TOWARD A NATIONAL LAND USE POLICY FOR URBAN AMERICA

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This country, its character and its people have developed in large part because of the land. The land has always been an integral part of the promise of America and Americans have fought on the land itself to fulfill that promise. Dreams of wealth, a home and a tranquil and secure future are now, as they have always been, inseparable from our national destiny. How we treat the land as we pursue these dreams tells much of what we are, what we care about, and what will become of us.

To date, land development has produced mixed results. We have evolved into a highly sophisticated society where the majority of citizens have attained a standard of living unmatched in human history. Our headlong rush for prosperity, however, has industrialized the land and made our air and water less fit for human consumption.[1] That same industrialization has given us Los Angeles, Cleveland, New York, Baltimore and other decaying urban enclaves where millions of Americans have become and will remain trapped unless this country can provide them viable alternatives.

Public awareness of pollution and its causes has developed rapidly in the 20th century and Congress finally has begun to check pollution. Congressional efforts have primarily dealt with our air and water,[2] however, and have ignored a fundamental cause of present difficulties: the misuse of the land, or what might be termed "land pollution."

How we plan for the use of the land is the key to the future. If we can bring sense to land use policies and practices and continue our legislative efforts to check air and water pollution, we will have a better tomorrow. If we neglect the land and land use planning, on the other hand, the pressures of growth will give us a 21st century America built on the model

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1 *See generally, e.g.*, S. DEGLER & S. BLOOM, FEDERAL POLLUTION CONTROL PROGRAMS: WATER, AIR AND SOLID WASTES (1969); *Air Pollution Symposium*, 10 ARIZ. L. REV. 1 (1968).

2 *E.g.*, Air Quality Act of 1967, 24 U.S.C. §§ 1857 *et seq.* (Supp. V, 1965-69); Water Quality Act of 1965, 33 U.S.C. §§ 466 *et seq.* (Supp. V, 1965-69). For general discussions of the *Air Quality Act*, see Edelman, *Air Pollution Abatement Procedures Under the Clean Air Act*, 10 ARIZ. L. REV. 30 (1968); Middleton, *Summary of the Air Quality Act of 1967*, 10 ARIZ. L. REV. 25 (1968); Muskie, *Role of the Federal Government in Air Pollution Control*, 10 ARIZ. L. REV. 17 (1968).

of urban sprawl even though we may enact strict antipollution laws.[3]

Planning for the future will be a difficult task. Before comprehensive regulation of land use is possible, we must first change our basic attitudes about the land, its ownership and development. For three hundred years we have moved westward seeking land to live and work on. The pioneer spirit has inculcated us with the notion that the land you could buy or claim was yours to do with as you pleased. This spirit permeates today's society and shapes our present approach to land use problems.

The quest for the land has also been a primary factor in developing our free enterprise system. Notwithstanding important inroads in the laissez faire philosophy,[4] the belief in the merits of pure, unrestricted free enterprise persists and will be an obstacle to implementation of the kind of land use planning that is needed. Governmental initiative in economic affairs is not a novel idea, however. Indeed, it was massive federal involvement and intervention that produced 20th century America. By calling for government intervention in land use planning on a national basis, therefore, I ask not for adoption of new principles, only for new applications of old ones to meet the needs of a changing world.

To demonstrate how federal involvement in land use development has brought us to the present, a historical examination of land policies is needed.[5] This will help explain our present practices and give us an insight into the needs of the future.

EARLY LAND POLICIES AND PRACTICES OF THE FEDERAL GOVERNMENT

The debate over land use dates from colonial days.[6] Great Britain's attempts to regulate land use and ownership was one factor in fomenting the colonial opposition which led to the American Revolution. Thomas Jefferson voiced the colonial sentiment this way:

> From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject their alotment only. This may be done by themselves assembled collectively, or by their legislature to whom they may have delegated sovereign authority: and, if they are alloted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.[7]

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[3] COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT ch. 9, at 165098 (1970).

[4] An obvious instance in the curtailment of the use of private property can be found in the exercise of the police power by local governments through zoning regulations, property tax and other devices. *See* notes 52-54 and accompanying text *infra*.

[5] For a review of past federal policies on the utilization of public lands, see Stoddard & O'Callaghan, *Creative Federalism and the Retention or Disposition of Public Lands*, 8 ARIZ. L. REV. 37 (1966).

[6] P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 1 (1968) [hereinafter cited as GATES & SWENSON].

[7] 1 J. BOYD, THE PAPERS OF THOMAS JEFFERSON 133 (1959).

