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## WHERE YARDS ARE WIDE: HAVE LAND USE PLANNING AND LAW GONE ASTRAY?

LEE R. EPSTEIN\*

This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.

. . . .  
[Expert] reports [on zoning], which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will . . . increase the safety and security of home life; greatly tend to prevent street accidents . . . ; decrease noise and other conditions . . . ; preserve a more favorable environment in which to rear children, etc. . . . [I]n such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings . . . of the district.—Justice Sutherland<sup>1</sup>

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.—Justice Douglas<sup>2</sup>

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<sup>1</sup> Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390, 394 (1926).

<sup>2</sup> Village of Belle Terre v. Boras, 416 U.S. 1, 9 (1974).

## INTRODUCTION

Could we ever quarrel with the hoary language of American zoning jurisprudence embodied in *Village of Euclid v. Ambler*? Is it possible to challenge the bedrock sanctity of Justice Douglas' foundational premises for the peace of suburban life, guaranteed in local law, as described in *Village of Belle Terre*? The answers are that we must, and it is. The times demand it.

As explained in the cases that created land use and environmental law, the jurisprudence that deals with urban and environmental conditions is inherently flexible;<sup>3</sup> evolution and change are as much its watchwords as are *stare decisis*. As social structures and communities are ever transforming themselves, as values and outlooks shift and fluctuate, as science reveals more of causes and effects, and as technology alters all facets of life, so too must the law change to recognize and accommodate that reformation.

This article argues that another one of those times of necessary legal change and challenge is upon us. The provenance of case law and professional urban planning training and practice<sup>4</sup> has, at least in some part, directly led to a situation where the very opposite of land use law's noble aims and the planning profession's grand visions is now occurring.

It is true that people *are* voting with their feet. Substantial populations are still moving to suburbs and exurbs, still "escaping" the real or perceived ills of cities and towns,<sup>5</sup> and still expressing fears about the stability of property and community values when faced with the "threat" of townhouses,<sup>6</sup> garden apartments, or a corner convenience store. At the same time, however, the sobering economic, fiscal, social, community, and

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<sup>3</sup> "[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions . . . . Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained . . . even half a century ago probably would have been rejected . . . ." *Village of Euclid*, 272 U.S. at 386-87.

<sup>4</sup> For example, see WILLIAM I. GOODMAN & ERIC C. FREUND EDS., *PRINCIPLES AND PRACTICE OF URBAN PLANNING* (1968).

<sup>5</sup> See DAVID RUSK, *BALTIMORE UNBOUND: A STRATEGY FOR REGIONAL RENEWAL* ix (1996) [hereinafter RUSK, *BALTIMORE UNBOUND*]; see also Judith Evans, *Home Buyers Favor Suburbs over Cities*, WASH. POST, June 29, 1996, at E1; *infra* note 18 (referring to population changes in and around Euclid, Ohio).

<sup>6</sup> See Stephen C. Fehr, *Town House Debate Hits Many People Where They Live*, WASH. POST, Feb. 18, 1996, at A1; Wendy Melillo, *Prince George's Council Limits Town Houses*, WASH. POST, Nov. 13, 1996, at A1.

environmental results from these trends are themselves gathering steam and presenting an increasingly insistent momentum for change.

### I. SPRAWL: NATURE AND IMPACT

Sprawl is historic. For at least half a century American cities have run over the countryside. And sprawl has been dissected and deplored for almost as long.<sup>7</sup>

What *is* sprawl? One astute and long-time observer, an Oregon land use lawyer, described sprawl as having five key features: it has taken place in highly fragmented metropolitan areas; it is characterized by vastly expanding metro areas (an urban area expansion some eight to ten times the rate of population expansion); it is characterized further by automobile-only design and low density; there exists a great disparity of capability to finance needed public services between rich (largely suburban) and poor (largely urban) districts; and there is further a great disparity of public investment.<sup>8</sup> In general, recognizable sprawl takes the form of large expanses of low-density, single-use development, married with strip and auto-oriented commercial land uses, at the very edges or beyond the fringes of existing urbanization.

Sprawling suburban and exurban growth, in the prevailing forms and patterns in which it is now occurring, is helping to make family life more, not less difficult. For the bucolic "peace" of Justice Douglas' Belle Terre, we are exchanging traffic congestion,<sup>9</sup> the suburban chauffeur

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<sup>7</sup> See Arnold Berke, *Striking Back at Sprawl*, HIST. PRESERVATION, Sept./Oct. 1995, at 54; see also THE EDITORS OF FORTUNE, THE EXPLODING METROPOLIS (1958); JEAN GOTTMANN, MEGALOPOLIS (1961); JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

<sup>8</sup> See Henry Richmond, *Sprawl: Its Nature, Consequences, Causes, and Remedies*, LAND PATTERNS, Spring 1996, at 1.

<sup>9</sup> See ANTHONY DOWNS, STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION (1992). Downs explains that the pace and manner of growth in many metropolitan areas has preordained worsening congestion conditions, and that in these same areas, it will never be possible to build our way out of the mess. See *id.* at 27-30. Along with rapid population and job growth in the suburbs have come significant increases in the use of automobiles, insignificant numbers of new road miles built (not counting road widenings), and a complete failure to make drivers bear the costs they generate. See *id.* at 10-14. According to Downs, the preferences for low-density neighborhoods that are a substantial distance from (also low-density) workplaces, and the desire to travel in private

syndrome,<sup>10</sup> and the loss of vast stretches of contiguous open space and resource lands (farms, forests, and wetlands).<sup>11</sup> The premises concerning the stability of local tax bases, so important to earlier land use case law,<sup>12</sup> are being turned on their heads as localities are recognizing the hard fiscal

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vehicles, are further "driving" the problem. *See id.* at 14-20; *see also* ROBERT D. YARO & TONY HISS, *A REGION AT RISK* 155 (1996); Jim Hogan, *Can We Build Our Way Out?*, *THE REGION*, Dec. 1993, at 6.

<sup>10</sup> I use this term to refer to the necessity to physically deliver suburban children to the various disparate destinations of their young "social" lives—soccer or baseball games, after-school activities, parties, shopping, or the library—almost always by private automobile. Given the designs of today's suburbs, there is virtually no other way for children to participate in community life, and no other way to safely get them where they need or desire to go. Not only does the syndrome place extraordinary time demands and stress on families, but according to the California State Highway Division's 1964-1970 Research Studies, it also adds to local traffic problems, with moderate to large lot development designs yielding a third more vehicle trips per day than more compact development patterns. *See* Kevin Kasowski, *Bridging the Gap*, *DEVELOPMENTS* (National Growth Management Leadership Project, Portland, Or.), Spring/Summer 1990, at 5.

<sup>11</sup> According to the U.S. Environmental Protection Agency's Chesapeake Bay Program, the Chesapeake Bay watershed conservatively loses more than 90,000 acres (141 square miles) per year of open land to development. *See* U.S. ENVTL. PROTECTION AGENCY, *STATE OF THE CHESAPEAKE BAY* 1995, at 5 (1995) [hereinafter EPA, *THE STATE OF THE CHESAPEAKE*]. In the San Francisco Bay area, which totals some 4.5 million acres, the Greenbelt Alliance has estimated that 570,000 acres (up to 19,000 acres per year) is at risk of suburbanization over the next 30 years; 731,000 acres are currently urbanized. *See* GREENBELT ALLIANCE, *AT RISK: THE BAY AREA GREENBELT* 2-3 (1994). During the boom years of the 1980s, Massachusetts' open land was being consumed at a rate averaging more than 18,000 acres annually. *See* DANIEL S. GREENBAUM & ARLEEN O'DONNELL, *MASSACHUSETTS AUDUBON SOC'Y, LOSING GROUND: THE CASE FOR LAND CONSERVATION IN MASSACHUSETTS* (1987).

<sup>12</sup> *See, e.g.,* *Senior v. Town of New Canaan*, 143 A.2d 415 (Conn. 1959) (upholding zoning commission action to amend local zoning regulation to increase minimum lot size from two acres to four acres); *Simon v. Town of Needham*, 42 N.E.2d 516 (Mass. 1942) (upholding a local zoning law that prescribed a minimum one-acre lot size for certain residential districts); *Fischer v. Bedminster TP.*, 93 A.2d 378 (N.J. 1952) (upholding township zoning which restricted residential construction in rural areas to lots of five acres or greater). *But see* *National Land & Inv. Co. v. Easttown Township*, 215 A.2d 597 (Pa. 1965) (holding that a four-acre minimum lot requirement was unconstitutional as applied to residential districts in the township).

realities of the cost of low-density residential growth.<sup>13</sup>

There still is "quiet" in far suburban streets, but the cost to the rest of metropolitan areas' regional transportation systems from miles of curlicue cul-de-sacs, the absence of a true network of streets, low densities that are nearly impossible to serve with cost-efficient transit, and isolated "pods" of segregated office, commercial, and residential uses, has been inordinately high; the cost to real mobility may be higher still.<sup>14</sup>

Of equal relevance, the environmental impacts of low-density, single-use sprawling subdivisions, and the strip commercial land uses designed to accommodate such residential patterns, are now known to be substantial, and the toll on some of the nation's most precious and important resources (for example, the Chesapeake, San Francisco, and Narragansett Bays, northern and southern forests, pine-barren ecosystems, wetlands, etc.) is inordinately high.<sup>15</sup>

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<sup>13</sup> See Anna Borgman, *As Exurbs Grow, So Does Burden of Borrowing*, WASH. POST, Feb. 26, 1995, at B1; Frank Clifford, *Sprawl's Costs Hurting State, Report Finds*, L.A. TIMES, Jan. 31, 1995, at A3; Jessica Matthews, *The Costs of Unplanned Urban Sprawl*, WASH. POST, Jan. 13, 1991, at C7; *Reckoning All the Costs of "Sprawl"*, CHI. TRIB., May 5, 1996, at 22.

<sup>14</sup> See CONSERVATION LAW FOUND., ROAD KILL: HOW SOLO DRIVING RUNS DOWN THE ECONOMY 22 (1994); DOWNS, *supra* note 9, at 17-20; *Traffic Congestion: The Highway Headache that Won't Go Away*, TRANSP. RESOURCE BOOK (Chesapeake Bay Found., Annapolis, Md.), Feb. 1993, at 2.

