Public Land Banking: A New Praxis for Urban Growth

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NOTE

Public Land Banking: A New Praxis for Urban Growth

If America's cities are to accommodate the increased urban population of the future without intensifying present disorders or giving rise to massive new ones, new tools must be developed to guide and control urban growth. In this Note, the authors examine the genesis and impact of disorderly urban growth. On the basis of the land use experiences in the United States and other countries, they suggest that one method of meeting the pressing need for ordering urban growth is to establish land banks: public bodies authorized to acquire, hold, and dispose of land in and around their localities. The authors then explore the organizational, legal, and financial considerations that would be involved in establishing such land banks.

I. INTRODUCTION

In the continuing trek from a rural to an urban nation, America has come to the crossroads in the use of its urban resources. The undisciplined, sporadic, and haphazard character of urbanization has spawned complex problems at every level of government and has imposed huge costs upon the private sector. Slums and blight have engulfed large portions of our major cities; violence, obsolescence, pollution, traffic congestion, and inadequate schools characterize their cores. In the suburbs, rising taxes, chaotic land use patterns, strip commercial development, and inadequate parks and open space are common. The suburbs of yesterday, the so-called "gray areas," are gradually becoming the slums of today as the social and economic infirmities of the city push outward to consume even larger areas. Beyond the suburbs, unused land and land devoted to such nonintensive uses as agriculture is being laced with scattered ribbons of homes and businesses, stretching finger-like along rural roadways and country lanes. This disorderly and dysfunctional pattern of urban development, aptly called "urban sprawl," has not only produced an unpleasant environment, but has imposed heavy costs on urban communities and generated marked inequities in the distribution of these costs.

In the face of these resolute trends, it is becoming apparent that existing methods of regulating land use are inadequate to cope with the insidious nature of urban sprawl. The magnitude of the problem is reflected by the prospect that from now until the year 2000, the United States population will grow from 208 million to be-
tween 280 and 305 million, and all of the increase will probably occur where there is now a town or city.\(^2\)

The actual demand for land will, in fact, probably be more intense than the projected increase in urban population alone would indicate. As man's income grows, all else being equal, his demand for land will increase. He will consequently desire larger homes, more attached open space, and additional public services.\(^3\) Assuming then that per capita income will continue to rise, it seems certain that demand for urban land per inhabitant will increase.\(^4\)

In a purely physical sense, there is enough space in the United States to accommodate all the urban centers that can possibly be envisaged.\(^5\) The impending demand for more land, therefore, reveals not a physical problem, but rather a managerial and financial one. The congestion endemic to our cities and the ubiquitous sprawl in the suburbs are primarily the result of inept management, not lack of space.

One method of managing urban growth and promoting orderly urban development is to establish land banks — public bodies which, by acquiring land in the path of anticipated urban expansion and

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\(^1\) Rosenthal, Younger Women Plan Big Decline in Rate of Births, N.Y. Times, Feb. 17, 1972, at 1, col. 8. Recent Census Bureau statistics indicate a sharp reduction in the population growth rate. The average number of children expected by wives between the ages of 18 to 24 dropped from 2.9 to 2.4 between 1967 and 1971. If the rate of 2.4 children per wife remains constant, then in the year 2000 the nation's population would be approximately 280 million rather than the 305 million persons anticipated if the 2.9 rate had persisted. In order for zero population growth to be achieved, however, the rate must decrease to 2.1 children per wife. \textit{Id.}

\(^2\) M. CLAWSON, R. HELD & C. STODDARD, \textsc{Land for the Future} 111 (1960).

\(^3\) W. LETWIN, \textsc{Municipal Land Banks: Land Reserve Policy for Urban Development} 6 (1969).

\(^4\) Indeed, between 1950 and 1960, the ratio of land to people in American cities rose markedly. Whereas population rose by 30 percent during this decade, built up land expanded by 75 percent. Moreover, 15 major metropolitan areas more than doubled their urbanized areas in the space of 10 years. In 40 out of 46 major metropolitan areas, population density declined between 1950 and 1960. J. DE TOURES, \textsc{Economic Dimensions of Major Metropolitan Areas} 14 (National Industrial Conference Board, Technical Paper No. 18, 1968). But note de Toures' doubts as to the persistence of this trend. \textit{Id.} at 18.

The automobile has been a key factor in this dynamic growth pattern. Introduction of the automobile extended the effective, or available area of metropolitan centers from about 700 square miles in 1940 (when the 15 mile-per-hour trolley prevailed as the mode of intra-urban transportation) to about 2800 square miles today (when the commuting speed is estimated to be 30 miles per hour). \textit{See H. Blumenfeld, \textsc{The Modern Metropolis} 55-66 (1967), cited in W. Letwin, supra note 3, at 8.}

\(^5\) If, for the purpose of illustration, urban land is considered to be all land in settled places of at least 1,000 population, then it still constituted less than two per cent of all acreage in the 50 states in 1964. G. MILGRAM, \textsc{U.S. Land Prices — Directions and Dynamics} 15 (Prepared for the consideration of the Nat'l Comm'n on Urban Problems, Research Report No. 13, 1968).
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keeping it free from premature development, can effectively control the pace and direction of urban growth. As the city expands, land in the bank's reserve closest to the city's core would be continually sold or leased to private developers, while land at the urban fringe would simultaneously be acquired or rented in order to immunize it from premature development. Operated properly, the land bank would minimize or eliminate sprawl. Other subsidiary aims could be pursued in accordance with the policies of the particular community that the land bank served. Redeveloping the inner city, reducing the price of urban land on the open market, curbing private land speculation, providing for future public uses, and subsidizing certain private or public uses by selling or leasing below the cost of the acquisition are among the array of possible subsidiary objectives.

The concept of land banking is hardly new. Several European countries have successfully operated land banks in various forms for many years. Although local governments in America, with the exception of Puerto Rico, have never maintained land reserves as a means of guiding and controlling urban development, lands have been publicly acquired in advance of need for schools, highways, and industrial facilities and the Federal Government has always maintained a general land reserve (i.e., the public domain). In addition, several prominent federal commissions have proposed land banking as a technique for combatting various urban problems.

While the literature of land economics and urban planning is replete with suggestions for land banking, there are no complete, in-depth efforts to elaborate what would be involved in establishing and operating a land bank. The purpose of this Note is to set up a framework for the kinds of decisions that would be involved in developing a working model for public land banking and to discuss the major problems inherent in land banking in the American legal context. It begins with a critique of present American land use controls; then, before elaborating on the operational and legal aspects

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6 See notes 37, 143-52 infra & accompanying text.

7 For a list of some of these proposals for large-scale public land acquisition as a means of controlling urban growth, see the bibliographical note contained in Reps, "The Future of American Planning: Requiem or Renascence?", in PLANNING, 1967 SELECTED PAPERS FROM THE 1967 ASPO NATIONAL PLANNING CONFERENCE 47, 59-65 (1967). See also M. Clawson, SUBURBAN LAND CONVERSION IN THE UNITED STATES 355-63 (1970); G. Edwards, LAND, PEOPLE, AND POLICY (1969); G. Milgram, supra note 5; Roberts, The Demise of Property Law, 57 CORNELL L. REV. 1, 36-50 (1971). The most extensive analysis of land banking to date is W. Letwin, supra note 3, which primarily follows an economic orientation.
of land banking, the Note surveys foreign experiences with similar schemes, American land acquisition programs, and recent American land use proposals.

II. THE NEED FOR ORDERLY DEVELOPMENT

We have been the most prodigal of people with land, and for years we wasted it with impunity. There was so much of it, and no matter how we fouled it, there was always more over the next hill, or so it seemed. W. Whyte, The Last Landscape 1 (1968).

A. The Genesis of Urban Sprawl

Public attitudes regarding the proper use of land arise from the polymorphous social, economic, ethical, and philosophical myths and persuasions about the true purpose of land that have developed throughout our history. In America, democracy began as a system in which ownership of land was intimately identified with freedom. One of the most tenacious ideas in American history was that every man who wanted to become a small land owner or farmer should be entitled to do so, even if he could not afford to buy the land outright with his own resources. This concept of land ownership was steeped in the Jeffersonian belief that society would be served best if each individual landowner had undisturbed freedom. Consequently, few restrictions were imposed on one's right to do whatever he pleased with the land he owned. The concept of agrarian imperialism so pervaded American thought that little concern was expressed regarding the use or misuse of land. Even in the early 1900's, when industrial exploitation invaded the public domain, the institution of land ownership was still girded with the legal rules which earlier had led Blackstone to conclude that private rights in property were impregnable against invasion "even for the general good of the whole community."


9 In 1776, Thomas Jefferson averred that "[t]he people who will migrate to the westward . . . will be a people little able to pay taxes. . . . By selling the lands to them, you will disgust them and cause an avulsion of them from the common union. They will settle the land in spite of everybody." R. Robbins, Our Landed Heritage 20 (1942). After tempestuous class and sectional struggles over land legislation, Congress passed the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392, which gave up to 160 acres to anyone who would settle and make improvements on it. Id. at 206-07.

10 R. Hofstadter, supra note 8, at 38.

Accompanying the urbanization and industrialization of the 20th century, came what appeared to be a diminishing faith in the unbridled superiority of private interests. Zoning, a planning device by which property rights were ostensibly subordinated to the health, safety, and welfare of the community, however, became popular only when it became touted as a method of stabilizing and protecting property values, while imposing nominal restrictions on areas portending speculative profit. The practice of zoning, therefore, has been substantially different from the theory, and the advent of modern land use controls has done little to dampen individual freedom and initiative in the use and exploitation of land.

This fundamentally laissez-faire policy of land use which characterized America's historical development still predominates in our cities today. Land in the area surrounding the urban core, which should be developed, is kept vacant by speculators who value their land at an optimistic future price in anticipation of high profits.

12 Zoning's potential for class stratification was prophetically identified in the 1924 district court opinion of Euclid v. Ambler Realty Co., 297 F. 307, 316 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926). The district court opined that the ordinance was a taking of property without just compensation, and declared:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straitjacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. Id. at 316.

It has taken 30 years for our society to belatedly agree with the district court. See Aloi & Goldberg, Racial and Economic Exclusionary Zoning: The Beginning of the End?, 1971 URBAN L. ANN. 9, 11.


14 Single family areas were secured from the intrusions of undesirable uses, but multifamily, commercial, and industrial areas were commonly overzoned. New York's zoning ordinance, for example, could provide enough business and industrial space for a city of 340,000,000 people. Id. at 11.

15 Much can be said regarding what is and is not included in the definitions of a city, metropolitan area, urban core and the like. For a discussion of this terminology, see M. Clawson, R. Held & C. Stoddard, supra note 2, at 60-63, 511-14.

16 Since land prices may fluctuate greatly, everyone who owns, buys, or sells land, with or without improvements, is technically a speculator. But those who enter the land market expressly to capitalize on these fluctuations are the ones usually referred to pejoratively as speculators. See M. Clawson, supra note 7, at 134-35.
As a result of the artificial shortage of land\(^\text{17}\) thus created, developers\(^\text{18}\) — residential ones at first — are forced to go beyond the areas of logical development to scattered and isolated locations on the urban fringe where land can be obtained at reasonable prices. Consumers, in the true American ethos, are willing to drive a bit further to achieve more land for less money — particularly where expressways and freeways are available to maximize their "automobility" and allow them communter access to their jobs in the city. Eventually, businesses also locate further out to maximize their returns and municipal government establishes a full complement of public services. This dynamic process of "leapfrogging" over expensive, close-in land to less expensive land on the periphery, leaves gaps near the core and creates a sporadic pattern of development around the fringe,\(^\text{19}\) a pattern which has been termed "urban sprawl."\(^\text{20}\)

The low population density which characterizes sprawl produces inefficient resource allocations, as well as impairing the aesthetic aspects of the metropolis. As land is divided and subdivided for scattered, small-scale development, irreplaceable natural and recreational resources are unnecessarily consumed. Basic services, such as water supply and sewage removal, must be extended over great distances, resulting in higher per capita costs for these services.\(^\text{21}\) Existing roads prove inadequate to accommodate newly scattered populations commuting into the increasingly distant city.\(^\text{22}\) Schools

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\(^{17}\) This shortage is "artificial" in the sense that it is created by the speculator's withholding of land from the market, rather than by an absolute physical absence of land.

\(^{18}\) In practice, several persons or firms — land assembler, broker, site planner, builder, subcontractor and sales agent — will often work together to carry out some or all of the processes herein ascribed to the developer.

\(^{19}\) The urban fringe is the "point where existing houses or current construction stops . . . ." A. SCHMID, CONVERTING LAND FROM RURAL TO URBAN USES 29 (1968). In practice, of course, this "point" will generally be a transitional area of some breadth. Id. at 29.


\(^{21}\) Alternatively, if separate new public services are provided by installing new plants and utility facilities, high costs will be encountered because of the diseconomies of small-scale operations. See, e.g., W. LETWIN, supra note 3, at 15.

\(^{22}\) See F. BOSSELMAN, ALTERNATIVES TO URBAN SPRAWL: LEGAL GUIDELINES
also prove inadequate to handle the increased suburban population. Consequently, new schools and new roads must be constructed and local residents must bear additional taxes. 23

The additional costs that are generated in the wake of sprawl are not imposed solely upon those who move beyond the fringe, but rather upon the community as a whole. For example, a recent study of one “leapfrog” subdivision development estimated that 40 percent of the added monetary costs had been born by the general public, and 60 percent by residents of the subdivision itself. 24

Moreover, the social costs to the urban population are even higher than the monetary ones that are incurred. Haphazard urban growth has led to a widespread pattern of affluent suburbs surrounding a poverty-ridden city core. In most metropolitan areas, racial minorities and the poor are either intentionally or unintentionally excluded from new developments outside the city. 25 Unable to afford outlying property, the poor are condemned to the urban ghettos, which become even more overcrowded to meet natural population increases. And as businesses and industry flee the city, municipalities are left with a shrinking tax base which proves inadequate to maintain a high level of municipal services, or to stem the tide of urban deterioration.

What is clear from these patterns of sprawl, then, is the need for orderly development — that is, development which conforms closely to optimal patterns of land use. Quite simply, the argument for orderly urban development stems from one fact: urban sprawl and disorderly development are extraordinarily and unnecessarily costly.

B. The Inadequacies of Existing Land Use Controls and the Alternative of Land Banking

Zoning, the workhorse of American land use control, has proven inadequate and often inimical to the task of ordering urban growth. 26 Comprehensive planning for the development of urban


23 Id.


26 While growth and development is also greatly affected by many other govern-
areas requires that planning instruments be sufficiently flexible to take into account the forces operating in today's urban land market. Traditional zoning has not provided this requisite flexibility.

Zoning is basically an exercise of the police power whereby a government body restricts the use of land by appropriate regulation and without compensation to the owner for the purpose of promoting the health, safety, morals, and welfare of some segment of the community.27 Created as a means of strengthening the institution of private property in the face of rapid and unsettling changes in the 1920's,28 zoning's primary objectives were: (1) protection of property values by requiring uniformity in each district;29 (2) exclusion of dangerous and nuisance uses from residential districts;30 and (3) prevention of the overexploitation of land.31

When zoning was originally conceived, urban land uses seemed to be compartmentalized into a definable scheme. The typical ordinance of the 1920's divided the municipality into three zones — residential (single-family), commercial, and unrestricted — expressed in separate sets of maps dealing with use, height, and land coverage. No attempt was made to cure past or existing evils by demolition or removal to other areas. Instead, zoning was used only to impose some sort of rational plan for future building. Its proponents expected that once zones were established and guidelines promulgated, every use would be segregated into its appropriate land area32 and nonconforming uses would disappear.33 Nonconforming

mental actions and ordinances such as building and housing codes, licensing ordinances, tax and assessment policy, etc., the actual development of new areas is directly regulated only by zoning and, to a lesser extent, subdivision regulation.

27 A few decisions have invalidated zoning regulations as being so restrictive that they constituted an actual taking for which compensation must be paid. See, e.g., Caudill v. Milford, 10 Ohio Misc. 1, 225 N.E.2d 302 (1967). The restrictiveness of a regulation is evaluated by taking into consideration such factors as surrounding uses and the reasonable return on property values.


29 New York City is generally credited with enacting the first comprehensive zoning ordinance (N.Y. GEN. CITY LAW art. 2-A, § 20(24)-(25) (McKinney 1968) (effective 1917) in 1916. See C. HAAR, LAND USE PLANNING 148 (1959). The ordinance came about because a group of Fifth Avenue merchants did not want to see factories blight the character of their area. W. WHYTE, supra note 20, at 40.