This American "claim" to ownership of New World land and to the right of land use was reasserted in the Declaration of Independence and the Treaty of Paris of 1783.[8] In the years since the Revolutionary War the questions of land ownership and use once debated between the Crown and the Colonies, have continued to be points of contention affecting the federal government, the states and the public.

State Acquisition of Public Land

The debate over the future of the public lands was set in the Constitutional Convention of 1787 when the original states ceded their claims to western land to the federal government.[9] This presented the question of whether the relinquished land, and any that was acquired later[10] would be used for the benefit of the original states, the central government, or would be used to attract new settlers to the west in a nation-building effort. The resolution of the debate during the ensuing century shaped the development of the American nation.

The nation's early needs were much different than they are today. The conclusion of the Revolutionary War brought large numbers of immigrants to the United States and returned the Continental Army to civilian endeavors. The economy, however, was at a low point and was unable to absorb this influx fully.[11] The federal government, moreover, desperately needed to raise revenue to retire the large debt it had incurred during the war. These economic pressures and the desire to develop the vast expanses of virgin land which lay to the west shaped our early land use policy. The Land Ordinance of May 20, 1785,[12] which provided that upon completion of public land surveys land would be sold at public auction with a minimum price of $1 per acre, represented the first attempt to dispose of the public lands.

With the admission of Ohio to the Union on February 19, 1803, however, the federal policy towards public lands was modified to allow the land to be used for the newly created states.[13] Congress granted Ohio one section in each township and certain other tracts of land for public schools[14] and also directed that three percent of the proceeds from the sale of federal land were to be expended for building roads in Ohio.[15] It was argued that

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[8] GATES & SWENSON, *supra* note 6, at 3.
[9] *Id.*
[10] According to the Bureau of Land Management, the United States has acquired 1,807,681,520 acres of public domain since its inception. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 4 (1964).
[11] GATES & SWENSON, *supra* note 6, at 59.
[12] 28 JOURNAL OF THE CONTINENTAL CONGRESS 375.
[13] Act of April 30, 1802, ch. 40, 2 Stat. 173, *as amended*, Act of March 3, 1803, ch. 21, 2 Stat. 225.
[14] Act of March 3, 1803, ch. 21, § 1, 2 Stat. 225-26.
[15] Act of March 3, 1803, ch. 21, § 2, 2 Stat. 226.

this change in policy was justified in that the aid would increase the value and utility of the remaining public lands.[16]

By 1821 six additional states had been admitted to the Union.[17] A share of the proceeds from the sale of public land was allocated to each for construction of roads. Moreover, almost 7,000,000 acres of land were granted for educational purposes and a total of 19 percent of the states' total area was turned over to state ownership. By altering the earlier policy of raising revenue, Congress stimulated the development of educational and transportation systems and thus enhanced the future of the new states and the nation.

The new policy of encouraging the settlement and development of the western lands met opposition, however. There were many proposals to devote the public lands for the exclusive benefit of the original states. The new states countered by arguing that all the land within their boundaries should be ceded to them to give them the same property base enjoyed by the original states.[18] Although neither argument prevailed, new states continued to be the object of congressional largesse. By 1850, well over 100,000,000 acres of public land had been given to states for building schools, canals and railroads, but not an acre had been granted to any of the original states.[19]

Private Acquisition of Public Land

The westward flow of settlers was a necessary prerequisite to the development of the United States during the 19th century. Without it, national commerce would have been impossible. Despite the need for congressional initiative, legislation generally acknowledged what had already occurred rather than shaped the future. Nonetheless, this congressional action and reaction created a fabric of public land law which stimulated growth of the nation.

Americans accustomed to a free grant system of land distribution, which had been common practice in the early South,[20] and to the ease with which early New Englanders could gain ownership to land,[21] did not adjust easily to the early land policies of the federal government. Consequently, federal measures to prevent the common practice of intrusion onto public lands before the land was surveyed and readied for sale were largely inef-

16 GATES & SWENSON, *supra* note 6, at 5.
17 *Id.*
18 Proposals were made to the Congress as early as 1826 to cede all public land to the state in which it lay. Twenty-four bills to accomplish this end were introduced between 1872 and 1901. As late as 1935 the sentiment in favor of cession was described as still strong but having diminished importance. Udall, *Arizona's Public Lands—Mixed Blessings, Mixed Burden*, 8 ARIZ. L. REV. 11, 14 (1966).
19 GATES & SWENSON, *supra* note 6, at 18.
20 *Id.* at 387.
21 *Id.*

fectual and it was often necessary for the government to legitimize earlier trespasses upon its land. For instance, residents of what later became the states of Mississippi, Alabama, Louisiana, Arkansas, Missouri and Michigan who were in possession of, occupying or improving lands as of stipulated dates were in many cases entitled to up to 640 acres by donation.[22] Other donative acts were passed to reward or to direct immigrants to remote areas often populated only by hostile Indians.[23]