<sup>15</sup> As an initial, direct impact, sprawl completely displaces and replaces forest, farm, and wetland with the highly managed landscape of the suburb and the street. Natural habitat and other natural functions (e.g., land and wetland as flood mediator) are lost. Indirectly, the newly extensive imperviousness prevents infiltration of storm water into ground water aquifers, and carries sediments, herbicides and pesticides, nitrogen and phosphorus, heavy metals, oil compounds, and asbestos from brake linings, quickly and directly into streams and rivers. The results include scoured and eroded urban streams that cannot sustain much life, great tongues of sediment that pour into tributaries, and entire watershed ecosystems primarily threatened not by the pollution that flows from industrial pipes and stacks, but by what runs off the land (and also, in the case of nitrogen and the Chesapeake Bay, by what falls as atmospheric deposition from mobile sources serving sprawling land use patterns). See THE YEAR 2020 PANEL, POPULATION GROWTH AND DEVELOPMENT IN THE CHESAPEAKE BAY WATERSHED TO THE YEAR 2020: THE REPORT OF THE YEAR 2020 PANEL TO THE CHESAPEAKE EXECUTIVE COUNCIL 22-23 (1988).

For example, with respect to the Chesapeake Bay, the technical, public policy, and popular literature on this subject is substantial. See, e.g., U.S. ENVTL. PROTECTION AGENCY, CHESAPEAKE BAY: A PROFILE OF ENVIRONMENTAL CHANGE (1983); U.S. ENVTL. PROTECTION AGENCY, CHESAPEAKE BAY PROGRAM TECHNICAL STUDIES: A SYNTHESIS

Finally, there is a direct relationship between the exodus from our cities and towns of middle class urban populations, together with their blue collar, professional, and service industry jobs, and those same towns' precipitous economic and social declines.<sup>16</sup> If we can believe recent studies, that relationship also pertains, sooner if not later, to a soon-to-follow decline in the stability of inner suburbs—a decline whose inevitable spread can eventually engulf locations farther and farther out.<sup>17</sup> The question persists: How long can a hollowed-out inner core survive—until the vacuum of crime, joblessness, poverty, infant mortality, and crumbling infrastructure sucks in

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(1982); GOVERNOR'S COMM'N ON GROWTH IN THE CHESAPEAKE BAY REGION, PROTECTING THE FUTURE: A VISION FOR MARYLAND (1991); THOMAS R. SCHEULER, DEPARTMENT OF ENVTL. PROGRAMS METRO. WASH. COUNCIL OF GOV'TS, CONTROLLING URBAN RUNOFF: A PRACTICAL MANUAL FOR PLANNING AND DESIGNING URBAN BMPs (1987); CHARLES W. COALE ET AL. EDS., LAND USE AND THE CHESAPEAKE BAY (1985); RICHARD R. HORNER ET AL., FUNDAMENTALS OF URBAN RUNOFF MANAGEMENT: TECHNICAL AND INSTITUTIONAL ISSUES (1994); TOM HORTON & WILLIAM M. EICHBAUM, TURNING THE TIDE: SAVING THE CHESAPEAKE BAY 128-66, 201-07 (1991); THE YEAR 2020 PANEL, *supra*. Indeed, *The Report of The Year 2020 Panel*, an analysis by an expert panel commissioned by the Governors of Maryland, Pennsylvania, and Virginia, the Mayor of the District of Columbia, and the Administrator of the U.S. Environmental Protection Agency, found that even if all point sources of pollution were adequately controlled, the Chesapeake Bay's restoration is severely threatened most by what happens on the land. See THE YEAR 2020 PANEL, *supra*. More contemporary analysis can be found in EPA, THE STATE OF THE CHESAPEAKE, *supra* note 11, at 5.

While it is true that some of the agricultural land replaced by low-density development is currently producing even higher inputs of nutrients and toxics than the sprawl that would replace it, such a situation is not universally true: "[U]rban uses can yield more nutrients per unit than well-managed, low-tillage cropland on pervious soils." COALE ET AL., *supra*, at 7. Farming *can be* conducted sustainably. Further, as explained in TURNING THE TIDE, preserving farmland as farmland preserves options, including taking land out of production or managing it differently for other productive "goods" in the future—say, as a wetland or to grow trees—while development precludes those options. See HORTON & EICHBAUM, *supra*, at 202-03. Too, the land has cultural and community value as a working landscape; and the multitude of other impacts of sprawl are avoided.

<sup>16</sup> See DAVID RUSK, CITIES WITHOUT SUBURBS (1993) [hereinafter RUSK, CITIES]; Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351 (1993); Richmond, *supra* note 8.

<sup>17</sup> See JOSEPH PERSKY ET AL., DOES AMERICA NEED CITIES?—AN URBAN INVESTMENT STRATEGY FOR NATIONAL PROSPERITY (1991); RUSK, BALTIMORE UNBOUND, *supra* note 5; Christopher B. Leinberger, *The Changing Location of Development and Investment Opportunities*, ADVISORY (Robert Charles Lesser & Co., Los Angeles, Cal.), Summer 1995, at 1-2.

the surrounding metropolitan region financially, socially, and in terms of image and market power?<sup>18</sup>

What can or should be done? How can these trends be reversed? As we enter the twenty-first century, how can planning's laudatory goals of urban compatibility and harmony, mobility and efficiency, social strength, fiscal soundness, community cohesiveness, and environmental integrity now be achieved? And how can the law, which has so well served to promote the 1950s to 1980s manifest destiny of outward mobility, be brought to bear on the adverse results of social and economic forces it has helped to unleash?

## II. PLANNING AND PUBLIC POLICY PRESCRIPTIONS

### A. Introduction

Advice from the experts abounds. Some urban planners and architects have said that design is the key: for the most part, we just need to begin designing real communities again, instead of subdivisions.<sup>19</sup> Some political conservatives and libertarians have argued that we merely need to return all power to the most local of levels, eliminate government regulation, and let loose private economic forces, whose "invisible hand" will bring us

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<sup>18</sup> Euclid, Ohio, the city whose then-new zoning ordinance featured in this century's most famous land use case, has lost greater than a quarter of its population, some 18,300 people, between 1970 and 1994. See *Sprawl Without Growth: The Land Use Tragedy of Northeast Ohio*, ECOCITY CLEV., Nov. 1995, at 4-5. South Euclid lost about 20% of its population, about 6,200 people, and Cleveland itself lost about 35%, some 257,978 people over the same 25-year period. See *id.* At the same time, Geauga County gained about 20,000 new residents, while Medina County grew by almost 50%, adding 40,000 new persons. See *id.* at 4. In addition to the decreased tax-base, Cuyahoga County, Cleveland, and the inner suburbs lost real income of about \$4 billion worth of payroll between 1972 and 1987 while the outer suburbs gained nearly \$1.5 billion. See *id.* at 5; see also D'Vera Cohn, *Surge Predicted in Area Jobs, Population over 30 Years*, WASH. POST, Jan. 13, 1994, at B1.

<sup>19</sup> See PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY AND THE AMERICAN DREAM* (1993); PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1994); Andres Duany & Elizabeth Plater-Zyberk, *The Second Coming of the American Small Town*, WILSON Q., Winter 1992, at 19; Duany Plater-Zyberk Architects, Inc., *Traditional Neighborhood Development Ordinance* (1991) (unpublished proposed model ordinance on file with the *William & Mary Environmental Law & Policy Review*).



to an appropriate social, fiscal, and environmental equilibrium.<sup>20</sup>

Some argue that we need not worry at all: that, as ever, money will be found to finance the expanding construction of new suburban schools, parks, police and fire stations, and more and wider roads (and the closing of urban schools, fire and rescue facilities, etc.); the environment will find technological fixes; and we cannot and should not intervene in the inevitable disappearance of the outmoded city. These theorists argue that any attempt to change the course of modern America's vast suburban movement is an untoward interference with the peoples' will and the free market—and is doomed to failure in any case.<sup>21</sup>

Some progressives, on the other hand, would change, and in some instances tighten, regulation and add planning at some (perhaps regional) level of government, to get at things like farmland, forest, wetland, and cultural or historic resource loss, and to reign in sprawl.<sup>22</sup> Today's zoning ordinances, for example, largely do not allow very creative solutions, such as mixes of uses, moderate densities, and designs that organize around transit accessibility.<sup>23</sup> Urban observers such as David Rusk and Myron Orfield have argued for new regional governance and regional public finance and revenue sharing arrangements, so that the social and economic burdens that plague many city centers—and which have already begun to spread to the inner suburbs—are more effectively addressed.<sup>24</sup>

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<sup>20</sup> See, e.g., RICHARD N. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995) (championing a conservative libertarian state and suggesting that our complex legal scheme can be simplified to several key principles).

<sup>21</sup> See THOMAS BYNRE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 227-31 (1991) (arguing that the changing demographics of the next suburban century indicate that urban America can be safely ignored by political America—with disastrous consequences for cities); PETER GORDON & HARRY W. RICHARDSON, *THE CASE FOR SUBURBAN DEVELOPMENT* (1996).

<sup>22</sup> See Jonathan Barnett, *Shaping Our Cities: It's Your Call*, *PLANNING*, Dec. 1, 1995, at 10; William Fulton, *We Have Seen the Future*, *PLANNING*, *supra*, at 14; see also AMERICAN PLANNING ASS'N, *PLANNING ADVISORY SERVICE REP. NO. 462/463, MODERNIZING STATE PLANNING STATUTES: GROWING SMART WORKING PAPERS VOLUME ONE* (1996) [hereinafter APA, PAS 462]; Jonathan Barnett, *Accidental Cities: The Deadly Grip of Outmoded Zoning*, *ARCHITECTURAL REC.*, Feb. 1992, at 94.

<sup>23</sup> See CALTHORPE, *supra* note 19.

<sup>24</sup> See RUSK, *BALTIMORE UNBOUND*, *supra* note 5; RUSK, *CITIES*, *supra* note 16; Myron Orfield, Jr., *Tax-Base Sharing to Reduce Fiscal Disparities*, in APA, PAS 462, *supra* note 22, at 167 [hereinafter Orfield, *Tax-Base Sharing*].

B. *The Causes of Sprawl: Policy and Society*

On one level or order, the cause of sprawl is quite simple: people *choosing* to live in a far suburban or exurban environment. Like most cause and effect relationships, however, this is too simple an explanation to serve those trying to understand the phenomenon. And, unless the myriad causes are understood, policies and programs invented to change its course are particularly ill-advised.

