

LOCAL AUTONOMY OR REGIONALISM?: SHARING THE BENEFITS AND BURDENS OF SUBURBAN COMMERCIAL DEVELOPMENT

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“There continues to be little or no consensus, and no effective political and administrative mechanisms, for acting responsibly upon local land use initiatives having substantial regional impact.”¹

INTRODUCTION

Land use decisions are generally made solely by local officials elected by and responsible only to citizens within the local municipality. For example, if the City of Westlake Village wants to approve the development of a Price-Costco commercial development within its borders, the neighboring City of Agoura Hills cannot interfere with its decision.² If the Village of Hoffman Estates wants to construct an outdoor concert arena, the neighboring Village of Barrington Hills is not consulted.³ If the City of Ventura approves a new shopping mall which will draw business and revenue away from the neighboring City of Oxnard, Oxnard citizens are not part of the approval process.⁴

Local decisions, however, often impose burdens on citizens outside the local municipality who are excluded from participating in the local decision-making process.⁵ In assessing whether to take on commercial projects, local officials must

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1. Roger K. Lewis, *Land-Use Lessons From the Mouse That We Roared At*, WASH. POST, Oct. 8, 1994, at F24 (summarizing public discussion of a Disney proposal for building a history theme park).

2. The commercial development had been pitched initially to Agoura Hills, California, but affluent residents objected to every location proposed by the developer. The reasons for the rejection were probably the same as those succinctly summed up by the court in *Quinton v. Edison Park Dev. Corp.*, 285 A.2d 5, 8 (N.J. 1971):

They were undoubtedly aware, as most of us are, that large shopping centers have played a prominent part in the uglification of American communities. The centers have often brought with them intolerable traffic problems. And they have often been accompanied by disturbing noises, lights, fumes, and congestion, along with unreasonable hours and modes of operation.

3. See *Village of Barrington Hills v. Village of Hoffman Estates*, 410 N.E.2d 37 (Ill. 1980).

4. See generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 430, 433 (1990) [hereinafter *Our Localism: Part II*].

5. See *id.* at 429. See also *Town of Northville v. Village of Sheridan*, 655 N.E.2d 22, 25

be cognizant of the potential competition between municipalities for commercial development.⁶ A "slow-growth" municipality that drives too hard a bargain with a developer by seeking excessive exactions may find the developer lured to the neighboring town.⁷ The neighboring town will receive the tax revenue⁸ from a commercial development on a border location, while traffic congestion and safety concerns may be increased in the "slow-growth" municipality.⁹ Thus, when community leaders consider development potential, their decisions may impact not only their own community, but may also affect neighboring ones as well.

Intergovernmental conflict¹⁰ and competition between municipalities, created by the unequal distribution of benefits and burdens that may result from local decision making, can be addressed in a variety of ways that will be discussed in this Article. However, none of these approaches has been universally accepted in this country, largely due to the great deference given by courts and legislatures to the concept of local autonomy over land use decisions.¹¹ The primary municipalities affected in these disputes are suburbs.¹² Indeed, it has been noted that "[t]he suburb, not the city, is the principal form of urban settlement in the United States today."¹³ The suburb is seen as the residential haven away from the glare of the big city lights where local government protects the home and family from undesirable influences.¹⁴ Therefore, attempts to increase state or regional

(Ill. App. Ct. 1994).

6. *Our Localism: Part II*, *supra* note 4, at 410, 443.

7. *See id.* at 410-12.

8. One common zoning objective is to increase the local property tax base "by zoning favorable to major new developments that will add substantially to the tax rolls." Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 409 (1994).

9. *See* Vicki Been, "Exit" As a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 512 (1991). The "antigrowth" policies of one municipality may also create benefits for neighboring municipalities in the form of increased housing prices due to increased housing demand in surrounding suburbs. *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 402-03 (1977).

10. For purposes of this Article, "intergovernmental conflict" refers only to conflict between municipalities. For a discussion of intergovernmental land use disputes between a city and the county or the state, see Laurie Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611 (1987) and George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417 (1995).

11. *See Our Localism: Part II*, *supra* note 4, at 355 (suburbs are able to protect local resources and avoid urban economic or social problems because of "localist values of courts and legislatures"). *See also* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 24-58, 85-111 (1990) [hereinafter *Our Localism: Part I*].

12. *Our Localism: Part II*, *supra* note 4, at 348-49.

13. *Id.* at 348.

14. *See id.* at 382. "The essence of the suburban model is the association of local

control are viewed as antithetical to the treasured values of family life and generally have been unsuccessful.¹⁵ Hence, this Article will focus upon disputes within the suburban context.

Part I of this Article discusses the litigation approach to addressing problems that arise when one municipality makes a land use decision regarding commercial development¹⁶ that benefits its own citizens but negatively impacts its neighbors. This part includes the issues of standing, nuisance, breach of a general duty to consider the impact on neighboring municipalities, due process violations, and the adequacy of environmental impact reports. Part II explores annexation as a way to expand territorial jurisdiction without regionalism and resolve the conflicts that result from fragmentation of the metropolitan area. Part III considers the option of intergovernmental contracting as a mechanism to ensure the cooperation of neighbors in land use decision making and to promote the sharing of benefits and burdens created by commercial development in adjacent communities. Part IV observes the legislative solution of state or regional planning to deal with the external burdens created by local land use regulation. Part V concludes by proposing that municipalities be encouraged and required to share the benefits and burdens by internalizing the externalities of their local land use decisions through a combination of voluntary regional planning, an effective use of environmental impact reports, and binding arbitration.

I. LITIGATING A SOLUTION TO INTERGOVERNMENTAL CONFLICT

A. *Standing*

In order to use litigation to block a neighboring municipality's land use decision, the objecting citizen or municipality must have standing to assert a legal cause of action.¹⁷ A nonresident plaintiff must demonstrate a particularized injury in order to obtain judicial review of local zoning practices.¹⁸ This particularized injury requirement has been especially difficult to meet in exclusionary zoning cases where nonresident plaintiffs must cite specific housing projects blocked by local zoning practices in which they have been assured homes.¹⁹ In the key

government with the values of home and family." *Id.*

15. *See id.* at 382-84. "The frequent linkage of local government to home and family leads to a deferential or protective attitude toward local power and a reluctance to mandate state intervention in local arrangements." *Id.* at 382.

16. This Article does not address the issues of low-income housing, educational facilities, or locally undesirable land uses (LULUs).

17. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (federal standing); *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996); *Society of the Plastics Indus., Inc. v. County of Suffolk*, 573 N.E.2d 1034, 1038-44 (N.Y. 1991) (discussing problems of standing in great detail); *Gwynedd Properties, Inc. v. Board of Supervisors*, 635 A.2d 714, 716 (Pa. Commw. Ct. 1993).

18. *See Warth*, 422 U.S. at 508.

19. *See Our Localism: Part I*, *supra* note 11, at 107 (discussing *Warth*); *see also* Been,

exclusionary zoning case, *Warth v. Seldin*,²⁰ the Supreme Court upheld local legislative authority "to pursue local self-interest, without any duty to take into account the effects of local land use regulation on excluded nonresidents,"²¹ and it "refused to take a regional perspective on local zoning practices."²²

States such as Vermont and Florida, which have adopted a regional planning approach to land use decision making, also limit standing in cases involving land use decisions.²³ Standing is restricted by statute to landowners, developers, and state planning agencies because they are considered to be the appropriate entities to protect the public's regional and statewide interests.²⁴ Neighboring municipalities are denied standing because their interests are considered to be adequately protected by regional processes.²⁵ However, in New Jersey, courts "have historically taken a liberal approach to the issue of standing 'in land use planning as well as in other actions particularly where matters of public policy are at stake.'"²⁶

Some jurisdictions have confronted the issue of standing for neighboring municipalities and have determined that "a municipality has standing to challenge the zoning ordinances of another municipality upon showing the existence of a real interest in the subject matter of the controversy."²⁷ It has been argued that giving plaintiffs standing in these cases "will invite chaos in the relationships

supra note 9, at 505 n.151 (plaintiffs face "extraordinary difficulties . . . in establishing standing in exclusionary zoning cases.").

20. 422 U.S. 490 (1975).

21. *Our Localism: Part I*, *supra* note 11, at 109.

22. *Id.* at 107.

23. See James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, in 1995 ZONING AND PLANNING LAW HANDBOOK 449, 483-84 (Alan M. Forrest ed., 1995).

24. See *id.* (citing *Friends of Everglades, Inc. v. Board of County Comm'rs*, 456 So. 2d 904, 908, 909-10, 913-15 (Fla. Dist. Ct. App. 1984)).

25. See *id.*

26. *Madin v. New Jersey Pinelands Comm'n*, 492 A.2d 1034, 1046 (N.J. Super. Ct. App. Div. 1985) (quoting *Dover Township v. Dover Township Bd. of Adjustment*, 386 A.2d 421, 426 (N.J. Super. Ct. App. Div. 1978)) (municipality is "interested" or "aggrieved" party when private developers propose a major project in its territory); see also *Hoboken Env't Comm., Inc. v. German Seaman's Mission*, 391 A.2d 577, 581 (N.J. Super. Ct. Ch. Div. 1978) (state has adopted a liberal approach to standing in zoning and land use cases to allow citizens and taxpayers of municipalities to object to land uses which have "'a potential impact on the integrity of the zoning plan and the community welfare' even in the absence of individualized injury") (quoting *Booth v. Board of Adjustment*, 234 A.2d 681, 682 (N.J. 1967)).

27. *Village of Barrington Hills v. Village of Hoffman Estates*, 410 N.E.2d 37, 40 (Ill. 1980) (citing *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441, 444 (N.J. 1954)); see also *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 687 (2d Cir. 1968); *Borough of Allendale v. Township Comm.*, 404 A.2d 50, 51 (N.J. Super. Ct. Law Div. 1979), *aff'd*, 426 A.2d 73 (N.J. Super. Ct. App. Div. 1991); *Ruegg v. Board of County Comm'rs*, 573 P.2d 740, 742 (Or. Ct. App. 1978).

between municipalities and flood the courts with zoning litigation.”²⁸ However, courts retain control over litigation by requiring that plaintiff municipalities demonstrate “direct, substantial and adverse effects upon [them] in the performance of their corporate obligations” in order to show a real interest in the controversy.²⁹ When major suburban commercial development is involved, objecting plaintiffs must demonstrate that they are directly affected by the passage of the ordinance in their rights, duties, privileges, benefits, or legal relationships.³⁰ Increased competition caused by commercial development in a neighboring municipality will not be a sufficient basis on which to confer standing; neighboring plaintiffs must instead show that a more substantial injury, such as a decrease in property values, has been suffered.³¹ Thus, the spectrum of standing requirements ranges from courts that allow only residents of a community to challenge municipal decisions to courts that allow neighboring municipalities to challenge zoning actions of another municipality. The effectiveness of using a litigation approach to resolve interlocal conflict will depend upon the jurisdiction’s approach to standing and the degree of injury required to confer that standing.