Congressional vacillation over land policy is also reflected in the Pre-Emption Act of 1841.[24] Congress once again recognized widespread illegal intrusion on public lands and permitted a settler to stake an exclusive claim to 160 acres. By allowing the settler to pay the purchase price of $1.25 per acre over an extended period, the desire to raise revenue was once again subordinated to the reality of settlement.

At the same time, the demand for land reform, or free land for all on a systematic basis, was growing. Men like George Henry Evans, an early labor leader, Horace Greeley, the famous editor and reformer, Congressmen Daniel Webster, William Seward, Charles Summer, Stephen Douglas, Andrew Johnson and Galusha Grow took up the banner of land reform. The newly formed Republican party put land reform in its platform. Northern Democrats, on the other hand, remained loyal to the party's pro-slavery faction, which could not reconcile free land with slavery, and refused to back reform.[25]

With the withdrawal of the Deep South from the Union, Congressional action became possible. On May 20, 1862, the Homestead Act[26] was enacted offering 160 acres of surveyed public land free to anyone who would reside upon and farm it. Homesteading never preempted other federal land policies as the sponsors of the Homestead Act had hoped, but it did result in grants of 287,300,000 acres of public land and served as a major impetus to the westward migration.[27]

Another manifestation of the free land policy is found in the land grants to railroads. The earliest grants were to the states for the benefit of the railroads. They included grants of land in aid of construction as well as rights of way.[28] Later, Congress made outright grants to the companies, the largest being the grants to the Pacific railroads between 1862 and 1871.[29] While it can be argued that Congress was overly generous with them, the railroads did play a major role in developing the west. The com-

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22 Act of March 27, 1804, ch. 61, 2 Stat. 303; Act of March 3, 1807, ch. 34, 2 Stat. 437.
23 GATES & SWENSON, *supra* note 6, at 388-90.
24 Act of Sept. 4, 1841, ch. 14, 5 Stat. 453.
25 GATES & SWENSON, *supra* note 6, at 392.
26 Act of May 20, 1862, ch. 75, 12 Stat. 392, *as amended*, 43 U.S.C. §§ 161-255 (1964).
27 U.S. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 6 (1964).
28 *E.g.*, Illinois Central Grant, Act of Sept. 30, 1850, ch. 61, 9 Stat. 466.
29 *E.g.*, Northern Pacific Grant, Act of July 2, 1864, ch. 217, 13 Stat. 365.

panies advertised extensively in Europe and in the eastern parts of the United States, bringing thousands of settlers to buy and develop their lands. The rail system which emerged tied together new undeveloped areas with the commercially established East, resulting in rapid economic expansion on a national scale.

There are two additional examples of this policy development. The Newlands Act of 1902 (often referred to as the Reclamation Act)[30] created the "reclamation fund" out of receipts from the disposal of land in 16 western states, all with arid and semi-arid land. The Act authorized the Secretary of the Interior to withdraw irrigable lands from entry, to construct irrigation works and to provide for the homesteading and sale of irrigated lands. The measure was a great success, stimulating agriculture and industry by making water and hydroelectric power available for the arid west. Arizona's Salt River Project, resulting in the development of Phoenix, is an excellent example of the impact of the Reclamation Act.[31]

The philosophy of the Mineral Location Act of 1872 (or Mining Law of 1872)[32] was similar to that of the Reclamation Act. It allows a miner who discovers certain minerals to obtain a patent on that land conveying fee simple title at a nominal price. The Act manifests the congressional belief that development of the country's mineral wealth can best be stimulated by private acquisition of public land. A good portion of the mineral production in the nation today was directly fostered by its liberal provisions.[33] While I agree with those who feel the law is anachronistic in terms of present needs, there is no question that it was sensible when it was enacted and that it had a significant and healthy impact on the growth of the west.[34]

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[30] Act of June 17, 1902, ch. 1093, 32 Stat. 388, *as amended*, 43 U.S.C. §§ 391 *et seq.* (1964).

[31] *See generally* ARIZ. HIGHWAYS 3 (Feb. 1, 1971), for an excellent capsulization of the history of Phoenix' and Maricopa County's phenomenal growth. The inescapable conclusion one comes to after reading the issue is that the area would not be what it is today had it not been for the Salt River Project.