One key to understanding underlying causes is to follow the money and public policy trails. Historically, just as the settlement and conquest of the frontier characterized much of American nineteenth century political and social history, twentieth century industrialization, followed by social reform and "City Beautiful" movements, and then post-World War II economic development, characterized a significant portion of this century's history.<sup>25</sup>

By the 1920s, the country's *laissez faire* attitude toward industrial growth and some of its resulting urban conditions was changing.<sup>26</sup> While the influx of hundreds of thousands of immigrants created a vital economy, the mix of sweatshops, coal-fired industrial plants, and densifying urban living conditions helped lead a reform movement to develop new work standards and a newly focused urban planning profession.<sup>27</sup> Even before these influences, so-called "street-car suburbs" were being developed, where the growing middle and upper economic classes could find fresh air away from the clash of urban life, while maintaining their economic connection via the tendons of electric transit.

It was easy for the early social reformers to observe the problems and to prescribe what they felt then were obvious remedies, among them being the separation of work from home, the development of "Garden Cities,"<sup>28</sup> and

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<sup>25</sup> See MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890* (1969).

<sup>26</sup> See generally GABRIEL KOLKO, *MAIN CURRENTS IN MODERN AMERICAN HISTORY* (1976); JAMES L. MACHOR, *PASTORAL CITIES: URBAN IDEALS AND THE SYMBOLIC LANDSCAPE OF AMERICA* (1973); RAYMOND A. MOHL & JAMES F. RICHARDSON EDS., *THE URBAN EXPERIENCE: THEMES IN AMERICAN HISTORY* (1973) [hereinafter *URBAN EXPERIENCE*].

<sup>27</sup> See Joseph L. Arnold, *City Planning in America*, in *URBAN EXPERIENCE*, *supra* note 26, at 21-30; Neil Betten, *Urban Workers and Labor Organization*, in *URBAN EXPERIENCE*, *supra* note 26, at 84; Humbert S. Nelli, *European Immigrants and Urban America*, in *URBAN EXPERIENCE*, *supra* note 26, at 70.

<sup>28</sup> See EBENEZER HOWARD, *GARDEN CITIES OF TO-MORROW* (1902).

other design solutions intended to bring light, air, and green spaces to beleaguered city dwellers.<sup>29</sup>

The stock market crash in 1929 and the depression that followed served to enhance the role of government and the use of the public fisc to try to overcome social problems. Over time, federal government policy came to support many of the reforms noted above, in the form of financial incentives and public subsidies. Federally-insured home mortgages became widely available in 1934,<sup>30</sup> and the federal income tax deduction for interest payments on home mortgages was announced in 1954.<sup>31</sup>

In the 1930s, as part of federal economic "pump-priming" activities, Franklin Roosevelt's Works Progress Administration ("WPA") set to work building up the nation's power, water, and transportation infrastructure.<sup>32</sup> In some ways, the latter work accelerated in the post-World War II era, when the federal government committed to fund a substantial proportion of the nation's roads and bridges out of general tax revenues (though not to reconstruct or further develop its rails, which by then were beginning to lose ridership and freight to rubber-tired vehicles).<sup>33</sup> The Interstate Highway System was codified during the Eisenhower Administration in 1958.<sup>34</sup> Leavittown, one of the earliest of tract suburban developments, broke ground in 1947, and continued building out through the mid-1950s. The suburbanization of America had begun in earnest.<sup>35</sup>

Thus, public policy and public spending have played an important

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<sup>29</sup> See SCOTT, *supra* note 25, chs. 1-4.

<sup>30</sup> Federal insurance for home mortgages was created by the National Housing Act, ch. 847, § 203, 48 Stat. 1247, 1248-49 (1934) (codified as amended at 12 U.S.C. § 1709 (1994)).

<sup>31</sup> The home mortgage interest deduction was created as part of the Internal Revenue Code of 1954. See Pub. Law No. 83-596, § 163, 68A Stat. 46 (1954) (codified as amended at I.R.C. § 163 (1994)).

<sup>32</sup> The WPA, part of the initial New Deal program passed by the Roosevelt Administration during its first 100 days in office, was funded through the Federal Emergency Relief Act of 1933, Pub. L. No. 73-15, 48 Stat. 55 (1933), and created by Exec. Order No. 7396, 3 C.F.R. 172 (1936-1938).

<sup>33</sup> See STEPHEN B. GODDARD, *GETTING THERE: THE EPIC STRUGGLE BETWEEN ROAD AND RAIL IN THE AMERICAN CENTURY* (1994).

<sup>34</sup> See Pub. L. No. 85-767, 72 Stat. 885 (1958).

<sup>35</sup> See JOEL GARREAU, *EDGE CITY: LIFE ON THE BORDERLAND* (1991); SCOTT, *supra* note 25, at 457; JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939* (1989).

part in creating incentives for suburbanization and sprawl. Everything from support for home mortgages; single family mortgages insurable in a government-backed securities market;<sup>36</sup> accelerated depreciation;<sup>37</sup> five-year amortization;<sup>38</sup> and deductibility of "passive" real estate losses,<sup>39</sup> represent federal tax policies that have served as a subsidy to sprawl. Even the definitive selection of automobile infrastructure as that which would receive overwhelming public financial support, has helped promote the current national profile of urbanization. Other public policies, too numerous and varied to name, have undoubtedly played a role in the nation's mid-to-late twentieth century urban diaspora.<sup>40</sup>

Finally, of course, there are several social and economic phenomena that have played a central role in the nation's internal outward migration. Post-World War II housing needs skyrocketed as hundreds of thousands of veterans returned home; in more recent times, the baby boom (directly related to the veterans just noted) presented another substantial spike in the housing demand curve.<sup>41</sup> As disinvestment in urban centers progressed slowly at first (due in part to the monetary incentives and public policies noted earlier), and now progresses more quickly as the cities' tax-bases erode, as urban capital infrastructure deteriorates, and as school systems crumble and crime increases, the public simply "wants out."<sup>42</sup>

What are some other reasons for the movement described above? Upper income Americans are increasingly wealthy; we are decidedly *not* a class-less society; and racial fears and tensions are very real motivators for social separation.<sup>43</sup> Virtually all of these factors have lead to centrifugal movement.

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<sup>36</sup> See I.R.C. § 143 (1994).

<sup>37</sup> See *id.* § 168 (1994 & Supp. I 1995).

<sup>38</sup> See *id.* § 195 (1994).

<sup>39</sup> See *id.* § 469.

<sup>40</sup> See Dreier, *supra* note 16, at 1355. In fact, according to Dreier, the abundance of other federal policies helping to promote the suburban exodus included a geographic Pentagon drain to suburban locations, *see id.* at 1379-80; "redlining" (discrimination in mortgage lending) that was illegal, though tolerated, for at least 15 years in most metropolitan areas, *see id.* at 1381-83; and cutbacks or elimination of federal urban assistance programs, such as federal revenue sharing, job training, etc., *see id.* at 1383-86.

<sup>41</sup> See HENRY L. DIAMOND & PATRICK F. NOONAN, *LAND USE IN AMERICA* 85 (1996).

<sup>42</sup> See generally CALTHORPE, *supra* note 19; JAMES F. RICHARDSON, *Perspectives on the Contemporary City*, in *URBAN EXPERIENCE*, *supra* note 26, at 222.

<sup>43</sup> See Joel Kotkin, *White Flight to the Fringes*, WASH. POST, Mar. 10, 1996, at C1.

If their roots are in the region, for most people, that can only mean migration to the suburbs. The current cost of developing housing (in other words, housing with land) in the exurbs is often lower than in urban areas, and the apparent (though not necessarily real) costs associated with living further out—primarily the cost of buying a house—are lower the farther one goes.<sup>44</sup> Similarly, the apparent (though not necessarily real) advantage over urban pathologies like crime has been perceived to be in the suburbs.<sup>45</sup> Quality of life values, such as education and private open space, have often been found there as well because of an ample tax base and the culture of a strong middle class.

Of course, such advantages are not static. Sometimes these are apparent advantages only.<sup>46</sup> Sometimes they are only temporary, until the social disintegration and fiscal pressures begin to encompass a broader and broader geographic reach.<sup>47</sup>

### C. Legal "Causes"

As noted in the very beginning of this article, the law also has been

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<sup>44</sup> See Patrick H. Hare, "One-Car Mortgages" and "One-Car Rents": Making Housing Affordable by Reducing Second-Car Ownership, LAND DEV., Spring/Summer 1994, at 12-14.

<sup>45</sup> See Elise Armacost, *Security Is More Than a Matter of Statistics*, BALTIMORE SUN, Apr. 11, 1996, at 3E; Ross Howard, *Environmentalists Say Car Culture Is a Killer*, ALBANY TIMES UNION, Apr. 21, 1996, at A10; Ken Miller, *Accidents Affecting Suburbanites Safety*, DES MOINES REG., Apr. 16, 1996, at 3.

<sup>46</sup> See Hare, *supra* note 44.

<sup>47</sup> For example, public education in Montgomery County, Maryland, once the country's premier public education system, has been beset by difficulties and problems that are typical of less well-regarded school systems across the country. See Dan Beyers, *Schools to Report to Parents: Officials Hope Student Data Boost Education Involvement*, WASH. POST, Oct. 12, 1995, at Md.1; Stephen Buckley, *Montgomery Citizens Form Coalition to Support Schools*, WASH. POST, Feb. 25, 1993, at Md.3; Ann Goldstein, *Montgomery Cuts Budget for Schools: \$16 Million Pared by Local School Board*, WASH. POST, Feb. 13, 1991, at D1; Ann Goldstein, *Montgomery Hit on Minority Education: Initiatives Inadequate Contribute to Resegregation Study Says*, WASH. POST, Sept. 11, 1990, at A1; see also MIKE GREENBERG, THE POETICS OF CITIES: DESIGNING NEIGHBORHOODS THAT WORK 72 (1995); Leinberger, *supra* note 17. "People moved to the suburbs in the hope of finding Arcadian peace and bucolic splendor only to be followed by all the noise, congestion, asphalt, and squalor they thought they had escaped . . . . [S]uburbia will continue inevitably to destroy itself by its own success . . . ." GREENBERG, *supra*, at 74.

a primary ingredient in the causes of sprawl, and thus will need to figure prominently in relieving us of sprawl's continuing and worsening burdens. What are some of the legal causes for the current condition?