B. Causes of Action: Nuisance and Breach of Duty

When suburban commercial development interferes with the use and enjoyment of neighboring land, common law nuisance is available as a potential cause of action for those individuals or entities harmed by the development. As a precursor to zoning, nuisance law provided the early basis for controlling land use by either excluding or controlling the location of undesirable activities.³² Zoning was eventually accepted in this country as an appropriate mechanism for proactively controlling land use by regulating nuisance activities.³³ However, nuisance actions are still available as an “after-the-fact” type of land use regulation³⁴ and are not preempted by zoning.³⁵ Concepts of nuisance and harm

28. *Village of Barrington Hills*, 410 N.E.2d at 40.

29. *Id.* (municipality alleged loss of municipal revenues due to diminution in property values, increased expenses for traffic control and litter cleanup, and degradation of air quality).

30. *See Westgate Shopping Village v. City of Toledo*, 639 N.E.2d 126, 129-31 (Ohio Ct. App. 1994).

31. *See Nautilus of Exeter v. Town of Exeter*, 656 A.2d 407, 408 (N.H. 1995) (increased competition is not sufficient to confer standing because it is a natural risk in the economy). *But cf. infra* notes 84-89 and accompanying text.

32. *See* DANIEL R. MANDELKER, *LAND USE LAW* §§ 4.02-4.15, at 100-13 (3d ed. 1993 & Supp. 1994) (discussing nuisance).

33. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926). Zoning is a valid extension of the police power of the state and will be held unconstitutional only if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Id.* at 394.

34. *See* Ralph D. Rinaldi, *Virginia’s Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77, 105 n.57 (1994).

35. *See* Robert J. Shostak, *The Prosecution of a Water Case*, in *EASTERN MINERAL LAW*

have also been used for much of the Supreme Court jurisprudence involving regulatory takings.³⁶

A municipality may be held liable for creating or maintaining a nuisance within its borders unless the state legislature provides otherwise.³⁷ A municipality is not exempt from nuisance liability on the ground that it was exercising governmental functions or powers, even when it is exempt from liability for negligence in performing such functions.³⁸ In *Village of Barrington Hills v. Village of Hoffman Estates*,³⁹ the municipalities of Barrington Hills and South Barrington filed a complaint against the municipality of Hoffman Estates, the real estate developer, the financing bank, and the landowners, challenging the construction of an open-air theater and the adoption of zoning ordinances relating to this commercial development.⁴⁰ The challenged ordinances rezoned a single-family residential area creating a central business district and a farming district.⁴¹ The property rezoned was "located at a substantial distance from the residentially developed area of Hoffman Estates but [was] in close proximity to residentially developed areas within the corporate limits of Barrington Hills and South Barrington."⁴² Therefore, the plaintiff municipalities were more severely impacted by the rezoning, in terms of location of the downgraded use, than the municipality which made the zoning decision. The plaintiff municipalities alleged three causes of action. First, they alleged that Hoffman Estates' rezoning actions denied them both Federal and State constitutional due process.⁴³ Second, they alleged that Hoffman Estates violated its own zoning ordinances by rezoning.⁴⁴ Finally, they alleged that the zoning ordinances which permitted the construction and operation of the theater constituted a public nuisance, entitling them to temporary and

FOUNDATION, PROCEEDINGS OF THE 14TH ANNUAL INSTITUTE § 21.02[2][b] (Cyril J. Fox, Jr. ed., 1993).

36. See *Been*, *supra* note 9, at 488 n.78 (discussing nuisance as part of the takings jurisprudence despite Ronald Coase's view that "externalities are reciprocal: while it can be said that the developer imposes a cost upon the community by building a development that pollutes the ground water, it would be just as accurate to say that the community imposes a cost upon the developer by demanding that ground water remain unpolluted") (citing Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960)).

37. See *Village of Lebanon v. Loop No. 175*, 32 N.E.2d 458 (Ohio Ct. App. 1935). "[A] municipality, regardless of the kind of function it may be exercising, is liable in damages to one who has been injured by the commission of a nuisance by the municipality." *Id.* at 461 (quoting *District of Columbia v. Totten*, 5 F.2d 374, 377 (D.C. Cir. 1925)).

38. See *Stanley v. City of Macon*, 97 S.E.2d 330, 332 (Ga. Ct. App. 1957); *Rodgers v. Kansas City*, 327 S.W.2d 478, 484 (Kan. Ct. App. 1959); *Windle v. City of Springfield*, 8 S.W.2d 61, 62 (Mo. 1928).

39. 410 N.E.2d 37 (Ill. 1980).

40. *Id.* at 38.

41. *Id.* at 38-39.

42. *Id.* at 39.

43. *Id.*

44. *Id.*

injunctive relief.⁴⁵ Although the reported decision for this dispute was based upon the issue of whether the neighboring municipalities had standing to object to the ordinances,⁴⁶ this case illustrates the potential causes of action that can be asserted against a municipality that burdens its neighbors as a result of local zoning activities.

The concept of nuisance can be viewed as a duty not to interfere with the use and enjoyment of another's property.⁴⁷ The duty of one municipality not to interfere with neighboring municipalities as a result of the zoning process has also been expressed by some courts as a general proposition of law.⁴⁸ For example, in *Quinton v. Edison Park Development Corp.*,⁴⁹ plaintiffs residing in the neighboring municipality of Woodbridge sued the municipality of Edison, objecting to the granting of a permit to build and operate a large shopping center in a residential area.⁵⁰ The plans for the shopping center provided for a 100-foot buffer strip between the facility and the residential section of Edison, but did not provide for a similar strip to protect Woodbridge residents.⁵¹ The court in *Quinton* concluded that Woodbridge residents were entitled to the same treatment as Edison residents in zoning decisions made by Edison.⁵² This conclusion was based upon New Jersey cases that "have long recognized the duty of municipal officials to look beyond municipal lines in the discharge of their zoning responsibilities."⁵³

New Jersey, both legislatively⁵⁴ and judicially, has recognized "that local zoning authorities should look beyond their own provincial needs to regional requirements."⁵⁵ New Jersey municipalities then, at the very least, owe a duty to hear residents of neighboring municipalities who may be adversely affected by

45. *Id.*

46. *Id.* at 40 (holding that neighboring municipalities have standing to assert a complaint against the municipality enacting the challenged zoning ordinances).

47. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 87, at 619 (5th ed. 1984).

48. See *Save a Valuable Env't v. City of Bothell*, 576 P.2d 401 (Wash. 1978) (striking down rezoning to allow development of a regional shopping center because of impact outside the community boundaries); see also *Quinton v. Edison Park Dev. Corp.*, 285 A.2d 5, 7 (N.J. 1971); *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441, 445-46 (N.J. 1954).

49. 285 A.2d 5 (N.J. 1971).

50. *Id.* at 6-7. Other parties were involved in the suit as well, including residents of Edison Heights, the builder, and the lessee/operator of the shopping center. See *id.*

51. *Id.*

52. *Id.* at 9 ("If a buffer strip is reasonably required for the protection of the Edison residents it is reasonably required for the protection of the Woodbridge residents who justly claim equal treatment.").

53. *Id.* at 8-9 (citing *Kunzler v. Hoffman*, 225 A.2d 321 (N.J. 1966); *Barone v. Township of Bridgewater*, 212 A.2d 129 (N.J. 1965); *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441 (N.J. 1954); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 64 A.2d 347 (N.J. 1949)).

54. See, e.g., N.J. STAT. ANN. §§ 40:55D-84 to D-87 (West 1991).

55. *Quinton*, 285 A.2d at 9 (quoting *Kunzler*, 225 A.2d at 326).

proposed zoning changes.⁵⁶ “To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning.”⁵⁷ This principle of regional duty culminated in the leading case on exclusionary zoning, *Southern Burlington County NAACP v. Township of Mount Laurel*⁵⁸ where the court commanded “developing municipalities in the state [to] consider regional housing needs.”⁵⁹

The obligation of a municipality to consider the general welfare of citizens both inside and outside municipal boundaries was clarified by the Supreme Court of New Hampshire in *Britton v. Town of Chester*.⁶⁰

The possibility that a municipality might be obligated to consider the needs of the regions outside its boundaries was addressed early on in our land use jurisprudence by the United States Supreme Court, paving the way for the term “community” to be used in the broader sense. In *Village of Euclid v. Ambler Realty Co.*, the Court recognized “the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.” When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance’s validity.⁶¹

Although some state courts have required local governments to consider regional needs when regulating land uses, these same courts have encouraged their state legislatures to take a more active role in land use regulation and local zoning and have disavowed judicial participation in regional planning.⁶² Nevertheless, this judicial acknowledgment of a municipal duty to consider the welfare of residents outside municipal lines may be used as support for legislative efforts to adopt regional or statewide planning programs.⁶³ State or regional planning and regulation is certainly an alternative approach to resolving intergovernmental conflict in advance of litigation. However, as discussed in Part IV of this Article,

56. See *Borough of Cresskill*, 104 A.2d at 445-46.

57. *Id.* at 446.

58. 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel II*].

59. Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 973 (1976) (citing *Mount Laurel II*, 336 A.2d at 727-28, 732-33).

60. 595 A.2d 492 (N.H. 1991).

61. *Id.* at 495 (citation omitted), quoted in STATE & REGIONAL COMPREHENSIVE PLANNING 232-33 (Peter A. Buchsbaum & Larry J. Smith eds., 1993) [hereinafter STATE & REGIONAL PLANNING]. See *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 487 (Cal. 1976); see also *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242-43 (N.Y. 1975).

62. See *Our Localism: Part I*, *supra* note 11, at 43-44 (discussing state court exclusionary zoning cases in Pennsylvania, California, New Jersey, and New York).

63. See STATE & REGIONAL PLANNING, *supra* note 61, at 232-33 (discussing Texas’ recognition of the obligation of municipalities to consider the general welfare of residents both inside and outside their boundaries).

a regional or statewide planning approach has its drawbacks and local control has generally been preferred and retained.⁶⁴

C. Cause of Action: Violation of Due Process

When a landowner believes that the use of his or her property has been more severely limited than similarly situated landowners, he or she may challenge the restriction as a violation of Fourteenth Amendment Due Process rights.⁶⁵ Courts have also been willing to consider zoning challenges by municipalities on Fourteenth Amendment grounds, using "reasonableness" as the constitutional standard that zoning officials must meet.⁶⁶

In *Township of River Vale v. Town of Orangetown*,⁶⁷ the municipality of River Vale sued the neighboring town of Orangetown, which had rezoned an area bordering River Vale from a residential district to an "office park" district.⁶⁸ River Vale alleged that its property "has been and will be depreciated in value without due process of law" as a result of Orangetown's rezoning actions.⁶⁹ The court supported River Vale's right to assert a claim that "the zoning ordinance arbitrarily diminished the value of plaintiff's land"⁷⁰ and was therefore unconstitutional as "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁷¹ The court rejected defendant's claim that a Fourteenth Amendment challenge could only be brought by a resident of the plaintiff municipality.⁷² River Vale was allowed to sue a neighboring municipality for a due process violation as a "person" entitled to protection within the meaning of the Fourteenth Amendment.⁷³ Thus, either a municipality or a resident can assert a cause of action for a due process violation when a neighboring

64. See discussion *infra* Parts IV, V.A.

65. See Mandelker, *supra* note 59, at 909 (requirement that zoning be "in accordance" with comprehensive plan serves as the basis for requiring that a zoning classification "be justified by policies applicable to the whole community" in order to pass constitutional muster). See also *Westgate Shopping Village v. City of Toledo*, 639 N.E.2d 126, 128 (Ohio Ct. App. 1994) (shopping center filed claim that ordinance was "unconstitutional, unreasonable, arbitrary, contrary to law, and not supported by a preponderance of substantial, reliable and probative evidence" because it permitted a competitive shopping mall to expand its operation).