[32] Act of May 10, 1872, ch. 152, 17 Stat. 91, *as amended*, 30 U.S.C. §§ 21-47 (1964).

[33] *See generally* Barry, *Discovery Under the Mining Laws*, 8 ARIZ. L. REV. 84 (1966).

[34] For some time I have felt that the present location system established by the Mineral Location Act of 1872 is an anachronism and should be changed. Under it, large portions of the public domain are open to random mineral exploration and development with no restrictions. Needless damage to the public domain has resulted. Heavy equipment has caused soil erosion and general destruction of many scenic spots, both of which could be avoided if a more rational mineral law was enacted. For suggested amendments to the Mining Law, see Twitty, *Amendments to the Mining Laws*, 8 ARIZ. L. REV. 63 (1966), and for an excellent discussion of recent developments under the Mineral Location Act, see Note, *Marketability and the Mining Law: The Effect of United States v. Coleman*, 10 ARIZ. L. REV. 391 (1968).

I favor a mineral leasing system for all mineral exploration on the public domain. Such a system would provide the Department of the Interior with sufficient leverage to control detrimental practices now employed by many developers and would result in a greater return for the federal government on its mineral hold-

CHANGING FEDERAL LAND POLICIES OF THE 20TH CENTURY

Even at the height of pressure for increased land development in the west, many began to think of the future significance of the nation's resources and the need for giving attention to their wise management. Some were upset with the large private land holdings that had been carved out of the public domain.[35] Others were alarmed that over half of the original public domain was in state or private hands by 1900.[36] Abuses of the Mining Law of 1872 were also becoming known and, in 1879, the Public Lands Commission reported to Congress on the abuses of the timber companies on public lands.[37]

The growing public awareness of the threat to the public lands led to congressional action. In 1872, Congress had created the Yellowstone National Park "as a public park or pleasure ground for the benefit and enjoyment of the people,"[38] and in 1891, the Forest Reserve Act[39] authorized the President to reserve from disposal public land wholly or partially covered by timber. The land disposal policy of the 19th century was modified further, if not eliminated, with the passage of the Taylor Grazing Act[40] in 1934. Aimed at alleviating the steady deterioration of western range lands, it authorized the Secretary of the Interior to establish grazing districts on the remaining unappropriated public domain and issue permits for their use. More importantly, a later amendment directed the Secretary to classify 142,000,000 acres of public land according to their most suitable use.[41] Once classified, the land would be marked either for retention or disposal.

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ings. For a discussion of the merits of the present law, see PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 124-30 (1970). For a contrary statement by this author and the other dissenting Commissioners Maurice K. Goddard, Robert E. Clark and Phillip H. Hoff, see *id.* at 130-31. Professor Clark, of the University of Arizona College of Law, played a major role in drafting the statement and much of the credit for it should go to him. It is now Congress' task to enact the reforms needed and with the help of like-minded colleagues, I hope to move the Congress in that direction.

If we are ever to have comprehensive land use planning, a change in the mineral laws must be a part of it. Since prospectors can now enter a good portion of that public domain in a random fashion and sometimes obtain title to the land, land use planners are confronted with a variable over which they have no control. Sound planning for these lands is thus very difficult, if not impossible.

35 *See* M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 27 (1957).

36 E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 8 (1951).

37 *See generally* REPORT OF THE PUBLIC LANDS COMMISSION, H.R. Exec. Doc. No. 46, 46th Cong., 2d Sess. (1880).

38 16 U.S.C. § 21 (1964) (originally enacted as Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32).

39 26 Stat. 1103 (1891), *as amended*, 16 U.S.C. § 471 (1964). Under the Act, large amounts of public land were withdrawn from the operation of the general land statutes until Congress acted to prohibit further withdrawals without its prior approval. Act of March 4, 1907, ch. 2907, 34 Stat. 1217.

40 48 Stat. 1269 (1934), *as amended*, 43 U.S.C. §§ 315-15r (1964).

41 Act of June 26, 1936, ch. 842, § 1, 49 Stat. 1976. The 1.42 million acre limitation was removed in 1954. 43 U.S.C. § 315 (1964). For a general review of the Secretary's rule-making power, see Carver & Landstrom, *Rule-Making as a Means of Exercising Secretarial Discretion in Public Land Actions*, 8 ARIZ. L. REV. 46 (1966).