### 1. *Legal Structure and Architecture*

One cause is "structural" in nature. The fundamental structure of urban planning or land use law arose largely in response to the development of urban planning as a profession, and to its "scientific" solutions to perceived problems during the first third of the twentieth century. Practicing planners, originally coming largely from the ranks of landscape architecture and architecture, developed chiefly spacial solutions to urban problems, e.g., the separation of "incompatible" land uses and activities,<sup>48</sup> or the incorporation of more green space into residential living patterns on an individual basis.<sup>49</sup> As these solutions developed early in this century, the promise of certain technologies, such as modern cars on modern superhighways not yet built, also greatly influenced the new designs.

With the introduction of the Standard State Zoning Enabling Act ("SZEa") in 1922,<sup>50</sup> the states, original holders of the police power, quickly

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<sup>48</sup> See, e.g., *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals*, 427 P.2d 810 (Cal. 1967) (disallowing a variance for a developer to build an apartment building in a residential area of the city); *Clemons v. City of Los Angeles*, 222 P.2d 439 (Cal. 1950) (upholding minimum lot width and lot size restrictions); *Chicago Bank & Trust Co. v. City of Highland Park*, 137 N.E.2d 835 (Ill. 1956) (upholding zoning ordinance limiting building height to three stories or 45 feet, and limiting the intensity of the use to 1,500 square feet of lot area per family).

<sup>49</sup> See *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980); *Sierra Club v. Kern County Bd. of Supervisors*, 179 Cal. Rptr. 261 (Cal. Ct. App. 1981); *Greenhills Home Owners Corp. v. Village of Greenhills*, 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd*, 215 N.E.2d 403 (Ohio 1966).

<sup>50</sup> The SZEa was developed by the Department of Commerce from 1921 to 1926. See Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in APA, PAS 462, *supra* note 22, at 1-2. The Act set up a general grant of power to "the legislative body of cities and incorporated villages" to allow them to:

regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

ADVISORY COMM. ON ZONING, U.S. DEPT. OF COMMERCE, A STANDARD STATE ZONING

passed similar laws devolving land use authority to local governments. Land use law became an administrative law practice based, in large part, on interpreting and manipulating intricate local planning, zoning, and subdivision ordinances that reflected the "science" of spacial organization. The rigidity of code standards promised coherence, the stability of the status quo, and some relative ease in enforcement and interpretation.

The SZEA and its varied state progeny suffer from a variety of ills. Outlined by Professor Clyde Forrest in a recent article,<sup>51</sup> they include: (1) ill-defined empowerment of both local government and planning commissions; (2) planning requirements that are not uniformly applied to state functions as well as local; (3) failure to describe the role of the courts; (4) multiple enabling acts and special authorities; (5) relative powerlessness of planning commissions; (6) uncoordinated municipal departments; and (7) an insufficiently defined role for the boards of zoning appeals.<sup>52</sup> To this list must be added the lack of on-going state guidance and review, and the lack of any regional coordinating role—there is no "system" in the system.

The local laws that resulted from such authority contained (and still contain) detailed standards and criteria for individual lot and road design, residential densities and commercial intensities of use, compatible uses, and other prescriptions.<sup>53</sup> This pattern then became the architecture or structure of land use law, and this structure—in its particulars and minutia, in its stringent and unyielding application (or paradoxically in the variances and

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ENABLING ACT § 1 (2d ed. 1926) (footnotes omitted) [hereinafter SZEA]. The SZEA declared that this type of legislation would be:

in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements . . . made with reasonable consideration . . . to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout [the] municipality.

*Id.* § 3 (footnotes omitted).

<sup>51</sup> Clyde W. Forrest, *Interfaces for Model Planning and Zoning Legislation*, in APA, PAS 462, *supra* note 22, at 47, 49-50.

<sup>52</sup> *See id.*

<sup>53</sup> *See, e.g.*, ANNE ARUNDEL COUNTY, MD., CODE art. 28 (1995); MONTGOMERY COUNTY, MD., CODE chs. 50-59 (1994).

special exceptions to rules that sometimes end up *being* the rule in many localities)—has played a substantial role in leading to the current results that can be seen on the landscape.

The jurisprudence that developed from these foundations has sometimes focused upon the derivation or use of local ordinance standards (for example, what is the proper, lawful density that can be required in order to conserve farmland or other open space);<sup>54</sup> the application of the local master plan and zoning to the jurisdiction's landscape (for example, is this or that zone appropriate here or there);<sup>55</sup> whether variances requested meet

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<sup>54</sup> In Anne Arundel County, Maryland, the maximum density in a residential low-density district is one dwelling unit per five acres. See ANNE ARUNDEL COUNTY, MD., CODE art. 28, § 2-2A-05 (1995). For cluster development, the regulations prescribe varying lot sizes and densities depending on the intensity of use in the area being developed. See *id.* §§ 2-606, -607. Anne Arundel's agricultural and open space zoning permits a density of one unit per 20 acres. See *id.* § 2-211(b).

Montgomery County, Maryland, has developed several different agricultural zones to preserve and protect rural areas for agricultural use, rural residential use, recreational facilities, and to protect scenic and environmental resources. See MONTGOMERY COUNTY, MD., CODE div. 59-C-9 (1994). These zones define the permitted land uses, density requirements, minimum lot acreage and width, yard requirements, lot coverage requirements, and maximum building height. See *id.* §§ 59-C-9.3 to -45.

Maryland courts have generally upheld density restrictions as a valid exercise of police power. See, e.g., *Malmar Assocs. v. Board of County Comm'rs*, 272 A.2d 6 (Md. 1971); *Fitzgerald v. Montgomery County*, 376 A.2d 1125 (Md. Ct. Spec. App. 1977). The courts have also upheld zoning restrictions specifically to protect open space and watershed areas. See *Norbeck Village Joint Venture v. Montgomery County Council*, 254 A.2d 700 (Md. 1969).

Examples of open space litigation elsewhere include *Sierra Club v. City of Hayward*, 623 P.2d 180 (Cal. 1980) (upholding density restrictions to protect agricultural lands), and *Marcus Assocs. v. Town of Huntington*, 382 N.E.2d 1323 (N.Y. 1978) (upholding "population density" as a legitimate purpose for zoning in industrial and residential areas). Another popular technique to preserve open space and agricultural lands is the transfer of development rights. See, e.g., *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. Dist. Ct. App. 1990) (historic and wetlands resource area); *Matlack v. Burlington County Bd. of Chosen Freeholders*, 466 A.2d 83 (N.J. Super. Ct.), *aff'd*, 476 A.2d 1262 (N.J. Super. Ct. App. Div. 1983) (pinelands).

<sup>55</sup> See *Montgomery County v. Woodward & Lothrop, Inc.*, 376 A.2d 483 (Md. 1978) (holding that uniformity requirement in Maryland zoning statute does not prohibit classifications within a district as long as they are *reasonable*, and based on public policy considerations); *Prince George's County v. Equitable Trust Co.*, 408 A.2d 737 (Md. Ct. Spec. App. 1979) (holding that there is no right to a particular zoning classification); see also *J-Marion Co. v. County of Sacramento*, 142 Cal. Rptr. 723 (Cal. Ct. App. 1977); *Lavitt v.*



hardship or other special circumstance requirements);<sup>56</sup> attacks on the process of, and standards for, adoption of ordinances or specific zones;<sup>57</sup> the labyrinthine detail of contemporary "sophisticated" planning regimes;<sup>58</sup> and

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Pierre, 203 A.2d 289 (Conn. 1964); *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956).

Interpretation of what zones are appropriate and in accordance with the Master Plan varies among the states. The plan is either advisory, *see City Nat'l Bank v. County of Kendall*, 489 N.E.2d 486 (Ill. App. Ct. 1986); *Landau v. City of Overland Park*, 767 P.2d 1290 (Kan. 1989); *Folsom Rd. Civic Ass'n v. Parish of St. Tammany Park*, 407 So. 2d 1219 (La. 1981), controlling of some land use decisions, *see Smith v. City of Little Rock*, 648 S.W.2d 454 (Ark. 1983); *Neuzil v. City of Iowa City*, 451 N.W.2d 59 (Iowa 1990); *City of Pharr v. Tippitt*, 616 S.W.2d 173 (Tex. 1981), or controlling of all zoning and land use regulation, *see Haines v. City of Phoenix*, 727 P.2d 339 (Ariz. 1986); *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973).

<sup>56</sup> *See Maryland Aviation Admin. v. Newsome*, 652 A.2d 116 (Md. 1995); *McLean v. Soley*, 310 A.2d 783 (Md. 1973) (establishing that the standard for granting a variance is a showing of practical difficulty or unreasonable hardship). The standard is applied to specific structures or uses. *See Ad + Soil, Inc. v. County Comm'rs*, 513 A.2d 893 (Md. 1986) (set-back lines); *Zellinger v. CRC Dev. Corp.*, 380 A.2d 1064 (Md. 1977) (building height limits); *Zengerle v. Board of County Comm'rs*, 272 A.2d 646 (Md. 1971) (sanitary landfill); *Skipjack Cove Marina v. County Comm'rs*, 250 A.2d 260 (Md. 1969) (marina); *Moseman v. County Council*, 636 A.2d 499 (Md. Ct. Spec. App. 1994) (mining); *United Parcel Serv., Inc. v. People's Counsel*, 611 A.2d 993 (Md. Ct. Spec. App. 1992) (trucking facility).

The determination of what level of hardship is sufficient for granting a variance is generally determined on a case-by-case basis. *See Miclon v. Zoning Bd. of Appeals*, 378 A.2d 531 (Conn. 1997); *Homan v. Lynch*, 147 A.2d 650 (Del. Super. 1959). "Hardship" generally refers to a restriction on the owners land that deprives him of all beneficial use, *see Rozes v. Smith*, 388 A.2d 816 (R.I. 1978), but may also include restrictions on deriving a "reasonable return." *City of E. Chicago v. Sinclair Ref. Co.*, 111 N.E.2d 459 (Ind. 1953); *Otto v. Steinhilber*, 24 N.E.2d 851 (N.Y. 1939). Measurement of "hardship" is extremely difficult. *See Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972); *Warren v. Board of Appeals*, 416 N.E.2d 1382 (Mass. 1981); *Zoning Bd. of Adjustment v. Koehler*, 278 A.2d 375 (Pa. Commw. Ct. 1971).

<sup>57</sup> *See Topanga Ass'n for Scenic Comm. v. County of Los Angeles*, 522 P.2d 12 (Cal. 1974); *Gilmartin v. District of Columbia Bd. of Zoning*, 579 A.2d 1164 (D.C. App. 1990); *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1990).

