have been founded for certain purposes, but in which the member states retain a large measure of their original independence. . . . By the federal principal I mean the method of division power so that the general and regional governments are each, within a sphere, coordinate and independent.” (citation omitted) Still another states simply that “Federalism is a device for dividing decisions and functions of government.” (citation omitted)

Id.

15. JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM 4 (State Univ. of N.Y. Press, 2d ed. 2008). Describing American Federalism, W. Brooke Graves states, “one might say that ‘We the People’ have in the Federal Constitution divided the powers of government between the central government in Washington and the governments of the several states.” GRAVES, *supra* note 14, at 15.

16. See REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 2 (Douglas T. Kendall ed., 2004) (stating that “[f]ederalism is . . . about assigning government authority to the correct level of government in our constitutional structure.”).

17. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009).

18. Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewal Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 442 (2008).

19. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) (stating “[d]ual federalism refers to the concept that the state and national governments enjoy exclusive and non-overlapping spheres of authority.” (citing Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513, 1526-37 (2002))).

20. Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 118-19 (2007).

21. *Id.*

exclusive jurisdiction were based on distinct subject matters.²² Third, the judiciary played the significant role of ensuring that both the state and federal governments did not overstep their bounds.²³ However, dual federalism (as embodied in the *Lochner v. New York*²⁴ decision) began its decline during the Great Depression and its abandonment began in the late 1930s by President Roosevelt's New Deal.²⁵

B. Cooperative Federalism

Arguably, cooperative federalism came to the forefront of American federalist theory around the 1970s.²⁶ Cooperative federalism views state governments as instruments of the federal government, implementing the programs and policies of the federal government in a relatively cooperative manner.²⁷ Under cooperative federalism, the federal government incentivizes the states with funds to be distributed upon condition; where the states are able to receive or keep funds distributed to them so long as they have complied with, or implemented a federal program or policy.²⁸ Therefore, “[r]ather than preempting the authority of state agencies and supplanting them with federal branch offices, cooperative federalism programs invite state agencies to superintend federal law.”²⁹ Under cooperative federalism, localized government entities can both implement national policy while contemporaneously designing and implementing the program to address the needs and identity of the individual locality.

In addition to allowing local governments to tailor national programs to better meet their needs,³⁰ cooperative federalism further “promote[s] competition within a federal regulatory framework” among the states.³¹ Cooperative federalism gives states the flexibility and broad latitude to take a different approach in implementing a federal program to maximize the

22. *Id.*

23. *Id.*

24. *Lochner v. New York*, 198 U.S. 45 (1905).

25. Schapiro, *supra* note 20, at 119.

26. Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695 (2001).

27. See Schapiro, *supra* note 19, at 284 (providing that “cooperative federalism acknowledges the close relationship between the state and national governments in a variety of areas, and it endorses these relationships. State implementation of federal regulatory regimes provides a prime example of the operation of cooperative federalism.”).

28. *Id.*

29. Weiser, *supra* note 26, at 1695.

30. Kevin Ramakrishana, Comment, *Subduing the Ceaseless Storm: Breaking the Build-Destroy-Rebuild Cycle Following Major Catastrophes through Taxation and Responsibility*, 2 ALB. GOV'T L. REV. 328, 331 (2009).

31. Weiser, *supra* note 26, at 1698.

needs of its constituents.³²

However, cooperative federalism is not always effective. For example, some have opined that cooperative federalism reduces “sunlight” on public officials—allowing state public officials to shield themselves from political accountability under the guise of “just following orders” from the federal government when implementing a federal program statewide.³³ More importantly, despite the best interests or desires of their constituents, states may be coerced into following federal policy due to the states’ need for federal funding.³⁴

Cooperative federalism theory can be analyzed through a number of different lenses. Two views of cooperative federalism most relevant to the federal government’s approach to local land use and planning are the “Leadership Model of Cooperative Fiscal Federalism”³⁵ (“cooperative fiscal federalism”), and “Coercive Federalism.” The remainder of this section focuses on these theories.

1. *Cooperative Fiscal Federalism*

Under cooperative fiscal federalism, “the federal government leverages its fiscal resources for particular types of activity that it believes are national priorities. When acting in this leadership role, the federal government has the choice whether, and how, to involve state and local governments.”³⁶ Cooperative fiscal federalism shows itself in state and local land use planning in federal legislation where the federal government allocates federal funding to leverage the implementation of a program or activity that federal policymakers believe is a “national priority.”³⁷ Examples of this approach include: The National Flood Insurance Program;³⁸ The Coastal Zone Management Act;³⁹ The Endangered Species Act;⁴⁰ The Stafford Relief and Emergency Assistance Act;⁴¹

32. *Id.* at 1699.

33. Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 MISS. C. L. REV. 127, 131 (2006).

34. *See id.* (“Some note that such programs, especially those that attach conditions to the receipt of funds, effectively coerce the states into accepting unattractive conditions because the states are rarely in a position to refuse such funding.”).

35. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2577 (2005).

36. *Id.* (citations omitted).

37. *Id.*

38. National Flood Insurance Program, Pub. L. No. 90-448, 82 Stat. 572 (1968) (codified at 42 U.S.C. §§ 4001-4129).

39. Coastal Zone Management Act, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified at 16 U.S.C. §§ 1451-1466).

40. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1544).

41. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No.

and The Energy Policy Act of 2005.⁴²

Through the use of financial incentives, the federal government is able “to shape state regulatory schemes and budgetary priorities to an extent that politics and the Commerce Clause likely would not have allowed through direct fiat.”⁴³ Further, this technique in some instances can end up being cost effective for the government, as in some cases it merely matches the contributions of the states for implementing a program—which “maximize[s] the federal policymaking influence while restraining federal spending.”⁴⁴

Cooperative fiscal federalism has continued to work politically for the states for many reasons including: the financial incentives; the states’ continuing ability to have policymaking power (albeit somewhat limited in some cases); and finally, the states’ ability to get recognition for the achievements accomplished by the implementation of these programs.

Like cooperative federalism, cooperative fiscal federalism was born from New Deal legislation, where the federal government largely expanded its economic regulatory power. This new attitude in the federal government, which had previously limited its duties to constitutionally enumerated powers,⁴⁵ overlapped with the birth of the zoning movement. The legacy of the New Deal, as well as the emergence of zoning, is largely attributed to the Progressive Era of the time.⁴⁶ As will be shown in Part III, cooperative fiscal federalism has allowed the federal government to implement a patchwork model of limited direct intervention into local and state land use planning.

2. *Coercive Federalism*

Under Coercive Federalism theory, the federal government forces “states to follow national approaches to policy matters in some areas.”⁴⁷ The federal government coerces states cooperation

100-707; 42 U.S.C. §§ 5121-5208 *amended by* Pub. L. No. 106-390; 114 Stat. 1552 (2000).

42. Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 595 (2005).

43. Super, *supra* note 35, at 2577-78.

44. *Id.* at 2578.

45. *Id.* at 2577.

46. MICHAEL A. WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 30 (2008). “In many ways, zoning is a quintessential Progressive concept. Many of the key components are present: the reliance on experts to craft and enforce a regulatory scheme; the belief that a pleasant environment would foster healthy, responsible citizens; and a trust in decentralized control . . . [and] a decidedly negative view of the immigrants . . . who from the 1880s to the mid-1920s poured into America’s cities in ‘alarming’ numbers.” *Id.* at 30-31.

47. Kimberly J. Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1726 n.398 (2007) (citing Joseph F. Zimmerman, *National-State Relations: Cooperative*

through certain regulatory tools, such as preemption, mandating certain federal programs, or withholding benefits from states that rely on the funding.⁴⁸ Coercive federalism is further characterized by “the federal government reduc[ing] its reliance on fiscal tools to stimulate intergovernmental policy cooperation and increas[ing] its reliance on regulatory tools to ensure the supremacy of federal policy.”⁴⁹

Coercive federalism emerged during the late 1970s and early 1980s due to the social unrest, economic backslide, and political climate of that time, which ultimately reduced the cooperative relationship between the federal government and the states.⁵⁰ The advent of coercive federalism is demonstrated by the fact that “the number of federal preemptions of state and local authority more than doubled after 1969. More than 50 percent of the preemption statutes enacted since 1789 were enacted during two decades—the 1970s and 1980s—representing 10 percent of the 200 year history of the federal republic.”⁵¹

With respect to its impact on land use policy and control, coercive federalism “dominates too many major environmental programs” and “retain[s] the federal role in establishing uniform national standards, but would abandon any real effort to plan and implement comprehensive regulatory programs.”⁵² Although researchers and scholars have focused more on federal environmental programs in discussions of coercive federalism, the reality is that a significant number of federal environmental policies are intertwined with, and their true effectiveness is related to, local land use actions. Statutes such as The Coastal Zone Management Act, The Clean Water Act, The Endangered Species Act, although generally classified as federal environmental legislation, directly affect local land use controls.⁵³

Federalism in the Twentieth Century, 31 PUBLIUS 15, 17-18, 27 (2001).

48. John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 148-49 (1990). Coercive Federalism represents the opposite end of the spectrum from Dual Federalism, and some argue this is the evolution of Cooperative Federalism. *Id.*

49. *Id.* at 139.

50. *Id.* at 148.

51. *Id.* (citing the U.S. Advisory Comm’n on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority* (Wash., DC: Advisory Comm’n on Intergovernmental Relations, Draft Report, 1989)).

52. Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”: Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 226 (1996).

53. See also Ashira P. Ostrow, *Land Law Federalism*, 61 EMORY L.J. ___, 13 (forthcoming 2012) (noting the federal intervention in land use regulation).

C. A New Paradigm for Federalism and Land Use Control

In attempting to categorize dozens of federal government policies, statutes, regulations, and programs that impact the control of non-federally owned lands through the lens of federalism theory, what emerges is a menu with federal initiatives from all decades falling into multiple categories discussed above—fiscal, coercive, or even pragmatic federalism.⁵⁴ What may be more telling, however, are the more recent examples of federal intrusion into local land use actions that have the effect, regardless of intent, of severely restricting local land use actions—such as the Religious Land Use and Institutionalized Persons Act of 2000 and the Telecommunications Act of 1996 including related rulemaking and federal guidance. In addition, for a number of years, Congress has been actively considering legislation related to regulatory taking and restrictions on the use of eminent domain that may have the effect of restricting the breadth of local control that currently exists. Layered with emerging policy areas that many argue demand national policy, such as siting of renewable energy and transmission lines, questions remain as to what is the appropriate direction of federalism in the land use context. Perhaps a new intergovernmental panel to explore these regulatory dynamics is long overdue.

III. FEDERAL INVOLVEMENT IN LAND USE REGULATION

Prior to the twentieth century, local land use planning as we know it did not exist; urban settlers and developers shaped the landscape through their “own sweet will,”⁵⁵ and restrictive covenants, common law nuisance, and limited municipal action promoting safety—such as fire and building codes—were all that limited the improvement and development of land.⁵⁶ In partial

54. Federalist scholars may be tempted to label the federal government’s growing involvement in the area of land use control “pragmatic federalism.” Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 161-64 (2004). According to pragmatic federalism theory, “the federal-state relationship [is] a process of distributing power to the central government or to the localities when each requires it, and when circumstances suggest one government rather than the other is best suited to regulate the activity in question.” *Id.* at 162. Further, under pragmatic federalism “all power derives from the central government, but the federal government should consider local initiatives and responsibility to be a central constitutional value.” *Id.* However, some note that pragmatic federalism can be more of a collaborative process, where state and local decision makers are able to engage the federal government in a cooperative, although “messy political process” in which both regulate cooperatively and protect their own interests. William R. Childs, *State Regulators and Pragmatic Federalism in the United States, 1889-1945*, 75 BUS. HIST. REV. 701, 704-05 (2001).

55. *Village of Lynbrook v. Cadoo*, 169 N.E. 394 (N.Y. 1929).

56. See SALKIN, *supra* note 11, § 1:3 (detailing the history of zoning in the

reaction to this uncoordinated and sometimes undesirable haphazard development that resulted in various economic impacts, municipal governments began to institute land use controls, such as zoning.

Zoning originated from the protests of New York City merchants concerned with the proximity of factories to their retail establishments.⁵⁷ These local merchants had what they believed to be a serious problem—one which affected their welfare, although not so much their health or safety—these merchants were losing business. During the early twentieth century, clothing factories were located as close to its main buyers (i.e., merchants) as possible to reduce its costs, notably transportation. When the factories let out for the day (or during lunch time) factory workers would leave their factory, adding to the congestion of the already crowded city streets. More importantly to the merchants, these factory workers were not only congesting streets, but driving away business. The merchants believed that keeping these factories—and factory workers—so close to the stores was “distasteful, unaesthetic, and unconducive to the image that merchants were attempting to foster.”⁵⁸ When the merchants attempted to move their stores, and leave areas inhabited by these pesky neighbors, the factories “in perverse obedience to what seemed to be an inevitable economic logic, followed them.”⁵⁹ Eventually, in 1907, the Fifth Avenue Association—made up of these merchants—was formed to address the factory problem.

The Association struggled with a solution to the factory problem for years, before approaching the Manhattan borough president in 1911. The borough president subsequently appointed a Fifth Avenue Commission—mostly made up of the Fifth Avenue Association—to study the problem. The solution the Commission came up with “was to limit the heights of buildings in the Fifth Avenue area. . . . Buildings should be limited to a height of 125 feet, on the theory that this particular height would make [factory] construction uneconomical without hampering [the merchant’s] retail activity.”⁶⁰ Soon after, contemporary reformers saw the good that this idea could provide for smarter growth in all throughout a city that was inundated with new citizens every day.⁶¹

United States).