The retained lands would be subject to intensive control by the government which was to consider the best utilization of the land in light of competing demands for its use. Thus the well-known principle of "multiple use" was established as an integral part of federal land policy.[42]

In the last decade monumental steps have been taken to insure that future generations of Americans will be able to enjoy our greatest natural resources. During the 1960's Congress established a national wilderness system,[43] passed the Wild and Scenic Rivers Act,[44] added six new national seashores[45] and acquired four new national parks.[46] While all of these measures should be welcomed, they fail to provide the majority of Americans with an improved environment in which to live. What is needed now is a nationally coordinated policy of land use which will not only protect our wilderness areas but will also provide more livable surroundings for those in urban environs.

A National Land Use Policy for Urban America

Although anachronisms such as the Mining Law of 1872 still exist Congress, by and large, has accepted the need for conserving the public lands. Unfortunately, enlightened federal policies toward the public lands are not enough. Various disposal practices of the federal government have already resulted in state or private ownership of two thirds of the nation's land.[47] Federal land policy no longer determines the manner in which these lands are developed and used.

By adding more land to the wilderness system, we add to the heritage that future generations will enjoy, but we fail to alleviate the growth pressures on the cities. When we create new national parks, we protect scenic areas from industrial intrusion, but we ignore the controversies that regularly erupt over the location of industrial parks or power plants.

A further step is needed. State and private lands must be brought within the ambit of land use planning on a systematic national basis. The planning must be coordinated with land use plans for public holdings. To accomplish this objective some basic attitudes on land use and development must be changed. The idea that the land is its owner's to do with as he pleases must be subordinated to the land use needs of the nation as a whole.

Meeting this challenge will not be an easy task. The problems created by present policies and practices are multifaceted. Solving them will re-

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[42] A statutory definition of multiple use was set forth in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1964). It limits the term to actual management of retained lands but the term is also broadly used to describe a general policy including standards for land disposal and management.

[43] 16 U.S.C. §§ 1131-36 (1964).

[44] *Id.* §§ 1271-87.

[45] *E.g.*, Assateugue Island National Seashore Act, *id.* §§ 459f-g.

[46] 16 U.S.C. § 1c (1964).

[47] Gates & Swenson, *supra* note 6, at ii.

quire experimentation and the refinement of many programs over a long period of time. But if these problems are to be solved, a framework for governmental involvement in the planning process will have to be created. This framework must involve both federal and state governments, for the actions and inaction at both levels contribute to present-day difficulties.

Problems Created by the Federal Government

Our failure to consider the environmental ramifications of various federal activities is now becoming painfully apparent. Construction projects such as airports, highways, communication facilities and defense plants too often have been undertaken without considering their broader effects on land use development.[48] In 1934, for example, Congress established the Everglades National Park to preserve the Florida Everglades for the enjoyment of future generations.[49] In 1948, Congress authorized the Corps of Engineers to construct a flood control project in those same Everglades. Today, the project imposes artificial controls upon the historic flow of water to the park and, to a major extent, threatens its very existence.[50]

In 1968, the Dade County Port Authority and the Department of Transportation initiated construction of a jet airport within six miles of the Everglades. The airport would create a serious problem of noise pollution, affecting the delicate balance that nature has struck there and threatening the values that Congress sought to preserve in 1934. More importantly, it would spur residential, commercial and industrial development which in turn would disrupt the Everglades' ecosystem no matter how stringent the anti-pollution laws might be.

There were no villains in this controversy, no "greedy industrialists" who had declared "the public be damned, full speed ahead." There were only different groups of public officials, representing different interests and constituencies with no clear idea on how to reconcile the competing demands for the public good. They were only seeking to attain and maximize conflicting goals which had been institutionalized and legitimized by a series of appropriation and authorization acts of Congress.

The Everglades controversy is but one dramatic example of a scenario that is repeated time and again across the country. As the incident indicates, there are now many federal agencies involved in decision-making which have an impact on land use and development. The Bureau of Rec-

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[48] For a criticism of this nation's myopic approach to the development of resources on the ocean floor, see Note, *The Oil Men and the Sea: The Future of Ocean Resource Development in Light of Santa Barbara—Some Proposals to Rectify Continuing Inadequate Federal Regulation of Offshore Leasing*, 11 ARIZ. L. REV. 677 (1969).

[49] 16 U.S.C. §§ 410-10c (1964).

[50] *See Hearings on the Water Supply, The Environmental and Jet Airport Problems of Everglades National Park Before the Senate Comm. on Interior & Insular Affairs*, 91st Cong., 1st Sess. (1969).

reation is currently involved in planning for a nationwide recreation plan. The Department of Transportation is preparing highway and rapid transit plans. The Department of Housing and Urban Development is deeply involved in urban planning. Mineral exploration on public lands continues although the Department of the Interior has inadequate authority to supervise it.