<sup>58</sup> *See, e.g., Adequate Public Facilities, MONTGOMERY COUNTY, MD., CODE ch. 50 (1994); Transfer of Development Rights, MONTGOMERY COUNTY, MD., CODE §§ 59-C-1.33 to .39, 59-C-9.6, div. 59-C-10 (1994); FISCAL YEAR 1997: ANNUAL GROWTH POLICY FOR MONTGOMERY COUNTY, MARYLAND (1996).*

constitutional questions concerning such things as racial exclusion<sup>59</sup> and takings.<sup>60</sup>

One cannot “blame” case law any more than any other single legal “cause” for what has resulted on the ground, especially since judge-made lawmaking in this country has always operated within the constraints of a three branch, constitutional government. The courts are limited in their authority, and it is the rare land use case in which planning law actually can be artfully created—where judges have the opportunity given Justice Sutherland in *Village of Euclid v. Ambler Realty Co.* in 1926,<sup>61</sup> or Wisconsin

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<sup>59</sup> Segregation ordinances were overturned by the U.S. Supreme Court in 1917, see *Buchanan v. Warley*, 245 U.S. 60 (1917), despite continued attempts by cities to justify them as a valid exercise of their police powers. See, e.g., *Richmond v. Deans*, 37 F.2d 712 (4th Cir.), *aff'd per curiam*, 281 U.S. 704 (1930). The result however, was that while ordinances that prohibited blacks from buying homes in certain neighborhoods were invalidated, other ordinances that had exclusionary effects continued to stand. The situation reached a head in the 1970s when the Superior Court of New Jersey struck down a zoning ordinance that economically discriminated against the poor, and deprived them of adequate housing. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 290 A.2d 465 (N.J. Super. Ct. App. Div. 1972). The decision was modified by the New Jersey Supreme Court, declaring that every municipality must make realistically possible an appropriate variety and choices of housing; that such opportunities cannot be foreclosed for people of low and moderate income; and that every municipality must meet their “fair share” of supplying the regional need for such housing. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1974). In his concurrence to the decision, Justice Pashman listed several widely used zoning devices that were considered to be inherently exclusionary: minimum house size requirements; minimum lot size and minimum frontage requirements; prohibition of multifamily housing; prohibition of mobile homes; and overzoning for nonresidential uses. See *id.* at 737-40 (Pashman, J. concurring).

<sup>60</sup> The takings doctrine flows from the prohibition in the Fifth Amendment against the government taking privately owned property without just compensation. See U.S. CONST. amend. V. In the context of zoning and land use law, the question of compensation, which was faced head-on in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), continues to evolve, with the key question being the extent of the deprivation of the intended use by the action of the ordinance, and thus to the extent of the required compensation. The U.S. Supreme Court has made several recent pronouncements regarding the reach and extent of takings law. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>61</sup> 272 U.S. 365 (1926).

Supreme Court Justice Owen in *State ex rel. Carter v. Harper*<sup>62</sup> a few years earlier to enunciate the expansiveness of the police power, for example—concerning racial exclusion and takings. But these precedents have been part of the problem: lawyers and judges continue to use case law of this lineage and “science,” to support “use exclusivity” and the moderate-to-large lot densities that are endemic to today’s land and resource-consuming zoning regimes.

The *practice* of land planning law on the public sector side has involved developing, writing, and defending these local laws and regulations. For the private sector, day-to-day it may involve inventing and promoting entire new ordinances, provisions, or zones, so that one’s private landowner or developer clients can eventually get what they want. Essentially, as with any specialization, the legal profession prospered greatly as the practice of land planning law became ever more complex and elaborate: building upon the planning-zoning-subdivision-site plan review process, or adding to and amending a structure invented seventy-five or more years ago.

The end result is a level of complexity, multiple reviews, and intricate standards that (*voilà!*) only a lawyer could figure out, but which threatens, with every passing day, to topple the entire process of planning into the wastebin of irrelevancy. Ironically, even worse, it creates results, noted above, that are antithetical to society, economy, and environment.

## 2. *Public Policy and Government.*

A second “legal” cause pertains to a reliance upon certain government models and public policies invented to address the problems of a different

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<sup>62</sup> 96 N.W. 451 (Wis. 1923). Preceding the more famous *Euclid*, this case from the Wisconsin Supreme Court used similar reasoning to support and justify exclusively residential districts:

The home seeker . . . seeks a home at some distance from the business center. A common and natural instinct directs him to a section far removed from the commerce, trade, and industry of the community . . . . [This] instinct craves fresh air, sunshine, and well-kept lawns. [Regulations that recognize such rights] . . . attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city.

*Id.* at 455.

era. As lawyers, we are trained to work within the system, but the system itself is broken; the longer we merely fiddle, the hotter Rome burns.

a. *Real Property Taxes*

Throughout the country, many local jurisdictions depend completely, or at least rely heavily, upon the local property tax to finance basic local services, such as public safety or the school system.<sup>63</sup> There are a number of problems with such a system, many of which (for example, intergenerational equity) cannot be treated here. The never-ending drive to keep local coffers full by permitting or encouraging the development of high tax ratables creates a regional competition for land development that is destructive of many a neighboring (and actually interdependent) jurisdiction's local economy, as well as it may ignore such economic principles as competitive advantage.<sup>64</sup>

Further, many local governments have misunderstood the delicate balance between the costs and benefits of various kinds of growth, and so end up impoverishing themselves further in the name of trying to resolve fiscal difficulties,<sup>65</sup> or end up doing so seemingly by default or political weakness.<sup>66</sup> The land use results: primarily more sprawl.

Other models of revenue generation, or variations of the tax upon land, may offer hope of releasing local governments from the dependence upon a taxing mechanism that has been destructive of the land (and in the

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<sup>63</sup> The constitutionality of such structures have been challenged across the country, with respect to the school funding issue. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (striking down school financing laws). The Supreme Court has held that such systems, and the resulting inequities in funding levels between "poor" school districts and "wealthy" ones, do not violate the Equal Protection Clause of the U.S. Constitution. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973). Nonetheless, since *Serrano*, at least 30 state supreme courts have grappled with the issue and many courts continue to find the resulting disparities intolerable. See Bill Swinford, *Shedding the Doctrinal Scrutiny Blanket: How State Supreme Courts Interpret Their State Constitutions in the Shadow of Rodriguez*, 67 TEMP. L. REV. 981, 984 n.11 (1994).

<sup>64</sup> See Anna Borgman, *Delegates Endorse Business Incentives*, WASH. POST, Feb. 1, 1996, at Md.1.

<sup>65</sup> See *id.*; Anna Borgman, *Living in Howard County Is Costly, and Many Want to Keep It that Way*, WASH. POST, July 10, 1995, at A1.

<sup>66</sup> See Michael D. Shear & William Casey, *Just Saying "Yes" to Developers*, WASH. POST, July 21, 1996, at A1.

end, the financial) base of so many communities.<sup>67</sup>

b. *Subsidies*

Aside from revenue *generation*, there is, of course, the issue of public revenue *disbursement*. Subsidies come in many forms, and there is great debate over whether the provision of particular financial "incentives" constitutes untoward subsidies to the private sector, and even whether some particular financial support for something *is* an actual "subsidy" (in other words, a public financial support for an enterprise deemed advantageous to the public), after all.

That the Highway Trust Fund,<sup>68</sup> established in 1956, heavily supported the building of various interstate highway and even intrastate road segments has never been at issue.<sup>69</sup> What has been at issue is whether such general taxpayer support for chiefly one mode of travel and shipping (private automobile and truck) has occurred, whether it has proven detrimental to all others, and from the perspective of this article, whether it has been detrimental to the greater landscape as a whole. There is substantial evidence at least on the first point,<sup>70</sup> and this author would argue that the landscape itself is evidence of the last. Local and state government's unquestioning willingness to provide or subsidize costly public services and infrastructure, often at the expense of inner ring communities, has been a certain boon to suburban and exurban sprawl.<sup>71</sup>

Second, with respect to subsidies, one might also legitimately question those granted to industries to lure them to a particular location for their purported long-term tax and employment benefits for the community and the state. Before the state seeks to lure a new plant with low front-end

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<sup>67</sup> See *infra* Part III.B.5.

<sup>68</sup> Highway Revenue Act of 1956, ch. 462, § 209, 70 Stat. 387, 397-401 (1956) (codified as amended at I.R.C. § 9503 (1994 & Supp. I 1995)).

<sup>69</sup> Some \$100 billion was provided over a 13 year period, and the interstate and defense highway segment alone cost about \$27.5 billion. See SCOTT, *supra* note 25, at 536.

<sup>70</sup> See PAUL M. WEYRICH & WILLIAM S. LIND, CONSERVATIVES AND MASS TRANSIT: IS IT TIME FOR A NEW LOOK? 9-12 (The Free Congress Found. ed., 1996); *Feeding the Auto Habit with Hidden Subsidies*, TRANSP. RESOURCE BOOK (Chesapeake Bay Found., Annapolis, Md.), Sept. 1993, at 1.

<sup>71</sup> See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 284-85 (1985); Phillip Longman, *Sprawl*, FLA. TREND, Dec. 1, 1994, at 44, 46-47.

taxes, free land assembly, and a variety of other incentives, should not a regional approach be taken? What long-term commitments will the new plant have to the community at large? Will the workers reside there, or in an adjacent jurisdiction—even in an adjacent state—that is left to absorb the negative impacts of such growth?

*c. Regional Systems*

This leads, finally, to a third public policy issue area where the prevailing government model is currently deficient. Throughout most of the country, local governments, having been delegated authority by the state to undertake planning and zoning activities, do so in virtual isolation from one another. There is no *real* regional “system of accounts,” little *actual* regional coordination and cooperation, and almost never a sharing of fiscal resources.

There are notable and widely discussed exceptions. Portland, Oregon’s Metro, a unique, regionally elected government body serving the three counties and twenty-four cities that make up that metropolitan area, has primary responsibilities in transportation, land use, and environmental planning.<sup>72</sup> For example, it is Metro that established and attempts to maintain and enforce the urban growth boundary encircling the region.<sup>73</sup>

In the Twin Cities of Minneapolis and St. Paul, Minnesota, the Metropolitan Council prepares regional plans and reviews and coordinates local ones.<sup>74</sup> Minnesota also has in place a “Fiscal Disparities Program,” a legislatively created program designed and implemented to provide for the sharing of growth in the commercial-industrial property tax-base within the seven county Twin Cities metropolitan area. Forty percent of the increase in commercial and industrial tax valuation goes into a regional pool for

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<sup>72</sup> See Metropolitan Service District Act of 1969, OR. REV. STAT. ch. 268 (1995). For formation requirements, see OR. REV. STAT. §§ 268.070-268.130.