33 The concept that all urban uses could be isolated into appropriate land areas seems to have been derived from the law of nuisance. While the Supreme Court in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), disclaimed nuisance as the predicate of zoning's constitutionality, Justice Sutherland's famous aphorism shows the close con-
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uses, however, have persisted almost a half-century since zoning has become common.\textsuperscript{34} Moreover, the problem has been intensified by the development of new methods of mass building production, which in turn have created uses which could not have been predicted in the 1920's and 30's when many existing zoning ordinances were adopted.

In the rare instances in which zoning schemes were flexible enough to permit subtle differentiation in land uses which developed in densely settled cities, the actual administration of the zoning regulations failed to cope with the rapid changes in urban growth patterns that have occurred in the last quarter of a century.\textsuperscript{35} Severe limitations have been imposed by the length of time it takes to change or amend a zoning ordinance and because zoning itself presupposes stability and predictability in the system. Moreover, boards of appeal, empowered by enabling laws and local ordinances to vary the application of the zoning ordinance in certain situations through the issuance of variances and special exceptions, have failed to perform a creative, rather than a merely responsive function. Their failure to do so can be attributed to the fact that board members are often appointed by local executive authority on the basis of political considerations, rather than on the basis of expertise in land use planning or any other useful qualification.\textsuperscript{38} Because of these administrative deficiencies, spot zoning, though legally prohibited, seems to be a natural phenomenon in American communities. A nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.” \textit{Id.} at 388.

\textsuperscript{34} In the early days of zoning, Edward Basset, the “father” of modern planning, exhorted: “Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past.” \textsc{E. Basset}, \textsc{Zoning: The Laws, Administration and Court Decisions During the First Twenty Years} 105 (1936).

\textsuperscript{35} Provisions requiring the “amortization” of nonconforming uses over a specified period of time are becoming more common. However, modern zoning ordinances generally limit amortization to open uses involving no substantial structures, to uses deemed especially objectionable like auto wrecking, junkyards, and coal storage dumps, and to heavy service establishments not designed for such use. M. Hershman, \textit{A Leader Looks at Land Use Controls} 39 (paper presented to the Association of Life Insurance Counsel, May 9, 1966 at White Sulphur Springs, Md.). Such amortization provisions raise perplexing constitutional issues. \textit{See, e.g., Los Angeles v. Gage}, 127 Cal. App.2d 442, 274 P.2d 34 (1954).

\textsuperscript{38} \textit{See} \textsc{Sullivan, Flexibility and the Rule of Law in American Zoning Administration}, in \textsc{Law and Land} 130 (C. Haar ed. 1964).

\textsuperscript{36} Zoning cognoscente Richard Babcock has described the administration of zoning thusly:

\begin{quote}
Stripped of all planning jargon, zoning administration is exposed as a process under which isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused ad hoc injunctions of bewildered courts. \textsc{W. Whyte}, \textit{supra} note 20, at 40-41.
\end{quote}
has crept into zoning ordinances through the indiscriminate or unsophisticated granting of variances. Although the practice of granting variances was originally designed to give the system flexibility and to cope with unfairness, its misuse has significantly weakened the basis of the system.

Zoning’s ineffectiveness in accommodating the rapidity of urban change largely lies in the fact that it is a prospective instrument. As traditionally conceived, zoning was intended not to directly alter existing land allocations, but merely to guide future land use decisions in a way that would encourage those uses which complement one another and to preclude those which conflict. Zoning is predicated on the incorrect assumptions that long-range trends affecting land use may be foreseen well in advance and adequately provided for by the local legislature and that land use “mistakes” which preceded enactment would disappear. Because these assumptions are incompatible with the reality of urban evolution, imperfections are inevitable in any zoning ordinance. Another factor which contributes to the ineffectiveness of zoning in ordering and controlling urban growth is the inability of zoning to operate as a positive force. While zoning can preclude undesirable uses of land, it cannot compel, or even encourage desirable land uses, nor can it control the timing of development.

A more effective way to combat urban sprawl and promote orderly development is to ensure the non-use of land for an indefinite period of time by acquiring or leasing the land. The entity overseeing this procedure would then have the opportunity to observe market forces in action so that it could develop or dispose of the land at a time appropriate for development and with use restrictions consonant with a current master plan for the area. Such is the essence of land banking.

When land is acquired by the bank, it will invariably be unready for use. While in reserve, the land will be reparcelled, cleared, provided with necessary public utilities, and otherwise be prepared for development. These changes will be effected by the land bank or other governmental bodies to reflect demographic changes, fluctuations in per capita income, prices, and other variables over which the traditional planning devices have little or no control. The advantages of land banking as compared to zoning and other traditional land use controls are many. The foremost advantage, of course, is that ownership of the land by the land bank permits the implementation of comprehensive land use plans that would other-
wise be impossible. As the Report of the Land Committee to the National Resources Planning Board said over 30 years ago:

[N]o method of land use control can be as effective as outright ownership of the land involved. A landowner may resist the pressure of taxation or the lure of subsidy; the city fathers may grant too many exceptions to the zoning ordinance or master plan; the budget may not allow for enough inspectors to enforce the building and sanitary codes; all attempts at enforcement are subject to litigation and delay; but if government itself owns the land, its control is absolute. Whether or not this control is intelligently used in the public interest depends on the extent to which American cities develop adequate plans and procedures to prevent abuse; it does not bear on the potential effectiveness of this type of land-use control.37

Land ownership could also make public officials more clearly responsible for the economic consequences of restricting land use. By giving the public an economic stake in the future uses of its land, officials would be compelled to weigh closely the costs and benefits of restrictions on land they propose to sell or lease.

The added control which comes with ownership would permit planning agencies a greater degree of supervision over the development and use of any parcel of land. Also, special restrictions enforceable by contract could be established for different parcels of land. These controls and restrictions would be imposed on the disposal of the land, as is done in urban renewal contracts.38

Land banking could effect more flexibility in governmental control not only through restrictions imposed on disposition of land from its reserve, but also through the selection of parcels to be brought into the reserve. The most effective manner of eliminating nonconforming uses, for example, is simply to acquire the incongruous parcel and redevelop it within the reserve to conform to its zoned use.

In sum, a land bank would provide for more sensitive regulation of land uses — regulation more adaptable over time and more discriminating in the particular use ultimately established at a particular site — than is possible with traditional controls. Although land banking is not intended as a replacement for traditional schemes of

37 U.S. NAT'L RESOURCES PLANNING BD., PUBLIC LAND ACQUISITION, PART II: URBAN LANDS 12 (1941).
land use control, its integration into existing planning and regulatory systems would create a more effective total system.

III. THE FOREIGN EXPERIENCE WITH LAND BANKING

A number of foreign governments have utilized a variety of land banking techniques since the beginning of the 20th century. Municipalities in Sweden, the Netherlands, Finland, and Israel have entered the market to buy land, hold it, and sell or lease it with a view toward controlling land speculation, making land available at low cost for public uses, and guiding the development of new areas in conformity with well-conceived master plans. Because of the differing political, social, and economic institutions and traditions which determine a country's land use policies, one country's land use experience is not directly applicable outside national boundaries. Certain similarities in the experiences among these countries, however, are at least illustrative both of the kinds of policy objectives that a land bank can accomplish and of the means for accomplishing them.

A. Sweden

Preeminent among the efforts at public land banking has been the development and expansion of Stockholm, Sweden. A policy of large-scale land purchases around the city, beginning at the turn of the century, has enabled Stockholm to shape its physical destiny in a remarkably effective way. Eighteen superbly planned new communities, each with a population of 250,000, have been built on land acquired by the land bank. Some of the acquired land was held for as long as 25 years and only developed after mass transportation and other public facilities were available.

39 A rarity in planning, the 1967 land use map of Stockholm is virtually identical to the 1952 general development plan which called for the creation of a series of separate and defined satellite communities. Stockholm's director of planning and building control has attributed the city's success in planning its physical, economic, and social development directly to its land banking program. Sidenbladh, Stockholm: A Planned City, SCIENTIFIC AMERICAN, Sept. 1965, at 106-08.


41 A determination by the city council in 1941 that future development in the Stockholm region would be directed along the lines of a proposed underground railway system, has significantly influenced planning decisions in the region. Underground lines, it was decided, were to pass directly through the centers of built-up areas. Highways, on the other hand, were designed to bypass the suburban developments by being situated in green belts which separate the railway lines. The total concept features a series of alternating greenbelt corridors and built-up strips radiating out from the city center. The result is a mutually reinforcing transportation and urban settlement system. See generally G. EDWARDS, supra note 7, at 61-62.
Land banking in Stockholm began in 1904, when the City Assembly inaugurated a policy of buying large areas of farm and forest land within a 9 mile radius of the city's center. By the 1930's, 32 square miles of rural land had been acquired, including much of the city's surrounding territory. Stockholm's boundaries were extended to encompass this land, which was planned as the location for garden communities for low and moderate income families in anticipation of future urban growth. By the end of 1967, Stockholm's land reserve was on the order of 142,500 acres, and more than half of this land had been purchased since 1960.

The program is administered by STRADA, Ltd., a city-owned real estate company that operates much like a private concern, but has the power of condemnation. When land is designated for acquisition, private owners are required to sell at market value. Since land prices tend to jump when a plan for redevelopment of an area has been adopted, Parliament enacted legislation which permitted STRADA to acquire land needed for redevelopment before it had adopted specific plans for the land. This legislation has been vital to the effort to keep land prices reasonable. Money to finance the acquisitions is borrowed on the open market. In most cases the land acquired has been leased out for farming until needed for development. Rents thus obtained have been used to pay interest on the borrowed capital. As land within the municipal boundaries becomes available, it too is purchased, with the result that Stockholm today owns 36 percent of the land within its municipal boundaries and 83 percent of the property directly surrounding the city.

The city has retained nearly all the land purchased over the years, preferring to lease it out under long-term contracts, rather than to dispose of it entirely. Consequently, almost 70 percent of the dwellings on the city's outskirts are built on leased land owned by the city. Under legislation enacted in 1953, leasehold contracts,
once of 60 to 100 years duration, were made valid for an "unlimited time," subject to termination provisions and regular 10- or 20-year rental adjustments.\footnote{Id.}

From the city's point of view, substantial advantages inhere in the leasing approach. As owner of the land, with a power to terminate leasehold contracts, the government can readily adapt to dynamic changes in the city's land development patterns without having to resort to appropriation. This is particularly advantageous since appropriation procedures in Sweden are generally complex and time consuming.\footnote{In Swedish appropriation litigation, title generally does not vest in the municipality until the case has proceeded to final adjudication in the courts and the assessed compensation has been deposited with the proper authorities. An exception called "prior admittance" exists. This exception permits the city to take possession immediately upon initiation of the appropriation proceedings. The city is required to formally guarantee that it will compensate the previous owner whatever fee is established by the court, plus six percent interest. A serious drawback to this procedure is that the city is bound to continue its claim for compulsory purchase; under normal procedures it is possible to withdraw a compulsory purchase claim even after the case has gone to the nation's highest court. \textit{Id.} at 60-61.}

As another advantage, the leasehold system permits the city to benefit from inflationary profits that would otherwise accrue to private land speculators. Appreciation in the value of land, it is reasoned, is generated by the actions of the community and government in expending vast sums, in providing public services and in promoting better land use. It is thus felt that individual landowners should not receive the benefits of this "undeserved increase of land value."\footnote{WESTMAN, \textit{MEMORANDUM RELATING TO ZONE EXPROPRIATION ON LOWER NORRMALM IN STOCKHOLM 3} (1967), \textit{cited in} G. EDWARDS, \textit{LAND, PEOPLE, AND POLICY} 36 (1969). See also notes 157-62 \textit{infra} \& accompanying text.}

These inflationary profits may then be distributed back to the community by adjusting the terms of the leases. Leases are subject to periodic renegotiation, so that as land values increase, rents may be raised for commercial or industrial uses while being kept at the original amount for low and moderate rent housing, in effect subsidizing these latter groups.\footnote{G. MILGRAM, supra note 5, at 64.}

\section*{B. The Netherlands}

Municipal land policy in the Netherlands, dating back to the \textit{Housing Act of 1901},\footnote{\textit{See} BOMMER, \textit{HOUSING AND PLANNING LEGISLATION IN THE NETHERLANDS} 11 (1967).} has sought to guide the development of new
areas by anticipating the need for land and by reducing the increase in land value that results from government development. To achieve these objectives, nearly every municipality in the Netherlands has developed an active land banking program, administered by an independent Grounds Department. The municipalities of Amsterdam and The Hague, alone, own more than 11 thousand acres together.

The considerable success of the large Dutch municipalities in shaping patterns of urban growth almost precisely as planned, can be attributed largely to their sophisticated practices of disposing of lands after purchase. While the type of disposition varies among cities, appropriate covenants or lease restrictions intricately specify the details of development to be followed by private developers for each individual parcel of land released. For example, Amsterdam controls development through lease restrictions contained in long-term leases, terminable at a fixed period, usually after 75 years. In Rotterdam, on the other hand, after the requisite plans for development of a particular area have been formulated, lots within the municipality are sold outright with a restriction that the private builder must use the property according to the detailed reconstruction plans incorporated in the deed. The leasehold, however, is generally favored in the Netherlands because it affords the municipality the opportunity to avoid later appropriation for public purpose, and better facilitates the later redevelopment of built-up areas. And, as in Sweden, the leasing system enables the municipality, and ultimately the public, to profit from any appreciation in land values by allowing for appropriate renegotiations of rent.

Several features of the Netherlands expropriation procedures have markedly contributed to the success of its land banking program. A Dutch municipality can legally take possession of condemned property within three months after initiating expropriation proceedings and compensation is negotiated or litigated after possession has been effected. The criteria used for establishing in-

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56 Id.
57 Id.
58 See Reps, supra note 7, at 54.
59 Grundlach, supra note 55, at 101-02.
60 Id.
61 Id.
62 G. EDWARDS, supra note 7, at 69.
demnity are somewhat broader in scope than those used in the United States. Because compensation is founded on the notion that "personal financial status should not be altered," the individual whose property is appropriated is awarded its current market value and any "anticipatory value" due to advantageous physical location with respect to existing development plans. In the case of industrial or commercial dislocation, the condemnation award includes moving expenses, loss of income, good will, and the cost of higher operating expenses (including property taxes) at the relocation site. As a result of the relatively generous compensation settlements, very few appropriation cases are litigated.

C. Foreign Experience Elsewhere

The experiences of Sweden and the Netherlands have been singled out as illustrative of the efficacious ways in which land banking can operate, but other foreign governments are also guiding urban growth by the large-scale acquisition of land. In the case of Denmark, for example, land acquisition policy is geared not only towards shaping and timing development, but also towards controlling land speculation in order to perfect the urban land market. Thus, the municipality of Copenhagen offers its own land at low prices in competition with private land owners when private demand seems excessive.

In the United Kingdom, it is widely felt that the key to proper redevelopment of towns is public acquisition of land, followed either by transfer to private developers, under conditions ensuring that they will themselves carry out development in accordance with the plan for the area, or by direct development by the local authority.

Israel has established a national land acquisition fund to prepare land for agricultural settlement and to develop land for housing and industrial purposes. The fund leases its land for 49 years to public or private bodies, with provision for extension and inheritance. Rentals amounting to four percent of land value are required to be paid annually — the value of land, however, is reassessed every 7 years.

63 Id.
64 Id. at 68-69.
66 Id.
IV. UNITED STATES EXPERIENCE WITH ADVANCE LAND ACQUISITION

Unlike European municipalities, local governments in the United States lack a strong tradition of acquiring and reserving land as a means of guiding and controlling urban growth. Two conspicuous factors have hindered the development of comprehensive land policies in this country. First, governments have been reluctant to acquire land for anything other than a narrow class of public purposes because of the historically entrenched view that private initiative should generally determine the uses to which land is put. Land not needed immediately for a specific public purpose, it follows, should remain in private hands. Second, governments traditionally have been unwilling to bear the cost of acquisition when other means, principally the various exercises of the police power, have been available for regulating land at minimal cost. In the face of diminishing urban land resources, however, the wisdom of such a laissez-faire stance and the efficacy of traditional regulatory measures appears doubtful. Many local governments are turning to other measures in order to exert some control over urban growth.

A. Advance Land Acquisition for Public Facilities

A number of local governments have begun to acquire land for future public facilities in advance of actual need by utilizing the power of eminent domain in conjunction with official maps or master plans. The advance land acquisition program in Richmond, Virginia provides a good example. In 1946, Richmond took its initial step towards a policy of advance land acquisition with the adoption of its first master plan. The plan was based on a 20-year growth projection and it set forth the location of future capital improvement projects. Three years later, a city ordinance was enacted

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68 Aside from these political or social predilections, government officials may also have felt legally restrained from attempting to implement comprehensive policies. See notes 227-40 infra & accompanying text.