These plans are generally necessary and desirable, but they lack overall coordination. No one in Congress or in the Executive has ever attempted to put them together to see if they are consistent, if they make sense, or even if people at the local level want them. Although the Environmental Policy Act of 1969[51] attempted to generate an awareness of environmental ramifications of federal actions, not one of the agencies is given the direction or information needed to judge the effects of their activities on urban development, population concentration and pollution.

Problems Created by State Government

At the state level, the problems of land use are different and more difficult. The states are primarily responsible for regulating land development, although historically they have delegated their authority to local government. Various tools are employed at the local level to control land use and development, but they are generally ineffective.[52]

Perhaps the most commonly known land use tool is zoning which classifies and segregates land according to desired uses. Suburban zoning presents a special problem because it is often used as a tool to exclude residential, commercial and industrial newcomers whose developments will cost municipalities more than they will receive in property taxes. Apartment houses that accommodate large numbers of families, public housing, and even one-family homes on small lots are often excluded. Thus in an age when there is tremendous pressure on the inner city, more desirable areas on the fringes of the city are closed to expansion. This tends to trap blacks and other members of minority groups in the inner-city thereby further exacerbating already strained race relations. It is understandable that suburban dwellers want to maintain their attractive neighborhoods, but this should not be done at the expense of overall planning for the highest and best use of all the land in large metropolitan areas.

The property tax has long been another important influence in land use decision-making. Because tax policy is a vital factor for land investors and developers, to consider it can have a significant impact on the quality

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[51] 42 U.S.C. §§ 4321 *et seq.* (Supp. V, 1965-69).

[52] The text discussion of zoning, property taxation, and sewer and water permitting as land use planning tools has its origins in the President's Message to Congress of August 10, 1970, transmitting *The First Annual Report of the Council on Environmental Quality.*

of urban environment.[53] A major cause of the deterioration of the central city has been the movement of the tax base elsewhere. It is presently common practice for improvements to property to be assessed at a higher value for levying the property tax than the original property. Consequently, urban land owners are discouraged from improving structurally-sound buildings or replacing deteriorating ones. Speculators have purchased land beyond the suburbs because of its low tax burden and attracted developers to it. Thus leapfrog development has become all too common, resulting in the common phenomena of urban sprawl.

Because of jurisdictional fragmentation in urban areas, the property tax is an ineffective device for dealing with social problems of the entire metropolitan area. In jurisdictions with high property tax bases revenue is sufficient to provide adequate schools and governmental services. The inner city, on the other hand, has relatively little revenue generated from property taxes, resulting in inadequate schools, governmental services and environmental quality. In order to provide even a minimal level of government services, the central city must increase its tax rate. This forces middle income families to the suburbs leaving the inner city populated by those rich enough to remain and those too poor to have any other choice. The spiraling effect of this exodus leaves the blacks and the minority groups to suffer in the deteriorating inner city.

The issuance of sewer and water permits is also frequently misused as a tool of land use planning. Before sewer and water services may be extended to new housing and other facilities, most communities require certification that public capacities are adequate to handle the expected number of residents and that equipment meet local standards. These permits and the controls over the use of wells and septic tanks provide the potential to shape the pace and direction of urban growth. Unfortunately, however, sewer and water lines are installed in response to uncoordinated and ill-conceived development more frequently than as a part of an overall plan for urban growth.

Local government laxity is all too apparent in the Southwest. Many land developers are now operating in New Mexico, Arizona, Colorado, Texas, Nevada and California with one thought in mind: making a fast dollar on land promotion and development schemes and then getting out. Well-financed speculators are being permitted to buy and sell the best remaining open land for future urban use without showing any concern for environmental values or insuring that a livable community will actually be developed.

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[53] For examples of the manners in which property taxes may be used to encourage environmental improvement, see THE PRESIDENT'S COUNCIL ON RECREATION AND NATURAL BEAUTY, FROM SEA TO SHINING SEA 68-69, 79, 108, 133, 256 (1968). For a criticism of the use of tax incentives, see Note, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511 (1970) (and authorities collected therein).

Certain activities in Arizona and New Mexico provide concrete examples.[54] In New Mexico large ranches were purchased in the areas surrounding Santa Fe and Albuquerque. Surveyors were brought in to plot road grids and divide the land into small plots. Roads were then bulldozed creating dust pollution and soil erosion. Street signs were posted and the developments called "estates." The lots were sold, and are still being sold, through massive advertising campaigns to city dwellers in the East and Midwest.