<sup>73</sup> See OR. REV. STAT. § 199.410; see also Scott A. Bollens, *State Growth Management: Intergovernmental Frameworks and Policy Objectives*, 58 J. AM. PLANNING ASS’N, 454, 461 (1992) (examining state growth programs in 13 states).

<sup>74</sup> See MINN. STAT. ANN. § 473.173 (West 1995 & Supp. 1997).

redistribution based on an adopted formula.<sup>75</sup>

Other states and regions have instituted programs for intergovernmental and interjurisdictional review of regionally significant actions,<sup>76</sup> but substantive regional coordination of planning is not yet widely practiced across the country. Nor, of course, is regional tax-base or revenue-sharing, which would help even out fiscal disparities among local jurisdictions in a metropolitan region, and reduce some of the regionally and locally damaging competition for such fiscal capacity.

### III. RESOLVING THE LEGAL CAUSES: TOWARD A NEW AMERICAN DREAM

#### A. *The New Dream Defined*

While there is far from universal agreement on this point, as discussed previously, let us assume for the purposes of this section that the "dream" of a single-family home on an acre or two in a suburban location far from an urban center has outlived its social, economic, and environmental utility.<sup>77</sup> While the "old" dream is currently still quite vital—while it is still being played out across the country by the thousands of new homes developed yearly in sprawl-type patterns from the Atlantic to the Pacific—the vision of a new one has gained some acceptance in the marketplace and among professional planners, architects, and developers.<sup>78</sup>

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<sup>75</sup> The other 60% stays in the local jurisdiction, *see* MINN. STAT. ANN. chs. 276A, 473F (West Supp. 1997); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 87 (1997) (discussing Minnesota's Fiscal Disparities Program). Despite these existing programs, however, "disparities are still nine to one comparing the tax capacity per household in the region's poorest and richest taxing districts." Richmond, *supra* note 8, at 1.

<sup>76</sup> *See, e.g.*, Florida's Developments of Regional Impact ("DRI") Program, FLA. STAT. ANN. § 380.06 (West 1997); Cape Cod Commission Act, 1989 Mass. Acts 716, *amended by*, 1990 Mass. Acts 2.

<sup>77</sup> There is, after all, a substantial body of evidence to support such a proposition. *See supra* notes 9-18 and accompanying text.

<sup>78</sup> *See* Jerry Adler, *Bye-Bye, Suburban Dream*, NEWSWEEK, May 15, 1995, at 41; Sue Doerfler, *The Outer Limits: 333-Mile Tour Finds Development Flourishing on Valley's Fringes*, ARIZ. REPUBLIC/PHOENIX GAZETTE, July 20, 1996, at AH1; Bradley Inman, *On 2 Coasts, A Search for Limits to the Sprawl that Appalls*, WASH. POST, Mar. 25, 1995, at E1; Chris Lester & Jeffrey Spivak, *Suburbs Can't Escape the Cost of Separation*, KAN. CITY STAR, Dec. 17, 1995, at A1; Chris Lester & Jeffrey Spivak, *The Test of Success: Teamwork*, KAN. CITY STAR, Dec. 22, 1995, at A1; Cheryl Meyer, *PDR Suggestions to Go to Planners*,

The new dream advances several points.

(1) A transit and roadway-interconnected network of rural villages, larger towns, cities, and focused development nodes in other urbanized areas (for example, metropolitan urban counties), where most new growth occurs within clear urban growth boundaries, and where growth occurs in this priority of order: first, as urban infill; second, adjacent to, and part of, existing development; and third, in outlying, non-sensitive areas in a compact fashion.

(2) Outside the growth boundaries, prevailing uses are green and open (forests, farms, wetlands, and parks), with sufficient land area so that such uses remain economically viable and environmentally secure.

(3) Open space areas are secured by very low-density zoning, and landowners' equity is protected via the economic viability of existing use and with effective transfer of development rights ("TDR") and purchase of development rights ("PDR") programs at local and state levels, financed by some percentage of property transfer taxes, general revenues, and bond issues.

(4) Inside the growth boundaries, city, town, and village nodes contain mostly unsegregated mixes of single-family and multi-family densities and other land uses so as to provide density and a "fabric" sufficient for the provision of public transit, employment opportunities, and civic, shopping, school, day care, and other day-to-day needs.

(5) Traditional designs encourage walking and biking, community interaction, the provision of a "civic realm," transit accessibility, compact uses of space, and through compactness, low per capita levels of impervious ground cover.

(6) Rivers, streams, and wetlands are well protected by buffers and effective storm water management systems, and are used as parkland and community open space; other sensitive areas are protected (for example, canyons, highland ridges, coastal zones, special grasslands, etc.).

How does the new dream stack up against reality? Many Americans seem to like exurbia just fine, either ignoring or merely failing to recognize

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PITTS. POST-GAZETTE, Sept. 12, 1996, at E6; Peter Pae, *Loudoun Avoided Sprawl Only to Encounter Crawl*, WASH. POST, July 3, 1996, at B1; Neal R. Peirce, *Vancouver's Model for the 21st Century*, BALTIMORE SUN, Aug. 12, 1996, at 11A; James Sanders, *Daniel Solomon: Creating a New City and New Hope for the Urban Future*, L.A. TIMES, Apr. 21, 1996, at M3; Michael J. Ybarra, *Putting City Sprawl on a Zoning Diet*, N.Y. TIMES, June 16, 1996, at 4E.



its hidden short or long-term costs and inherent problems. Some of a more philosophical bent would argue that the American spirit and culture have virtually preordained our current circumstances; that our nationhood represents itself in a never-ending quest for internal *lebensraum*—the psychology of manifest destiny writ both large and small.<sup>79</sup> There is some truth to this view. The culture of America has been greatly shaped by the land and the landscape.<sup>80</sup> The homesteader is more than a character in a chapter of our history as a society and political economy. In a sense, that spirit broadly exists even today, or at least it still pervades our popular culture. Additionally, as one social analyst has recently written, “[f]rom Thomas Jefferson to William Jennings Bryan, anti-urbanism has been a mainstay of American political thought.”<sup>81</sup>

But the “land of the free” does not mean that the land *is* free. We have been greatly influenced throughout our history by both “visible” (government) and “invisible” hands (the market economy). Just as in previous times “visible” hand mechanisms were utilized to provide the impetus and legal structure for first stealing and then carving up the Great Plains and the American West, or in the recent past for helping to spawn and support a great suburban migration,<sup>82</sup> we can just as assuredly invent and utilize new economic, legal, and public policy tools to meet new social, environmental, and economic exigencies. Indeed, in the view of this author, the new dream is one of *the* essential underpinnings to a sustainable

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<sup>79</sup> See generally BERNARD DeVOTO, *ACROSS THE WIDE MISSOURI* (1947); BERNARD DeVOTO, *MARK TWAIN'S AMERICA* (1960); BERNARD DeVOTO, *THE YEAR OF DECISION, 1846* (1943); *THE JOURNALS OF LEWIS AND CLARK* (Bernard DeVoto ed., 1953).

<sup>80</sup> See Kotkin, *supra* note 43, at C2. See generally FREDERICK JACKSON TURNER, *REREADING FREDERICK JACKSON TURNER: "THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY" AND OTHER ESSAYS* (John Mack Faragher ed., First Owl Book ed. 1995); FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY* (Max Farrand ed., Peter Smith 2d ed. 1959) (1932); FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* (Harold P. Simonson ed., Frederick Ungar Publ'g 1963) (1894).

<sup>81</sup> Kotkin, *supra* note 43, at C2. While the author agrees in part with Joel Kotkin's premise, its translation to modern life is more problematic. Indeed, somehow, over the centuries and the more recent decades, the Jeffersonian ideal of a democracy, sustained by agrarianism and the populism of Bryan, have been *converted* to represent suburban and exurban life. In their pure form, however, while anti-urban, these political philosophies and economies would assuredly also be anti-exurban, for that development pattern represents the actual destruction of rural life.

<sup>82</sup> See *supra* Part II.C.2.

American future, one based not on the profligate use of natural resources that demands depletion, but rather one based upon a natural economy of space and place.

This new dream is not radical. While it reflects more traditional land use patterns than those prevailing since the 1950s, such patterns are both historically familiar and intuitively attractive. The new dream does represent a significant *departure* from current trends, but not one that is impossible to achieve over time, despite many of the obstacles previously discussed.

### B. *Resolving the Legal Problems in Order to Achieve the New Dream*

I have previously broadly defined “legal causes” of planning form and planning process to include both legal structure and public policy.<sup>83</sup> This section presents a broad (but necessarily abbreviated) menu of land use law and planning “fixes” for getting us closer to the new American dream, and for resolving the legal problems identified earlier. Let us consider them *seriatim*, by each of the previously identified problems.

#### 1. *Spatial Solutions*

The old “science” of planning prescribed chiefly spatial solutions to then-recognized urban problems, such as lack of light and air, or heavy industry chock-a-block with the residences of workers.<sup>84</sup> Modern codes which strictly segregate uses, residential densities, and commercial intensities, in many cases, perform a disservice, however. The mantra of “compatibility” need not mean exclusivity, and in fact, we know now that the more isolated the use, the less efficiently the settlement pattern often works. We would do well as lawyers and planners to substantially scuttle the view, encoded into master plans and ordinances, that spatial separation of each use from each other is a “good” in itself.

#### 2. *Planning for Automobiles*

Virtually since the 1930s, we have managed quite nicely to arrange our landscape for the convenience of the private automobile (or other large

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<sup>83</sup> See *supra* Part II.C.

<sup>84</sup> See *supra* notes 28-29 and accompanying text.

motor vehicle) and its driver, but in the process have ignored or made substantially subservient any and all other needs—of community, of environment, of pedestrian, of aesthetics, and of planning for other modes of transportation.<sup>85</sup> We need to begin planning for people.