57. STANISLAW J. MAKIELSKI, JR., *THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE* 11-12 (1966).

58. *Id.*

59. *Id.*

60. *Id.* at 13.

61. *See id.* at 40 (“The borough presidents and the local and specialized interest groups all left their imprint on the final form of the Zoning Resolution of 1916. If it unlikely that the Reformers could have achieved zoning without considering borough and local interests.”). *Id.*

Cumulatively, this led to the enactment of the New York City Zoning Resolution of 1916.⁶² The Resolution contained three provisions with three sets of restrictions for building within the city: use restrictions, bulk restrictions, and administrative restrictions. The use restrictions separated city land into four districts: residential, business, unrestricted, and undetermined.⁶³ These designations prohibited incompatible uses from locating within districts.⁶⁴ The bulk restrictions instituted prohibitions on the height and size of buildings according to its use districts. This included five levels of height districts, each of which “limited the height of the building at the street line to a varying multiple of the street width.”⁶⁵ Finally, the administrative restrictions of the Resolution contained enforcement provisions, including a Board of Standards and Appeals (who heard appeals from zoning restrictions); and a Board of Estimate (who would amend the code when necessary).⁶⁶ Eventually, in 1920, this Resolution was upheld by New York’s highest court—The Court of Appeals—as a proper exercise of the state’s police power.⁶⁷

The New York Zoning Resolution was the catalyst for a larger movement by local governments across the country to control the development of land within their jurisdiction. The fact that the Resolution recognized that certain land uses were incompatible with, and should be separated from one another quickly caught on with other states. Within five years of the passage of New York’s Zoning Resolution, “roughly twenty states had authorized some or all municipalities to pass comprehensive zoning ordinances,”⁶⁸ and within ten years that number doubled, resulting in vast increases

62. *About Zoning*, N.Y. CITY DEP’T OF CITY PLANNING (2012), <http://www.nyc.gov/html/dcp/html/zone/zonehis.shtml>. See also MAKIELSKI, JR., *supra* note 57, at 7 (“New York City’s Zoning Resolution of 1916 was a major innovation in municipal public policy. It was the product of municipal reform, a set of responses to complex economic and social problems, and the claims of local and special interests.”).

63. “Undetermined” was left for future determination, although it was generally believed that it would be used mostly for industrial activities. MAKIELSKI, JR., *supra* note 57, at 36.

64. *Id.* at 36; see also *About Zoning*, *supra* note 62 (noting that the Zoning Resolution “established height and setback controls and designated residential districts that excluded what were seen as incompatible uses.”).

65. Stuart Meck, Paul Wack & Michelle J. Zimet, *Zoning and Subdivision Regulations*, in *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* 344 (Charles J. Hoch et al. eds., 3d ed. 2000).

66. The Board of Estimate also had to abide by the “Twenty Percent Rule” where, if twenty percent of property owners affected by a change in the zoning code objected to the change, the Board was required to pass an amendment to the zoning code unanimously, rather than by a simple majority. MAKIELSKI, JR., *supra* note 57, at 37.

67. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 210 (N.Y. 1920).

68. WOLF, *supra* note 46, at 29.

in the number of local zoning ordinances.⁶⁹

By the end of the 1920s, nearly eight hundred municipalities nationwide had adopted land-use measures.⁷⁰ In response to this phenomenon, as well as public health concerns about urban-dwellers in unzoned cities, and the belief that homeownership would have economic and social benefits, the United States Department of Commerce created two committees.⁷¹ One committee would draft a model zoning and planning act, and the other would draft a state housing code—each of these would be influenced by the New York Zoning Resolution.⁷²

The first committee would go on to draft the Standard State Zoning Enabling Act (“SZE A”) in 1924, with a revised version being published in 1926.⁷³ The SZE A “was intended to delegate the state’s police power to municipalities to remove any question over their authority to enact zoning ordinances.”⁷⁴ The SZE A was adopted by all fifty states,⁷⁵ and scholars continue to document the profound and lasting impact that the model planning and zoning enabling acts have had on current state and local land use regulatory regimes. The SZE A provided a blueprint for local municipalities to enact zoning laws, by attempting to create a system where localities could regulate the land uses within their jurisdiction while also balancing the property rights of landowners.⁷⁶ The SZE A further showed municipalities how to

69. *Id.* Interestingly, one of the key planners who worked on the New York City Zoning Controls would go on to draft similar ordinances in Dallas, Atlanta, Providence, Columbus, and the suburban Cleveland area. *Id.* at 28-29.

70. SEYMOUR I. TOLL, ZONED AMERICAN 193-94, 201-02 (1969).

71. This effort was spearheaded by then Secretary of Commerce and future U.S. President, Herbert Hoover. WOLF, *supra* note 46, at 29.

72. Meck, Wack & Zimet, *supra* note 65, at 344.

73. WOLF, *supra* note 46. Standard State Zoning Enabling Act of 1926, available at <http://law.wustl.edu/landuselaw/StndZoningEnablingAct1926.pdf>

74. Meck, Wack & Zimet, *supra* note 65, at 344.

The SZE A contained procedures for establishing and amending zoning ordinances, and it authorized a temporary zoning commission in the municipality to recommend to the local legislative body district boundaries along with the proposed written text of the ordinance; the zoning commission was to go out of existence after the initial ordinance was enacted. Appeals in connection with enforcement of the zoning code were to be heard by a board of adjustment created by the SZE A. The board was an independent body given the authority to grant variances . . . and allow special exceptions . . . in a zone when certain criteria were shown to be satisfied.

Id.

75. Steven D. Villavaso, *Planning Enabling Legislation in Louisiana: A Retrospective Analysis*, 45 LOY. L. REV. 655, 658 (1999) (citations omitted).

76. U.S. Dep’t of Commerce, Advisory Comm. on Zoning, *A Standard State Zoning Enabling Act under Which Municipalities May Adopt Zoning Regulations* (rev. ed. 1926), available at <http://www.planning.org/>

enact and amend zoning ordinances, as well as how to authorize a zoning commission to propose the proper legislation for zoning.⁷⁷

The Standard City Planning Enabling Act (“SCPEA”) was drafted in 1928 as a companion piece to the SZE. The primary purpose for the SCPEA was to develop a “master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission’s judgment, bear relation to the planning of the municipality.”⁷⁸ The SCPEA was further intended to “transform the process of land division from one that merely provided a more efficient and uniform method for selling land and recording . . . land to one in which local governments could control urban development.”⁷⁹

Each of these model acts offered a uniform national framework for local land use planning, which heavily influenced, though did not require, further state and local actions. By 1930, forty-seven states had adopted zoning enabling legislation.⁸⁰ Thirty-five states had adopted enabling legislation based on the SZE,⁸¹ and ten states had used the SCPEA.⁸² Today, the enabling legislation in nearly every state reflects the influence of either the SZE or the SCPEA.⁸³

What follows is a brief overview of federal legislative, regulatory, and programmatic actions that affect local land use regulation. It is organized into three parts: activities pre-publication of THE QUIET REVOLUTION in 1971, a quarter century post-QUIET REVOLUTION, and recent actions from 1988 to present. A number of observations are evident: the federal government has always had some level of influence in the area of local land use planning and regulation, shifting from providing guidance and suggesting some level of uniformity, to more actively influencing decision-making activities at the local level by rewarding desired

growingsmart/pdf/SZEnablingAct1926.pdf. The Act was published in 1924 by the Advisory Committee on Zoning, Department of Commerce, revising the Act in 1926. *Id.* Note that a second model act, “A Standard City Planning Enabling Act” was published in 1928, yet was never as popular as the SZE, likely because it gave less authority to planning authorities. Villavaso, *supra* note 75, at 658 (1999) (citations omitted).

77. Meck, Wack & Zimet, *supra* note 65, at 344.

78. Am. Planning Ass’n, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 7-110 (2002), available at <http://www.planning.org/growingsmart/guidebook/seven02.htm> (citing Advisory Comm. on City Planning and Zoning, U.S. Dep’t of Commerce, *A Standard City Planning Enabling Act* 6 (1928)).

79. Meck, Wack & Zimet, *supra* note 65, at 346.

80. *Id.* at 344.

81. N. KRAUSE, DIV. OF BUILDING AND HOUSING, U.S. BUREAU OF STANDARDS, U.S. DEP’T OF COMMERCE, ZONING PROGRESS IN THE UNITED STATES: ZONING LEGISLATION IN THE UNITED STATES 2 (1930).

82. Meck, Wack & Zimet, *supra* note 65, at 346.

83. *Id.* at 346.

activities and/or outcomes with federal funding, to exercising varying levels of control butting right up to the question of preemption.

A. *Pre-QUIET REVOLUTION Federal Legislation*

1. *Housing Act of 1954 and the HUD 701 Program*

The federal government had been giving funding to state and local governments for the redevelopment projects dating back to the New Deal.⁸⁴ However, the Section 701 Program, included in the Housing Act of 1954⁸⁵ gave land use planning “official recognition under the national urban policy umbrella.”⁸⁶ The Section 701 Program,⁸⁷ commonly known as the HUD 701 Program, authorized comprehensive land planning assistance to state and local public agencies, and further sought to promote comprehensive planning for land use development by encouraging local governments to establish and improve planning techniques.⁸⁸ Specifically, these local comprehensive plans were required to use a specific pattern of land use design, decided by the federal government, which coordinated with circulation, public facilities, and housing.⁸⁹

To qualify for federal funding, local governments had to adopt comprehensive plans that addressed certain techniques, notably land use.⁹⁰ Localities could receive funding for up to two-thirds of the total of the planning work, and up to seventy-five percent in areas where development was deemed significant for national growth and development.⁹¹ The 701 Program proved to be immensely popular, issuing funds for close to thirty years.⁹²

84. Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 465 (2000).

85. Housing Act, Pub. L. No. 83-560, 68 Stat. 590 (1954).

86. Kayden, *supra* note 84, at 465.

87. Housing Act of 1954 § 701, 40 U.S.C. § 461(c) (1982).

88. Carl Feiss, *The Foundations of Federal Planning Assistance*, 51 J. OF AM. PLANNING ASS'N 175 (1985).

89. Philip R. Berke, *Integrating Bioconservation and Land Use Planning*, 10 VT. J. ENVTL. L. 407, 418 (2009).

90. Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL ESTATE L.J. 429, 434 (2004), available at http://www.governmentlaw.org/files/EJ_land_use.pdf.

91. Feiss, *supra* note 88, at 175.

92. Salkin, *supra* note 90, at 434; see also Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 385 (2002) (stating that it was just the beginning of massive infrastructural improvements). Ultimately, it was repealed by the Omnibus Budget Reconciliation Act of 1981. The Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981). See also Nestor M. Davidson, *Fostering Regionalism*, 38 FORDHAM URB. L.J. 675, 675 n.2 (2011) (stating that the Omnibus Budget Reconciliation Act of 1981 was the

During that time, thousands of local governments participated in the program, adopting what was referred to as “701 plans.”⁹³ This marked a significant beginning of federal influence in land use planning, as over time additional planning incentive programs have been issued by the federal government aimed at similar comprehensive planning goals.⁹⁴

2. *The Fire Island National Seashore Act of 1964*

Only a handful of federal laws impose specific zoning standards on local governments.⁹⁵ One of these is the Fire Island National Seashore (“FINS”) Act of 1964,⁹⁶ which created the first national park in New York⁹⁷ aiming to protect the “gemlike” beaches and sand reefs that run along the south shore of Long Island from real estate development, road construction, and shoreline erosion.⁹⁸ Unlike most other National Parks, Wildlife Refuges, and other protected federal lands, however, the Fire Island National Seashore created a framework that was intended to allow limited private development along with the preservation of natural resources and public recreational opportunities.

To accomplish the goals of the Fire Island National Seashore Act, Congress granted to the Secretary of the Interior broad powers over Fire Island, including over the local land use authorities originally in place over Fire Island.⁹⁹ The Secretary has authority to acquire property in the area, through purchase or

source of the repeal).

93. Arthur C. Nelson, *Leadership in a New Era*, 72 J. OF AM. PLANNING ASS'N 393, 393 (2006).

94. See Kayden, *supra* note 84, at 465 (referring to federal financial disbursements in the 1930s); *see also* Patricia E. Salkin, *Regional Planning in New York State*, 13 PACE L. REV. 505, 510-12 (1993) (referring to comprehensive planning efforts in the 1950s through the 1970s).

95. *See generally* John S. Davis, *The National Trails System Act and the Use of Protective Federal Zoning*, 10 HARV. ENVTL. L. REV. 189 (1986) (referring to the National Trails System Act); John F. Lambert, Jr., *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35 (1982) (referring to the National Park Service); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976) (referring to the impact of legislation on national parks).

96. Fire Island National Seashore Act of 1964, Pub. L. No. 88-587, 78 Stat. 928 (1964) (codified as amended at 16 U.S.C. § 459e (2006)).

97. *President Signs Measure for Fire Island Seashore*, N.Y. TIMES, Sept. 12, 1964, at 50.