66. See *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968) (discussing Supreme Court standard of review for local zoning ordinances).

67. *Id.*

68. *Id.* at 685.

69. *Id.*

70. *Id.* at 686.

71. *Id.*

72. *Id.* (finding that cases cited by defendant involved municipalities suing the state which created them, not municipalities suing other municipalities).

73. *Id.* But see *Town of Northville v. Village of Sheridan*, 655 N.E.2d 22, 24 (Ill. App. Ct. 1994) ("[A] municipality does not have due process or equal protection rights which can be protected.").

municipality makes a land use decision which unreasonably impacts nonresidents.

D. Cause of Action: Adequacy of the Environmental Impact Statement

Actions taken by federal agencies are guided by the National Environmental Policy Act of 1969 (NEPA),⁷⁴ which may require the inclusion of a detailed statement of the environmental impact of the proposed action in its decision-making process.⁷⁵ This detailed statement, commonly called an environmental impact statement (EIS), is required "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁷⁶ At least fifteen states have enacted legislation modeled after NEPA; this legislation requires state and local agencies to take environmental impact into account in their decision-making process whenever necessary to protect the quality of the environment.⁷⁷

In the states that have enacted programs similar to NEPA, before issuing a conditional use or building permit, a municipality may be required to prepare an environmental impact report if the proposed project "may have a significant effect on the environment."⁷⁸ The existence of a NEPA-type program at the state level is typically intended "to ensure that governmental entities in their regulatory function [will] determine that private individuals [are] not forsaking ecological cognizance in pursuit of economic advantage."⁷⁹ Private activity that adversely affects the environment may be subject to government agency regulation through the granting or denial of a permit.⁸⁰ Hence, local residents who object to certain land use decisions may challenge the EIS process in order to stop, or at least limit, an unpopular project.⁸¹

Citizens who oppose major land use projects have used the environmental impact review process as an effective check on these projects, even though they

74. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331-4347 (1994 & Supp. I 1995)).

75. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW, § 9.1, at 801-03 (2d ed. 1994) (discussing sections 101 and 102 of NEPA).

76. *Id.* at 803 (citing subsection 102(2)(c) of NEPA).

77. See DANIEL MANDELKER, NEPA LAW AND LITIGATION §§ 13-14 (2d ed. 1994); see, e.g., California Environmental Quality Act of 1970 (CEQA), ch. 1433, 1970 Cal. Stat. 2780 (codified as amended at CAL. PUB. RES. CODE §§ 21000-21177 (West 1996 & Supp. 1997) (requiring that environmental impact report (EIR) be prepared if local or state governmental action may have a significant impact on the environment)).

78. See, e.g., *Friends of Mammoth v. Board of Supervisors of Mono County*, 502 P.2d 1049, 1059 (1972) (holding that CEQA requires preparation of "an environmental impact report prior to the decision to grant the conditional use and building permits").

79. *Id.* at 1055.

80. *Id.*

81. See RODGERS, *supra* note 75, § 9.1, at 818 ("The typical claims, overwhelmingly, are: failure to prepare an EIS and inadequacy of the EIS.").

do not have the authority to influence the approval process.⁸² For example, a group of approximately twenty residents of Bishop, California was able to delay the construction of a proposed shopping center for at least three years by challenging the environmental impact review process.⁸³ Bishop residents were concerned that the new shopping center would adversely affect the downtown shopping area by taking away business from these establishments, resulting in an "eventual physical deterioration of downtown Bishop."⁸⁴ The proposed shopping center project required actions by the Inyo County Board of Supervisors to amend the Bishop general plan, to rezone, and to approve a tract map, road abandonment, and variance. These actions were approved in December 1983 and March 1984 and litigation began thereafter with a claim for failure to conduct an adequate environmental review.⁸⁵ The plaintiffs' application for a writ of mandate was judicially resolved finally in September 1985, when the court directed the county to set aside its actions based on a finding that "the lead agency never considered whether the environmental effects of the total shopping center project, properly defined, were significantly adverse and thus required an EIR."⁸⁶ The local government unit was required to "begin the environmental review process anew"⁸⁷ and to include an analysis of socioeconomic impacts, such as "whether the proposed shopping center [would] take business away from the downtown shopping area."⁸⁸

Other municipalities have used the environmental review process as a way of controlling the socioeconomic impact of land use actions taken by their neighbors.

82. See Wickersham, *supra* note 23, at 487-88 (discussing use of environmental review process as a means of citizen control, including "abuse of environmental regulations for exclusionary purposes"); see also Matt Assad, *Northampton Councilwoman Wants Impact Study on Ballpark*, MORNING CALL, July 1, 1994, at B6 (discussing baseball committee's concern that requiring an environmental impact study could delay or prevent acquisition of financing to facilitate bringing a baseball team into the area).

83. See *Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo*, 217 Cal. Rptr. 893 (Cal. Ct. App. 1985).

84. *Id.* at 904.

85. *Id.* at 895.

86. *Id.* at 903.

87. *Id.* at 907.

88. *Id.* at 904. Socioeconomic impacts must be considered in a municipality's decision whether or not an EIS needs to be prepared. See *Marin Mun. Water Dist. v. KG Land Cal. Corp.*, 1 Cal. Rptr. 2d 767, 773 (Cal. Ct. App. 1991) (explaining that social and economic changes that result from a project are not treated as significant environmental effects, but that such effects "may have some relevance in determining the significance of a physical change"); *Real Estate Bd. v. City of New York*, 556 N.Y.S.2d 853, 854 (App. Div. 1990) (environmental impact statement was adequate because it "carefully examined whether the [rezoning] proposal would result in the displacement of local residents and businesses"); Mary F. Pols, *City Tackles Adventist Development*, L.A. TIMES (Ventura County Edition), Dec. 13, 1995, at B1 (City's environmental review of proposed commercial project recommended denial of project and identified problem that "existing businesses would suffer revenue losses if the commercial center is built.").

Recently, the City of Oxnard, California, challenged the approval of a new shopping mall in the neighboring City of Ventura using the environmental review process as a basis for litigation.⁸⁹ Discord between the neighboring municipalities in this area is not new.⁹⁰ Ventura and another neighboring community, Camarillo, objected to Oxnard's approval of a large shopping center in 1995, claiming that it would affect traffic in the entire area and that "Oxnard's environmental analysis of the project understated the amount of traffic" that would travel through the area.⁹¹ A commercial shopping center had been proposed in the mid-1980s and was halted, largely due to a lawsuit filed by Ventura in 1985 which claimed that the project would cause traffic problems affecting Ventura.⁹² When Ventura decided to expand a local shopping center, Oxnard proposed that the cities join together to develop a regional shopping center located in Oxnard and share the sales-tax revenue.⁹³ Ventura officials rejected Oxnard's proposal stating that any compromise should have been negotiated "a long time ago" and that Oxnard's complaint that its economy would be hurt was "of little concern to Ventura."⁹⁴ Unfortunately, the neighboring cities' failure to work together on such a regional issue may result in a delay in the project that will "kill it outright" with no benefit to either city.⁹⁵

Although litigation based on the environmental impact review process may be a successful mechanism to delay or even thwart a commercial development project in a neighboring municipality, the environmental impact statement itself can, instead, serve as a baseline for negotiations between municipalities that wish to share some of the benefits and burdens of their land use decisions. Impact studies that identify areas of anticipated traffic increases or additional safety requirements can serve as a basis for compromise between municipalities where regional

89. Tracy Wilson & Eric Wahlgren, *Mall Foes File Voter Petitions and Lawsuit*, L.A. TIMES, Feb. 29, 1996, at B1 (Oxnard officials file suit contending that environmental documents failed to analyze project's economic impact on Oxnard.).

90. Miguel Bustillo & Constance Sommer, *Two Cities' Tug of War Grows Revenues: Economic Concerns Intensify Discord Between Oxnard and Ventura, Which Vie for Development*, L.A. TIMES, Mar. 5, 1995, at B1 ("[R]ivalry between Oxnard and Ventura is intensifying, as dwindling funds, growing urban ills and the rise of eastern Ventura County have pitted the two cities against each other in a tug of war over money, prestige and political pull.").

91. Miguel Bustillo, *Panel Oks Shopping Center Along Freeway*, L.A. TIMES, Mar. 18, 1995, at B1.

92. Miguel Bustillo & Tracy Wilson, *Oxnard Offers Joint Mall Plan*, L.A. TIMES, Dec. 9, 1995, at B1.

93. *Id.*

94. Tracy Wilson, *Ventura Rejects Plea to Change Mall Plans*, L.A. TIMES, Dec. 12, 1995, at B1. One Ventura councilman stated, "Oxnard has made its own bed and is now going to have to sleep in it." *Id.*

95. Wilson & Wahlgren, *supra* note 89, at B1 (Greater Oxnard Economic Development Corporation president states, "[I]t is truly unfortunate because if the two cities go against each other, it is really a zero-sum game.").

benefits and impacts will result from proposed commercial development.⁹⁶

II. ANNEXATION

Central city annexation of surrounding areas has been one approach to resolving the problem of how to share the benefits and burdens of urban growth.⁹⁷ Annexation is the process by which one municipality expands its territorial reach by incorporating adjacent areas into its legal boundaries.⁹⁸ Restrictions on this process of annexation are defined by annexation legislation, which has changed significantly over the past fifty years.⁹⁹ Current annexation legislation generally requires the consent of local residents. This requirement, in conjunction with the ease of municipal incorporation, has resulted in "the multiplicity of autonomous, economically and socially differentiated local governments in most metropolitan areas."¹⁰⁰

Annexation allows the absorption of suburban areas into a larger city so that a central city can increase its tax base and support the inner city infrastructure.¹⁰¹ Theoretically, this process can be used to resolve a multitude of problems confronting residents of a metropolitan area that would potentially result in intergovernmental conflict. Central cities lacking the resources to tackle problems such as crime, pollution, lack of adequate housing, and transportation can expand their territorial boundaries to control spill-over effects into surrounding areas by dealing directly with these problems that are not contained by artificial boundaries.¹⁰² Ohio's annexation legislation, for example, makes annexation procedurally easy and encourages the growth of existing cities.¹⁰³ However, annexation requires the consent of both the acquiring municipality and the territory sought to be annexed.¹⁰⁴ The commencement of annexation proceedings generally results in a lengthy struggle between the municipality, which needs an infusion of economic growth, and the neighboring suburb, which wants to keep its strong tax base and local autonomy.¹⁰⁵

Initially, suburban residents were attracted to the concept of annexation because of the quality services offered by the urban infrastructure.¹⁰⁶ However, as

96. See *infra* notes 217-21 and accompanying text.

97. See Johnstone, *supra* note 8, at 441.

98. See *Our Localism: Part I*, *supra* note 11, at 78 n.326.

99. See *Our Localism: Part II*, *supra* note 4, at 358-63.

100. *Our Localism: Part I*, *supra* note 11, at 81.