The minimum road and parking standards that are written into subdivision regulations usually permit little or no flexibility, precisely prescribing parking spaces required per commercial square foot or per unit of residential density. Many of these standards were written in the 1950s and 1960s, and have undergone little change since then. If new compact community designs that mix uses and make pedestrian access more prominent are adopted, opportunities for changes in standards<sup>86</sup> become apparent, and additional flexibility may also be available as planners and lawyers craft new ordinances.

On a different scale, some city plans placed freeways along parkland and riverfront, or routinely split communities in half. Instead of celebrating the magnificent natural attributes of a region, or solidifying already rooted and stable areas, more than 50,000 homes were being torn down each year.<sup>87</sup> "Nearly [twenty percent] of Baltimore's African-American population had their homes destroyed to make room for I-95 and I-83, and countless other neighborhoods nationwide lost thousands of homes, schools, and businesses."<sup>88</sup> While the implementation of the National Environmental Policy Act<sup>89</sup> has helped avoid some of the same circumstances in ensuing years,<sup>90</sup> state and local law should be changed or enhanced to prevent the possibility from occurring again.

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<sup>85</sup> See generally CALTHORPE, *supra* note 19; KATZ, *supra* note 19; Duany & Plater-Zyberk, *supra* note 19.

<sup>86</sup> Some changes may include narrowing certain streets; reducing parking requirements by recognizing the capability of shared parking facilities, tuck-under, off-alley, and on-street parking; and traffic calming techniques.

<sup>87</sup> See Roy Kienitz, *In Washington*, SURFACE TRANSP. POL'Y PROJECT PROGRESS, July 1996, at 2.

<sup>88</sup> *Id.*

<sup>89</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370d (1994 & Supp. I 1995)).

<sup>90</sup> See, e.g., *National Wildlife Fed'n v. Snow*, 561 F.2d 227, 233 (D.C. Cir. 1976) (noting that highway building is "controversial and disruptive"); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); see also *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986); *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985); *Scottsdale Mall v. Indiana*, 549 F.2d 484 (7th Cir. 1977).

### 3. *The Standard State Zoning Enabling Act ("SZEa")*

In brief, we need only reference the SZEa's various limited authorizations, purposes, and overall format, to recognize some of its inherent difficulties for helping localities achieve the new dream. Because it prescribes and permits strict segregation and prohibitions of uses, and limits its purposes to those largely articulated in the 1920s (for example, "the provision of adequate light and air"),<sup>91</sup> states would do well to restructure their basic planning enabling laws along broader and more flexible lines.<sup>92</sup>

For many applications, "Euclidian" zoning has outlived its usefulness, and strict adherence to minimum setback rules, use prohibitions, minimum lot sizes, and sometimes a score of categories of discrete residential densities, should yield instead to flexible, performance-based standards, maximum setbacks and lot sizes (in urban areas), and simplicity over complexity in categorization.

With good legal drafting, other reforms to state enabling laws could readily embrace changes in most of the problem areas noted previously. Among these should be clearer, more articulate authority and roles for planning bodies, and more formalized interlocal and intergovernmental coordination.

### 4. *The Use of Special Planning "Tools" and State Guidance*

Local jurisdictions typically use a variety of techniques for trying to focus growth and conserve rural land. On the rural or agricultural conservation side, these range from rather sophisticated TDR programs, to rather unsophisticated, and often completely unsuccessful, so-called "low-density" or "rural conservation" zoning—in the eastern United States, on the order of one dwelling unit per two or three acres.<sup>93</sup> The latter is a virtual formula for sprawl and for agricultural and forest land fragmentation.

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<sup>91</sup> See SZEa, *supra* note 50, § 3.

<sup>92</sup> See, e.g., Florida Environmental Land Use and Water Management Act of 1972, FLA. STAT. ANN. § 380 (West Supp. 1996); Vermont State Land Use and Development Act of 1970, VT. STAT. ANN. tit. 10, §§ 6001-6108 (1993 & Supp. 1996).

<sup>93</sup> An example is rural, and urbanizing, Charles County, Maryland. Its "Agricultural Conservation" zone has a minimum lot size of one dwelling unit per three acres, as do its "Rural Conservation" and "Rural Residential" zones. CHARLES COUNTY, MD., CODE §§ 297-87, 297-88A(1)-(2), figs. VI-1, VI-2 (1996).

No tool is right for every locality, but those which conserve rural land in low enough densities to make resource utilization, such as farming or timbering, feasible and economical are more likely to achieve the conservation side of their objectives. Twenty to fifty acre densities (and above, depending on geographic location)<sup>94</sup> have at least the chance of accomplishing this, and may be combined with equity-enhancing mechanisms, such as TDR or PDR programs.

Focusing on the growth side, the complexity of current code structures does little to encourage development within urbanized areas, and may have the opposite effect.<sup>95</sup> Developers who have to dance to the expensive tune of multiple layers of permit and plan reviews; who have to produce multiple studies to justify increasing densities, mixing uses, or decreasing road widths or setbacks; or who must withstand a barrage of slings and arrows from local Not In My Back Yarders ("NIMBYs") who find support in some outdated plan or ordinance, are not likely to pursue in-town or immediately adjacent growth opportunities. Such developers will go where land is cheap, opposition is scattered or unlikely, and the process is more swift. They will go to the exurbs.<sup>96</sup>

The solution to this particular structural problem is fortunately quite simple: local government lawyers and planners can simplify and streamline the process *where development is desirable* according to the new dream, primarily in or adjacent to already urbanized areas. One way to do this is to officially recognize urban growth boundaries ("UGBs") that are emplaced to accommodate twenty to twenty-five years of anticipated growth around urbanized areas, to make it extraordinarily difficult to develop significant projects outside them, and to make it easy (and much less expensive) to develop significant projects inside them—with guidance as to pattern and

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<sup>94</sup> Generally there is a large minimum acreage requirement for establishment of agricultural or conservation "districts" for which certain tax preferences apply—in California it is 100 acres, and in New York it is 500 acres. See CAL. GOV'T CODE § 51,230 (West 1983); N.Y. AGRIC. & MKTS. LAW § 303 (Consol. 1991 & Supp. 1996). In its tidewater areas, Maryland has established a "resource conservation area" with a 20-acre minimum lot size. See MD. CODE ANN., NAT. RES. § 8-1808.1(d) (Supp. 1996).

<sup>95</sup> See W. Joseph Duckworth, *Metropolitan Growth Patterns: A Homebuilder's Perspective*, in LAND USE IN AMERICA, *supra* note 41, at 59.

<sup>96</sup> See *id.* at 62. It is obvious that in the intermountain West, even densities of one dwelling per 35 or more acres can be horribly destructive of open space and productive range land.

design.<sup>97</sup> Other necessary adjuncts to revised land use codes, of course, include focused public investments in urban infrastructure, business development incentives, and significant improvements in both urban public safety (or its perception) and urban education.

Finally, there needs to be *some* level of state guidance provided to localities. Well-intentioned local governments would benefit, as they would be able to provide for change in the face of resistance by “blaming” someone else. Those local governments not inclined to alter their land use systems, codes, and policies to achieve sustainability ends would be required to do so, in order, say, to continue receiving state infrastructure aid of various kinds. Such growth management systems exist in a variety of forms throughout the country.<sup>98</sup>

In a related vein, state government itself likely needs some reform. Administrative processes and programs that spur exurban growth require change. For example, the formulae that most states utilize to disburse transportation trust funds to localities tend to encourage sprawl, relying almost exclusively upon such criteria as proportional existing miles of roadway, motor vehicle registrations, population, or vehicle miles of travel.<sup>99</sup> Such formulae might beneficially be changed to include growth and density factors that would promote system improvement in urbanized areas and reduce spending for substantial new facilities in the midst of open areas.

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<sup>97</sup> See, e.g., *supra* notes 72-73 and accompanying text (discussing Portland, Oregon Metro). See also FLA. STAT. ANN. § 186.009 (West Supp. 1997) (giving the Office of Planning and Budgeting of the Executive Office of the Governor authority to require designation of UGBs in the comprehensive plans of local jurisdictions); MINN. STAT. ANN. § 473.861 (West 1994) (requiring a regional urban growth area for a five county area around metropolitan Minneapolis and St. Paul); WASH. REV. CODE ANN. § 36.70A.110(1) (West Supp. 1997) (requiring designation of areas within which urban growth will not be permitted); GAIL EASLEY, AMERICAN PLANNING ASS'N, PLANNING ADVISORY SERVICE REP. NO. 440, STAYING INSIDE THE LINES: URBAN GROWTH BOUNDARIES (1992).

<sup>98</sup> See *supra* note 97.

<sup>99</sup> A few examples of the differing formulae for distributing counties' shares of state road revenues include: Virginia, 20% by land area, 80% by population, VA. CODE ANN. § 33.1-23.4.C (Michie 1996); Florida, 20% by land area, 25% by population, 50% by in-county collections, see OFFICE OF HIGHWAY INFO. MANAGEMENT, U.S. DEPT. OF TRANSP., PUB. NO. FHWA-PL-95-036, HIGHWAY TAXES & FEES: HOW THEY ARE COLLECTED AND DISTRIBUTED 1995, at 15-68 (1995); and Kentucky, 20% equally, 20% by population, 20% by mileage, and 40% by land area, see *id.*

## 5. *Taxes*

Because local governments tend to depend so heavily on real property taxes to finance public services<sup>100</sup> increased commercial and residential real estate development has historically been viewed as a boost to local fiscal stability. As has already been explored, this is not always or often the case, especially if one takes the long-term fiscal health of a community into account. Local property tax structure can have a substantial influence upon whether it is economical to keep open land open and in resource use.

State law usually provides whatever authority (and limitations) to tax that exists for selected governmental units.<sup>101</sup> The prescription offered here is two-fold: revenue diversification and change in the nature of the property tax structure itself. Concerning the former, where it does not already so provide, state law should be liberalized to permit other local sources to supplant the property tax. Examples include local sales taxes (somewhat regressive), local income taxes (progressive, but can have an affect upon business climate), user charges for public services and facilities (which also can be regressive), telecommunication fees, developer impact fees, and special benefit assessments. The use of these sources requires rather fine balancing, but their diverse nature is their most healthy attribute.<sup>102</sup>

Concerning a change in the property tax itself, the split-rate tax is offered here for consideration.<sup>103</sup> As with revenue diversification, state law

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<sup>100</sup> For example, in Maryland, the real property tax is the largest single revenue source for counties (which units perform as the general purpose local government throughout most of the state)—more than 30% in FY 1993. See 7 MARYLAND GEN. ASSEMBLY, 1994 LEGISLATIVE HANDBOOK SERIES, MARYLAND LOCAL GOVERNMENT: REVENUES AND STATE AID 4 (1994).