98. *See Protecting Fire Island*, N.Y. TIMES, June 26, 1963, at 38 (discussing the Federal Government's proposal for Fire Island); *see also* *Biderman v. Morton*, 497 F.2d 1141, 1143 (2d Cir. 1974) (describing Fire Island in illustrative detail).

99. However, in drafting the Act, “Congress carefully avoided interfering with the power of the municipalities on the Seashore to enact zoning ordinances or grant zoning variances.” *Biderman*, 497 F.2d at 1143-44.

condemnation, “‘improved property,’ zoned in a manner not ‘satisfactory to the Secretary,’ or which had been ‘subject to any variance, exception, or use that fails to conform to any applicable standard contained in regulations [issued by] the Secretary’”¹⁰⁰ The Secretary also has the power to “‘issue regulations . . . specifying standards that are consistent with the purposes of this Act for zoning ordinances which must meet his approval,’”¹⁰¹ and is required to review local zoning ordinances to determine whether the local ordinances comply with federal regulations. The Secretary is prohibited from approving any zoning ordinances or amendments to zoning ordinances that are adverse to the purpose of the Act.¹⁰²

Under the 1991 federal zoning standards for Fire Island, the seashore is divided into three districts: the Community Development District, the Seashore District, and the Dune District, and permitted and prohibited uses within these areas are set forth in the implementing regulations.¹⁰³

100. *Id.* at 1144.

101. Fire Island National Seashore Act of 1964, Pub. L. No. 88-587, 78 Stat. 930 (1964) (codified as amended at 16 U.S.C. § 459e (2006)).

102. 16 U.S.C. § 459e(b) (2006).

103. *See generally* 36 C.F.R. § 28.10(a)-(c) (2012).

Single family homes, houses of worship, schools, community facilities, and professional home occupations are permitted within the Community Development District, as are commercial or industrial uses that existed prior to enactment of the FINS Act. Any change in preexisting commercial or industrial uses, including construction, expansion, conversion of an existing structure, or a change in the type, location, mode or manner of operation, is deemed a new use and is permitted only with the approval of the local government and the Superintendent of the Fire Island National Seashore. Uses that are specifically prohibited include apartments and multiple dwelling buildings, guest houses with cooking facilities, and the subdivision of land into lots smaller than 4,000 square feet. Municipalities are also prohibited from rezoning any residential area to commercial or industrial without prior review by the Secretary.

In the Seashore District, the construction, development or expansion of any structure not in existence prior to enactment of the FINS Act is prohibited. Preexisting structures may be used as single family homes or accessory uses, and they may also be altered, expanded or moved.

The Dune District is subject to the most restrictive regulations. Permitted uses are limited to the residential use of preexisting structures and vehicular or pedestrian dune crossings that have been approved by the local government and the Superintendent, as well as dune protection measures such as snow fencing, poles, beach nourishment, and dune grass plantings. All development commenced subsequent to November, 1978, is prohibited, including the construction of new structures and the expansion of existing structures, including buildings, bulkheads, septic systems, decks, and swimming pools. Where property straddles the boundary between a Dune District and either of the other districts, the more restrictive Dune District provisions apply.

Additionally, the zoning standards provide that commercial and industrial developments “must provide a service to Fire Island” and cannot be likely to cause adverse impacts on the Seashore’s natural resources.¹⁰⁴ Where development is permitted, it may occupy thirty-five percent of the lot area, except for lots larger than 7500 square feet, which can include development on no more than 2625 square feet.¹⁰⁵ There is a general height limit of twenty-eight feet for buildings and accessory structures, and illuminated signs are prohibited.¹⁰⁶ Local governments on the seashore must also have in place restrictions on leaf and trash burning, excavations, vegetation removal, and the dumping or storing of refuse materials, equipment, or “other unsightly objects which would pose safety hazards and/or detract from the natural or cultural scene.”¹⁰⁷ They must also enact regulations to limit the potential for flooding and related erosion consistent with the Federal Insurance Administration’s National Flood Insurance Program.¹⁰⁸

The federal zoning standards provide that nonconforming uses may not be “altered, intensified, enlarged, extended, or moved except to bring the use or structure into conformity with the approved local zoning ordinance,” and any “nonconforming use which has been abandoned for more than one year may not be resumed or replaced by another nonconforming use or structure.”¹⁰⁹ The reconstruction of nonconforming uses or structures that have been severely damaged or destroyed by fire, natural disaster, abandonment or neglect is generally prohibited, except in the Community Development and Seashore Districts, where reconstruction is permitted to the extent of the previous dimensions and so long as a building permit application is submitted within one year of the damage or destruction.¹¹⁰ Nonconforming uses in the Dune District can only be reconstructed if they will conform to the approved local zoning.¹¹¹

Local governments on the seashore must also provide the Superintendent with copies of all applications for variances, exceptions, special permits, and permits for commercial and industrial uses within five days of their submission.¹¹² A copy of the written notice of the dates and times of any public hearings on such applications must be sent to the Superintendent at least ten

104. *Id.* § 28.12(b).

105. *Id.* § 28.12(c)-(e).

106. *Id.* § 28.12(f), (h).

107. *Id.* § 28.12(i).

108. *Id.* § 28.12(j).

109. *Id.* § 28.11(b)(1)-(2).

110. *Id.* § 28.11(c).

111. *Id.* § 28.11(c)(5).

112. *Id.* § 28.13(a).

days prior to the hearing date, and notice of any action taken on such applications must be provided within fifteen days of the decision.¹¹³ “The Superintendent, within fifteen working days of receiving notice of an application for a variance . . . or a change in [the] use [of an existing structure,] shall provide” written comments to the landowner and the zoning authority.¹¹⁴ If the Superintendent determines upon review that the proposed use or development does not conform to the federal standards or is likely to cause significant harm to the seashore’s natural resources, the Superintendent must also inform the property owner and municipality that, should the development proceed, the National Park Service (“NPS”) may seek an injunction or institute a condemnation action to acquire the property.¹¹⁵

3. *The National Flood Insurance Act of 1968*

Flooding is the most common natural disaster in the United States, and accounts for more property damage than any other natural disaster.¹¹⁶ Beginning in the early twentieth century, the federal government began its engagement in a lengthy campaign to mitigate the damage and losses caused by flooding. At the turn of the century, the U.S. Army Corps of Engineers built various flood control structures—levees, floodways, dams, reservoirs, and drainage projects—in floodplains to combat flooding.¹¹⁷ To that end, Congress passed the Flood Control Act of 1936 to give broader resources to the Corps to continue building these structures, ultimately resulting in over seven billion in federal funds spent, including over \$500 million annually, despite continued billion dollar losses in downstream areas resulting from flooding.¹¹⁸

By the early 1950s, it became clear that flood control construction alone would not be sufficient. In 1952, Congress rejected proposed legislation from President Truman recommending enactment of a federally subsidized flood insurance system.¹¹⁹ Although Congress enacted the Federal Flood Insurance Act in 1956, funding was never appropriated.¹²⁰ Eventually, a recommendation from various federal commissions in the 1960s, including from HUD, coupled with more extreme flooding damage,

113. *Id.* § 28.13(a).

114. *Id.* § 28.20(a).

115. *Id.* § 28.20.

116. RAWLE O. KING, CONG. RESEARCH. SERV., RL 32972, FEDERAL FLOOD INSURANCE: THE REPETITIVE LOSS PROBLEM (2005), available at <http://www.fas.org/sgp/crs/misc/RL32972.pdf>.

117. Oliver Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 64 (1985).

118. PRESIDENT LYNDON B. JOHNSON, A UNIFIED NATIONAL PROGRAM FOR MANAGING FLOOD LOSSES, H.R. DOC. NO. 465, at 3 (2d Sess. 1966).

119. Houck, *supra* note 117, at 67.

120. *Id.* at 68.

led to the enactment of the National Flood Insurance Program, to complement the existing flood control construction techniques of the Army Corps of Engineers.¹²¹

The National Flood Insurance Program (“NFIP”)¹²² was enacted for the purpose of authorizing the federal government to provide flood insurance to certain land owners who lived in political subdivisions which enacted land use restrictions that conformed to federal standards,¹²³ as well as to “encourage sound land use by minimizing exposure of property to flood losses.”¹²⁴ The NFIP further sought to discourage local governments from allowing development to occur in areas that were exposed to the risk of flooding.¹²⁵ Eligibility in the NFIP was conditioned on the local government adopting ordinances that complied with floodplain zoning criteria determined by the U.S. Department of Housing and Urban Development.¹²⁶

The NFIP was slow to catch on; after a year of the Act’s passage, only one community was eligible.¹²⁷ Hoping to help the NFIP be more palatable for localities, Congress amended the program to allow communities to receive low levels of insurance coverage even if they did not have comprehensive zoning plans which regulated new development in floodplains, only to find continuing indifference.¹²⁸ In 1972, after a particularly destructive hurricane season, Congress again amended the NFIP, increasing the incentives offered under the existing legislative framework. The new incentives raised the limits of insurance, but municipalities were required to participate in the program and purchase flood insurance in order to receive federal assistance for construction in flood areas—local communities had to participate in the program or would be denied the aid they needed.¹²⁹

These new provisions “were deliberately designed to compel participation in the program.”¹³⁰ The underlying Senate report to this amendment noted that “despite the efforts of the Federal Insurance Administration to carry out the Congressional intent for land use and control measures in its administration of the Act, it became quite obvious that without mandating provisions to bring about these measures, no real accomplishment could be expected in this respect.”¹³¹

121. *Id.* at 67-69.

122. 42 U.S.C. §§ 4001-4129 (West 2006).

123. *Id.*

124. *Id.*

125. *Id.*

126. Houck, *supra* note 117, at 69-70.

127. *Id.*

128. *Id.*

129. *Id.* at 70.

130. *Id.* at 71.

131. *Id.* at 69-70 (citing S. REP. NO. 583, (1st Sess. 1973), *reprinted in* 1973

NFIP is overseen by the Federal Emergency Management Agency (“FEMA”) as well as local municipalities.¹³² In order to participate in the program, local governments must ensure that their comprehensive land use plans are consistent with the objectives of the federal regulations.¹³³ Section 4022 of the flood insurance programs flatly prohibits flood insurance coverage “unless an appropriate public body . . . [has] adopted adequate land use and control measures (with effective enforcement provisions).”¹³⁴ To enforce the land use policy, FEMA issues various maps to the participating municipalities, which dictate land use control regulations as well as whether flood insurance needs to be purchased.¹³⁵

In practice, for property owners to participate in the NFIP, the community they live in must enact land use regulations that are consistent with the objectives of the federal regulations, which seek to reduce the risk of future flood damage to new construction projects in areas marked as a special hazard area under the Flood Insurance Rate Map (“FIRM”).¹³⁶ Additionally, local governments must submit development reports, proving the implementation of the proper land use regulations to the program administrator every one to two years.¹³⁷ If the community does not enact the proper land use restrictions, then the property owners cannot participate in the NFIP, and new construction projects will not be eligible for coverage.¹³⁸

4. *The National Environmental Policy Act of 1969*

The National Environmental Policy Act¹³⁹ (“NEPA”) was born out of growing concern that our nation’s environment was being given secondary consideration to economic and social factors in public decision making.¹⁴⁰ Supporters envisioned that the

U.S. CODE CONG. & AD. NEWS 3217, 3220 (1973)).

132. Aparna K. Majmudar, *The National Flood Insurance Program: Maintaining Its Head Above Water*, 16 U. MIAMI INT’L & COMP. L. REV. 183, 189 (2009).

133. 44 C.F.R. § 60.2(g).

134. 42 U.S.C. § 4022 (2005). See Majmudar, *supra* note 132, at 189 (discussing the background of the National Flood Insurance Program).

135. Majmudar, *supra* note 132, at 189-93.

136. 44 C.F.R. § 60.2(g); BRIAN W. BLAESSER & ALLEN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 8:47 (2011). The Flood Insurance Rate Map is a map of a community, prepared by FEMA, which outlines different flood risk areas in that community. *Flood Insurance Rate Maps*, U.S. DEPT OF HOMELAND SECURITY – FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/hazard/map/firm.shtm> (last visited Apr. 1, 2012).

137. 44 C.F.R. § 59.22(b)(2).

138. BLAESSER & WEINSTEIN, *supra* note 136.

139. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969).

140. Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past*,

legislation's legacy would establish a Council on Environmental Quality ("CEQ"), placing an environmental advisor in close proximity to the president.¹⁴¹ NEPA, enacted "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment,"¹⁴² and to "promote efforts which will prevent or eliminate damage to the environment,"¹⁴³ requires agencies, usually federal but also state and local whenever a federal link is present, to assess the environmental impacts of any proposed actions. In effect, "NEPA set[s] forth a framework for considering the environmental impacts of certain government decision making," although it does not require specific results.¹⁴⁴ NEPA requires the preparation of an environmental impact statement for proposals which involve first, "major Federal actions" that are second, "significantly affecting the quality of the human environment."¹⁴⁵ Major federal action is generally considered to include "projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies."¹⁴⁶ Under this section, NEPA applies to state and local government projects that rely on federal approval.¹⁴⁷

Although not specifically targeting local land decision making, the federal model has been closely replicated by more than a dozen states that have adopted "mini-NEPAs."¹⁴⁸ Guidelines issued by the CEQ in 1971 and again in 1973 showed states how to administer a mini-NEPA program, and much like the federal statute, these regulations were largely imitated by states.¹⁴⁹

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

Foresight for the Future, 39 ENVTL. L. REP. NEWS & ANALYSIS 10675, 10675 (2009).