69 The degree of regulation by the police power is occasionally so great that the owner, in a practical sense, has ownership taken away from him. In such instances, the courts will generally find a taking for which compensation should have been paid. Under the present system, the government is given no opportunity to pay this compensation because the court declares the regulation invalid and permits the landowner to violate it and use the land the way in which he desires. This method of invalidating an ordinance can well thwart the entire purpose of the comprehensive plans for an area. See F. Bosselman, supra note 22, at 27-39.

70 See generally D. Shoup & R. Mack, supra note 40.

71 Id. at 85-97.
enabling the municipality to acquire any property on which private construction was contemplated if the property in question was designated on the master plan for some future public use.\textsuperscript{72} By anticipating the need for land and purchasing it in advance, the city has been able to forestall rising prices caused by inflation\textsuperscript{73} and prevent construction which would have conflicted with the optimal selection of sites for municipal purposes. Of a sample of 21 sites which Richmond has acquired in advance for expressways, street widenings and school additions, the average saving after all costs were taken into account was estimated to be between four and six times the cost of each site.\textsuperscript{74} In addition to the dollar savings there were other intangible benefits, such as avoiding future relocation problems and strengthening the process of rational, long-term planning.\textsuperscript{75}

Similar programs are no longer uncommon. The leading study of advance land acquisition indicates that about one-third of the cities of over 50,000 inhabitants in the United States carry on some sort of advance acquisition activity.\textsuperscript{76} The programs in existence, however, tend to be small — typically less than six acquisitions per year. Their scope is also narrowly confined to acquisitions for such purposes as schools and parks.\textsuperscript{77}

Montgomery County, Maryland utilizes a more sophisticated approach to advance land acquisition in that the county can acquire land adjacent to proposed public facilities at the time the land for the facility itself is acquired. The county is authorized to make the necessary improvements and dispose of the land for private development in a manner consistent with the nature of the public facility.\textsuperscript{78} Exercising such control over the adjoining land, the county can avoid haphazard and suboptimal private development of these parcels.

\textsuperscript{72} Building permits are required for all private improvements exceeding $1000 in value. This application process enables the planning commission to ascertain whether the proposed improvement is located on a site reserved on the master plan for a future public facility and to determine whether the property should be acquired to preempt the private development. \textit{Id.} at 86.

\textsuperscript{73} The median rate of appreciation from purchase date to 1966 for a sample of 21 properties was about six percent per year. \textit{Id.} at 90. This is actually considerably lower than land inflation in most urban areas.

\textsuperscript{74} \textit{Id.} at 92-93.
\textsuperscript{75} \textit{Id.} at 95-97.
\textsuperscript{76} \textit{Id.} at 4.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textsc{Montgomery county code §§ 26A-1 to -4} (Maryland 1965).
While ensuring the availability of optimal sites for future public uses at current, rather than future prices, existing land acquisition programs have had little influence on promoting orderly land development. Limited in purpose, advance land acquisition has not been structured to control the pace at which the demand for government services will increase. Moreover, as the programs are restricted to land lying within the municipal limits, they cannot guide or control development on the fringe areas of the city where the greatest growth is likely to occur.

B. Industrial Land Reserves

Another approach to planning for urban growth, the creation of industrial reserves, concentrates more directly on some of the specific causes and effects of urban sprawl. In the past several years industries looking for new sites on which to expand have increasingly turned away from cities because of the prohibitive costs of acquiring and developing urban land for industrial use, not to mention the actual scarcity of such land. Confronted with the flight of businesses and workers to the suburbs and the concomitant weakening of the municipal tax base, several cities have sought to stem the tide by providing cheaper sites for private industry.

A good illustration of this approach is the industrial land reserve program being carried out in Philadelphia by the Philadelphia Industrial Development Corporation (PIDC), a nonprofit partnership of the city of Philadelphia and the Greater Philadelphia Chamber of Commerce. The program began in 1959 with about 2,500 acres of city-owned land, and today, with a 19 million dollar Industrial Development Fund, a revolving source of capital has been provided by PIDC for the acquisition and development of 5,500 additional acres by 1980. The Fund has enabled the city to replenish its industrial reserves and the overall program has ensured a constant supply of new industrial sites at reasonable costs, thereby attracting and holding industry.

A similar program has produced comparable benefits in Milwaukee, a city which began acquiring and reserving prime land for industry in 1964. To date, nearly three-quarters of the plant space

70 See generally Philadelphia Industrial Development Corporation, Take a Look at America's Fastest Moving City . . . in 1980 (1968); Philadelphia Industrial Development Corporation, PIDC's Big Year in New Plant Construction (1967).

80 Id.

81 See generally Conway Research, Inc., Milwaukee: An Economic Develop-
in the industrial reserves is occupied by firms coming from the suburbs. Furthermore, while not yet having disposed of one-quarter of the publicly acquired land, the city has already recouped over one-half of the costs of the program.

C. Land Banking in Puerto Rico

In 1961 the Puerto Rico Planning Board undertook a study to investigate the supply and demand of land in Puerto Rico's urban areas and to analyze the problems created by the rapid increase in the price of public and private lands. The findings and recommendations of the study led to the creation in 1962 of the Puerto Rico Land Administration, a public corporation empowered, *inter alia*:

To acquire real property, urban or rural, which may be kept in reserve towards facilitating . . . development of public work and social and economic welfare programs . . . which may be undertaken by the Administration itself, by the Commonwealth of Puerto Rico or its agencies, and by private persons for the benefit of the above mentioned public entities or of the community, including, but not limited to, housing and industrial development programs . . .

In enacting the ambitious and innovative legislation which created the Land Administration, the Legislative Assembly of the Commonwealth of Puerto Rico was concerned with the nonoptimal utilization of urban land, brought about by rapidly rising land prices and speculation in real estate, and the disorganizing impact of these factors on government programs. The 1961 study had estimated that 16,200 acres of land were required for the next 15 years for public and private residential purposes in the San Juan Metropolitan Area (SJMA) — where most of the growth of the island was expected to take place — with 10,520 acres required for the first 10 years. The supply of land considered usable for residential pur-

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82 CONWAY RESEARCH, supra note 81, at 9.
83 See generally MILWAUKEE DIVISION, supra note 81.
84 See PUERTO RICO PLANNING Bd., supra note 65, at 50.
85 P.R. LAWS ANN. tit. 23 § 311f(s) (1964) (originally enacted as Puerto Rican Land Administration Act of May 16, 1962, No. 13).
86 For a discussion of the treatment accorded the legislation by the Supreme Court of Puerto Rico and the United States Supreme Court, see notes 272-87 infra & accompanying text.
87 The figures in the study were based on cuerdas, one cuerda being equal to 0.97128 acre.
88 See PUERTO RICO PLANNING Bd., supra note 65, at 50.
poses was 19,100 acres\(^8\) of which about 11,880 acres, slightly greater than the 10-year demand, was immediately ready for use.\(^9\) This situation left a precarious balance between supply and demand, which made it evident that meticulous care had to be exercised in land use decisions.

The study further revealed that speculative practices in the purchase and sale of land, together with the high pressure for development in Puerto Rico, had generated a rapid and accelerating increase in land prices, averaging 20 to 30 percent per year\(^1\) over a 5-year period. As a result, land in the core areas was being fragmented, making it impossible to assemble sufficient parcels for manageable development.\(^2\) Consequently, there was a marked tendency during that 5-year period for development in the SJMA to move outward, bypassing the land that was best suited (except for its inflated price) for development.\(^3\)

The land which was bypassed was creating serious social, administrative, and economic problems.\(^4\) Were such a trend to continue,

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\(^8\) While all of this land will eventually be available for construction, it is not necessarily the best land from the standpoint of achieving a relatively high population density. Some of the land is rolling and hilly, and thus will probably be best used for higher priced houses with minimum densities. Some of the land is subject to flooding, and the construction around such land must be done carefully so that flooding damages will not be intensified. *Id.* at 31.

\(^9\) The Puerto Rico Urban Renewal and Housing Administration owned about 1,063 acres of prime land. The remainder was in private hands. *Id.* at 32.

\(^1\) *Id.* at iv. Inflationary trends in the price of raw land are by no means unique to Puerto Rico. *See note 180 infra.*

\(^2\) *Id.* at iv.

\(^3\) *Id.* The SJMA has increased in area by seven times in the past 30 years. This growth has occurred, and will continue to occur, largely along the Northern Corridor to the East and West, since growth is restricted by steep hills to the South, and the ocean to the North. *PUERTO RICO PLANNING BD., TUSCA PROJECT (Transportation and Urban Settlements Combined Action), INTERIM REPORT ONE 34-35 (1970).*

\(^4\) *See Commonwealth v. Rosso, ___ P.R. ___ (1967), appeal dismissed, 393 U.S. 14 (1968) (per curiam), as translated in Callies, Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use, 2 PROSPECTUS 199 (1968).*

Among the statistics cited by that court were the following:

(1) The rate of building construction went up from approximately 2,000 units/year in the decade 1950-1960 to 7,600 units/year in 1966. In the same 1950-1960 decade some 38,000 private dwellings were constructed in the metropolitan area of San Juan. (2) In the past decade the metropolitan area of San Juan absorbed the entire population increase sustained by Puerto Rico. From a population of 509,000 in 1950 it increased to 648,000 in 1960, despite substantial emigration. It has been anticipated that the population will be 863,000 in 1970 and 1,112,000 in 1980. (3) The number of jobs in the metropolitan area has increased from 140,000 in 1950 to 180,000 in 1960, and it is anticipated that there will be 254,000 jobs in 1970 and 326,000 jobs in 1980. Of this increment it is expected that 65% will be in industrial manufacturing and 33% in government. It appears that this will
the area could never have been developed into a well-balanced community. The population would become too scattered for the government to provide it with adequate schools and other public services except at great per capita costs. It was estimated that a 15 percent annual increase in land prices would increase the 15-year cost of the housing program by $38 million and the road program by $20 million. This rapid increase in housing costs would preclude a large number of families from purchasing housing on the private market; in fact, it was estimated that a 30 percent increase in land prices would result in placing an additional 33,000 families at the mercy of government programs by 1975. The additional land acquired to house these families and the increased land prices would raise the cost of the program by about $200 million, exclusive of the additional construction costs resulting from the larger population requiring government assistance.

The multifarious social and economic problems created by spiraling prices and nonoptimum utilization of land in the rapidly developing areas of Puerto Rico were lucidly enumerated by the Legislative Assembly in the legislation creating the Land Administration. The Assembly found:

(a) That the Commonwealth of Puerto Rico is one of the most densely populated areas in the world; that urban lands, or lands adapted to urban development, are monopolized and kept unused by their owners, which creates an artificial shortage of land and raises its price at a rate higher than the raise in price of other properties and staple commodities; that the speedy raise in the price of land makes it impossible for persons of moderate or low resources to purchase land in appropriate areas, and forces such persons to build their homes outside of close-to-town areas and far from their places of work and other activities; that the raise in the

result in an increase of 80,000 in the number of families able to earn $3,000/year in the decade 1960-70. It is therefore anticipated that the demand for homes will increase spectacularly. By 1980 it is anticipated that 206,000 families will be able to earn $3,000/year, with most of these families young, the men being in the 20-25 year age bracket. It is anticipated that from 20,800 of these families in 1960 there will be 42,000 by 1970 and 47,000 by 1980. (4) Although the present density has been six dwellings/cuerda it is expected under the new guidelines established by the planning commission that the density will increase to eight living units/cuerda. The 170,000 living units which are expected to be necessary by 1980 will require some 20,700 cuerdas. (5) To realize the objectives of public housing for 1970 family residence, it will be necessary to construct about 16,000 units of public housing and to develop some 12,000 plots of land. It will be necessary to duplicate this number between 1970 and 1980. Id. at 206 n.19.

95 PUERTO RICO PLANNING BD., supra note 65, at 44.
96 Id.
97 Id.
price of land makes for undesirable urban expansions, which, in turn, creates serious financial problems to the Commonwealth and municipal governments, as the costs of providing public services such as roads, water, sewers, public parks, public health, fire prevention and fire fighting, police vigilance, and others such as are necessary for the protection of life and property, so essential for the development of a community, increase several times; that the raise in the price of land increases the overhead cost of industrial and commercial enterprises and, therefore, sets their products at a disadvantage in commercial competition locally as well as abroad; that the relatively speedy raise in the price of land increases differences in income, inasmuch as unused land in Puerto Rico, both urban and rural, is controlled, to a large extent, by a small number of persons;

(c) that the raise in the price of land also affects or prevents the implementing of the master plans and is a cause of worry for the public conglomerate and constitutes a serious problem, to control which available public funds may be put to maximum use, by authorizing the acquisition of private property whenever necessary;

(d) that it is in the public interest to avoid, as soon as possible, the excessive and disproportionate increase in the market price of land.

It was believed by the legislature and expressly stated in the Act that these serious increases in land prices were induced by speculative land hoarders. Land speculators had acquired large blocks of land in the metropolitan area well in advance of its present rapid growth and, in many cases, held on to them until they could obtain high prices. Inevitably, the reduction of the supply, relative to what it would otherwise have been, created a further rise in the market price of land. Because of the rapid acceleration of economic growth and family income and the natural physical constraints preventing the city from spreading in all directions, these effects have been particularly noticeable in the San Juan area.

Consequently, the legislature hoped to expand the current supply of land by taking measures which would tend to reduce hoarding and to ensure that the long-run price of land could be stabilized or increased at a rate consistent with the costs of holding land. This would be accomplished primarily by providing a steady flow of residential land into the market, and, to this end, the Legislative Assembly granted broad and sweeping powers to the Land Administration.

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89 See note 94 supra.
90 See note 93 supra.
91 P.R. LAWS ANN. tit. 23, § 311f(j), (k), (q), (s), (b-1) (1964). Interestingly,
The Land Administration is authorized to acquire any real or personal property in any lawful manner. This includes general purchase, purchase by option, installment or public auction, or acquisition by lease, exchange, gift or eminent domain. The private property so acquired may be kept in reserve to facilitate public work and social and economic welfare programs, including housing and industrial development programs, recreational, beautification, and open-space programs, and irrigation and reclamation programs. The only restriction imposed on maintaining its land reserve is that whenever land is acquired by condemnation for purposes of public work development or social welfare, such purposes shall be carried out within 15 years from the date of acquisition.

In disposing of its property, the Administration is authorized to establish any conditions and limitations regarding its use or utilization as it may deem necessary to ensure the effectuation of the purposes of the Act. It is further authorized to sell lands or interests therein at prices it considers reasonable in order to lower the cost of housing or to fulfill any of the other purposes of the Act. The Land Administration is further empowered to carry out by itself, or jointly with agencies of the Commonwealth or of the United States, or by means of covenants with private persons or entities, any programs, including housing projects, to ensure the most effective development and fullest utilization of lands owned by the Administration, the Commonwealth, or its agencies. To fund such programs, the Administration may issue its own bonds, the legislation [Puerto Rican Land Administration Act of May 16, 1962, No. 13, Statement of Motives] frankly admits that traditional remedies have so far failed. It found:

(b) that this ever-increasing price of land cannot be controlled, nor the problems thereby created can be solved, by any of the tools available to the Commonwealth and municipal governments; that the levy of taxes and the regulations of physical planning are insufficient; that the regulation on subdivision and zoning operates prospectively for undeveloped and underdeveloped areas and cannot prevent the undesirable, but legal, use of the land; and that the regulation on land subdivision is insufficient to control either the expansion of city limits or the disconnected and inadequate expansion of the cities.

Id. § (b).

102 P.R. LAWS ANN. tit. 23, § 311f(j) (1964).
103 Id. § 311f(g).
104 Id. § 311f(x).
105 Id. § 311f(v).
106 Id.
107 Id. § 311f(g).
108 Id. § 311f(x).
109 Id. § 311f(b-1).
110 Id. § 311f(w).
PUBLIC LAND BANKING

secured by its revenue, income or property. More importantly, the legislature appropriated 20 million dollars for the Administration to carry out its purposes.

The Land Administration is constituted as a public corporation—a "government instrumentality having a juridical personality separate and apart from the Commonwealth." Its powers are exercised, and its general policy is determined, by a Governing Board composed of the Governor of Puerto Rico, as Chairman, the Chairman of the Puerto Rico Planning Board, as Vice Chairman, the Secretaries of the Treasury, Public Works, and Agriculture, the Director of the Urban Renewal and Housing Corporation, the Economic Development Administrator, and two additional members appointed by the Governor, with the advice and consent of the Senate, each individual serving for a term of four years.

Because of the virtual identity of the Governing Board with the major governmental departments and agencies—each of which is extremely powerful in its own domain—the Land Administration does not act with the autonomy otherwise indicated in its enacting legislation. Consequently, although authorized to undertake development projects on its own, the Administration has acted more like a clearing house or general procurer of land for the other departments of government.

