

ENERGY, CLIMATE, AND THE LAND
AN ARGUMENT FOR FEDERAL LEADERSHIP
IN NATIONAL LAND USE REFORM

BY

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INTRODUCTION

On August 25th, 2005 a category five hurricane slammed into the Gulf Coast of the United States, its 125 mph winds generating a storm swell that pushed New Orleans' stressed levee system to the breaking point. The now-infamous Hurricane Katrina numbers among the "severe" tropical cyclones whose global frequency has increased 80% over the last 35 years, driven partially, evidence suggests, by balmier oceans heated by global warming.¹ As the streets of New Orleans flooded, half way around the world Sunni, Shiite, and Kurd leaders wrangled in Baghdad over the final draft of the Iraqi Constitution.² Just a few days earlier, U.S. troop levels in Iraq had been increased to over 140,000 in the second year of a war justified on fallacious grounds, and surely motivated as much by concerns over national energy security as international security.³⁴ As Iraqi leaders argued and Americans patrolled the streets of Baghdad, as Gulf Coast residents fled their cities and towns, in a mundane but not irrelevant contrast, someone somewhere

¹ Richard A. Kerr, "Is Katrina a Harbinger of Still More Powerful Hurricanes?" *Science Magazine* 309, no. 5742 (16 September 2005, 2005), 1807, <http://www.sciencemag.org/cgi/content/full/309/5742/1807> (accessed 29 March 2009).

² Aneesh Raman, Cal Perry and Enis Dulami, "Committee Signs Iraq's Draft Constitution," *CNN.Com* 28 Aug. 2005, 2005, <http://www.cnn.com/2005/WORLD/meast/08/28/iraq.constitution/index.html> (accessed 29 March 2009).

³ Larry Shaughnessy, "1,500 More Troops Headed for Iraq," *CNN.Com* 25 Aug. 2005, 2005, <http://www.cnn.com/2005/WORLD/meast/08/25/troops.iraq/index.html> (accessed 29 March 2009).

⁴ Greg Palast, "Secret U.S. Plans for Iraq's Oil," *BBC News*, sec. News Night, 17 March 2005, 2005, <http://news.bbc.co.uk/2/hi/programmes/newsnight/4354269.stm> (accessed 28 March 2005).

in New Jersey, was stopped in traffic- most likely one of the reoccurring traffic jams that afflict 39% of Garden State residents multiple times a week.⁵

Other than their mutual concurrence on a random Sunday in August, how could these three utterly distinct events be related to one another in any meaningful way? For a large majority of Americans the explanation of this connection lies all around, engrained into the very landscape in which they live. The answer in brief is *land*; or more precisely, how approximately 191 million Americans acquire, develop, and live on it. That number represents the 70% of Americans who, at the turn of the millennium, lived in suburban or exurban locations. These are the regions most afflicted the diffuse pattern of growth, pejoratively termed suburban “sprawl,” that now dominates the United States.⁶ “Sprawl” describes a built environment that is characterized by the spatial segregation of residential, commercial, business, and civic areas; extremely low building densities, and a dispersal of development across the land; ubiquitous high capacity, high-speed roads; the general absence of sidewalks, bicycle facilities, or alternative transportation options; and copious amounts of the ultimate American frustration- traffic.⁷ Sprawl is a hot-button issue of the day, and now ranks among the top of American’s environmental concerns.⁸ It has drawn wide criticism from environmentalists, preservationists, architect, planners, public officials, and citizens themselves for the economic, ecological, and social

⁵ Monmouth University, *Garden State Traffic* (West Long Branch, NJ: Monmouth University Polling Institute,[2007]), www.monmouth.edu/polling (accessed 29 March 2009).

⁶ U.S. Bureau of the Census, *Population Profile of the United States, 1999* (Washington D.C.: Prepared by Judith Waldthrop of the Population Division’s Special Project Staff, Bureau of the Census,[2001]), www.census.gov/prod/2001pubs/p23-205.pdf (accessed 29 March 2009).; Reid Ewing, Rolf Pendall and Don Chen, *Measuring Sprawl and its Impact* (Washington D.C.: Smart Growth America,[2002]), <http://www.smartgrowthamerica.org/resources.html> (accessed 25 Feb. 2009).

⁷ Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, *Suburban Nation : The Rise of Sprawl and the Decline of the American Dream*, 1st ed. (New York: North Point Press, 2000), 5-7.

⁸ Don Chen, *Greetings from Smart Growth America* (Washington D.C.: Smart Growth America, 1-24.

problems it causes.⁹ Sprawl's critics have long accused in of exacerbating fossil fuel consumption on the basis of sheer qualitative observation.¹⁰ However, there is now quantitative proof that sprawling communities lock their residents into energy intensive lifestyles centered on an inefficient system of transportation, which places greenhouse gasses into our atmosphere and US dollars into treasuries of the Persian Gulf.

It is not surprising, therefore, that this wasteful form of growth has drawn ire from public leaders, such as Senator Henry Jackson's (D. WA), who declared,

“We simply cannot afford to continue to absorb the enormous costs in economic loses, delays, resource misallocations, and adverse social and environmental effects which have been and will be exacted by our failure to plan for the sound and balanced use of our land.”¹¹

This is an insightful and timely statement, especially given its date of delivery before Congress: 1975.¹² Judging by the events of August 28th, 2005, it would seem that the nation *has* continued to absorb the “economic loses, delays, resource misallocations, and adverse social and environmental effects” caused by a failure to use our lands

⁹ Junjie Wu, "Land-use Changes and Regulations in Five Western States of the Untied States" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 202.

¹⁰ Susan Owens, "Spatial Structure and Energy Demand" In *Energy Policy and Land-use Planning : An International Perspective*, eds. David R. Cope, Peter J. Hills and Peter James, 1st ed., Vol. 32 (Oxford ; New York: Pergamon Press, 1984), 220, 225-226.

¹¹ Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 41.

¹² *Ibid.*, 41

rationally. The question that begs to be asked is, why? As awareness has steadily grown about the negative implications of status quo, inefficient suburban growth, why has it persisted? Indeed, why has it not only persisted since Senator Jackson's time, but *expanded*, so that in the face of the national subprime mortgage crises, researchers estimate that the 40% of existing large lot suburban homes (built on 1/6 and acre or more) are in excess of demand, and will produce a glut in the housing market equivalent to 22 million homes by 2025?¹³

The answer is not simplistic, and it is not brief. It cannot be entirely attributed to market forces, or to political ineptitude, or even to greed and blissful ignorance. Rather, the adjective that best describes the circumstances that have produced to this three-pronged land use-energy-climate crisis is *paralysis*. Far from being a topic of political obscurity, land use policy has been one of the most contentious and consistently debated subjects since the founding of the United States. Land use policy is a natural source of controversy not only because of its direct impact on the structure of society and patterns of economic activity, but because land is vehicle of expression for deeper ideology. Throughout the history of the United States, land has been inextricably enmeshed in fundamental political and philosophical ideals. These ideals of personal liberty, innate equality, and equal opportunity were the touchstones of the American Revolution and have been incorporated into the fabric of American identity. The democratization of land became synonymous with these revolutionary ideals, just as the feudal and monarchical

¹³ Arthur C. Nelson, "Mountain Megaopolis, Long-Term Development of the Mountain Megapolitain Areas" (Albuquerque, NM, 23 January 2009, 2009).

system of the old world had been synonymous with oppression, inferiority, and inescapable servitude.¹⁴

Some amount of land regulation is unquestionably necessary to preserve a stable society, but the locus of that regulatory authority and the appropriate scope of government influence on private land use has remained a question of vehement debate. The persistent ideological struggle to locate land use authority at the “proper” level of governmental is largely responsible for the federal government’s historically incoherent approach to land use policy.¹⁵ In fact, federal land use policy may be more aptly described as “non-policy,” for the national government has never formally adopted a set of policy goals addressing land use throughout the country (i.e. land that is not federally owned).¹⁶ This silence has not prevented the federal government from having an astounding impact on the use and development of America’s land, but it has made it exceedingly difficult to trace the policy origins of the present land use-energy-climate crisis, which the United States has quite literally built itself into.

It is widely accepted that the federal government is constitutionally constrained from directly regulating local land use decisions, as that authority is delegated to the states. Yet between centralized land use control and federal ambivalence, there exists a wide and murky chasm. It has taken over 200 years to extricate land from the web of ideology that has jealously guarded against periodic attempts to extend greater public influence of the

¹⁴ Marshal Harris, "Private Interests in Public Lands: Intra- and Inter-Private" In *Land use Policy and Problems in the United States*, ed. Howard W. Ottoson (Lincoln: University of Nebraska Press, 1963), 312, 319-323.; John Brewster, "The Relevance of the Jeffersonian Dream Today" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 90-95.

¹⁵ William Kelly, "'Across the Barricades'" In *Land use in America*, eds. Henry Diamond and Patrick Noonan (Washington D.C.: Island Press, 1996), 188.

¹⁶ Wu, *Land-use Changes and Regulations in Five Western States of the United States*, 201

terms of land acquisition, use, and development. To this day, it is still not entirely free from these associations, and discussion of land use policy at the national level cannot ensue without invoking battle between a multitude of groups and ideologies: property-rights versus the public interest, local-control against centralized authority, growth advocates versus conservationists, small government against large, and states-rights versus a federal agenda. To the extent that proponents of these varied viewpoints could be generalized into two broad categories, call them pro-local individualists and nationalist-communitarians, in the longstanding land use debate, pro-local individualists have largely carried the day. The product of their repeated political triumphs is an intensely localized system of land use authority that lacks both the perspective and resources needed to consider growth within a broader regional context.

In addition to its 50 state governments, as of 1997 the United States had 87,453 identifiable units of government, including counties, cities, towns and townships among others.¹⁷ Even if only half of these local entities exercised land use authority within its territory, the outcome could hardly be anything other than chaotic, especially in dense metropolitan areas where many jurisdictions exist in close proximity, and are integrated into overlapping regional economies. Attempts by states in recent decades to stimulate, entice, or compel more centralized or more stringent local land use regulations have largely proved ineffective in the face of adamant local resistance.¹⁸ In light of this precedent, the outlook to for federal leadership in land use reform is hardly encouraging. Yet the recent passage of landmark legislation in California, and promising activity in

¹⁷ Alan Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century* (London: M.E. Sharpe, 2004), 24.

¹⁸ Frank Popper, "Understanding American Land use Regulation since 1970" In *Classic Readings in Urban Planning*, ed. J. M. Stein (New York: McGraw Hill, 1995), 149.

Congress suggests that that the pressure to actively *do something* about the nation's land use problems is finally beginning to crest, carried on a wave of national concern over global climate change and growing energy dependence.

These two issues may finally provide the leverage needed to free questions of land use policy from the ideological mire, which has thus far prevented them from being considered in a fully objective light. The time has come for the federal government to assert itself clearly in the sphere of land use policy, and to pursue creative strategies that will catalyze meaningful policy change throughout the nation. But the path to progress is complex, and must be charted with care. It will not be possible to overcome the barriers that have hobbled federal land use initiatives for over 200 years without close consideration of the forces that gave rise to them. Likewise, the argument for federal leadership will founder unless it clearly articulates the connection between local land use decisions and national climate and energy concerns- a relationship that to many remains opaque. Finally, policy innovation in California offers an excellent roadmap that may guide national policy and provide valuable insight into how the delicate subject of land use can be successfully addressed. With an eye to these foundations, a federal effort at land use reform may finally prove successful, and set the nation down the path towards economically sustainable, regionally coordinated, energy-efficient growth; a path that must be followed if the United States is reduce its contribution to global warming and free itself from dependence upon foreign fossil fuels.

LAND USE POLICY IN A NATIONAL CONTEXT: THE STRUGGLE TO DEFINE A FEDERAL ROLE

Introduction

Political tension over the use and development of land has existed since the earliest days of the United States. Land's persistent status as a contentious and divisive topic attests to its place in a deeper political controversy, one that has marked the nation from its beginning. This debate can be captured by a single question: where does the authority of the federal government end and that of states and localities begin? The struggle to answer this question produced the very system of federalism in which Americans live, and throughout the history of the United States, has pitted proponents of centralized and localized authority against one another in most of the controversies surrounding land, and its use, regulation, and development¹⁹Hence, to study the

¹⁹ Michael Lacey, "Federalism and National Planning: The Nineteenth Century Legacy" In *The American Planning Tradition*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 92.; Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 9.

milestones of national land use policy is to study the longstanding conflict between the two dominant traditions in American politics: Nationalism and Federalism, the traditions of Hamilton and Jefferson.

These traditions are the basis of the two-party system that marks American politics, and they have consistently taken opposing sides on national matters of land use policy²⁰. In doing so, each tradition has invoked divergent constitutional interpretations and articulated opposing visions for the structure of American governance and society itself. Is the constitution to be strictly read, its omissions as binding as its stated prohibitions? Or do its silences leave room for improvisation? Should the national government be kept small, removed, and deferent to local interests? Or should it be active and robust, capable of building common institutions and advancing common interests? Finally, to what future should America aspire: a rural agrarian democracy, or a cosmopolitan industrial power? Disagreement on these foundational questions animated early debates over national land policies, and similar questions of constitutionality and federal authority pervade the topic to this day. The product of this ongoing ideological struggle has been two centuries of oscillating public policies regarding land, during which the federal government has utterly failed to articulate anything approaching a national position on land use policy²¹.

²⁰ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 94

²¹ William Kelly, "'Across the Barricades'" In *Land use in America*, eds. Henry Diamond and Patrick Noonan (Washington D.C.: Island Press, 1996), 188.; Junjie Wu, "Land-use Changes and Regulations in Five Western States of the United States" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 201.

The debate over federal land use policy has risen to the fore of the national political stage on four primary occasions: the movement for a system of national internal improvements, the battle over federal land sales, the creation of the National Resources Planning Board, and the fight for a National Land Use Planning Act. On each occasion, a pressing need for federal leadership broke upon the rocks of ideological divisions and Constitutional ambiguities. Yet the defeat of explicit federal leadership in land use policy did *not* amount to the defeat national land use policy generally. It simply pushed federal influence underground, into the sphere of implicit policy where its objectives became harder identify and its outcomes more difficult to assess. The consequences of this situation have been economically, environmentally, and even politically damaging. To grasp why future national land use policy must break from this precedent, and how it may do so, it is necessary to examine the ideological schisms and political framework that have shaped its improvident past.

Political Framework and the Origin of Two Traditions

Land use policy in the United States has been heavily influenced by the Nation's complex federalist system²². This system, which requires a division of powers between the national and state governments, is a product of founders' simultaneous fear of consolidated power and dissatisfaction with the impotence of a confederation. While the central government established under the Articles of Confederation proved insufficient

²² Alan Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century* (London: M.E. Sharpe, 2004), 24.

govern the young United States effectively, Federalist Paper Ten warned early leaders against creating a central power that was unduly strong²³. “The accumulation of all powers... may be pronounced the very definition of tyranny,” wrote Madison²⁴. This tension, stemming from a need for more centralized power and a simultaneous fear of it, produced a Constitution that both enhanced and checked the power of the national government; that respected the will of majority but amplified the voice of the minority. Federalism was therefore a complex compromise between the two dominant traditions of early political thought²⁵. Hence Diamond observes that federalism is “always an arrangement pointed in two contrary directions... aimed at securing two contrary ends”²⁶. The origin of the controversy surrounding land use policy can be traced to the two dominant American political traditions, and how they diverged in their interpretation of this federalist system, and the Constitution that governed it.

The first tradition can be described as following the ideal and principles championed by Thomas Jefferson. Often referred to as the state’s rights faction, this tradition was embodied by Jefferson’s Democratic Republicans and later Andrew Jackson’s Democrats. It is currently lodged within the modern Republican Party²⁷. Historically, members supported the precise separation of state and national government, and thus subscribed to what Lacey calls “dual federalism”- the concept that state and federal government have distinct jurisdiction and authority, which should never overlap.

²³ Ross Talbot, "The Political Forces" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 138.; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 109

²⁴ Talbot, *The Political Forces*, 138

²⁵ *Ibid.*, 138-139

²⁶ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 92

²⁷ {{92 Lacey, Michael 2000/s 93-94;}}

Deeply anti-institutional, they perceived all models institutionalism, including greater federal bureaucracy, as aristocratic and at odds with democratic ideals. They championed state sovereignty in all domestic matters, small government over large, low taxes over high, and minimal government regulation²⁸. Influenced by a recent colonial experience, “states-rights” advocates were extremely skeptical of consolidated power²⁹. Taking this position at the Constitutional Convention, weaker states successfully compelled proponents of centralization to accept a federal government whose power was checked and divided beyond their choosing. Those in the Jeffersonian tradition henceforth interpreted the Union and the national government it created as a product and agent of the states, and resisted any policy measures perceived as expanding national power over them³⁰. This position was perpetuated under a “strict construction” reading of the Constitution; an interpretation that allotted the federal government only those powers *expressly* granted to it within the constitution and reserved all else to the jurisdiction of the states³¹.

In opposition stand those who follow the nationalist tradition of Alexander Hamilton. Known simply as Federalists under Hamilton, proponents of this view eventually joined the “Nationalist wing” of Jefferson’s Democratic Republicans, and later formed the Whig party in opposition to the Jacksonian Democrats. Ironically, the tradition survives in the modern Democratic Party. This tradition has historically

²⁸ Ibid., 90-97

²⁹ Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century*, 38

³⁰ Talbot, *The Political Forces*, 139; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 94,98

³¹ Daniel Feller, *The Public Lands in Jacksonian Politics* (Madison: University of Wisconsin Press, 1984), xxii.

embraced institutions and a federal government capable of establishing as a means to define and advance national interests. In crafting the constitution, Federalists would have preferred a stronger central government, more constrained state governments, and likely something closer to a parliamentary system³². Yet a Union enhanced, if insufficiently, was preferable to none, and thus the constitutional compromise was struck. However, unlike the “states-rights” faction, national federalists considered the union to be created by the people of the nation as a whole. The Union thus superceded the states, and the rights of the national community transcended those of the local. This perspective supported a “Nationalist” theory of federalism, one that saw room for a greater federal role in various policy spheres through cooperation with the states³³.

Though an apparently small detail, the difference between viewing the Union as an agent of the states rather than the states as a product of the Union had profound ideological consequences. It deeply impacted the political development of both traditions and their respective interpretation of the Constitution itself. This difference is a primary source from which their diverging views on land policy have sprung³⁴. Depending upon their view of the national government, leaders either saw a constitutionally legitimate role for it in cooperating state policy, or in contrast, believed no such role was allowable. These contrasting positions fueled one of the first great debates concerning national land policy: the proposal for a national system of internal infrastructure improvements.

³² Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 94, 98; Talbot, *The Political Forces*, 139

³³ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 94, 98

³⁴ Anthony Flint, *The Battle Over Sprawl and the Future of America* (Baltimore: Johns Hopkins University Press, 2006), 133.

***National Need versus Constitutional Constraints: Dual Federalism and the
Death of National Internal Improvements***

At the outset of the Nineteenth Century, the young United States was rapidly expanding, as Western states were steadily carved out of the vast public domain to join the Union. Yet the deplorable state of national infrastructure meant that Union continued to operate more like a grouping of individual colonies than a single national body. Roads and canals were woefully lacking, or extremely primitive, impairing interstate commerce and communication³⁵. The dire situation motivated Federalist Senator John Quincy Adams's to issue a request for, "a plan for the purpose of opening roads, and building canals...which, as objects of public improvement may require and deserve the aid of government"³⁶. In response, Secretary of the Treasury Albert Gallatin created a formal plan in 1807 that outlined a national system of interlocking roads and canals, intended to establish the physical and institutional infrastructure necessary for a dynamic, interdependent economy and culture. It would create an inventory of all the projects underway or planned in the states, and a method for selecting among them and complementing them, thereby fusing together a national transport and communications infrastructure, and strengthening the Union³⁷.

Gallatin's plan effectively detailed one piece of a larger body of federalist proposals, collectively referred to as the "American System." Springing from the

³⁵ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 99-103

³⁶ *Ibid.*, 101

³⁷ Feller, *The Public Lands in Jacksonian Politics*, 9, 48; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 101

economic tradition of Alexander Hamilton, the American System was a plan of nation building and public finance intended to place the national government at the center of a seven-part system, where it could orchestrate the development of a strong American civilization. Integral to the plan was a proposed program of internal infrastructure improvements that would allow federal revenues from western land sales and various tariffs to be reinvested in the nation in the form public works projects. This strategy would advance the common good, while closing a financial link in the system and productively disposing of politically unpopular federal surpluses³⁸. Gallatin's plan was essentially a blueprint of this internal improvements system.

As President Jefferson's Secretary of the Treasury, Gallatin was staunchly opposed to many of the Hamiltonian financial policies underpinning the American System, yet on the issue of internal improvements he and others in the Nationalist Wing of the Democratic Republicans sympathized with Federalists. The two groups had different ideological reasons for supporting federal internal improvements, but they shared a flexible reading of the Constitution that contrasted with the strict constructionist view held by Jefferson and many in the states'-rights traditions. This flexible interpretation allowed Nationalist Democrats and Federalists (before the party dissolved) to view internal improvements as both massively beneficially and entirely constitutional³⁹. Federalists shared the Hamiltonian conviction that civil works, would not only make the nation's commerce stronger and more competitive, but would turn the abstract national government into a tangible, positive force in Americans' daily lives,

³⁸ Ibid., 100-101; Feller, *The Public Lands in Jacksonian Politics*, 73

³⁹ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 104-105

thereby strengthening their bond to the Union⁴⁰. Gallatin and other sympathetic Nationalist Democrats regarded comprehensive internal improvements as a crucial way to strengthen the *states*, ultimately making them *more autonomous* from the national government. Fundamentally, both groups interpreted the constitution as allowing a system of *cooperative federalism* that made internal improvements legally permissible. Unlike the strict constructionist interpretation, this cooperative reading of the Constitution allowed for collaboration between the national and state governments, and the integration of responsibility and resources. The federal government might be involved in financing or guiding local policy, so long as the states were willing partners. Thus, Gallatin believed the federal government could legitimately execute internal improvements so long as it obtained, “the consent of the state through which such a road or canals must pass”⁴¹.

President Jefferson and his successors, James Madison and James Monroe, were enticed by the economic benefits of such a system, but constrained by their adherence to strict-constructionist principles. They doubted the constitutionality of internal improvements and the American system generally⁴². During their terms, both Jefferson and Madison requested the constitutional amendment from Congress that would grant the federal government the authority to fund, plan, and execute internal improvements; an authority they believed it otherwise lacked⁴³. When Congress failed to produce such an amendment, however, neither Jefferson nor his successors pressed the issue. Ironically,

⁴⁰ Feller, *The Public Lands in Jacksonian Politics*, 48; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 93

⁴¹ *Ibid.*, 104, 108

⁴² Feller, *The Public Lands in Jacksonian Politics*, xxii

⁴³ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 104

Jefferson himself set a precedent that illustrated the implausibility of adhering to his own strict constructionist creed of limited national government, clear separation between nation and state, and uncorrupted state sovereignty.

In 1802 Jefferson signed the Ohio Enabling Act. The act admitted Ohio to the Union under an agreement that 5% of all proceeds from future sales of Ohio's public lands would be used to construct roads for Ohio's benefit, with 3% going towards roads within its borders and 2% towards roads leading to the state. In return, Ohio would not tax public land sales for five years. By creating a contractual obligation for the federal government to build roads in Ohio, the act dodged the constitutional question of whether or not the federal government had the authority to do so. Jefferson thereby created a constitutional loophole that was "cheerfully exploited" by congress for decades following its passage, as a means to finance badly needed public works in Western States⁴⁴. Subsequently, new western states were admitted on the same terms, providing a back door through which at least *some* of the much needed infrastructure was secured. The Ohio Enabling Act was early evidence that the complete and rigid separation of national and state authority was not only unrealistic, but potential in conflict with broader national interests.

The next President, James Madison, perpetuated this constitutional contradiction, while also continuing to resist Nationalists' demands for an official federal improvements program. Willfully admitting Indiana and Mississippi to the union under the Ohio precedent, Madison nonetheless held to his strict constructionist principles by vetoing the

⁴⁴ Feller, *The Public Lands in Jacksonian Politics*, 8-9, 53

Clay-Calhoun “bonus bill” on his last day in office; a measure that would have funded and implemented portions of the Gallatin Plan⁴⁵. Madison defended this inconsistency by asserting that western public lands and revenue generated from their sale were unique. Because western states were carved from public land, he reasoned, projects such as Ohio’s Cumberland Road were under congressional jurisdiction, and the land-sale revenue that funded them was exempt from constitutional limitations on federal spending⁴⁶. Congress’s constitutional right to make, “all needful rules and regulations respecting the territory of the United States” was therefore used to justify the western loophole⁴⁷. President Monroe happily continued this hypocritical policy, likewise admitting new states with a 5% appropriations provision while resisting a formal nation-wide internal improvements program. He therefore vetoed the Cumberland Road Bill of 1822, which would have financed the road’s ongoing maintenance as well as the construction of tollbooths⁴⁸. While he took no issue with repairs, Monroe believed that federal construction and operation of tollbooths “usurped states’ rights,” by infringing upon their jurisdiction, sovereignty, and revenue collecting authority⁴⁹.

Yet once again, the strict-constructionist pretension of keeping federal power closely constrained and separate from state jurisdiction broke down. Monroe ultimately signed a version of the bill that allowed federal appropriations for road maintenance. In doing so, he expanded federal funding beyond the narrow realm of road construction that

⁴⁵ Ibid., 53; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 106

⁴⁶ Feller, *The Public Lands in Jacksonian Politics*, 53

⁴⁷ Ibid., 53

⁴⁸ Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century*, 40

⁴⁹ Feller, *The Public Lands in Jacksonian Politics*, 56-57

had been authorized under the Ohio contract. He thereby widened the constitutional loophole it had created. Furthermore, in 1824 Monroe signed a general survey bill authorizing the survey of roads and canals deemed by the federal government to be of a national commercial or military importance, once again expanding federal authority, quite literally, into state territory⁵⁰. These two actions greatly alarmed the “Old Republican” wing of the Democratic Republicans, and awoke latent southern resistance to internal improvements that would deepen and solidify during the Adams administration.

The southern Vanguard of the Jeffersonian tradition, Old Republicans combined philosophical and constitutional objections to a strong central government with a strict constructionist reading of the constitution to create an ideological and political shield for the slave system. They had fought every measure of consolidation brought before congress as dangerous expansions of federal power, and came to regard internal improvements as a vehicle of consolidation in disguise⁵¹. National funds, when distributed for local projects, were tantamount to bribes that might woo states away from their sovereign principles⁵². John Randolph’s warning to congress in the Survey Bill debate of 1824 reveals the complex ideological, constitutional, and political issues with which federal land policy was enmeshed. If Congress had the authority to survey land, he warned, then it would have the power to, “emancipate every slave in the United States”⁵³. As this quote displays, land policy has never been a self-contained issue. Rather, from the

⁵⁰ Ibid., 56-57

⁵¹ Ibid., 74

⁵² Ibid., 136

⁵³ Ibid., 72

beginning, the debate over land use policy was a proxy for deeper political and ideological disagreements regarding the subjectively *desirable* and legally *permissible* scope of federal authority, as vested to it by an occasionally opaque Constitution. Roused by Randolph's warning of the political *implications* of internal improvements, proponents of local control and states' rights launched a resistance that proved fatal to this much-needed system.

The election of 1824 brought John Quincy Adams to power. A former Federalist Senator, Adams became a leader of the Nationalist wing of the Democratic Republicans following the collapse of the Federalist Party. He was arguable the strongest supporter of the Nationalist theory of federalism since Hamilton, and believed deeply in the beneficent power of government⁵⁴. Adams considered a national system of internal improvements program as an essential way to advance the common good and strengthen the nation as a whole. He would make the final and strongest push during the antebellum period for a national system of internal improvements⁵⁵. Ironically, with a champion of internal improvements finally in the Whitehouse, one who *did not* demand a Constitutional amendment to act, the congressional landscape was shifting. Opposition to Adams coalesced around Andrew Jackson, who bore the mantle of the West and, as a slave owner, gradually inherited the support of an increasingly paranoid south⁵⁶. The American System, which Adams aimed to implement fully, tied improvements to a revenue-generating protective tariff. The tariff would burden a financially troubled south,

⁵⁴ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 98

⁵⁵ *Ibid.*, 108; Feller, *The Public Lands in Jacksonian Politics*, 72

⁵⁶ *Ibid.*, 70-71

while the improvements plan would expand federal influence and erode a strict constructionist reading of the constitution: the South's primary shield for slavery⁵⁷.

Excluding the old republican vanguard, the South had tacitly supported internal improvements, but tied to a larger American System and endorsed by a New England President, the policy appeared more menacing. Southern opposition to internal improvements gradually joined forces with western property rights movement to oppose Adams' national development policies, leaving Adams without the congressional support needed to implement either the Gallatin Plan or the American System⁵⁸. In a bid for a second term, Adams was defeated by Andrew Jackson, who carefully kept his precise stance on the contentious issue of internal improvements unclear. Despite being hailed as a man of the West, where support for internal improvements was quite strong, upon taking office, Jackson largely derailed the movement for internal improvements. His veto of the Maysville Road Bill in 1830 marked the beginning of a hostile policy towards internal improvements, and the end of nationalist hopes for a federal role in the planning and development of regional infrastructure⁵⁹. Jackson's reasons for abandoning internal improvements were complex, and most likely tied to his need for southern support on liberalized western land policy⁶⁰. Thus the ideology of states-rights and strict construction, fundamentally important to the South, became the decisive factor in this national debate. The consequences of withdrawing the federal government from the

⁵⁷ Ibid., 59, 89

⁵⁸ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 110; Feller, *The Public Lands in Jacksonian Politics*, 53

⁵⁹ Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century*, 40

⁶⁰ Feller, *The Public Lands in Jacksonian Politics*, 122-142

sphere of national development were profound. To this day, the states struggle under burdens that grew from this ill-advised decision.

The inflexible dual federalism advanced by the Jeffersonian tradition rejected the notion of common interests and shared responsibility between the Nation and the States. This interpretation of federalism dominated among early Nineteenth Century leaders, and advanced the view that the states alone should undertake infrastructural development, with the extent of federal aid limited to public land grants⁶¹. Under Jackson, the responsibility of financing and executing crucial improvements was left almost entirely to the states. These projects were formidable, and most young states lacked the resources and expertise to execute them successfully, a reality that Gallatin had acknowledged years before. Borrowing on public credit, states frequently undertook projects beyond their capability, resulting in widespread failure and excessive debt. Outraged citizens amended state constitutions to limit states' ability to leverage debt⁶². The economic storms that griped the Nation in the 1830s and 1840s only worsened state defaults, and banks ceased to lend without the guarantee of being able to sue on debt; a guarantee states could no longer offer. Thus, all responsibility for borrowing to execute internal works passed to cities and counties⁶³.

State governments were thereby rendered, “effectively impotent with respect to the developmental functions of government,” creating a void of capability that would be

⁶¹ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 90; Thomas Le Duc, "History and Appraisal of U.S. Land Policy to 1862" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 20.

⁶² Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 103, 113

⁶³ Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century*, 40

ultimately filled by private industry⁶⁴. In dire need of infrastructure, states passed liberal laws of incorporation, in the hope of stimulating and attracting private sector investment by reducing public regulation of the corporate realm. Thus, “a virtually unlimited field for private enterprise, increasingly free of state participation, was opened up”⁶⁵. Scholar Henry Carter Adams wrote in 1887, “The growth of the private corporation... arose upon the ruin of States as industrial centers of administration”⁶⁶. The exclusion of the federal government from states’ internal development thereby laid the foundation for the “laissez faire” economics that dominated the United States for decades following the Civil War. Had the federal government been recognized as an essential partner in states’ physical development, rather than a meddlesome force to be excluded, it could have provided the intellectual and fiscal resources needed to plan and execute projects that either transcended state boundaries or eclipsed local capabilities. Had federal land revenues been applied to a comprehensive system of internal improvements, commerce, industry, and communication might have better flourished throughout the Union, strengthening the states themselves⁶⁷. Instead, the states became hobbled by debt in the short-term, and hamstrung by a future inability to borrow.

The Federal Land System and the Push for Privatization

The political and economic damage done to the states by the myopic resistance to federal internal improvements was only the beginning of the troubles unleashed by early

⁶⁴ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 112-113

⁶⁵ *Ibid.*, 114

⁶⁶ *Ibid.*, 113

⁶⁷ *Ibid.*, 108-112

land policy. Opponents of federal power were not satisfied with blocking internal improvements, for another potent mechanism of consolidation persisted: the federal land system itself. Throughout the internal improvement debate, disagreement simultaneously raged over the public land system and the terms and conditions of federal land sales. Not until internal improvements were safely derailed, however, did the very existence of the federal land system come under attack. The battle over the fate federal land system was the culmination of a near-perpetual conflict that plagued the system since inception. The public domain was created over a period of roughly twenty years, from 1780-1802, as seven eastern states ceded their western territories, secured following the Revolution, to the federal government⁶⁸. Placing these lands under national jurisdiction was an attempt to mitigate the substantial disadvantage faced by those states that had no claim to western lands⁶⁹. With the creation of a public domain, tension rapidly emerged as leaders simultaneously attempted to honor and control the American drive to obtain, develop, and protect property; a force that had helped motivate the American Revolution and would shape nascent land policies⁷⁰. The states' various acts of cession had clarified that the federal government would not retain western lands indefinitely, but rather sell them off for revenue to pay down the National Debt⁷¹. Yet there agreement ended. Precisely how the government would dispose of the public lands, in what quantities, and at what prices was a subject of vehement debate.