141. *Id.*

142. 42 U.S.C. § 4321.

143. *Id.*

144. Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 383 (2002) (citing 42 U.S.C. §§ 4321-4370(d)).

145. National Environmental Policy Act, 42 U.S.C. § 4332(C) (West 2011).

146. 40 C.F.R. § 1508.18(a) (2012).

147. *Md. Conservation Council, Inc., v. Gilchrist*, 808 F.2d 1039, 1042-43 (4th Cir. 1986).

148. *Integrating State Environmental Policy Acts with Local Planning*, AM. PLANNING ASS'N, <http://www.planning.org/growingsmart/guidebook/twelve.htm?print=true> (last visited Apr. 1, 2012).

149. Weiner, *supra* note 141, at 10677.

proposed development otherwise met local zoning restrictions.¹⁵⁰ Some believe that the administration of mini-NEPAs has disrupted local discretion where the environmental lens has conflicted with the objectives of a locally-tailored comprehensive development scheme.¹⁵¹

5. *The National Land Use Policy Act*

Although never adopted, the National Land Use Policy Act (“NLUPA”) was originally introduced in 1970¹⁵² with the intent of supplementing and enhancing the coordination of government action at the state level.¹⁵³ The legislation would have created a federal agency to ensure that all other federal agencies were complying with state plans, and it would have provided incentives for states to create similar agencies to coordinate with their local municipalities.¹⁵⁴ States would have been eligible to receive federal funding, and the proposal would have created a national data system for state and local governments use to engage in more sophisticated land use planning—conditioned on the state creating a land use plan.¹⁵⁵ These state plans were meant to operate as evolving blueprints, allowing “broad local input and constant revision as more was known and as conditions changed.”¹⁵⁶ Together, these provisions of NLUPA would have resulted in coordination and integration, lessening conflicts and confusion among the land use authorities at the federal, state, and local levels.¹⁵⁷

Despite the name of the act, which implies that the federal government would have even stronger powers of influence over local land use planning, the proposed legislation did not give the federal government the express authority to plan or regulate land

150. *Id.*

151. See Daniel R. Mandelker, *The National Environmental Policy Act: A Review of its Experiences and Problems*, 32 WASH. U. J.L. & POL’Y 293, 310 (2010) (noting the different purposes and requirements of environmental reviews and reviews under local land use regulations); Keith H. Hirokawa, *The Gap Between Informational Goals and the Duty to Gather Information: Challenging Piecemealed Review under the Washington State Environmental Policy Act*, 25 SEATTLE U.L. REV. 343, 343-44 (2001) (noting the individual environmental impacts of several small projects may be negligible, but in totality the projects have a significant environmental impact).

152. National Land Use Policy Act, S. 3354, 91st Cong., 2d Sess. (1970). The Act passed the Senate twice, but died in the House of Representatives. See generally John R. Nolon, *The National Land Use Policy Act*, 13 PACE ENVTL. L. REV. 519, 520 (1996) (noting the legislation was introduced in 1970 but failed to survive strict scrutiny in the House of Representatives).

153. Kayden, *supra* note 84, at 448.

154. Nolon, *supra* note 152, at 519.

155. *Id.*

156. *Id.*

157. *Id.* at 522.

use and development. Instead, it was meant to ensure a more collaborative process between the federal, state, and local governments in land use planning and development.

B. The Quarter Century Post-QUIET REVOLUTION

1. Environmental Laws Impacting Land Use Control

Although environmental law has a long and complex history with its early federal origins tracing back to the presidency of Theodore Roosevelt (1901-1908),¹⁵⁸ modern federal environmental law came of age in a flurry during the 1970s due to a mix of political, social, and economic changes.¹⁵⁹ Before that time, states were primarily responsible for dealing with environmental issues,¹⁶⁰ allowing some states to engage in a “race to the bottom” environmental policy out of concerns that overregulation and harsh environmental compliance penalties within their borders would have an exclusionary effect on business and economic development.¹⁶¹ Not surprisingly, this dangerously lax environmental regime led to a number of problems including pollution, conservation issues, and urban sprawl.¹⁶² Enhanced media coverage provided a first-hand look at environmental tragedies like the Cuyahoga River in Cleveland catching fire, the Santa Barbara Oil Spill of 1969, and Lake Erie being declared “dead.” These events, combined with writings like Rachel Carson’s *SILENT SPRING*, demonstrated a rapidly growing public awareness of the linkages between an unhealthy environmental policy and the dangers it presents to the public health.¹⁶³ This new

158. A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. U. J.L. & POLY 1, 4 (2010); see also Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 5 (2007) (discussing the “fierce environmental disputes over transboundary pollution” resolved by the United States Supreme Court during the earlier part of the twentieth century).

159. See generally Tarlock, *supra* note 158, at 1 (noting the significant changes to federal environmental law in the 1970s).

160. See Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POLY F. 185, 185 (2003) (noting that “[u]ntil 1970, the federal government’s involvement in environmental regulation was extremely limited; the primary responsibility for dealing with environmental problems was entrusted not to the federal government, but rather to the states.”).

161. James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10905, 10907-08 (2010).

162. See generally Keith H. Hirokawa, *Sustaining Ecosystem Services through Local Environmental Law*, 28 PACE ENVTL. L. REV. 760, 762-74 (2011) (discussing the divergence between federal pollution control and local land use).

163. Philip R. Berke, Timothy Beatley & Bruce Stiftel, *Environmental Policy*, in *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* 172 (Charles

environmental awareness spread across the country and eventually turned into discontent before the federal government took notice, entering into “a remarkable burst of legislative activity during the 1970s.”¹⁶⁴ Through the enactment of several new environmental statutes and regulations, the federal government emerged as the dominant government protector and regulator of the environment,¹⁶⁵ and many of the resulting environmental statutes continue to significantly influence and impact local land use controls.¹⁶⁶

a. The Coastal Zone Management Act of 1972

The Coastal Zone Management Act (“CZMA”) was initially enacted in 1972,¹⁶⁷ setting forth the national Coastal Zone Management Program, administered federally by the Department of Commerce under the direction of the National Oceanic and Atmospheric Administration (“NOAA”) and at the state level by an agency designated by each state or territory.¹⁶⁸ The purpose of the CZMA was to increase state involvement in efforts by the federal government to protect the coastal zone.¹⁶⁹ The Act was a response to a growing concern that the nation’s coasts were becoming polluted due to the “piecemeal development of coastal ecosystems without an overall strategy for comprehensive coastal management.”¹⁷⁰ Following on the heels of the defeat of the National Land Use Policy Act (discussed above), some of the supporters felt the CZMA should have been part of a larger national land use management initiative.¹⁷¹ Perhaps the CZMA

Hoch et al. eds., 2000).

164. Percival, *supra* note 158, at 6.

165. Ashira P. Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 308 (2011); *see also* Kayden, *supra* note 84, at 453-54 (noting that the federal government has enacted several environmental laws since the 1970s that make it the leader in environmental protection).

166. Ostrow, *supra* note 165, at 308.

167. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-65 (2004)).

168. *Id.* §§ 1282-85 (current version at 16 U.S.C. §§ 1455-1456).

169. *See* Sierra B. Weaver, *Local Management of Natural Resources: Should Local Governments be able to Keep Oil Out?*, 26 HARV. ENVTL. L. REV. 231, 237 (2002) (citing 16 U.S.C. §§ 1451-52).

170. Michael J. Straub, *The West Coast of New England: A Case for the Inclusion of Lake Champlain in the Federal Coastal Zone Management Program*, 16 VT. L. REV. 749, 749 (1991) (referring to the findings of the Stratton Commission in OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION, REPORT OF THE COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, H.R. Doc. No. 91-42 (1st Sess. 1969)).

171. Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 749 (1996) (citing CHARLES M. LAMB, LAND USE POLITICS AND LAW IN THE 1970S 32-33 (1975)).

was successfully enacted—partly due to the fact that it both aided development while preserving the environment.¹⁷² The Act’s purpose, in part, “to encourage and assist states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development . . . ,”¹⁷³ provides the opportunity for states to work with local governments to achieve a shared land use vision for the coastline and coastal resources.

Pursuant to the Act, the National Oceanic and Atmospheric Administration provides states with funds necessary to enhance their waterfronts.¹⁷⁴ States then are authorized to allocate a portion of the grants to local governments or area-wide agencies, a regional agency, or an interstate agency.¹⁷⁵ With the federal funding flowing to the states, state governments typically re-grant dollars to local governments for a variety of land use planning and zoning initiatives including: development of local land use plans, feasibility and natural features studies, drafting of related provisions in local zoning ordinances, and waterfront redevelopment studies.¹⁷⁶ In order for local governments to access the federal pass-through dollars for the development of local waterfront revitalization plans from their respective states, they must agree to follow the federally-approved state coastal policies and to have their local plans reviewed, and approved for such, by the state government. While local governments maintain some level of flexibility in the design of the local waterfront plan, and must ensure consistency with future local land use regulations, the fiscal “carrot” and federal control rests in the required constituency with the federally approved state policies.¹⁷⁷

172. Poirier, *supra* note 171, at 719.

173. 16 U.S.C. § 1452(2).

174. *Id.* § 1455(a).

175. *Id.* § 1455(c).

176. See generally *Local Waterfront Revitalization Program*, N.Y. DEP’T OF STATE, DIV. OF COASTAL RESOURCES, http://nyswaterfronts.com/aboutus_lwrp.asp (last visited Apr. 1, 2012) (noting that a “Local Waterfront Revitalization Program” is a planning document to be prepared by a community to address all the critical issues addressing the waterfront).

177. See Salkin, *Integrating Local Waterfront Revitalization Planning into Local Comprehensive Planning and Zoning*, 22 PACE ENVTL. L. REV. 207 (2005) (noting that state and local governments have several “effective regulatory tools to protect, preserve, and promote sustainability” throughout their coastlines).

b. The Clean Water Act of 1972

Enacted in 1972, the Clean Water Act's ("CWA")¹⁷⁸ primary objective was to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."¹⁷⁹ The CWA had two stated goals: (1) eliminate "the discharge of pollutants into the navigable waters" by 1985;¹⁸⁰ and (2) provide "for the protection and propagation of fish, shellfish, and wildlife" and "recreation in and on the water" by 1983.¹⁸¹

To accomplish these goals, the CWA regulates discharge into "navigable waters," which are broadly defined as "the waters of the United States, including territorial seas."¹⁸² This definition has been further expanded by the U.S. Army Corps of Engineers, who has interpreted "navigable waters" to include not only traditional navigable waters, but also the tributaries of traditional navigable waters and wetlands located adjacent to navigable waters.¹⁸³ The exact scope of the CWA's jurisdiction remains to be seen.¹⁸⁴

Procedurally, the CWA operates under a series of related permitting processes. The U.S. Army Corps of Engineers has authority to issue permits under Section 404 for the dredge or fill of navigable waters,¹⁸⁵ which may be vetoed by the EPA.¹⁸⁶ The Army may issue state, regional, and nationwide general permits when the Secretary determines that the discharge activity "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."¹⁸⁷

The CWA indirectly affects local land use planning in its regulation of "point source" runoff through the EPA's administration of the CWA's National Pollutant Discharge Elimination System ("NPDES") program. Point sources are defined as "discernible, confined and discrete conveyance" which includes pipes, ditches, containers, landfill collection systems, and vessels

178. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251).

179. 33 U.S.C. § 1251(a) (2012).

180. *Id.* § 1251(a)(1).

181. *Id.* § 1251(a)(2).

182. *Id.* § 1362(7).

183. 33 C.F.R. § 328.3; 40 C.F.R. § 230.3(s).

184. See *Rapanos v. United States*, 546 U.S. 932 (2005) (noting that the petition for writ of certiorari was granted); Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* to the EPA & U.S. Army Corps of Engineers (June 5, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_guide_memo.pdf.

185. 33 U.S.C. § 1344.

186. *Id.* § 1344(c).

187. *Id.* § 1344(e)(1).

that can or may discharge storm water runoff.¹⁸⁸ The NPDES program is initially administered by the EPA until the state successfully applies to supervise the program and is accepted as a suitable supervisor of the NPDES program, based on criteria established by the federal government.¹⁸⁹ The NPDES program affects local land use planning by treating communities as polluters and requiring local municipalities to implement and oversee “a storm water management program . . . [which] reduce[s] the discharge of pollutants . . . to the maximum extent practicable.”¹⁹⁰ In order to receive a permit under the NPDES, local municipalities must prepare a plan to reduce storm water pollution that includes the adoption of land use control local ordinances and other restrictions that determine the collection, transmission, and treatment of storm water runoff from new and ongoing development.¹⁹¹

Furthermore, the CWA affects local land use planning by its regulation of “nonpoint sources,” which include certain agricultural uses and the maintenance of water structures, such as dams, maintenance of ponds, irrigation ditches, or drainage ditches.¹⁹² Under the CWA, nonpoint sources were left to the states to regulate.¹⁹³ Despite giving the states this regulatory authority, the federal government influences state regulation through the use of federal initiatives.¹⁹⁴ These federal initiatives include: Section 208 Planning, where states are assisted by the U.S. Fish and Wildlife Service to develop state-based waste treatment management practices in their state;¹⁹⁵ Section 319 Management Plans, which authorize federal funding for states to develop state management plans regarding nonpoint source management;¹⁹⁶ the Coastal Zone Management Act; and Section 303 Pollutant Load Calculations and Planning Requirements, which require states to identify and rank waters based on the severity of the pollution.¹⁹⁷

The federal permitting process—overseen by both the Army Corps of Engineers and EPA—has significant implications for

188. 40 C.F.R. § 122.2.