101. See *Our Localism: Part II*, *supra* note 4, at 363-64.

102. See Mary Shannon Place, Note, *Municipal Annexation in Ohio: Putting An End to the Bitter Battle*, 41 CLEV. ST. L. REV. 345, 346-48 (1993) (advocating municipal annexation as a possible solution to regional problems in urban areas).

103. See *id.* at 354.

104. See *id.* at 348 (citing OHIO REV. CODE ANN. § 709.033 (Anderson 1991)).

105. See *id.* at 362. The Note proposes negotiation and mediation as a solution to these annexation disputes in Ohio. *Id.* at 366-80.

106. See *Our Localism: Part II*, *supra* note 4, at 365, 374 & n.125 (discussing disincentives

the suburban areas became wealthier, the desire to avoid urban taxes, as well as urban problems such as an aging infrastructure, pollution, poverty and crime, encouraged suburban dwellers to choose local incorporation rather than annexation.¹⁰⁷ In addition, new state laws have allowed suburbs to combine for the purpose of funding infrastructure without losing local autonomy, have authorized intergovernmental contract for services, and have provided state financial assistance.¹⁰⁸ Therefore, as a current approach to resolving regional conflicts, annexation has only been effective in a few places and is generally not a feasible option because of strong suburban opposition.¹⁰⁹

III. CONTRACTING A SOLUTION TO INTERGOVERNMENTAL CONFLICT

In most states, municipalities may contract with each other to obtain services such as law enforcement, administrative services, sewers and water supply, and parks and recreation.¹¹⁰ This allows municipalities to take advantage of economies of scale and to avoid fixed costs and the unnecessary duplication of the service systems which can easily be extended to surrounding suburbs.¹¹¹ The contractual relationship between municipalities is an alternative to regional control over the provision of public goods and services or the fragmentation and duplication of efforts at local levels.¹¹² The providing municipality gains financial support from the adjacent community and the purchasing municipality retains local control while receiving the benefits of an existing service structure.¹¹³

Although contracts between municipalities for the provision of services are not uncommon and are generally enforceable,¹¹⁴ interlocal agreements providing for

to suburban independence because "major cities were the first localities to create professional police and fire departments, develop extensive school systems, pave streets, sidewalks and roads, create parks and invest in the costly public works necessary to provide water, power and sewage and waste removal").

107. See *id.* at 365-66.

108. See *id.* at 375-81 (discussing these new state laws in detail).

109. See Johnstone, *supra* note 8, at 441.

110. See *Our Localism: Part II*, *supra* note 4, at 377-78; see also Michael E. Libonati, *The Law of Intergovernmental Relations: IVHS Opportunities and Constraints*, 22 *TRANSP. L. J.* 225, 241 (1994) ("Forty-two states have enabling legislation or a constitutional provision authorizing cooperative intergovernmental service agreements.").

111. See *Our Localism: Part II*, *supra* note 4, at 378.

112. See *id.* at 379-80.

113. See *id.* at 378-79 (noting that such contracting is an alternative to annexation, which will likely be rejected by the outlying area if such interlocal contracting is available).

114. See, e.g., *City of Los Angeles v. City of Artesia*, 140 Cal. Rptr. 684, 686 (Cal. Ct. App. 1977) (adjudicating dispute over amounts to be paid by cities contracting with county, which has provided police protection services to numerous cities within county limits since 1954); *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 49 (Colo. Ct. App. 1991) (holding that intergovernmental agreement between city and county for mass transit system operation is valid); *Nations v. Downtown Dev. Auth.*, 345 S.E.2d 581, 584 (Ga. 1986) ("pledge of municipal taxing

payments “as compensation for spillovers or to ameliorate wealth differences [between communities] are virtually unknown.”¹¹⁵ Such payments could be used to improve transportation infrastructure or provide more parks or greenways as buffers against commercial development. However, contracting between municipalities for purposes other than providing standard municipal services such as law enforcement and water supply has not occurred, either because local governments are reluctant “to cooperate over issues with lifestyle implications, for example subsidized housing,”¹¹⁶ or because such contracts would be unenforceable under the legal constraints on governmental contracts.¹¹⁷ The legal constraint that is most likely to be implicated in the enforcement of intermunicipal contracts is the requirement that a municipality not bargain away its police power or “unduly bind successive legislative bodies by preventing them from exercising their essential powers.”¹¹⁸ Under this “reserved powers” doctrine,¹¹⁹ also referred to as the “inalienable power” doctrine,¹²⁰ a municipality is barred from relinquishing control over its police power, that is, the power to promote the public health, safety, and welfare.¹²¹

The application of these sovereign power doctrines potentially constrains the enforcement of municipal contracts and creates a dilemma for the courts. On one hand, public policy dictates that our expectation that contracts will be performed must be supported in order to maintain a viable economic society.¹²² On the other hand, a basic principle of our democratic society is that “the powers granted to the

power is permissible under the intergovernmental contracts clause”); *City of Racine v. Town of Mount Pleasant*, 213 N.W.2d 60, 64 (Wis. 1973) (City, in agreeing to supply sewer treatment, is not acting as a public service system or utility with the town, but is instead acting under an agreement permitted by legislation allowing contracts between municipalities for receipt or furnishing of services.). See also Timothy D. Hall, Annotation, *Right of One Governmental Subdivision to Sue Another Such Subdivision for Damages*, 11 A.L.R. 5TH 630 (1993).

115. *Our Localism: Part II*, *supra* note 4, at 432-33.

116. *Id.* at 378 & n.143 (discussing fact that there are few interlocal agreements to provide services with social implications, as illustrated by Cleveland suburbs refusing to agree with the regional housing authority to accept subsidized housing units within their communities).

117. See generally Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990) (primary focus of Article is whether municipalities are bound by their contracts).

118. *Id.* at 281-82 (discussing four legal challenges that can be made to governmental contracts). See also *City of Glendale v. Los Angeles Superior Court*, 23 Cal. Rptr. 2d 305, 312 (Cal. Ct. App. 1993) (holding city could not contract away power of eminent domain).

119. *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2454 (1996) (explaining the development of the unmistakability doctrine as a response to allowing state legislatures to bind their successors by entering into contracts protected by the Contract Clause and defining the “reserved powers” doctrine as holding that certain substantive powers of sovereignty can not be contracted away).

120. Griffith, *supra* note 117, at 283.

121. See *id.* at 282.

122. See *id.* at 283.

government come from the people and remain with the government unless withdrawn by the people.”¹²³ As a result of this dilemma, various judicial tests have been developed over time to resolve the conflict as to whether an intermunicipal contract should be enforced. These tests include: distinguishing between government functions that are proprietary (acting as a private party) versus governmental;¹²⁴ examining the contract’s subject matter or the parties’ contractual functions;¹²⁵ and other policy-based tests that look at various factors such as fairness, reasonableness, advantage to the municipality, and impairment of municipal discretion.¹²⁶ These tests for enforceability are applied both to contracts between municipalities and to contracts between municipalities and private parties.¹²⁷ Therefore, in order to ensure enforceability, contracts between municipalities should be entered into in good faith pursuant to the municipality’s basic legal structure, the contract should allow each municipality to receive some benefit that outweighs its loss of control, and the continuing performance of the contract should not result in substantial harm to residents of either of the contracting municipalities.¹²⁸

Intergovernmental contracting for the provision of standard municipal services is a valuable capability for reasons discussed above, and is generally enforceable despite a “reserved powers” doctrine challenge.¹²⁹ However, these service contracts do not require adjacent municipalities to take externalities into account when they make land use decisions that are beneficial to their communities, but that negatively impact surrounding suburbs. The intergovernmental contracting needed to resolve conflicts created by suburban commercial development must involve either promises to share the benefits and burdens of land use decisions that affect more than one municipality or promises to develop and then follow local land use plans which will avoid interlocal conflict.

The development and implementation of local general plans can serve as a basis for intergovernmental contracting and cooperation.¹³⁰ If local land use

123. *Id.* at 283-84.

124. *See id.* at 284 (This governmental/proprietary test has been replaced in many jurisdictions by the function test.).

125. *See id.* (The function test has been used to find that the municipality’s sovereign powers include its power to tax, its police power, and its power of eminent domain.).

126. *See id.* at 285. At the end of her article, Professor Griffith proposes her own five-part test to replace this patchwork of judicial analysis techniques. *Id.* at 348.

127. *See id.* at 364 & n.399 (discussing application of proposed five standards to contracts among public entities).

128. *See id.* at 364-65 (applying proposed five-standard test of enforceability to contracts between local governmental units).

129. *See United States v. Winstar Corp.*, 116 S. Ct. 2432, 2457 (1996) (discussing analogous U.S. government supply contracts, such as buying food for the army, the Court stated that “no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine[,]” which is a contractual restraint on regulatory powers in addition to the “reserved powers” doctrine).

130. *See, e.g., Marin Mun. Water Dist. v. KG Land Cal. Corp.*, 1 Cal. Rptr. 2d 767, 777 (Cal.

decisions must adhere to a general plan, one option would be to encourage neighboring municipalities to cooperate with each other in the development of local plans, allowing them to agree that these plans will be implemented and will not be amended without mutual consent. However, several difficulties exist with this approach to controlling the problem of intergovernmental conflict.

First, neighboring localities must have an incentive to cooperate in the development of local plans. Unless the state legislature requires regional coordination of land use decision making, the localities must view the process as a valuable, mutually beneficial arrangement. If the localities are not equal in terms of wealth and attractiveness to current residents and newcomers, then it is doubtful that mutual advantage will serve as an incentive for regional cooperation. The less desirable community will not likely have sufficient revenue to bargain with its wealthier neighbors. However, it is always possible that the wealthier neighbors may be willing to pay to prevent the less desirable community from approving undesirable commercial development that will have detrimental impacts beyond its borders.

The second major difficulty, assuming municipalities will cooperate in local plan development, is the lack of binding authority of the planning process over land use decision making. Historically, local comprehensive planning was not necessarily viewed as a prerequisite to land use regulation and decisions.¹³¹ Although planning proponents have encouraged the adoption of mandatory local comprehensive planning,¹³² land use decisions that are inconsistent with the local plan can be executed by simply amending the general plan.¹³³

Finally, even if municipalities promise not to amend the plan, such a promise will likely run afoul of the "reserved powers" doctrine as a bargaining away of police power and a binding of successive legislative bodies to prevent them from exercising their power to amend the local plan.¹³⁴ If the municipality does amend its plan in breach of a contract with a neighboring municipality, such regulatory action could be challenged as an unconstitutional impairment of contract.¹³⁵

Ct. App. 1991) (EIR must discuss any inconsistencies between proposed project and general and regional plans); *City of Portland v. City of Beaverton*, 886 P.2d 1084, 1085 (Or. Ct. App. 1994) (upholding Oregon's Land Use Board of Appeals remand of City of Beaverton and Washington County's amendment of their comprehensive plans because the amendments conflicted with Portland's unamended comprehensive plan, and the two jurisdictions were not allowed to unilaterally alter the land use planning status quo).