⁶⁸ Marion Clawson, *The Federal Lands Revisited* (Washington, D.C.; Baltimore: Resources for the Future; Distributed by the Johns Hopkins University Press, 1983), 1-2.

⁶⁹ Feller, *The Public Lands in Jacksonian Politics*, 3-4

⁷⁰ Kelly, "Across the Barricades", 188; Richard Barrows, *The Roles of Federal, State, and Local Government in Land use Planning* (Washington D.C.: National Planning Association, 1982), 10.

⁷¹ Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, 4-5

Like the conflict over internal improvements, disagreement over the federal land system is traceable to deeper ideological divisions. The primary cleavage of the federal land debate separated “property rights advocates” from “public interest proponents,” and fell largely in parallel to cleavage separating the state-rights advocates from Nationalists. As with internal improvements, the tension between these two factions produced decades of erratic public policy⁷². By advocating different models for the public land system, each group advanced a different view of the desirable and permissible federal role in domestic state affairs, as well differing views on property generally and very structure of American society.

Thomas Jefferson and others in the “states-rights” tradition tended to align as property rights advocates as well. The property rights position, as articulated by James Madison in Federalist Paper #14, generally held that a central purpose of government was to protect the private property of individuals⁷³. The view of property as a thing to be protected from exterior designs or influence was compatible with the Jeffersonian emphasis on individual freedom and opportunity. It became codified within the land policies of Jefferson’s Democratic Republicans, and later, the Jacksonian Democrats. This ideological perspective supported a specific set of land policies: those that urged the rapid and extensive settlement of western lands, and strove to expedite the transfer of public lands from government ownership to private hands⁷⁴. These Jeffersonian policies

⁷² Kelly, “*Across the Barricades*”, 188, 190

⁷³ Flint, *The Battle Over Sprawl and the Future of America*, 133

⁷⁴ Feller, *The Public Lands in Jacksonian Politics*, 191; Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 10

advanced a specific goal: the rapid creation of a nation of “freeholders” (private landowners).

The functional premise of this policy was that land secured by individuals would be improved and cultivated for the purpose of farming, thereby adding value to the land⁷⁵. The ideological premise, held by Jefferson and his successors, was that a *causal relationship* existed between widespread land ownership and democracy. Land ownership would enable common men to view themselves as equals rather than inferiors, by making them independent, self-sufficient, and economically stable. Therefore, the theory held, the free-holder would form the foundation of a democratic society dependent upon self-governance. By fostering material and psychological independence, the free-holder movement was expected to stimulate aspirations for democratic self-rule, and enable settlers to liberate their minds from an inherited feudal mentality⁷⁶. To the chagrin of property rights advocates, newly formed western states faced a unique situation that threatened the vision of unfettered land ownership. Carved from public lands, the new states did not actually control the vast majority of their vacant territory; the federal government did. Until that land was transferred into private hands, states had no control over its settlement or development. Hence, “nothing was more important to the western states than control of the terms under which land was opened for settlement”⁷⁷. Subsequently, western leaders clamored for liberalized land policy that would lower the

⁷⁵ Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, 11, 5

⁷⁶ John Brewster, "The Relevance of the Jeffersonian Dream Today" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 95-97.

⁷⁷ Feller, *The Public Lands in Jacksonian Politics*, 5

price of public lands, increase sales, and expedite the transfer of territory from federal to private (taxable) hands⁷⁸.

On the other side of the property debate stood the “public interest proponents.” Historically those who subscribed to this view tended to align behind the tradition the Nationalist tradition: John Quincy Adams, Henry Clay, and the Whig party. This view, as expressed by Benjamin Franklin, held that property was a creature of society and therefore, “subject to the calls of that society whenever its necessities require it, to the last farthing”⁷⁹. Members of this tradition agreed that public land should be conveyed into the hands of private citizens, but they saw a potential to manage the process in a way that would harness the vast resources of the nation for the larger public good⁸⁰ (Harrison 10) By controlling and limiting settlement, the land would be developed in a compact manner, thus concentrating the thin human capital of the young nation and encouraging society and culture to flourish, rather than dispersing limited resources throughout the continent⁸¹. By managing land sales, the federal government could capture revenue to be reinvested for the public benefit, helping to fund public works and internal improvement projects, among other things⁸². The Nationalist vision contrasted starkly with that of property rights advocates, who sought a privatized agrarian realm free from government influence. The Nationalist approach to land policy was fundamentally supportive of an

⁷⁸ George M. Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-Emption to Homestead* (Boston: R.G. Badger, 1917), 20-22.

⁷⁹ Flint, *The Battle Over Sprawl and the Future of America*, 133

⁸⁰ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 10

⁸¹ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 100

⁸² Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 10

urbanized society, one that rested upon trade, commerce, and industry, rather than subsistence farming. Furthermore, it did not pursue the clear separation of federal and state jurisdiction, but advanced a vision of a benevolent and active federal government; one that might cooperate with the states in overseeing the sale and development of their territory.

Hamilton's proposal to congress for a dual system of public land disposal reflects these goals. He recommended that land be made available to settlers in 100-acre parcels, at a price of 30 cents and acre, while other buyers could purchase larger tracts on credit⁸³. The low price of 30 cents an acre would make land accessible to genuine settlers of humble means, while the modest parcel size of 100 acres would help limit the supply of land on the market, thus enhancing demand for prime parcels and allowing an auction system to function effectively. Land would be classified by value as the best parcels were bid up accordingly, ensuring the federal government appropriate returns on its land resources; returns that could be used to enhance public welfare. Thus this vision for limited, managed land sales was inextricably linked to broader nationalist goals for internal improvements, and an active, benevolent federal power. Congress rejected the plan, and opted instead to present land at auction in units of 640 acres, at \$2 per acre minimum, in the hopes of selling more land, more quickly. However, successive cycles of land speculation and market collapse revealed the error in this decision, and motivated congress to reassess the prudence of its policy. Debate over the terms and conditions of sales ensued, and marked the beginning of an ongoing attempt to "fix" the land sale

⁸³ Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, 7

system by promoting settlement over speculation, and land purchase over illegal squatting⁸⁴.

Despite decades of disagreement and revision, by the late 1820s both ideological camps could agree that the land system was dysfunctional. It had failed to meet revenue expectations and the auction system had largely broken down. The government's rush to survey and sell public lands had compounded with generous land grants to glut the market⁸⁵. Congress had granted significant tracts of land to the states in the hopes that states would invest in roads and canals, as the failure to pass a federal internal improvement program had left the national infrastructure sorely underdeveloped. Significant land grants were also made to railroad corporations as incentive to build west, and to war veterans as thanks for service in the War of 1812⁸⁶. Unfortunately, hardly a trace of the infrastructure construction expected was actually undertaken or completed by the states, while war veterans were more apt to sell their land to speculators than move west and settle it. Because the cost of land fluctuated with supply, by flooding the market these policies significantly depressed prices and reduced federal revenues. According to states'-rights and property rights advocates in Congress, however, the land sale system did not suffer from being too liberal, but rather, from being too constrained. They argued the federal government was pricing lands out of the market, thereby retaining control of too much land, undermining state sovereignty, and keeping western states in a tenant-like

⁸⁴ Ibid., 8-9

⁸⁵ Feller, *The Public Lands in Jacksonian Politics*, 79

⁸⁶ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 11; Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, 10, 20

status⁸⁷. The commencement of the Andrew Jackson's first presidential term in 1829 and a dwindling national debt presented this faction with a window of opportunity to "solve" the public land problem by doing away with public land system itself. By striking down this troublesome agent of federal power, the congressional coalition of states-rights and property rights advocates aimed to privatize the western territories, halt the expansion of "corrupting" federal influence, and stem the erosion of strict constructionist principles⁸⁸.

Under the leadership of Jacksonian Democrat Senator Hart Benton of Missouri, the "states'-rights" faction of the South united with property-rights proponents in the West to demand lenient preemption laws and a land sale system based on "graduation." Preemption was a privilege extended to settlers who had occupied lands *before* they came under federal jurisdiction. It granted them the right to purchase their land at a non-competitive, minimum price, in thanks of their service improving the land. In theory it was a retroactive policy that did not negate federal sanctions on illegal squatting, but in practice it enticed settlers to squat illegally on federal lands, and then clamor for preemptive rights⁸⁹. Cloaked in a Jeffersonian mantle of the virtuous freeholder, liberal preemption law advanced Western States' desire to see their lands settled, sold, and on state tax rolls⁹⁰.

Likewise, graduation would accelerate the transfer western lands out of federal hands by dropping minimum prices. Senator Benton argued the failure of the land system

⁸⁷ Feller, *The Public Lands in Jacksonian Politics*, 75-78

⁸⁸ *Ibid.*, 143-145

⁸⁹ *Ibid.*, 127-129; Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-emption to Homestead*, 19-21

⁹⁰ Feller, *The Public Lands in Jacksonian Politics*, 81

was due to the arbitrary pricing of land at \$1.25 an acre, which he considered above market value. His proposed graduation bill reduced the price of untaken lands \$0.25 an acre each year. After a year at the minimal price of \$0.25 an acre (\$.05 for settlers) all unsold lands would be ceded back to the states, ensuring all lands were out of federal hands within five years⁹¹. Pre-emption and graduation not only reflected Democrats' subscription to the Jeffersonian theory of free-holder democracy, but also, strict-constructionist opposition to national presence in the local sphere; that is, federal regulation of state territory⁹². Senator John Randolph argued that Western states should control *all* of their land so as to avoid the pernicious influence of Washington. Thus, liberalized land policy was simply a step towards a larger goal: non-policy, that is, the functional end of a federal land system. In 1830 Democrats successfully slipped the General Pre-emption act through Congress, thereby extending preferential purchase rights to *all* existing inhabitants of federal lands and weakening feeble sanctions on squatting beyond repair⁹³.

Nationalist opposition to graduation, lodged within the Whig Party, proved far more resilient. Whigs contested graduation on functional and ideological grounds, and rallied around Henry Clay's alternative proposal of distribution. From a functional perspective, Whigs argued that the cheap land sales proposed by graduation would weaken the nascent American society just taking root on the coast. Graduation would draw population off the coast and into the vast frontier, thereby thinning the human

⁹¹ Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-Emption to Homestead*, 26

⁹² *Ibid.*, 29

⁹³ Feller, *The Public Lands in Jacksonian Politics*, 75-130

capital so vital to commerce and industry in the east. As Adams' Secretary of the Treasury Richard Rush said, "The creation of capital is retarded rather than accelerated by the diffusion of a thin population over a great surface of soil"⁹⁴. Ideologically, the dissolution of the federal land system undermined Whigs' nationalist goals. The land system bound western states to the union, forcing them to turn to federal government for essential services and making them friends of federal power. To an extent, it achieved an intended goal of internal improvements: making the federal government an active presence in the lives of Americans who were distant, geographically and culturally, from Washington. The unchecked privatization of western lands would, in contrast, "sever the hand of the federal government in the west"⁹⁵.

Clay's proposal of distribution was a compromise aimed at placating western demands for cheap land, while preserving the federal land system. Distribution would allocate the proceeds from land sales to the states in proportion to their population. States could put the revenues towards educational facilities or the development of internal improvements. Additionally, 10% of a land sale would be granted back to the state from which the land came⁹⁶. Whigs supported the proposal not only as a means of preserving managed land sales, but as a back door through which public revenues could be channeled to internal improvements⁹⁷. Though President Jackson had blocked internal improvements and supported liberalized pre-emption, he had never articulated a clear position on the land system. In 1832 this changed, as he aligned himself clearly with

⁹⁴ Ibid., 92

⁹⁵ Ibid., 76

⁹⁶ Ibid., 146-148; Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-emption to Homestead*, 27-29

⁹⁷ Feller, *The Public Lands in Jacksonian Politics*, 168

Benton and opponents of distribution. “It is desirable,” he declared, “that...in convenient time...the right of soil...be surrendered to the States respectively in which it lies”⁹⁸.

Despite impressive legislative maneuverings by Clay to push a distribution bill through congress, Jackson it in 1833 simply by allowing it to expire unsigned, on his last day in office.

Neither the Whigs nor the Democrats successfully revolutionized the Federal land system, for the system was neither dissolved by graduation nor secured and enhanced by distribution. Yet the passage of the General Preemption Act and the veto of distribution under Jackson set the system down a path that would shape federal land policy for the rest of the century. Though the modest changes under Jackson seem “almost trivial” in comparison to the drastic systemic revisions proposed by congressional factions, Jackson’s term nonetheless catalyzed a period of substantial devolution of land use authority and privatization of land resources⁹⁹. By blocking internal improvements and expanding preemption, the Jackson administration undermined Nationalist goals and advanced the aim of the states’-rights and property rights movement: cheap, plentiful land and the removal of federal influence from western territory. This movement grew and strengthened in subsequent decades, achieving legislative victories such as the Graduation Act of 1854, and the Homestead Act of 1863¹⁰⁰.

Yet, as with Jefferson’s passage of the Ohio Enabling Act, a disconnect existed between the ideological goals of the property-rights/state’s-rights tradition, and the

⁹⁸ Ibid., 158-159

⁹⁹ Ibid., 195; Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 110

¹⁰⁰ Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-Emption to Homestead*, 186-189

logical implications of legislation it enacted. The Homestead Act, an apparent triumph for the Jeffersonian tradition, is the paragon of this ironic inconsistency. In order to advance the Jeffersonian vision of freeholder democracy, unfettered and uncorrupted by national interference, the Homestead Act actually employed a model of *cooperative* federalism, the model long pursued by the nationalist tradition in both internal improvements and managed land sales. The act allowed a settler to freely claim 60 acres, *if* he agreed to build a house on it, live on it, and farm it for five years¹⁰¹. Therefore, the federal government was essentially outlining substantive land use regulations for millions of acres of western lands; regulations that would govern their use even after they left public ownership and were transferred to private hands. A quarter of a billion acres were claimed under these stipulations¹⁰². Talbot calls the Homestead Act the “perfect example of cooperative federalism,” for it made federal resources (western land) available to the states under certain nationally determined stipulations: the land was developed in a specified manner, put to specified use, for a specified length of time. The Homestead Act demonstrated that a central plank of the strict constructionist ideology, the separation of national and state agency, was unviable and a somewhat “erroneous concept”¹⁰³. Thus, even during the 19th century heyday of the state’s right movement, cooperative aspects of nation-state relations existed; as present in the legislation of Jefferson-Jackson men as in that of their nationalist opponents.

¹⁰¹ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 11

¹⁰² *Ibid.*, 11

¹⁰³ Talbot, *The Political Forces*, 141

As this abbreviated review of early federal land policy demonstrates, state and federal authority has never truly coexisted in two neatly separated layers, but have always to some extent blended and overlapped, in what has been called the “marble cake theory” of American federalism¹⁰⁴. Had the inevitable relationship between national policy and local land use been openly recognized, rather than stubbornly denied, the federal government and the states *together* might have articulated land policies that would have maximized the efficiency of settlement and the public benefit derived from the nations’ vast land resources. Instead, liberalized pre-emption law and toothless prohibitions on squatting disconnected land ownership and land settlement. Hence those who settled rarely bought and those who bought often did not settle¹⁰⁵. This unmanaged privatization of land facilitated widespread exploitation of public resources such as coal, timber, and precious metals¹⁰⁶. Cloaked in the virtue of an expanding agrarian republic, rapid privatization allowed industrial resources such as timber, waterpower sites, minerals, and other commodities to find their way into corporate hierarchies. In what amounted to public robbery, Congress failed to regulate the removal of over \$1 billion in gold and silver from federal lands, and actually purchased back ores taken illegally from public domain¹⁰⁷.

Proponents of small government, local control, and privatization largely triumphed in the land policy debates of the 19th century. Yet by slaying the institutional dragon of consolidated governance, they simply cleared the way for the meteoritic rise of

¹⁰⁴ Ibid., 142

¹⁰⁵ Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, 9

¹⁰⁶ Ibid., 20-22

¹⁰⁷ Ibid., 23; Feller, *The Public Lands in Jacksonian Politics*, 123

other urbane “corrupt” and “aristocratic” institutions: those of business, industry, and finance, which were constrained by no constitution, beholden to no electorate, and party to no social contract¹⁰⁸. As Henry Carter Adams wrote in 1887, it was not the “encroachments of government” that would endanger American’ liberty, but rather the “irresponsible exercise” of power emanating from an unconstrained corporate sphere¹⁰⁹. Ironically, rather than strengthening local *public* control or empowering a nation of freeholders, the land policies of the Jefferson-Jackson tradition enfeebled state governments, made cities the seat of political and economic power, and imbued big business with local and national political influence that vastly eclipsed that of individuals. Consequently, public leaders would spend most of the late Nineteenth and Early Twentieth Century attempting to control what Theodore Roosevelt described as the “mighty commercial forces,” which they themselves had, “called into being”¹¹⁰.

A Window of Federal Leadership: the National Resources Planning Board

By the early 20th Century, Theodore Roosevelt’s “New Nationalism” initiated a much-needed transition towards greater federal stewardship of public lands, in attempt to rectify the decades of mismanagement that followed the Jackson era. However, it took the economic crises of the Great Depression for the federal government, lead by Franklin Delano Roosevelt (FDR), to delve into land use policy at a truly national level. With the creation of the National Resources Planning Board (NRPB), FDR revived the old

¹⁰⁸ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 114-116

¹⁰⁹ *Ibid.*, 113

¹¹⁰ *Ibid.*, 117

nationalist dream of a federal government involved in planning, funding, and executing projects throughout the country.

The NRPB grew out of the National Planning Board (NPB), a New Deal organization created in 1933 to coordinate and plan the projects of the Public Works Administration (PWA)¹¹¹. In addition to conducting research and coordinating federal planning with regards to prudent natural resource use, the NPB stimulated local, regional and state planning and helped the PWA plan and select its various civil works projects¹¹². NPB was integral in catalyzing land use planning throughout the states. It recommended and secured federal fiscal assistance for states to establish local or state planning boards. Under this leadership 30 states moved to establish, or had established, state planning boards from 1933 to 1935¹¹³. In 1934 the President folded the NPB into the National Resources Board (NRB), which as its name suggests, moved beyond being an adjunct of the public works program to adopt a greater focus on natural resource planning. After undergoing a largely technical name change to become the Natural Resources Committee (NRC) in 1935, the organization was eventually fused into NRPB in 1939¹¹⁴.

The NRPB was distinguished from its various predecessors by the addition of a new element: economic planning. Indeed, the NRPB strove to make the union of physical and economic planning, “a permanent part of the national state for the first time in

¹¹¹ Allen Brinkley, "The National Resources Planning Board and the Reconstruction of Planning" In *The American Planning Tradition*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 174.

¹¹² Marion Clawson and Resources for the Future, *New Deal Planning : The National Resources Planning Board* (Baltimore: Published for Resources for the Future by Johns Hopkins University Press, 1981), 43.

¹¹³ *Ibid.*, 82

¹¹⁴ Brinkley, *The National Resources Planning Board and the Reconstruction of Planning*, 175

American history”¹¹⁵. As this marriage displays, planning is a somewhat broad term, applicable to both the physical realm of land and the abstract realm of policy. The NRPB would be active in both spheres. Although it initially devoted most of its energies towards “resource planning,” crafting regulations for the development of land, water, forest, and other resources, a “broader planning agenda was never far from the surface”¹¹⁶. The NRPB engaged in four primary branches of direct planning activities. These included the physical: water resource planning and public works coordination; and the abstract, policy formation in new or undefined arenas and in federal agency coordination¹¹⁷.

With regards to *physical planning*, the Board’s activities were greatly influenced by the backgrounds of its Chairman and Director, Frederic Delano and Charles W. Eliot. With unusually extensive experience in city planning, these individuals understood the need for coordinating public works at all levels of government¹¹⁸. Articulating the objective and cause for physical planning at the national level, Eliot said, “National planning means a consistent policy ...towards the highest and best use of our resources. The place to start is with physical matters”¹¹⁹. As early as 1935, the NRC report *Regional Factors in Resource Planning* recognized that states lacked the capacity to adequately address regional problems or plan sufficiently for the conservation and development of their resources. The NRPB therefore built upon the work of its various predecessors by

¹¹⁵ Ibid., 174

¹¹⁶ Ibid., 175

¹¹⁷ Clawson and Resources for the Future, *New Deal Planning : The National Resources Planning Board*, 99

¹¹⁸ Ibid., 83

¹¹⁹ Ibid., 42

actively promoting and developing regional planning throughout the nation¹²⁰. It also stimulated *city* planning and helped to improve its quality by providing local planning entities with federal funds, and notified them of the services and information they could attain from federal agencies¹²¹.

FDR, who played a direct role in forming the NRPB, had no compunctions about the unprecedented marriage of land, resource, organizational, and economic planning at the national level. However, conservatives in Congress regarded the NRPB's planning activities, be they abstract or physical, far more critically. Opposition to the board, which Clawson describes as "violent and emotional," stemmed from three sources: general opposition to President Roosevelt and many of his policies, a misunderstanding of the nature of NRPB activity, and deep ideological opposition to many of the policies advanced by the NRPB¹²². Congressional hostility towards the NRPB was intertwined with broader congressional discontent over the sweeping policies being undertaken by FDR, such as his proposal for "reorganization." This proposal would have expanded the power of the executive office and, among other things, created a permanent NRPB. Outrage over this significant power play only intensified when year later, Roosevelt attempted to modify the Supreme Court, which had declared many of his programs to be unconstitutional, by adding more judges. This created a "hurricane of opposition" among Republicans *and* Democrats in Congress¹²³. Yet the need for unity in the face of the early war effort inhibited Congress from acting out against many of Roosevelt's programs and

¹²⁰ Ibid., 167-68, 99

¹²¹ Ibid., 174

¹²² Ibid., 95

¹²³ Ibid., 226, 95

policies. Thus when the opportunity arose to lash out justifiably at some New Deal initiative, Congress did so vehemently.

Opposition to the Board was also routed in fundamental suspicion and misunderstanding of its activities. The fact that the NRPB brought economic, physical, and organizational planning to a *national* level inspired accusations of left-wing paternalism, socialism, and an executive play for dictatorial powers¹²⁴. Planning was viewed as a generally un-American activity, and conjured associations with communism and fascism among the general public as well as within Congress. Opponents thought the Board and its planners strove to regiment and control the lives of Americans, that they somehow did not understand the American system of governance¹²⁵. The Board largely failed to rebuff these arguments, and clearly convey the goals, justification, and precise nature of its activities. The NRPB, its staff, and the President considered planning essential for several reasons. They believed that coordinating government activities was beneficial, and that planning could further this coordination. Planning could thereby enhance the efficiency with which economic and social goals were reached. In order to execute sound planning and develop effective plans, facts are research was needed. Thus, *institutions* were necessary to gather and synthesize this information. Finally, in regards to physical planning, an adamantly local affair, the NRPB was *not* the practitioner of its own planning. It did not draft plans for local communities and then impose them. Rather,

¹²⁴ Ibid., 210-212

¹²⁵ Ibid., 97

it stimulated and assisted the planning processes in *others*: local, regional, and state bodies¹²⁶.

Into this troubled climate of political hostility and widespread misperceptions, the NRPB released two extremely controversial reports that inflamed latent ideological opposition to the Board and its activities. In the early 1940s, the NRPB gradually increased its focus on controversial economic issues. In 1943 it released two controversial documents of economic planning, *After the War-Full Employment*, and *Security, Work, and Relief Policies*¹²⁷. The reports were strong statements of the liberal social planning policies that had already drawn criticism to the NRPB. They effectively made the Board a magnet for conservative opposition in congress, and offered a long-desired object of attack for general critics of New Deal programs¹²⁸. Senator Robert A. Taft's critique of the two reports revealed the sources of conservative opposition. First, the report's recommendations were based on the sort of deficit spending that Republicans so despised, and second, "The Board's plans are based upon unlimited government interference in and regulation of all business activity, plus a very large amount of government regulation of... private industry"¹²⁹. Thus, the two reports essentially recommended the substantial expansion of federal power and influence, a strategy fundamentally at odds with the foundational conservative vision of small government and

¹²⁶ Ibid., 94, 175

¹²⁷ Ibid., 12; Brinkley, *The National Resources Planning Board and the Reconstruction of Planning*, 179

¹²⁸ Clawson and Resources for the Future, *New Deal Planning : The National Resources Planning Board*, 227; Brinkley, *The National Resources Planning Board and the Reconstruction of Planning*, 179-180

¹²⁹ Clawson and Resources for the Future, *New Deal Planning : The National Resources Planning Board*, 232

minimal regulation of the private sphere. As far as conservatives were concerned, there mere *existence* of the NRPB flouted the notion of limited government and reflected an unsanctioned expansion of federal bureaucracy. Senator Taft observed that, “Congress has never passed a planning law, has never created a planning agency, and had never given the board the authority to do the kinds of things it is doing”¹³⁰.

In the following budgetary year, Congress authorized no funds for NRPB, thereby effectively killing the agency¹³¹. The release of the reports had brought the latent political and ideological resistance to the Board to a head, and offered conservatives the ammunition they needed to bring down the dangerous of federal “interference” in local and private-sector activity. Though the NRPB was never in a position to *implements* its recommendations, the extremity of its economic views was enough to sink it. Unfortunately, the Board’s far-sighted physical planning activities went down with the ship. Ironically, historian Philip White observed that what little support the Board had in congress grew from the physical planning activities it carried out at the local, state, and regional level¹³². Clawson speculates that if the NRPB survived, the state planning bodies established under its predecessor the NPB might have developed into major forces on the national planning scene. They could have injected much needed direction, foresight, and coordination to the post-war boom that would embrace the nation over subsequent decades. Rather, most withered or died after the NRPB was abolished and federal

¹³⁰ Ibid., 232

¹³¹ Brinkley, *The National Resources Planning Board and the Reconstruction of Planning*, 180

¹³² Clawson and Resources for the Future, *New Deal Planning : The National Resources Planning Board*, 228

assistance for their staffing was discontinued¹³³. Once again, fear of federal consolidation and a meddling national government had rallied the forces of localism, small government, and states-rights to expel the federal government from the sphere of land use policy. As the nation approached half a century of meteoric growth, the consequences of this action would grave.

In the post-war era, the federal government retained the responsibility to stimulate national growth, but found itself stripped of the institutional mechanisms needed to plan for that growth, either physically or economically¹³⁴. Consequentially, post-war policies that catalyzed growth proceeded with little evaluation of their physical or spatial consequences. With national planning guidance gone, planning for physical growth became purely the responsibility of states, which by and large delegated the authority to local governments¹³⁵. Thus land use authority was almost completely localized during the boom years of the 1950s and 60s when technological change and a series of federal policies joined together to significantly alter America's built environment. Under the pressure of rapid growth and development, deficiencies in a local system of land use regulation quickly became clear¹³⁶. Zoning ordinances adopted in the 1920s and 30s were in many cases the sole "planning" mechanisms available to localities, and often proved inadequate to handle the scope and complexity of large residential, civic, and

¹³³ Ibid., 83

¹³⁴ Margaret Weir, "Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation" In *The American Planning Tradition: Culture and Policy*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 195.

¹³⁵ Ibid., 195-196

¹³⁶ Frank Popper, "Understanding American Land use Regulation since 1970" In *Classic Readings in Urban Planning*, ed. J. M. Stein (New York: McGraw Hill, 1995), 142.

infrastructure projects of the 1960s¹³⁷. Individual communities often pursued projects of a regional or statewide significance without considering the impact on surrounding areas¹³⁸. At best, this approach produced an incoherent, uncoordinated, and inefficient pattern of growth; at worst it caused serious ecological damage, social dysfunction, and economic inefficiencies¹³⁹. Not only was localized planning insufficient to deal with modern, large-scale growth, in many cases it was simply absent. Local control of land use also meant localities could choose to simply *not exercise control*¹⁴⁰. Such a land use policy, or rather non-policy, represented the ultimate devolution of authority to private individuals and developers.

The National Land Use Planning Act: a Renewed Push for Federal Leadership

The effects of this poorly planned, uncoordinated growth were significant enough to garner national attention. In 1972, Senator Henry Jackson (D) of Washington introduced a bill intended to bolster weak land use planning capabilities at the local level. By using national influence to entice regional coordination within states, the “National Land Use Planning Act” was a quintessential example of cooperative federalism. It leveraged national resources and state authority to advance a broadly defined land use policy. Introduced in its first form in 1970, it made federal funds available for states to better plan their growth, offering them grants to draw up statewide land use plans, protect

¹³⁷ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 6-7

¹³⁸ Popper, *Understanding American Land use Regulation since 1970*, 142

¹³⁹ Peter F. Cannavò, *The Working Landscape : Founding, Preservation, and the Politics of Place* (Cambridge, Mass.: MIT Press, 2007), 95-96, <http://www.loc.gov/catdir/toc/ecip071/2006031788.html>.

¹⁴⁰ Popper, *Understanding American Land use Regulation since 1970*, 142

environmentally sensitive areas, and regulate large private and public works projects¹⁴¹. The goal of the bill was to build the *capacity* of the states to plan. The federal legislation would not shape the details of state plans, or exercise control over the outcome of local land use decisions pertaining to non-federal lands¹⁴². The authority to create *substantive* planning guidelines remained the purview of states, the bill simply strove to motivate states to adopt and implement coherent guidelines and land use policies¹⁴³. The National Land Use Planning Act strove to rectify a key problem with local land policy: the failure of states to override parochial locale decisions. By motivating states to reclaim their constitutionally vested planning authority, the bill would, “require states to exercise states’ rights,” while leaving local authority intact¹⁴⁴.

To implement its policies, the bill relied upon a federal grant-in-aid scheme; a key component of cooperative legislation. Funds were available for states to plan *if they chose to*. While critics condemn federal grants-in-aid as a couched form of bribery and state intimidation, supporters laud them as a constitutionally acceptable means for the national government to inspire or induce the states to do something that they otherwise would not or could not do¹⁴⁵. Indeed, lawyers and policy makers agreed in 1960s that states were proper locus of planning power, but doubted states would undertake action on their

¹⁴¹ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 38-39; Popper, *Understanding American Land use Regulation since 1970*, 144

¹⁴² Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 39

¹⁴³ *Ibid.*, 45

¹⁴⁴ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 201

¹⁴⁵ Talbot, *The Political Forces*, 142

own¹⁴⁶. Though the bill initially strove to impose sanctions on the states that fail to plan, conservatives in Congress vehemently opposed the measure as a violation of states' rights and evidence of excessive federal intervention. Thus the sanction was never attached¹⁴⁷. By employing cooperative federalism, the National Land Use Planning Act joined a growing body of 1970s legislation, most of it environmentally focused, which recognized the necessity of collaboration and coordination between multiple levels of government in dealing with modern challenges that transcended local jurisdictions. Some states had already begun to exert themselves to regain a greater role in local land use decisions, without any federal incentives¹⁴⁸. Yet efforts to compel or encourage more comprehensive local land use regulation often proved "ineffectual in the face of local resistance"¹⁴⁹. The National Land Use Planning Act strove to give states the resources needed to overcome these barriers. Despite national trends towards cooperative federalism and more centralized environmental policy at the state level, the National Land Use Planning Act touched an old and sensitive nerve in Congress. Once again, land use policy became the battleground of a larger ideological battle: the forces of localization clashed with centralization, individualism opposed institutionalism, and state's-rights challenged federal leadership.

Opposition to the National Land Use Planning Act at the local, congressional, and executive level stemmed from concerns that it threatened local autonomy and property

¹⁴⁶ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 195

¹⁴⁷ *Ibid.*, 202

¹⁴⁸ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 5-7, 23

¹⁴⁹ Popper, *Understanding American Land use Regulation since 1970*, 149

rights, eroded barriers between national and state government, and unduly enhanced the influence of the national government. At the local level, opponents perceived the bill as a blatant measure of consolidation that threatened the interests of many influential groups that distinctly benefited from a decentralized system of control. Weir writes that the “politics of federalism” inherently motivates interest groups to institutionalize land use power at whichever level of government they can influence most strongly¹⁵⁰. Small business owners and developers, especially in the South and West, benefited immensely from local control, as fragmented political systems and limited political participation enabled them to significantly impact local development decisions¹⁵¹. The bill’s supporters identified this dominance of pro-development forces in local politics as a primary reason for the failure of local zoning law to produce prudent land use programs. According to EPA administrator John R. Quarles Jr., there were often dynamics in, “local and State political structures...which do not adequately reflect and support and protect...the public interest”¹⁵². These interests could sway local officials to accept projects that might generate significant externalities, to be born by the local or regional community as a whole. In order to overcome the biases inherent in such a localized system, some land use authority would have to be re-centralized to the state level where local, subjective interests exerted less power. By offering federal incentives for states to reclaim their land use authority, the Jackson Bill attempted to rectify this systemic flaw.