In Arizona, this same kind of development is taking place just a few miles south of Tucson. There, the Gulf American Corporation (GAC), a Pennsylvania-based land development firm, has purchased two large tracts of land with the original intent of selling immediately the lots carved from them and worrying about water, facilities and industrial development later. The two areas contain close to 100,000 acres of prime desert land. On Empire Ranch GAC anticipates an eventual population of 38,000 people housed on some 30,000 lots.[55]

It has been argued that GAC should not be allowed to proceed because any increase in Arizona's population would only mean a deterioration of environmental quality for surrounding areas. If the developments are improperly planned, this could very easily prove true. But with proper limits placed on GAC's activity, new people and development in southern Arizona could very well prove beneficial to the citizens of existing communities.

The Pima County Board of Supervisors has taken a first step in insuring that Empire Ranch will be developed in a manner conducive to the well being of the entire region. The Board approved only a limited land sales plan, rejecting GAC's contention that unlimited land sales should be allowed immediately.[56] GAC argued that if people could not be attracted to the area first, industry would never come.[57] While GAC's argument has a certain appeal, it ignores a very basic fact. If GAC is allowed to sell an unlimited number of small parcels of land and then fails to attract the kind of industry that can support a new community, the result is a 20th Century ghost town. Moreover, if a developer sells small parcels and does not provide adequate streets and utilities, the "community" is uninhabitable. When, for whatever reason, a new community does not come into existence, it would be almost impossible to reassemble the small parcels into single ownership for another use. The corporation would have its profits, but for all practical purposes the land would be ruined aesthetically and for any future commercial or recreational development.

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[54] The facts which follow were compiled by former Secretary of the Interior Stewart L. Udall for a syndicated column he prepares under the Newsday, Inc., copyright. This particular column was released Sept. 20, 1970.

[55] *See* Arizona Republic, Dec. 6, 1970, § B, at 24, col. 3, for a listing of the Arizona activities of GAC and other developers.

[56] Tucson Daily Citizen, Dec. 8, 1970, § B, at 31, col. 5.

[57] *Id.*

If the approach of the Pima County Board of Supervisors were applied in other instances of land use conflicts, urban problems would not be as acute as they are today. In nearly every major community and major city, every state and every region of the country, similar land use conflicts are being faced. The continued growth of the nation and the increased size, scale and impact of private actions, have created a situation in which many, if not most, land use decisions are not being made rationally. Instead, land use planning and management decisions are being made on the basis of expediency, tradition, outdated legal principles and short term economic considerations, all of which are basically unrelated to what the real concerns of land use management should be.

The National Land Use Policy Act of 1971

To change prevailing attitudes toward the land, three hundred years of land use and development practices will have to be overcome. But attitudes will have to change if land use problems are to be handled adequately. To start the process, I believe a major legislative effort by the Congress is needed. Others have recognized this need. Senator Henry Jackson, for example, proposed a comprehensive land use bill in the last session and has done so again in the 92nd Congress.[58] President Nixon has proposed a national land use policy to the Congress.[59] I have joined in this effort by introducing the National Land Use Policy Act of 1971.

This measure has three major aspects:

First, it would establish a grant-in-aid program to assist state and local governments in hiring and training personnel and developing the expertise needed to improve land use planning and management at the state level.

Second, provisions are included which are designed to encourage each state to inventory its land resources and develop a statewide environmental, recreational, and industrial land use plan within three years. The states would be encouraged to assume appropriate land use management powers over those assets and resources which are of regional, statewide or national significance. These might include ocean beaches, portions of major river systems and lakes, buffer zones around existing state and national parks and recreation areas, areas involving multiple county and interstate environmental problems such as air, water and noise pollution, transportation and utility corridors, and areas which are compatible for heavy industry such as refineries, major metal processing plants and thermal power plants.

Third, the Act would assign to the Land and Water Resources Planning Council—now the Water Resources Council—the responsibility of

[58] S. 3354, 91st Cong., 2d Sess. (1970); S. 632, 92nd Cong., 1st Sess. (1971).
[59] The President's Message to Congress of Feb. 8, 1971, transmitting the *First Annual Report on the State of the Nation's Environment*, at III-A.

administering the grant-in-aid program, working with state and local governments, and reviewing state land use plans. In addition, the Council would have responsibility for co-ordinating federal-state planning and for maintaining a data and information center on all federal and federally assisted activities which have land use planning and management ramifications.

Because the Water Resources Council already administers analogous programs concerning the water and related land resources of the federal government, the legislation has ben drafted as an amendment to the Water Resources Planning Act of 1965.[60] The experience, the established communications network, the river basin commission system and staff organization of the Council will provide an excellent base for the development of this broader function.