The land acquisition procedure used is for agencies desirous of land to go to the Planning Board for a determination of whether their proposed use for the designated land is in conformity with the master plan. On approval of the Planning Board, the Land Administration acquires the land, or any right, interest, or easement requested therein, and reconveys it to the agency at a price it considers reasonable.

Thus, instead of 10 or 12 agencies, each with the power of eminent domain and each acquiring rather small quantities of land for its individual purposes, the Land Administration centralizes all acquisitions and makes large purchases, thereby reducing the price per acre considerably. Moreover, because the

111 Id. § 311f(m).
113 P.R. LAWS ANN. tit 23 § 311b(a) (1964).
114 Id. § 311b(b).
115 Interview with Jack Noble, former legal consultant to the Puerto Rico Planning Board, in San Juan, Puerto Rico, Aug. 23, 1971.
116 Id.
117 Interview with Atilono Leon, Director of the Appraisal Division of the Land Administration, in San Juan, Puerto Rico, Aug. 23, 1971.
price of property proximate to land designated for government development invariably rises when the project is announced, the Land Administration often condemns surrounding land to curb speculation and to capture this uneared, publicly created increment in value for the Commonwealth.\textsuperscript{118} In so doing, the Land Administration has managed to secure a steady flow of land at reasonable prices.

As of June 30, 1970, the Administration had acquired almost 24,000 acres, 6,100 of which have been sold to government agencies and instrumentalities for specific public uses.\textsuperscript{119} The construction of thousands of units of low and middle income housing has been possible only because of the reduction in land cost inherent in the economics of large-scale acquisition.\textsuperscript{120} Moreover, the actualization of two new communities, now in the planning stage, is likely to be facilitated by the elimination of the legal problems usually associated with large-scale land assembly.\textsuperscript{121}

Because of the immediate need to reduce inflationary land prices and make land available for public purposes, the Land Administration has not treated urban sprawl and the promotion of regional growth as priority concerns. Attention has recently turned in those directions, however, with the recognition — reinforced by observation of the impact of a strict policy of acquisition without long-range planning — that inflationary prices, leapfrog development, high transportation costs, and expensive and inefficient public facilities will continue unless a program to induce more compact development (\textit{i.e.}, reduce or eliminate sprawl) can be implemented. Of great significance for future development is the concomitant realization that past attempts to promote such development have failed, in large part because they did not incorporate transportation policies with land use policies.\textsuperscript{122} The impact of intra-urban transportation,

\textsuperscript{118} \textit{Id.} The price of property designated for condemnation will similarly rise. The Act therefore provides that "just compensation" shall be based on the market value of the property "without taking into consideration any increase in such value due to the compensation project having been announced and publicized" and shall not include "any new increase by reason of the public improvement or expenditures made in the locality" by any agencies of the Commonwealth. P.R. LAWS ANN. tit. 23, § 311m(f) (1964).

\textsuperscript{119} Total cost of acquisitions has amounted to over $80 million, of which $15.5 million has been recouped from government agencies for land purchased at their request. \textit{ADMINISTRACION DE TERRENOS DE PUERTO RICO, INFORME ANUAL} (1970).

\textsuperscript{120} Interview with Atileno Leon, \textit{supra} note 117.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} Interview with David Fairchild, Transportation Unit, Puerto Rico Planning Board, in San Juan, Puerto Rico, March 26, 1971.
combined with rising per capita income and a growing population, cannot be underestimated.\textsuperscript{123} In Puerto Rico, some 67,000 acres were already in urban use in 1965. By 1985, assuming little or no increase in average urban densities from those observed over the last 10 years in typical urban fringe areas, it is estimated that some 330,000 acres will be needed for urban use. This implies that more than one-third of the land available for development will be urbanized by the year 2,000.\textsuperscript{124} Such senseless sprawl, on an island with already one of the highest population densities in the world, is the result of unguided development and the lack of a public transportation policy.

The creation of the Transportation and Urban Settlements Combined Action Project (TUSCA Project) marks the first step in incorporating this realization into government policy. TUSCA's objective is the development of an integrated program to achieve mutually reinforcing systems of transportation and land use and urban settlements.\textsuperscript{125} While the scope of this project is broad, the recognition of the problem to be solved is, of course, the most significant step in reaching a solution. The Land Administration's powers to acquire both urban and rural land for a wide range of public purposes will be the prime instrument to implement the policy of TUSCA.\textsuperscript{126}

\section*{D. Recent Projects and Proposals}

Critical for the implementation of any new comprehensive legislative scheme in a democratic society is a broad recognition of the problem sought to be remedied. In order to place a proposal for land banking in perspective and to demonstrate that it represents something more than the idle reveries of academics and planners, this section will examine some of the recent legislation and prominent public reports that have identified the "urban land problem" and proposed land banking or closely related programs as solutions.

\subsection{1. Urban Growth and New Community Development Act of 1970}

Probably the foremost recent statement of the need for orderly and rational urban growth was that made by the Congress of the

\textsuperscript{123} See note 4 supra.

\textsuperscript{124} \textit{Puerto Rico Planning Bd., TUSCA Project} supra note 93, at 20.

\textsuperscript{125} \textit{Id.} at 3.

\textsuperscript{126} \textit{Id.} at 23.
United States in the Urban Growth and New Community Development Act of 1970. Finding that continuation of established patterns of urban development, together with anticipated population increases, would result in inefficient and wasteful use of land resources, Congress declared its intent "to provide for the development of a national urban growth policy and to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, cities, counties, towns, and communities in predominantly rural areas which demonstrate a special potential for accelerated growth . . . ."\footnote{Urban Growth and New Community Development Act of Dec. 31, 1970, Pub. L. No. 91-609, tit. VII, 84 Stat. 1791 (codified in scattered sections of 12, 40, 42 U.S.C.).} Should present growth trends continue, Congress observed that irreplaceable natural and recreational resources would be destroyed, public facilities and services would become increasingly costly and inefficient, options as to where and under what conditions people could live would be unduly limited, separation of people within metropolitan areas by income and race would increase, business and employment opportunities for central city residents would lessen, and the ability of cities to retain a tax base adequate to support vital services for their citizens would be diminished. To counter these trends, Congress provided for financial and other assistance to private developers and state and local public bodies with the aim of encouraging "the orderly development of well-planned, diversified, and economically sound new communities including major additions to existing communities."\footnote{Id. § 4511(f). The new Act of 1970 expands and clarifies the New Communities Act of 1968. 42 U.S.C. §§ 3901-14 (originally enacted as Act of Aug. 1, 1968, Pub. L. No. 90-448, tit. IV, 82 Stat. 513). The new Act creates the Community Development Corporation (42 U.S.C. § 4532(a) (1970)) which will act as the policymaking body for new community financing, and allows local public bodies to finance under the program (id. § 4516) as well as private developers (id. § 4515(a)). Under the Act direct loans up to $20 million are available for individual developers to make interest payments on indebtedness incurred in financing new community development (id. § 4515). Grants up to two-thirds of the planning costs are also available (id. § 4521(a)). Finally, the outstanding bonds, debentures, notes or other obligations (guaranteed under 42 U.S.C. § 4514(c)) shall not involve a principal obligation in an amount exceeding 80 percent of land value and 90 percent of actual cost of land development for private developers and up to 100 percent in each category for public development agencies.} Aid is available for several kinds of development, including "new communities" which are: (1) economically balanced within metropolitan areas as alternatives to urban sprawl; (2) additions to existing smaller towns and cities capable of conversion to growth centers; (3) major new-towns-in-town
to help renew central cities, including the development of areas adjacent to central cities; or (4) free-standing new communities which are economically feasible and would assist in distributing population growth.\footnote{131 See DIRECTOR, OFFICE OF NEW COMMUNITIES DEVELOPMENT, HUD, OUTLINE OF NEW COMMUNITIES ASSISTANCE (1971). While clearly focusing on the problem of population and urban growth, the 1970 Act can have a salutary effect on urban sprawl only to the extent that it does not offer new towns or new communities as a single panaceic solution. Although widely heralded in a variety of journals, new towns may have the untoward effect of exacerbating existing problems. Unless they are truly self-sufficient, new towns may merely become satellite communities whose vitality and viability depend upon the central city. If such is the case, all that will have been created is a suburban development that contributes to the wasteful spread of the metropolitan area. On the other hand, self-contained new towns geographically removed from the urban center will do little to handle the anticipated growth of urban areas. They are simply too expensive and too difficult to construct to be produced in sufficient quantity to meet the needs of the expanding population. For a different kind of criticism of "the new town approach." See W. WHYTE, supra note 20.\footnote{132 42 U.S.C. § 4513(a)(1) (1970).\footnote{133 Id. § 4513(a)(6). In addition a program is eligible only if it will be economically feasible [id. § 4513(a)(2)]; is consistent with comprehensive planning [id. § 4513(a)(4)] makes substantial provision for low and moderate income housing [id. § 4513(a)(7)] and fulfills other requirements enumerated in 42 U.S.C. § 4513 (1970).}} A new community program is eligible for federal assistance, but only if the new community, as determined by the Secretary of Housing and Urban Development, would provide an alternative to disorderly growth,\footnote{134 The UDC was created by the New York State Urban Development Corporation Act of 1968. N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1971).} would be characterized by well balanced and diversified land use patterns and would include or be served by adequate public, community, and commercial facilities.\footnote{133 See DIRECTOR, OFFICE OF NEW COMMUNITIES DEVELOPMENT, HUD, OUTLINE OF NEW COMMUNITIES ASSISTANCE (1971). While clearly focusing on the problem of population and urban growth, the 1970 Act can have a salutary effect on urban sprawl only to the extent that it does not offer new towns or new communities as a single panaceic solution. Although widely heralded in a variety of journals, new towns may have the untoward effect of exacerbating existing problems. Unless they are truly self-sufficient, new towns may merely become satellite communities whose vitality and viability depend upon the central city. If such is the case, all that will have been created is a suburban development that contributes to the wasteful spread of the metropolitan area. On the other hand, self-contained new towns geographically removed from the urban center will do little to handle the anticipated growth of urban areas. They are simply too expensive and too difficult to construct to be produced in sufficient quantity to meet the needs of the expanding population. For a different kind of criticism of "the new town approach." See W. WHYTE, supra note 20.\footnote{132 42 U.S.C. § 4513(a)(1) (1970).\footnote{133 Id. § 4513(a)(6). In addition a program is eligible only if it will be economically feasible [id. § 4513(a)(2)]; is consistent with comprehensive planning [id. § 4513(a)(4)] makes substantial provision for low and moderate income housing [id. § 4513(a)(7)] and fulfills other requirements enumerated in 42 U.S.C. § 4513 (1970).}}

The legislation thus recognizes that sprawling subdivisions and suburbs ringing the central city neither provide adequately for community needs nor enhance the natural and urban environment. The Act emphasizes the need to encourage orderly and balanced urban development, and if wisely administered and properly funded, it holds promise for promoting and facilitating the sound growth of metropolitan areas.

2. New York State Urban Development Corporation Act of 1968

The states, too, have begun to develop programs and entities to promote urban development. Foremost among these is the New York State Urban Development Corporation (UDC).\footnote{134 The UDC was created by the New York State Urban Development Corporation Act of 1968. N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1971).} The UDC is a public benefit corporation whose legislative purpose is to deal, more effectively than has thus far been possible, with statewide...
urban problems of physical deterioration, economic stagnation, un-
employment, shortage of housing, and the lack of civic facilities.\textsuperscript{135} Rather than being limited to any single area of need, such as hous-
ing or schools, its corporate purpose encompasses a broad range of
urban problems. It can plan and carry out projects to supply hous-
ing; to redevelop blighted areas; to assist industrial and commercial
development; to provide educational, cultural, and community facili-
ties; and, through a combination of these activities, to develop new
communities.\textsuperscript{136}

The corporation has been given the power to acquire real prop-
erty by purchase, lease, or condemnation.\textsuperscript{137} Furthermore, the UDC
is empowered to develop projects without conforming to local zon-
ing ordinances or building regulations when compliance is not fea-
sible or practical.\textsuperscript{138} Unlike other development agencies, the UDC
has the power both to initiate and to carry out its own enterprises,
all of which can be accomplished through its ability to create sub-
sidiary corporations.\textsuperscript{139} It is authorized to issue notes and bonds in
the aggregate principal amount of up to one billion dollars,\textsuperscript{140} and
its projects receive full or partial exemption from local real property
taxes.\textsuperscript{141}

Apparently believing that the development of new towns and
rational expansion of existing communities is necessary to accommo-
date population increases in a balanced and efficient manner, UDC
has formulated plans for the acquisition of land and construction
of three new communities, containing housing, industry, and all
commercial, utility, and civic facilities required by a moderate-sized
town.\textsuperscript{142} The new communities will be located in Amherst (outside
Buffalo), Lysander (12 miles from Syracuse), and on Welfare
Island in New York City. The proximity of these future com-
munities to major urban areas suggests that UDC, rather than at-
tempting to create entirely new self-contained towns, is focusing
upon ordering the growth of already built-up areas — an approach

\textsuperscript{135} Id. § 6252. For a discussion of the UDC, see Amdursky, \textit{A Public-Private
\textsuperscript{136} N.Y. UNCONSOL. LAWS § 6252 (McKinney Supp. 1971).
\textsuperscript{137} Id. § 6255(7).
\textsuperscript{138} Id. § 6266(3).
\textsuperscript{139} Id. § 6262.
\textsuperscript{140} Id. §§ 6267(1), 6268.
\textsuperscript{141} Id. § 6272.
\textsuperscript{142} See Amdursky, supra note 135.
which parallels that recommended by the National Commission on Urban Problems.

3. The National Commission on Urban Problems

After examining the many current techniques for land use control, the Commission concluded that many land use objectives cannot be achieved by complete reliance on those techniques associated with the police power: "[A]ll too often attempts to apply the police powers approach have resulted in failure to achieve public objectives, and have been accompanied by substantial inequities and abuses of power." The time has come, the Commission concluded, "for government to assert its legitimate concern with urban development through the use of techniques necessary to accomplish public objectives. In many situations, this [would require] that the government actually obtain land through purchase or eminent domain — and that regulation be supplemented by compensation to private property owners." The Commission recommended that state governments enact legislation enabling both state and local development authorities to acquire land in advance of development to ensure the continuing availability of the sites needed for development, to control the timing, location, type, and scale of development, to prevent urban sprawl, and to reserve to the public any gains in land values resulting from the action of government in promoting and servicing development. The Commission also recommended that Congress establish a federal revolving fund to facilitate the purchase of land by local governments.

4. Advisory Commission on Intergovernmental Relations

A similar land banking scheme has also been proposed by the Advisory Committee on Intergovernmental Relations. In its report, Urban and Rural America: Policies for Future Growth, the Advisory Committee suggested that the establishment of state land development agencies — empowered to undertake large-scale urban and new community land purchase, assembly, and improvement —

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144 Id.
145 Id. at 251. THE PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME (1969), concerned with the availability of land for low and moderate income housing, recommended that the Federal Government acquire large tracts of land for the construction of subsidized housing and related community facilities.
146 BUILDING THE AMERICAN CITY, supra note 143, at 252-53.
would provide a major method of implementing state and local growth policies.\textsuperscript{147} Only by advance acquisition, the Committee concluded, will it be possible for states and local governments to purchase before development in an area takes place and before the resulting rapid increase in price.\textsuperscript{148} The Committee also recommended that the Federal Government provide ready loans at low interest rates for land acquisition.\textsuperscript{149}


The most recent major proposal for massive public acquisition of land is that made by the staid American Institute of Architects in a national policy statement on the country's growth and development.\textsuperscript{150} Citing the polarization of rich and poor, white and black, the growth of the suburbs and the decline of the cities, the increase of urban sprawl without community services, jobs separated from housing, and the lack of choice for millions of Americans regarding fundamental living conditions, the Institute proposed immediate government purchase and preparation in advance of development of one million acres of land for future community development within the central cities and outlying metropolitan areas.\textsuperscript{151} The Institute claimed that the acquisition cost, estimated at five billion dollars, and a large portion of the costs of preparing the land for redevelopment, would be recaptured over the next 30 years by the appreciation in value of the land realized by lease and sale.\textsuperscript{152} Running throughout its recommendations is the conviction that land be treated as a public, rather than a private commodity.

V. THE OBJECTIVES OF LAND BANKING

A. Orderly Development

As the population of the United States continues to grow, urban centers will continue to expand into land which was once exclusively

\textsuperscript{147} ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 161 (1968).

\textsuperscript{148} Id. at 152.

\textsuperscript{149} Id.


\textsuperscript{151} AIA REPORT, supra note 150, at 26-27.