¹⁵⁰ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 194

¹⁵¹ *Ibid.*, 209

¹⁵² Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 45

In Congress, opponents argued that the Bill facilitated “naked federal intervention” into areas of authority constitutionally reserved to the states¹⁵³. The heart of Congressional opposition, lodged within the House of Representatives, was the Coordinating Committee on Land Use Control. Assembled by Chamber of Commerce lobbyist Dan Dening, the Committee united business and agricultural interests against the bill under the premise that it directly threatened private property rights¹⁵⁴. Dening intentionally targeted the House of Representatives, where local interests were “inherently” stronger than in the Senate. Portraying the National Land Use Planning Act as an assault on private property rights helped galvanize the opposition around a clear, if misleading message¹⁵⁵. Despite the reality that the Bill’s carefully constructed language steered clear of substantive regulation and imposed no sanctions if states refused to plan, opponents protested that the bill exacerbated a trend towards greater public control of private property. Minority views within the Senate report accompanying the bill warned, “A national land use planning bill will stimulate the regulation of private property”¹⁵⁶. Meanwhile, opponents in the House Interior Committee associated the bill with a controversial report by the Rockefeller Fund, titled *The Use of Land*. This report recommended, “An end to the land owner’s traditionally presumed right to develop his property regardless of environmental and social costs”¹⁵⁷. While opponents conceded the

¹⁵³ Ibid., 42

¹⁵⁴ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 210

¹⁵⁵ Ibid., 210

¹⁵⁶ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 44

¹⁵⁷ Ibid., 43

bill was clearly not so *extreme*, they argued that it “constituted an opening wedge for divorcing land use ownership from land use decisions”¹⁵⁸.

It seems perplexing that such a purely optional, capacity building measure motivated this stiff resistance. After all, the bill explicitly avoided regulating substantive outcomes of local planning process, and rather focused on building state institutions more capable of carrying out those processes effectively, if they elected to do so. Yet conservative opposition to this cooperative legislation is traceable to a deeper aversion towards institutions that has marked the tradition since its beginning. Stoic advocates of individual autonomy and personal liberty, conservatives in the Jeffersonian tradition have historically mistrusted public bureaucracy and institutions as vehicles of corruption, government interference, and control¹⁵⁹. This logic motivated opponents’ objections to the provision in the Jackson’s bill that stipulated a specific set of requirements by which the federal government would determine “eligible state land use programs”. By controlling the criteria under which state land use programs could be eligible for incentives, the federal government could presumably influence the nature of the state institutions themselves, and thereby extend its influence into the local sphere. Thus, conservatives perceived even this minimal expansion of federal involvement in land use policy as an intolerable threat. Reflecting upon the dangers of the bill, Professor of Law Bernard H. Seigan reasoned, “Entering a room through a locked door is much more

¹⁵⁸ Ibid., 44

¹⁵⁹ Lacey, *Federalism and National Planning: The Nineteenth Century Legacy*, 96

difficult than through one that is slightly ajar”¹⁶⁰. As the guardians of the states-rights and property-rights tradition, conservatives in Congress were determined to keep the door to explicit federal land use policy safely locked.

Finally, at the executive level the Nixon administration’s broad policy goal to reduce federal influence in state affairs, combined with the President’s dire need of conservative support following the Watergate scandal, to motivate the withdrawal of four years of support from the National Land Use Planning Act. Initially, Nixon had been receptive to Jackson’s bill as a way to appeal to broad environmental sympathies among voters, and his support was consistent with his prior attempts to appease environmental interests, so long as policy measures were financially feasible and realistic¹⁶¹. However, the administration was simultaneously attempting to break from the “creative federalism” employed by their predecessors, and replace it with “new federalism”. “Creative federalism” was essentially a policy of cooperative federalism, and was embodied by the categorical grants made to states and localities during the 1950s and 60s. Categorical grants came with strings attached, allowing the federal government to specify the policy spheres in which the funds had to be spent. The Nixon administration strove to replace categorical grants with “block” grants that gave the federal government little discretion over how the funds were spent. The planning grants proposed by Jackson’s bill echoed the categorical grants and “excessive” federal interference that the administration strove

¹⁶⁰ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 40

¹⁶¹ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 211

to reduce¹⁶². Furthermore, as Watergate unfolded, Nixon's need of support from the conservative base of his party overrode his desire to appeal to environmentalists and moderates. Though Jackson's bill passed the Senate, upon Nixon's withdraw of support it failed to pass the House by a mere 7 votes¹⁶³.

Though the lack of executive support undoubtedly helped turn the tide in such a closely divided Congress, other forces were also responsible for the bill's failure. Its narrow defeat attests to reasonably broad Congressional support for the bill. A portion of the blame for its failure actually lies with *liberal* interest groups, who not only failed to unite into the cohesive coalition necessary to withstand the conservative attack, but at times actually *undermined* the bill. Surprisingly, in several instances these groups acted on concerns that paralleled those of the conservative opposition. Three prominent groups that could have bolstered the bill's chances in Congress were the environmental movement, African American interests, and urban public leadership such as the National League of Cities and the US Conference of Mayors¹⁶⁴. Residual animosity between African American interest groups such as the NAACP and the environmental movement prevented these two groups from aligning behind the bill and forming a powerful coalition¹⁶⁵. Simultaneously, both urban leadership and the environmental movement took issue with various aspects of the bill, and therefore reserved their full support.

¹⁶² Ibid., 200

¹⁶³ Popper, *Understanding American Land use Regulation since 1970*, 144

¹⁶⁴ Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 205-209

¹⁶⁵ Ibid., 206

For its part, the environmental movement of the 1970s took a very limited interest in the National Land Use Planning Act. First of all land use planning did not appear as “crises-oriented” as its other targeted issues. Secondly, the legislative approach inherently demanded compromise, and was therefore not the movement’s preferred method of action. The environmental movement instead preferred either litigation or federal regulation as a more pure and direct means to achieve its objectives¹⁶⁶. Purity was a keystone of the environmental movement, and its cool reception of Jackson’s bill was largely due to the bill’s moderate tenor. The environmental movement of 1970s was staunchly anti-development, while Senator Jackson’s bill reflected an old-school conservationist approach, one that attempted to balance the needs of growth and development with environmental concerns. Environmental interests were thus highly skeptical of any measure that might “tip the scales” in favor of development¹⁶⁷. Finally, and the environmental movement of this era shared a surprising similarity with conservative opponents of land use planning: it was deeply anti-institutional. This ideological bent partially explained its preference for litigation and the private power of the courts over federal legislation. Land use planning was therefore regarded somewhat skeptically, as it not only relied upon the creation and augmentation of institutions, but because “by its very nature, planning would have forced environmentalists to justify compromises with development”¹⁶⁸.

¹⁶⁶ Ibid., 207-208

¹⁶⁷ Ibid., 208

¹⁶⁸ Ibid., 209

Local leadership of American cities also displayed a mixed response to the bill. While the US Conference of Mayors initially supported it, as it came closer to passage, concern grew over the implications the bill would have on the balance of power between cities and states. Delegates from Chicago were especially wary of the bill and reflected Mayor Daley's concern that the bill would enable a state planning commission to undermine the goals and interests of the city¹⁶⁹. This concern paralleled the states'-rights objection made by conservative opposition in Congress. For example, a report issued by the Senate Interior Committee minority warned that the bill would "effectively preempt state and local rights to plan and regulate land use," and would shift this authority to the federal government¹⁷⁰. Where conservatives feared a shift in power from the state to the federal level, liberal urban interests feared an *augmentation* of state power and subsequent reduction of metropolitan independence. Hence, four of Chicago's seven congressional delegates voted against the bill; four votes of 7 that made the difference between victory and defeat. This surprising outcome only emphasizes the extent to which the politics of federalism do indeed encourage local actors to vigorously defend their hold on power, influence, and everything, including land use authority, which confers it. The defeat of the National Land Use Planning offers a valuable lesson still relevant today: power, once delegated, is phenomenally challenging to reclaim.

In the decades following Senator Jackson's defeat, growth proceeded apace with little modification of localized planning systems. The early 1970s witnessed a modest

¹⁶⁹ Ibid., 205

¹⁷⁰ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 43

increase in centralized state and federal land use regulation, but the piecemeal legislation was often narrowly tailored and environmentally focused, regulating specific uses, sites, or land resources¹⁷¹. Comprehensive measures to proactively *plan* development, rather than simply constrain or prohibit it, remained conspicuously absent¹⁷². The one form of land use regulation that did proliferate was “Euclidean zoning law”. The provisions of Euclidean zoning channeled growth into a framework of low-density, single use, automobile-dependant growth on the urban edge¹⁷³. This facilitated explosive, sprawling development, and between 1960 and 1990 urbanized land increased 120%¹⁷⁴. By 1990, the majority of Americans lived in suburbs, rather than dense urban areas, and the rampant consumption of land only accelerated thereafter¹⁷⁵. Between 1992 and 1997, 2.2 million acres of land were developed in US at rate 2.5 times faster than from 1982 to 1992¹⁷⁶. Numerous economic, environmental, and social problems have been linked to this rampant growth, including increased levels of air pollution, fossil fuel consumption and green house gas emissions¹⁷⁷. Considering that vehicle miles driven increased 468%

¹⁷¹ Popper, *Understanding American Land use Regulation since 1970*, 148-150

¹⁷² Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation*, 208

¹⁷³ Jay Wickersham, "Legal Framework: The Laws of Sprawl and the Laws of Smart Growth" In *Urban Sprawl : A Comprehensive Reference Guide*, ed. David C. Soule (Westport, Conn.: Greenwood Press, 2006), 26, <http://www.loc.gov/catdir/toc/ecip0515/2005019208.html>.

¹⁷⁴ Kathleen P. Bell, "Objectives and Perspectives" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 4.

¹⁷⁵ Eran Ben-Elia, "Transportation Impact Statement (TIS): A New Tool for Transportation and Land use Planning," *Environment and Planning* 35, no. 12 (2003), 4, <http://www.envplan.com/abstract.cgi?id=a35239> (accessed Oct. 2008).

¹⁷⁶ Cannavò, *The Working Landscape : Founding, Preservation, and the Politics of Place*, 95

¹⁷⁷ *Ibid.*, 95

between 1950 and 1990, while population grew only 78%, the secondary impacts of sprawl stemming from the automobile have been formidable¹⁷⁸.

Conclusion

At the close of the Twentieth Century and the dawn of the Twenty First, the United States does not face the same legislative environment that confronted Jefferson and Adams, Jackson and Clay, or even FDR. With time, growth, and national maturation, most conservatives have come to accept the necessity of more robust federal institutions while retaining where possible, ideological allegiance to the principles of the Jeffersonian tradition. Land use remains a policy sphere where this allegiance is uniquely strong, and has successfully resisted most attempts to centralize or consolidate land use authority, even at the state level. Barring a brief window of national economic crisis, the federal government has been effectively prohibited from exerting any *explicit* influence over local land use and development. These various attempts to pass legislation creating or directly shaping land use were all blocked by concerted opposition. States-rights and property-rights advocates have striven to preserve local control in all aspects of land policy, and continue to invoke a strict-constructionists reading of the Constitution that precludes the expansion of federal activity into states' domestic policy spheres. Yet the lack of a defined and acknowledged national ethos on land use policy has not prevented the federal government from substantially impacting land use and development

¹⁷⁸ Jonathan Rubin, "Transportation and Land use Change" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 42.

throughout the nation. Rather, it simply contributed to local and national land use outcomes that were incoherent and undesirable, if not economically, environmentally, and politically damaging.

As these case studies demonstrate, land may be an inherently local entity, but the implications of its use and development are not; they are regional if not national in scope. For over two centuries, recurring conflict has persisted in the United States between those who have accepted the connection between private land and the common interest, and those who have rejected it. The latter group, those who have followed in the Jeffersonian tradition, have thus far largely won the policy battle. But the land use war is not yet over. The narrow defeat of the National Land Use Planning Act and the now widespread acceptance a cooperative model of federalism offers hope. Environmental legislation, which largely employs the cooperative model, is inherently well positioned to address land use policy, as the environmental implications of land use policy are so direct. Cooperative federalism, though still taboo in the realm of land use policy may yet prove to be the path towards a more rational, regionally coordinated, and *sustainable* land use policy for the entire United States.

2

THE AMERICAN RESOURCE CRISES: LINKING LAND USE POLICY TO FOSSIL FUEL DEPENDENCE AND GLOBAL CLIMATE CHANGE

Introduction

The fruitless attempts to establish national leadership in land use policy attest to the unique place that land occupies in American consciousness and political history. It remains symbolically and functionally bound to elemental American ideals of equality, opportunity, and political pluralism. As such, land has escaped a general trend of increasing federal involvement in diverse policy spheres.¹⁷⁹ Federal legislation that has impacted the use and development of land has done so indirectly, through policy vehicles targeting other objectives.¹⁸⁰ This pattern persisted throughout the Twentieth Century, even as federal legislation influencing the management of other natural resources increased and became more direct. Today, the United States finds itself confronted with two formidable challenges, both of which are fundamentally natural resource issues. They are first, a pressing need for national energy independence, and second, a growing

¹⁷⁹ Marion Clawson, *The Federal Lands Revisited* (Washington, D.C.; Baltimore: Resources for the Future; Distributed by the Johns Hopkins University Press, 1983), 42.

¹⁸⁰ Jason Jordan (Lobbyist, Advocacy Associates), in discussion with the author, 19 Feb. 2009, 2009.

threat of global climate change. Ironically, to address these issues, the nation must return to the source of its oldest, most “original” resource controversy: land use. The use and development of land is intimately related to how society uses energy- particularly fossil fuels for its transportation needs. Land use patterns are therefore closely related to carbon emissions stemming from fossil fuel combustion. If the United States is to address and overcome these two emerging crises, the federal government must consciously consider how its policies have shaped local land use decisions in the past, and henceforth, how it can alter this influence to move the nation towards more energy-efficient, sustainable land use policy.

Context: an Emerging Federal Role in Land Resource Management

The dawn of the Twentieth Century marked a turning point in the federal government’s relationship to the Nation’s lands, and the natural resources contained upon, within, and above them. Over the course of the century, the federal government gradually came to recognize and assume its role in the protection and management of national resources. Yet land persisted as a uniquely controversial branch of resource regulation. During the Nineteenth Century, as especially following 1830, Washington simultaneously accelerated the privatization of public land, and failed to coherently manage or regulate those lands it retained. According to historian Wallace Stegner, “In the vacuum created by the absence of this authority, the unnecessary waste and destruction of our country’s most valuable resource- its land- is almost awesome in its

dimensions.”¹⁸¹ This vacuum of authority largely explains why corporations, rather than the government or academic community, pioneered the planning & development of America’s resources in post civil war period.¹⁸²

The shift away from this precedent began under President Theodore Roosevelt (TR), who strove to reassert public control over public resources, and to build a government capable of competing with the “unfettered private sector” that had grown to monopolize America’s natural resources.¹⁸³ TR recognized two crucial qualities in America’s natural resources: first, that they were common to the American people as a whole, making their use, preservation, or degradation a matter of *national* concern; and second, that in addition to being common in the normative sense, they were often common in the physical sense- transcending boundaries of local and state jurisdiction. Together, these characteristics justified, even demanded, that the federal government assert itself in national resource management. Roosevelt therefore appealed, “I do not ask for over-centralization, but I do ask that we work in a spirit of broad and far reaching nationalism when we work for that which concerns our nation as a whole.”¹⁸⁴

He set about building the institutions necessary for resource management, creating the Inland Waterways Commission and The Public Lands Commission, and holding the North American Conservation Conference. Rivers and watersheds

¹⁸¹ Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 20-21.

¹⁸² Michael Lacey, "Federalism and National Planning: The Nineteenth Century Legacy" In *The American Planning Tradition*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 118.

¹⁸³ *Ibid.*, 118, 122

¹⁸⁴ *Ibid.*, 118

exemplified the common quality of natural resources, for they flowed through numerous state jurisdictions. TR described regional water systems as a “promising field for cooperation between the states and the nation,” thereby revealing his desire to re-establish a model of cooperative federalism in the arena of resource management.¹⁸⁵ Though many of Roosevelt’s innovative proposals remained unrealized, and many achievements were quickly undone by his successors, the seeds of national stewardship and cooperative federalism had been planted.¹⁸⁶ The coming century would see the federal role in national resource management firmly take root.

The 1930s witnessed the first significant increase in federal resource management since the time of TR. In 1933, Franklin Delano Roosevelt realized his cousin’s vision of federal-state collaboration in waterway management with the creation of the Tennessee Valley Authority (TVA). The TVA was one of four institutions created during the New Deal to handle river basin planning. The only river basin organization that is a federal corporation, the TVA’s diverse objectives include hydropower, navigation, flood control, land, and water management.¹⁸⁷ While the New Deal River Basin Planning initiatives were created as vehicles for national, regional, and local economic recovery, they were also intended to deal with trans-regional problems, like the flooding of the Mississippi River Basin.¹⁸⁸ The TVA demonstrated the utility and necessity of creating new government entities to deal *regional* resource management. Simultaneously, Congress began to exercise its legislative powers to exert greater control

¹⁸⁵ Ibid., 117, 122-125

¹⁸⁶ Ibid., 134

¹⁸⁷ James Wescoat, "Watersheds in Regional Planning" In *The American Planning Tradition*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 154-156.

¹⁸⁸ Ibid., 148, 155

over national resources. According to Harrison, the passage of The Taylor Grazing Act of 1934 was the true turning point of federal resource policy. With this act, the Federal government explicitly regulated the private use of public lands for cattle grazing, thereby protecting them and replacing its historical policy of public land disposal with a *policy* of retention, classification, and management.¹⁸⁹ This new policy approach was institutionalized in 1946 with the creation of the Bureau of Land Management.

Henceforth, Congress increased its oversight of the public domain, steadily dividing the public lands into various programs of conservation and management, such as national forests, national wild life refuges, national wilderness systems, national seashores, wild scenic rivers systems, and so on.¹⁹⁰ Expanding federal jurisdiction over national resources did not stop at the boundaries of the public lands, however. As these resource management programs were matters of the national interest, the statutes establishing them granted the federal government the power to take state or privately owned land when it was necessary to complete the program.¹⁹¹ Such a license of authority marked a stark departure from the Congress that had, merely a century ago, repeatedly blocked the federal government from formally funding regional infrastructure projects within state territory. The thought of reclaiming state territory in the name of a “national interest” in resource conservation and management would have then seemed unthinkable. Yet throughout this period, the justification for regulating the use of certain lands remained the resources that they supported or contained. The policy objective was to

¹⁸⁹ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 23

¹⁹⁰ *Ibid.*, 21

¹⁹¹ *Ibid.*, 22

protect these resources from overuse or degradation, not stipulate how land, as an entity in and of itself, should be best used or developed.

In the second portion of the Twentieth Century, federal legislation increased the extent of national influence on resource management and hence, indirectly, on land use. The environmental movement that began in the 1960s produced numerous pieces of legislation that recognized the shared ownership of, and common interest in natural resources, as well as the supra-local effort needed to manage and protect them effectively. The National Water Pollution Control Act and Water Quality Act strove to establish a national policy to enhance the, “quality and value of our water resources.”¹⁹² The 1970s witnessed a blossoming of cooperative federalism in the sphere of resource management legislation. The 1972 Coastal Zone Management Act, the 1977 Surface Mine Control and Reclamation Act, the 1970 Clean Air Act, the 1972 Clean Water Act, and the 1974 Safe Drinking Water Act all established cooperative systems of regulation, in which the federal government funded regulatory programs within the states, to ensure that the degradation of vital resources was prevented, reversed, or reduced.¹⁹³ Finally, as recently as 2007, the US Supreme Court ruled that green house gases (the most important being CO₂) met the definition of a pollutant, and can therefore be regulated.¹⁹⁴ The national Environmental Protection Agency is now responsible for addressing carbon emissions, however necessary, in order to reduce emissions

¹⁹² Ibid., 29

¹⁹³ Frank Popper, "Understanding American Land use Regulation since 1970" In *Classic Readings in Urban Planning*, ed. J. M. Stein (New York: McGraw Hill, 1995), 143-144.

¹⁹⁴ John M. Levy, *Contemporary Urban Planning*, 6th ed. (Upper Saddle River, N.J.: Prentice Hall, 2003), 298.

appropriately.¹⁹⁵ What future legislation this ruling will produce remains to be seen. However, as these examples display, the Twentieth Century witnessed the rise of *national* resource policy, as the federal government transitioned from an absentee landlord to an active steward of the Nation's resources. Wherever land use decisions impacted the quality, abundance, or security of those resources, federal regulation was largely tolerated in constraining them, be they pertinent to public or private domain.

There are both normative and functional justifications for this transition towards greater federal regulation of common natural resources. From a normative perspective, it is consistent with democratic principles to argue that a sovereign body of people has the right to influence issues relevant to themselves, their environment, and the governance and functioning of their society. To the extent that the use or preservation, quantity or quality of a natural resource is nationally relevant, the federal government is best positioned to address the issue in a manner that reflects the national interest. The Rockefeller foundation articulated this position in its 1973 report *The Use Of Land*, stating, "Important developments should be regulated by government representing all the people whose lives are likely to be affected by it...where a regulatory decision significantly effects people in more than one locality, [then] state, regional, or even federal action is necessary."¹⁹⁶ Beyond this normative argument lies a functional one: issues surrounding natural resource management frequently transcend local boundaries, or eclipse local and state capacity. In such cases, the advantage of supra-local authority is

¹⁹⁵ Tom Adams (President, California League of Conservation Voters), in discussion with the author, January 2009.

¹⁹⁶ Popper, *Understanding American Land use Regulation since 1970*, 143

clear. Local governments have no incentive to solve problems when the costs and benefits are not internal to their own jurisdiction, or the local cost is not proportional to that of society as a whole.¹⁹⁷ The local cost/ benefit analysis of a given resource management decision likely will not reflect its regional or national implications. Federal laws and state regulatory programs are intended to overcome and compensate for myopic local decisions that would impose significant costs on society.¹⁹⁸

Energy and its Impact: The Resource Crises of the Twenty-First Century

Over a hundred years have passed since Theodore Roosevelt first framed natural resource management as an issue of national concern. Today, two of the most daunting issues confronting the United States, energy independence and global climate change, center on natural resources- fossil fuels specifically. These issues explicitly concern not only the national community, but the global community as well. Thus, they demand and necessitate a national policy response. The availability and cost of energy is a present and growing concern. Energy consumption in the United States is expected to increase over 30% by 2030, and as consumption increases, concern over energy availability centers around oil.¹⁹⁹ By 2005 US was consumed 20.7 million barrels a day. Global reserve-production ratios (the remaining amount of a depleting natural resource, expressed in years) for coal, natural gas, and oil are estimated to be 220, 60, and 40-80 years,

¹⁹⁷ Richard Barrows, *The Roles of Federal, State, and Local Government in Land use Planning* (Washington D.C.: National Planning Association, 1982), 6.

¹⁹⁸ *Ibid.*, 6-7

¹⁹⁹ Stephen A. Roosa, *Sustainable Development Handbook* (Lilburn, GA; Boca Raton, FL: Fairmont Press; CRC Press, 2008), 17-18.

respectively.²⁰⁰ Even more troubling than the future *availability* of oil, are its present origins. As the United State's consumption of oil has increased, so has its dependence upon foreign sources. Between 1973 and 1998, crude oil imports rose 168%, climbing from 3.24 to 8.7 million barrels per day. During same time period, domestic production declined 36%.²⁰¹ This heavy dependence on a depleting, largely foreign energy source leaves the US economy vulnerable to disruption, and binds the United States to a geopolitical strategy that is disproportionately focused on ensuring stability in oil-producing regions of the world. As President George W. Bush stated,

“...this dependence leaves us more vulnerable to hostile regimes and to terrorists” who could seriously harm the economy by interfering with access to oil.²⁰²

Any strategy that aims to reduce US dependence upon oil must take the transportation sector into account. As of 2005, the transportation sector accounted for a staggering 68% of national oil use, while gasoline alone accounts for just under half of all oil usage.²⁰³ Recent legislation speaks to the vital importance of the transportation sector to energy conservation and independence initiatives. The national Energy Independence and Security Act of 2007 requires that fuel economy standards in passenger vehicle increase to at least 35 mpg by 2020. This will produce to a 34% increase in fleet-wide fuel economy by 2030.²⁰⁴ Although legislation targeting vehicular fuel efficiency is well

²⁰⁰ Ibid., 18-19

²⁰¹ Ibid., 18

²⁰² Ibid., 18

²⁰³ Energy Information Administration, *Annual Energy Outlook 2005* (Washington D.C.: U.S. Department of Energy,[2005]) (accessed 26 Feb. 2009).; Paul R. Portney and et al., "Policy Watch: The Economics of Fuel Economy Standards," *The Journal of Economic Perspectives* 12 (2003), 205.

²⁰⁴ Reid H. Ewing, *Growing Cooler : Evidence on Urban Development and Climate Change* (Washington, D.C.: Uli, 2008), 5.

intended and commendable, as the following analysis displays, it will ultimately prove insufficient to solve the primary consequence of national fossil fuel addiction: global climate change.

Growing fossil fuel consumption is not only problematic because of decreasing or unreliable supply, but because of its direct contribution to global climate change through carbon emissions. In the atmosphere, carbon and water vapor combine as CO₂ to create a “thermal blanket for the planet,” which operates much like a glass greenhouse by trapping the sun’s energy. The effect is beneficial, in that without it earth would be too cold to support life, but excessive anthropogenic generation of CO₂ is now contributing to the warming of the planet, roughly 1.25°F in the past 150 years.²⁰⁵ This may not seem significant, but small increases in temperature have serious ramifications. With even a 2° to 3°C increase in average global temperature, all coral reefs are at risk of being bleached, coastal flooding would threaten to harm or displace 70 million to 250 million people, hundreds of millions more would face an increased risk of hunger, and the Amazon rainforest and the Great Lakes Ecosystems would be at risk of collapse.²⁰⁶ International and domestic consensus is building around the policy goal of cutting GHG emissions 60 - 80% below 1990 levels.²⁰⁷ Yet such ambitious goals stand in the face of troubling projections of increasing fossil fuel consumption and global GHG emissions. According to Mega, fossil fuels will account for 90% of the world’s primary energy mix

²⁰⁵ Robert Stavins, *A U.S. Cap and Trade System to Address Global Climate Change* (Washington D.C.: The Brookings Institution, [2007]) (accessed 26 March 2009).; Ewing, *Growing Cooler: Evidence on Urban Development and Climate Change*, 1

²⁰⁶ *Ibid.*, 42-43

²⁰⁷ *Ibid.*, 1

by 2020²⁰⁸. Even if the drastic reduction target of 60-80% were met, global warming would not be prevented, but rather limited to a global temperature increase of 2° to 3° C.²⁰⁹ Immediate action is necessary.

As a significant consumer of fossil fuels, the transportation sector is a huge source of GHG emissions. One third of US emissions come from transportation sector, and that share is rising.²¹⁰ Of the numerous green house gasses, Carbon Dioxide (CO₂) is most ubiquitous and problematic. Because no abatement technologies exist for CO₂, emissions are exactly proportional to gasoline use.²¹¹ Hence, for every gallon of gasoline burned twenty pounds of CO₂ are released.²¹² There are only three ways to reduce CO₂ emissions from the transportation sector: design more fuel-efficient vehicles, create cleaner fuels, or simply reduce the amount people drive. The Energy Independence and Security Act is consistent with the historic policy approach of focusing on the first two strategies as a means to reduce carbon emissions. Thus far, federal and state policy has completely ignored the third component of transportation emissions: vehicle miles traveled (VMT).²¹³ This two-pronged approach will prove insufficient to reduce GHG emission to target levels for two reasons; one psychological and the other statistical.

The psychological explanation is described by a phenomenon known as the “rebound effect.” If tighter fuel economy standards make it less costly to drive, people

²⁰⁸ Voila Mega, *Sustainable Development, Energy, and the City : A Civilisation of Visions and Actions* (New York: Springer, 2005), 160.

²⁰⁹ Ewing, *Growing Cooler : Evidence on Urban Development and Climate Change*, 1

²¹⁰ *Ibid.*, 2

²¹¹ Portney and et al., *Policy Watch: The Economics of Fuel Economy Standards*, 207

²¹² Ewing, *Growing Cooler : Evidence on Urban Development and Climate Change*, 1

²¹³ Reid Ewing, Rolf Pendall and Don Chen, *Measuring Sprawl and its Impact* (Washington D.C.: Smart Growth America,[2002]), <http://www.smartgrowthamerica.org/resources.html> (accessed 25 Feb. 2009).

may very well respond by driving *more*. Emissions and local pollution could actually increase.²¹⁴ Portney finds that this rebound effect can offset 10-20% of initial reductions in fuel consumption gained from tighter fuel efficiency standards.²¹⁵ In the words of California legislative advocate Pete Price, “you can make your cars and your fuels as clean as possible, but if you don’t reduce VMT, it just overwhelms it all.”²¹⁶ Secondly, statistics prove that national VMT is rapidly *growing*. Since 1980 the number of miles Americans drive has grown three times faster than the national population, and the US Energy Information Administration (EIA) projects an additional 48% increase in driving between 2005 and 2030.²¹⁷ That increase would totally wipe out the GHG emission reductions achieved from improved fuel efficiency under the Energy Independence and Security Act. These statistics demonstrate that VMT must be addressed in order to reduce oil consumption and GHG emissions in the transportation sector. To reduce VMT, policy makers will have to broaden their view *beyond* cars and the fuels they burn, and begin to consider the environment in which they are used.

Ironically, to address today’s natural resource challenges, the Nation must revisit its oldest resource controversy: land use. The fundamental importance of land use to energy and climate goals cannot be dismissed. As Ewing argues, the pattern and manner in which land is developed has profound consequences for national energy consumption and GHG emissions. What is the linking element between land use, energy consumption and CO2 emissions? Transportation. Ewing writes, “Population growth has

²¹⁴ Portney and et al., *Policy Watch: The Economics of Fuel Economy Standards*, 208

²¹⁵ *Ibid.*, 210

²¹⁶ Pete Price (Legislative Consultant for the California League of Conservation Voters, Price Consulting), in discussion with the author, 28 Jan. 2009, 2009.

²¹⁷ Ewing, *Growing Cooler : Evidence on Urban Development and Climate Change*, 2, 6

been responsible for only a quarter of the increase in vehicle miles traveled over the last couple of decades. A larger share of the increase can be traced to a changing built environment.²¹⁸ This change originated with the unprecedented model of growth that emerged to accommodate the post-war, post- industrial decentralization of America's economy and population. During the second half of the Twentieth Century, population, resources, businesses, and amenities shifted from the center of American cities and towns to the urban fringe. Between 1960 and 1990 urbanized land area increased 120%, as the outskirts of cities expanded rapidly and inner centers experienced decay.²¹⁹ This relentless growth took on a new form: low-density, compartmentalized, auto-oriented, and thoroughly suburban.²²⁰ By 1996, 63% of Americans lived in an environment classified as suburban.²²¹ To grasp how the built environment changed, why it changed, and the significance of this transformation it is necessary to examine the regulatory framework and policy context in which it occurred.

***Drawing the Connection: the Impact of Land Use on Fossil Fuel Consumption
and Greenhouse Gas Emissions***

In the post-war era, widely adopted local zoning laws interacted with a series of federal policies to mutually determine the broader spatial organization of American

²¹⁸ Ibid., 2-3

²¹⁹ Kathleen P. Bell, "Objectives and Perspectives" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 4-5.

²²⁰ Peter F. Cannavò, *The Working Landscape : Founding, Preservation, and the Politics of Place* (Cambridge, Mass.: MIT Press, 2007), 94, <http://www.loc.gov/catdir/toc/ecip071/2006031788.html>.

²²¹ Jonathan Rubin, "Transportation and Land use Change" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 43.

society, a characteristic Owen describes as, “fundamental to the way it uses energy.”²²² The primary mechanism through which local governments plan and regulate land use decisions is zoning law.²²³ The origin of *local* zoning authority is the Standard Zoning Enabling Act (SZE), passed in 1922 by the U.S. Department of Commerce. The act was a model law that, if adopted by a state, would grant local governments the authority to zone.²²⁴ All 50 states would eventually adopt SZE, and by the 1940s, most communities across the nation had some form of land-use regulations based upon it.²²⁵

The overwhelming popularity of SZE was likely due to the broad, vaguely defined powers it granted to local municipalities through a sweeping invocation of state police powers.²²⁶ SZE gave local governments the power to regulate the density of the population, the location and use of buildings, structures, and land for trade, residence, or other purposes. A 1926 case challenging the constitutionality of zoning law, *Village of Euclid v. Ambler Realty Co.* was a turning point in the history of U.S. land regulation. Ruling in favor of the defendant Euclid, the Supreme Court institutionalized zoning as a legitimate exercise of state police powers, and established the precedent for modern

²²² Susan Owens, "Spatial Structure and Energy Demand" In *Energy Policy and Land-use Planning : An International Perspective*, eds. David R. Cope, Peter J. Hills and Peter James, 1st ed., Vol. 32 (Oxford ; New York: Pergamon Press, 1984), 219.

²²³ J. B. Cullingworth, *The Political Culture of Planning : American Land use Planning in Comparative Perspective* (New York: Routledge, 1993), 9.

²²⁴ *Ibid.*, 28

²²⁵ David C. Soule, *Urban Sprawl : A Comprehensive Reference Guide* (Westport, Conn.: Greenwood Press, 2006), 13, <http://www.loc.gov/catdir/toc/ecip0515/2005019208.html>.; Cullingworth, *The Political Culture of Planning : American Land use Planning in Comparative Perspective*, 11

²²⁶ William A. Fischel, *The Economics of Zoning Laws : A Property Rights Approach to American Land use Controls* (Baltimore: John Hopkins University Press, 1985), 29.

suburban land-use regulation: Euclidean zoning law.²²⁷ The spread of this regulatory model across the country has dramatically exacerbated transportation energy demands.