131. See Mandelker, *supra* note 59, at 900-09.

132. See, e.g., *id.* at 910.

133. See MANDELKER, *supra* note 32, § 6.34, at 256-57 (discussing spot planning).

134. It is possible to make an argument, based on *Winstar Corp.*, 116 S. Ct. at 2461-62, that such an agreement not to amend the plan does not thwart the use of sovereign power, but only indirectly deters the regulatory action by raising its costs to include breach of contract remedies.

135. The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. Because the local exercise of police power has been delegated by the state, any local regulation will potentially be implicated if it impairs a contractual relationship. See Judith Welch Wegner, *Moving Toward the Bargaining Table:*

Tax-base sharing among municipalities¹³⁶ is one way to manage the inequality problem created when wealthy people escape the urban areas by moving into outlying suburbs in order to maintain a higher quality of life.¹³⁷ Inner cities cannot survive if the needed tax base is built outside the cities and revenues are not redistributed based upon need.¹³⁸ Contracts between local governments could allow metropolitan areas to share tax-base gains and offset regional burdens created by local land use decisions. However, state legislatures may have to rewrite laws dealing with intergovernmental contracts in order to allow such tax-base sharing agreements to be enforceable under current sovereign powers doctrine.¹³⁹ If annexation laws are also revised, one incentive available to an urban city is to agree with surrounding suburbs that the city will not annex the outlying areas, in return for the suburbs' promise to share their tax base.¹⁴⁰ Minnesota has already enacted legislation to require tax-base sharing among municipalities in the Minneapolis-St. Paul area.¹⁴¹ Local areas that are realizing "above-average industrial and commercial property tax growth [are required] to share a percentage of the increment with other localities, with the size of the interlocal payments turning on the population and needs of the recipients."¹⁴² Although Minnesota's tax-base sharing is an interesting approach to resolving the growing gap between the urban and suburban quality of life that has been created by urban sprawl, the contractual approach proposed in Part V encourages tax-base sharing based upon quantifiable externalities that result from one municipality's land use decision.¹⁴³

Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, 65 N.C. L. REV. 957, 962-77 (1987) (discussing in detail the "theoretical framework [governing] public-private land use deals"). See also *Royal Liquor Mart, Inc. v. City of Rockford*, 479 N.E.2d 485, 493-94 (Ill. App. Ct. 1985) (holding that referendum to invalidate a sales tax would constitute an impairment, under the Contract Clause, of the contractual relationship between the city and the Metro Authority to enact the sales tax).

However, where a municipality purports to contract away its police power (as it would be doing if it promised not to amend its plan) that provision could be found void ab initio. There could then be no Contract Clause violation because no obligation ever existed. See *Chemical Bank v. Washington Pub. Power Supply Sys.*, 691 P.2d 524, 545 (Wash. 1984) (en banc).

136. See Matt Pommer, *Lobbyist Sees Drastic Changes Coming For Cities*, CAPITAL TIMES, (Madison, Wisconsin), Oct. 10, 1994, at 3A. ("Tax-base sharing is a concept by which a particular municipal area pools revenues from the growth in values into a pot and it is redistributed based on need.").

137. See *id.* (citing interview with executive director of the Alliance of Cities in Wisconsin).

138. See *id.*

139. See *id.*

140. See *id.*

141. See *Our Localism: Part II*, *supra* note 4, at 449 (discussing the Minnesota Metropolitan Fiscal Disparities Act, ch. 24, 1971 Minn. Laws 2286 (1971) (codified as amended at MINN. STAT. ANN. §§ 473F.01 to .13 (West 1994 & Supp. 1997))).

142. *Id.*

143. See *infra* notes 215-21 and accompanying text (discussing tax-base sharing according to environmental impact report).

IV. STATE AND REGIONAL PLANNING: THE IDEAL, BUT PERHAPS, UNATTAINABLE, SOLUTION TO LOCAL CONFLICT

Municipalities have no inherent power to control land use within their borders; they only have those powers which have been delegated to them by the state legislature.¹⁴⁴ The state holds the power to regulate land use as part of its general police power.¹⁴⁵ Although states have freely delegated this power,¹⁴⁶ commentators since the 1800s have endorsed the concept that cities should be subject to state authority and strict judicial review in order to ensure that municipalities act for the public good and avoid the abuse of power by local private interests.¹⁴⁷ However, contrary to these views about the lack of local power,¹⁴⁸ cities have not been powerless in the area of local land use control as a result of state authority.¹⁴⁹ In fact, “[l]ocalism as a value is deeply embedded in the American legal and political culture.”¹⁵⁰ Therefore, any time the state legislature has attempted to review or rescind its grant of local power, the “structures of local control and the traditional commitment to local land use autonomy” have been retained.¹⁵¹

Local governments in metropolitan areas often make land use decisions which have spillover effects on surrounding jurisdictions.¹⁵² In fact, local power issues typically find local governments at odds with each other, rather than with the

144. See Gerald E. Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980) (citing 1 CHESTER JAMES ANTIEAU, *MUNICIPAL CORPORATION LAW* § 2.00 (1979)). The power to legislate with respect to local issues is referred to as the concept of “home rule” and may be the result of either state legislation or a state constitutional amendment. *Our Localism: Part I, supra* note 11, at 10-11.

145. See Wickersham, *supra* note 23, at 465 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926)).

146. See *id.* at 453 (“By 1930, forty-seven of the forty-eight states had zoning enabling acts” that transferred the power of land use regulation to local authorities.).

147. See Frug, *supra* note 144, at 1109-15 (discussing JOHN DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* (1st ed., Chicago, Cockcroft 1872) and EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.82, at 137 (3d rev. ed. 1979)).

148. See *id.* at 1078 (The “specific purpose of this Article is to discuss why cities can exercise only certain powers and how this powerlessness has affected their role in society.”); see also *Our Localism: Part I, supra* note 11, at 11 (“According to Professor Frug and other scholars, these state constitutional measures have failed to protect or empower localities.”).

149. See Wickersham, *supra* note 23, at 465 (Until the passage of state growth management statutes in the 1970s, “states had exercised virtually no oversight of local zoning.”); see also *Our Localism: Part I, supra* note 11, at 1 (“Most local governments in this country are far from legally powerless.”).

150. *Our Localism: Part I, supra* note 11, at 1.

151. *Id.* at 64-65 (discussing attempts at increased state participation in land use regulation to address regional issues).

152. See *id.* at 14 (Interlocal conflicts from local spillovers may require state intervention.).

state.¹⁵³ The nature of the suburb, the dominant form of urban community,¹⁵⁴ is such that local governments within the suburban area are just “fragments of larger, economically interdependent regions.”¹⁵⁵ Therefore, legislative and judicial attempts to promote the concept of “localism,”¹⁵⁶ that is, greater local self-determination by local government units, has resulted in externalities from local actions affecting people outside local boundaries and regional inequalities in education, housing and employment opportunities.¹⁵⁷ Returning power from local governments to the state level to allow a regional approach to local problems and development may be the only effective way to eliminate interlocal differences in wealth and conflicts over externally-generated burdens.¹⁵⁸

Initial legislative attempts to regionalize land use decision making were aimed at protecting sensitive environmental resources, not limited by artificial municipal boundaries,¹⁵⁹ and controlling “developments of regional impact (DRIs).”¹⁶⁰ States sought to protect critical areas from development that could yield a local increase in jobs and the tax base, but result in statewide environmental losses.¹⁶¹ These efforts to increase state involvement in land use planning and regulation were collectively termed the “quiet revolution in land use control” and scholars predicted an eventual shift from local to state land use control.¹⁶² This shift in responsibility from local to state control has not yet occurred as predicted, though some scholars continue to see a trend in growth management programs toward greater state intervention in the local planning and implementation process.¹⁶³ Although states such as Oregon and Florida have enacted strong regional land use legislation,¹⁶⁴ most state land use legislation has left local autonomy intact by making regional planning and control optional or purely advisory.¹⁶⁵

153. See *id.* at 3 (Typical impression about conflict in local government law is that it exists between state and local power, but instead such conflict generally involves local governments pitted against each other.).

154. See *id.* at 4.

155. *Id.* at 5.

156. *Id.* at 1 (The term, “localism,” as used in this Article refers to the use of greater local power for purposes of “economic efficiency, education for public life and popular political empowerment.”).

157. See *id.* at 4-5. This Article only focuses on the externalities problem, not the inequality problem in local services due to wealth and political power differences between local units.

158. See *id.* at 6 (urging “scholars to give greater attention to the state as a political and legal focal point in the system of local governments”).

159. See STATE & REGIONAL PLANNING, *supra* note 61, at 4.

160. *Our Localism: Part I*, *supra* note 11, at 65.

161. See *id.*

162. *Id.* at 64.

163. See Johnstone, *supra* note 8, at 418.

164. See STATE & REGIONAL PLANNING, *supra* note 61, at 95.

165. See *Our Localism: Part I*, *supra* note 11, at 66-67. Even Oregon’s land use program is “based on the premise that local governments are the primary units for effectuating land-use planning activity.” STATE & REGIONAL PLANNING, *supra* note 61, at 64. Hawai’i is the only state

Intergovernmental coordination is only one objective of state and regional planning efforts. This Article addresses state and regional planning issues as they relate to achieving this objective of avoiding intergovernmental conflict. However, other major goals for regional planning, which will not be discussed here, include the protection of natural resources, growth management, providing and allocating affordable housing, agricultural land preservation, and ensuring an adequate infrastructure.¹⁶⁶ An example of how intergovernmental coordination can be achieved through regional planning is found in Florida, where each local government adopts a comprehensive plan for the community. This local comprehensive plan must then be coordinated with adjacent municipality and county plans, as well as with state and regional plans, and it must be demonstrated that the local plan's impact on adjacent communities has been taken into account.¹⁶⁷

There are two basic models for state and regional control over land use planning and regulation.¹⁶⁸ The first is the "Planning Consistency" model, which attempts to overcome the problems of fragmentation and parochialism that are prevalent in local land use decision making by establishing three main requirements.¹⁶⁹ First, local governments must perform comprehensive land development planning.¹⁷⁰ Second, the local plan must be consistent with state and regional land use goals.¹⁷¹ Finally, the Planning Consistency model requires consistency between local regulations and the local, state, and regional planning goals.¹⁷² Therefore, if local regulations and decisions must take into account regional and statewide impacts, interlocal conflicts can be mitigated by thoughtful regional planning and appropriate coordination among the local governmental units.

The second model, the American Law Institute's Model Land Development Code (MLDC), was issued in 1975 to address state growth management regulation. If adopted by states, the MLDC replaces the Standard City Planning Act (SCPA) and the Standard State Zoning Enabling Act (SZEA) which were developed in the 1920s, and which have been adopted by a majority of states.¹⁷³

that provides for the statewide regulation of land and which has converted its state general plan into law. *Id.* at 126-27.

166. See STATE & REGIONAL PLANNING, *supra* note 61, at 99-101; Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 485 (1993).