\textsuperscript{152} Id.
rural. If urban development proceeds in the haphazard fashion of the past, then the ills which characterize our present metropolitan areas will likely be intensified. If, on the other hand, the timing and direction of urban growth are controlled — pursuant to plans that would, to a large extent, elevate to the public level the power to determine the precise use for a particular parcel of land — new development may proceed in harmony with urban needs and environmental considerations. Regulating the sequence and tempo of metropolitan development is a function for which land banking is ideally suited and one for which traditional land use controls have proven patently inadequate.

The importance of timing development cannot be overstated. As was stressed above, urban sprawl is the cause of extraordinary social and economic costs that could be sharply reduced if a pattern of orderly and rational development were maintained. For example, the cost of establishing and operating municipal services and facilities in a newly developed urban area is directly affected by the sequence in which the facilities and services are instituted. The sequence of development determines whether facilities such as pipes and streets will have to be extended inefficiently and uneconomically over long distances to serve scattered users, or whether they will be extended gradually to serve areas built in careful phase with efficient facility growth.

Timing of development is also important to retain control over the eventual character of development. An area which is currently remote from utility lines, for example, may, in the absence of control over timing, be subjected to scattered construction served by a low-intensity infrastructure of individual wells and separate sewage disposal fields. Subsequent attempts to convert such an area into the denser character which occurs in the later stages of metropolitan growth may be wasteful and expensive. Timing is similarly essential to the economic stability of a rapidly developed area. In municipalities where new residential construction of large numbers of low and lower-middle income homes is not timed in relation to

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153 Between 1920 and 1970, the urbanized areas forming the cores of the metropolitan complexes of Los Angeles, New York, Chicago, San Francisco, Detroit, Miami and Washington increased their geographic area from under 2,000 square miles to approximately 9,000 square miles. According to growth projections, these seven urbanized areas will double in the next 30 years to reach approximately 18,000 square miles. Pickard, _Is Dispersal the Answer to Urban Growth_, 29 URBAN LAND 6, n.5 (Jan. 1970), citing J. PICKARD, DIMENSIONS OF METROPOLITANISM 89-91, apps., tables S-2 to -6, A-36 to -53 (1967).

154 See notes 15-25 supra & accompanying text.
business and industrial expansion, it may not be possible to adequately offset service costs with tax income from commerce and industry.

By acquiring land on the periphery of the city in advance of anticipated development, the land bank could observe market forces and develop or dispose of land in an optimal manner. With the flexibility and control derived from direct ownership of land, the land bank could aid the implementation of publicly determined metropolitan growth plans. For example, it could slow down development by setting a high price on its land, or it could stimulate rapid development by establishing a low price. Were such control over growth the principal objective of the land bank, it would be constantly selling and acquiring land: selling the most centrally located sites in its reserve, and purchasing sites on the periphery. In this manner, it would be organizing the outward growth of the city in an orderly way. And by controlling certain developmental decisions, the land bank would ensure public determinations of many questions of public import that have been left to the private sector in the past.

Moreover, the land bank could reduce the costs of services to the citizenry by acquiring land in advance of development at relatively low prices. The increase in value upon the eventual resale of this land would automatically accrue to the public, since the public would own the land, and could be applied to meeting the costs of any new services. Conceptually, this is merely a reapplication of Henry George's doctrine of "unearned increment." Land prices are naturally enhanced when new public and private facilities and services are established nearby, simply because such land is of greater practical value; George believed it was unethical for individuals to receive gains from land if the increase in value was not caused by their own enterprise, but rather by the progress of society. Of course, this pattern of urban growth is simplistic. Depending on the locale, proper orderly expansion may not necessarily be outward, but may call for a complex variety of development, redevelopment, extension, intensification, and renewal.

See Hagman, The Single Tax and Land-Use Planning: Henry George Updated, 12 U.C.L.A.L. REV. 762, 766 (1965); Comment, Municipal Real Estate Taxation as an Instrument for Community Planning, 57 YALE L.J. 219, 231 (1947); Note, Site Value Taxation: Economic Incentives and Land Use Planning, 9 HARV. J. LEGIS. 115 (1971). Georgian analysis was premised on the conviction that land was the most important of the basic factors of production. Since land was a gift of nature rather than a product of labor, George believed it should not be subject to private ownership. Given this proposition, rent gained through the mere occupation of land was an "unearned increment," and as such, should be taxed. This concept did not actually
sequently, he espoused a confiscatory tax on land rent which would appropriate the unearned increase in the value of land for the common use.\textsuperscript{159}

George's "land value tax," lauded "not only as a panacea for urban land use but also as a cure for unemployment, a preventative for inflation and a guarantor of perpetual industrial and international peace . . . ,"\textsuperscript{160} suffered a defect typical of many utopian schemes.\textsuperscript{161} Even if tempered by being introduced into a municipal tax system as a single phase in an integrated community plan, its administration would likely be difficult. But a land bank could achieve the same effect George sought without becoming entangled in the complexities of taxation. By owning the land outright, a public land bank would receive the unearned increment without further ado.\textsuperscript{162}

B. Urban Redevelopment

Public land acquisition and disposition is already a familiar component of urban renewal.\textsuperscript{163} By coordinating the activities of the municipal planning board, the local public agency,\textsuperscript{164} various municipal departments, and private developers, urban renewal is designed to be a comprehensive program to redevelop and revitalize our deteriorating cities. The urban renewal program, however, has clearly failed to achieve its purposes. One factor that has severely

\textsuperscript{160} Hagman, supra note 157, at 766-67.
\textsuperscript{161} D. Netzer, Economics of the Property Tax 197-98 (1968). As a land use device, it was alleged that the tax would automatically prevent undesirable speculative holding of land by keeping land prices low and thereby encouraging development, while at the same time keeping prices high enough to encourage intensive uses and prevent sprawl. Hagman, supra note 157, at 765.
\textsuperscript{162} Hagman, supra note 157, at 781.
\textsuperscript{163} Hagman, supra note 157, at 76-78.
\textsuperscript{164} Puerto Rico, Sweden, and the Netherlands have made this objective an integral part of their land reserve policy. See text accompanying notes 52-56, 118 supra. Moreover, while not expressly articulated, capturing unearned increment is an implicit assumption in United States municipal advance land acquisition programs.

George's concept of capturing "unearned increment" is still being extolled and pursued by influential groups. The National Commission on Urban Problems has emphasized that "land value results largely from social and governmental factors" and recommends studies aimed at public capture of some of the values so created. Building the American City, supra note 143, at ch. 6.

\textsuperscript{163} See notes 299-307 infra & accompanying text.
\textsuperscript{164} See note 306 infra.
hindered its efforts is the jurisdictional limitations of the municipal agencies which implement the renewal activities. Edward Logue, the Executive Director of the New York Urban Development Corporation, has stated the problem bluntly: "[A]s long as efforts to cope with the poor are geographically confined to the central city, they are bound to fail."\(^{165}\)

Urban renewal cannot properly be considered as affecting only a community, a neighborhood or a locality — *i.e.*, parts of much larger wholes. The effects of slum clearance and urban redevelopment reach far beyond the renewal areas themselves and touch the entire region of which these areas are a part. Indeed, the economics of the whole urban complex are involved in every renewal project. Highway and street construction, water supply and sewerage, traffic and parking, mass transit, and a host of other activities must all be considered, along with urban renewal, as parts of a single metropolitan picture. To achieve renewal goals, then, the entire metropolitan area must be considered. While several states explicitly authorize the cooperation of local renewal agencies, such cooperation is of little utility when a large city is surrounded by many smaller communities which do not carry on renewal activities\(^ {166}\) and whose indiscriminate zoning laws create incompatible uses along municipal borders and prevent utilization of regional facilities.

A multijurisdictional land bank would be able to overcome these obstacles and promote truly comprehensive redevelopment. Briefly, the land bank would pursue this objective in the following way. Parcels of land would be acquired and assembled into integrated holdings of neighborhood size, notwithstanding municipal boundaries. Where needed, eminent domain would be used to obtain contiguous parcels. Once such integrated holdings had been assembled, the land bank, in conjunction with the local planning boards of the municipalities involved, would arrange for development of the area as a total unit, replete with police and fire protection, schools, streets, and the like. Zoning, licensing, and building code restrictions, now an obstacle to meaningful redevelopment,\(^ {167}\) would be revised to ensure harmonious architecture and to maximize the utility of all the property within the bank's jurisdiction.

\(^{165}\) G. Edwards, *supra* note 7, at 114.


Land banking should be able to further improve the urban renewal program by providing a much needed timing and overview component to the redevelopment process. The requirement of programming the completion of renewal projects within five to eight years of the final planning often results in "hurried, wasteful, inefficient, piecemeal, and often extravagant development, inimical to the city's future." To ensure development of cleared inner-city land to its fullest potential, delay should be encouraged when it is not feasible to immediately and efficiently develop the land. As the former Director of the Norfolk Redevelopment and Housing Authority, Lawrence Cox, has stated:

Delays and land lying idle are inevitable if urban renewal is going to do what it should in downtown areas. Projects involving great investments do not spring full-blown upon the scene in the average-size American community. Delay counseled by realistic appraisal of land potential is worthwhile delay. So, my thesis is to have worthwhile delay introduced into urban renewal, particularly in central city areas. A land bank might take title during such a delay, clear the land and hold it — leaving it either unused or used for interim purposes which do not require construction, such as parks, recreation areas, and parking lots — pending determination of the optimal future use. During the holding period, there would be opportunity for reviewing new proposals by private developers, providing the necessary infrastructure, and modifying plans to conform to changing conditions. Simultaneously, banked land outside of the immediate renewal area could be developed for low- and moderate-income housing for those displaced by land clearance, correcting a primary defect of past renewal efforts.

168 Brownfield, supra note 38, at 760 (1960).

169 Address to the American Society of Planning Officials, National Planning Conference, held at Miami Beach, Fla., on May 22-26, 1960, cited in id. at 738 n.28.

170 The demolition of deteriorating structures in the Cox scheme would admittedly decrease the local tax basis, for even those structures bad enough to be designated for slum clearance contribute to local tax revenues. Id. at 761. However, as part of the urban renewal program, the city may receive a federal contribution to indemnify it at least to the extent of the land being removed from the tax roles. See 42 U.S.C. § 1460(e) (1970).

171 The proceeds upon disposition, after payment of the purchase price of the land and carrying charges, would, according to Cox's scheme, be returned to the federal and local governments on a two-thirds, one-third basis, corresponding to the federal grant in aid formula. Brownfield, supra note 38, at 760.

172 See generally, BUILDING THE AMERICAN CITY, supra note 143, at 80-83.
C. New Community Development

The characteristics of land banking which would enable it to effectively promote orderly urban development and facilitate inner-city redevelopment indicate its possible utility as an instrument for new community development. While new communities, or new towns, are a comparatively recent development in the United States, they are likely to become a common fixture on the American scene.173

The few new towns that now exist have been strictly for-profit private ventures undertaken on a grand scale.174 Future new community development in the United States, however, is not likely to come about exclusively through private enterprise. New town operations yield a lower return than conventional suburban investment, they require substantially larger investments of capital,175 and private development of new communities can be stymied by a number of nonfinancial problems. In fact,

the planned communities now being built in the United States are basically the result of a fortuitous combination of circumstances. New communities are being carried out by developers who have come upon a large expanse of land held by a single owner or who have quickly assembled land in a covert fashion . . . , or by large national corporations that have accessible raw land in a metropolitan area.176

Now that the creation of new communities is a national priority, a more active role for state or local government is natural. A public land bank, with broad powers to acquire, improve, and dispose of land, could effectively fulfill this role and could facilitate new community development in a number of ways. The land bank's power to condemn land — supplemented by statutory "quick-take" procedures177 — could expedite the assembly of integrated holdings of land and avoid the payment of exorbitant prices to holders of "swing" property (i.e., land critical to the land bank's purposes).

As a governmental entity with a strong capital-raising capacity,178


175Id. at 52.

176Id.

177See notes 214-15 infra & accompanying text.

178See notes 295-343 infra & accompanying text.
the land bank could make the large outlays necessary to acquire tracts for new communities and would be in a position, largely because of its power of eminent domain, to institute appropriate improvements, infrastructure, and community services, overriding local regulations where necessary. Indeed, it is essentially the lack of these features which Congress identified in the Urban Growth and New Community Development Act of 1970 as the reason for private enterprise's failure to develop new communities. Congress concluded that new community development had "been prevented by difficulties in (1) obtaining adequate financing . . . ; (2) the timely assembly of sufficiently large sites . . . ; and (3) making necessary arrangements, among all private and public organizations involved, for providing site and related improvements . . . in a timely and coordinated manner."179 Because a land bank could be relatively free from these problems, it is well suited to performing the initial phases of new community development, after which “prepared packages” could be transferred to private developers who, at that point, would be more able to take up the process of building new communities. And finally, with its ability to time and control the location of development and impose restrictions on the use of property, the land bank could ensure that development conforms to plans for long-range metropolitan and regional growth.

D. Controlling Land Price Inflation

Since the postwar period, increasing income and population have maintained a high level of demand for urban land. This continued demand, in conjunction with a limited supply of land available for development, has caused a rapid, long-term increase in the price of urban sites.180 In part, this inflationary trend is caused by speculators who do not intend to develop their property; instead, they hold land until the market price rises enough to induce them to sell and

180 In a four year period between 1960 and 1964, for instance, land prices for residential uses were reported to have increased about 15 percent annually in raw land and about 16 percent annually in the price of finished lots. G. MILGRAM, supra note 5, at 55.

According to a study prepared by McGraw-Hill for the President's Committee on Urban Housing, areas of rapid growth such as Staten Island, New York, or Montgomery County, Maryland have experienced five-fold increases in the price of land between 1950 and 1965. Builders from the Washington, D.C. vicinity have reported that the prices they paid per acre of land increased from $3,400 in 1960 to $5,800 in 1964, a jump of over 70 percent in a four-year period. PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 141 (1969).
then they take their investment profit.\textsuperscript{181} The upward pressure on land prices is increased by these speculators because the land held by them further depletes the supply of property that can be readily put to productive uses.\textsuperscript{182} Given this longstanding upward trend, it is not surprising that a common argument for land banking is that, by exerting some control over the land market, the bank could have a salutary effect on inflation.

Although other, more direct methods of controlling land prices could be more effective,\textsuperscript{183} a land bank’s influence over the land market would allow it to pursue price control as an ancillary objective. By disposing of land at prices below what would otherwise be the going market price,\textsuperscript{184} the land bank could probably inhibit further inflation. Not only would the competing, cheaper land from the land bank tend to keep prices at a lower level, but the mere threat of such interference with the land market might undercut the inflationary effects of the speculator. Knowing that the land bank might release low-priced land at some future date — which would curtail the market value of a speculator’s holdings — the attractiveness of urban land speculation would be greatly reduced, and the number of such speculators would probably decline. With fewer speculators buying and holding urban land, the supply of prime land would increase, and a major cause of inflation would be partially eliminated.

Thus, by selling relatively little land, the land bank might be able to control inflation without sacrificing its other objectives. But the land bank’s power to affect prices would be limited by a number

\textsuperscript{181} For a discussion of the speculator’s role in a theoretical or "perfect" land market, see Elias & Gillies, Some Observations on the Role of Speculators and Speculation in Land Development, 12 U.C.L.A. L. REV. 789 (1965).

\textsuperscript{182} Such speculation can be effected with little capital by acquiring options on the land, rather than buying it outright. Largely because of such devices, approximately one-seventh to one-fifth of the land in U.S. central cities is held out of productive use. See Hagman, supra note 164, at 165.

\textsuperscript{183} If the principal objective were to halt inflation of land prices, a land bank would be a rather costly means of achieving that goal. A land bank affects prices only indirectly, by dealing in land to such an extent that the entire market is modified. Price controls alone could be achieved more directly without actual ownership of the land, simply by creating an administrative commission empowered to regulate prices in the manner desired by the legislature.

\textsuperscript{184} Because of its relatively low holding costs (see note 292 infra) and the economies of scale created by acquiring large amounts of land, a land bank could sell at prices somewhat below those possible for private speculators without incurring losses. To sell at even lower prices, the land bank would have to absorb losses on the property involved. Such losses would be justifiable if the overall effect on the price of land was adequate in relation to the amount of loss. Indeed, since future acquisition costs would be lowered, the bank might actually lose nothing over the long run.
of factors. The first and most important would be the absolute volume of land the bank could sell at below-market prices. If the quantity of such land was insignificant in view of the demand, any inhibitory price effects could be temporary and the speculator might simply wait until the market rebounded. Moreover, as the bank disposed of more and more land in an effort to control inflation, its reduced reserves would become a less effective deterrent to future speculation. If the speculators were tenacious, they again might be able to “outwait” the bank.