Euclidean Zoning establishes patterns of growth that are inherently inefficient in regards to transportation energy requirements. Two characteristic elements of Euclidean Zoning are particularly responsible for this inefficiency: segregated land use and density restrictions. To begin with the former, Euclidean Zoning creates a hierarchy, or “pyramid” of uses. At the top rests the most restrictive use, single-family residential, while at the bottom lies the “anything goes” category of heavy industrial. The levels in between represent successive gradations of restriction.²²⁸ The Supreme Court’s ruling in *Euclid* drastically expanded the scope of what municipalities could prohibit as “nuisances” harmful to the “health, safety, and welfare” of the community.²²⁹ Therefore, although some localities have a more flexible form of “cumulative zoning,” highly restrictive “exclusive zoning” has become increasingly widespread. In cumulative zoning, uses at the top of the pyramid are permitted to move down (i.e. a residential use is allowed to move into a commercial district) but uses at the bottom cannot move up (i.e. an industrial use cannot relocate to a retail district). This allows for a moderate degree of use integration. In contrast, exclusive zoning allows only the precise uses allocated to

²²⁷ Jay Wickersham, "Legal Framework: The Laws of Sprawl and the Laws of Smart Growth" In *Urban Sprawl: A Comprehensive Reference Guide*, ed. David C. Soule (Westport, Conn.: Greenwood Press, 2006), 26-31, <http://www.loc.gov/catdir/toc/ecip0515/2005019208.html>.

²²⁸ *Ibid.*, 28

²²⁹ Cullingworth, *The Political Culture of Planning: American Land use Planning in Comparative Perspective*, 29

each level in a given zone. There is no flexibility in either direction, causing nearly a complete segregation of uses.²³⁰

Large single use settlements cause transportation energy to be used inefficiently.²³¹ By allocating diverse origins and destinations to spatially distinct pods, and prohibiting them from intermingling, segregated land use prevents citizens from achieving varied tasks in a single location, or combining multiple objectives into a single trip.²³² Each new objective requires its own journey. Origins and destinations rarely coincide, and instead different facilities are spread out across the regional landscape by function. Housing, office parks, commercial centers, and public buildings are all kept spatially separate. As each cluster of development is segmented from the next and typically connected by high capacity roads, different daily activities are only accessible by vehicle.²³³ Thus, single use development increases the frequency and the distance of trips. This arrangement partially explains why the average number of miles driven per day increases from urban to suburban to exurban locations as diverse urban areas give way to single use zoning. This causes a suburban resident traveling by private car to face travel costs (largely a function of the variable cost of fuel) approximately 19% greater than a person of similar characteristics in an urban area. This difference jumps to 45% when the comparison is between urban and exurban residents.²³⁴ Lack of transportation options and lack of overlap in trip objectives means households often feel compelled to

²³⁰ {{126 Lamer, Chad 2004/s 397;}}

²³¹ Owens, *Spatial Structure and Energy Demand*, 226

²³² Wickersham, *Legal Framework: The Laws of Sprawl and the Laws of Smart Growth*, 27-29

²³³ Cannavò, *The Working Landscape : Founding, Preservation, and the Politics of Place*, 94

²³⁴ Robert W. Burchell and others, *Costs of Sprawl--2000*, Vol. 74 (Washington, D.C.: National Academy Press, 2002), 323, 336.

have a car for each licensed driver. Despite the fact that national polls have found that roughly 55% of Americans would like to walk more rather than drive, and 52% of American would like to bicycle more in lieu of driving, the spatial arrangement of suburbia simply does not support it.²³⁵ Therefore, in modern suburbia owning a car is not optional; it's essential.²³⁶

Mixing land uses effectively reduces transportation energy consumption.²³⁷ When different building types serving different functions are integrated into a continuous urban fabric, a single trip can achieve multiple purposes. This is known as “internal trip capture rate,” and it improves whenever retail, office, and residential uses are integrated.²³⁸ The traditional land use patterns found in older cities and towns, now largely obsolete, were characterized by walkable, mixed-use, commercial centers, interconnected with adjacent neighborhoods.²³⁹ By integrating different destinations into the same area, rather than segmenting them spatially, mixing uses reduces the distance between points on a single “trip string,” and thereby reduces fuel consumed by automotive travel. At the same time, this arrangement facilitates biking or walking once a destination *area* is reached.²⁴⁰ The superior efficiency and travel-mode flexibility offered by mixed land uses helps explain the EPA’s finding that developments within existing towns result in far fewer toxic auto

²³⁵ Barbara McCann and Reid Ewing, *Measuring the Health Effects of Sprawl* (Washington D.C.: Smart Growth America,[2003]), <http://www.smartgrowthamerica.org/healthreport.html> (accessed Feb. 2008).

²³⁶ Ewing, Pendall and Chen, *Measuring Sprawl and its Impact*, 19

²³⁷ Levy, *Contemporary Urban Planning*, 317

²³⁸ Kiyoshi Takami, "Car use and Sustainability: Reflections on Retail Development Control Strategies" In *Sustainable Cities : Japanese Perspectives on Physical and Social Structures*, ed. Hidenori Tamagawa (Tokyo ; New York: United Nations University Press, 2006), 141, <http://www.loc.gov/catdir/toc/ecip068/2006003758.html>.; Wickersham, *Legal Framework: The Laws of Sprawl and the Laws of Smart Growth*, 148

²³⁹ *Ibid.*, 30

²⁴⁰ Takami, *Car use and Sustainability: Reflections on Retail Development Control Strategies*, 141

emissions than those in peripheral subdivisions. Comparing a proposed development within an existing town to one on the metropolitan fringe, the EPA concluded that the site in town would result in VMT savings of 15% to 52%.²⁴¹

Once density restrictions are combined with segregated land use, the practical necessity for automotive travel becomes even more pronounced. Density restrictions can be traced to the Twentieth Century reaction against industrialization, which blamed excessive building densities and overcrowding for the blight that plagued Nineteenth Century cities. To solve the density “problem,” zoning laws granted localities the power to set a maximum allowable capital to land ratio for all development.²⁴² This ratio describes density in terms of the amount of physical resources employed over a fixed area of land. As land prices increase near the central business districts of urban centers, landowners compensate for reduced land area by using their space more intensively.²⁴³ Typical suburban zoning codes inhibit the intensive use of land by restricting the size and location of all structures on a lot, specifying the frontal, side, and rear set-back lines. Codes also set restrictions on building height and define minimum allowable lot sizes or a maximum allowable number of units per acre. They even specify the minimum allowable number of parking spaces a retail or residential unit must provide.²⁴⁴ These rigid design standards ensure that a small number of structures will occupy large lots; each is graced by its own sea of parking, and connected to others by an extensive network of roads.

²⁴¹ Reid Ewing and Richard Kreutzer, "Understanding the Relationship between Public Health and the Built Environment" (Report, 2006).

²⁴² William T. Bogart, *The Economics of Cities and Suburbs* (Upper Saddle River, N.J.: Prentice Hall, 1998), 21.

²⁴³ *Ibid.*, 187

²⁴⁴ Wickersham, *Legal Framework: The Laws of Sprawl and the Laws of Smart Growth*, 29

While density restrictions may be logical and efficient when the costs of a given land use exceed the potential consumption benefits, in many cases suburban zoning restricts density far below negative externality-generating levels. Furthermore, density is often conflated with overcrowding, the true source of the urban blight that reformers strove to eliminate. Greater densities do not produce overcrowding; rather insufficient housing infrastructure does.²⁴⁵ Evans argues that the negative externalities generated by moderate densities are not great at all.²⁴⁶ With the transit-viability threshold estimated to be a moderate seven dwellings per acre, the benefits accrued from reduced auto use alone would likely outweigh any minor costs produced by increasing density to this modest level.²⁴⁷

The post-industrial transformation of America's urban landscape illustrates how low-density land use patterns have exacerbated transportation energy demands. Post-industrialization was characterized by a population exodus from dense urban centers, and a dramatic increase in the land area of cities.²⁴⁸ From 1950 to 1990 Houston grew from 160 sq. miles to 571 sq. miles, and Phoenix grew from 17 sq. miles to 283 sq. miles.²⁴⁹ During this period, US population increased 78%, yet VMT increased a staggering 468%,

²⁴⁵ Jane Jacobs, *The Death and Life of Great American Cities*, Modern Library ed. (New York: Modern Library, 1961), 201-205.

²⁴⁶ Alan W. Evans, *Economics and Land use Planning* (Oxford ; Malden, MA: Blackwell Pub., 2004), 50, <http://www.loc.gov/catdir/toc/ecip0413/2004001028.html>.

²⁴⁷ Curtis Johnson, "Transportation Systems: Market Choices and Fair Prices, Five Years of Twin Cities Research" In *Urban Sprawl : A Comprehensive Reference Guide*, ed. David C. Soule (Westport, Conn.: Greenwood Press, 2006), 171.

²⁴⁸ Douglas S. Massey, *Strangers in a Strange Land : Humans in an Urbanizing World* (New York: W.W. Norton, 2005), 235-237.

²⁴⁹ Wendell Cox, "U.S. Urbanized Areas: 1950-1990 Central City Data," www.demographia.com (accessed Jan. 10, 2009).

and the number of private vehicles in use increased by 377%.²⁵⁰ These statistics substantiate Roosa's claim that as cities increase in area and decrease in density, the frequency and distance of commuting increases, and with it, fossil fuels consumption.²⁵¹ By dispersing destinations, travel by foot or bicycle is discouraged, if not made prohibitively difficult, public transit is made economically infeasible, and private auto use is heavily encouraged.²⁵² In conjunction with single use zoning, this arrangement creates an urban system "utterly beholden" to petroleum and asphalt.²⁵³ For example, Greater Phoenix, a city built around the car, has a population little more than twice that of Manhattan, yet as of 2000 it covered 200 times as much land. At that scale, no transit system can conceivably serve it.²⁵⁴ Simply introducing transportation options, such as public transportation, or enhanced bicycling and pedestrian facilities, cannot overcome the efficiency barriers posed by land use patterns. Cities like Phoenix must alter their land use patterns by increasing density, mixing uses, and integrated street networks, if non-automated transportation is to become a viable option.²⁵⁵

Greater density has the potential to drastically reduce energy consumption in the transportation sector. Great Britain is a nation that has recognized this positive relationship. Admitting that, "the externalities of low density are global in character," Great Britain has established an urban planning policy that embraces density as a positive

²⁵⁰ Rubin, *Transportation and Land use Change*, 42

²⁵¹ Roosa, *Sustainable Development Handbook*, 11

²⁵² Evans, *Economics and Land use Planning*, 45

²⁵³ Alan Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century* (London: M.E. Sharpe, 2004), 75.

²⁵⁴ David Owen, "Green Manhattan," *The New Yorker*, 18 Dec. 2004, 2004, 115 (accessed Jan. 2009).

²⁵⁵ Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, *Suburban Nation : The Rise of Sprawl and the Decline of the American Dream*, 1st ed. (New York: North Point Press, 2000), 137-138.

quality; that can reduce the consumption of fossil fuels and land while contributing to global sustainability.²⁵⁶ Increasing density both between and within buildings saves energy. Inter-building density facilitates non-automated travel between structures. As distances are reduced, walking and bicycling become practical options. A 1995 transportation survey found that only 3.3% of all trips made were on foot or bicycle in the least dense areas surveyed, while in the most dense areas non-automated trips were practically five times as high.²⁵⁷ Concentrating or clustering development also increases the number of destinations served by a given amount of road or railway. This makes mass-transit and options such as car-pooling more practical.²⁵⁸ Intra-building density increases the likelihood that origins and destinations will exist within the same building, as with office space for example. With origins and destinations stacked vertically, rather than dispersed horizontally across the transport network, communication time is reduced and trips can be made on foot rather than by vehicle.²⁵⁹

The energy benefits of density partially explain Manhattan's immense efficiency: more than 800 times that of the nation as a whole. In fact, if New York City were granted statehood, it would have the lowest per capita energy use, despite being more populous than all but 11 states.²⁶⁰ Manhattanites consume gasoline at a rate that the average American has not matched since the 1920s, and at least 82% of them travel to work by

²⁵⁶ Evans, *Economics and Land use Planning*, 41-42

²⁵⁷ Howard Frumkin, Lawrence D. Frank and Richard Jackson, *Urban Sprawl and Public Health : Designing, Planning, and Building for Healthy Communities* (Washington, DC: Island Press, 2004), 102.

²⁵⁸ Wickersham, *Legal Framework: The Laws of Sprawl and the Laws of Smart Growth*, 38

²⁵⁹ Evans, *Economics and Land use Planning*, 44-45

²⁶⁰ Owen, *Green Manhattan*, 112

transit, bicycle, or foot.²⁶¹ As a whole, 95% of New Yorkers that work in Manhattan do not drive to work.²⁶² If the urban form of Phoenix or Huston were comparable to that of New York or Boston, studies indicate that gasoline consumption would be as much as 30% lower.²⁶³ New York's extreme compactness is a key component of this impressive efficiency.²⁶⁴

The Elephant in the Corner: the Federal Impact on Local Land Use Policy

As the preceding discussion displays, land use is integrally related to the amount of fossil fuels the United States consumes and the green house gasses it emits. To achieve meaningful reductions in both areas, and thereby advance the national goals of energy independence and climate change mitigation, it will be absolutely essential to change land use policy at the most local levels, where the day to day development decisions are made. How can such a feat be accomplished? Precedent and current constitutional interpretation places local land use authority outside of federal jurisdiction. Yet this does not mean the federal government is impotent in the land use sphere. A simple truth unrecognized by many, is that federal policy has already played a central role in the post-industrial spatial transformation.²⁶⁵

Evans argues that the government has long dictated not only *where* we may live, but *what* may live next to us, and where our work, recreational, and commercial facilities

²⁶¹ Ibid. 111

²⁶² The City of New York, *PlaNYC, a Greener, Greater New York*. (New York: The City of New York,[2006]).

²⁶³ Roosa, *Sustainable Development Handbook*, 11

²⁶⁴ Owen, *Green Manhattan*, 112

²⁶⁵ Jason Jordan (*Lobbyist, Advocacy Associates*), *in Discussion with the Author*

may locate.²⁶⁶ Beneath straightforward “market behavior” that appears to drive growth lies, “a serious subterranean set of causes: incentives in the tax code, influence of zoning ordinances, and myriad land and housing development rules and regulations,” the majority of which favor low density suburban areas and discourage investment in older developed regions.²⁶⁷ Federal transportation and housing policies during the post-war years stand out as uniquely significant in terms of the land use policies they encouraged. The following analysis not only demonstrates that indirect federal policy has dramatically impacted local land use, but also reveals which policy spheres must be looked to as vehicles of change if the nation is to reverse over a half-century of inefficient, unsustainable land use policy.

Following World War II, the spread of SZA and Euclidean zoning aligned local forces to favor decentralized, single-use development over more compact, mixed-use, traditional patterns. Simultaneously, policies targeting housing and transportation infrastructure influenced both supply and demand in the land market in a way that supported and exacerbated these trends. To begin with housing, the Federal Housing Administration (FHA) and the Veterans Administration (VA) significantly biased producers in the land market (developers) to supply a certain kind of real estate product. Following World War II, the FHA and the VA were established to aid millions of Americans in purchasing a home, and therefore offered cheap and accessible credit.²⁶⁸ In

²⁶⁶ Evans, *Economics and Land use Planning*, 3

²⁶⁷ Johnson, *Transportation Systems: Market Choices and Fair Prices, Five Years of Twin Cities Research*, 159

²⁶⁸ Soule, *Urban Sprawl : A Comprehensive Reference Guide*, 17; Chad Lamer, "Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism," *The Kansas Journal of Law Public Policy* 13, no. 3 (2004)

attempt to secure its investments, the federal government established a comprehensive system of loan-appraisal through the FHA designed to minimize or eliminate risk of loan defaults. To qualify for a loan, lenders, borrowers, and developers had to submit detailed plans and documentation of project proposals to the FHA, which determined whether a project had “sound prospects.”²⁶⁹

The FHA published set of preferred technical and design standards by which it measured proposed projects. These standards and design regulations specified everything from lot density to appropriate street width, and essentially laid the foundations for the modern low-density, single-use subdivision. Developers preferred to preemptively comply with FHA standards rather than risk losing financial backing.²⁷⁰ By the 1940s, 32 states had created planning commissions that codified rules and regulations governing subdivision development, most of which were adopted from FHA standards.²⁷¹ Thus, federal loan policies *strongly* encouraged local governments to adopt zoning regulations consistent with the Euclidean model, and encouraged local developers to proposed projects that complied with them. In doing so, these policies determined the form, type, and location of housing that would be supplied for decades to come.

Not only did federal policy strongly bias the default form of development pursued throughout the nation, it also biased consumer demand to favor single-family suburban homes. A group of fiscal instruments essentially subsidized suburbanization by shielding

²⁶⁹ Eran Ben-Joseph, "Smarter Standards and Regulations: Diversifying the Spatial Paradigm" In *Smart Growth : Form and Consequences*, eds. Terry S. Szold and Armando Carbonell (Cambridge, MA: Lincoln Institute of Land Policy, 2002), 112.

²⁷⁰ *Ibid.*, 112

²⁷¹ *Ibid.*, 114

potential homebuyers from the true cost of suburban home-ownership. The VA and FHA offered veterans returning from the war accessible, low-cost credit. Yet the accommodating loans came with certain qualifications. The FHA's underwriting procedure made it cheaper to borrow money to purchase a single-family home, most of which were built on the urban fringe, than a home in a multifamily dwelling- more likely to be found in older cities and towns.²⁷² Simultaneously, the loans offered for home repairs were smaller than those offered to cover home purchase, thereby encouraging families to up and out to newly developed areas, rather than stay and repair. Finally, FHA programs actually made it cheaper to own a home than to rent one.²⁷³ Federal tax policy further subsidized home ownership by allowing mortgage payments to be deducted from federal income taxes.²⁷⁴ A mortgage became a tax break, while monthly rents offered no comparable benefit. The cumulative effect of these policies has been to encourage ownership of suburban housing, and thereby exacerbate the outward flow of population from urban centers to the suburban, metropolitan periphery.²⁷⁵

Federal funding of transportation infrastructure likewise biased supply and demand in the land market. Transportation policy had such an impact on post-war growth, Harrison goes as far as to identify the interstate highway system as an example of

²⁷² Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 397

²⁷³ Ibid.

²⁷⁴ Soule, *Urban Sprawl : A Comprehensive Reference Guide*, 18

²⁷⁵ Fischel, *The Economics of Zoning Laws : A Property Rights Approach to American Land use Controls*, 282

federal land use *planning*.²⁷⁶ Although numerous factors contributed to suburbanization, Bell also argues that, “it is difficult to overstate the importance of affordable private automobile transportation and the construction of public roads.”²⁷⁷ In 1956, President Eisenhower cited national defense as a justification for constructing an expansive network of national highways that would facilitate rapid evacuation of urban centers in the instance of a nuclear attack, while conveniently supporting interstate travel and commerce²⁷⁸. The Interstate Defense Highway Act committed 13.5 billion in federal funds to build over 41,000 miles of highway within 14 years.²⁷⁹ The federal highway program drastically altered the character of suburban and rural communities by opening previously remote, secluded areas to development. Before the new highways, most early suburbs were relatively centralized and close to their parent city.²⁸⁰ With the possibility of rapid commutes over greater distances, remote areas became feasible communities for suburban commuters.

Even before the Interstate Highway Act of 1956, the federal government had been offering the states aid for some roadway construction since the 1920s. Similar subsidies were not made available to regional railways or urban transit systems.²⁸¹ The Interstate Highway Act simply elevated federal road subsidies to an unprecedented level. By picking up 90% of the 25 billion dollar tab, the federal government substantially shielded

²⁷⁶ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 28

²⁷⁷ Bell, *Objectives and Perspectives*, 4

²⁷⁸ Soule, *Urban Sprawl : A Comprehensive Reference Guide*, 17

²⁷⁹ Cullingworth, *The Political Culture of Planning : American Land use Planning in Comparative Perspective*, 156; Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 398

²⁸⁰ Ibid.

²⁸¹ Soule, *Urban Sprawl : A Comprehensive Reference Guide*, 16

states from the true cost of roadway infrastructure.²⁸² By extension, taxpayers were shielded from the dramatic increases in local property taxes, tolls, or gasoline taxes that would have been necessary had states been responsible for funding the construction themselves. If the external costs of the road system were loaded on to consumers, in addition to the costs of road maintenance and infrastructure provision, the gas tax would climb by \$0.67 per gallon.²⁸³ Rubin cites Delucchi's estimate that motor vehicle services produced and priced as they are represent only 30% to 50% of the total true cost of vehicle services. These estimates, to the extent that they are even "remotely correct," support the argument that vehicles are used more than they would be if all costs were born directly by users.²⁸⁴

Since the cost of moving to suburbia does not reflect the cost of the transportation system that serves it, consumers can elect to live at great distances from central urban areas without paying for the public cost of providing access to those areas. Segerson's graph clearly depicts how this policy increases consumer demand for peripheral locations beyond what would be supported if consumers faced "honest" transportation costs.

²⁸² Ibid., 17

²⁸³ Johnson, *Transportation Systems: Market Choices and Fair Prices, Five Years of Twin Cities Research*, 168

²⁸⁴ Rubin, *Transportation and Land use Change*, 45

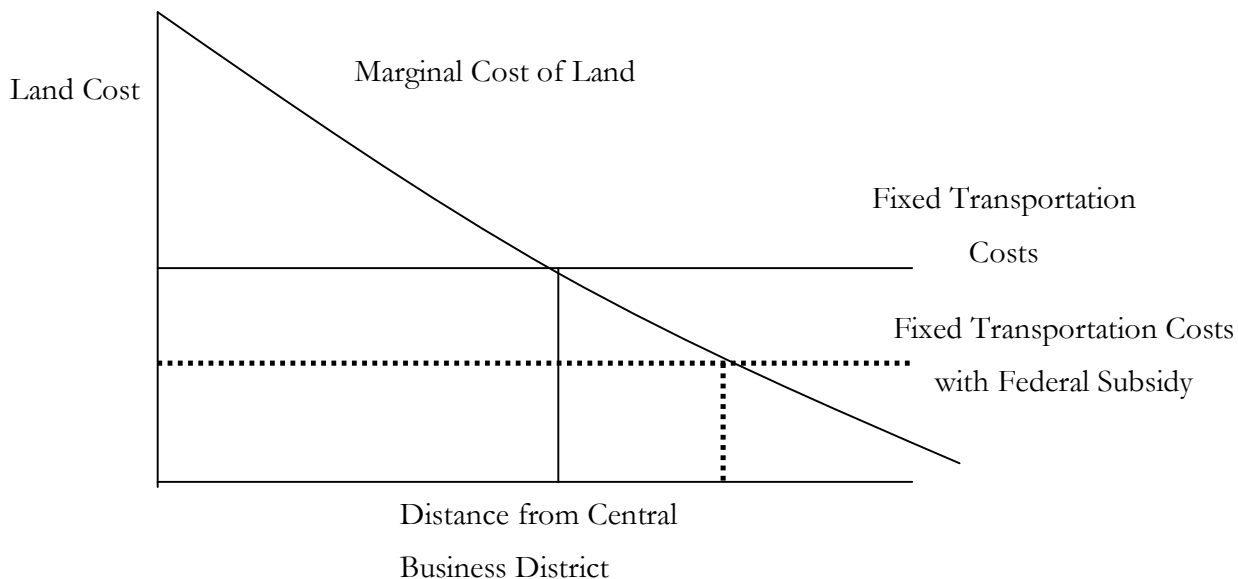


Fig. 2

Federal subsidy of transportation infrastructure effectively lowered the “fixed transportation costs” curve, causing the intersection with the marginal land cost saving curve to occur at greater distance from central business district than it would have under a higher transportation costs curve (See Fig. 2).²⁸⁵ Thus, a reduction in commuting costs increases the amount consumers are willing to pay for housing at any distance from a central business district, as well as the distances they are willing to commute.

While many of these policies were established in an era when oil was plentiful and domestic, climate change was only seasonal, and the effects of auto-oriented sprawl unknown, they have been indefensibly perpetuated by contemporary federal policy. The United States continues to over-subsidize roads, while infrastructure for more efficient

²⁸⁵ Kathleen Segerson and et al., "Theoretical Background" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 95.

modes of transportation remains sorely neglected.²⁸⁶ Inherent biases persist in federal transportation funding equations, which discourage states from undertaking alternative transportation projects, such as transit programs and light rail. States must supply smaller percentage match of funds to build roads than they do to build transit, meaning a state must supply a greater percentage of the cost of a transit project than a road project. It is therefore simply more difficult for states to afford to build them.²⁸⁷

As Rubes notes, the type of transportation infrastructure that is supported and developed, “directly determines the type of communities that get built.”²⁸⁸ In other words, whether future land use decisions produce sprawling, low-density, auto-oriented communities or more compact, mixed-use, and multi-modal environments depends significantly upon the transportation infrastructure that is laid down. This infrastructure produces a system that, in a vicious feedback loop, then influences subsequent land use decisions. The cycle must be broken. Even more troubling is a funding policy that actually *rewards* states whose populations consume more oil. Currently part of the equation used to determine the allocation of transportation funds to a state is based upon how much residents drive within it, and how much oil they use. If more oil is being consumed for transportation, than a state gets more funding.²⁸⁹ This equation, while perversely logical, blatantly rewards states for perpetuating inefficient land use decisions that foster sprawl, worsen traffic, and cultivate unsustainable dependence upon fossil fuels.

²⁸⁶ Kate Rube (Policy Director, Smart Growth America), in discussion with author, 2009.

²⁸⁷ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in discussion with the author, 20 Feb. 2009, 2009.

²⁸⁸ *Kate Rube (Policy Director, Smart Growth America), in Discussion with Author*

²⁸⁹ *Ibid.*

Conclusion

In facing two of today's most pressing resource crises, the United States is brought full circle to find the root of its contemporary problems lodged in an old and persistent controversy: to what extent is the federal government justified and authorized to guide the use and development of land resources? While the trans-jurisdictional nature of natural resources has become widely accepted as grounds for an expanding federal role in resource stewardship and management, land- itself a crucial resource- has eluded such *explicit* national oversight. Although the federal government has never established a clear vision for national land use policy, throughout the Twentieth Century it passed reams of legislation that dramatically impacted local land use decisions. Though sometimes targeted at related objectives, such as managing the resources contained under, on, or above the land, this legislation was just as frequently a product of completely distinct policy spheres, such as transportation and housing.

The United States now finds itself built into an immensely inefficient settlement pattern, reliant upon a fossil-fuel dependant transportation system. Unguided, uncoordinated local land use decisions profoundly influence national fossil fuel consumption and green house gas emissions. Thus the *national* challenges of energy independence and climate change mitigation cannot be addressed without considering the policies, federal and local, implicit and explicit, which determine how America develops, travels, and lives on its land. Luckily, the states need not wait upon federal leadership to

progress towards more efficient, sustainable land use policy. As Wingo notes, states can be the catalysts in the national-regional partnerships to reform land use policy.²⁹⁰ Indeed, according to Popper, the political possibilities for land use policy reform at the state, regional, and local levels are, “better than they have ever been.”²⁹¹ In California, building momentum of public awareness, political will, and private-sector interest has pushed American land use policy in a bold new direction. The creative, timely strategies emerging here deserve close consideration, as they may hold the seeds of a comprehensive, cooperative, resource-based land policy for the entire United States.

²⁹⁰ Lowdon Jr Wingo, "The use of Urban Land" In *Land use Policy and Problems in the United States*, ed. Howard W. Ottoson (Lincoln: University of Nebraska Press, 1963), 252.

²⁹¹ Popper, *Understanding American Land use Regulation since 1970*, 152

3

CALIFORNIA SENATE BILL 375: A NEW MODEL FOR LAND USE LEGISLATION

Introduction

California is widely recognized as a national leader in environmental awareness, activism, and legislation, *but even it* has not escaped the divisive politics of land use. California is severely impacted by the consequences of sprawl and a strong “car culture.”²⁹² Yet historically, efforts to strengthen state oversight of local land use decisions have largely been resisted. An active property rights movement, anti-takings groups, existing laws, and decades of entrenched practice have had a “chilling effect” on attempts to increase centralized land use regulation.²⁹³ Attempts to pass explicit land use mandates have been blocked in the State Legislature for 30 years.²⁹⁴ In the 1970s, the director of the California League of Cities said, “There is no interest in statewide land use planning in California...Not by cities, not by counties, not by the state.”²⁹⁵ Yet as of October 1st, 2008 Governor Arnold Schwarzenegger signed revolutionary land use

²⁹² "SB 375 Q&A" (fact sheet, 2008) (accessed December 2008).

²⁹³ Ann Notthoff (California Advocacy Director, National Resources Defense Council), in discussion with the author, 26 Jan. 2009, 2009.

²⁹⁴ *SB 375 Q&A*, 1

²⁹⁵ Frank Popper, "Understanding American Land use Regulation since 1970" In *Classic Readings in Urban Planning*, ed. J. M. Stein (New York: McGraw Hill, 1995), 150.

legislation into law: Senate Bill 375. How did such a political leap occur? The catalyst for this shift was the novel context in which SB 375 situated the land use issue: the threat of global climate change and the need for energy independence.

A step ahead of the federal government, California has formally recognized the connection between land use patterns, fossil fuel consumption, and greenhouse gas (GHG) emissions from the transportation sector. With the passage of SB 375 the state has acted on it. In California, cars and light trucks are now responsible for 40% of the state's greenhouse gas emissions, making the transportation sector the state's largest GHG emitter. The number of miles Californians drive is increasing at nearly twice the rate of population growth, making cars and light trucks responsible for 70% of California's petroleum use and 50% of its air pollution.²⁹⁶ These conditions have produced a prescient understanding of the land use- energy-climate relationship among activists and lawmakers, and have made CO² emissions and energy consumption the critical "game changers" in California land use politics.²⁹⁷ SB 375 recognizes that if growth continues in the present pattern, the product will continue to be, "sprawl and its accompanying penalty... greenhouse gas and air pollution, petroleum consumption, traffic congestion and loss of resource lands."²⁹⁸ Yet the success of the bill stemmed from a second crucial recognition: the centralization of all land use decisions, through binding mandates, uniform standards, or direct regulation, is politically unviable and functionally

²⁹⁶ *Senate Bill 375*, Public Law 375, (2008): 4.

²⁹⁷ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in discussion with the author, Jan. 2009, 2009.

²⁹⁸ *SB 375 Q&A*, 1-5

impractical.²⁹⁹ The bill's great innovation was to change the playing field of land use policy by altering the framework in which local land use decisions are made. By shifting the focus of the land use debate from the regulation of individual decisions to the *outcomes* of those decisions in terms of fossil fuel consumption and GHG emissions, SB375 is able to leverage existing state and federal law to compel substantive reform in local land use policies.

Making the Argument for Land Use Reform

Authored by California Senate President pro Tem, Darrell Steinberg, SB375 articulates an unprecedented justification for land use planning: reducing vehicle miles traveled (VMT), fossil fuel consumption, and GHG emissions from the transportation sector.³⁰⁰ This justification places SB375 on firm foundations of preexisting state and federal legislation, which it builds upon to stimulate local policy reform. The explicit purpose of SB 375 is to allow California to meet its commitment to law AB32- The Global Warming Solution Act of 2006. This law stipulates that California must reduce GHG emissions to 1990 levels by 2020.³⁰¹ Following the passage of AB 32, the California Air Resources Board (CARB) identified reducing mobile emissions from the

²⁹⁹ Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 16.; Richard Barrows, *The Roles of Federal, State, and Local Government in Land use Planning* (Washington D.C.: National Planning Association, 1982), 17.

³⁰⁰ Steinberg, *Senate Bill 375*

³⁰¹ *Ibid.* 4

transportation sector as essential if the 2020 target was to be met.³⁰² SB 375 resulted from an additional insight: simply improving fuel efficiency would not be enough to adequately reduce emissions from cars and trucks. In order to achieve significant GHG emissions reductions, it would be necessary to change land use patterns and improve transportation strategies.³⁰³ Therefore, SB 375 creates a system of incentives for more efficient growth within the 37 counties served by California's 17 Metropolitan Planning Organizations (MPOs)- an area containing roughly 97.7% of the state's population.³⁰⁴ The keystone of the law is a regional growth blueprint, or "Sustainable Communities Strategy" (SCS) that would, if implemented, enable the region to meet GHG emissions reduction targets.³⁰⁵ While state law AB 32 stimulated the creation of SB 375, pre-existing federal law became its primary implementation vehicle.

By identifying transportation as crucial sector for GHG emissions reductions, AB32 created an opportunity to link land use policy to air quality and climate change goals, through the intermediary sphere of transportation policy.³⁰⁶ SB375 therefore relies upon several pieces of federal transportation and air quality legislation to promote more sustainable local land use policies throughout the state. In 1962, The National Highway Act created Metropolitan Planning Organizations (MPOs) within all metropolitan areas exceeding 50 thousand in population, and required them to carry out basic transportation

³⁰² Pete Price (Legislative Consultant for the California League of Conservation Voters, Price Consulting), in discussion with the author, 28 Jan. 2009, 2009.

³⁰³ Steinberg, *Senate Bill 375*, 4

³⁰⁴ California State Association of Counties, *SB 375 (STEINBERG) Addressing Greenhouse Gas Emissions from the Transportation Sector Via Regional Transportation Plans* (Sacramento: California State Association of Counties, [2008]) (accessed Dec. 2008).