167. See STATE & REGIONAL PLANNING, *supra* note 61, at 101-02.

168. See Wickersham, *supra* note 23. As of 1993, Vermont, Maryland, Georgia, Florida, Oregon, Hawai'i, Washington, Maine, Rhode Island, and New Jersey had adopted comprehensive planning and growth management systems, and Virginia, Pennsylvania, Texas, and California were also moving in the direction of developing a state and/or regional planning structure. See STATE & REGIONAL PLANNING, *supra* note 61, at 4-5.

169. See Wickersham, *supra* note 23, at 518-59.

170. See *id.* at 519.

171. See *id.*

172. See *id.*

173. See Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M.*

The ALI model permits the state to exercise authority over land use decisions affecting multiple municipalities,¹⁷⁴ and in so doing, attempts to address some of the concerns levied at typical planning and zoning statutes.¹⁷⁵

Ideally, regional control over land use planning and regulation should follow the Planning Consistency model, which emulates the Oregon state growth management statute and which has substantially influenced the statutes in Georgia, Maine, Maryland, New Jersey, Rhode Island, Washington, Florida and Vermont.¹⁷⁶ This model of regional land use control has "proven more effective at shaping development patterns to meet environmental and social goals" than the American Law Institute's MLDC.¹⁷⁷

In theory, state or regional land use control could provide a structure for encouraging local governmental units to cooperate in their planning and land regulation efforts. This cooperation would, in turn, enable local governments to share the benefits derived from commercial development, such as new job opportunities and an increased tax base, while providing a mechanism to mitigate or share the burdens generated by the development, such as traffic congestion and the need to increase police services. In reality, though, the implementation of regional planning and regulation does not necessarily achieve the goal of eliminating interlocal conflict over commercial development. Regional decision makers must be selected, and if the regional body is comprised of disinterested third parties appointed by a state agency, then local governments can validly complain that the decision makers are not familiar with quality of life issues in a particular locale, nor sufficiently impacted by the selection of new "neighbors." However, if the regional decision makers are selected from the various local governmental units, they may become too interested, and the process may break down because "collections of local government officials in regional guise but ultimately accountable politically only to their local constituencies cannot be expected to produce effective advocacy for state and regional interests."¹⁷⁸

Local control proponents claim that keeping control at the local government

Jackson and National Land-Use Legislation, 28 URB. LAW. 7, 20 n.74 (1996).

174. See *id.* at 20. States establish authority by designating areas of "critical importance." *Id.* However, the ALI estimated that only 10% of all land use decisions would involve these critically important areas, and hence, that states would retain control over 90% of the land use decisions. *Id.* at 21.

175. See Steven H. Magee, Comment, *Protecting Land Around Airports; Avoiding Regulatory Takings Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243, 263 (1996). For example, the MLDC attempts to address criticisms of typical "lot-by-lot" development "by encouraging the compilation of wide amount of information and creating a 'land development plan' rather than a more traditional 'comprehensive plan.'" *Id.* at 264 n.132 (citation omitted).

176. Wickersham, *supra* note 23, at 451-52.

177. See *id.* at 450-51, 518. The MLDC was modeled after the Vermont statutory framework and provides for "state or regional regulation of major development projects, and state regulation of critical resources." *Id.*

178. *Our Localism: Part I*, *supra* note 11, at 67 (quoting T. PELHAM, STATE LAND-USE PLANNING AND REGULATION 42 (1979)) (discussing study of Florida's DRI program).

level, which is smaller in area and population than the state or region, encourages individual participation in the process and facilitates decision making for the common good.¹⁷⁹ The face-to-face interaction that is possible with a smaller unit enables people to understand more about each other and their needs and put aside individual self-interest for the public welfare.¹⁸⁰ It is also feared that regional planning will not work because coordination of the process will be administratively burdensome¹⁸¹ and because decisions will be made by individuals or agencies who do not know enough about the topography, individuality, or character of the area. Often, however, cries to retain the "community character" of an area may just be a plea to give local preference for development that preserves "expensive homes and the affluent people who can afford to own them."¹⁸² In contrast, less affluent communities cannot use local autonomy to "protect local social values and community character"¹⁸³ for they must instead encourage commercial development to increase their local property tax base to meet local demand for resources.¹⁸⁴ There can be no doubt that local regulatory decisions are "profoundly affected by local fiscal capacity"¹⁸⁵ and this "economic localism reflects and reinforces existing interpersonal and interlocal inequalities."¹⁸⁶

Even if state or regional planning laws require that municipalities and counties coordinate development of plans and implementation of regulations,¹⁸⁷ or assess significant adverse effects of a proposed project,¹⁸⁸ final discretion may be reserved to the local units¹⁸⁹ and enforcement provisions for these coordination

179. See *Our Localism: Part II*, *supra* note 4, at 396.

180. See *id.*

181. See *id.* at 399 ("urban economists see the empowerment of local governments as a way to overcome the perils of centralization"); see also *id.* at 402 (discussing economist view that "government is likely to be more efficient at the local level because the costs of government will be lower").

182. *Our Localism: Part I*, *supra* note 11, at 58 ("Local zoning autonomy often results in the promotion of local parochialism and a commitment to the preservation of community status regardless of the cost to other localities and to the balanced development of a region.").

183. *Id.*

184. See *id.*; see also *Our Localism: Part II*, *supra* note 4, at 351 (discussing the fact that fiscal health of most localities is based on decisions of private individuals and businesses to move to and remain in the boundaries of the locality); Johnstone, *supra* note 8, at 409 (discussing the zoning objective of some local governments to increase their tax base by rezoning to permit a major new shopping center or office complex).

185. *Our Localism: Part II*, *supra* note 4, at 424.

186. *Id.* at 425.

187. See, e.g., OR. REV. STAT. § 197.025 (Supp. 1996); WASH. REV. CODE § 36.70A.100 (1991).

188. See, e.g., CAL. PUB. RES. CODE §§ 21000-21002.1 (West 1996) (CEQA requires public agencies to give consideration to environmental effects in the decision-making process.).

189. See STATE & REGIONAL PLANNING, *supra* note 61, at 208 (discussing decision making under CEQA).

requirements are either lacking or inadequate.¹⁹⁰ Until states decide to truly reclaim the police power they have delegated to local authorities by taking a state or region-centered approach to land use planning, the ideology of localism will pervade any state or regional planning efforts that are not supported by adequate enforcement and the incentive to cooperate.¹⁹¹ However, the ideal of local authority has been "sustained by legal doctrines, embraced by powerful economic and political interests and legitimated by academic theorists."¹⁹² If state legislatures cannot manage to overcome this devotion to local autonomy in order to enact state or regional planning and regulation,¹⁹³ then local governments must, nevertheless, be required to cooperate with their neighbors or be provided the appropriate incentives to share the benefits and burdens of commercial development land use decisions. Part V discusses the possibility of creating state or regional planning models that retain local autonomy while providing a mechanism to eliminate or reduce interlocal conflicts over urban commercial development that affects more than one municipality.

V. RETAINING LOCAL CONTROL BY PROVIDING ECONOMIC INCENTIVES TO COOPERATE

A. *Regional Planning: A Dream?*

Regional planning is an essential component of any effort to control the impacts of land use decisions that span municipal boundaries.¹⁹⁴ The difficulty with using any planning model, however, is enforcing conformity of land use decisions with a specific plan. Some local governments have avoided the examination of their actions for conformity against a local general plan by establishing a "sufficiently vague plan, [such that] any land use ordinance arguably conforms."¹⁹⁵ The precedent of using a local plan as a guideline or local land use

190. See *id.* at 217-18. See also Marie L. York, *Regions: Blind Isolation or Shared Vision?*, LAND USE LAW, Apr. 1995, at 3, 3 (Authority for regional planning may exist, but implementation is often missing.).

191. See *Our Localism: Part II*, *supra* note 4, at 451-52 (discussing problems created by ideology of localism).

192. *Id.* at 452. See also Johnstone, *supra* note 8, at 402-03 ("Tradition in this country of local government autonomy over local affairs is so strong that the federal government lacks effective power to force the requisite coordinated political action needed for comprehensive urban renewal.").

193. See Johnstone, *supra* note 8, at 446. Complete federal or state government takeover of growth control programs is one way to resolve the regional problems concerning sharing of benefits and burdens, "but on urban land use issues this has often proven to be impossible" because of local government's political strength and influence. *Id.*

194. See York, *supra* note 190, at 3 ("[R]egional planning has been advocated as an essential addition to local planning to control the phenomena that transcend city limits.").

195. Flavio Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 879 (1983).

regulation is strong in theory, but in practice courts have not always required a comprehensive plan as essential to actual regulation and, instead, have often upheld zoning ordinances and regulations as self-contained expressions of a plan and its implementation.¹⁹⁶ Therefore, before regional planning can be effective, land use regulation must adhere to and be consistent with a plan, whether that plan be local, regional, or both.

Assuming that state legislation requires local government to adopt a comprehensive plan before it regulates land use, municipalities can, nevertheless, amend their plans to conform with desired land use decisions. Whether comprehensive planning is required to take place at the local or at the regional level, local governments must have an incentive to cooperate both in the development of the local or regional plans and in the implementation and maintenance of these plans. If states have not been able to successfully implement mandatory regional planning, then municipalities must somehow be encouraged to participate cooperatively in the local planning processes of adjacent communities. The major issue becomes what type of legal rule will be effective in establishing this incentive to cooperate with surrounding local municipalities if the state has not mandated regional cooperation via a comprehensive (and enforceable) statewide or regional planning system.

B. Creating an Economically Efficient Legal Rule to Resolve Interlocal Conflict over Suburban Commercial Development

The economic approach to evaluating legal rules requires that we look primarily to efficiency, i.e., maximizing aggregate social benefit over aggregate social cost.¹⁹⁷ In order to evaluate the efficiency of a legal rule, two aspects of efficiency must be examined: incentives and risk allocation.¹⁹⁸ First, to create incentives for individuals, or in this case, municipalities, to behave efficiently requires that we determine how to persuade municipalities to take into account the effects of their land use decision making on the benefits of and costs to adjacent municipalities.¹⁹⁹

The incentive issue includes two behavior features referred to as the "care decision and the activity-level decision."²⁰⁰ In this case, the care decision would refer to the municipality's behavior that affects costs and benefits, i.e., land use regulation and decision making, given an assumed level of participation in this

196. See *id.* at 849.

197. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 129-30 (Little, Brown & Co. ed., 1989). It might be possible to use an equitable approach to resolving intergovernmental conflict by distributing tax revenue on a need basis to various communities. However, the legal rule adopted to resolve intergovernmental conflict over commercial development should be based on efficiency criteria rather than equitable concerns.