It must also be remembered that the land bank represents a new factor on the demand side of the market. In seeking new land to add to its reserves, the bank would exert some upward pressure on existing market values, thus compounding any other inflationary tendencies. As in Puerto Rico and New York, however, the land bank’s upward displacement of land prices could be minimized if the enabling legislation provided that the compensation value for any land taken by condemnation would be calculated exclusive of the bank’s upward effect on prices.

And finally, there is a potential conflict between the land bank’s

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185 The mere fact that a land bank procured certain sites would probably affect the price of neighboring land, independent of the increased demand represented by the land bank’s transactions. If the land bank had announced its intention to begin development of a new community in a given area, for example, the surrounding land values would certainly rise.

186 Section 14(f) of the Puerto Rico Land Administration Act provides:

In case of condemnation of property for the purposes of this act, the just compensation shall be based on the value in the market of such property, without taking into consideration any increase in such value due to the condemnation project having been announced and publicized.

The valuation to be made shall not include any increase due to well-founded and reasonable expectation that the property to be acquired by the [Land] Administration or by the Commonwealth, or other property similar thereto, or situated within the locality where the former is situated, may now or later be required for public use or social benefit, or be necessary for some use to which it can be applied only by the Administration or the Commonwealth or any agency or instrumentality thereof with power for the condemnation of private property.

In case of condemnation, the just compensation shall likewise not include any new increase by reason of the public improvement or expenditures made in the locality by the Administration or the Commonwealth or any agency thereof, nor shall it include any increase by reason of any other work done by or at the initiative thereof, to effectuate the purposes of this act, when the increase be the result of plans or resolutions, officially adopted, for the acquisition of land for public works or for the purposes of this act.

187 The New York State Urban Development Act provides: “No award of compensation shall be increased by reason of any increase in the value of real property caused by the actual or proposed acquisition, use or disposition by the [Urban Development Corporation] of any other real property for corporate purposes.” N.Y. UNCONSOL. LAWS § 6263(6) (McKinney Supp. 1971).
principle objective of promoting orderly development and a second objective of controlling inflation. In pursuing the latter policy, land must be released from the bank's reserve with less than optimal consideration for the developmental consequences of releasing the land into the market. As more and more land is sold, the success of the land bank's planning function is unavoidably threatened. It is impossible to predict the precise degree to which price inflation can be controlled without undermining the land bank's other objectives, for the problems inherent in attaining any of the bank's objectives are products of innumerable factors particular to any given place and time. One crucial variable, however, is certainly the amount of land involved. The large quantity of land necessary to ensure the orderly development of an area and the quantity that must be released into the market to inhibit inflation, would have to be compatible with the quantities that the land bank is financially and practically capable of acquiring if both objectives are to be achieved.

VI. THE LAND BANK ENTITY

To accomplish its objectives, a public land bank must have the financial capability\textsuperscript{188} and legal power to purchase or condemn land throughout a broad geographical area. It must also be in a position, largely unconstrained by state and local politics, to make public decisions concerning optimal land use. Given these prerequisites, the only governmental entity on the municipal, metropolitan or state level that could effectively operate a land bank in most jurisdictions would appear to be the special purpose public corporation.

A. The Municipal Corporation

Legal, political, and fiscal considerations dictate the infeasibility of a municipal land bank. Since urban growth typically occurs at and beyond the fringes of a city,\textsuperscript{189} a land bank must be able to ac-

\textsuperscript{188}The financial capability of the land bank refers primarily to the ability to raise large sums of money for capital outlays. Almost certainly, this means that money raised through bond issuances must be available to the land bank. Indeed, since World War II, about 50 percent of total state and local government capital outlays have been financed by such indebtedness. Manvel, State and Local Government Financing of Capital Outlays, 1946-65, in 2 State and Local Public Facility Needs and Financing, 89th Cong., 2d Sess. 53, 59 (Joint Economic Comm. Print. 1966) [hereinafter cited as PUBLIC FACILITY FINANCING]. See also notes 288-350 infra & accompanying text.

\textsuperscript{189}Between 1950 and 1960, population in the suburban fringe grew by 48.5 percent. Population in the core cities grew by only 10.8 percent and nine of the ten...
quire and dispose of land lying outside municipal boundaries if it is
to exercise effective control over urban development. Given the
less than sanguine relationship existing between city and suburbs,
however, it would seem politically unwise, and legally vexatious\textsuperscript{100} for a city to attempt to overstep its natural bounds and exert domi-
nion over suburban lands.\textsuperscript{101} Furthermore, in light of the precarious
financial straits of major cities, it would be fiscally imprudent, or
even impossible, for most municipalities to attempt land banking on
anything but a limited scale.

B. The Metropolitan Agency

As local government's inability to deal with regional problems
has become increasingly clear, it has often been urged that munici-
pal government be reorganized into metropolitan areas.\textsuperscript{102} With a
handful of exceptions,\textsuperscript{103} however, municipalities have jealously
guarded their autonomy and have refused to give up significant
power to any form of metropolitan, county, or federated govern-
ment. Moreover, outside of a few localities there exist no metro-
politan agencies with sufficient authority to act upon metropolitan
problems. And because of its potential for controversy, land bank-

\textsuperscript{100} The power of municipal corporations to purchase or condemn land outside
corporate limits, where allowed at all, has been confined by narrow judicial construc-
tion to acquisitions for a traditional class of public projects such as airports, bridges,
and utilities. See C. Rhynne, Municipal Law §§ 13-1, -8, -9 (1957). Conceivably
then, a suburb wishing to resist central city land banking could initiate litigation chal-
lenging the extraterritorial exercise of municipal power. See generally Note, Public
Land Ownership, 52 Yale L.J. 634 (1943).

\textsuperscript{101} A city could attempt to expand its jurisdiction by annexation. But because
consent by the residents of the area to be annexed is a very common prerequisite to
annexation, this approach would appear to be of little utility to most major cities.
Dixon, New Constitutional Forms for Metropolis: Reapportioned County Boards; Lo-
cal Councils of Government, 30 Law & Contemp. Prob. 57, 68 (1965); Woodroof,
Systems and Standards of Municipal Annexation Review: A Comparative Analysis, 58

\textsuperscript{102} See, e.g., S. Greer, Metropolitics (1963); V. Jones, Metropolitan
Government (1942). For a contrary view, see J. Jacobs, The Death and Life
of Great American Cities 425 (1961). See also Friesma, The Metropolis and the
Maze of Local Government, in Urban Politics and Problems 409 (H. Mahood &
E. Angus eds. 1969).

\textsuperscript{103} Municipal federation has enjoyed varied success, for example, in the areas of
Miami, Nashville, Indianapolis, Winnipeg, and Toronto. See, e.g., E. Sofen, The
Miami Metropolitan Experiment (1963); H. Kaplan, Urban Political Sys-
tems, A Functional Analysis of Metro Toronto (1967); Grant, A Compari-
sion of Predictions and Experiences with Nashville "Metro", 1 Urban Affairs Q.
33-54 (1965); Grant, supra note 189, at 49; Laneberry, Reforming Metropolitan Gov-
ing does not seem to be a likely candidate to pioneer as an effort of metropolitan government.

C. The State Agency

While state concern for urban problems has finally begun to surface in recent years, the question remains whether state agencies, even if committed by statute to serve urban ends, offer any unique qualifications for the operation of public land banks. In many states, the state agency is constitutionally restricted to the extent that it could be of little or no utility as a land bank. These restrictions range from an absolute limit on the number of state agencies that can be created, to less absolute, but equally important restraints on the agency's autonomy and financial capacity.

In terms of financing a land bank, the states would appear superior to any lower political subdivisions. Though not without their own fiscal problems, the states generally have greater capability than do their political subdivisions for securing the capital necessary to finance large-scale projects. Like municipalities, however, virtually every state has some constitutional limitation on the amount or kind of bonds that it may secure with its full faith and credit. These limitations — by cutting off the bond market as a principal source of capital — would preclude the state agency as a viable entity for land banking, were it not for the common use of revenue bonds.

In the majority of states, revenue (or nonguaranteed) bonds can be used to generate capital outside of the normal constitutional restrictions on state debt. In only a minority of states — albeit

194 See, e.g., N.Y. CONST. art. 5, § 2.
195 For a summary of the constitutional limitations applicable to the states' long-term general obligation debt (i.e., that debt unconditionally secured by the full faith and credit of the state government), see J. Dawson, Patterns of Obligation Bonds, in PUBLIC FACILITY FINANCING, supra note 188, at 148, 153-55. Most state constitutions either prohibit the issuance of general obligation bonds without public approval in a referendum or proscribe entirely borrowing beyond a certain level — a level already reached in most states. Shestack, The Public Authority, 105 U. PA. L. REV. 553, 557 (1957).
196 The current importance of revenue bonds, as compared to general obligation bonds, is evidenced by the increasing percentage of state debt represented by the former. See Curley, Patterns of Revenue Bond Financing, in PUBLIC FACILITY FINANCING, supra note 188, at 156, 157.
197 Revenue bonds are debts payable solely from designated sources — e.g., from earnings of revenue-producing activities (toll highways and bridges, electric power projects, etc.), or from specific nonproperty taxes. Such bonds do not constitute an obligation against any other resources of the political unit if the pledged sources prove insufficient. Through the courts it has been rationalized (principally via the special fund doctrine) that this method of borrowing is not really borrowing at all within the meaning of constitutional restrictions, since a pledge of revenues of a particular en-
some of the most important urban ones — is the state agency inadequate from a capital-raising point of view.\textsuperscript{198}

Even in those states where revenue bonds are an approved system of financing, the traditional agency is still not the best choice of entity. While the state agency clearly has a number of positive features — including the ability to allocate resources throughout a large region and the power to relate metropolitan planning to planning for those areas of the state which do not yet contain urban concentrations but which are obviously vital to the economic welfare of the whole state — these very features, in conjunction with the fiscal practicalities of the agency, also give rise to a major drawback. So as not to arouse the wrath of local legislators, a state land banking operation dependent upon yearly legislative appropriations would probably proceed too cautiously to be fully effective.\textsuperscript{199}

A land banking agency would also be seriously hindered in those states where its directors would serve at the pleasure of the governor.\textsuperscript{200} Again, the traditional appointment and removal system applicable to the directors of the various departments of state governments would make a state agency more politically sensitive and less autonomous than is desirable. Moreover, since coordinated, long-term planning is critical to the operation of a land bank, the likely enterprise, as opposed to a pledge of the full credit of the political unit, does not create a charge or lien upon the general revenues or taxing power of the political unit, and thus provides immunity for the taxpayer. See cases cited in Shestack, supra note 195, at 558-62. See generally Foley, Revenue Financing of Public Enterprise, 35 Mich. L. Rev. 1 (1936); Fordham, Revenue Bond Sanctions, 42 Colum. L. Rev. 395 (1942); Williams & Nehemkis, Municipal Improvements As Affected by Constitutional Debt Limitations, 37 Colum. L. Rev. 177 (1937).

Under the special fund doctrine, cross pledging of net revenues of an existing project of a special fund for the payment of bonds issued to finance the acquisition of new properties (whether distinct or merely improvements to or extensions of the old), also does not involve the creation of debt within the meaning of constitutional debt limitations. See Fordham, supra, at 396 n.8. See also Shestack, supra note 195, at 560.

Some states follow what is called the restricted special fund doctrine, under which revenue bonds do not escape legal limitations if they are to be amortized by the cross-pledging of revenues derived from the proceeds of other special funds, such as license fees or cigarette taxes. Id. at 559. In addition, under the restricted theory, a pledge of all the revenues of an existing project to pay for only a part (addition or replacement) of that project creates debt within the meaning of constitutional limitations. Williams & Nehemkis, supra, at 194.

\textsuperscript{198}See id. at 211.

\textsuperscript{199}To the extent that a land banking agency could be established with a continuing appropriation, or with an independent financial power operated through an "earmarked" fund (i.e., allowing the land bank's revenues from bond sales, etc., to go directly to a fund exclusively reserved for the purposes of the land bank, rather than first being paid into the state's general fund and then requiring specific appropriation), a state agency could achieve some of the political autonomy necessary to effective operation.

\textsuperscript{200}See, e.g., N.Y. Const. art. 5, § 4; N.J. Const. art. 5, § 4, § 1.
hood that an entirely new slate of directors would be installed with a change in administration weighs heavily against the practicality of an agency form of land bank. In sum, while the typical state agency has the necessary jurisdictional scope, it is often too constrained by constitutional or practical limitations to operate as a fully effective land bank.

D. The Public Corporation

A frequent and successful approach to public problems with interjurisdictional ramifications is to establish special purpose public corporations, i.e., "corporate bodies authorized by legislative action to function outside of the regular structure of state or local government in order to finance, construct, and usually to operate revenue-producing enterprises."201 Ranging from the New York Port Authority to the local sewer district, these special purpose authorities are often created to provide for local or metropolitan needs in the absence of a metropolitan agency.202 Operating on a regional


The public corporation is to be distinguished from the quasi-public corporation, the latter being a legal hybrid which possesses some characteristics of a purely private corporation and others of a purely governmental corporation. Quasi-public corporations may be owned jointly by government and private interests, as in the case of the Communications Satellite Corporation (COMSAT) [47 U.S.C. §§ 701-44 (1970)] or owned privately and financed jointly with public and private funds. See Amdursky, supra note 135, at 199. Because of the success of COMSAT, many proposals for public action have suggested mixed private-public corporations. The advantage of such a corporation is its ability to combine the resources and expertise of private enterprise and government and to create a relatively risk-free market for private investment. See id. at 204.

Because land banking operations have the potential to generate profits, there may be a lure for private participation in the form of quasi-public corporations. Land banking, however, involves decisions in which the maximization of profits may well conflict with promoting the public welfare and with the general goals of the bank. But the principal drawback to using a quasi-public corporation is essentially a philosophical one. Implicit in land banking is the Jeffersonian notion that land is for the common use of all men, and this concept is to be given effect through a public, rather than a private, determination of how the land would be best used. The benefits produced should pass to the public. If private shareholders were the beneficiaries, the underlying intention of land banking would be frustrated — not to mention the resistance that would probably meet any effort to subject such large amounts of land to centralized private ownership.

202 The Census Bureau has reported the presence of 5,411 such special authorities in the 212 Standard Metropolitan Statistical Areas. U.S. BUREAU OF THE CENSUS, STA-
basis, they are more able to meet area-wide problems and to distribute public services equitably.203

While public corporations are instrumentalities of the state, they differ from the typical state agency in that they have juridical and corporate personalities separate and apart from the state. A public corporation can sue and be sued in its own name204 and can secure its obligations by pledges of its own revenue and property, rather than by the full faith and credit of the state.205 And the corporation’s obligations, whether or not they are secured by designated revenues, are widely approved as being outside the general constitutional limitations on state and local debt.206 Moreover, all revenues generated by the corporation go exclusively for its own corporate purposes, instead of being diffused throughout other branches of government as is generally the case with state agencies.207

By operating on behalf of, but not necessarily within the state government, the public corporation is relieved from many of the usual governmental controls; it acts independently in such matters as personnel, accounting, purchasing, financial management, and legal services.208 Furthermore, because the public corporation has no direct voting constituency and is relatively untied to partisan politics by virtue of the overlapping terms of its directors, it enjoys a degree of autonomy that is lacking in most state and local agencies.209

TISTICAL ABSTRACT OF THE U.S. 1971, 829 (1971). Some typical activities of these authorities are bridge and tunnel control, park maintenance and development, operation of public utilities, sewage control, and transportation management. See authorities cited in note 201 supra.

203 See S. Greer, supra note 192; V. Jones, supra note 192.

204 Thus, the state will not be liable for any judgments against the corporation. E.g., Linger v. Pennsylvania Turnpike Comm’n, 158 F. Supp. 900, 903 (W.D. Pa. 1958).

205 See Shestack, supra note 195, at 555.

206 See, e.g., Shestack, supra note 195, at 557.

207 See Abel, supra note 201, at 355.

208 Relief from civil service requirements and auditing may enhance more business-like operations. See Quirk & Wein, A Short Constitutional History of Entities Commonly Known as Authorities, 56 Cornell L. Rev. 521, 587-88 n. 387 (1971).

209 See Abel, supra note 201, at 355-59; Gulick, supra note 201, at 76-77; J. Scott & J. Bollen, Governing a Metropolitan Region 82-85 (1968); W. Sayer & H. Kaufman, Governing New York City 324-37 (1960). Some critics of the public authority approach would prefer to call this autonomy “anonymity” and decry the absence of true public control over such corporations, pointing to such examples as that of Fridley, Minnesota. In that city of 15,000 persons, the citizens were expected to exercise informed control over nine separate local governmental entities. Comm. for Economic Development, Modernizing Local Government 12 (1966). Some critics also bemoan the lack of coordination between service-rendering authorities, and point to metropolitan government as the solution. Such criticism, however, seems
The public corporation’s freedom from legal debt limitations, coupled with the federal,¹¹⁰ state, and local tax exemption on the interest of its bonds²¹¹ and its immunity from local property tax and local control,²¹² gives the public corporation a substantial capacity to undertake and finance large-scale projects. All of these features, some of which are unique, make the public corporation the logical instrumentality for operating a land bank.