³⁰⁵ Steinberg, *Senate Bill 375*, 8

³⁰⁶ Amanda Eaken (Land Use Policy Analyst, Natural Resources Defense Council), in discussion with the author, 26 January 2009, Jan. 2009.

planning for their region in order to access federal highway funds.³⁰⁷ In 1970, the Clean Air Act (CAA) authorized the EPA to protect citizens from hazardous airborne pollutants by setting state air quality standards.³⁰⁸ The 1991 Intermodal Surface Transportation Efficiency Act (ISTEA) tied these two acts together by requiring that all MPOs located in air-quality “non-attainment areas” (regions failing to meet CAA standards) produce a regional transportation plan (RTP) every four years.³⁰⁹

The RTP must comply with all the requirements of the CAA, as well as advance its general goals.³¹⁰ It must also forecast a growth pattern for the region over the coming 20 to 30 years. Federal law requires that this forecast be based on the “most recent planning assumptions” and realistic projections of growth. If it is not, the federal government can withhold transportation funds.³¹¹ Finally, federal law requires MPOs to include a land use allocation element in the RTP, and here is where the California law steps in. SB 375 builds upon the legislative foundation of ISTEA by imbedding an enhanced land use element within the RTP: the Sustainable Communities Strategy (SCS).³¹² Hence rather than approach land use policy exclusively and on its own terms, California has wisely drawn a series of creative connections between the outcome of local land use decisions and larger policy issues. Doing so has placed land use reform

³⁰⁷ Compass Community Planning Associates, *A Brief History of Metropolitan Planning Organizations* (Meridian, ID: Compass Community Planning Associates).

³⁰⁸ U.S. Environmental Protection Agency, "History of the Clean Air Act," U.S. Environmental Protection Agency, http://www.epa.gov/air/caa/caa_history.html (accessed Feb. 15, 2009).

³⁰⁹ California State Association of Counties, *SB 375 (STEINBERG) Addressing Greenhouse Gas Emissions from the Transportation Sector Via Regional Transportation Plans*, 3

³¹⁰ Ibid.

³¹¹ Steinberg, *Senate Bill 375*, 6; California State Association of Counties, *SB 375 (STEINBERG) Addressing*

Greenhouse Gas Emissions from the Transportation Sector Via Regional Transportation Plans, 3

³¹² Steinberg, *Senate Bill 375*, 8

within the context of state environmental law and federal transportation policy. This framework also lends SB 375 the resources it needs to support a compelling yet flexible system of implementation.

A Cooperative Approach: Implementation Mechanisms

Though it originated at the state level, as a piece of legislation SB 375 is a classic example of cooperative federalism, linking existing national and state laws, and harnessing federal funds to create strong incentives for local policy change. The Sustainable Communities Strategy is the crucial link within SB 375 between California state policy goals, and the federal resources needed to meet them. To meet AB32 targets, SB375 mandates that the California Air Resources Board (CARB) set GHG emission reductions targets for the state, as well as for each region served by a MPO by September 30, 2010. CARB is also responsible for certifying that a regional SCS would achieve its purpose of reducing GHG emissions.³¹³ By embedding the SCS within the RTP, and upholding the federal requirements that the RTP be “internally consistent,” SB 375 ensures that the policy goals and allocation of transportation funds outlined within the RTP will be, “consistent with the SCS, its land use plan, and its transportation policies.”³¹⁴ Development projects inconsistent with the SCS are not *prohibited*, but are not eligible for federal transportation funding, as that would violate the requirement for internal consistency between the RTP’s policy element and its financial element.³¹⁵

³¹³ Ibid. legislative digest, 1

³¹⁴ Ibid. 8

³¹⁵ "SB 375 (Steinberg) Update" (memoranda, 2008).

Without the passage of SB375, CARB could still set regional targets, but it could *not* harness over \$15 billion per year in federal transportation dollars as an incentive for the land use reform needed to meet those targets.³¹⁶ Thus, the bill does not require that local projects conform to the planning policies codified in the SCS, but by linking federal transportation funds to SCS compatibility, SB375 constructs a powerful financial incentive for local compliance with regional plans.

Due to localities' heavy reliance on federal transportation funding, critics might assert that this financial incentive is optional in theory while mandatory in practice. Yet in a pattern repeated throughout the bill, SB375 provides a crucial element of local flexibility that eases the demands of the SCS and reaffirms the bill's optional nature. Although the notion of capturing federal resources and subjecting them to new state law through the SCS was highly contentious, Senator Steinberg and other proponents refused to dissolve what they considered to be the "heart of the bill."³¹⁷ Instead, the bill's authors included a "soft" option for localities lacking the human and fiscal resources necessary to create an SCS capable of meeting regional targets: the Alternative Planning Strategy (APS).³¹⁸ If CARB determines that an MPO's prepared SCS is unable to achieve regional GHG reduction targets, that MPO must prepare an APS to its SCS. The APS is a plan that outlines how a locality *would* hit the targets through alternative development patterns, infrastructure, or additional transportation measures, *if* it had the necessary fiscal or

³¹⁶ Ann Notthoff (California Advocacy Director, National Resources Defense Council), in *Discussion with the Author*

³¹⁷ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

³¹⁸ Pete Price (Legislative Consultant for the California League of Conservation Voters, Price Consulting), in *Discussion with the Author*; William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

human resources.³¹⁹ SB375 does not require an MPO to produce a SCS that is CARB-certified, but does demand that at a minimum, the MPO produce an *APS* that would meet regional GHG emissions reduction targets, if implemented.³²⁰ Unlike the SCS, the APS is not part of the RTP. Therefore, the APS is not a conduit for state or federal funds, and projects compatible with the APS are not eligible for these resources.³²¹ Unfortunately, although the APS preserves the integrity of SB 375 as an incentive-based law, it may therefore also weaken the incentive for communities to produce a CARB-certified SCS.

Although direct financial incentives do not apply to projects compatible with a CARB-certified APS, SB 375 leverages a second state law to create an additional regulatory incentive, one that does capture APS-compatible projects. SB 375 draws upon the California Environmental Quality Act (CEQA) of 1970 to entice the public and private sector to adopt or propose projects that comply with SCS *or* the APS.³²² To environmental groups throughout the state CEQA has been a cherished piece of legislation. To private developers it has been a troublesome thorn in their sides, and longtime source of frustration.³²³ CEQA does not regulate land use directly, but requires agencies or developers to submit an Environmental Impact Report documenting potential adverse environmental consequences of a project.³²⁴ If, in the course of preparing this document, an adverse impact is found, the developer must take appropriate steps to

³¹⁹ Ibid.

³²⁰ Steinberg, *Senate Bill 375*, 11

³²¹ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

³²² Steinberg, *Senate Bill 375*, 36-38

³²³ Ann Nothoff (California Advocacy Director, National Resources Defense Council), in *Discussion with the Author*; Pete Price (Legislative Consultant for the California League of Conservation Voters, Price Consulting), in *Discussion with the Author*

³²⁴ Steinberg, *Senate Bill 375*, legislative digest, 3

mitigate it. This costs time, and time costs money.³²⁵ However, developers' primary complaint about CEQA is not just the lengthy processes it establishes, but the uncertainty it introduces into their business plan. As legislative consultant Pete Price notes, "CEQA is... a public access document," which allows the public to have a say in the development process, and bring a suit to court if they believe a project has not proceeded appropriately. Developers have complained that citizens occasionally bring "frivolous law suits" in order to delay the process until the developer gives up and goes away.³²⁶ SB375 makes CEQA the basis of regulatory incentives that encourage the private and public sector to pursue land use strategies that will reduce fossil fuel consumption and GHG emissions.

Projects that advance the goal of reducing GHG emissions through their consistency with the SCS *or* the APS, or through their proximity to transit are exempt from the lengthy CEQA review process. In the first case, residential or mixed-use projects must be consistent with the use designation, density, building intensity, and relevant policies specified for the project area in the regional SCS or APS. The second case applies to a "transit priority project" (TPP) that must meet 3 requirements. It must: contain at least 50% residential use; have a minimum net density of 20 units per acre; and be located within one-half mile of a major transit stop or high quality transit corridor included in a RTP.³²⁷ To prevent the erosion of environmental standards (and the support of environmental groups), four additional pages of environmental and land use criteria

³²⁵ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

³²⁶ Ibid.

³²⁷ California State Association of Counties, *SB 375 (STEINBERG) Addressing Greenhouse Gas Emissions from the Transportation Sector Via Regional Transportation Plans*, 13-14

must be satisfied for a TPP project to qualify for CEQA review exemption.³²⁸ Therefore, even when localities are unable or unwilling to produce a CARB-certified SCS, SB 375 retains a regulatory incentive to entice land use decisions consistent with the APS. By shortening the development process, reducing time and cost, and removing a significant amount of uncertainty from projects, the CEQA review exemption is a powerful incentive that will encourage developers to submit, and local governments to approve, land use decisions that will help California achieve AB 32 climate goals, state and federal air quality standards, and greater petroleum conservation.³²⁹

In addition to constructing the twin incentives of financial resources and regulatory exemption, SB 375 leverages a third state law to stimulate local land use reform. By linking the SCS to existing California housing law, the bill seeks to induce substantive change in a crucial branch of local land use policy: zoning law. California's Planning and Zoning Law requires each city and county to prepare and adopt a general plan for its jurisdiction that contains several mandatory elements, including a housing element. The housing element must identify the existing and projected housing needs of all economic segments of the community.³³⁰ Those cities and counties served by an MPO in an air quality non-attainment region are given the option of aligning their preparation of the Regional Housing Needs Allocation (RHNA) plans with the preparation of the Regional Transportation Plan (RTP). Though closely related to one another, these documents have historically been produced on different temporal cycles, with the RTP

³²⁸ Steinberg, *Senate Bill 375*, 32-36

³²⁹ *Ibid.* 5

³³⁰ *Ibid.* legislative digest, 2

produced every four years and the RHNA plans every five.³³¹ Placing the RHNA revision on an eight-year cycle not only extends the temporal scope of RHNA planning, but aligns it with regional transportation planning. Furthermore, SB 375 requires the RTP to plan for the Regional Housing Needs Allocation (RHNA) and requires the RHNA allocation to be consistent with the projected development pattern established by the SCS component of the RTP.³³² Housing units will still be distributed fairly across all local governments in a region, as mandated by RHNA, but must be adopted in a manner consistent with the regional SCS. This implicitly requires local zoning law to accommodate and support the land use, density, and development standards established by the SCS.

To ensure timely change, SB375 sets forth a schedule for re-zoning, and enables individuals to take legal action should a government fail to re-zone appropriately. It requires localities to adopt their allocated housing elements within eighteen months of Sept. 30, 2010. Local agencies must complete any necessary rezoning within 3 years and 120 days of adopting their first housing element.³³³ If a court finds local agencies have failed to complete rezoning as mandated, it may impose sanctions as necessary.³³⁴ The only housing that the state is authorized to allocate is the affordable housing covered under RHNA plans. Though these SCS-compatible developments are only a small portion of regional development, according to Legislative Consultant William Craven, insisting upon their compatibility with the SCS *should be* sufficient to induce substantial revision

³³¹ Ibid. legislative digest, 2-3

³³² Ibid. 28

³³³ California State Association of Counties, *SB 375 (STEINBERG) Addressing Greenhouse Gas Emissions from the Transportation Sector Via Regional Transportation Plans*, 10

³³⁴ Steinberg, *Senate Bill 375*, 22-23

to zoning law across the state.³³⁵ This will ensure that other projects consistent with the SCS-will also be accommodated by prevailing zoning law. Hence, by shaping the terms for RHNA adoption, SB 375 ensures that the *principles* established within a regional SCS can become *practice*, as local zoning law will accommodate them. These three incentives exemplify California’s creative strategy of leveraging accepted spheres of state or federal authority, such as transportation, environmental, and affordable housing policy to induce change within the local arena of land use. In each case SCS is the cornerstone by which SB 375 supports “broader planning tools” in an age when California’s population “lives at a regional, rather than local level.”³³⁶

A Cooperative Approach: Balancing Centralized Standards and Local Vision

Having articulated a clear goal for local land use outcomes, and established a standard planning *process* by which regions may choose to meet that goal, SB 375 steps back, and carefully allows localities significant discretion over the development and implementation of regional plans. In doing so, it took the same principles of cooperative federalism evident in the financial incentive scheme, and applies them to local, regional, and state relations. It thereby avoids excessive top-down regulation, and balances state authority with local input and implementation responsibility.³³⁷

³³⁵ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

³³⁶ SB 375 Q&A, 2

³³⁷ Ibid.

Critics may assert that reserving local authority over means is irrelevant if a centralized institution has already fixed the end. This inherently constrains the choices available to localities, and thereby reduces local autonomy and control, and expands the power of centralized state bureaucracy. To avoid property rights advocates and proponents of local control, this argument undoubtedly poses a valid concern. However, adhering to a truly cooperative model, SB 375 purposefully establishes channels of local influence on the selection of regional GHG emission reduction targets, and on the development of the SCS/ APS component of the Regional Transportation Plan (RTP) - i.e. the ends. Responsibility to set state and regional GHG emission reduction targets *does* rest with a state agency (CARB), but the target setting process is structured to be a collaborative effort.³³⁸ SB 375 relies upon insight from local governments and regional MPOs for the perspective necessary to set realistic targets. The bill mandates the creation of a Regional Targets Advisor Committee no later than January 31st, 2009. Composed of MPO representatives, affected air districts, the League of California Cities, the California State Association of Counties, local transportation agencies, and members of the public from diverse interest groups, the committee shall “recommend factors to be considered and methodologies to be used” for setting GHG emission reduction targets for the affected regions. Before CARB may alter or update regional targets, it must engage in meetings with these primary local stakeholders.³³⁹

In developing the SCS component of the RTP, or the APS, cities and counties will work with and through their regional MPO. A MPO must solicit and consider local input

³³⁸ Steinberg, *Senate Bill 375*, 7-8

³³⁹ *Ibid.* 7-8

and recommendations by holding multiple workshops with city and county-level officials.³⁴⁰ Through this process SB 375 preserves a large measure of regional and local discretion over *how* the regional target is to be met using various land use strategies. SB 375 also mandates public outreach workshops during the development of the SCS, and multiple public hearings of the completed draft to garner input and feedback at all stages of the process.³⁴¹ Locally, the SCS should therefore be perceived as endogenous and legitimate, growing from the bottom up rather than imposed from the top down.

Throughout the SCS-development process, CARB is required to share technical expertise and information with local and regional MPOs, so that they are able to predict whether an SCS will be approved.³⁴² CARB is authorized to approve or reject the SCS created by an MPO, but it *may not* issue conditional approvals or otherwise interfere with local decision-making.³⁴³ In other words, it may not make substantive recommendations as to the details of a region's SCS; these remain local prerogative. It must verify that the SCS will achieve GHG emissions reductions targets, but there state authority ends. However, because specific development patterns and design choices are necessary to reduce VMT and subsequent emissions,³⁴⁴ using CARB compliance the state can effectively compel adherence to “smart growth principles”³⁴⁵ without *explicitly* mandating them. To better illustrate how this may be possible, it is necessary to examine

³⁴⁰ Ibid. 8-9

³⁴¹ Ibid. 9-10

³⁴² Ibid. 7

³⁴³ Ibid. 11

³⁴⁴ See Chapter 2

³⁴⁵ “Smart Growth.” a form of growth that favors mixed land uses, compact development patterns, and pedestrian accessibility; supports alternative transportation options; provides a range of housing types and options; and emphasizes community distinctiveness and livability. See: Chen, Don. *Greetings from Smart Growth America*.

the technical tool SB 375 establishes for projecting regional GHG emissions, and adjudicating an SCS or APS: travel demand models.

In order for a regional MPO to predict how various land use patterns impact fossil fuel consumption and CO₂ emissions, it must develop complex travel demand models that integrate land use and transportation.³⁴⁶ SB 375 raises the standard for regional transportation modeling, while accommodating variations in local need, resources, and capabilities.³⁴⁷ The bill maintains that planning models used for making transportation infrastructure decisions should be able to analyze the effects of multiple policy choices, such as residential development patterns, expanded transit service and accessibility, the walkability of communities, and the use of economic incentives and disincentives. SB 375 authorizes CARB to maintain guidelines for the models used in RTP development.³⁴⁸ These guidelines are flexible, rather than standardized, to account for local and regional variability. The largest metropolitan areas with the most resources are expected to use the most complex, integrated models. Smaller MPOs with fewer resources will use a phased approach, in which older models are gradually refined and expanded to account for more variables and analyze the outcome of more policy options.³⁴⁹

At a minimum, however, the models must account for the following: the relationship between land use density, household vehicle ownership, and VMT; the

³⁴⁶ Tucker Libby, "State Policy Makers Lack Data for Addressing Climate Change," *Daily Journal of Commerce* 29 May 2008, 2008, <http://www.djcoregon.com/articleDetail.htm/2008/05/29/State-policy-makers-lack-data-for-addressing-climate-change-A-new-Oregon-commission-on-global-warming> (accessed 21 Nov. 2008).

³⁴⁷ Steinberg, *Senate Bill 375*, 5

³⁴⁸ *Ibid.* 5

³⁴⁹ *Amanda Eaken (Land use Policy Analyst, Natural Resources Defense Council), in Discussion with the Author*

impact of enhanced transit service on household vehicle ownership and VMT; changes in travel and land development likely to result from highway or passenger rail expansion; mode splitting between automobile, transit, carpool, and bicycle and pedestrian travel; and the speed, frequency, days, and hours of operation of transit service.³⁵⁰ Such models will allow localities to select from a range of policy options, and to custom tailor an SCS that is practical and effective for their region. Lastly, the responsibility to implement the regional planning and transportation policy needed to hit emissions targets rests with local governments and MPOs.

Political Strategy: Building the Coalition

The bill's carefully balanced approach to setting regional targets, drafting regional plans, and implementing land use strategies reflects the concerns of diverse interest groups whose consent and support were essential to its passage. The interest groups that hold a stake in land use policy are numerous and powerful; a situation that often gives rise to a contentious political environment. The case of SB 375 was no exception, and for the bill to pass the California legislature, it had to address the concerns of these varied interests and thereby build a formidable coalition of support. The primary groups that held sway over the fate of SB 375 were local governments, the homebuilders and developers associations, environmental groups, affordable housing groups, and the highway/ road lobby.³⁵¹ According Ann Notthoff, the California Advocacy Director for

³⁵⁰ Steinberg, *Senate Bill 375*, 5

³⁵¹ Tom Adams (President, California League of Conservation Voters), in discussion with the author, January 2009.

the National Resources Defense Council, building a coalition among these interests was crucial, as any one of them alone was potentially powerful enough to block the bill.³⁵² However, in order to *pass* SB 375, practically all would need to endorse it.³⁵³ The ultimate coalition that formed included all of these preceding groups, with the exception of the highway and road lobby, and the surprising addition of several eleventh-hour endorsements from the auto and oil industries.³⁵⁴ This coalition was powerful enough to motivate what Notthoff called the, “greatest bi-partisan effort on a piece of environmental legislation” that she had ever seen.³⁵⁵ What compelled such unprecedented collaboration? Two factors explain the formation of this impressive coalition. First, Senator Steinberg was skillfully able to accommodate the concerns of these disparate groups without compromising the fundamental objectives of the bill. Secondly, a “perfect storm” of market, political, and fiscal forces has been steadily converging to the advantage of SB 375.³⁵⁶ Together these factors help explain the bill’s unusual depth of support.

In order to secure the cooperation of local government, SB375 had to overcome entrenched resistance to altering the status quo of local land use control. Just as tension over sovereignty and the right to home rule have long colored nation- state relations, they have they likewise marked the relationship between states and their

³⁵² *Ann Notthoff (California Advocacy Director, National Resources Defense Council), in Discussion with the Author*

³⁵³ *William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in Discussion with the Author*

³⁵⁴ *Ibid.*

³⁵⁵ *Ann Notthoff (California Advocacy Director, National Resources Defense Council), in Discussion with the Author*

³⁵⁶ *Tom Adams (President, California League of Conservation Voters), in Discussion with the Author*

localities.³⁵⁷ William Craven observed that states do not want the “feds” telling them what to do on the subjects of growth and development, while local governments are equally resistant to state interference in local land use decisions.³⁵⁸ In California as in other states, existing law and decades of practice give local governments land use authority, and as Pete Price noted, “possession is nine tenths of the law”. Thus local governments’ primary concern was that SB 375 would qualify or constrain their control of land use decisions.³⁵⁹ To allay this concern, explicit language in the bill emphasized the fact that although incentives for compliance are strong, the land use elements of the bill remain non-binding. The bill states,

“Nothing in a sustainable communities strategy shall be interpreted as superceding the exercise of land use authority of cities and counties within the region.”³⁶⁰

and additionally,

³⁵⁷ Alan Rabinowitz, *Urban Economics and Land use in America: The Transformation of Cities in the Twentieth Century* (London: M.E. Sharpe, 2004), 3.

³⁵⁸ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

³⁵⁹ Tom Adams (President, California League of Conservation Voters), in *Discussion with the Author*

³⁶⁰ Steinberg, *Senate Bill 375*, 11-12

“Nothing in this section shall require a city’s or county’s land use policies and regulations...be consistent with the regional transportation plan or alternative planning strategy.”³⁶¹

These clauses remind local governments that although land use decisions consistent with the SCS and/or the APS are eligible for fiscal and regulatory incentives, they are in no way *mandatory*. Furthermore, the very inclusion of the APS itself represents an overture to localities, allowing them to avoid the burden of including a CARB-certified SCS in their RTP that would exceed their implementation capacity. A CARB-certified APS, as it is not incorporated into the RTP, does *not* place the same implementation burden on local governments as the SCS, while still offering up the CEQA review exemption as an attractive incentive for compliance.

Though these accommodations were undoubtedly essential to securing local support, shifting political and fiscal circumstances also helped sway local governments towards backing the bill. Politically there is growing awareness about the threats of climate change and energy security among the electorate, and local officials increasingly want to be perceived as leaders on the issue.³⁶² Furthermore, the public’s tolerance for unchecked sprawl is decreasing. Citizens now recognize that are current and historic growth patterns are not sustainable and must be changed.³⁶³ SB 375 established a comprehensive new strategy for achieving significant GHG emissions reductions and

³⁶¹ Ibid. 12

³⁶² Tom Adams (President, California League of Conservation Voters), in *Discussion with the Author*

³⁶³ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

addressing the threat of climate change, while mitigating the increasingly unpopular sprawl that has plagued California for decades. Fiscally, the current California budget crisis only highlights the economic infeasibility of sprawl.³⁶⁴ The infrastructure needed to support sprawl, such as water and sewer laterals, electrical lines, and roads, is exorbitantly expensive compared to more compact forms of growth.³⁶⁵ According to Tom Adams, the President of the California League of Conservation Voters, the state simply cannot afford to continue to finance the infrastructure of sprawl. As the vast majority of local transportation funds come from the state (either directly or as reallocated federal funds), if the state can't afford the infrastructure, neither can localities.³⁶⁶ The economic downturn helped convince local governments that the old business-as-usual model of endless sprawl simply can't continue. SB 375 provided as new and timely vision.

A second extremely powerful set of interests that had to be won over was the developers and homebuilding industry. This industry has historically been a huge source of resistance to state or federal attempts to exert greater influence over land use. Little has changed from the 1970s, when the industry staunchly opposed Senator Jackson's National Land Use Planning Act.³⁶⁷ Today, as in the 1970s, developers and the building industry can still exert far more political influence locally than at the state or national level. Thus the group has traditionally considered its interest to lay in resisting

³⁶⁴ Tom Adams (*President, California League of Conservation Voters*), in *Discussion with the Author*

³⁶⁵ Robert W. Burchell and others, *Costs of Sprawl--2000*, Vol. 74 (Washington, D.C.: National Academy Press, 2002), 605.

³⁶⁶ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), in *Discussion with the Author*

³⁶⁷ See Chapter 1

consolidation, and keeping land use authority as decentralized as possible.³⁶⁸ Like local government, this group was brought behind SB 375 through a combination of accommodations within the bill, and political and economic forces outside of it. The CEQA review exemption within the bill was the primary incentive offered to the building industry, and the opportunity to bypass the lengthy and uncertain review process was extremely appealing to developers.³⁶⁹ According to legislative staffer William Craven, it was the part of the bill most actively sought by the home building agencies.

More important than internal incentives, however, were shifting external forces that cast SB 375 in a new light of political and economic self-interest. Politically, the industry recognized that the passage of AB 32 had initiated a new era of GHG regulation, and that the connection between land use patterns and GHG emissions was only growing stronger. Thanks to AB 32 the question was not *if* land use would be regulated, but *when*. Therefore, it was in the industry's rational self-interest to come to the table and help shape SB 375, rather than simply resist it.³⁷⁰ Economically, developers sensed that the home market was shifting. Even before the subprime mortgage crises of 2008, changing demographics have spurred demand for a new and different product. According to Tom Adams, aging baby boomers often do not want to be dependent upon cars, and are fueling a growing market for more compact development. Simultaneously, the market in California for single-family detached homes in sprawling areas has largely bottomed

³⁶⁸ Ann Notthoff (California Advocacy Director, National Resources Defense Council), in *Discussion with the Author*

³⁶⁹ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

³⁷⁰ Amanda Eaken (Land use Policy Analyst, National Resources Defense Council), in *Discussion with the Author*

out.³⁷¹ As Craven observes, “People aren’t buying those houses, they want to live in closer to job centers...the home builders that are smart and agile are realizing this.” He notes statistics for home sales since the 2008 mortgage crises as evidence that a landscape of sprawl no longer attracts premium prices. “If you look at this [northern California] region...the homes that are continuing to sell during the economic downturn are the ones closer in [to cities centers]. So there is now market based support for the kind of land use development patterns that SB375 encourages. There wasn’t in the 1970s”. These industry trends likely played a significant role in swaying the development and building industry towards supporting SB375.

For their part, environmental interests largely supported SB 375, but did express concern over the language and tactics of the bill. To retain environmentalists’ valuable support, it was necessary to allay their concerns through specific provisions, and in some cases concessions. Environmental groups supported the bill’s goals, but they took issue with one of its primary implementation incentives: the CEQA review exemption incentive. NRDC land use policy analyst Amanda Eaken describes CEQA as a “Holy Grail” for environmentalists. They considered exemptions from its review process to be a dangerous slippery slope. Considering there have been numerous attempts by the building industry to weaken and water down CEQA regulations, this fear may not have been totally unfounded.³⁷² Consequently, environmental supporters did not want SB 375

³⁷¹ Tom Adams (*President, California League of Conservation Voters*), in *Discussion with the Author*

³⁷² Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), in *Discussion with the Author*

to offer review exemptions as incentive for SCS-compatible development.³⁷³ As that the CEQA incentives were essential to secure the support of the building industry, the review exemptions for certain residential projects remained in the bill. However, they remained with rigorous qualifications- over four pages in the case of Transit Priority Projects.³⁷⁴ These stipulations assure that only high quality projects meeting various standards were eligible for exemption. Finally, in a concession to environmentalists, the authors resisted requests to extend the CEQA review incentive to transportation projects that met similar criteria. According to William Craven, this request was not incorporated into the bill precisely because it would have strained and most likely broken their much needed support.

Two of the most surprising endorsements came from industries not typically known for a progressive environmental stance: the auto and energy industries. For a bill that explicitly aims to reduce car use (i.e. VMT) through land use strategies, the support of Toyota and Ford Motors seems almost inexplicable. Yet once again, the winds of political and economic change were significant enough to make these companies believe SB 375 to be more in line with their self-interest than opposed to it. Politically, it is worth noting that these companies came into the coalition near the end of the legislative process, when according to Pete Price it “looked like something was going to happen.” Also, as these automakers were undoubtedly aware, the author of the bill Senator Darrel Steinberg was in the process of assuming the role of Senate Protem, which

³⁷³ *Amanda Eaken (Land use Policy Analyst, Natural Resources Defense Council), in Discussion with the Author*

³⁷⁴ Steinberg, *Senate Bill 375*, 33-38

would make him the “most powerful legislator in the building.”³⁷⁵ For the sake of future political goodwill, it was a prudent move to endorse the legislation of a man who would be shaping all future regulation of the auto industry in the Nation’s largest auto market.

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However these companies also recognized that the substantive goals of the bill could, if achieved, reduce political and economic pressure on their industry. Existing law AB 32 clearly identifies the transportation sector as a crucial arena for GHG emission reductions, and there are limited ways to achieve this. The conventional tactic has been to require automakers to build a cleaner car by raising fuel efficiency standards. The less conventional, and prior to SB 375 essentially untried tactic is to reduce the amount that people drive- in other words, change development patterns.³⁷⁷ To a car company, the prospect of sharing the burden of emissions reductions with those responsible for land use decisions (i.e. developers and local government) is understandably appealing.

The support of Sempra Energy and Pacific Gas and Electric can be attributed to similar logic. In California, almost the entire population lives in air quality non-attainment areas. Thus there is perpetual pressure to ratchet down polluting emissions³⁷⁸. Emissions come from either stationary sources or mobile sources, with the primary stationary sources being power plants and oil refineries. From the perspective of an oil or

³⁷⁵ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

³⁷⁶ David Shepardson, "Big Three Lose Ground in Biggest US Market," *Detroit News* Thursday January 29, 2009, 2009, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20090129/AUTO01/901290465> (accessed 10 Feb., 2009).

³⁷⁷ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

³⁷⁸ *Ibid.*

energy company that owns numerous refineries or power generating plants, the more emissions reductions that are achieved from mobile sources (i.e. the transportation sector) the less pressure will be exerted upon stationary sources.³⁷⁹ These companies therefore have a vested economic interest in seeing more emissions reductions come from mobile sources and, like the auto companies, in distributing the burden and responsibility of GHG reduction.

Despite the impressive coalition of support, one interest group remained staunchly opposed to SB 375 and almost succeeded in blocking it from becoming law: the highway and road lobby.³⁸⁰ The primary objection of the industry was, more or less, the Bill's explicit purpose. The highway and road lobby worried that by seeking to reduce VMT and GHG emissions through more efficient land use patterns, the bill would result in fewer roads being built.³⁸¹ This presumption is likely correct, as the successful implementation of SB 375 *would* result in reduced driving rates, reduced traffic load, and therefore reduced demand for new roads. Unfortunately, the objections of the road lobby were generally irreconcilable with the central aim of the bill. Legislators had little choice but to construct as powerful a coalition as possible in order to overwhelm the opposition of this influential group. According to Tom Adams, the sway of the road lobby is so significant that although SB375 was brought before Governor Schwarzenegger with the support of all the Democrats in the state legislature, a group of Republicans, and an impressive coalition of support, this single lobby nearly succeeded in preventing SB 375

³⁷⁹ Ibid.

³⁸⁰ Tom Adams (*President, California League of Conservation Voters*), in *Discussion with the Author*

³⁸¹ Amanda Eaken (*Land use Policy Analyst, Natural Resources Defense Council*), in *Discussion with the Author*

from becoming law.³⁸² Ultimately, the coalition was deep and diverse enough to overpower the opposition of highway and road lobby, but the process of building this coalition was not without costs.

Critical Analysis: Will SB 375 Succeed in Stimulating Local Land Use Reform?

SB 375 stands as a “landmark” piece of legislation from the environmental, land use, and planning perspective, but it was unquestionably weakened by a series of legislative concessions. Though it has many strengths, legislative advocate for the American Planning Association Jason Jordan observes, “The devil is always in the details.”³⁸³ Concerning the implementation tools and regulatory mechanisms that CARB and the state rely upon to realize the law, Jordan reports being, “underwhelmed at the level of emphasis on the land use... component of the program.” He suggests that these weaknesses produce a law does not fully reflect the ultimate importance of land use reforms in achieving its own objectives.³⁸⁴ The potential loopholes within SB 375 merit examination, as they call into question the future effectiveness of the bill as a means to compel more sustainable land use patterns and reduce GHG emissions.

The largest, most obvious loophole within the law is simply its nature as an incentive-based piece of legislation. As it concerns land use, SB375 is not a state mandate. According to Price, even progressives at the local level are extremely wary of, “anything that would take away or shift to someone else their land use authority.” Hence,

³⁸² Tom Adams (President, California League of Conservation Voters), in Discussion with the Author

³⁸³ Jason Jordan (Lobbyist, Advocacy Associates), in discussion with the author, 19 Feb. 2009, 2009.

³⁸⁴ Ibid.

extremely explicit language within the bill emphasizes that it does not usurp local authority, or mandate that local plans and policies be consistent with the RTP or APS.³⁸⁵ Therefore, local authorities can still approve development projects that are incompatible with the principles and plans of the SCS. Though a city or county could not access federal transportation funds to build the transportation infrastructure needed for such a project, theoretically it could leverage private resources to do so. This would *seem* to effectively undermine the influence of SB 375's primary financial incentive. According to Price, however, it is highly unlikely that localities could furnish adequate financing on their own. The substantial cost of any sizable road requires localities to rely on federal or state funding. SB 375 gradually makes these funds inaccessible to projects that are incompatible with the SCS component of the RTP. Transportation projects funded under California proposition 1-B, and underway by 2011, may be eligible for *state funding* regardless of RTP compatibility (although federal funds will be withheld). Yet after 2011, neither state nor federal funds will be available to projects that fail to comply with the SCS element of their RTP.³⁸⁶ Hence, although the land use element of SB 375 is optional in theory, it should prove extremely compelling in practice.