189. 33 U.S.C. § 1342(b).

190. 40 C.F.R. § 122.34(a).

191. *Id.* § 122.34(b).

192. 33 U.S.C. § 1251(a)(7).

193. *Id.* § 1251(b).

194. Laura D. Guercio, *The Struggle Between Man and Nature-Agriculture, Nonpoint Source Pollution, and Clean Water: How to Implement the State of Vermont's Phosphorous TMDL Within the Lake Champlain Basin*, 12 VT. J. ENVTL. L. 455, 466 (2011).

195. 33 U.S.C. § 1288; Guercio, *supra* note 194, at 466.

196. 33 U.S.C. § 1251(a)(7); Guercio, *supra* note 194, at 466.

197. 33 U.S.C. § 1251(a); Guercio, *supra* note 194, at 466; *Scott v. City of Hammond*, 741 F.2d 992, 996-98 (7th Cir. 1984).

proposed development under consideration by local land use authorities who must be mindful during land use decision making.

c. The Endangered Species Act of 1973

The Endangered Species Act (“ESA”) was enacted in 1973 by Congress, upon finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”¹⁹⁸ Overseen by two federal agencies—the National Fish and Wildlife Service (“NFWS”), and the National Oceanic and Atmospheric Administration (“NOAA”), provisions of the ESA attempt to promote cooperation between the federal government and states because the states have “close working relationships with local governments . . . and are in a unique position to assist the Services in implementing all aspects of the Act.”¹⁹⁹ Notably, Section Six of the ESA expressly authorizes the NFWS or NOAA to enter into cooperative agreements with states.²⁰⁰ Moreover, states are financially incentivized into entering into cooperative agreements with the federal government.²⁰¹ However, to enter into such an agreement, the state must “establish[] and maintain[] an adequate and active program for the conservation of endangered species and threatened species.”²⁰²

The Supreme Court has described the ESA as the “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”²⁰³ It is aimed at protecting species designated as “endangered” or “threatened,” made upon a factor based determination initiated by either the NFWS or the NOAA.²⁰⁴ Upon a designation of endangered or threatened, the DOI or NOAA must then identify “critical habitat[s]” of the species.²⁰⁵ The designation of a critical habitat then requires agency consultation for any development by a federal agency that could affect either the survivability or recoverability of the species.²⁰⁶

198. Endangered Species Act of 1973, Pub. L. No. 93–205, § 2(a), 87 Stat. 884 (1973) (amended 2002).

199. Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,274 (July 1, 1994).

200. Endangered Species Act of 1973, Pub. L. No. 93–205, § 6, 87 Stat. 889 (1973).

201. 16 U.S.C. § 1535(d)(2).

202. Endangered Species Act of 1973, Pub. L. No. 93–205, § 8(c), 87 Stat. 890 (1973).

203. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

204. 16 U.S.C. § 1533(a)(1).

205. *Id.* § 1533(a)(3)(A)(i).

206. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d

Section Nine of the ESA prohibits the “taking” of any endangered species.²⁰⁷ This broad “taking” language includes habitat modifications of the endangered species that actually injures or kills the species due to the significant impairment of breeding, feeding, or sheltering lands.²⁰⁸ State, local, and private entities are subject to the “taking” prohibitions of the ESA. The Act applies to all lands in the United States, whether they are state-owned, municipality-owned, or privately owned.²⁰⁹ A “taking” under the ESA influences land use development, both privately and in all levels of government.²¹⁰ Under this language, the ESA restricts the development of land in any manner that could significantly impair the recovery of an endangered species, unless the developer can obtain a permit issued by a federal agency.²¹¹ Further, at least in part, the ESA’s review process affects local land use and planning because it replaces local discretion in certain land use matters with the discretion of a federal agency to determine the relationship between the survival of the species and the land use proposal.²¹²

d. The Nuclear Waste Policy Act of 1982

The Nuclear Waste Policy Act (“NWPA”), enacted in 1982,²¹³ was intended to identify and develop regional repositories where the federal government could safely store nuclear waste. The site selection and zoning processes were originally overseen by the Department of Energy²¹⁴ where great lengths were taken in its site selection process, recognizing the essential role of the host state or Indian tribe in the construction and safety of the site.²¹⁵ Eventually, however, the site selection process was overtaken by Congress due to the political maneuvering by states, which sought to keep nuclear waste repositories outside of their borders.²¹⁶ In light of this stalemate, Congress ultimately conducted an end-run

1059, 1069 (9th Cir. 2004).

207. 16 U.S.C. § 1538(a)(1)(B)-(C).

208. *Id.* § 1532(19); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691 (1995).

209. 16 U.S.C. § 1538 (1988); *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000).

210. Jacalyn R. Fleming, *The Scope of Federal Authority under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L. REV. 497, 498 (2001-2002); Michael Cassidy & Michael Donohue, *The Endangered Species Act and Land Use Planning*, 29 ZONING AND PLANNING LAW REPORT. 9, 1 (2006).

211. 16 U.S.C. § 1539(a)(2)(A).

212. *Id.* § 1539(a)(2)(A)(i)-(iv).

213. 42 U.S.C. § 10101.

214. 42 U.S.C. § 10131-33.

215. Marta Adams, *Yucca Mountain—Nevada’s Perspective*, 46 IDAHO L. REV. 423, 429 (2010).

216. *Id.* at 431.

around the NWPAs, amending it to designate the Yucca Mountains, located in Nevada, as the only site that would be considered a long-term nuclear waste repository.

Although the Yucca Mountain site was ultimately abandoned in 2009,²¹⁷ the NWPAs contained provisions which affected local land use law. For example, the NWPAs had the ability to preempt state and local land use planning involving the nuclear repository. Under the NWPAs, a state could reject the site selection by DOE, but this rejection could be overturned by a resolution passing both houses of Congress,²¹⁸ effectively preempting local zoning and removing the power from the local governments for nuclear waste storage. As with other federal environmental laws, the provisions of the NWPAs contained no direct control over local zoning, however, the “Screw Nevada”²¹⁹ Amendment to the NWPAs showed how Congress, lacking the patience to comply with the local and state land use regulatory scheme, was dismissive of a cooperative land use control regime.

2. *The Fair Housing Act Amendment of 1988*

In 1988, Congress amended the Fair Housing Act for the specific purpose of “prohibit[ing] local governments from applying land use regulations in a manner that will . . . give disabled people less opportunity to live in certain neighborhoods than people without disabilities.”²²⁰ Almost twenty-five years after the enactment of the Fire Island National Seashore Act (discussed in Section III.A.2), the Fair Housing Act boldly, on its face, took on local land use control, this time for the purpose of ensuring civil rights.

The Fair Housing Act Amendments (“FHAA”) broadened the definition of unlawful discrimination, providing that, “discrimination includes a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling,”²²¹ as well as the failure to implement various building standards to multifamily dwellings.²²² House Reports, which accompany the FHAA, state

217. See *FY 2010 Appropriations Hearing: Hearing Before the Subcomm. on Energy and Water Development and Related Agencies of the S. Comm. on Appropriations*, 111th Cong. 10-11 (2009) [hereinafter *Appropriations Hearing*] (statement of Steven Chu, Sec’y, U.S. Dep’t of Energy) (requesting the termination of the Yucca Mountain program, and seeking alternative ways to dispose of nuclear waste).

218. 42 U.S.C. § 10135(b)-(c).

219. Adams, *supra* note 215, at 431.

220. *Smith & Lee Assocs., Inc., v. City of Taylor*, Mich., 102 F.3d 781, 795 (6th Cir. 1996).

221. 42 U.S.C. § 3604(f)(3)(B).

222. *Id.* § 3604(f)(3)(c).

that the “the prohibition against discrimination against those with handicaps appl[ies] to zoning decisions and practices,”²²³ and that it is further meant to “prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.”²²⁴

Consequentially, the FHAA has impacted local government decision making in the land use context by requiring reasonable accommodations and the granting of exceptions and variances where regulations would prohibit disabled persons from having an equal opportunity to live in a certain community.²²⁵ The FHAA further “provide[s] a vehicle for plaintiffs to challenge provisions of local zoning ordinances,”²²⁶ and courts have held that the statute prohibits discriminatory land use restrictions by municipalities, even where such actions are “ostensibly authorized by local ordinance.”²²⁷

Additionally, under the FHAA, local governments must contribute to the enforcement of matters usually covered by a state or local building code. The Secretary of HUD can “encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C) [of the Act], and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).”²²⁸

3. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act (“ADA” or “Act”) was enacted by Congress in 1990²²⁹ to ensure that individuals with disabilities have equal access to facilities and activities alike.²³⁰

223. H.R. Rep. No. 100-711, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

224. *Id.*

225. *Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597, 604 (4th Cir. 1997).

226. SALKIN, *supra* note 11, § 3:5.

227. *Id.* (quoting *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450 (Dist. N.J. 1992)).

228. 42 U.S.C. § 3604(f)(5)(C). The standards included in paragraph (f)(3)(e) are those mentioned *supra* concerning building standards making the dwelling more accessible to an individual confined to a wheelchair. *Id.* § 3604(f)(3)(C).

229. 42 U.S.C. §§ 12101-12213.

230. H.R. Rep. No. 101-485, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304. The Committee on Education and Labor submitted a report along with its affirmative vote in favor of the ADA.

Like the FHAA, the history of the ADA is grounded in the civil rights movement.²³¹ The ADA prohibits discrimination against individuals with disabilities²³² in any public “service, program, or activity.”²³³ This broad phrase is applied to land use planning through Section 202 of the Act, which holds that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²³⁴ Most relevant to local land use planning is the statute’s requirement that governments make reasonable accommodations for individuals with disabilities. Although the language of the statute does not specifically indicate that it applies to local land use planning and regulatory decision making, the Department of Justice made it clear in early guidance documents that the Act did indeed apply to local land use regulations.²³⁵ This interpretation was later reiterated by a

The Committee stated that:

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

Id. Outlining how individuals with disabilities were treated, the report stated that:

- (1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
- (2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
- (3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
- (4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
- (5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

H.R. Rep. No. 101-485, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

231. Daniel P. Dalton & Brett J. Miller, *The Ever Expanding Scope of the Americans with Disabilities Act: Whether Title II of the ADA Applies to Zoning Issues*, 38 URB. LAW. 613 (2006) (explaining that the Civil Rights Act of 1964 and the Rehabilitation Act remain the basis for much of the disability legislation and that Title II of the ADA borrows from the enforcement provisions of the Civil Rights Act).

232. 42 U.S.C. § 12101.

233. *Id.* § 12131.

234. *Id.*

235. Dalton & Miller, *supra* note 231, at 613-14.

number of federal circuit courts.²³⁶ Like the FHAA, the ADA not only mandates local land use regulatory compliance with federal rules for a specified segment of the population, but it also provides a vehicle for enforcement through the federal courts.

4. *The Disaster Relief Act of 1974, The Stafford Disaster Relief and Emergency Assistance Act of 1988, and The Disaster Mitigation Act of 2000*

In response to the damage caused by natural disasters, Congress enacted the Disaster Relief Act of 1974.²³⁷ Unlike the National Flood Insurance Act of 1968,²³⁸ this legislation was not crafted specifically to control the use of land in disaster-prone areas, yet Congress did include limited land use provisions to further the federal government's goal of "encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations."²³⁹

To encourage uses of land that are more suited to resist the damage caused by natural disasters, Congress created an incentive program whereby applicants who rebuild or repair structures in compliance with federal standards would be provided with federal loans or grant funding.²⁴⁰ Further, state and local governments were required to "agree that the natural hazards in the areas in which the proceeds of the grants or loans are to be used shall be evaluated and appropriate action shall be taken to mitigate such hazards, including safe land-use and construction practices[.]"²⁴¹ The Disaster Relief Act also permits the president to institute a program from "disaster preparedness that utilizes services of all appropriate agencies."²⁴² Under this section, the president can provide grants to states so that they can create

236. See, e.g., *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997) (holding that both the ADA and the Rehabilitation Act apply to the city's zoning decision). See also *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002) ("a proper reasonable accommodation might assert that the zoning authority should have waived or modified its rule against elevators in residential dwellings to permit those who need them to use them and thereby have full access to and enjoyment of residences there."), and *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (holding that a variance from the City zoning ordinance restricting group homes from operating within 2500 feet of each other is a reasonable accommodation under both the ADA and the FHAA).

237. 42 U.S.C. §§ 5121-5208.

238. 42 U.S.C. §§ 4001-4129.

239. 42 U.S.C. § 5121(b)(5); *Vt. Agency of Natural Res. v. Duranleau*, 617 A.2d 143 (Vt. 1992) ("language of the Disaster Relief Act expressly encourages states to develop land use and construction regulations").

240. 42 U.S.C. § 5131(c).

241. *Id.* § 5176 (repealed 2000).