When created,²¹³ the public corporation land bank must be
to confuse cause and effect. The proliferation of special authorities, rather than causing the aforementioned problems, is actually only a manifestation of the deeper problem of management in a complex society. As the task of governing becomes more complex, delegation of more and more power is necessitated. Thus, even on the municipal level we witness a proliferation of agencies and departments over which the mayor or city council exercises little effective control. The best the mayor can do is to select priorities, give general direction to city government, and appoint skilled managers who will keep the city running.

Thus, the problems of democratic control and coordination may be lessened, but will not be eliminated by metropolitan government. In any event, in the absence of metropolitan government, the special or multi-purpose corporation remains the best approach to area-wide problems. See Friesma, supra note 192, at 421-25.

²¹⁰ INT. REV. CODE of 1954, § 103 provides that gross income does not include interest on the obligations of a political subdivision. A “political subdivision” is defined in the Federal Income Tax Regulations as “any division of the State . . . to which has been delegated the right to exercise part of the sovereign powers of the State . . . .” Treas. Reg. § 1.103-1 (1956). A public corporation which is designated in the authorizing legislation as a corporate governmental agency of the state and which possesses the power of eminent domain, should easily fit within the definition of “political subdivision.” See, e.g., Commissioner v. Shamberg’s Estate, 144 F.2d 998 (2d Cir.), cert. denied, 323 U.S. 792 (1944) (interest on obligations of New York Port Authority is tax exempt).

Also, a land bank should not be troubled by the 1969 amendment to section 103 excluding “industrial development bonds” from the income exemption. The thrust of the recent amendments is to prohibit private business from reaping the benefits of interest exemptions on state and local bonds issued to finance the construction of factories to be leased to private industry. Although land acquired by the land bank will also, in many cases, be transferred to private interests, the purpose of the acquisition-disposition, as in urban renewal, differs substantially from that involved in industrial development projects. Unlike the nonexempted industrial development projects, the land bank will generally not be constructing facilities to be leased. Rather, its role will be limited to providing the land and infrastructure necessary for construction. Such activity parallels the construction of industrial parks — projects for which bond interest is specifically exempt under section 103(c)(5).

²¹¹ See Quirk & Wein, supra note 208, at 587-88.

²¹² See authorities cited in note 201 supra.

²¹³ Public corporations can be validly created by special acts of state legislatures despite common state constitutional prohibitions against the passage of legislation which by its effect is of local rather than state-wide applicability. See Abel, supra note 201, at 358. Cf. Meadowlands Regional Development Agency v. New Jersey, 112 N.J. Super. 89, 270 A.2d 418 (1970). Although the geographical jurisdiction of a public corporation may be limited, the authorizing legislation would probably not be deemed a prohibited special or local act provided there is a reasonable basis for the legislative
granted the power to acquire land, both through negotiated pur-
chase on the open market and by eminent domain procedures. To
avoid time-consuming prior purchase negotiations (which are re-
quired by many states before condemnation can occur) and pro-
tracted compensation litigation, the enactment of a quick-take stat-
ute might be desirable to facilitate rapid land assembly. There
are two key elements to quick-take statutes. First, title may be ac-
quired merely by filing a map and description of the area. And
second, litigation to set compensation occurs only after the taking.

Since the real payoff with land banking comes not from the
acquisition of land, but rather from its reservation and ultimate dis-
position for use, the legislation authorizing the land bank must pro-
vide for sufficient flexibility in its post-acquisition stages. There-
fore, in addition to being empowered to hold its land in reserve for
indefinite periods of time, the land bank must be authorized to:
(1) carry out detailed site planning; (2) install, or contract for,
infrastructure improvements such as trunk sewers, water mains,
open spaces, and principal roads; and (3) sell, lease, or otherwise
dispose of improved sites or raw land or rights thereto to private
developers with appropriate use, development, and design restric-
tions.

The financing component of the land bank’s enabling legisla-
tion should grant the power to borrow money and issue bonds for
its corporate purposes and to secure its indebtedness by pledging its
own revenues or by encumbering its property. The land bank must
also be authorized to enter into agreements with state and federal
classification. See, e.g., People ex rel. Gutknecht v. Chicago, 3 III. 2d 539, 121 N.E.2d
791 (1954); Meadowlands Regional Development Agency v. New Jersey, infra.

Public corporations can also be created pursuant to state enabling legislation. Such
legislation would empower municipalities in a metropolitan area to jointly establish
a public body for the purpose of operating a land bank. To ensure a truly regional
or metropolitan operational scope, the legislation might prohibit operations until the
land bank district included a sufficient number of municipalities and townships to cover
a prescribed geographical growth area.

214 Note the quick-take provision for the Port of New York Authority. N.Y. Un-
CONSOL. LAWS § 6901 (McKinney 1971).

The constitutions of many states, often referred to as “first pay” states, require that
compensation be paid prior to or contemporaneously with the taking. “The United
States Constitution requires no such restriction. Hence so far as the federal govern-
ment is concerned, a condemnor may take possession in advance of payment.” Mar-
quis, Constitutional and Statutory Authority to Condemn, 43 IOWA L. REV. 170, 172
(1958), citing Hurley v. Kincaid, 285 U.S. 95 (1932). See also Bragg v. Weaver,
251 U.S. 57, 62 (1919).

215 A third element in some statutes is the requirement that the condemning public
corporation contemporaneously deposit with the clerk of courts the amount of money
it estimates to be just compensation for the property taken. See, e.g., N.J.S.A. 13:17-
governments so as to be able to accept their assistance, financial and otherwise.

Development projects approved or initiated by the land bank must be coordinated with local and regional planning programs and development agencies. Legislation merely providing for the cooperation of planning and action agencies, however, is generally insufficient to ensure their cooperation. Recognizing this, various federal programs have successfully used the "carrot" of financial assistance to exact a regional approach to this or that community problem. In the same vein, since Congress has already declared that orderly urban growth and development is in the national interest, it is not unreasonable that it would financially embrace a strategy calculated to encourage rational changes in land use policies, as land banking purports to do.

One way in which legislation could ensure at least a degree of state and local cooperation with a multijurisdictional land bank is to provide for the selection of directors from all pertinent levels of government. On the state level, the following officials or their equivalents could be appointed ex officio directors: (1) the commissioner of finance; (2) the commissioner of commerce; (3) the director of environmental affairs; and (4) the director of the office of planning coordination within the executive department. Planning officials of the municipalities within the land bank district and persons prominent in community affairs named by the mayors of the respective municipalities would round out the board of directors. The executive director should be an experienced urbanist with the necessary authority to hire a competent staff.

And finally, the land bank should be given the power to pre-

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217 See notes 127-29 supra & accompanying text.

218 One approach to the question of control is illustrated by the Philadelphia Housing Development Corporation, a non-profit corporation created to serve as a city-wide, centralized, property-acquisition service and land bank for acquiring, stockpiling, and reselling to a non-profit housing corporation structures and lots that are suitable for rehabilitation or new low-cost housing. The Corporation has 35 directors, 10 of whom are city officials (including the mayor), the remaining 25 being other persons "prominent" in community affairs. With a revolving fund provided by the city and with the presence of city officials on the board, presumably the Corporation's activities are integrated with municipal plans and policies. See H. BAIN, THE DEVELOPMENT DISTRICT 141-42 (Study Prepared for the Maryland-National Capital Park and Planning Commission 1968).

The Hackensack Meadowlands Development Commission has four of its seven directors selected from the separate counties over which the commission has jurisdiction. N.J.S.A. 13:17-5(b)(2) (Supp. 1971).
empt local land use controls which conflict with metropolitan and regional needs. The present structure of urban government has proven itself incapable of coping with the enormous problems created by metropolitan growth. Each local unit of government is usually concerned only with the parochial, short-term interests of its own area. Consequently, the wisdom of the states' delegation, to local agencies, of the power to regulate and control land development has come under serious attack. The National Commission on Urban Problems stated the situation thusly:

Today, a basic problem results because of the delegation of the zoning power from the States to local governments of any size. This often results in a type of Balkanization which is intolerable in large urban areas where local government boundaries rarely reflect the true economic and social watersheds. The present indiscriminate distribution of zoning authority leads to incompatible uses along municipal borders, duplication of public facilities, and attempted exclusion of regional facilities.

The states should not be content to allow zoning authority to be unconditionally exercised by local governments, and should instead foster a regional perspective in land use control. The states' responsibilities for achieving rational land use could be met by giving a multijurisdictional land bank certain zoning powers, or at least the power to review local zoning. To be sure, such a power of review

\[219\] At least two prominent public corporations have been empowered to overrule local zoning regulation: the New York State Urban Development Corporation, if it finds that a site is appropriate for low or moderate income housing, N.Y. UNCONSOL. LAWS § 6283 (McKinney Supp. 1971); and the Hackensack Meadowlands Development Commission, which encompasses 14 municipalities. N.J.S.A. 13:17-11(b) (Supp. 1971).

A number of state agencies have been given similar innovative land use powers to combat various social problems on a regional level. For example, Massachusetts deals with the problem of obtaining local permission to construct modestly priced housing in the Zoning Appeals Act, 40B MASS. GEN. LAWS ANN. §§ 20-23 (Supp. 1971), which establishes a Housing Appeals Committee within the Department of Community Affairs to hear appeals by developers who have been denied the necessary local approval to build subsidized housing. The Committee's standard of review is whether the local board acted in a matter "consistent with local needs," id. § 23, defined to include regional housing needs, traditional local standards for residential development, and an equal treatment of subsidized and unsubsidized housing. Id. § 20.


would not completely replace local regulation as the mechanism for controlling land use. Many, if not the majority of land use decisions do not involve matters of metropolitan, regional, or state concern, and these instances should be handled by local agencies especially familiar with the conditions of the immediate community. But those decisions which would have an impact beyond municipal borders should be subject to review, and possible reversal, by the public land bank to ensure conformity with a development and growth plan for the region.

VII. THE LEGALITY OF USING CONDEMNATION FOR LAND BANKING PURPOSES

In most cases, a public land bank should acquire property by negotiated purchase. The ability to acquire land by the exercise of the power of eminent domain, however, would be critical to a land bank’s operation. Without the power to take property by condemnation, private owners could frustrate the bank’s objectives either by refusing outright to sell or by demanding unjustifiably high prices. The mere threat of condemnation would tend to minimize the number of such cases, and the actual use of the eminent domain power would, of course, compel any remaining owners to transfer their property for “just compensation.” Because the power of eminent domain would occupy such an important place in the operation of a land bank, it is appropriate here to consider the legality, under both federal and state law, of using condemnation for the general purposes which land banking pursues.

A. The “Public Use” Requirement

Eminent domain has been defined as “the power, inherent in a sovereign state, of taking or of authorizing the taking of any prop-

221 The fraction of acquisitions that would be consummated by purchase rather than condemnation, would depend upon a number of factors. One of the most obvious, however, is the extent to which the land bank would offer “full” compensation, especially in comparison with typical judicial awards. Cf. notes 62-64 supra & accompanying text.

222 For a thorough treatment of just compensation, see L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN (2d ed. 1953).

223 There is no need to make a similar inquiry regarding the power of a governmental entity to purchase property for land banking. Once it is shown that the condemnation power could be so used, as this section shows, then the power to purchase follows naturally because the latter is invariably as broad or broader in scope as the former. See Note, State Constitutional Limitations on the Power of Eminent Domain, 77 HARV. L. REV. 717, 719 (1963). See also Marquis, Constitutional and Statutory Authority to Condemn, 43 IOWA L. REV. 170 (1958).
Once it is granted that the government of a given territory is sovereign, it necessarily follows that the government possesses the power to appropriate any property within its jurisdiction for public use. Thus, provisions found in state constitutions, as well as the Federal Constitution, relating to the taking of property do not, even by implication, grant the power of eminent domain; they merely limit a power already existing which would otherwise be unlimited.

The most important limitation on the exercise of the power of eminent domain is the requirement that private property be taken only for a public use. This limitation is imposed by explicit constitutional prohibitions in only a few states, but all state courts have agreed in holding that property may not be taken but for public use. The Federal Constitution also imposes a public use requirement, both on the states and the Federal Government. The fifth amendment, which contains the typical constitutional phrase, "nor shall private property be taken for public use without just compensation," clearly binds only the Federal Government; but the Supreme Court has held that the due process clause of the 14th amendment similarly prohibits the states from taking property for private use.

224 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1 (2d ed. 1917) (emphasis added). See also 1 J. LEWIS, EMINENT DOMAIN § 1 (3d ed. 1909); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) ("It [the power of eminent domain] requires no constitutional recognition; it is an attribute of sovereignty").

225 Id. See also J. LEWIS, supra note 224, at §§ 5, 250. Others have founded their opinion on the ground that it would be contrary to general constitutional provisions that no person shall be deprived of his property except by the law of the land. J. LEWIS, supra note 224, at § 250. And a few courts have held that to take property for private use would subvert the fundamental principles of free government, or the "spirit" of the state constitution. Id.

226 Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). In applying the public use restriction to individual cases, however, the Supreme Court has maintained a long tradition of refusing to interfere with local exercises of the power of eminent domain. In 1908, for example, the Court stated that "no case is recalled where this Court has condemned a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public use in conformity with its laws." Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). The same statement would apply with equal force today: the Supreme Court has never reversed a state court determination that a condemnation was consonant with state public use requirements, nor has it ever "invalidated a federal taking for lack of a public use so far as is known." Marquis, supra note 223, at 189. Cf. Berman v. Parker, 348 U.S. 26, 36 (1954); United States ex rel. TVA v. Welch, 327 U.S. 598, 607 (1946). In recent years, the common
Although the public use requirement is well-ensconced in the law, its meaning is not so settled. State and federal courts alike have generally avoided articulating broad guiding principles or general definitions of the term.\footnote{229} For the most part, they have proceeded to determine the meaning of "public use" on a case-by-case basis, "influenced more by the settled practices and social necessities of the people of the state in which the question arises than by philosophical considerations."\footnote{230} Consequently, what is a public use has varied from state to state and from time to time, and whether the taking of property to promote orderly urban growth and minimize urban sprawl and deterioration constitutes a public use will depend largely upon whether the courts concur with a legislative finding that such activity is beneficial to the community.

Prior to the turn of the century, the power of eminent domain was often limited by the requirement that condemned property be put to a use falling within a narrow class of traditional governmental functions.\footnote{231} Moreover, condemnation was prohibited unless the property to be taken would be available for actual use\footnote{232} by the public \textit{at large}.\footnote{233} With the advent of the 20th century, however,
courts began to refashion the public use doctrine, making it more responsive to the expanding scope of governmental activity. Whether this change in view reflected judicial foresight or was merely the result of the difficulties of applying a stringent test to myriad factual situations is unclear. But in any event, the "use by the public" test was slowly abandoned in favor of a more expansive test better attuned to the social needs of an increasingly industrialized society. Several courts, for example, while adhering to the notion that the ultimate use of appropriated land must be beneficial to more than just a few persons, began to equate public use with public benefit. As the Supreme Court of Illinois held: "Public use means public usefulness, utility, advantage or benefit." And the Supreme Court of Massachusetts, approving condemnation of land to improve Boston Harbor, stated that it was not necessary that the entire community directly enjoy or participate in an improvement or enterprise to find a public use.

The public use requirement did not become coextensive with public benefit or advantage in all jurisdictions contemporaneously. While a number of courts forthrightly insisted that the public benefit test satisfied the public use requirement, many others clung to the narrower view even though they were forced "to sanction loopholes, limitations, and evasions of the doctrine to avoid bringing it into irreconcilable conflict with the expanding industrialization of the times." The unworkability of the "use by the public" test, however, was apparent to most and by the late 1930's and 1940's

half it was constructed was approved as a public use on the theory that it provided a means for him to leave his home to vote and sit on juries. Brewer v. Bowman, 9 Ga. 37, 40-41 (1850).

By the middle of the 19th century, reaction against legislative excesses impelled the courts to seek a narrower definition of the eminent domain power. The result was an increase in the protection of private property by the development of the theory that indirect benefit to the community did not justify the exercise of eminent domain. Instead, it was deemed necessary that the public possess a "right" to use the facility or service for which the property was desired. See generally Nichols, supra note 227, at 618-19; Note, supra note 223.