A source of larger concern for proponents of land use policy reform is the provision for an Alternative Planning Strategy (APS). Prior to adopting an SCS, a regional MPO must quantify the GHG emissions reductions achieved by the strategy, and the difference, if any, between that amount and the regional reduction targets set by the

³⁸⁵ Steinberg, *Senate Bill 375*, 11-12

³⁸⁶ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

CARB. If the MPO finds the SCS is insufficient to meet regional targets, it must prepare an APS that illustrates how the target would be met with additional or alternative measures.³⁸⁷ In this case, the APS must obtain CARB certification.³⁸⁸ The APS does not negate the need for an SCS element within the RTP, however it does allow cities and counties to push more extensive or challenging policy measures (those necessary to meet the regional target) out of the RTP and into the APS.³⁸⁹ This scenario would render the SCS component of the RTP less comprehensive, and would thereby subject regional development to fewer and less rigorous standards. Because the APS is not part of the RTP, projects would not have to comply with it to receive federal transportation funds. They would only have to align with the less comprehensive SCS component. As Price notes, this could easily provide localities with a means of evasion, as they might prepare only a “half-hearted SCS” and declare the remaining policy measures beyond their capabilities, shifting them into the APS.

Despite the potential for localities to abuse the APS loophole, Craven asserts that the APS provides a vital “off-ramp” for those jurisdictions genuinely incapable of implementing all the measures necessary to hit their regional GHG emissions reduction target. Craven explains, “SB375 is not instant gratification. It’s going to take a while for the regions and the locals to figure out how to develop a SCS that is effective.” It will also take time for federal and state transportation money to be captured in a geographic area, and for the localities to develop and realize an SCS that will “hit the

³⁸⁷ Steinberg, *Senate Bill 375*, 10

³⁸⁸ *Ibid.* 11

³⁸⁹ *Pete Price (Legislative Consultant for the California League of Conservation Voters, Price Consulting), in Discussion with the Author*

targets.”³⁹⁰ Craven concedes that the GHG reduction benefits of SB 375 will not be very great if all jurisdictions opt to produce the APS. Yet he notes that the CEQA review exemption will remain a compelling incentive, one that *does* apply to APS-compatible projects, even though the federal funding incentive does not.³⁹¹ Thus private developers will have an appealing reason to submit projects that comply with a CARB-certified APS. The CEQA review exemption will therefore remain a powerful tool to encourage private actors to make more sustainable land use decision, even when the RTP in an area lacks a CARB-certified SCS. Hopeful, Craven said, “We think the CEQUA benefits for infill housing and more compact development are such that the regions are really going to try, maybe not immediately, but say 4 years out...to go for the APS.” Therefore, what appear to be the law’s two primary loopholes may in fact undermine its efficacy less than expected.

Finally, of the various concessions made to pass SB 375, one farsighted provision stands out as a particularly significant loss. According to Price, early versions of the bill had included a provision detailing a specific spatial order in which the sustainable community strategy would be implemented in regions containing especially valuable “resource areas,” such as farmland or natural habitats. The provision set up a type of concentric zones model for regional development, stipulating that growth must first be directed into the most developed areas, before progressively spreading out from

³⁹⁰ *William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in Discussion with the Author*

³⁹¹ *Ibid.*

city, town, or regional centers.³⁹² Such a measure would have strongly supported urban infill over greenfield development on virgin land, and helped protect a region's valuable natural resource lands from development. The requirement was ultimately removed, and replaced with a watered-down directive that the SCS must, "gather and consider the best practically available scientific information regarding resource areas and farmland in the region."³⁹³ As Price explains, the hope of this directive was that requiring regions to identify and consider their natural resource areas would apply (or allow others to apply) political pressure to protect these areas from development. However, in his view the omission of the concentric growth provision was the bill's most damaging loss.³⁹⁴ As this concession illustrates, SB 375 is only a first step towards instituting more comprehensive, regionally coordinated, sustainable land use policy. Though it makes unprecedented progress in achieving these goals, its implementation mechanisms are not completely foolproof, and it leaves some promising avenues unexplored.

Conclusion

Set against the backdrop of a long and contentious history of American land use policy, the substance, ingenuity, and above all the *passage* of California Senate Bill 375 take on new meaning. The success of the bill is evidence of a larger national transition away from a pure, idealistic, but nonetheless rigid and impractical interpretation of the

³⁹² Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

³⁹³ Steinberg, *Senate Bill 375*, 8

³⁹⁴ Pete Price (*Legislative Consultant for the California League of Conservation Voters, Price Consulting*), *in Discussion with the Author*

Constitution. It signals that the same realization that spurred federal action in the sphere of environmental policy is finally spreading into the sphere of land use policy: some problems simply eclipse state capacity and transcend local boundaries. As the United States lacks coordinated regional governance structures, there is no sovereign below the state capable of formulating the policy and regulations needed to effectively address land use, and no sovereign besides the federal government that possesses the resources states need to do so. Unless the states wish to sort themselves into regional coalitions, and establish loci of regional authority, they must collaborate with the national government to receive funding, expertise, and guidance if they are to confront the formidable challenges produced by decades of decentralized, loosely regulated, and uncoordinated land use policy.

Yet SB375 also serves as a powerful reminder that due to constitutional necessity and cultural identity, land use policy in United States is a fundamentally different beast from its more centralized international peers. The substantive regulation of local land use decisions at the national level is not only politically infeasible in the United States, with a variegated landmass over 3.5 million square miles, it is simply irrational.³⁹⁵ By drawing an unprecedented connection between land use patterns, VMT, fossil fuel consumption, and GHG emissions, SB 375 fuses new state law with established federal and state legislation to stimulate substantive change in local land use policy *without* resorting to unpopular and politically infeasible centralization. Rather, it acknowledges there must

³⁹⁵ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 45

always be a strong dose of local expertise and citizen input to ensure that land use policy remains sensitive to its local context. Hence, by blending local precision with national resources and regional vision, SB375 balances centralization and localization, and – like the federalist system itself - strives to harness virtues of each.

4

THE FOUNDATIONS OF A NATIONAL LAND USE POLICY

AN ANALYSIS OF EMERGING LEGISLATION

Introduction

California Senate Bill 375 (SB375) makes commendable progress towards reforming land use policy to support regionally coordinated, sustainable growth in California's metropolitan areas. However, the threat of global climate change and the urgent need to reduce dependence on fossil fuels confronts the United States as a whole. To meet these challenges on a national level, the innovation begun in CA must expand beyond its borders. With the Obama administration in power, there is now a renewed emphasis in Washington on pursuing energy independence and preventing global climate change. The transportation sector, which accounts for 70% of the United States' oil consumption and 27% of its greenhouse gas emissions (GHG), must figure prominently in any national policy seeking to address these issues.³⁹⁶ However, the transportation system cannot be considered in isolation from the development patterns it serves. Without significantly changing the way we grow, it will simply be infeasible to attain any kind of significant reductions in fossil fuel consumption and GHG emissions from this

³⁹⁶ Nathanael Greene, *Growing Energy, how Biofuels can Help End America's Oil Dependence* (New York: National Resources Defense Council,[2004]).

crucial sector.³⁹⁷ The complex relationship between land use patterns and transportation energy requirements make federal leadership in land use policy all the more pressing. Addressing energy consumption and climate change is going to necessitate systemic change, not merely “changing light bulbs and developing more fuel-efficient cars.” The nation must rethink how it invests in transportation infrastructure, approaches density, and supports mixed-use and transit-oriented development.³⁹⁸

While politicians, environmentalists, “smart growth” advocates, and others eagerly watch the California law to gauge its success, several leaders are working in Congress to bring similar legislation to the national level. Representative Ellen Tauscher (D) of California and Representative Earl Blumenauer (D) of Oregon are responsible for two innovative bills that recognize the relationship between local land use decisions and the energy and carbon implications of the nation’s transportation system. The bills, the “Sustainable Regions Blueprint Act” (SRBA) and the “Clean Low-Emission, Affordable, New Transportation Efficiency Act” (CLEAN TEA) encourage states and regions to align their land use policies with national transportation goals.³⁹⁹ These bills hold the potential to establish, for the first time, a clear national position on land use policy. However, they will have to contend, with the same forces that have hobbled federal land use measures throughout the United States’ history. Any federal land use measure must confront both political resistance and practical barriers. Lessons drawn from history and

³⁹⁷ Jason Jordan (Lobbyist, Advocacy Associates), in discussion with the author, 19 Feb. 2009, 2009.

³⁹⁸ Ibid.

³⁹⁹ Earl Blumenauer, "Clean, Low Emission, Affordable, New Transportation Act" (working draft of bill, obtained by author, U.S. House of Representatives, 2009) (accessed Feb. 2009).; Ellen Tauscher, "The Sustainable Regions Blueprint Act" (draft of House Bill, working language, U.S. House of Representatives, 2009).

the successful passage of SB 375 suggest that a series of strategies are necessary if federal land use measures are to be politically viable and functionally effective. These strategies include: framing the land use issue wisely; choosing an appropriate political action channel; and ensuring that the legislation itself meets specific criteria in terms of structure and content. The extent to which SRBA and CLEAN TEA employ these strategies will largely determine whether they die in the halls of congress, or emerge as the foundations of a national land use policy.

Confronting Opposition: Active and Passive Resistance to Federal Land Use Reforms

Any national legislation touching upon land use can expect to face opposition from a variety of traditional sources. Attempting to alter the status quo in local land use policy will likely generate active resistance, grounded in ideological beliefs and economic self-interest, as well as passive resistance stemming from sheer systemic inertia. Ideological resistance to federal interference in land use policy has existed since the time of Hamilton and Jefferson, and persists to this day. Although indirect federal influence on land use has expanded dramatically since the 1970s through channels such as environmental policy, most direct land use planning and regulatory powers continues to reside with state and local governments.⁴⁰⁰ Whenever issues of growth and development are explicitly raised at the national level, states and local governments go on

⁴⁰⁰ Frank Popper, "Understanding American Land use Regulation since 1970" In *Classic Readings in Urban Planning*, ed. J. M. Stein (New York: McGraw Hill, 1995), 143-144.; Richard Barrows, *The Roles of Federal, State, and Local Government in Land use Planning* (Washington D.C.: National Planning Association, 1982), 3.

“high alert.”⁴⁰¹ Involving the federal government in “anything related to land use” raises a “red flag” for those suspicious of federal interference in domestic state policy.⁴⁰²

The recent demise of the Community Character Act demonstrated that land use authority remains a, “very proprietary thing.”⁴⁰³ Sponsored in 2003 by Representative Blumenaur and the American Planning Association, the bill would have provided funding to communities to reform their zoning law and pay for greater land use planning.⁴⁰⁴ It contained no mandates, but was completely incentive based; as the Legislative Director for Representative Blumenauer Janine Benner described it, “just carrots no sticks.” Yet an opposed representative circulated a condemning letter throughout Congress, warning legislators about the “dangers” of the bill.⁴⁰⁵ The bill quickly died as accusations swirled that it attempted to promote, “federal zoning policy.”⁴⁰⁶ This latent Congressional opposition stems mostly from conservatives, who often represent more rural areas. Conservatives adamantly oppose policies they perceive as jeopardizing local land use control in their districts, even when the proposed policies are optional and/or targeted at urban and suburban areas.⁴⁰⁷ The narrowly defeated National Land Use Planning Act of 1972 contained no explicit mandates, yet roused concern over “naked federal

⁴⁰¹ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in discussion with the author, Jan. 2009, 2009.

⁴⁰² Kate Rube (Policy Director, Smart Growth America), in discussion with author, 2009.

⁴⁰³ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in discussion with the author, 20 Feb. 2009, 2009.

⁴⁰⁴ Janine Benner (Legislative Director, Office of Representative Earl Blumenauer, U.S. House of Representatives), in discussion with the author, February 2009, 2009.; Anthony Flint, *The Battle Over Sprawl and the Future of America* (Baltimore: Johns Hopkins University Press, 2006), 99.

⁴⁰⁵ Janine Benner (Legislative Director, Office of Representative Earl Blumenauer, U.S. House of Representatives), in Discussion with the Author

⁴⁰⁶ Flint, *The Battle Over Sprawl and the Future of America*, 99

⁴⁰⁷ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in Discussion with the Author

intervention” into an area of domestic state authority.⁴⁰⁸ Conservative suspicion that national land use legislation, mandatory or not, will “stimulate the regulation of private property” thwarted the National Land Use Planning Act, and likewise scuttled the 2003 Community Character Act.⁴⁰⁹ Thus any federal land use measure must tread with the utmost caution, and employ truly innovative strategies to overcome the entrenched suspicion and ideological opposition to federal involvement in land use policy.

Active resistance to land use reform can also be expected from several interest groups seeking to protect their economic self-interest. The road and highway lobby, which adamantly opposed SB 375 in California, can be expected to put up stiff resistance to any similar action in Congress.⁴¹⁰ California Senate staffer William Crave warned, “If you want federal leadership on this issue [land use], the transportation lobby groups are going to have to be reckoned with.”⁴¹¹ These groups are even more powerful at the national level than at the state level,⁴¹² and according to Schmid, thoroughly “entrenched.”⁴¹³ One of the primary parties in the road and highway lobby is The American Association of State Road and Highway Transportation Authorities, or AASHTO. AASHTO represents the departments of transportation throughout the states.

⁴⁰⁸ Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 42.

⁴⁰⁹ Ibid., 42; Janine Benner (Legislative Director, Office of Representative Earl Blumenauer, U.S. House of Representatives), in *Discussion with the Author*

⁴¹⁰ Tom Adams (President, California League of Conservation Voters), in discussion with the author, January 2009.

⁴¹¹ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

⁴¹² Tom Adams (President, California League of Conservation Voters), in *Discussion with the Author*

⁴¹³ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

Schmid describes AASHTO as, “the traditionalists.” As road builders, they are fighting against many of the transportation reform policies contained within CLEAN TEA, such as greater equilibrium between road and transit financing.⁴¹⁴ The resistance of this group is entirely logical, as their economic self interest is inherently opposed to land use strategies that would diversify the transportation system beyond its present, utter dependence upon the automobile. This threatens the very livelihood of AASHTO constituents. Land use patterns that accommodate diverse transportation options and reduce vehicle miles traveled (VMT) support the goals reducing fossil fuel dependence and GHG emissions, but not the job security of nearly 573 thousands individuals employed by the construction, maintenance, or support of roads and highways.⁴¹⁵

A national attempt to reform status quo land use policies will also have to contend with sheer systemic inertia. A complex web of interests has grown up around decades of entrenched practice. Breaking the hold of an entire growth system that has been in place for over sixty years, and formulating a new vision to take its place, is immensely difficult to achieve within the legislative process.⁴¹⁶ Stavins observes that once a “policy architecture” is established it can be “exceptionally” resistant to change.⁴¹⁷ As industries

⁴¹⁴ Ibid.

⁴¹⁵ U.S. Department of Labor, "Occupational Employment and Wages, may 2007: 47-4051 Highway Maintenance Worker," Bureau of Labor Statistics, <http://www.bls.gov/oes/current/oes474051.htm> (accessed 16 March, 2009).; U.S. Department of Labor, "Career Guide to Industries: Construction," Bureau of Labor Statistics, <http://www.bls.gov/oco/cg/cgs003.htm> (accessed 16 March, 2009).; U.S. Department of Labor, "May 2007 National Industry-Specific Occupational Employment and Wage Statistics: NAICS 488400- Support Activities for Road Transportatio," Bureau of Labor Statistics, <http://www.bls.gov/oes/current/naics4_488400.htm> (accessed March 16, 2009).

⁴¹⁶ Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁴¹⁷ Robert Stavins, *A U.S. Cap and Trade System to Address Global Climate Change* (Washington D.C.: The Brookings Institution,[2007]) (accessed 26 March 2009).

learn how to operate within a policy framework, status quo sets in.⁴¹⁸ This is certainly the case with the modern auto-oriented, sprawl-oriented growth system. Lending institutions, for example, know very well how to finance sprawl but don't know how to approach financing transit-oriented development.⁴¹⁹ Chambers of commerce and home builders associations are tied to the system they are accustomed to, while the construction industries are oriented to build a certain type of development and do not possess good economic models to write the financial perspectives for new kinds of development.⁴²⁰ CLEAN TEA and SRBA alter status quo land use and development practices by articulating new goals for the transportation system, which depend upon a new approach to local land use development decisions. To support a more efficient transportation system, new kinds of transportation and development projects will be necessary; projects that may be outside of the comfort zone of many industries. Jordan notes that these industries are likely to resist systemic change due to uncertainty over the financial implications. This discomfort with uncertainty will likely become expressed as political opposition, as these influential industries and organizations make their concerns known to lawmakers.⁴²¹

Federal land use legislation also faces practical implementation barriers. Legally, the federal government is constitutionally constrained from engaging in direct land use planning activities at the local level. This power resides with the states, practically all of

⁴¹⁸ Ibid.

⁴¹⁹ Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁴²⁰ Kate Rube (*Policy Director, Smart Growth America*), in *Discussion with Author*; Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁴²¹ Ibid.

which delegated it to local governments during the first half of the Twentieth Century.⁴²² However, the sheer size of the United States, and the detailed information required to engage in local land use planning makes direct federal regulation of local land use decisions an impractical and prohibitively expensive task.⁴²³ Furthermore, planning is, at its core, an activity founded upon local vision.⁴²⁴ Jason Jordan, legislative advocate for the American Planning Association, stresses that communities are different. They have grown differently; they possess different economic dynamics, and display different demographics. This makes it very difficult to craft one size fits all zoning regulations or other land use solutions.⁴²⁵

Hence, the Constitutional constraint on direct federal land use planning is not, per se, a barrier to land use reform, but to the extent that it is expanded to prohibit *any and all* federal activity, the constraint undoubtedly poses a considerable hurdle. It is plausible that the uniform imposition of federal standards would create chaos in local state planning scene,⁴²⁶ and that there must therefore always be local control over, “certain aspects of the planning process.”⁴²⁷ However, this does not alter the reality that numerous federal policies have a significant, if indirect, impact on local land use policies. Thus, respecting limitations on federal authority in this sphere does not preclude reshaping federal policies to facilitate better outcomes from local decisions. Indeed, the

⁴²² Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 2

⁴²³ *Ibid.*, 16-17

⁴²⁴ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁴²⁵ *Ibid.*

⁴²⁶ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 17

⁴²⁷ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

United States now faces a situation in which federal policies *must* be changed to induce different development outcomes throughout the nation.⁴²⁸

Strategies in Response: Framing the Issue and Choosing a Channel for Action

Several strategies will prove crucial during the legislative process if federal land use policy is to overcome the political and practical barriers that confront it. These include framing the land use issue wisely, choosing an appropriate political action channel, and ensuring that the legislation meets specific criteria in regards to content and structure. First, it is fundamentally important that the land use issue be framed correctly.⁴²⁹ Because land use remains an intensely parochial issue, national lawmakers must articulate *why* a federal position on land use is essential. The problems of fossil fuel dependence and climate change are an excellent frame through which to pursue land use reform for several reasons: they are impacted by land use decisions directly; there is a growing political will to address them and a growing public awareness about them; and there is increasing private sector support for innovative policies to address them.

First, fossil fuel consumption and GHG emissions are directly impacted by local land use decisions across the nation, making it essential that national efforts to address climate and energy problems take land use into consideration. With the oil crises of the 1970s, the planning profession became aware of the relationship between energy

⁴²⁸ Ibid.

⁴²⁹ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

consumption and land use policy for the first time.⁴³⁰ The built environment has largely been planned and developed in a way that reflects lack of energy constraints. Urban and suburban sprawl, characterized by low densities and the separation of activities, reflects especial disregard for the energy requirements of the transportation sector.⁴³¹ Yet once constructed, the built environment constrains the level and pattern of energy demand, leaving the transportation system especially vulnerable to variations in energy price and supply.⁴³² Locking Americans into a system in which they are utterly dependent upon high levels of person mobility not only commits them to energy-intensive lifestyles, but high-polluting lifestyles as well. As CO₂ emissions are directly proportional to gasoline use, which is directly related to vehicle miles traveled (VMT), the land use patterns that keep Americans in their cars are also placing planet-warming carbon into our atmosphere.⁴³³

Secondly, climate change and energy independence are nationally relevant issues that have been recently brought to the fore of the national agenda by the Obama administration. In his first address to the Joint Session of Congress on February 24th, 2009 President Obama announced, "I ask this Congress to send me legislation that places a market-based cap on carbon pollution and drives the production of more renewable

⁴³⁰ Susan Owens, "Spatial Structure and Energy Demand" In *Energy Policy and Land-use Planning : An International Perspective*, eds. David R. Cope, Peter J. Hills and Peter James, 1st ed., Vol. 32 (Oxford ; New York: Pergamon Press, 1984), 215.

⁴³¹ Ibid., 220

⁴³² Ibid., 220

⁴³³ Paul R. Portney and et al., "Policy Watch: The Economics of Fuel Economy Standards," *The Journal of Economic Perspectives* 12 (2003), 207.

energy in America."⁴³⁴ Lawmakers are coming to understand the relationship between these issues and land use policy, just as political momentum builds to address climate change and energy consumption. These converging forces may cast federal land use reform in a more favorable light. Indeed, Benner suggests that the virulent reaction against the 2003 Community Character Act would not be replicated today. Rather, heightened concern over dependence upon foreign oil, and the growing comprehension of the relationship between land use and energy consumption would likely temper the response to such a measure.⁴³⁵ Furthermore, Schmid argues that climate change has replaced national security during the post- 9/11 era as the “topic de jour” in Congress. In the coming years, drawing a connection between policy objectives and combating global warming will be the way to get things done on Capitol Hill.⁴³⁶ As Jordan observes, the threat of global climate change has become a “terrific reason for doing a whole lot of other good things” from the land use perspective.⁴³⁷

Growing public awareness of these issues has only strengthened political resolve to reduce the nation’s dependence upon fossil fuels and stem GHG emissions. According to Jordan, climate change and energy are particularly promising frameworks for discussing land use because on these issue the public really “gets it.”⁴³⁸ Citizens understand the urgency of these problems and the potentially dire consequences of failing

⁴³⁴ Barack Obama, *Address by the President to the Joint Session of Congress* (United States Capitol: , 2009), 9.

⁴³⁵ Janine Benner (Legislative Director, Office of Representative Earl Blumenauer, U.S. House of Representatives), in *Discussion with the Author*

⁴³⁶ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁴³⁷ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁴³⁸ Ibid.

to act. Trends over more than a decade of Gallup polls show that Americans now are more likely than they have been in the past to claim understanding of global warming, to recognize that global warming could be a threat in their lifetimes, and to say the effects of global warming have already begun.⁴³⁹ In 2008 the percentage of Americans who believed “drastic action” was necessary to address this threat stood at 34%, a 10% increase from 2003 when it dipped to 23%.⁴⁴⁰ A 2008 poll commissioned by the nonpartisan Presidential Climate Action Project, found that 62% of US adults surveyed believe it is important that the next President of the United States initiates “strong action” to address climate change soon after taking office.⁴⁴¹ On the subject of energy, a 2008 Gallup poll, found that 95% of Americans believe the current U.S. energy situation is either very serious (46%) or fairly serious (49%). Of those surveyed, 62% believe the United States is likely to face a critical energy shortage during the next five years.⁴⁴² Regarding strategies to confront the national energy problem, by a margin of 61% to 29% Americans favor emphasizing more consumer conservation of existing energy supplies, rather than emphasizing the production of more oil, gas, and coal supplies.⁴⁴³ Thus, the issues of global climate change and national energy security have become the subject of considerable public attention and concern.

⁴³⁹ Frank Newport, "Little Increase in American's Global Warming Worries," *Gallup.Com* 21 Apr. 2008, 2008, <http://www.gallup.com/poll/106660/Little-Increase-Americans-Global-Warming-Worries.aspx> (accessed 13 March 2009).

⁴⁴⁰ Ibid.

⁴⁴¹ L. K. Williams, "Poll shows Climate Change an Election Issue," *Environmental Protection*, <http://www.eponline.com/articles/65440/> (accessed March 13, 2009).

⁴⁴² Dennis Jacobe, "Half of the Public Favors the Environment Over Growth," *Gallup.Com* 26 March, 2008, 2008, <http://www.gallup.com/poll/105715/Half-Public-Favors-Environment-Over-Growth.aspx> (accessed 13 March 2009).

⁴⁴³ Ibid.

Finally, building momentum for national climate change legislation has caused industrial America to reconsider its political and economic self-interest. Just as California's passage of AB 32 encouraged the development, construction, utility, and auto industries to come to the table in support of SB 375,⁴⁴⁴ the likelihood of a national cap on carbon emissions, or other climate regime regulation, is stimulating support within the private sector for innovative strategies to reduce GHG emissions. Industries such as utility, oil, and auto companies are going to be regulated in, "any climate regime that is conceivable."⁴⁴⁵ Though their first instinct was to "keep the genie in the bottle," once the dynamic in Congress shifted to suggest a "fait accompli," it became politically and economically advantageous for these industries to search for alternative policies that will achieve carbon emissions reductions in sectors other than their own.⁴⁴⁶ According to Jordan, these interests have been useful in putting pressure on the political system to make changes that will spread the burden of carbon emission reductions. This includes tapping the potential of land use reforms to reduce VMT and GHG emissions from the transport sector, strategies that would have been "unthinkable" for the auto companies until recently. This situation has "catapulted climate change policy" to become instrumental in addressing, "a whole host of planning and land use issues."⁴⁴⁷ Thus, due to their direct relationship to land use policy, growing political will, public awareness,

⁴⁴⁴ Ann Notthoff (California Advocacy Director, National Resources Defense Council), in discussion with the author, 26 Jan. 2009, 2009.

⁴⁴⁵ Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

and private sector support, the issues of energy independence and climate change are outstanding frames through which to approach national land use reform.

Framing land use reform appropriately is crucial, because this initial strategy will largely determine the political mechanisms available to pursue it. According to Barrows, the manner in which an issue is raised determines the action channel for the policy decision, which in turn shapes the power of the different actors, and influences the ultimate outcome.⁴⁴⁸ Approaching land use reform on its own terms is not an option. Because the Constitution vests land use authority with the states, there simply is not a viable action channel for federal land use policy in its own right. As the failure of the 1972 National Land Use Planning Act and the Community Character Act demonstrate, such an approach will illicit deep-seated ideological resistance. In the face of such resistance, land use reform advocates have modified their approach. Describing this new strategy Jordan says, “We see federal policy as an instrument...and it will never be as clean as a national land use act. But we’ve learned a lot from figuring out how different federal programs ...influenced development decisions.”⁴⁴⁹ These federal programs provide indirect, but potentially more successful channels through which to influence land use policy. According to Ann Notthoff, the “back door approach” to land use may actually be a smarter and more effective way to address the “systemic” problems that promote inefficient sprawl.⁴⁵⁰

⁴⁴⁸ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 11

⁴⁴⁹ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁴⁵⁰ Ann Notthoff (California Advocacy Director, National Resources Defense Council), in *Discussion with the Author*

It is crucial to recall that the transportation system is the linking element between land use policy, fossil fuel consumption, and GHG emissions. Therefore, by approaching the land use reform through the frame of energy independence and climate change, the political action channel can be shifted from a sphere where federal jurisdiction is contested (land use policy), to those where it is widely accepted: transportation and environmental policy. Indeed, environmental and transportation policy have been two of the most significant channels through which the federal government has engaged in a kind of indirect land use planning.⁴⁵¹ For this reason, William Craven speculates that implementing the strategies of SB 375 at the national level (i.e. leveraging transportation and environmental policy) might actually prove less contentious than it did at the state level.⁴⁵² Using regional transportation plans (RTP), SB 375 leverages federal transportation funds to stimulate the creation of a sustainable communities strategy and encourage its implementation.⁴⁵³ Craven points out that RTPs and the Metropolitan Planning Organizations that produce them are actually federal constructs. Therefore, he believes that changing the requirements for RTPs to help meet regional GHG reduction targets, or redirecting funding towards projects that help achieve certain targets would likely be viewed as a federal prerogative.⁴⁵⁴

⁴⁵¹ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 28, 31

⁴⁵² William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

⁴⁵³ Senate Bill 375, Public Law 375, (2008): 8-12.

⁴⁵⁴ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

Similarly, on April 2, 2007 the US Supreme Court ruled that greenhouse gasses, the most important being CO₂, met the definition of a pollutant, and thereby required the EPA and other Federal agencies to take steps to reduce them.⁴⁵⁵ Hence, raising land use policy in the context of energy and climate goals opens two promising channels for reform at the federal level: transportation and environmental policy. However, regulating regional transportation planning and targeting federal funds towards specific projects is very different from expanding direct federal control over land use planning.⁴⁵⁶ Likewise, the jump from regulating GHG emissions to local development decisions is a large and potentially overreaching step. These distinctions are crucial, and must be preserved in both the content and implementation strategies of any federal land use measure if massive political resistance is to be avoided.

Strategies in Response: Constructing the Legislation

To be politically and functionally viable, national legislation targeting land use reform must be carefully drafted in regards to both its content and its implementation structure. It should articulate clear goals; define standards by which to meet them; and employ a cooperative structure that aims to build institutions and local capacity, and employ an incentive-based implementation strategy. To date, the federal government has abstained from establishing any goals or principles to guide local land use policy. The absence of a formal national policy guiding land use is problematic, for it not only

⁴⁵⁵ John M. Levy, *Contemporary Urban Planning*, 6th ed. (Upper Saddle River, N.J.: Prentice Hall, 2003), 298.

⁴⁵⁶ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in *Discussion with the Author*

obscures the interaction between federal policies and metropolitan land use decisions; it implicitly denies a historical reality: that Congress significantly impacts development patterns through various secondary policies.⁴⁵⁷ Without an explicit recognition of this relationship, diverse federal policies have proceeded in disregard of their impact on the spatial organization of American society, and have significantly biased the entire system of local development towards an unsustainable pattern of suburban sprawl.⁴⁵⁸ Moving forwards, Wingo argues that federal policies, “urgently need to develop around a clear and consistent view of...metropolitan civilization.”⁴⁵⁹ It is not *necessary*, or even prudent, that the federal government draft one size fits all regulation to govern local land use policy, but it must ensure that diverse federal policies that influence metropolitan development “proceed from a *consistent set of objectives*.” SB375 demonstrated how diverse state policies, such as transportation funding and affordable housing allocation, can be shaped to promote specific land use outcomes at the local and regional level; outcomes that supported a clear set of state policy goals- reducing VMT, fossil fuel consumption, and GHG emissions from the transport sector.

Establishing national goals for land use outcomes will be irrelevant if consistent standards do not also exist against which to measure them. Some centralized body must establish quantitative or procedural standards in order to measure the extent to which local land use policies advance national objectives. SB375 assigned this role to the California Air Resources Board (CARB), which not only establishes regional GHG

⁴⁵⁷ Lowdon Jr Wingo, "The use of Urban Land" In *Land use Policy and Problems in the United States*, ed. Howard W. Ottoson (Lincoln: University of Nebraska Press, 1963), 233.; *Kate Rube (Policy Director, Smart Growth America), in Discussion with Author*

⁴⁵⁸ *Jason Jordan (Lobbyist, Advocacy Associates), in Discussion with the Author*

⁴⁵⁹ Wingo, *The use of Urban Land*, 250

reduction targets for localities to meet (goals), but also holds local Metropolitan Planning Organizations to explicit standards concerning the modeling and planning processes they must employ (procedural standards), the accuracy of those models in estimating GHG reductions (quantitative standards), and the effectiveness of regional plans in hitting GHG reduction targets (quantitative standards).⁴⁶⁰ Any legislation modeled on SB375 at the national level would necessitate a similar arrangement. If the federal government demanded that states and regions study GHG emissions from the transport sector and produce plans to reduce them, several logical questions would follow: which models are the correct ones? What are proper metrics of measurement? What does it mean to reduce greenhouse gasses? Who determines what constitutes a reduction?⁴⁶¹ All of these questions require direction from the federal government through consistent regulatory standards. With federal direction establishing standards for what such models would look like, regions will be able to empower themselves to make more informed land use decisions.

However, a national policy that establishes goals and consistent measures of progress will not be worthwhile unless states and regions possess the ability to realistically pursue the objectives. Thus, national land use reform should leverage federal influence and resources to build local capacity and fashion new institutions for planning and development.⁴⁶² Kate Rube, the policy director for Smart Growth America, described an ideal federal land use policy as a large-scale resources-sharing, capacity-building

⁴⁶⁰ Steinberg, *Senate Bill 375*, 5-11

⁴⁶¹ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁴⁶² Wingo, *The use of Urban Land*, 251

measure that would create incentives for communities to engage in a long-term regional planning process. Such a program would empower citizens to determine a vision for their community.⁴⁶³ A strategy that enhances local capacity and builds supportive institutions enables localities to meet nationally established goals, but it avoids mandating how they do so; an approach historically proven to be politically unpopular and constitutionally questionable.⁴⁶⁴ The creation of Metropolitan Planning Organizations (MPO) in 1973 was one such institution building measure that attempted to enhance local capabilities to plan for transportation infrastructure development at a more comprehensive regional level.⁴⁶⁵

SB 375 successfully applied this strategy, establishing new institutions and enhancing local planning capacity with state resources. The bill created the Regional Transportation Advisory Committee (RTAC) to enhance to the planning process. RTAC is an important body that facilitates the flow of information and ideas between the local, regional, and state level. Supplying CARB with locally specific data, information, and feedback, RTAC ensures the standards and targets set by CARB are realistic and well informed.⁴⁶⁶ SB375 also enhances the capacity of regions to plan by making superior state technical know-how and intellectual resources available to local or regional MPOs. By sharing its knowledge of writing successful, accurate, integrated travel demand and land use models, CARB outfits localities and regions with the tools they need to plan

⁴⁶³ *Kate Rube (Policy Director, Smart Growth America), in Discussion with Author*

⁴⁶⁴ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 15

⁴⁶⁵ Compass Community Planning Associates, *A Brief History of Metropolitan Planning Organizations* (Meridian, ID: Compass Community Planning Associates.; Jason Jordan (Lobbyist, Advocacy Associates), *in Discussion with the Author*

⁴⁶⁶ Steinberg, *Senate Bill 375*, 7

more effectively.⁴⁶⁷ Thus effective regional planning demands a collaborative approach in which information, ideas, expertise, and resources flow from the bottom up as well as from the top down.