242. 42 U.S.C. § 5131(a).

comprehensive plans to prepare for natural disasters, disaster preparedness, and prevention plans, and for the improvement of disaster assistance plans.²⁴³

The Disaster Mitigation Act of 2000 (“DMA”)²⁴⁴ amended the original legislation, and was based on findings that state and local governments needed to better prepare for natural disasters.²⁴⁵ The DMA authorizes the president to provide various forms of financial and technical assistance to states and local governments during and after a major disaster.²⁴⁶ The Hazard Mitigation Program authorized under the law provides “mitigation” assistance to state and local governments to avoid more extensive damage in future major disasters.²⁴⁷ The Hazard Mitigation Program provides financial incentives to both state and local governments to prepare and submit mitigation plans to FEMA.²⁴⁸ Through these plans, the federal government is able to indirectly influence local land use and planning as the local hazard mitigation plans must provide a “blueprint” for reducing potential losses, based on existing policies and programs of the local municipalities.²⁴⁹ This blueprint should identify projects and techniques used by the locality in mitigating potential disasters, “with particular emphasis on new and existing buildings and infrastructure.”²⁵⁰ The mitigation plans further emphasize cooperative involvement among municipalities, allowing for multiple local governments to submit “multi-jurisdictional plans,”²⁵¹ as well as requiring the plans to be drafted according to a planning process which allows involvement from “neighboring communities, local and regional agencies involved in hazard mitigation,” and the public.²⁵²

C. More Recent Post-QUIET REVOLUTION Federal Actions

The Fire Island National Seashore Act, the Fair Housing Act Amendments, and the Americans with Disabilities Act, discussed above, by statutory language and intent, possess more significant restraints on local land use control than the resulting intended and perhaps unintended impacts from the environmental laws of

243. *Id.* § 5131(c).

244. Disaster Mitigation Act of 2000, Pub. L. No. 106-390, 114 Stat. 1552 (2000).

245. *Id.* § 101, 114 Stat. at 1153.

246. *Id.* § 203, 114 Stat. at 1153.

247. *Id.*; 44 C.F.R. § 206.431 (2009); 44 C.F.R. § 201.6 (2009).

248. 44 C.F.R. § 201.6(a)(1) (2009).

249. See generally Patricia E. Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10158, 10161 (Mar. 2008).

250. 44 C.F.R. § 201.6(c)(3)(ii) (2009).

251. *Id.* § 201.6(a)(4).

252. *Id.* § 201.6(b)(2).

the 1970s and the incentive-approached programs aimed at achieving better planning and coordination. More recent legislative and regulatory initiatives, however, seem to have ratcheted up the extent of federal influence over local land use authority. The impacts of all of these federal statutes on local land use control have had many intended and unintended results, and one identifiable outcome has been a significant increase in the amount of land use litigation, once a bastion of state court practice, in the federal courts. The statutes discussed below are meant to offer a cursory overview of the shift in the land use regulatory regime to highlight the growing willingness of Congress in modern times to enact laws that impede the tradition of local control.

1. *The Telecommunications Act of 1996*

Congress enacted the Telecommunications Act of 1996 (“TCA”)²⁵³ with the intent of reducing the effect that disparate or piecemeal local land use regulation had upon the broad implementation of a wireless communications network.²⁵⁴ Upon signing the law, President Clinton stated that the legislation was “revolutionary,” and that it would “bring the future to our doorstep.”²⁵⁵ The impetus for the new law came from the industry, which argued that such action was needed to promote greater competition.²⁵⁶

253. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

254. H.R. Rep. No. 104-204(I), at 47; H.R. Rep. No. 104-204(I), at 104, stating:

The Committee [on Commerce] finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

255. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 123 (1996) (quoting President William J. Clinton, Remarks on Signing the Telecommunications Act of 1996: February 8, 1996, 32 Wkly. Comp. Pres. Doc. 215 (Feb. 12, 1996)).

256. Carol A. Goforth, *A Bad Call: Preemption of State and Local Authority to Regulate Wireless Communication Facilities on the Basis of Radio Frequency Emissions*, 44 N.Y.L. SCH. L. REV. 311 (2001). One cannot help but wonder whether following the events of September 11, 2001, the federal actions described in this Section might have been justified under the banner of

The TCA preempts state and local zoning and land use regulations “that materially limit[] transmission or reception by satellite earth station antennas, or impose[] more than minimal costs on users of such antennas . . . unless the promulgating authority can demonstrate that such regulation is reasonable.”²⁵⁷ Characterized by one court as a “refreshing experiment in federalism,”²⁵⁸ whether Congress and the Federal Communications Commission (“FCC”) have achieved the proper balance of authority may elicit different responses from the various stakeholder interests.

Among other things, the TCA prohibits local governments from completely banning wireless towers within their jurisdiction,²⁵⁹ prohibits discriminatory or preferential zoning by the local government in favor of one provider over another where substantially the same services are provided,²⁶⁰ and forbids localities from banning the siting of radio towers based upon environmental factors, such as radio frequency emissions.²⁶¹ Further, the TCA requires local land use boards and commissions to make a timely response to applications and requires that any denials be in writing and “supported by substantial evidence contained in the written record.”²⁶² The statute further mandates that decision makers render a decision in a reasonable time

homeland security as opposed to pro-business competitiveness.

257. 47 C.F.R. § 25.104(a) (2012). Reasonable means that the local regulation has “clearly defined health, safety or aesthetic objective[s] that [are] stated in the text of the regulation itself,” and does not unduly burden access to satellite service. *Id.*

258. *Town of Amherst v. Omnipoint Commc’n Enter., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

259. 47 U.S.C. § 332(c)(7)(B)(i)(II).

260. *Id.* § 332(c)(7)(B)(i)(I). Under the anti-discrimination provision of the TCA, many circuit courts, with the exception of the fourth circuit, “are willing [sic] find a violation based on specific zoning decisions alone. These circuits hold that a local zoning authority runs afoul of the statute if its enforcement of local requirements creates ‘significant gaps’ in service coverage.” SALKIN, *supra* note 11, § 25:3. In some circuits, if any provider offers cellular service in the area in question, then a cap of coverage will not be found, where as other circuits will find a violation if the provider has a gap in its own service network. *Id.* Once this gap has been shown, the provider must then make a showing of the necessity and intrusiveness of the proposed tower. *Id.*

261. 47 U.S.C. § 332(c)(7)(B)(iv). The Committee on Commerce felt that not only would local RF restrictions impede progress of a nationwide network, but this impediment would serve no rational purpose, as “local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence.” H.R. Rep. No. 104-204(I), at 95 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10.

262. 47 U.S.C. § 332(c)(7)(B)(iii). This standard requires that the local authority base its decision on less than a preponderance of the evidence, but more than a scintilla. SALKIN, *supra* note 11, at § 25:54. Under this standard, “generalized [aesthetic] concerns of citizens are, standing alone, not substantial evidence.” *Id.*

period.²⁶³

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

2. *The Religious Land Use and Institutionalized Persons Act*

In 2000, Congress passed, and President Clinton signed, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).²⁶⁴ Designed in part to eliminate discrimination in the land use regulatory context, Section Two provides in part, “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that . . . [the regulation] is in furtherance of a compelling governmental interest.”²⁶⁵ The Act also prohibits governments from treating religious groups on “less than

263. 47 U.S.C. § 332(c)(7)(B)(ii). The Federal Communications Commission (FCC) issued new rules, effective November 18, 2009, establishing deadlines for state and local governments to act on wireless tower siting with respect to applications involving personal wireless services covered by Section 332(c)(7) of the Telecommunications Act. That section “includes commercial mobile service, unlicensed wireless service and common carrier exchange services.” § 332(c)(7). Section 332(c)(7) requires state or local government to act on a wireless tower siting request “within a reasonable amount of time.” *Id.* The FCC’s new rules now provide the following time periods for action by a state or local government: “(1) 90 days from submission of the request for collocations; and (2) 150 days from submission of the request for all other wireless facility siting applications.” *Id.* If there is a failure to timely act, an applicant can file a claim for relief in court within thirty days of the failure to act. Timeframes may be extended by mutual consent of the parties. A party whose application has been pending for longer than those time periods as of November 18, 2009:

[M]ay, after providing notice to the relevant state or local government, file suit under Section 332 if the state or local government fails to act within 60 days from the date of such notice. The notice provided to the state or local government must include a copy of the FCC’s declaratory ruling.

Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd. 13994 (2009).

264. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000). For a history behind the enactment of the statute and a more detailed discussion of its impact on local governments see Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 THE URB. LAWYER 195 (2008).

265. 42 U.S.C. § 2000cc(a)(1).

equal terms” with nonreligious groups,²⁶⁶ and prohibits local governments from zoning out religious uses.²⁶⁷

In an introduction to an Albany Law School Government Law Review Symposium on this issue, along with co-author Amy Lavine, we explained²⁶⁸:

For all of RLUIPA’s noble intentions, and despite its drafters’ belief that it does not give religious groups “immunity” from zoning laws,²⁶⁹ the statute can potentially be invoked to shield religious organizations from valid concerns about development patterns and community character. It has been relied on, for example, by a church seeking to use its land for outdoor concerts,²⁷⁰ and by another wishing to erect an electronic billboard not permitted by the local sign code.²⁷¹ Big box churches²⁷² and houses of worship seeking to build entertainment facilities,²⁷³ rehabilitation centers,²⁷⁴ offices,²⁷⁵ and other auxiliary uses²⁷⁶ have also sought the protections of the

266. *Id.* § 2000cc(b).

267. *Id.*

268. Patricia E. Salkin & Amy Lavine, *God and the Land: A Holy War Between Religious Exercise and Community Planning and Development*, 2 ALB. GOV’T L. REV. viii (2009).

269. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch, Kennedy, and Reid).

270. *Church of Universal Love and Music v. Fayette Cnty.*, No. 06-872, 2008 WL 4006690, at *1 (W.D. Pa. Aug. 26, 2008).

271. *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cnty.*, 941 A.2d 560, 563 (Md. Ct. Spec. App. 2008).

272. *See, e.g., Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, 612 F. Supp. 2d 1157, 1161 (D. Colo. 2009) (seeking to expand its facilities under RLUIPA); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002) (seeking to build a 300,000 square foot church with over 4700 seats).

273. *See, e.g., Scottish Rite Cathedral Ass’n v. City of L.A.*, 67 Cal. Rptr. 3d 207, 210 (Cal. Ct. App. 2008) (questioning whether a church could build a theater and banquet space rentals); *City of Hope v. Sadsbury Twp. Zoning Hearing Bd.*, 890 A.2d 1137, 1140 (Pa. Commw. Ct. 2006) (seeking to use land for a campground and hiking trails).

274. *See generally Calvary Temple Assembly of God v. City of Marinette*, No. 06-c-1148, 2008 U.S. Dist. LEXIS 55500 (E.D. Wis. July 18, 2008) (arguing the right to open a counseling center under RLUIPA); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008) (seeking to open a homeless shelter); *Men of Destiny Ministries, Inc. v. Osceola Cnty.*, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321 (M.D. Fla. Nov. 6, 2006) (seeking to open a rehabilitation center); *New Life Ministries v. Charter Twp. of Mt. Morris*, No. 05-74339, 2006 U.S. Dist. LEXIS 63848 (E.D. Mich. Sept. 7, 2006) (seeking to use the church’s property for an alcohol and drug treatment program).

275. *See N. Pac. Union Conference Ass’n v. Clark Cnty.*, 74 P.3d 140, 142 (Wash. Ct. App. 2003) (seeking to use the land for a 40,000 square foot office building).

276. *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 647 (10th Cir. 2006) (involving a church-operated day care); *DiLaura v. Ann Arbor Charter Twp.*, 30 F. App’x 501, 503 (6th Cir. 2002) (involving the use of a house as a religious retreat for a Catholic organization); *Sisters of St.*

statute, sometimes with success. These types of land use, whether religious or not, raise legitimate concerns among local governments and nearby property owners. While they may not always be “compelling,” requiring them to pass strict scrutiny seems to give religious organizations an unfair advantage in the land development process. RLUIPA also imposes a federal standard on an area of law that has traditionally been local in nature; indeed, few things are more local than decisions affecting communities’ growth and development. The threat of RLUIPA litigation and the costs that it entails, however, give local governments a strong disincentive to impose limitations on development projects proposed by religious groups, even where they might conflict with long term plans and legitimate community concerns.

Since the enactment of the statute, the floodgates have burst open with litigation in attempts to clarify RLUIPA’s statutory ambiguities. The statute, for example, defines “religious exercise” to include “[t]he use, building, or conversion of real property for the purpose of religious exercise”²⁷⁷ and the courts have struggled to demarcate the point at which a house of worship’s accessory facilities lose their religious qualities.²⁷⁸ The courts have also had to decide whether the term “land use regulation”—defined to include zoning and landmarking laws²⁷⁹—applies to such things as building code requirements,²⁸⁰ open space plans,²⁸¹ and the use of eminent domain.²⁸² RLUIPA’s substantial burden provision, however, has

Francis Health Servs. v. Morgan Cnty., 397 F. Supp. 2d 1032, 1036 (S.D. Ind. 2005) (involving a religious hospital); *Life Teen, Inc. v. Yavapi County*, No. CIV 01-1490 PCT RCB, 2003 U.S. Dist. LEXIS 24363, at *2 (D. Ariz. Mar. 26, 2003) (involving the establishment of a youth camp affiliated with a Catholic organization); *Greater Bible Way Temple v. City of Jackson*, 733 N.W.2d 734, 737 (Mich. 2007) (involving the establishment of an apartment complex by a religious organization).