198. See *id.* at 130.

199. See *id.* at 131.

200. *Id.*

regulatory behavior which creates the dispute.²⁰¹ The incentive question asks first, whether the legal rule proposed to control or resolve intergovernmental conflict creates incentives for municipalities to take the appropriate amount of care in their land use regulation and decision making. Care, in the land use situation, could be defined either as decision making that is supported by substantial evidence and is neither arbitrary nor capricious,²⁰² or as decision making that takes into account the welfare of residents outside municipal boundaries.²⁰³ Therefore, any legal rule we derive for purposes of controlling intergovernmental conflict must start with the allocation of responsibility for externalities.²⁰⁴ This Article proposes that any solution to the intergovernmental conflict problem start with the assignment of a legal right to a municipality not to be substantially impacted by land use decisions of an adjacent community. In other words, the legal rule must recognize the obligation of a municipality to consider the costs to communities outside its borders that are affected by local land use decisions.²⁰⁵ Thus, any legal rule designed to resolve intergovernmental conflict over land use must be evaluated in terms of whether it creates incentives for municipalities to use care in taking into account the adverse impacts its land use decisions have on surrounding communities.

The second facet of the incentive question is the activity-level decision.²⁰⁶ Here, the activity-level decision refers to the extent of the municipality's participation in land use decision making. Each municipality's decision about how much to participate in the land use decision-making process (e.g., approve requests for commercial development) affects its benefits (e.g., an increased tax base) and the expected burdens (e.g., increased traffic), including those burdens external to the municipality.²⁰⁷ A municipality's decision to maintain a low activity level of land use regulation or growth and forgo the benefits of commercial development may, nevertheless, affect its level of burdens if surrounding communities are forced or encouraged to operate at a higher activity level.²⁰⁸ Therefore, in order to determine the efficiency of a proposed legal rule

201. *Id.*

202. This is the general judicial review standard applied to local land use decision making. MANDELKER, *supra* note 32, § 6.53, at 275.

203. *See supra* notes 47-64 and accompanying text (discussing nuisance and judicially-created obligation to control externalities).

204. *See* POLINSKY, *supra* note 197, at 11-12 (discussing Coase Theorem and its conclusion that the "efficient outcome will be achieved regardless of the assignment of the legal right").

205. *See supra* notes 47-64 and accompanying text (discussing municipal duty to consider welfare of nonresidents).

206. *See* POLINSKY, *supra* note 197, at 131.

207. Affluent communities may often seek to limit growth, while communities where residential wealth is limited will adopt policies to encourage development that is "clean" and will generate revenue. *See Our Localism: Part II, supra* note 4, at 424.

208. *See* James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 73 (1994).

Existing growth management systems tend to generate growth in neighboring

to resolve intergovernmental conflict over commercial development, both the care decision, which requires municipalities to take externalities into account, and the activity-level decision,²⁰⁹ which could result in burdens whether the municipality's activity level is high or low, must be evaluated together.

The risk-allocation question is the second aspect of the legal rule efficiency determination and asks whether the legal rule efficiently allocates risk among the relevant municipalities.²¹⁰ Risks include both beneficial ones, e.g., when it is uncertain how much tax-base growth will occur, and detrimental ones, e.g., when the burdens created by land use decisions are uncertain.²¹¹ If risk cannot be eliminated, it is best to reduce the risk carried by a risk-averse party.²¹² Because municipalities are likely to have a similar level of aversion to risk,²¹³ risk should be equally allocated among the municipalities.²¹⁴ Because the legal rule must provide for an equal allocation of risk among municipalities in order to achieve efficiency, factors other than risk-aversion, such as burdens identified by an environmental impact report, must be used to allocate the risk associated with land use decision making.

C. *The Proposed Economically-Efficient Rule*

The rule herein proposed, as an alternative to mandated, comprehensive, and enforceable statewide or regional planning addresses only the conflict between suburban municipalities created by commercial development. It does not profess to resolve the inequities in housing and education created by urban sprawl and the flight from the inner cities.²¹⁵ Nor does it address the "not in my back yard" (NIMBY) problem, where suburbs refuse to allow certain necessary facilities, such

communities. . . . Local governments often suppress the pace of development within their own communities. . . . Additionally, the dispersion of overall regional development patterns may be exacerbated by growth management systems because development sometimes leapfrogs to adjacent and nonadjacent communities that are more accommodating to growth.

Id.

209. See *Been, supra* note 9, at 531-32 (discussing competition between communities for growth that increases tax base and stating that "even communities that are not currently active competitors serve as a constraint upon their neighbors because they may reenter the competition at any time").

210. See *POLINSKY, supra* note 197, at 132.

211. See *id.*

212. See *id.* at 132-33.

213. Municipal decisions are made by public officials who are elected and are generally concerned about the support of their constituency for reelection. This structure is basically the same for all municipalities and will, therefore, likely place them at the same level of risk-aversion.

214. See *POLINSKY, supra* note 197, at 133.

215. See *Our Localism: Part II, supra* note 4, at 438-39 (discussing "jurisdictional separation of wealth and need that results from the fragmentation of most metropolitan areas into a central city surrounded by a multiplicity of suburbs").

as solid-waste disposal sites or jails, in their community.²¹⁶ The rule herein proposed for managing commercial development in the suburbs requires an initial allocation of the legal right to a municipality not to be substantially impacted by land use decisions made by adjacent communities. This allocation of a right not to be impacted creates an incentive for municipalities to assess the external effects of their decisions as long as this obligation is enforced. Instead of relying on litigation, as discussed in Part I, to enforce this obligation to care, the process should begin with cooperative planning, whereby adjacent municipalities meet to discuss their local comprehensive plans and determine when and where potential areas of conflict might arise with implementation of the local plans.²¹⁷ This planning process will allow municipalities to retain local autonomy while enabling them to assess the magnitude of their obligation not to substantially impact surrounding communities. State legislation should also facilitate contracting between municipalities²¹⁸ to ensure that agreed-upon local plans will not be amended without consultation with, or perhaps approval by, adjacent municipalities. If mandatory or voluntary planning and interlocal coordination is not available, the process can, nevertheless, proceed given the municipality's obligation to consider impacts on nearby residents.²¹⁹

The EIS is an established structure, either at the federal level, the state level, or both, in which significant environmental effects are taken into account whenever a major project, such as a commercial development, is proposed.²²⁰ The process proposed in this Article uses the EIS as a basis for distributing any anticipated benefits, such as tax-base growth, to those municipalities who are expected to suffer significant adverse effects from the proposed commercial development. Instead of sharing tax revenue based on some state or regional determination of need,²²¹ municipalities should jointly determine how to allocate proposed benefits and burdens. The process of using the EIS to allocate the risks

216. *See id.* at 442-43 (discussing the NIMBY problem and its effect on suburban policies).

217. "Localities may accept some form of regional planning as long as the regional body lacks the power to effectuate its plans without local approval." *Id.* at 432.

218. *Id.* at 431 n.369 ("the number of interlocal agreements involving suburbs 'is remarkably small' because of suburban fears of becoming dependent") (citing J. BOLLENS & H. SCHMANDT, *THE METROPOLIS: ITS PEOPLE, POLITICS AND ECONOMIC LIFE* 328 (3d ed. 1975)); *see also id.* at 431-32 ("Interlocal cooperation is highly unusual and more commonly the product of state or federal compulsion than voluntary local action.").

219. *See id.* at 431 (discussing interlocal cooperation and stating that "[a]lthough theoretically attractive, interlocal cooperation has in practice been relatively narrow in scope and typically confined to matters of technical infrastructure that realize economies of scale and effectuate regional economic integration, but that have only limited implications for local wealth and social status") (footnote omitted).

220. *See supra* notes 74-81 and accompanying text (discussing National Environmental Policy Act of 1969 and its requirement that agencies consider the environmental impact of their decision making in order to protect environmental quality).

221. *See supra* notes 136-43 and accompanying text (discussing Minnesota tax sharing legislation).

associated with commercial development land use decisions will treat municipalities, which will be assumed to have the same risk-aversion level, equally. The assignment to municipalities of a legal right not to be substantially impacted by external decision making, the knowledge by municipalities that their level of participation in allowing commercial development may not directly relate to the burdens they will experience, and the allocation of risks, both beneficial and burdensome, by using the existing EIS process, potentially establish the economic efficiency of the proposed process.

D. The Procedure To Facilitate Success of The Proposed Rule

The success of any legal rule depends on how the rule is implemented and how it is enforced. Conformance with state, regional, or local planning requirements can be facilitated through the use of economic incentives and/or sanctions. States with regional land use planning programs generally provide for state monitoring of local planning efforts and states may sanction local governments with the loss of eligibility for state funds if noncompliance is discovered.²²² For example, Washington state legislation provides a method to encourage local compliance with regional (county-wide) plans through the use of “incentives that take the form of technical assistance, grants, and priority funding for projects inspired by the planning process” and sanctions for noncompliance that include the temporary withholding of revenues collected by the state.²²³ Maryland, Florida and New Jersey also use the sanction of withholding state funds in order to secure local compliance with state-mandated comprehensive planning,²²⁴ while Rhode Island and Florida provide that the state will prepare a comprehensive plan if the local government fails to do so.²²⁵ Therefore, the proposed process should include sanctions and incentives similar to those found in Washington, Florida, New Jersey, and other states that have successfully implemented state or regional planning programs.

Although sanctions and/or litigation may be necessary to ensure eventual compliance with a process that seeks to resolve intergovernmental conflicts over land use decisions, alternative dispute resolution (ADR) methods of negotiation, mediation, and/or arbitration are preferable approaches to securing long-term cooperation throughout the process of sharing commercial development benefits and burdens. Municipalities have several incentives to avoid litigation and choose, instead, an ADR approach. First, litigation is expensive.²²⁶ Elected local officials

222. See Johnstone, *supra* note 8, at 423-25 (discussing enforcement of local compliance with planning through use of sanctions and mediation as a method for resolving local-state conflicts over such compliance).

223. See STATE & REGIONAL PLANNING, *supra* note 61, at 142-44 (discussing countywide regional planning programs in Washington).

224. See Porter, *supra* note 166, at 493-99 (discussing sanctions and incentives used by various states to secure compliance).

225. See *id.* at 494.

226. See Place, *supra* note 102, at 374-75 (“The costs of litigating the strained interlocal

are hesitant to spend local tax money on costly litigation rather than on maintaining and improving the municipality infrastructure, for fear of losing the support of their constituency at election time. Second, litigation causes delays in the commercial development and may result, many times intentionally, in the abandonment of the project by commercial developers.²²⁷ Finally, litigation is certainly not conducive to maintaining good ongoing relationships with adjacent municipalities.²²⁸ Goodwill between municipalities is necessary for future land use decisions requiring cooperation between communities.

ADR approaches, such as negotiation and mediation, have the advantage of offering a less expensive alternative that can avoid protracted litigation and that can strengthen ongoing relationships between communities. Negotiation and mediation offer the opportunity for local government staff and/or officials to have face-to-face contact²²⁹ with the goal of producing an agreement which meets the interests of each side, fairly resolves the areas of conflict, is enduring, and takes the greater community interests into account.²³⁰ The trend toward greater local government participation in ADR is reflected in the routine use by cities and counties of "arbitration and mediation techniques to resolve labor disputes, construction contract disputes and disputes over the value of property taken through eminent domain."²³¹ These techniques can similarly offer the advantage of resolving intergovernmental conflicts over commercial development "in a more cost effective and less adversarial manner."²³²

Negotiation is a method of ADR that requires the parties to discuss problems, with or without the aid of representatives and/or a facilitator, and arrive at a mutually acceptable solution.²³³ In mediation, a similar process, the disputing

relations and fact that a judicial proclamation addresses only a fraction of the area-wide problems and issues involved . . . may be sufficient incentive to the municipality to participate in ADR methods.").