Harrison suggested in 1975 that a successful federal land use program would be one in which the national government provides assistance to states, be it financial, technical, or intellectual resources, so that they may establish for themselves comprehensive land use programs.⁴⁶⁸ Today, the federal government's fiscal and intellectual resources will be more critical than ever to enable states to meet policy objectives. For example, the complexity of integrated models can be expected to pose a hurdle to many states that lack the fiscal and intellectual resources needed to write and implement them. The inability of municipalities and smaller MPOs to write accurate integrated transportation and land use models will be a substantial barrier to improving land use decisions at the local level.⁴⁶⁹ There is a large role for the federal government to play in funding the creation of improved models at the state and metropolitan level, and using its resources to build land use planning capabilities generally throughout the nation.⁴⁷⁰ Federal assistance will allow planning bodies within the states to hire more people and to train existing personnel to be more familiar with the necessary

⁴⁶⁷ Ibid. 7-8, 11

⁴⁶⁸ Harrison, Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?*, 16

⁴⁶⁹ Amanda Eaken (Land Use Policy Analyst, Natural Resources Defense Council), in discussion with the author, 26 January 2009, Jan. 2009.

⁴⁷⁰ Ibid.; Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in Discussion with the Author

models.⁴⁷¹ Therefore, a federal policy cannot merely *establish* national goals and objectives, it must ensure that states possess the resources and capabilities needed to meet them, and that institutions exist to coordinate and facilitate their activities.

Finally, a federal land use measure must adopt a cooperative, incentive-based approach to implementation. In cases where the national government is constitutionally constrained from interfering in the affairs of states, such as land use planning, the model of cooperative federalism has allowed it to influence state policy without usurping state sovereignty. Federal grants-in aid are made available for states to adopt and execute certain policies, if they so choose.⁴⁷² Various scholars suggest that the federal government would be most effective in the sphere of land use policy by taking such a cooperative approach: encouraging certain activities with incentives, and acting through state authority.⁴⁷³ Schmid agrees that the federal government needs to create incentives and empower local communities to go through planning processes, while avoiding explicit mandates. For example, it cannot mandate that communities zone in a specific way. Such a direct approach to land use reform simply “will not work.”⁴⁷⁴ The defeat of the 1972 National Land Use Planning Act and more recently, the 2003 Community Character Act would seem to confirm that assumption, as they were both

⁴⁷¹ Ibid.

⁴⁷² Ross Talbot, "The Political Forces" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 141-142.

⁴⁷³ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 17; Junjie Wu, "Land-use Changes and Regulations in Five Western States of the United States" In *Economics of Rural Land-use Change*, eds. Kathleen P. Bell, Kevin J. Boyle and Jonathan Rubin (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2006), 209.

⁴⁷⁴ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

defeated even *without* explicit mandates.⁴⁷⁵ Luckily, the success of SB 375 at the state level offers hope that fiscal and regulatory incentives, applied in the context of enhanced local capacity, can produce politically successful and functionally compelling legislation, without resorting to binding land use mandates. If SRBA and CLEAN TEA can strike a similar balance, while carefully framing the land use issue and securing a promising channel for political action, they may prove equally successful at the national level.

To find legislative success, a final piece needs to fall into place behind any federal land use measure: there must be a deep and diverse coalition assembled in Washington to take on the entrenched interests opposed to reform. A broad-based coalition supporting transporting transportation and land use reform will be more effective and politically viable for two reasons. First, it will resist being stereotyped or pigeonholed as representing a narrow set of interests. As the passage of SB 375 displayed, a broad coalition was crucial to overcoming the powerful and entrenched opposition of the California road and highway lobby.⁴⁷⁶ Second, history suggests that a diverse coalition will be less apt than a monolithic one to fall prey to infighting or fragmentation. According to Jordan, the last reauthorization of the federal transportation program revealed that leaving transportation reform exclusively in the hands of transportation interest groups is problematic. There is an inherent danger that such a coalition will become fragmented along the lines of various funding streams, as each group attempts to

⁴⁷⁵ Margaret Weir, "Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land use Planning Legislation" In *The American Planning Tradition: Culture and Policy*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 201-209.; *Janine Benner (Legislative Director, Office of Representative Earl Blumenauer, U.S. House of Representatives), in Discussion with the Author*

⁴⁷⁶ *Amanda Eaken (Land use Policy Analyst, Natural Resources Defense Council), in Discussion with the Author; Tom Adams (President, California League of Conservation Voters), in Discussion with the Author*

protect pet projects and various pools of resources. Such infighting makes it extremely difficult to bring the message of reform to congress.⁴⁷⁷

National Action: The Sustainable Regions Blueprint Act and CLEAN TEA

As the preceding discussion displayed, political will, public awareness, and private sector interests are aligning to support national action on climate change and energy independence. Simultaneously, a window of political opportunity is opening in Congress to not only address these issues, but to incorporate land use reform as a key component of a national policy response. According to Schmid, momentum is finally building in congress to react to these pressing political and environmental issues precisely as two pieces of legislation are emerging that can serve as ideal vehicles for political action. There is a “perfect storm” of political will and legislative opportunity.⁴⁷⁸ This legislation is a pending climate bill (as requested by President Obama), and the reauthorization of the federal transportation program: the Safe Accountable Flexible Efficient Transportation Equity Act: a Legacy for Users (SAFETEA LU).⁴⁷⁹ These bills not only have the potential to serve as vehicles for action on climate change and energy independence, but for land use reform as well. As the federal transportation program is up for reauthorization this year, efforts to respond to President Obama’s request for a national cap and trade system will coincide with the revision of SAFETY LU. According

⁴⁷⁷ Jason Jordan (Lobbyist, Advocacy Associates), in Discussion with the Author

⁴⁷⁸ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in Discussion with the Author

⁴⁷⁹ Ibid.

to Jason Jordan, it is crucial that these two things interlock.⁴⁸⁰ Due to the integrated nature of these issues, each piece of legislation must speak to and advance the goals of the other. Representatives Tauscher and Blumenauer are leveraging land use reform as a crucial link between transportation policy and climate and energy goals. They are working to integrate the principles of SB 375 into these legislative opportunities, and thereby bring California's pioneering land use reform strategies to the national level.⁴⁸¹

The Sustainable Regions Blueprint Act

Every five years Congress must reauthorize the federal transportation program. This year SAFETEA LU, is up for reauthorization with a strong emphasis on reform.⁴⁸² The Sustainable Regions Blue Print Act (SRBA) would be an unprecedented addition to the federal transportation program, and would help align land use strategies with clearly defined goals for federal transportation policy. Though it is yet to be introduced into Congress and currently lacks formal language, SRBA is essentially land use planning legislation based upon the model of SB 375. Drafted by Representative Tauscher's office, the bill innovatively recognizes the impact of land use decisions on transportation outcomes. Thus, it structures regional planning activity around a defined goal: reducing vehicle miles traveled (VMT) (and hence fossil fuel consumption) and GHG emissions from the transportation sector.⁴⁸³ By incorporating SRBA into SAFETEA LU

⁴⁸⁰ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁴⁸¹ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁴⁸² Ibid.

⁴⁸³ Tauscher, *The Sustainable Regions Blueprint Act*, 1

reauthorization, Representative Tauscher would effectively bring the planning principles of SB 375 to the nation as a whole. Therefore, it is clear that SRBA already employs two strategies critical to the political and functional success of federal land use legislation. It clearly *defines objectives* for land use policy in terms of transportation outcomes (VMT and GHG emissions), and thereby *frames* land use in the context of broader policy goals surrounding climate change and energy independence.

A closer look at the nascent content of SRBA reveals that it will likely employ a cooperative structure, relying upon federal resource to build capacity at the local level. The bill would amend federal transportation act, title 23, chapter 1, section 134 United States Code: “Metropolitan Transportation Planning”. It would require each MPO or regionally planning entity representing a population of 500,000 or more to prepare and adopt a regional growth blueprint, encompassing a twenty-year planning horizon.⁴⁸⁴ The goal of the blueprinting process would be to encourage land use outcomes that reduce VMT and GHG emissions from the transportation sector. The process would:

- 1) Define the geographic area within the blueprint, encompassing at a minimum the metropolitan statistical area.
- 2) Produce a base-case study describing how the region is expected to grow presuming current local population and economic trends and current land use plans and policies.
- 3) Generate at least two alternative scenarios, one of which must be based upon the goal of reducing VMT and greenhouse gas emissions from transportation sector.

⁴⁸⁴ Ibid.

4) Culminate in the MPO adopting a preferred alternative scenario⁴⁸⁵

The bill requires a MPO to produce at least three growth scenarios (the base case and two alternatives) before adopting a sustainable communities blueprint.⁴⁸⁶ To help pay for the increased responsibility of this involved planning process, the Metropolitan Planning “takedown” from federal transportation funding would increase from 1.25 to 2%.⁴⁸⁷ Therefore, SRBA allocates federal resources to enhancing the land use planning capacity of regions, enabling them to clearly identify an action path to meeting transportation goals.

In addition to defining an objective for local land use policy, SRBA provides a set of standards by which Regional Blueprint Plans can be assessed. As part of the blueprint, a MPO must adopt specific growth principles to guide regional land use and transportation decisions, such as: multi-modal transportation choices, mixed-use development, compact development, housing choice and diversity, energy efficient design, and natural resource conservation among others.⁴⁸⁸ Owens, writing in light of the 1970’s energy crises, argued that planning should aim to ensure that land use patterns do not constrain individuals to energy intensive lifestyles, but instead support transportation alternatives and systemic flexibility, should energy become scarce and expensive.⁴⁸⁹ The growth principles established by SRBA do precisely this, by encouraging land use

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Owens, *Spatial Structure and Energy Demand*, 232

patterns that flexibly support alternative forms of transportation with lower energy requirements. These standards, which demonstrably support the stated transportation goals,⁴⁹⁰ will allow the federal government, or relevant centralized institution, to assess the effectiveness of regional growth blueprints.

In order to ensure the region blueprint is a product of local vision and not *only* federal standards, each MPO is required to engage in vigorous public outreach and interaction while developing its blueprint plan. SRBA requires MPOs post materials online, hold workshops, gather public feedback, and so forth.⁴⁹¹ Finally, SRBA is careful to assuage local concerns over excessive federal interference. The act is not a mandate, but rather a process-building program in which actual implementation is fully optional. Although SRBA demands that all large cities 500 thousand or more go through this planning process, and provides them with the federal funds to do so, it *does not require* localities to align their land use decisions with the plan. Therefore, like SB 375 it contains a savings clause that stipulates, “Nothing in a Sustainable Communities Blueprint shall be interpreted as superseding the land use authority of municipalities and counties within the MPO Jurisdiction.”⁴⁹²

Unlike SB375, however, SRBA seems to lack a system of compelling incentives to encourage localities to implement their regional blueprint. Primarily, the bill demands that MPOs update their blueprint every four years with an analysis regarding the

⁴⁹⁰ Levy, *Contemporary Urban Planning*, 317

⁴⁹¹ Tauscher, *The Sustainable Regions Blueprint Act*, 2

⁴⁹² Ibid.

achievement of the stated goals.⁴⁹³ This may place implicit pressure on communities to implement those strategies found to successfully reduce VMT and GHG emissions, but it will do little more. According to Schmid, the hope is that by going through this visioning process, communities will realize the immense health and economic benefits they can achieve by actually implementing a sustainable community plan, and thereby *choose* to do so.⁴⁹⁴ The cooperative, capacity-building approach of SRBA and its avoidance of binding mandates will likely prove politically palatable to skeptics and opponents of federal land use reform. However, without compelling implementation incentives it is questionable how effective the measure would ultimately be in stimulating local policy change.

CLEAN TEA

In conjunction with this optional land use planning measure, Representative Blumenaue has drafted a complimentary bill that leverages federal authority in transportation and climate change policy to support land use reform as part of a new more sustainable transportation program. The bill, titled the “Clean Low-Emission, Affordable, New Transportation Efficiency Act” or CLEAN TEA, addresses three existing flaws in the federal transportation program: a lack of clear policy objectives, a lack of uniform standards or metrics of accountability, and weak regional coordination between diverse stakeholder groups. In doing so, the bill explicitly recognizes the relationship between

⁴⁹³ Ibid.

⁴⁹⁴ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

land use policies, transportation outcomes, and climate goals, and integrates transportation and land use strategies to meet defined policy goals.

A pressing problem with the existing transportation program is its lack of a unifying policy objective. Despite the vast sums of federal dollars funneled to states for transportation purposes, \$244.1 billion from 2005-2009,⁴⁹⁵ the federal government has never outlined clear goals or a comprehensive vision for the national transportation system. Kate Rube of Smart Growth America (SGA) says, “There is nothing in existing transportation law that articulates what it is we are trying to accomplish with all this money we are spending on it.”⁴⁹⁶ SGA is a national coalition advocating for land use reform to support more environmentally sustainable, socially equitable growth. The smart growth movement recognizes the relationship between investments in transportation infrastructure and subsequent land use outcomes. It therefore actively supports transportation reforms that integrate land use strategies.⁴⁹⁷ SGA asserts that the federal investment in transportation infrastructure should advance specific goals, and is advocating for legislation that outlines a clear objective for the nation’s transportation system.⁴⁹⁸ Schmid agrees that the transportation program needs to promote better outcomes. Whether using the context of climate change and metrics of carbon emissions

⁴⁹⁵ U.S. Department of Transportation, *A Summary of Highway Provisions in SAFTEA-LU* (Federal Highway Administration, 2005), www.fhwa.dot.gov/safetealu/summary.htm (accessed Feb. 2009).

⁴⁹⁶ Kate Rube (Policy Director, Smart Growth America), in *Discussion with Author*

⁴⁹⁷ United States. Environmental Protection Agency. Development, Community, and Environment Division, Smart Growth Network and International City/County Management Association, *Getting to Smart Growth II : 100 More Policies for Implementation* (Washington, D.C.: Smart Growth Network, 2003), 71-80, <http://purl.access.gpo.gov/GPO/LPS73112>.

⁴⁹⁸ Kate Rube (Policy Director, Smart Growth America), in *Discussion with Author*

or some other objective measurement, the transportation program needs to move towards a performance-based system focused on attaining specific ends.⁴⁹⁹

Since the current program lacks clear goals and objectives, it naturally lacks a system of standards or accountability mechanisms by which to define and measure outcomes. If the federal transportation program is to support a clear set of goals, such as reducing energy consumption and GHG emissions, states must be held accountable for achieving those goals with the significant federal funds they receive. Rube suggests the federal government exercise its power of the purse more actively to induce desirable outcomes, asserting, “Let’s reward places that are meeting these goals, and let’s take money away from places that are not.”⁵⁰⁰ Jordan agrees that localities must be held more accountable for advancing specific goals with their transportation investment decisions. While local government and the private sector can exercise ample discretion over the policy means of achieving specified goals, transportation policy must nonetheless state clearly that there is going to be, “a quid pro quo. If we are going to finance at certain level on land use outcomes, then we want to see outcomes.”⁵⁰¹ Therefore, a reauthorized federal transportation program must identify specific objectives, but not without also defining standards and accountability mechanisms to ensure that they are met.

Finally, existing transportation policy suffers, like local land use policy, from a lack of coordination between diverse stakeholders; public and private, local and regional. Historically, the regional “planning” undertaken by MPOs has been almost

⁴⁹⁹ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁵⁰⁰ Kate Rube (Policy Director, Smart Growth America), in *Discussion with the Author*

⁵⁰¹ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

exclusively transportation focused.⁵⁰² But as Jordan notes, planning policy cannot simply be about transportation, it must bring together housing interests, economic development interests, and environmental protection interests in addition to transportation interests.⁵⁰³ Despite the American preference for local control, diverse metropolitan economies and the lands they occupy resemble *regional systems*.⁵⁰⁴ Yet the myopic isolation of transportation planning from related regional issues has created a disconnect between federal transportation policy and the land use patterns it stimulates. By its very nature, planning is a complex and cross cutting process,⁵⁰⁵ and it must be treated as such. Yet what Jordan describes as a “silo mentality” characterizes transportation policy, “across the board,” at the federal, state, and local levels. While coordination can occur voluntarily among localities and various stakeholders, the costs of organization are often prohibitively high, and the temptation for any single party to free ride on the benefits generated by the organizational action of others is strong.⁵⁰⁶ Federal leadership and assistance is therefore needed and warranted to stimulate greater regional and interdisciplinary coordination in land use and transportation planning.⁵⁰⁷

CLEAN TEA strives to remedy these problems. The act would amend title 49, United States Code, to require States and MPOs to develop plans to reduce GHG emissions from the transportation sector.⁵⁰⁸ It would require states and regions go through

⁵⁰² Compass Community Planning Associates, *A Brief History of Metropolitan Planning Organizations*, 5-6

⁵⁰³ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁵⁰⁴ Wingo, *The use of Urban Land*, 231-254

⁵⁰⁵ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁵⁰⁶ Barrows, *The Roles of Federal, State, and Local Government in Land use Planning*, 7; Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁵⁰⁷ Wingo, *The use of Urban Land*, 250-252

⁵⁰⁸ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 1

the process of producing a plan that would reduce GHG emissions in their region. Ten percent of proceeds from a GHG emissions allowance auction would be reserved to fund transportation projects and land use strategies certified as reducing emissions. These projects would be outlined within a region's adopted plan and certified by the federal government.⁵⁰⁹ The primary argument underpinning this legislation mirrors that of SB 375 exactly: the transportation sector is responsible for 30% of the nation's greenhouse gas emissions and 70% of its oil consumption.⁵¹⁰ Without reductions from this sector, the United States will be unable to meet any significant emission-reduction goals. By recognizing the connection between land use policy, transportation outcomes, and climate goals, CLEAN TEA places land use reform squarely within the compelling frame of climate change policy.

CLEAN TEA is therefore able to leverage climate change policy, in addition to federal transportation policy, as a channel for land use reform. CLEAN TEA is predicated on the adoption of a national cap and trade program for GHG emissions. Under such a system, CLEAN TEA would establish a fund within the US treasury termed the 'Low Green House Gas Transportation Fund' supported by revenues generated from an annual auction of GHG emissions credits.⁵¹¹ The fund will be overseen by the Secretary of the Treasury, who will transfer as necessary resources from the fund to the Secretary of Transportation, in order to provide assistance to states in implementing

⁵⁰⁹ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁵¹⁰ Ibid.; Greene, *Growing Energy, how Biofuels can Help End America's Oil Dependence*, 1-96

⁵¹¹ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 4-6

projects under their transportation greenhouse gas reduction plans.⁵¹² The act would capture 10% of the revenues generated from the auction of emissions credits to fund projects that will create a more efficient transportation system, and will generally support the implementation of the GHG reduction plan. Eligible strategies include funding new passenger rail or transit, or expanding existing systems, supporting transit oriented development (TOD), and enhancing bicycle and pedestrian facilities.⁵¹³ As Schmid notes, dedicating 10% of find revenues to more efficient transportation and land use projects does not match the 30% of national GHG emissions generated by the transportation sector, but it would nonetheless be regarded as a huge success.⁵¹⁴

CLEAN TEA rectifies a foundational flaw in the existing transportation program by articulating clear objectives for transportation outcomes, which place the program in the service the broader national agenda on climate change. The act establishes objectives for the planning process, and articulates acceptable methods of meeting them. The Act states that each state and MPO must establish the goal of reducing GHG emissions from the transportation sector during the 10 year period following its adoption, through increases in mobility options, reductions in VMT, and reductions in the use of petroleum-derived fuel.⁵¹⁵ Therefore, each state and MPO must develop a prioritized list of projects that support the GHG reduction plan. These projects must also be integrated into a state or MPO's long-range transportation plan and transportation improvement

⁵¹² Ibid.

⁵¹³ Ibid.

⁵¹⁴ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁵¹⁵ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 6

plan.⁵¹⁶ CLEAN TEA outlines a variety of strategies states or MPOs may use to ensure their plans meet GHG reduction goals. These include: new transit projects, or expansion of existing systems; intercity passenger rail; enhancement of bicycle and pedestrian facilities; traffic calming measures; additional freight rail capacity; carpool, vanpool, or car share projects; updates to zoning code and other land use regulations; improvements in travel and land use data collection; improvements in travel models measuring GHG emissions and emissions reductions; and transportation control measures as described in the Clean Air Act.⁽¹⁾ CLEAN TEA therefore creates a comprehensive planning process that aligns transportation and land use strategies, to meet the broader climate goals of reducing fossil fuel consumption and GHG emissions.

In addition to using regional planning to focus local transportation decisions around national objectives, CLEAN TEA holds GHG reduction plans to a consistent standard, and holds the system itself accountable for meeting national GHG reduction goals. The plans produced by states and MPOs must meet specific requirements to receive federal certification. States and MPOs must submit their plans to the Secretary of Transportation no later than two years after the adoption of the bill. The Act stipulates that the Secretary of Transportation, in consultation with the administrator of the EPA, shall determine and certify whether a plan is likely to achieve the GHG reduction goal established by the State or MPO, and whether it has complied the requirements for public involvement, consultation, and coordination, as established in subsection 6304 (e).⁵¹⁷ Under CLEAN TEA, The Secretary of Transportation will establish or update standards

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

for transportation data collection, monitoring, planning, and modeling to ensure that the GHG reduction targets and the plans developed to meet them are based upon accurate information and standardized measurements.⁵¹⁸ All plans must be updated every 4 years, and each update must include an analysis regarding achievement of stated goals.⁵¹⁹

CLEAN TEA enhances systemic accountability through an internal review provision that evaluates the extent to which planning processes actually contribute to reducing fossil fuel consumption and GHG emissions in the transportation sector. Beginning 5 years after the adoption of the bill, and at 5 year intervals thereafter, the administrator of the EPA must submit a report to the relevant committees of the House and Senate that describes:

- 1) The *aggregate* (i.e. national) reduction in greenhouse gas emissions from the transportation sector, as a result of the implementation of state and regional plans.
- 2) The impact of other federal policies and programs on CLEAN TEA.
- 3) Changes in federal law that could improve the performance of the plans.
- 4) Regulatory changes planned *to improve* the performance of the plans.⁵²⁰

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

⁵²⁰ Ibid.

By holding state accountable to meeting specified transportation goals, the federal government can indirectly encourage the local land use reforms needed to meet those goals. This approach may help CLEAN TEA dodge the political resistance that has historically accompanied a direct approach to land use reform. According to Jordan, land use reform advocates are trying to *avoid* arguing for explicit federal biases towards a new approach to development and land use, despite the “strong case” that could be made for such a policy. Instead they are pushing for reform based on policy outcomes. “I don’t think we need to be overly prescriptive with local communities,” Jordan says, “but pushing them towards great accountability [in terms of] outcomes, will drive them towards better development patterns.”⁵²¹

This internal review provision is significant not only because it is an essential accountability mechanism for the program itself, but because it explicitly recognizes the potential for substantial interaction between diverse federal policies. Points two and three signify an attempt to break down the walls that have historically isolated the planning and development of transportation projects from related policy spheres. This language opens the door to a more nuanced and integrated approach to federal transportation policy, one that considers the relevant issues of economic development, housing, environmental, and land use policy, rather than shuts them out. This provision therefore reflects an emphasis on collaboration and coordination that is articulated more explicitly elsewhere in the bill.

CLEAN TEA is structured as cooperative piece of legislation. As such, it uses federal resources to build state and local capacity, and to encourage more efficient land

⁵²¹ Ibid.

use strategies and transportation outcomes. CLEAN TEA builds local capacity to plan more effectively for regional transportation investment in three ways. First, it catalyzes collaboration among various stakeholders in the production of regional plans. The bill requires that each plan is prepared with “Strong public and stakeholder involvement.” This is defined to include the use of, “public comment periods, scenario planning, the most recent models and public charrettes,” with “charrettes” defined collaborative design sessions held over two or more days.⁵²² Therefore, despite the federal standards CLEAN TEA imposes on the development and outcome of GHG reduction plans, the bill strives to ensure that the substance of the plans remains a product of coordinated local vision. As Jordon notes, anytime legislation touching upon land use and development “smacks of being prescriptive,” local and state governments put up staunch resistance.⁵²³ Thus it is crucial that the plans be perceived among local communities as endogenously produced, rather than externally imposed. Ample public involvement in the development of regional transportation GHG reduction plans will empower communities to determine *how* they meet the objective of reducing transportation GHG emissions, and help mitigate accusations of excessive federal interference in the local planning process.

Secondly, CLEAN TEA also strengthens local capacity by requiring that each GHG reduction plan is prepared with “strong regional coordination.” In doing so, it helps alleviate the “silo mentality” that plagues the current transportation program. Whether created by an MPO or some other state entity, the plan must be produced in consultation with diverse local and state interests. These include local and state housing, economic

⁵²² Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁵²³ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 11, 2

development, land use, environmental, and transportation agencies.⁵²⁴ This provision ensures that local transportation development decisions will not persist in a vacuum, disregarding their influence on a host of local, regional, and national issues. Such cross-disciplinary coordination is essential if diverse local, state, and federal policies are all to align behind the national objectives of reducing fossil fuel consumption and GHG emissions. The bill stipulates that any “updates to zoning or other land use regulations and plans,” identified in section 6304 (b) must promote greater coordination between local, regional, and state plans, or support transit-oriented or mixed-use development, in order to be considered an valid component of the transportation GHG reduction plan (and therefore eligible for funding).⁵²⁵ Hence, the bill directly acknowledges the intimate relationship between local land use regulations and investment in transportation infrastructure. This recognition is a definitive step towards aligning transportation and land use goals, and promoting coordination of those goals at the regional, state, and national level.

Finally, CLEAN TEA advances local planning capacity in an even more significant way, by addressing one of the most formidable challenges states and regions face in undertaking comprehensive transportation planning: accurate modeling. Writing models that can accurately predict the relationship and interaction between transportation and land use in metropolitan areas is intensely difficult.⁵²⁶ As of 1996 less than a dozen agencies and regions throughout the nation employed land use modeling to predict

⁵²⁴ Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁵²⁵ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 11

⁵²⁶ *Ibid.*

location of houses and jobs, even fewer attempted to integrate land use and transportation models.⁵²⁷ According to Ben-Elia, comprehensive urban models integrating transportation and land use planning reflect the immense complexity of urban environments, requiring large amounts of data needed and sophisticated mathematical computations.⁵²⁸ The fiscal and intellectual resources needed to write and use such regional models presents an insurmountable hurdle to many states and MPOs. California, which relies upon integrated models to implement SB375, is a national anomaly. It has invested an unusually large amount of resources in planning personnel, and therefore possesses an unusual concentration of the technical experience and intellectual capacity needed to create these models.⁵²⁹ According to Schmid, there remains a very small number of MPOs in other regions that have the ability to plan and model effectively. As of 2008, even Oregon, a state that has avidly pursued modeling capabilities, lacked models that could accurately predicting how specific policy changes will impact GHG emissions from transportation and land use decisions.⁵³⁰ Thus, there is a crucial role for the federal government to raise other regions up to the level of technical expertise and analytical capacity found in California.

CLEAN TEA advances this objective by putting federal resources to use in researching and developing the modeling tools necessary for effective, integrated

⁵²⁷ Cambridge Systematics and Parsons Brinkerhoff, Quade and Douglass, *Making the Land use Air Quality Connection: An Analysis of Alternatives* 1000 Friends of Oregon, [1996] (accessed Oct. 2008).

⁵²⁸ Ibid.

⁵²⁹ Eran Ben-Elia, "Transportation Impact Statement (TIS): A New Tool for Transportation and Land use Planning," *Environment and Planning* 35, no. 12 (2003), 2179, <http://www.envplan.com/abstract.cgi?id=a35239> (accessed Oct. 2008).

⁵³⁰ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

regional transportation and land use planning. The bill stipulates that the Secretary of Transportation and the Administrator of the EPA shall arrange for The Transportation Research Board of the National Academy of Sciences to produce a report, one year after the adoption of the bill, detailing how to best improve: research tools to assess the effect of transportation plans and land use plans on motor vehicle use rate and GHG emissions; data resources needed by the federal government to assess GHG emissions data from the transportation sector; and policies to reduce GHG emissions from the transportation sector.⁵³¹ Based upon the information and recommendations contained within the report, the Secretary of Transportation shall establish or update standards for transportation data collection, monitoring, planning, and modeling.⁵³² Thus, under CLEAN TEA the federal government takes the lead in researching and developing the best practices, data collection standards, and modeling techniques needed for effective planning. Though it does not remove *all* obstacles of cost or personnel expertise, this process will pave the way for states and MPOs to develop more effective modeling, by allowing them to direct scarce resources towards personnel training and acquisition, rather than research and development.

Lastly, CLEAN TEA uses the cooperative system of resource sharing to entice implementation of regional GHG reduction plans. The federal funds made available through CLEAN TEA act as carrots to the states, encouraging them to align state policy, in this case transportation investment decisions, with national objectives. Presuming the

⁵³¹ Ibid.; Tucker Libby, "State Policy Makers Lack Data for Addressing Climate Change," *Daily Journal of Commerce* 29 May 2008, 2008, <http://www.djcoregon.com/articleDetail.htm/2008/05/29/State-policy-makers-lack-data-for-addressing-climate-change-A-new-Oregon-commission-on-global-warming> (accessed 21 Nov. 2008).

⁵³² Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 11-12

implementation of a national cap and trade system for carbon, the auction of emissions credits would provide a revenue stream to fund projects that create a more efficient transportation system, and advance national climate goals.⁵³³ This creative strategy echoes a modern day internal improvements program. Just as Gallatin and Clay strove to harness the proceeds of western land sales to finance the infrastructural development of the union, Rep. Blumenauer's proposal would capture the proceeds of a new federal system to finance, but also reshape the nation's transportation infrastructure. Today, such a novel and innovative approach to the funding the national transportation program is especially poignant. According to Jordan, the current status of the program is "dire." The old system, in which a gas tax-financed trust fund flows into federal highway funding, is "breaking down" and essentially bankrupt. In terms of funding infrastructure development, "the gas tax is not the financing solution we need" says Jordan. Rather, national leaders need to find creative ways to "meet our environmental obligations while capturing value" to provide adequate funding for infrastructure development.⁵³⁴

Representative Blumenauer's strategy of capturing value from a national cap and trade system, and channeling it into the states is precisely such a solution. Research released by the Brookings Institute suggests a national cap and trade system could generate significant government revenue. Under less aggressive implementation trajectory, revenue would rise from \$119 billion in 2015 to \$473 billion in 2050. Under a more aggressive trajectory, revenues could hit \$269 billion as early as 2015.⁵³⁵ Capturing

⁵³³ Ibid.

⁵³⁴ Ibid.

⁵³⁵ Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

just 10% of these revenues, as CLEAN TEA would do, would produce a generous stream of resources to channel towards sustainable transportation and land use strategies. These targeted federal funds will stimulate change within *willing* communities, which might otherwise lack the resources to undertake projects such as zoning law revision. Rube notes that local officials are at times willing to pursue more sustainable land use policies, but are often confronted by insurmountable obstacles of cost. Updating zoning law, for example, is extremely expensive. It takes a lot of staff and expertise, and currently most local governments “just don’t have those resources.”⁵³⁶

In addition to channeling funds towards goal-oriented transportation and land use measures, CLEAN TEA changes the federal cost share equation for many transportation projects. Historically, states have needed a larger percentage match of project costs for alternative transportation projects (i.e. light rail) than for highways and roads.⁵³⁷ CLEAN TEA helps level the playing field, with the federal government using revenues from the auction fund to cover 80% of the cost of projects included within a transportation GHG reduction plan.⁵³⁸ CLEAN TEA also ensures that federal funds are allocated on the basis of the *quality* and *ambition* of the GHG reduction plans produced by states and MPOs.⁵³⁹ While the current transportation program actually rewards states for consuming more fossil fuel, by giving them greater transportation aid, this provision of CLEAN TEA would reward states for actively pursuing the opposite: reducing VMT, fossil fuel consumption, and subsequent GHG emissions. Thus, CLEAN TEA will not only secure a

⁵³⁶ Stavins, *A U.S. Cap and Trade System to Address Global Climate Change*, 58

⁵³⁷ Kate Rube (Policy Director, Smart Growth America), in *Discussion with Author*

⁵³⁸ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁵³⁹ Blumenauer, *Clean, Low Emission, Affordable, New Transportation Act*, 15

funding source for future infrastructure development, it will ensure those resources flow to the projects that support an *efficient* transportation system in the Twenty First Century.

The careful construction of CLEAN TEA and SRBA to focus on goal setting, local and state capacity building, and incentive-based implementation position the bills well to avoid conservative opposition in Congress. However, powerful interest groups remain opposed to many of the goals of these bills, such as the national road and highway lobby, represented by AASHTO. To take on AASHTO, an equally strong movement will have to build behind these bills. Fortunately, a new coalition has formed in Washington to advocate for a more efficient, flexible, sustainable transportation system:

Transportation for America. Transportation for America is composed of diverse stakeholders including environmental, land use, and transportation groups, as well as organizations such as the National Association of Realtors (NAR). Groups such as NAR are not traditionally involved in transportation and climate change policy, but are coming to see their role in it.⁵⁴⁰

In contrast to AASHTO, Transportation for America is the “new game in town,” the “renegades” who are bringing a fresh set of interests to bear on Washington.⁵⁴¹ In order to be successful, however, Transportation for America must continue to diversify its membership to avoid being stereotyped as the “crazy environmentalists,” or a purely “leftist” organization, as that would undermine its influence.⁵⁴² It must continue to cast its net as broadly as possible. With this in mind Transportation for America has, “very

⁵⁴⁰ Ibid.