277. 42 U.S.C. § 2000cc-5(7)(B) (2000).

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

279. 42 U.S.C. § 2000cc-5(5).

280. See, e.g., *Second Baptist Church v. Gilpin Twp.*, 118 F. App’x 615, 617 (3d Cir. 2004) (holding that a mandatory sewer connection ordinance was not subject to RLUIPA); *Beechy v. Cent. Mich. Dist. Health Dep’t*, 475 F. Supp. 2d 671, 680-84 (E.D. Mich. 2007) (applying RLUIPA to a septic system requirement).

281. See *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at *8 (D. N.J. Oct. 1, 2007) (holding that a township open space plan is a land use regulation subject to RLUIPA).

282. See *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616,

caused the most disagreement among the courts, as the statute fails to define the phrase. This has resulted in an inconsistent application of the statutory standard across the country,²⁸³ and combined with the fact-intensive inquiries conducted by most courts, RLUIPA's prohibition on substantial burdens has seemed, at times, to cause unpredictable results.²⁸⁴

There is little doubt that RLUIPA has had profound impacts on land use planning and control. According to a recent report issued by the U.S. Department of Justice, in the first ten years since RLUIPA was enacted, the Department opened fifty-one investigations against communities, filed seven lawsuits, participated in ten amicus briefs to defend the constitutionality of the statute, and has collected millions of dollars in damages against violators.²⁸⁵

Professor Marci Hamilton explains that this statute is yet another example in the federalism paradigm furthering the notion that Congress is good and the states are bad, and she asserts that this perspective must be reexamined.²⁸⁶ She argues that from a federalism perspective, Congress should have asked the following questions prior to passing the measure: What is the degree of interference with state and local law? What are the purposes and aspirations of state and local laws affected by the federal law? Why is it that local land laws differ in their treatment of religious landowners? Given the interconnectedness of all members of a community covered by a master zoning plan (a reality that comes out once one analyzes even a single zoning plan), what was the

641-42 (7th Cir. 2007) (concluding that the taking of religious property was not subject to RLUIPA); *Albanian Associated Fund*, 2007 WL 2904194, at *8 (holding that although the condemnation could not be challenged under RLUIPA, the implementation of the land use plan under which the condemnation was initiated did fall within the scope of RLUIPA).

283. See generally Salkin & Lavine, *supra* note 264, at 195 (analyzing how different courts across the country have interpreted RLUIPA).

284. Salkin & Lavine, *supra* note 268. See *id.* at 228-34 (analyzing the courts' inconsistent application of RLUIPA).

285. U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 5-6 (2010), available at http://www.justice.gov/crt/rluiipa_report_092210.pdf.

286. Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 328-29 (2003). "Part of the blame for the anemic congressional response to the Court's federalism cases—as well as the academics' and the press's impassioned, negative responses—must be laid at the feet of a paradigm of a congressional-state relationship that has outlasted its usefulness." *Id.* at 328-29. "The RLP/RLUIPA legislative history illustrates that the states are assumed to be bad constitutional actors—a handful of claims is sufficient for Congress to proceed to interfere significantly in a quintessentially local arena and for it to claim a 'massive' record of state misconduct. Moreover, members of Congress attach little to no value to having fifty discrete states independently pursuing the public good." *Id.* at 355.

likely impact of privileging religious land uses vis-à-vis all other land uses, including residential uses? And have any states experimented with a regime like RLPA/RLUIPA, giving religious entities special privileges in the land use process, and if so, what was the result?²⁸⁷ Professor Hamilton's call for greater empirical evidence to justify federal preemptive or curtailing legislation on the local land use regulatory regime is equally applicable to the other statutes discussed in this Article.

3. *The Energy Policy Act of 2005*

The Energy Policy Act of 2005 ("EnPA")²⁸⁸ affects local land use planning in communities by allowing the use of eminent domain to obtain a right of way for the siting of electric transmission facilities and by giving the federal government extensive control over the interstate siting of such facilities.²⁸⁹ Specifically, the Federal Energy Regulatory Commission ("FERC") can issue construction permits for interstate transmission facilities in areas the Secretary of Energy has designated as "national interest electric transmission corridors,"²⁹⁰ preempting the local siting process²⁹¹ by giving FERC the exclusive authority to site electric transmission lines and interstate natural gas pipelines, storage facilities, and terminals.²⁹² Although a company seeking to place transmission lines must abide by state and local zoning ordinances, where there is a conflict between the ordinances and the FERC regulations, the FERC requirements will prevail.²⁹³ EnPA also grants operators of interstate energy transmission facilities the authority to obtain the right of way on private

287. *Id.* at 355-56.

288. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 595 (West 2011).

289. 119 Stat. 946; 16 U.S.C.A. § 824p (West 2011).

290. 119 Stat. 947; 16 U.S.C.A. § 824p(b). A corridor is designated based upon a study, conducted once every three years, by the Secretary. § 824p(a)(1). The Secretary "may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor." § 824p(a)(2). The Secretary may consider, among other factors, the economic development and vitality of the area and the effects unreasonably priced energy will have on such an economic setting, as well as the economic growth in the area and the effect that a limited supply of energy will have on such growth. § 824p(a)(4).

291. AES Sparrows Point LNG, L.L.C. v. Smith, 470 F. Supp. 2d 586, 596-99 (D. Md. 2007).

292. § 824p(a)(2). *See* 15 U.S.C. 717b-1(b) (mandating that a state agency be consulted by the commission). Note that this does not include wind energy facilities.

293. FED. ENERGY REGULATORY COMM'N, A GUIDE TO THE FERC ELECTRIC TRANSMISSION FACILITIES PERMIT PROCESS 10 (2010), available at <http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf>.

land.²⁹⁴ Where the facility operator cannot come to terms with the land owner to obtain the right of way to construct or modify the transmission facility, the operator may initiate eminent domain proceedings in court.²⁹⁵ By exercising this right, local land use plans and zoning regulations are further preempted.

The area of federal energy policy in general presents unique challenges in the land use context as the desire to take advantage of more renewable energy sources, such as wind and solar, rely on the willingness of local governments to modify zoning ordinances and land use regulations to permit the siting of such uses.²⁹⁶ While a number of state governments have preempted local zoning control when it comes to the siting of large scale wind energy facilities,²⁹⁷ it remains unknown whether the federal government will assert a more aggressive regulatory role in terms of land use preemption in the future.

IV. THE INCREASING TREND OF FEDERAL PROGRAMMATIC INFLUENCE

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

294. 119 Stat. 948; § 824p(e)(1).

295. 119 Stat. 948; § 824p(e)(1).

296. See generally JOHN R. NOLAN & PATRICIA E. SALKIN, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT IN A NUTSHELL (2011) (discussing the initiatives that state and local governments are taking in order to take advantage of renewable energy).

297. E.g., Power N.Y. Act of 2011, 2011 N.Y. Sess. Laws, ch. 388 (McKinney) (providing procedures to certify wind-powered facilities).

A. The Department of Defense

The Department of Defense (“DoD”) owns several thousand buildings and facilities throughout the United States, which cumulatively involves over thirty million acres of land.²⁹⁸ Despite being one of the largest landholders in the United States, DoD is not often considered in the context of local land use planning and control. Yet, its influence, particularly when it comes to the economic impact on local communities, is immense. DoD has expressed concerns that “[t]he encroachment of incompatible civilian land use activities too near an installation can negatively affect DoD missions and operations, expose the public to potential health and safety risk, and become a national defense issue.”²⁹⁹ As a result, with the cyclical Base Realignment and Closure (“BRAC”), many localities find themselves with inadequate land use regulations to prevent a base closure and/or to deal with the sudden disappearance of DoD’s presence.

Through its Office of Economic Development (“OED”), DoD offers the opportunity to engage in Joint Land Use Studies (“JLUS”). JLUS are basic collaborative planning processes funded by DoD whereby Department representatives and the local government identify encroachment issues around a military base and subsequently the local government updates its zoning and land use regulations to address these concerns.³⁰⁰ JLUS are aimed at promoting “cooperation in land use planning between the military and civilian communities as a way to reduce adverse impacts on both military and civilian activities.”³⁰¹ DoD is also authorized to enter into agreements with local governments to restrict incompatible land uses close to military installations.³⁰² While DoD does not encroach upon local land use control in the traditional sense, the reality is that the consequences of failing to address DoD needs in local land use regulations could have devastating economic impacts for its host communities.³⁰³

298. *About the Department of Defense*, DEP’T OF DEFENSE, <http://www.defense.gov/about> (last visited Apr. 1, 2012).

299. DEP’T OF DEFENSE OFFICE OF ECON. ADJUSTMENT, PRACTICAL GUIDE TO COMPATIBLE CIVILIAN DEVELOPMENT NEAR MILITARY INSTALLATIONS IV-4 (2005).

300. *Id.* at V-19.

301. Ryan Santicola, *Encroachment: Where National Security, Land Use, and the Environment Collide*, ARMY L., July 2006, at 1, 6.

302. *Id.* DOD may also enter into these agreements with private entities as well. *Id.*

303. Tara A. Butler, *Strategies to Encourage Compatible Development Near Military Installations*, ZONING AND PLANNING L. REPORT, July-Aug. 2005, at 1, 6 (stating that “[d]espite its strong interest in preserving its military installations, the federal government does not pass and enforce laws that ban development near them. The most valuable contribution the federal government provides to prevent encroachment is to offer policy guidance and

B. *The Environmental Protection Agency*

The Environmental Protection Agency was established in 1970 to establish and enforce environmental standards, monitor and analyze the environment, and assist state and local governments in controlling pollution.³⁰⁴ The EPA has plainly noted that it “recognizes that land use planning is within the authority of local governments,”³⁰⁵ yet it further notes that “land use planning plays a critical role in state and local activities to mitigate greenhouse gases and adapt to a changing climate.”³⁰⁶ The Agency has noted that “[a]lthough land use planning is an integral responsibility of local governments, state-level policies and support for local efforts . . . are critically important.”³⁰⁷ As will be discussed below, the EPA funds a variety of programs that may influence local land use planning.

C. *The Department of Housing and Urban Development*

In the 1930s, Congress established both the Federal Housing Administration and the Public Housing Administration as separate federal agencies which dealt with homeownership and low-income rental assistance.³⁰⁸ As these federal agencies began to shift their focus to urban development, Congress passed the Housing Act of 1949 “to address the multiple problems of people living in the nation’s burgeoning cities that had grown rapidly and haphazardly in the first half of the 20th Century.”³⁰⁹ The centerpiece of this act was the so-called “slum clearance” program, which authorized federal funding to local land use authorities for the acquisition, demolition, and redevelopment of blighted areas.³¹⁰ Further, the act established a direct relationship between local municipalities and what would soon be the Department of Housing and Urban Development.³¹¹

In the 1950s and 1960s, HUD’s focus on urban development broadened. As discussed above, in 1954, the HUD 701 Program³¹²

financial assistance to states and localities to promote joint compatible land-use planning conducted by the local community in cooperation with the local military installation.”).

304. COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, FIRST ANNUAL REPORT 25 (1970).

305. 64 Fed. Reg. 68761 (Dec. 8, 1999).

306. *State and Local Climate and Energy Program*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/statelocalclimate/state/topics/land.html> (last visited Apr. 1, 2012).

307. *Id.*

308. LAWRENCE L. THOMPSON, A HISTORY OF HUD 30 (2006), available at http://www.hudnlha.com/housing_news/hud_history.pdf.

309. *Id.* at 6.

310. *Id.* at 7.

311. *Id.*

312. Housing Act of 1954, Pub. L. No. 83-560, § 701, 68 Stat. 640 (1954).

provided federal funds for urban planning, land use studies, surveys, and other local land use plans to promote the healthier growth and redevelopment of population centers. In 1991, the Kemp Commission, appointed by Secretary Jack Kemp, released the report, NOT IN MY BACKYARD: REGULATORY BARRIERS TO AFFORDABLE HOUSING, which launched an attack on local land use controls as a leading cause of increased housing costs.³¹³ In addition to the creation of a clearinghouse on regulatory barriers to affordable housing, the Department launched a “Bringing Homes Within Reach through Regulatory Reform” program as part of HUD’s Affordable America’s Affordable Communities Initiative in 1994.³¹⁴ This program was “designed to encourage some 25,000 local government officials and community leaders throughout the country to work together to identify solutions to the housing affordability challenge.”³¹⁵ Zoning tools viewed as exclusionary were the target of this effort. In 1966, the federal government enacted the Model Cities program which gave funding to municipalities for the implementation of five-year comprehensive plans for cities.³¹⁶ The program, administered through HUD, “required local citizen participation in the preparation and implementation of the five-year comprehensive plans for each designated city”³¹⁷ Recognizing the intersection of affordable housing and local land use planning and regulatory controls, HUD continues to provide incentive based funds based in part by localities’ comprehensive planning of development.³¹⁸

D. The Department of Transportation

The Department of Transportation (“DOT”) was created by Congress in 1966³¹⁹ to “ensur[e] a fast, safe, efficient, accessible, and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people”³²⁰ The federal transportation planning infrastructure, which includes DOT’s Federal Highway Administration (“FHA”),

313. Patricia E. Salkin, *Barriers to Affordable Housing: Are Land-Use Controls the Scapegoat?*, LAND USE L. & ZONING DIGEST, Apr. 1993, at 3.