<sup>101</sup> E.g., CAL. REV. & TAX. CODE (West 1995); MD. CODE ANN., TAX-GEN. (1995); N.Y. TAX LAW (Consol. 1990 & Supp. 1996); TEX. TAX CODE ANN. (West 1995).

<sup>102</sup> See John Kincaid & Robert D. Ebel, *Introductory Notes* to ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SR-13, LOCAL REVENUE DIVERSIFICATION: RURAL ECONOMIES iv (1990).

<sup>103</sup> See WALLACE E. OATES & ROBERT M. SCHWAB, THE IMPACT OF URBAN LAND TAXATION: THE PITTSBURGH EXPERIENCE (University of Md. Working Paper No. 95-02, 1995), reprinted in 50 NAT'L TAX J. 1 (forthcoming 1997) (exploring the impact of split-rate tax reform on the economic development of the city); Christopher Simon, Real Property Tax: Land Use Asset, Not Liability 7-9 (Aug. 7, 1995) (unpublished Chesapeake Bay Foundation research paper on file with *William & Mary Environmental Law & Policy Review*) (arguing the split-rate tax can "promote inward development and limit sprawl").

might well need to be changed to permit various relevant units of local government the option of using this method. The concept applies different tax rates to buildings and land, with buildings considered a more economically productive unit in certain locations. Accordingly, tax rates on buildings near existing infrastructure—within designated growth areas or boundaries, or next to transit lines in a city—should be substantially lower than those applied to raw land in those same locations, in order to promote conversion and economic production as well as the continued maintenance of the real property. In order to *decrease* the incentive for conversion of raw or open land to developed uses in exurban locations, tax rates on land there would be lowered; this would decrease the cost of open land ownership, as well as the cost of resource-based operations such as farming and timbering. Use value taxation is the related variation on that theme, and has been used by some states to help protect agricultural or forest land by assuring that what is taxed is the current open space/resource use, rather than the so-called “highest and best use”—usually some form of development.<sup>104</sup> So-called “preferential assessment” programs at the state level, taxing farm and open space land at its current use value, however, do not in themselves prevent or even slow conversions to urban uses, and may even speed them up because pure preferential assessment programs merely subsidize speculator’s holding costs. These programs need to be complemented with substantial tax penalties for conversion in order to work.<sup>105</sup>

Finally with respect to taxes, it should be noted that tax policy in a larger context can have a significant effect on environmental conservation, restoration, and sustainability. As a society, we should “tax things we would like to get rid of rather than things we would like to keep.”<sup>106</sup> In other words, we should not necessarily be taxing income and capital, but rather pollution, road congestion, and natural resource depletion.

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<sup>104</sup> See CAL. GOV'T CODE §§ 51,200-51,295 (West 1983 & Supp 1997); FLA. STAT. ANN. § 193.461 (West 1989 & Supp. 1997); N.H. REV. STAT. ANN. §§ 79-A:1 to :26 (1991 & Supp. 1996); VA. CODE ANN. § 58.1-3229 to -3244 (Michie 1991 & Supp. 1996).

<sup>105</sup> See David J. Forkenbrock & Peter S. Fisher, *Tax Incentives to Slow Farmland Conversion*, 11 POL'Y STUD. J. 25, 29 (1983).

<sup>106</sup> Robert Costanza et al., *The Tax Shift: Non-partisan Tax Reform that Is Economically Efficient, Socially Equitable, and Ecologically Sustainable* (Mar. 1995) (unpublished manuscript on file with the *William & Mary Environmental Law & Policy Review*).



## 6. *Subsidies*

In a similar vein, we should subsidize that which we want to occur in order to better our lot over the long-term, not that which will do so merely expediently—and the devil take the hindmost for the future. Sprawl is not one of the things that local, state, and federal subsidies should continue to support and promote. New development in the exurbs should be forced to support itself, via development impact fees that cover the full cost of extending and operating roads, water, sewer, police and fire protection, schools, and parks, over time. Such development should also absorb the cost of environmental infrastructure necessary to help mitigate long-term impacts: construction and maintenance of storm water management facilities; septic system bonding or permit fees; and mitigation funds for reforestation, stream restoration, and wetlands enhancement.

Subsidies, on the other hand, might be appropriate to encourage transit development and continued usage; the development of in-town or close-in housing and commercial land uses; the promotion of moderate density where urban infrastructure is already present; the construction of green infrastructure such as parks and greenways as part of new development opportunities; and other “goods” under the new American dream.

## 7. *Regional Coordination and Fiscal Cooperation*

This particular public policy and government structural problem poses substantial and singular challenges, in part because of the very *political* nature of the “fix.” No local power or authority is more jealously guarded than the ability to set the local land use agenda—and that is the way it should be, to a point. After all, the local government is the closest and theoretically the most accessible to the people in many ways. The word “theoretically” is important here: the reality is that usually “the people” have little to say with respect to their own land use future. They are usually woefully ignorant of it, and ignorant too of the process for changing it. On the other hand, the local battlefield on which the land use war is constantly waged is often occupied by two traditional forces: the development community and the NIMBYs. The issues become narrow, neighborhood by neighborhood scuffles, or are occasionally joined by a local environmental group. In the meantime, the regional context for such decisionmaking is usually lost, because there is simply no mechanism to accommodate it.

While exceedingly difficult to achieve, what is needed is some regional oversight, ideally by a regionally elected body, or (less desirable but still useful) by a regionally appointed one with some ceded authority to review and coordinate local plans. As noted previously, there are several models available, each of which might be adapted to particular state, local, and regional political circumstances. Florida, Colorado, and Massachusetts have each adopted portions of the American Law Institute's Model Land Development Code with respect to development activities of regional impact.<sup>107</sup> Regional review and coordination mechanisms require clear and legitimate authority, and they need to fit adequately into the overall state-local planning structure.<sup>108</sup> Other requirements include processes for intergovernmental dispute resolution, an equitable mitigation program, and criteria for judging regional impacts.<sup>109</sup>

Some form of tax-base sharing, also extraordinarily difficult to accomplish but of enormous potential value, could lessen the competition for tax ratables among jurisdictions in a region, and thus lessen the fiscal incentive for sprawl. It could also help urban cores and inner suburbs cope, in the short-term, with the tremendous losses of fiscal capacity they have endured over the past thirty to forty years, as urban populations have fled outward and left the centers impoverished, unable to compete for business investment, and unable to socially support the desperate poor that are left.<sup>110</sup> Again, the difficulty of attaining a regional revenue-sharing program is well recognized; but there may be new political alliances that can be made between city and inner ring suburbs—alliances built upon a common understanding of the regional taxing and spending inequities that are hollowing out the inner cores of many metropolitan regions.

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<sup>107</sup> COLO. REV. STAT. §§ 24-65-101 to -106 (1988 & Supp. 1996); FLA. STAT. ANN. §§ 380.01-.19 (West 1997); Cape Cod Commission Act, 1989 Mass. Acts 716, *amended by* 1990 Mass. Acts 2; Rules of Procedure and Practice Pertaining to Developments of Regional Impact, FLA. ADMIN. CODE ANN. r. 9J-2 (1996); MODEL LAND DEV. CODE §§ 7-301 to -305 (1975).

<sup>108</sup> See Mayra Morris, *Approaches to Regulating Developments of Regional Impact*, in APA, PAS 462, *supra* note 22, at 111.

<sup>109</sup> See *id.* at 122-23.

<sup>110</sup> See ORFIELD, METROPOLITICS, *supra* note 75, at 84-87; Orfield, *Tax-Base Sharing*, *supra* note 24.

## CONCLUSION

Getting the law right is crucial. Law is the foundation on which policy mechanisms for protecting the environment and developing sustainable communities are built. If, however, we do not change parts of the legal structure, economic incentives for public or private enterprise to operate sustainably will remain lamentably scarce.<sup>111</sup>

The premise of this article has been that planning and land use law have somehow gone astray over the course of their seventy-five to eighty year modern history. As a result, planning and land use law need to change to reflect the environmental exigencies of today and tomorrow. We cannot and should not expect a system invented and constructed to resolve social and "environmental" problems of the early twentieth century to serve us equally well as we enter the next millennium. On the other hand, we *should* expect such structures to require major revision, as we reflect upon their expected and unexpected products or consequences.

In a way, the planning system, land use law, and related federal and state public policy wrought out of those early reform movements have performed "successfully." That is, many of the ends planning and law sought to achieve (or which were inevitable, although not necessarily intended) have been achieved: a recognizable, regularized land use system is in place virtually throughout the nation; work has largely been divorced from home, and home from play, school, civic, and commercial life; all forms of multi-family housing have been separated from single family housing; real property values have been protected in direct proportion to those properties' exclusivity; rich have been segregated from poor; a great suburban migration, of both population and financial resources, has been encouraged, and even energized; a ground transportation system has been unified virtually into one mode; and both suburban and exurban environmental resources are almost guaranteed to be wastefully consumed or severely impacted.

The unintended consequences, especially, would be severely regrettable to those like Justice William O. Douglas, who in *Village of Belle*

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<sup>111</sup> James M. McElfish, Jr. & J. William Futrell, *Sustainable Development Law: More Than a Planning Goal*, in APA, PAS 462, *supra* note 22, at 64.

*Terre*,<sup>112</sup> sincerely opined that moderately large lot, suburban-type (and there, family-only) zoning was a way to achieve both sanctuary and modest environmental goals.<sup>113</sup> Justice Douglas has long been identified with a genuine and earnest concern for environmental integrity. That we are not achieving such goals and, indeed, that our planning and legal systems are contributing to their actual demise, is the single most damning aspect of current law, policy, and practice.

This article proposes changes to those parts of the system in which lawyers are most often involved and capable of creating change. They include both the “architecture” and “infrastructure” of land use planning, and the larger public policy sphere that provides its context. We now know what the problems are. If we have the wisdom, the fortitude, and the honesty to inspire a transformation for the better, it *can* happen. If we, as lawyers to whom “the system” has been entrusted, do not, such leadership may never come, and we face social and environmental declines of substantial proportions in the next century.

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<sup>112</sup> *Village of Belle Terre v. Boras*, 416 U.S. 1 (1974).

<sup>113</sup> *See id.* at 9.