⁵⁴¹ Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in *Discussion with the Author*

⁵⁴² Ibid.

intentionally” expanded beyond local governments, transit agencies, and bicycle and pedestrian groups, to build alliances with the public health community, senior citizen mobility advocates, and even organizations working on food and housing issues.⁵⁴³ SB 375 demonstrated the importance of coalition building. A deep and diversified coalition will be equally crucial at the national level to counterbalance the sway of AASHTO and marshal the Congressional support needed to pass these bills into law.

Outlook

In light of the bleak history of federal land use legislation, and the current political landscape in Washington, what then are the prospects of these emerging bills? From a political perspective, the odds for success look reasonably strong. These two bills are emerging at a time when unprecedented political momentum and public support are building to address the problems of global climate change and energy independence. This momentum appears to be bringing the private sector to the table in support of innovative strategies to curb energy consumption and thereby reduce greenhouse gas emissions. By framing land use policy in the context of these issues, and integrating land use strategies into comprehensive new transportation program that seeks to address them, SRBA and CLEAN TEA leverage a compelling argument for land use reform. Positioned with action channels of uncontested federal authority, transportation and environmental policy, the land use components of these bills are well poised for success. Furthermore, both the

⁵⁴³ Ibid.

substance and structure of these bills promises to mitigate conservative opposition in Congress, and ease local concerns over federal interference in local land use authority.

Both bills avoid land use mandates, and carefully raise land use reform in the context of the transportation outcomes it impacts. SRBA, the more explicitly land use-focused of the two, is a capacity-building, process-oriented *purely optional* measure. CLEAN TEA issues mandates only in regards to transportation outcomes; leaving states and localities the discretion of how to attain those outcomes, but raising certain land use strategies as acceptable methods. It is unquestionable that these bills would constitute significant progress towards land use reform, simply by articulating clear national goals for land use policy outcomes. Yet the question remains, how *effective* would these measures be in stimulating actual change? Both bills enhance the capabilities of local governments to reform their land use policies, and by leveraging federal transportation dollars, CLEAN TEA strongly *encourages* localities to undertake certain land use reforms. However, neither bill contains a crucial component, one that analysts expect will prove fundamental to the success of SB 375 in California: private sector incentives. Private decisions have dramatic effects on land use, and it is crucial that private actors are incentivized to place development in prudent locations.⁵⁴⁴ If passed, SRBA and CLEAN TEA will open the door to land use reform at the local level, but they cannot compel local governments to walk through it. To bring about true systemic change, private actors must take that step willingly.

⁵⁴⁴ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

5

SRBA AND CLEAN TEA IN PERSPECTIVE: IDENTIFYING A
WEAKNESS AND CONSIDERING A SOLUTION

A PROPOSAL

Introduction

Today, national land use policy appears to finally be evolving, to be catching up with the rest of the federalist system, which has grown and changed so dramatically over the course of the Twentieth Century. The United States now boasts a robust and involved central government that is active in diverse policy spheres and working to confront the problems of an ever-growing, increasingly complex society.⁵⁴⁵ California's SB 375 and the nationally pending CLEAN TEA and Sustainable Regions Blue Print Act (SRBA) reflect this evolution. They are evidence of a modern recognition that the social impact of local and regional land use decisions cannot persist unacknowledged and unaddressed. These bills attempt to align the outcomes of public and private land use decisions with the common interest, while infringing upon the substance of those decisions as little as possible. While SB 375 is safely passed, the national bills have yet to become law.

⁵⁴⁵ Marion Clawson, *The Federal Lands Revisited* (Washington, D.C.; Baltimore: Resources for the Future; Distributed by the Johns Hopkins University Press, 1983), 29-44.

Presuming their passage, what will be their significance for the future of national land use? How effective will they be in stimulating actual reform?

CLEAN TEA and SRBA would undoubtedly mark the Federal Government's most significant legislative foray into the sphere of explicit land use policy to date, at least as pertaining to land use planning and development. For that alone they may be praised as commendable signs of much-needed leadership. Yet it is worth examining a weakness that both pending bills currently share, and considering a complimentary policy measure that would not only rectify this flaw, but would considerably enhance the effectiveness of these bills in stimulating national land use reform. As this proposal will demonstrate, creative strategies will have to be employed, and all opportunities leveraged if the nation's incoherent, uncoordinated, and utterly inefficient land use policies are to change for the better.

A Missing Component: the Lack of Private Sector Incentives

An important distinction that differentiates CLEAN TEA and SRBA from California's SB 375 is the lack of private sector incentives within the two national bills. They exclusively target the public sector, and neither one currently contains incentives such as SB 375's CEQA review exemption that would influence land use decisions among private actors. Both pieces of legislation are still in the developmental stage and could expand to include private sector incentives, but if passed without such provisions these land-mark pieces of legislation would fall short of reaching their full potential to catalyze change. As they are, both proposed bills would significantly promote reform

through the channel of the public sector; encouraging localities to adopt policies that accommodate more sustainable land use decisions. Hence, CLEAN TEA and SRBA attempt to alter the legal framework in which private decisions are made, and thereby open the door to more sustainable private decisions.

Essentially, these bills attempt to remove the market barriers that federal, state, and local policies have put in place.⁵⁴⁶ Currently, under ubiquitous zoning laws, development displaying the sustainable characteristics of a town like Alexandria Virginia- pedestrian-friendly, mixed use, compact development- simply cannot be built. It is illegal. As Duany explains, layers of zoning regulation preclude the adoption these traditional, more efficient development types and instead *mandate* intensely wasteful development: single use, low density, auto-oriented sprawl.⁵⁴⁷ Such regulations, according to Rube and Jordan, are interfering with the operation of the private market, and constraining the choices that private developers face.⁵⁴⁸ University of Michigan professor of urban and regional planning, Jonathan Levine, characterizes current land use planning as a “highly regulated” mechanism that “lowers development densities, separates land uses, and mandates large roadways and parking facilities.” It is, in other words, “a template for urban sprawl, rather than being an inevitable product of Americans' transportation, land-use, and housing preferences.”⁵⁴⁹

⁵⁴⁶ See Chapter 2

⁵⁴⁷ Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, *Suburban Nation : The Rise of Sprawl and the Decline of the American Dream*, 1st ed. (New York: North Point Press, 2000), 16-18.

⁵⁴⁸ Kate Rube (Policy Director, Smart Growth America), in discussion with author, 2009.; Jason Jordan (Lobbyist, Advocacy Associates), in discussion with the author, 19 Feb. 2009, 2009.

⁵⁴⁹ John Caulfield, "Walk this Way," *Builder Magazine*, September 6, 2007, 2007, , <http://www.builderonline.com/business/walk-this-way.aspx> (accessed March 2009).

Clearly, in order to secure more sustainable land use outcomes that contribute to the United State's climate and energy goals, reforming this regulatory framework is vital. Yet it is also insufficient. William Craven identified the CEQA review exemption as an absolutely pivotal component of California's SB 375.⁵⁵⁰ As an incentive that would strongly entice developers to align their decisions with regional Sustainable Community Strategies, the CEQA review exemption attempts to capture the potential of the private sector to catalyze change. Private actors have a profound impact on the built environment,⁵⁵¹ and while the regulatory framework in which private decisions are made greatly influences land use outcomes, at the end of the day individual actors will largely determine the nature of America's growth patterns. Private decisions must support public sector action if truly systemic change is to occur. Fortunately, today private actors face a market that is rapidly shifting of its own accord, and shifting in a direction favorable to proponents of land use reform. There is a great opportunity for the public sector to leverage emerging market trends, and create a system of incentives that targets private actors. If this can be done effectively, then over the coming century, the full might of American capitalism, entrepreneurialism, economic growth, and physical expansion could be channeled out of the wasteful framework of sprawl and into a more sustainable, energy efficient system.

⁵⁵⁰ William Craven (Chief Consultant, Senate Natural Resources and Water Committee, California State Senate), in discussion with the author, Jan. 2009, 2009.

⁵⁵¹ *Kate Rube (Policy Director, Smart Growth America), in Discussion with Author*

After The Sub-prime Crisis: A Shifting Market

Current research suggests that the market will become a key driver in changing prevailing land use decisions to favor more energy efficient development patterns.⁵⁵² As Rube notes, “smart growth” communities are “what people want, it’s where the market is going.” The demand for housing in “location efficient areas” where costs of transportation are lower, thanks to greater proximity to downtown centers and increased transit options, is growing. Meanwhile, the market is saturated, if not over capacity, for single-family detached, suburban housing.⁵⁵³ According to extensive research conducted by Arthur C. Nelson, Presidential Professor and Director of Metropolitan Research at University of Utah, there are several factors contributing to this market shift: one is demographic, the other is changing consumer preferences. Of the two, statistics suggest that demographic forces promise to become the true juggernaut of change in the real estate market. The nation is on the cusp of a demographic wave in which the baby boom generation will be hitting 65. This wave will grow and crest from 2010 to 2025.⁵⁵⁴ Nelson’s research shows that 51% of seniors want to retire in a city or in a suburb close to a city center⁵⁵⁵. These statistics support the argument that mobility options become increasingly important as individuals age, considering that private automobile travel may become increasingly difficult.⁵⁵⁶ Simultaneously between 2000 and 2040 growth in single-person households is predicted to be twice that of families with

⁵⁵² Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

⁵⁵³ Ibid.

⁵⁵⁴ Arthur C. Nelson, "Mountain Megaopolis, Long-Term Development of the Mountain Megapolitain Areas" (Albuquerque, NM, 23 January 2009, 2009).

⁵⁵⁵ Ibid.

⁵⁵⁶ Duany, Plater-Zyberk and Speck, *Suburban Nation : The Rise of Sprawl and the Decline of the American Dream*, 123

children.⁵⁵⁷ This trend suggests that urban amenities catering to the lifestyles of single professionals will become increasingly in demand. Together, these shifts are creating greater demand for condominiums and townhouses closer to urban centers, as well as a growing preference for smaller-lot detached homes.⁵⁵⁸

Secondly, consumer preferences are changing in light of the sub-prime mortgage crises of 2008. These preferences are reflected in housing values across the nation, which have for the most part taken a dramatic plunge. Although housing prices for condominiums have fallen along with those of single-family homes, Nelson's data shows that between comparable units, prices for condominiums have declined *less and more slowly*.⁵⁵⁹ Furthermore, taking the DC metro area as an example, it appears that areas closer to urban centers are weathering the crises better than more distant suburbs. The rate of home foreclosures in the DC metro area increases dramatically outside of the reach of Washington's primary public transportation system, metro rail.⁵⁶⁰ These patterns suggest that real estate markets in and near urban centers will prove more robust in the years to come. As Jordan notes, only 10% of existing housing stock is in or near urban, mixed-use, walkable areas served by transit. Thus, even if overall market demand for these communities represents just a quarter of total demand, the future potential for *growth* exists in more efficient central locations, rather than the suburban fringe.⁵⁶¹

⁵⁵⁷ Nelson, *Mountain Megaopolis, Long-Term Development of the Mountain Megapolitan Areas*, 24

⁵⁵⁸ Caulfield, *Walk this Way*

⁵⁵⁹ Nelson, *Mountain Megaopolis, Long-Term Development of the Mountain Megapolitan Areas*, 17

⁵⁶⁰ *Ibid.*

⁵⁶¹ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

If these estimates are correct, the private sector will perceive more energy efficient, environmentally sustainable land use decisions to be consistent with their economic self-interest. However, until public sector reform takes hold, they will continue to confront legal and regulatory barriers in the form of local zoning laws and regulations, which will prevent them from meeting growing market demand. The passage of SB 375 illustrated that the private sector can be a key partner in stimulating public sector reform. Had the developers and homebuilders associations not supported the bill, it likely would not have passed.⁵⁶² The opportunity exists for the federal government to craft legislation that will help place the private sector on the side of public land use reform, simply by tying the activities of private developers into a larger system: a national carbon market created within a cap and trade program. In January 2009, President Obama called upon Congress to deliver a national cap and trade program to help cut the America's carbon emissions and stem global climate change.⁵⁶³ Though it is yet unclear as to whether such legislation will be successful, and precisely what form the program would take, it is worth considering how such a system could be leveraged as vehicle of land use reform in the private sector.

⁵⁶² Tom Adams (President, California League of Conservation Voters), in discussion with the author, January 2009.

⁵⁶³ Barack Obama, *Address by the President to the Joint Session of Congress* (United States Capitol: , 2009), 9.

***LUEE Credits: Leveraging a Cap and Trade System to Create Private Sector
Incentives***

A cap and trade system would place a limit or “cap” on the aggregate emissions of CO₂ and/or other greenhouse gasses emitted by a group of regulated sources. It does this by creating a limited number of tradable emissions allowances for a given period, and requiring firms to surrender a quantity of allowances equal to their emissions over that period. Allowances are at first either allocated or auctioned off, after which they may be traded among all regulated parties. The need to surrender allowances and the ability to trade them establishes a price on emissions and gives firms an incentive to reduce their emissions.⁵⁶⁴ According to the Brookings Institute, a well-designed cap and trade system should contain a provision for emission “offsets” in addition to the standard emissions allowances.⁵⁶⁵ An offset represents a reduction in CO₂ emission or the sequestration (capture) of carbon outside of regulated sectors.⁵⁶⁶ It is essentially a credit, quantified and sold by tons of CO₂, which an individual, firm, or institution can purchase to counterbalance his/her/its greenhouse gas emissions. Sources of offsets include renewable energy projects, energy efficiency projects, and biological sequestration

⁵⁶⁴ Robert Stavins, *A U.S. Cap and Trade System to Address Global Climate Change* (Washington D.C.: The Brookings Institution,[2007]) (accessed 26 March 2009).

⁵⁶⁵ Ibid.

⁵⁶⁶ Reggi Inc., *Regional Greenhouse Gas Initiative: Executive Summary* (New York: Reggie Inc., www.awm.delaware.gov/SiteCollectionDocuments/RGGI_Executive%20Summary.pdf (accessed Oct. 2008)).

(carbon capture) projects (i.e. reforestation).⁵⁶⁷ Offsets are an effective way to encourage emissions reductions in sectors outside of the cap and trade program.⁵⁶⁸

Offsets provide an excellent way to leverage the carbon saving potential of certain sectors that are too costly, complex, or otherwise infeasible to be incorporated into the cap and trade system directly.⁵⁶⁹ Due to quantitative uncertainty and coordination costs among numerous actors, the land use sector likely falls here. The Brookings Institute recommends incorporating carbon savings from “land management techniques” into a complementary system of offsets. However, Brookings considers land as a source of offsets only in regards to biological sequestration through reforestation techniques or changed agricultural practices.⁵⁷⁰ Yet, through its influence on the transportation sector, the land use sector can be a source of emissions *reductions*, not merely a carbon sink. Thus, within the context of a federal cap and trade system, the potential exists to define a new source of carbon offsets: Land Use Energy Efficiency credits.

Now that the technical expertise exists to write integrated land use- transportation demand models that predict the impact of land use choices on vehicle use and GHG emissions, it is possible to measure the CO₂ impact of regional development decisions.⁵⁷¹ Therefore, the potential exists to create an assessment system in which the carbon impacts of regional land use decisions could be evaluated and measured against a baseline model of regional development. Such a baseline model, like that which would be

⁵⁶⁷ Harvard Green Campus Initiative, "Carbon Offsets Fact Sheet" (fact sheet, Cambridge, , greencampus.harvard.edu/cre/documents/CarbonOffsetsfactsheet.pdf (accessed 26 March 2009).

⁵⁶⁸ Stavins, *A U.S. Cap and Trade System to Address Global Climate Change*, 28

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Great Communities Collaborative, "URBEMIS: A New Era in Traffic Modeling" (Brief, 2009) (accessed March 2009).

required under SRBA, would extrapolate current development, travel, and demographic trends into a given future period, and estimate the carbon impact of business-as-usual growth. Theoretically, a given development project could then be assessed on the basis of its contribution or reduction to regional GHG emissions from the transportation sector, as relative to this baseline. Such an assessment could potentially incorporate on-site “green-building” practices to better capture the over all GHG implications of a land use decision, or it could restrict analysis to carbon impacts stemming from travel demand. The latter alone would provide a significant opportunity to generate valuable offsets.

The ability to derive carbon offsets from land use decisions creates the potential to allocate those credits to actors responsible for the decisions. For example developers who have undertaken emission-saving projects would be eligible to receive a commensurate quantity of offsets. These credits, which could be deemed *Land Use Energy Efficiency* (LUEE) Credits, would correspond to a defined quantity of carbon saved in tons. They could then be sold as regional offsets, available for purchase to regulated polluters throughout the nation. The offset assessment process would have to be conducted on a regional level, in order for models to accurately capture the physical and political variations among local environments. However the sale of LUEE credits should not be regionally restricted, as the source of CO₂ emissions is irrelevant to the cumulative atmospheric levels, and regional restrictions on offsets are generally discouraged⁵⁷². Private developers would then have a valuable asset, simply as a result of making land use choices that advance the national goals of reduced fossil fuel consumption and GHG

⁵⁷² Stavins, *A U.S. Cap and Trade System to Address Global Climate Change*, 28-29

emissions. Even without a national cap and trade program, a robust market for offsets has already emerged. Stimulated in part by the United States' refusal to ratify the Kyoto treaty, environmentally conscious consumers, corporation, and institutions are now purchasing offsets to negate their carbon contributions.⁵⁷³ Researchers' best estimates already place the worth of the market for offsets as high as \$100 million.⁵⁷⁴ Within the framework of a national carbon cap and trade system LUEE credits would become valuable currency and depending upon the scale of projects, potentially a significant boost to developers' bottom-lines.

The value of LUEE offset system would not be limited to the private sector, however. The public sector is also active in development, and could also capture the value generated by emission-reducing projects. For example, were a city or state to build a light rail project rather than an additional high capacity road, it too should be eligible to receive LUEE credits proportional to the tons of CO₂ saved by that policy change. The state or city could then monetize its LUEE credits as an additional source of revenue. Such a possibility is especially poignant in light of the dire situation that confronts the national transportation program. As Jordan argued, the gas-tax financed system of infrastructure provision is "breaking down" and a new financial model is needed. Saleable offsets from sustainable transportation projects would provide cities and states with an additional stream of revenue that could be used to further fund transportation infrastructure development. The Brookings Institute estimates that under a national cap

⁵⁷³ Ben Elgin, "Another Inconvenient Truth," *BusinessWeek Magazine*, 26 March 2007, 2007, , http://www.businessweek.com/magazine/content/07_13/b4027057.htm (accessed 27 March 2009).

⁵⁷⁴ Ibid.

and trade system implemented on a “less aggressive” schedule, the value of offsets could hit \$18 per ton CO₂ by 2015 and \$70 per ton by 2050. Under more aggressive implementation scenario, their value could hit \$41 per ton in 2015 and \$161 per ton in 2050.⁵⁷⁵ Thus, LUEE sales could become a significant source of revenue for a cash-strapped state and local governments. Because of its influence on transportation emissions, the land use sector has the potential to become a major player in the offset market, but practical barriers must first be overcome, and potential complications must be researched and addressed. There is the opportunity for the federal government to take a leading role in these areas by lending its resources, expertise, and coordinating capacity to such an initiative.

Potential Obstacles: Difficulties Posed by Offsets

There are several potential problems with carbon offsets, both general and specific to the case of hypothetical LUEE credits. Generally, the largest problem faced by offsets is their objective validity, i.e. how accurately they reflect actual carbon savings. Two questions must be addressed to ascertain the validity of an offset. First, is it additional? And second, is it certified? The first question is essentially asking whether or not an offset activity would have occurred *in the absence of a payment*, i.e. would it have happened anyway.⁵⁷⁶ If an emission reduction would have happened regardless of the offset payment, it is not additional for it is not offsetting any *additional* carbon emissions.

⁵⁷⁵ Stavins, *A U.S. Cap and Trade System to Address Global Climate Change*, 58

⁵⁷⁶ Harvard Green Campus Initiative, *Carbon Offsets Fact Sheet*

The emissions “savings” it supposedly represents would never have been emitted in the first place. For example, in an investigation of six offset deals, Business week Magazine found that five of the six companies selling their emissions reductions as offsets were not influenced by the prospect of selling offsets in their decision to cut emissions. They would have cut emissions regardless.⁵⁷⁷ Therefore, an offset that is not additional misrepresents actual carbon savings. They are the climate equivalent of recording financial earnings that do not exist, and would undermine the effectiveness of a cap and trade system. Discussing the danger of inaccurate offsets, Anja S. Kollmuss of the Tufts Climate initiative said, “We cannot solve the climate crises by buying offsets and claiming to be carbon neutral...nature does not fall for accounting schemes”.⁵⁷⁸

Certification, the second problem facing offsets, is supposedly an objective mark of an offset’s validity, as it implies that a third party has assessed an offset, checked for its additionality, and generally determined its accuracy. The standardization and careful regulation of the certification process is vital if offsets are to become an acceptable part of a national climate regime. Stavins emphasizes that, “offsets must be given only for real, additional, verifiable, and permanent reductions in emissions... strict criteria should be developed for allowing the generation of approved offsets”.⁵⁷⁹ At the moment, no such criteria exist. Currently there is no regulation over the offset market, no centralized body determining what constitutes an offset and what qualification must be met for

⁵⁷⁷ Elgin, *Another Inconvenient Truth*

⁵⁷⁸ Ibid.

⁵⁷⁹ Stavins, *A U.S. Cap and Trade System to Address Global Climate Change*, 29

certification.⁵⁸⁰ Jennifer Martin of the Center for Resource Solutions says, “right now, it’s a no-mans land out there”⁵⁸¹. If offsets are to be incorporated into a national cap and trade program at all, the federal government must act to address these problems. It could do so in two possible ways. It could establish governmental assessment agencies throughout the states, to ensure that all offsets were additional and properly certified according to uniform standards. Or, it could establish comprehensive certification standards in specified offset sectors, and then allow the private sector to carry out certification work. However, the second option raises the question of accountability, and would likely necessitate some sort of auditing procedure to ensure that third party certification organizations were conforming to the standards appropriately.

Hypothetical LUEE credits would face unique challenges regarding accuracy, in addition to those posed by additionality and certification. Namely, the modeling processes by which emissions reductions are quantified are complex and a potential source of error. Though the sophisticated models needed to make these estimations exist, they are not widely distributed throughout the nation. According to Jordan, capturing the offset potential of the land use sector is a “perfectly reasonable” proposition, but calls attention to the fact that modeling capabilities throughout the nation are “in desperate need of attention.”⁵⁸² Indeed, the conventional, widely used method of estimating the vehicular travel generated by development employs only a basic model. Prescribed by the Institute of Traffic Engineers, this simplistic model requires only two variables to be

⁵⁸⁰ Elgin, *Another Inconvenient Truth*; Paul Schmid (Legislative Director, Office of Representative Ellen Tauscher, U.S. House of Representatives), in discussion with the author, 20 Feb. 2009, 2009.

⁵⁸¹ Elgin, *Another Inconvenient Truth*

⁵⁸² Jason Jordan (*Lobbyist, Advocacy Associates*), in *Discussion with the Author*

taken into account: the *type* of development, and the *amount* of new building.⁵⁸³ It completely ignores the context and precise characteristics of development, which significantly impact the automobile use (and thus CO₂ emissions) generated by development. This simplistic model is completely incapable of estimating GHG emissions from a given land use change. There will need to be substantial investment in capacity at the regional level, in order to bring the nations' metropolitan areas up to date, and up to the level of expertise needed to write the more accurate, more sophisticated models that will be the foundation of any land use offset program; models such as URBEMIS.⁵⁸⁴

URBEMIS is the product of a collaborative effort between California air quality management districts and the California Department of Transportation, which together strove to capture all the key variables that influence automobile trip generation.⁵⁸⁵ The URBEMIS model objectively predicts traffic in a way that takes the context of surrounding areas into account, and provides the opportunity to quantify the impact of development's location, its physical characteristics, and existing traffic mitigation programs. It allows for following inputs: land uses (type and amount of development), mix of uses within ½ mile of the site, local services and retail within ½ mile of the site, transit access (total busses within ¼ a mile and total trains within ½ a mile), bicycle and pedestrian infrastructure, the percent affordable units, and existing transportation demand mitigation strategies. The model's diversified outputs include: total trips and total VMT

⁵⁸³ Great Communities Collaborative, *URBEMIS: A New Era in Traffic Modeling*, 1-2

⁵⁸⁴ Jason Jordan (Lobbyist, Advocacy Associates), in *Discussion with the Author*

⁵⁸⁵ Great Communities Collaborative, *URBEMIS: A New Era in Traffic Modeling*, 1-2

generated by projects; annual tons of CO₂ and various other greenhouse gasses and pollutants and a summary of the demand mitigation policies applied and the percent reduction they achieved in preceding outcome variables.⁵⁸⁶ Therefore, the VMT and GHG emissions estimates produced by URBEMIS accurately account for the complexity of metropolitan areas, and allow policy makers to predict the effect of various policy measures on emissions outcomes.

Conclusion

URBEMIS represents the level of model sophistication necessary for a national LUEE credit assessment program to function. In order to get there, state and regional planning entities will need the aid of the federal government. As Jordan described, there must be a major capacity building initiative at the national level. The passage of CLEAN TEA would lay the foundations for such an effort, as the bill contains explicit provisions that establish modeling standards, support modeling research and development, and thereby strengthen local capacity. Yet, the federal government must go beyond this preliminary measure to catalyze meaningful change. The real estate market, which is inextricably tied to private land use decisions, is beginning to favor more sustainable communities. The public sector must act swiftly to leverage this opportunity to work *with* rather than against the market. To harness market forces as a vehicle for land use reform, the federal government must establish a market framework that supports and encourages appropriate private sector activities. In conjunction with the policy framework that SRBA

⁵⁸⁶ Ibid.

and CLEAN TEA aim to establish, such a market framework would complete the holistic economic and political system needed to supplant the post-war, Twentieth Century growth machine that is still in place today. If the federal government can achieve this, complementing its policy approach with an innovative market strategy, then a new offset sector- Land Use Energy Efficiency Credits- will become feasible, valuable, and an engine for land use reform.

REFLECTION

The prominence with which land policy has figured in the political history of the United States is due not merely to its complex and far-reaching social, political, and economic impacts, but also to its foundational role within the construct of American identity. As land acquisition has been a primary basis of class fluidity and upward mobility, the relationship between property ownership and deeper American ideals of equality, liberty, and opportunity are strong. The opportunity that property ownership conferred upon millions of formerly powerless, repressed, or disenfranchised people who settled in America was indeed unprecedented. Its historical significance can only be appreciated in light of the European feudal system from which many colonists and early settlers fled.⁵⁸⁷ It is therefore shortsighted and rash to reduce the American drive to acquire and develop property to a purely materialistic pursuit, for this quality not only led the whole nation towards, “remarkable...material progress,” but as Brewster notes, has also produced a “practical idealism” that has long distinguished the American people and fueled the promise of the American dream for all those willing to devote themselves to “proficient work and use of their creative power”.⁵⁸⁸

⁵⁸⁷ Marshal Harris, "Private Interests in Public Lands: Intra- and Inter-Private" In *Land use Policy and Problems in the United States*, ed. Howard W. Ottoson (Lincoln: University of Nebraska Press, 1963), 312.

⁵⁸⁸ John Brewster, "The Relevance of the Jeffersonian Dream Today" In *Land use Policy and Problems in the United States*, ed. Howard Ottoson (Lincoln: University of Nebraska Press, 1963), 91-92.

It is likewise imprudent to cast the Jeffersonian tradition, which strove to expand and protect property acquisition, as entirely foolhardy or misguided. One need only reflect upon the words of Senator Lyon of Michigan, spoken in 1838, to appreciate the profound social and political implications that an ideology of widespread property ownership represented in a Western Civilization that, with the French Revolution of 1789, had just recently cast off the vestiges feudalism. In defense of squatters who illegally populated the public lands Lyon cried, “What laws have they violated? Laws...which do injustice to every poor man in the United States who is unable to purchase land, and seeks a home where he can support himself and family; laws which are as unreasonable as they are unnecessary, and which are opposed to the moral sense of the people.”⁵⁸⁹ This notion, that laws restricting property acquisition could be opposed to the “*moral* sense of the people,” implies a belief that something much greater was denied a man without property: fundamental rights. Though the rights of liberty, equality, and opportunity, were never *fully contingent* upon the ownership of land, from the Jeffersonian perspective they were essentially synonymous with it. The centuries of land policy that pushed for local control, unconstrained property rights, minimal government interference, and a limited federal role, are largely reducible to an implicit desire to protect these fundamental ideals of personal liberty, equality, and opportunity.

Yet all too often these ideals have become the shield for greed, exploitation, or the rejection of social responsibility. The public costs of centuries of Jeffersonian policies, however nobly motivated, have been immense. Relentless attempts to decentralize land

⁵⁸⁹ George M. Stephenson, *The Political History of the Public Lands, from 1840 to 1862 : From Pre-Emption to Homestead* (Boston: R.G. Badger, 1917), 22.

ownership and management as fully as possible produced negative ramifications that continue to echo through the centuries: the exploitation of natural resources, the unchecked empowerment of industry, the weakening of state financing power, the explosion of unguided growth, and the establishment of a fossil-fuel dependant, energy-inefficient pattern of civilization. In a highly mobile, intricately interwoven, post-industrial society, both economies and individual lives operate at a regional, national, and even global scale. In this context, the nation can no longer afford to view its land and the policies that affect it through a lens of localism and individualism. The external impacts of land use decisions are too great and reach too far to retain a Nineteenth Century mentality in formulating land use policy. Even in Jefferson's time the practical difficulties of confining authority over land and its development to a purely local context were evident, and they have only grown.

In reflecting upon the multifaceted, complex, and immensely sensitive subject of land, it is beneficial to recall the appeal made by Theodore Roosevelt in his effort to establish a national vision for America's land resources. "I do not ask for over-centralization," said Roosevelt, "but I do ask that we work in a spirit of broad and far reaching nationalism when we work for that which concerns our nation as a whole."⁵⁹⁰ Today, due to the energy and carbon implications of private and public development decisions, even the most local land use policies concern the nation as a whole. This does not imply that local development decisions must be directly regulated by the national government, but it does suggest that there must be a degree of centralization and

⁵⁹⁰ Michael Lacey, "Federalism and National Planning: The Nineteenth Century Legacy" In *The American Planning Tradition*, ed. Robert Fishman (Washington D.C.: Woodrow Wilson Center Press, 2000), 118.

coordination in land use policy within and between the state and national level. At the very least, there must be a system of objective standards and procedures by which local actors may be held accountable for the *outcomes* of their decisions.

The federal government has a vital role to play in establishing standards and goals for land use outcomes; crafting uniform metrics of measurement for analysis; and outlining comprehensive processes for policy development and implementation that will allow states and regions to meet these goals. Without federal encouragement and assistance, states will continue to struggle with insufficient resources to institute meaningful land use reforms. By engaging in vigorous capacity-building measures that follow a model of cooperative federalism, the national government must take the lead in stimulating policy reform at the state and local level. This reform will in turn *enable* private actors to make land use decisions that will advance the goals of reducing fossil fuel consumption and greenhouse gas emissions. However, opening the door to desirable private sector activity is insufficient. Decades of policy have erected long-standing market barriers, which have created entrenched practices and systemic inertia. To overcome these obstacles the federal government must help catalyze a new direction for private sector activity, by constructing appealing incentives for private actors to align their land use decisions with national climate and energy goals.

As California determined following the passage of its climate regulation bill AB-32, without addressing the energy and carbon impacts of land use, via the transportation sector, it will prove extremely difficult if not impossible to meet meaningful greenhouse gas emission reduction goals. As this holds true for California where 40% of CO₂

emissions stem from the transportation sector,⁵⁹¹ so it holds true for the nation, which can attribute 27% of its total CO₂ emissions to transportation.⁵⁹² Therefore, as political momentum for a national climate regime builds, it is not merely desirable that the federal government leads the nation towards comprehensive land use reform- it is essential. Faced with the threat of dwindling energy supplies and a warming planet, and all of the economic, environmental, social, and political disruption which that entails, continued inaction is not a risk that the United States and its people, collectively or individually, can afford to take.

In 1975, Senator Morris K. Udall (D-Ariz) placed a question before a Congress divided over the alleged flaws of existing land use policy and the proposed solution of a National Land Use Planning Act. The “fundamental question,” stated Udall, “is whether there is any need for federal legislation to do something about all of these problems.”⁵⁹³ This extensive dissertation has attempted, as far as possible, to definitively answer that very difficult question. Upon reflection, it seems clear that Senator Udall’s own answer is more poignant today than ever before:

“Yes, the federal government can and must do something about land use.”⁵⁹⁴

⁵⁹¹ *Senate Bill 375*, Public Law 375, (2008): 4.

⁵⁹² Reid H. Ewing, *Growing Cooler : Evidence on Urban Development and Climate Change* (Washington, D.C.: Uli, 2008), 2.

⁵⁹³ Hunter Craycroft Harrison, John A. Lynch and American Enterprise Institute for Public Policy Research, *Federal Land use Policy : Should the Federal Government Adopt a Comprehensive Program to Control Land use in the United States?* (Washington: American Enterprise Institute for Public Policy Research, 1975), 41.

⁵⁹⁴ *Ibid.*, 41

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