314. U.S. DEP’T OF URBAN HOUSING AND DEV., HUD HELPING COMMUNITIES EXPAND AFFORDABLE HOUSING THROUGH REGULATORY REFORM, *available at* <http://archives.hud.gov/news/2004/pr04-025.cfm>. The clearinghouse has now evolved into a portal and can be accessed at <http://www.huduser.org/portal/rbc>.
Id.

315. *Id.*

316. THOMPSON, *supra* note 308, at 7.

317. *Id.*

318. *Id.* at 17.

319. *What We Do*, U.S. DEP’T OF TRANSPORTATION, <http://www.dot.gov/about.html#whatwedo> (last visited Apr. 1, 2012).

320. *Id.*

has specific, statutorily defined land use planning requirements,³²¹ which include consulting with local land use planning authorities.³²² This further reflects DOT's enabling legislation, which recognizes that it is in the national interest to encourage the growth of a safe national transportation infrastructure that will further "foster economic growth and development within and between States and urbanized areas . . ."³²³ Transportation regulations are intended "to be consistent with local comprehensive land use planning and urban development objectives . . ."³²⁴

E. Interagency Collaboration

As previously noted, for the most part, the federal agencies engage their own independent relationship with local governments over the aspects of land use regulatory control that are relevant only to the individual agency's mission. More recently, several agencies have collaborated, pooling fiscal and programmatic resources to promote greater sustainability through an intergovernmental partnership aimed at influencing local land use planning and control behaviors. The Partnership for Sustainable Communities ("PSC") was founded in 2009 by the Secretaries of HUD and DOT, and the Administrator of the EPA to enable more prosperous communities.³²⁵

Under the PSC, each agency uses federal grants and programs to further their shared interests in the form of programs which affect the sustainability of towns, cities, and regions.³²⁶

321. See 23 U.S.C. §§ 134-35 (2008) (providing land use requirements in relation to metropolitan and statewide transportation planning); 23 C.F.R. § 450 (2007) (implementing 23 U.S.C. § 135).

322. See 23 U.S.C. §§ 134(g), 134(i)(4); *id.* § 135(f)(2)(D) (indicating consultation requirements between agency officials and government officials).

323. *Id.* § 134(a)(1).

324. Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 924 (1991).

325. ENVTL. PROT. AGENCY, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, A YEAR OF PROGRESS FOR AMERICAN COMMUNITIES 2 (2010), available at http://www.epa.gov/smartgrowth/pdf/partnership_year1.pdf.

The Partnership advocates that "[d]eveloping more sustainable communities is important to our national goals of strengthening our economy, creating good jobs now while providing a foundation for lasting prosperity, using energy more efficiently to secure energy independence, and protecting our natural environment and human health." *Sustainable Communities*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, <http://www.sustainablecommunities.gov/> (last visited Apr. 1, 2012).

326. Each member of the agency has a specific role to fill in order for the comprehensive venture to be a success. HUD's role is to provide resources to assist in the implementation of sustainable development, DOT utilizes funding to integrate transportation in ways which "directly support" sustainable

Additionally, the PSC has removed regulatory and policy barriers that, if in place, would impede the goals of the partnership.³²⁷ Finally, the PSC adheres to six “livability principles” which guide the goals and funding allocation of this partnership.³²⁸ The PSC provides this assistance in the form of various federal programs and initiatives. These programs include the Transportation Investment Generating Economic Recovery (“TIGER”) program,³²⁹ the Sustainable Communities Regional Planning Grant program,³³⁰ and the Smart Growth Implementation Assistance program.³³¹ Each of these programs includes provisions affecting the control of land use and zoning by local and state governments.³³²

The TIGER program was originally created through the American Recovery and Reinvestment Act of 2009.³³³ Administered by the DOT, TIGER grants are for the purpose of improving the nation’s infrastructure.³³⁴ The grants are

communities, and the EPA uses funding and resources to provide technical assistance to communities implementing sustainable planning, as well as assisting in the development of “environmental sustainability metrics and practices.” Notice of Funding Availability (NOFA) for HUD’s Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program, No. FR-5396-N-03, 6 (June 23, 2010), *available at* <http://archives.hud.gov/funding/2010/scrpgsec.pdf>.

327. *Id.* at 8.

328. *Id.* at 3, 6. The partnership is guided by six “livability principles.” *Id.* at 7-8. The first guiding principle is to develop additional transportation opportunities within a community, reducing greenhouse emissions, reliance on foreign oil, as well as lowering transportation costs. *Id.* at 7. The next principle is to promote the use of equitable and affordable housing, creating such housing in new locations and with increased energy efficiency. *Id.* The PSC also strives to enhance economic competitiveness through creating “reliable and timely access to employment centers, educational opportunities, services and other basic needs by workers, as well as expanded business access to markets.” *Id.* Of particular importance to local government officials is the guiding principle of supporting existing communities. *Id.* at 7-8. Through this principle, the federal government will fund programs that revitalize communities, such as increasing transportation, “mixed-use development and land recycling . . .” *Id.* at 7. Additionally, the partnership’s livability principles seek to promote the sixth livability principle, to fund programs that value and enhance the unique characteristics of neighborhoods by promoting “healthy, safe, and walkable neighborhoods.” *Id.* at 8. Lastly, the partnership will also strive to coordinate federal funding. *Id.*

329. ENVTL. PROT. AGENCY, *supra* note 325, at 4.

330. *Id.* at 5.

331. *Id.* at 6.

332. *Id.* at 4-6.

333. Notice of Funding Availability for Supplemental Discretionary Grants for Capital Investments in Surface Transportation Infrastructure under the American Recovery and Reinvestment Act, 74 Fed. Reg. 28,755, 28,757 (June 17, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-14262.pdf>.

334. *DOT Information Related to the American Recovery and Reinvestment Act of 2009*, DEP’T OF TRANSPORTATION, <http://www.dot.gov/>

discretionary, and awarded to local municipalities that submit applications that address both primary and secondary goals under the program, including the sustainability of the project, the economic stimulus of the project, the innovation of the project, and the collaborative nature of the project.³³⁵ Although the selection criteria does not directly call for the revision of local and regional planning, certain aspects of TIGER projects could affect local and state land use regulations and policies requiring localities to indicate a willingness to make changes.³³⁶ Rezoning and variances may, in some instances, be necessary to satisfy certain TIGER criteria as a successful applicant must attempt to fully integrate transportation not only in residential neighborhoods and communities, but also integrate the transportation into places of interest, such as places of employment and locations to purchase commodities.³³⁷ In addition to transportation integration, local planning may also need to implement a strategy of reducing transportation altogether. This effort would be facilitated by the rezoning of communities on a large scale, breaking from exclusionary methods of contemporary zoning, by integrating retail, commercial, and other nonresidential uses within neighborhoods. Therefore, attempts to win these funds through the competitive bidding process may incentivize more sustainable local land use regulations.

The PSC also supports the Community Challenge Grants (“CCG”) program administered by HUD.³³⁸ The CCG program is

recovery/ost/faqs.htm (last visited Apr. 1, 2012).

335. Interim Notice of Funding Availability for the Department of Transportation’s National Infrastructure Investments under Full-Year Continuing Appropriations, 2011, 76 Fed. Reg. 38,719, 38,722-23 (July 1, 2011), available at http://www.dot.gov/tiger/docs/FY11_TIGER_IntNOFA.pdf. The primary group of selection criteria is composed of long-term goals established by the applicant political subdivision. *Id.* at 38,722. These long-term goals include: repairing existing the existing transportation infrastructure, enhancing medium to long-term economic competitiveness, increasing the livability of communities through increasing transportation options and access, improving environmental sustainability, and improving the safety of the United States transportation system. *Id.* at 38,723. Inherent in these criteria are the creation of jobs and stimulating the economy, as part of the Obama Administrations broader policy goals. The secondary goals the applicants should emphasize are transportation innovation and collaboration or partnership. *Id.*

336. The impact of land use decisions, regulations, and plans have the ability to have a profound impact on many of the selection criteria, such as revitalizing existing and creating new transportation opportunities, as well as promoting environmental sustainability. *Id.* at 38,724.

337. The Notice states, “[p]articuliar attention will be paid to the degree to which such projects contribute significantly to broader traveler mobility through intermodal connections, enhanced job commuting options, or improved connections between residential and commercial areas.” *Id.*

338. DEP’T OF HOUSING AND URBAN DEV., FREQUENTLY ASKED QUESTIONS

aimed at fostering reform and reducing “barriers to . . . affordable, economically vital, and sustainable communities.”³³⁹ CCG directly impacts and influences land use planning, as it states in the overview on its website that efforts to obtain these grants “may include amending or replacing local master plans, zoning codes, and building codes, either on a jurisdiction-wide basis or in a specific neighborhood, district, corridor, or sector to promote mixed-use development, affordable housing, the reuse of older buildings and structures for new purposes”³⁴⁰ CCG grants are given out based upon the “six livability criteria” determined by the PSC.³⁴¹ Further, eligibility for funding is conditioned on seven designated activities designated by HUD. These activities directly influence land use planning, as some even include a complete revision of the town’s zoning for mixed use, or altered zoning for the sake of energy or transportation efficiency.³⁴²

Another initiative of the PSC is The Sustainable Communities Regional Planning Grant (“SCRPG”) program which is administered by HUD, but coordinated in conjunction with DOT

ABOUT HUD’S FY2011 COMMUNITY CHALLENGE PLANNING GRANT PROGRAM 1 (2011), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=FY11ComChPlanFAQ.pdf>. Formerly, the program was operated in conjunction with DOT. *Id.*

339. Dep’t of Housing and Urban Dev., *Community Challenge Grants*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/sustainable_housing_communities/HUD-DOT_Community_Challenge_Grants (last visited Apr. 1, 2012).

340. *Id.*

341. *See supra* note 328 and accompanying text.

342. Notice of Funding Availability for the Department of Housing and Urban Development’s Community Challenge Planning Grants and the Department of Transportation’s TIGER II Planning Grants, 75 Fed. Reg. 36,246, 36,248-49 (June 24, 2010), *available at* <http://edocket.access.gpo.gov/2010/pdf/2010-15353.pdf>. HUD designated seven activities required for funding. *Id.* The first activity provided for is the creation of a master or comprehensive plan that promotes low income housing areas with retail and business uses, as well as “discourage[ing] development not aligned with sustainable transportation plans or disaster mitigation analyses.” *Id.* at 36,248. The second criterion mirrors the goals of the Partnership, focusing on the alignment of planning and the goals of livability and sustainability. *Id.* Under the third set of activities, the HUD program calls for a wholesale revision of local zoning, requiring movement towards inclusionary mixed-use zoning as well as using inclusionary and form based codes to promote the interests of fair housing. *Id.* The grants will also be used to alter zoning codes to increase energy efficiency, affordability, and the salubrity of housing options, to create strategies to locate low income housing in mixed-use neighborhoods and transit corridors, and to integrate low income housing into areas with few existing affordable housing options. *Id.* Lastly, the local government can receive funding by “[p]lanning, establishing, and maintaining acquisition funds and/or land banks for development, redevelopment, and revitalization that reserve property for the development of affordable housing within the context of sustainable development.” *Id.* at 36,249.

and EPA.³⁴³ SCRPG is aimed at “planning efforts that integrate housing, land use, economic and workforce development, transportation, and infrastructure investments . . .”³⁴⁴ Consortia made up of local governments, regional planning agencies, nonprofit organizations, and private industries must be created to receive funding from SCRPG.³⁴⁵ Again, the program is based on the PSC’s six livability principals. The SCRPG parallels the TIGER program in that there is no mandatory requirement for revision to the local zoning or land use planning of the consortium municipalities seeking the funds, although program criteria make it clear that the localities that are stronger candidates for the grant should demonstrate their willingness to be flexible in terms of land use and planning in its application.

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

V. CONCLUSION

While the common belief is that land use planning and control is an essential characteristic of local government, the reality is that the federal government has been both indirectly and directly influencing and controlling various aspects of the land use regulatory regime throughout zoning history. Empirical research is needed to truly ascertain the “on the ground” impact of the influence of federal land use initiatives on communities. Have the programs truly been enacted to address issues that rise to matters of federal or national concern? Have the legislative, regulatory, and programmatic efforts achieved their intended purpose? Is local control truly ineffective or inefficient, and if the answer is yes or maybe, what evidence exists that a land use regulatory regime would be better if managed and regulated at a higher level of government? However, the patchwork of federal intrusions into state and land use control appears to be the continuing trend in

343. Dep’t of Housing and Urban Dev., *Sustainable Communities Regional Planning Grants*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/sustainable_housing_communities/sustainable_communities_regional_planning_grants (last visited Apr. 1, 2012).

344. *Id.*

345. Advance Notice of Requirements for HUD’s Fiscal Year 2011 Sustainable Communities Regional Plan Grant Program, No. FR-5559-N-01, 14 (June 20, 2011), *available at* <http://archives.hud.gov/funding/2011/ascp01nofa.pdf>.

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the foreseeable future. The Commission on Environmental Quality should revisit the groundbreaking research agenda it envisioned for THE QUIET REVOLUTION forty years ago, and undertake a new national study to benchmark the successes and failures of the land use regulatory regime at all levels of government and in different substantive policy areas such as housing, energy, environment, and the economy.