Passage of the bill could cause some problems for the states. Development and implementation of a statewide land use plan will require the creation of new governmental agencies in some states and the restructuring of existing institutions in others. The legislation sets forth certain minimal standards on environmental, recreational and industrial land use planning which the statewide plan will have to meet to qualify for continued grant-in-aid eligibility.

Within four years of the enactment of the bill, the statewide land use planning agency must have the authority to implement the resulting plan. This would include the authority to acquire land, to control the types of development that would take place in areas subject to the plan, to conduct hearings allowing full public participation on any land use decisions made, and to make changes in the statewide plan when required by changed conditions. If a state should fail to adopt an acceptable plan within four years, entitlement to certain additional federal assistance programs, to be designated by the President, may be reduced at a rate of 30 percent per year until the state has complied with the Act. Programs to be designated by the President would be those which tend to create land use problems unless they are properly planned. These might include federal highway construction trust funds and other public work programs.

Some will object to this approach on the ground that it disturbs the traditional relationship between the federal government and the states in the area of land use planning and management. To be sure, the Act would inject the federal government into the process to a degree not heretofore experienced. But it does rely on federal-state co-operation, without which land use planning could not be effective, while giving the federal government leverage to insure adequate performance at the state level.

The inadequacy of Arizona's institutions to handle comprehensive

[60] 42 U.S.C. §§ 1962 *et seq.* (1964).

land use planning gives a good example of the need for immediate federal involvement. The Arizona Department of Economic Planning and Development (ADEPD) is now undertaking a statewide land development study. Its work will not be completed for at least another five years, however, and even after completion the state will not have the authority to implement the plan.

My approach is to give Arizona and other states the resources and the authority to plan for future growth. We have to determine how we want this country to proceed from the present—where we want needed new communities and what the nature of those communities should be;[61] where we want to put new highways, parks, houses, factories, airports, transmission lines, sewers, and all the other necessities of life.

In Arizona the ADEPD could be expanded to handle Arizona's needs, or a new agency could be created. Many citizens from many walks of life should participate on the planning committee. The state belongs to all of us—the Douglas housewife as well as the Phoenix corporate lawyer, the reservation Navajo and the Mexican-American worker.

There are some groups that already are attempting to guide the state's development and they should obviously be represented.[62] The resulting committee would be large but its work could be delegated to subcommittees prior to the adoption of a final plan by the full committee. This way we could say to newcomers and the rest of the nation: "Here's the way we want our state to develop. We think it is a step toward preserving what is great about our state, changing what isn't and giving strong guidance for the future."

Different states might have different approaches, but the important thing now is to insure that each state has an approach. Attitudes are difficult to change and time is running out. None of us wants to give up the flexibility that has been ours in dealing with private property, but it has become quite clear to me that the time has come for each of us to take a broad

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[61] With millions of Americans trapped in the central cities and with millions of additional Americans expected by the turn of the century, new communities will have to be constructed on a massive scale if all Americans are to have the opportunity to live in attractive, well-managed urban regions. The cities as they now exist will be unable to handle the additional demand. If new communities are carefully planned and developed, their presence will add much to urban America. If they are allowed to develop in a haphazard way, depending only on the judgment of the market place, the result will be based on the model of present-day urban sprawl.

[62] The list, by no means inclusive, should include: the League of Arizona Cities and Towns; the Arizona Association of Counties; Resource Conservation and Development Districts; the six Arizona planning districts including the Maricopa Association of Government and the Pima Association of Government; the Governor's Commission on Environmental Protection; the State Advisory Council on Intergovernmental Relations; the Arizona Economic Planning and Development Board. I would also include the League of Women Voters, the Arizona Academy of Science, university and community college groups, environment and civil rights groups, and labor unions and chambers of commerce.

view of where we are and where we want to go. To do this we are going to have to involve our governmental institutions in the land use decision-making process. The alternative is simply unacceptable.

If we move now we can still shape our country so that all citizens can make both a good living and have a good life. If we wait, the opportunity may be forever lost. As Governor Sargent of Massachusetts has said:

> Given the predicted pressure of population growth and subsequent development expansion, land use planning both public and private must be tempered with an urgency of purpose. If we do not act now, the opportunities that are currently available will not exist come the end of the decade.[63]

[63] *Hearings on S. 3354 Before the Senate Comm. on Interior & Insular Affairs*, 91st Cong., 2d Sess., pt. 1, at 13 (1970).