227. Bustillo & Sommer, *supra* note 90, at B1.

228. See Place, *supra* note 102, at 375; see also Bustillo & Sommer, *supra* note 90, at B1.

229. See *Our Localism: Part II*, *supra* note 4, at 396. Briffault discusses the advantages of small size governmental units including the ability to have face-to-face interaction with its companion benefits of "empathy and commitment to the common good." *Id.* at 396 n.217 (quoting J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 270, 275 (1980)); see also Place, *supra* note 102, at 367 n.147 (alternative dispute resolution methods refer to processes where "disputing parties meet face to face and attempt to reach an acceptable resolution, either by way of consensus or by submitting the issue to a neutral third party for determination") (citing GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES* 5 (1986)).

230. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 4 (2d ed. 1991) (defining a "wise agreement").

231. Jeffrey B. Groy & Donald L. Elliott, *Using Arbitration and Mediation to Resolve Land Use Disputes*, 15 *CURRENT MUN. PROBS.* 190, 197 (1988-89) (citations omitted).

232. See Place, *supra* note 102, at 367.

233. For an overview of how negotiation relates to mediation and other ADR processes, see CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 6, 14 (1986).

parties seek the active assistance of a neutral third party, the mediator, who does not impose a solution, but instead directs the parties in their efforts to reach a solution.²³⁴ Because skilled mediators lead the discussions in mediation, dispute resolution often occurs quicker than through unaided negotiation.²³⁵ Therefore, mediation is the procedure recommended herein, both for distributing the benefits and burdens of commercial development as determined by the EIS and for resolution of interlocal conflict. The process of negotiation may be an effective process for implementing regional planning or local planning that takes regional impacts into account. However, mediation should be used as the dispute resolution process when municipalities experience conflict in the planning process²³⁶ or when they must meet to allocate benefits and burdens according to the EIS.

Finally, arbitration is a process similar to litigation because it involves the use of an arbitrator with the authority to impose a solution, but arbitration is generally less formal and faster than the judicial system.²³⁷ Nonetheless, because arbitration results in a decision that is imposed on the parties, rather than a resolution arrived at by the parties themselves, the process is not as conducive to maintaining good relationships as are the methods of negotiation and mediation.²³⁸ Still, arbitration is a viable alternative to litigation if the parties cannot arrive at a mutually satisfactory solution using negotiation or mediation.

Therefore, considering these ADR options, this Article proposes that municipalities be required to mediate the allocation of commercial development benefits and burdens that extend across municipal boundaries using the EIS as the information source. If an allocation decision cannot be mutually agreed upon and supported by an interlocal contract, the parties should be required to submit to binding arbitration. Binding arbitration will foreclose the parties from continuing the dispute in the litigation process unless they challenge the arbitrator's decision as unreasonable or as an abuse of discretion.²³⁹

234. *See id.*

235. *See id.*

236. *See* JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES* (1992).

237. *See id.*

238. *See* Joseph Shade, *The Oil & Gas Lease and ADR: A Marriage Made in Heaven Waiting to Happen*, 30 TULSA L.J. 599, 621 (1995).

Mediation "is far less adversarial than litigation or arbitration, and therefore less [likely to disrupt existing] relationships." If the parties are able to resolve the dispute consensually through negotiations, the relationship which existed prior to the dispute may be preserved. In some instances, the relationship may even be strengthened because the parties sometimes come to appreciate each other's differing points of view. *Id.* (alteration in original) (footnote omitted) (quoting CENTER FOR PUB. RESOURCES, *ADR FOR OIL AND GAS INDUSTRY DISPUTES* 6 (1991)).

239. Paul Salvatore, *Alternative Dispute Resolution in Employment Law: The Pros, the Cons, and the How*, in *ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE* 537, 565-66 (A.L.I.-A.B.A. Course of Study No. C976, 1994). "Arbitration awards are generally

California has encouraged the use of ADR to resolve land use conflicts by enacting the Land Use and Environmental Dispute Mediation Act,²⁴⁰ which encourages the use of collaborative problem solving in land use planning and regulation.²⁴¹ The Act provides that suits brought in superior court as a result of actions such as the approval or denial of a development project or an act or decision made pursuant to CEQA may be subject to a mediation proceeding.²⁴² The mediation proceeding must follow the procedure defined in the Act and includes the mutual selection of a mediator experienced in land use issues and a time limit of thirty days for this selection.²⁴³ However, the Act only seeks to encourage and facilitate mediation, allowing the parties to resort to the judicial system if they cannot reach a voluntary resolution.²⁴⁴ Using the Act as a basis, the Western Justice Center has proposed an ADR system for the Southern California Association of Governments (SCAG)²⁴⁵ that can be used to resolve interjurisdictional disputes such as city revenue sharing.²⁴⁶ This proposed system offers an excellent procedural mechanism for using ADR to resolve interlocal disputes arising from spill-over impacts of land use decisions and tax-revenue sharing.²⁴⁷ Although this model could easily be adapted to serve as the procedure for implementing the rule proposed in this Article, the entire process should be made mandatory, rather than voluntary.²⁴⁸ Furthermore, conservative timelines, e.g., thirty days to select a mediator, should be established in the mediation process so that proposed commercial projects are not unreasonably delayed. If mediation fails to achieve a satisfactory allocation of benefits and burdens based on the EIS, such that neighboring communities can mutually approve a proposed commercial project having regional impacts, then the parties will be required to select an arbitrator and proceed immediately to binding arbitration. This use of mandatory ADR techniques may seem somewhat contrary to the principles of ADR, which generally encourage voluntary participation in a consensus-building process. However, local governments will need this incentive to cooperate in order to

subject to challenge only when: (1) Bias is shown on the part of the arbitrator; (2) Material and relevant evidence is not even considered; or (3) The decision is arbitrary and capricious." *Id.* (footnotes omitted).

240. CAL. GOV'T CODE §§ 66030-66037 (West Supp. 1997).

241. *Id.* § 66030.

242. *Id.* § 66031.

243. *Id.*

244. *Id.* § 66030.

245. SCAG is one of the four major regional Councils of Government (COGS), which are voluntary organizations made up of elected city and county officials within each region. York, *supra* note 190, at 6.

246. WESTERN JUSTICE CTR., HAYES FOUND., ALTERNATIVE DISPUTE RESOLUTION SYSTEMS (1995) (available in Pepperdine University School of Law, Straus Institute for Dispute Resolution).

247. *See id.* at 53-57.

248. *See id.* at 41 (emphasizing that "participation in a SCAG-sponsored dispute resolution process does not limit any of the parties from withdrawing at any time and pursuing other means of pressing their position or seeking redress").

successfully resolve interlocal conflicts without resorting to litigation or the loss of local autonomy through state-mandated land use decision making.²⁴⁹

CONCLUSION

With the growth of metropolitan areas, where local borders artificially divide areas that are economically and socially interdependent, interlocal conflicts frequently arise where one municipality's land use decisions adversely affect surrounding communities.²⁵⁰ Yet local governments have little interest in cooperating with their neighbors, and "[i]ntegrated regional policies on these matters are uncommon."²⁵¹ Municipalities will not take extralocal effects into account nor share the benefits of commercial development with neighboring communities unless they are required to do so by a legal rule which encourages them to cooperate.²⁵² The trend in growth management programs is toward increased state government involvement in land use planning and regulation²⁵³ and state or regional planning appears to be the most effective and efficient method for avoiding interlocal conflicts.²⁵⁴ However, state or regional planning and control has not been universally accepted as the solution to controlling interlocal disputes; the devotion to local autonomy, fueled by the ideology of localism, has kept many states from successfully addressing the problems of interlocal inequities and local externalities.²⁵⁵

To resolve the interlocal conflicts that arise when commercial development occurs in a suburban area and affects neighboring municipalities, a legal rule is needed that will encourage, but not require, regional planning and that will resolve

249. See Johnstone, *supra* note 8, at 402-03 (discussing difficulty of getting local governments to cooperate).

250. See *Our Localism, Part II, supra* note 4, at 426-27.

251. *Id.* at 443. "[S]uburbs prefer to rely on their own resources, protect their own values and shun fiscally draining and socially threatening ties to the cities." *Id.*

252. See *id.* at 434 for a strong statement of this problem:

Local governments will not, as long as they need not, take extralocal effects into account, give a voice to nonresidents affected by local actions, internalize externalities, make compensatory payments for negative spillovers or transfer local wealth to other communities in the region to ameliorate fiscal disparities. Without federal or state intervention, so roundly condemned by localists, the pervasive problems of externalities and interlocal service inequalities reflecting tax-base disparities will certainly persist.

253. See Johnstone, *supra* note 8, at 418.

254. See *supra* notes 152-93 and accompanying text (discussing the solution of state and/or regional planning); see also *Our Localism: Part II, supra* note 4, at 451-54 (stating that "problems of interlocal inequities and local externalities cannot be satisfactorily addressed" without greater state participation in land use planning and regulation, and suggesting that the ideology of localism be "jettisoned" in order to allow development of legal doctrines that combine local initiative and state oversight).

255. See *Our Localism: Part II, supra* note 4, at 451-52 (discussing how the ideology of localism has obstructed the ability of states to address interlocal problems).

disputes without resorting to expensive and delaying litigation and without sacrificing local autonomy. The rule requires an initial allocation of a right to municipalities to be free from significant adverse effects resulting from land use decisions of adjacent communities. This potentially efficient rule can either require or merely encourage communities to participate in a regional planning effort using local comprehensive planning as the basis for discussion. The incentive to cooperate in regional planning is achieved by the municipality's knowledge of an obligation to surrounding communities not to adversely impact nonresidents. If municipalities choose not to cooperate, they will nevertheless be held accountable to other communities for local land use decisions that result in external negative impacts.

Once it has been determined, through the existing federal and/or state environmental impact process, that a proposed commercial development project impacts adjacent municipalities, the decision making municipality will be required to mediate a resolution of these externalities. The mediation process will facilitate the allocation of tax-base growth and projected burdens that the project will generate among the impacted municipalities. Interlocal contracting can be employed at this point in the process, as well as earlier in any regional planning process, to assure local governments that their interests will be protected. The mediation process will provide municipalities with the opportunity to conduct face-to-face negotiations and avoid unnecessary delay and expensive litigation. If the mediation process is successful in allowing the parties to reach a satisfactory solution for sharing the benefits and burdens of commercial development, the municipalities will strengthen their relationships and promote future collaborative problem solving. However, the mediation process must not depend on voluntary cooperation for success. Local governments must be given a strong incentive to cooperate in a timely and reasonable manner by requiring binding arbitration of the allocation of benefits and burdens if the mediation process fails to produce results within a reasonable time. Only by eliminating the use of litigation as a tactic for the delay of commercial development projects and by encouraging municipalities to cooperate in the mandatory allocation of benefits and externalities can interlocal conflicts be resolved while simultaneously preserving municipal relationships and permitting beneficial economic growth.