234 See Nichols, supra note 227, at 619.
235 See J. Lewis, supra note 224, at § 256.
236 See P. Nichols, supra note 224, at § 504 n.26-30.
239 See P. Nichols, supra note 224, at § 504, n. 26-30; Lewis, supra note 224, at § 131, n.18; Nichols, supra note 227, at 619.
240 Nichols, supra note 227, at 619.
241 The Supreme Court expressly repudiated the narrow doctrine in 1916, declaring
condemnation and slum clearance for public housing were upheld in nearly every state undertaking such programs, despite the fact that the primary use was to be restricted to relatively few individuals. The language of the New York Court of Appeals in the 1936 case of *New York City Housing Authority v. Muller* was indicative of the trend:

The fundamental purpose of government is to protect the health, safety and general welfare of the public. . . . Its power plant for the purpose consists of the power of taxation, the police power and the power of eminent domain. . . . [I]f the menace is serious enough to the public to warrant public action and the power applied is reasonable and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed.

Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use. . . .

In a matter of farreaching public concern, the public is seeking to take the defendant's property and to administer it as part of a project conceived and to be carried out in its own interest and for its own protection. That is a public benefit, and, therefore, at least as far as this case is concerned, a public use.

The equation of public use with public benefit, as evidenced in *Muller*, effected a radical change in eminent domain law. The conceptual shift to public benefit allowed the courts to concentrate on the overall purpose of the project for which land was to be condemned, while minimizing the question of the specific use to which the property would ultimately be put. Thus, if the overall

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The objection uniquely and most frequently raised against the validity of redevelopment acts is that, because of the turning over of lands acquired to private interests for development, the purpose contemplated is not such "public use" as justifies the power of eminent domain. . . . Almost without exception the redevelopment acts have been upheld against this type of objection. *Id.* at 1420.


244 The *Muller* court had framed the issue in the following terms: "We are called upon to say whether under the facts of this case, including the circumstances of time and place, the use of the power [of eminent domain] is a use for the public benefit — a public use — within the law." *Id.* at 339-40, 1 N.E.2d at 154.

245 For example, note the language of Redevelopment Agency of San Francisco v. Hayes, 122 Cal. App. 2d 777, 790, 266 P.2d 105, 114, cert. denied, 348 U.S. 897
purposes of a project were beneficial to the community, and the use of condemned property bore a reasonable relation to these purposes, then the public use requirement was satisfied.246

Epitomizing this change in view is the 1954 Supreme Court decision in Berman v. Parker,247 which upheld the constitutionality of urban renewal under the District of Columbia Redevelopment Act of 1945.248 The Act authorized condemnation for the purpose of "redevelopment of blighted territory . . . and the prevention, reduction, or elimination of blighting factors or causes of blight."249 The plaintiffs owned nonresidential property, in sound condition, which was to be taken for the purposes of a renewal project. They argued that the taking of sound property in order to develop a better balanced, more attractive community did not constitute a legitimate public purpose. The Court rejected this argument, holding that it was well within the government's power to condemn property as part of an overall plan to make the community "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."250 Having found that the replanning and rede-
velopment of slum areas constituted a valid public purpose, the Court concluded that land, buildings, or improvements not in themselves unsanitary or substandard could be included in the condemnation site if deemed an integral part of the effective clearance, replanning, and reconstruction of the slum area.

The same conclusion was reached in regard to plaintiffs' claim that transferring condemned land to private interests for implementation of the renewal project amounted to a violation of the public use requirement, as a taking of one businessman's land for the benefit of another. As the Court stated:

[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purpose of community redevelopment projects.2

Berman, of course, dealt only with federal legislation pertaining to the District of Columbia, but the Court explicitly stated that the very same principles were applicable to 14th amendment restrictions on state takings. "The legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the states legislating concerning local affairs."252

many poor people, how many moderately well-to-do people, how many families of two, how many of four, etc., should be provided for in this neighborhood, and what the proper development of a community should be.

Of course the plan as pictured in the prospectus is attractive. . . . But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates government seizure of private property. Schneider v. District of Columbia, 117 F. Supp. 705, 724 (D.D.C. 1953).

251 348 U.S. at 33-34. Even before Berman, the state courts had been relatively unconcerned with the disposition of appropriated property once it had been established that its taking was for a public purpose. See, e.g., cases cited in Redevelopment Agency of San Francisco v. Hayes, 122 Cal. App. 2d 777, 787-88, 266 P.2d 105, 112, cert. denied, 348 U.S. 897 (1954). As one court had remarked: "If upon completion of the project the public good is enhanced, it does not matter that private interests may be benefited." Murray v. LaGuardia, 291 N.Y. 320, 329-30, 52 N.E.2d 884, 888 (1943).

252 348 U.S. at 32 (citations omitted). The principle of judicial deference to legislative determinations in the area of social legislation, the court stated, "admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Id. See also United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946):

[W]hen Congress has spoken on the subject [of public use], "Its decision is entitled to deference until it is shown to involve an impossibility." Old Dominion Co. v. United States, 269 U.S. 55, 66. Any departure from this judicial restraint would result in courts deciding what is and what is not a gov-
Equally as important as Berman, however, were the many state decisions which upheld government projects against claims that the public use requirements of the state constitutions were violated. In most of these cases, the state courts adopted broad principles similar to those of Muller or Berman; the only differences lay in the factual circumstances of these other cases, which in some senses "went beyond" the situations of Muller or Berman.

In People ex rel. Gutknecht v. Chicago, for example, the Supreme Court of Illinois approved legislation authorizing the exercise of the power of eminent domain for redevelopment of predominantly open areas which were unmarketable for decent housing or other acceptable uses and seemed destined to become slums themselves. Holding that the power of eminent domain could be used not only to eliminate slums but to prevent them as well, the court remarked: "We are aware of no constitutional premise which paralyzes the power of government to deal with an evil until it has reached its maximum development."254

In a similar case, a California district court of appeals upheld a program to convert a blighted area, which was 85 percent vacant, into a predominantly residential neighborhood containing open space and commercial, public, institutional and community facilities. The court stated: "To hold that . . . redevelopment of such areas as contemplated here [is] not [a] public [use], is to view present day conditions under the myopic eyes of years now gone."255

Blighted area redevelopment projects have not been restricted to redevelopment for primarily residential uses. In Schenck v. Pittsburgh, the Supreme Court of Pennsylvania rejected plaintiff's argument and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.

253 3 Ill. 2d 539, 121 N.E.2d 791 (1954). See also Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P.2d 752 (1952) (redevelopment authorities have the power to exercise the right of eminent domain pursuant to a redevelopment proposal even though the area may be predominantly open, vacant, or unimproved); Rubinoff v. District Court, 145 Colo. 225, 360 P.2d 114 (1961); Zisook v. Maryland-Drexel Neighborhood Redevelopment Corp., 3 Ill. 2d 570, 121 N.E.2d 804 (1954).

254 3 Ill. 2d at 545, 121 N.E.2d at 795. Similarly, no force was found in the interterrem argument that, if the use of eminent domain in the prevention of slums is permitted, "every piece of property in the city or state can be condemned to prevent it from becoming a slum. [Legitimate use of governmental power]," the court reasoned, "is not prohibited because of the possibility that the power may be abused." Id.


256 122 Cal. App. 2d at 803, 266 P.2d at 122.

gument that redevelopment must be limited primarily to relieving undesirable living conditions and upheld condemnation for the rehabilitation of a deteriorating business section of Pittsburgh. And in People ex rel. Adamowski v. Chicago Land Clearance Commission,258 the Supreme Court of Illinois upheld a project which would transform a blighted vacant area into an industrial zone. The court concluded that the elimination of a blighted vacant area in itself satisfies the public use requirement, regardless of the type of redevelopment that occurs thereafter.

Redevelopment of nonblighted areas has also been upheld. In Cannata v. New York,259 condemnation was authorized for the purpose of reclaiming and redeveloping economically deficient areas which impaired the sound growth of the community. In upholding condemnation of an area that showed no tangible physical blight and was designated to become an industrial park, the New York court stated that "an area does not have to be a 'slum' one to make its redevelopment a public use, nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for industrial buildings."260

The governing principles, then, are the same under most state constitutions as they are under the Federal Constitution. If the goals of a governmental project are beneficial to the community and the use of condemned property bears a reasonable relation to these goals, then the public use requirement is not a bar to condemnation. And possibly more important, a legislative determination of the appropriateness of condemnation is accorded a very strong presumption of validity:261 in few modern cases has a court found

258 14 Ill. 2d 74, 150 N.E.2d 792 (1958). See also Oliver v. Clairton, 374 Pa. 333, 98 A.2d 47 (1953) (upholding project to take an area which was 53.8 percent residential and redevelop it into an area containing primarily commercial and industrial uses).


260 Id. at 712, 182 N.E.2d 397, 227 N.Y.S.2d at 906. See also Graham v. Houlihan, 147 Conn. 321, 329, 160 A.2d 745, 750 (1960) ("In these days of advanced city planning and urban improvement, the city authorities could properly conclude that there was a probability of greater benefit to the community if the land in the area were put to better use."); Green v. Frazier, 253 U.S. 233 (1920); Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.), cert. denied, 329 U.S. 772 (1946); Hawkins v. Greenfield, 248 Ind. 593, 230 N.E.2d 396 (1967); Courtesy Sandwich Shop Inc. v. Port of New York Authority, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963); Wilson v. Long Branch, 27 N.J. 360, 142 A.2d 837, cert. denied, 358 U.S. 873 (1958); Gohld Realty Co. v. Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

261 See, e.g., Berman v. Parker, 348 U.S. 26, 32 (1954): "Subject to specific constitutional limitations, when the legislature has spoken the public interest has been declared in terms well-nigh conclusive."
that public use was not what the legislature had determined it to be. Although promoting orderly urban growth differs in some ways from slum rehabilitation, slum prevention and the like, it is extremely unlikely that a court that has sanctioned these latter programs would hold, contrary to a legislative determination, that curbing urban sprawl and maintaining rational growth were not a public purpose. Innumerable reports, books, and articles attest to the enormity of the social and economic costs of disorderly urban growth, costs which could be largely reduced. Nor is it likely that such a court would conclude, again faced with a contrary legislative determination, that land banking was an unreasonable or irrational means of ordering urban development.

Land banking, in fact, is designed to succeed where established programs of slum clearance, urban renewal, economic rejuvenation and the like have failed, because it represents a more comprehensive and integrated approach to the problems of urban deterioration and because it focuses attention on the urban fringe, as well as the inner city. Past programs have by and large failed to make substantial improvements in the urban environment because they have taken more limited approaches — limited by being subject to piecemeal, rather than comprehensive planning,262 and by concentrating on the urban core to the exclusion of the fringe. Concentration on the fringe is crucial because of the immediate nexus between urban decay and uncontrolled urban expansion.

For example, poor housing conditions are magnified when private landowners hold property in the urban fringe for long periods of time in anticipation of increased market value. This speculative withholding of property, coupled with low-density suburban zoning,263 increases the cost of property available for residential development.264 Consequently, the price of housing is elevated beyond

262 "[P]lanning in urban renewal is limited to the municipality in which the program is to be conducted. This emphasis is unfortunate. It inhibits any program which is directed in part to the improvement of the housing supply since housing demands and housing needs are regional in nature." Mandelker, The Comprehensive Planning Requirement in Urban Renewal, 116 U. PA. L. REV. 25, 28 (1967).


264 Whether zoning or speculation contributes more to the artificial shortage of land available for residential development is uncertain. In any event, the impact of the artificial shortage is clearly significant. See generally F. Boselman, supra, note 22, at 13.
the reach of many who are left with no alternative but to live in the deteriorating central cities. At the same time, most of the new clerical, unskilled and semiskilled jobs in metropolitan areas are being created in the suburbs and beyond; those who must reside in the central city are thus impeded in their access to the most rapidly growing job markets. Obviously, this sequence of events cannot be altered without controlling the land market in the urban fringe. A public land bank, by acquiring land at the urban fringe, by controlling the inflation of land values, and by providing better quality, less expensive public services and facilities for newly developed areas, would make more realistic the possibility of decent housing for low- and moderate-income families near new employment centers. Indeed, comprehensive control of fringe area de-

265 See Exclusionary Zoning, supra note 263, at 62. The National Commission on Civil Disorders concluded: "To continue present [land use] policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in central cities; the other, predominantly white and affluent, located in the suburbs." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 22 (Bantam ed. 1968).

266 See Exclusionary Zoning, supra note 263, at 62. See also Girsh Appeal, 437 Pa. 237, 244, 263 A.2d 395, 398 (1970):

Figures show that most jobs that are being created in urban areas... are in the suburbs... Thus the suburbs, which at one time were merely "bedrooms" for those who worked in the urban core, are now becoming active business areas in their own right. It follows then that formerly "outlying," somewhat rural communities, are now becoming logical areas for development and population growth — in a sense, suburbs to the suburbs.

267 To control land use in the urban fringe, it is necessary to keep fringe area land free from premature private development. In some cases this will require holding on to acquired land for several years before disposing of it for development consistent with a master plan for the area. Although a few courts have prohibited takings for projects which will not be implemented in the immediate future on the grounds that property may not be condemned for a speculative or remote future use (see, e.g., Board of Education v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954)), the rationale of such cases does not apply to land banking because land will not be acquired by a land bank for either speculative or remote future uses. On the contrary, acquired land will be put to public use at the moment of its acquisition because, from that time on, it is serving to implement the land bank's public objectives: curbing urban sprawl, perfecting the land market by controlling inflation, etc. Moreover, since the use to which condemned property is finally put is no longer the test of whether property is being taken for public use, it is largely irrelevant to what use the property is finally put as long as it is put to a use which bears a reasonable relation to the goals of the legislative program.

A land bank, pursuant to enabling legislation, will dispose of land with restrictions which will guarantee that land use will be consistent with a master plan for the area — much as is done in the typical urban renewal project (see, e.g., Berman v. Parker, 348 U.S. 26, 30 (1954)). Therefore, courts will probably find that a land banking program provides sufficient guarantees that the land will be used in a way reasonably related to the purposes of the land bank.

268 See notes 180-87 supra & accompanying text.

269 See text accompanying note 156 supra.

270 See e.g., notes 95-97, 119-21 supra & accompanying text.
development appears to be the only plausible way to accommodate a growing population without magnifying present urban disorders.271

B. Commonwealth v. Rosso

So far, only one case has tested the foregoing conclusion — that a land bank could rely on the power of condemnation to implement its programs — and there it was resoundingly affirmed. In a unanimous and exhaustive opinion, the Supreme Court of Puerto Rico upheld legislation272 specifically providing for land reservation as a means of promoting the efficient utilization of land.273

Act 13, passed by the Legislative Assembly of Puerto Rico in May, 1962, created the Puerto Rico Land Administration, a public corporation authorized to "acquire ... private property and keep it in reserve, for the benefit of the people of Puerto Rico."274 The Act contemplated that land would be acquired both by purchase and by the exercise of the power of eminent domain,275 and would be held in reserve for an unspecified period without any particular future use being designated at the time of a taking.276 The Rossos', whose land had been designated for condemnation pursuant to the Act, contended that the public use doctrine — under both the United States and Puerto Rico Constitutions277 — prohibited the Commonwealth from condemning private property until there was a specific plan for the land and a clear public necessity for doing so. The lower court, reluctant to allow expansion of governmental power at the expense of individual property rights, took a rather traditional view


273 ____ P.R. ____ (1967), appeal dismissed, 393 U.S. 14 (1968) (per curiam) (Translated excerpts of the opinion of the Supreme Court of Puerto Rico appear in Callies, supra note 94. The case is also translated, in full, in Brief for Appellant, app. B, Rosso v. Puerto Rico, 393 U.S. 14 (1968)).

274 P.R. LAWS ANN. tit. 23, § 7(q) (1964).

275 Id. § 311f(j).

276 Id. Although the Act provides for reserving land specifically for preserving open space, it has a far greater reach than open space legislation such as 42 U.S.C.A. §§ 1500-1500e (Supp. 1972), in that it also provides for short- and long-term reservation of land for other purposes.

277 The Puerto Rico Constitution, like the constitutions of most states, has a section similar to the fifth amendment just compensation provision of the Federal Constitution: "Private property shall not be taken or damaged for public use except upon payment of just compensation and in the manner provided by law." P.R. CONST. art. 2, § 9.
In upholding the Rossos' contentions, the court stated that "[t]he necessity which justifies an expropriation is that which exists in the present or in the immediate future and is required for the expropriation itself. . . . Private property . . . cannot be expropriated for a use which is not revealed." But on appeal, the Supreme Court of Puerto Rico reversed, holding Act 13 constitutional in all respects, and stating that the Act constituted a "legitimate use of public power in protection of that which a community of 2,712,808 human beings existing in a territory of 3,435 square miles sees as a most precious value for survival: vital space.

The court enumerated at length the social, economic, and moral justifications for its decision. Reference was made to the legislative finding that only a publicly constituted body with broad powers of land acquisition and regulation could assist the Commonwealth in carrying out its public policy of industrial, commercial and housing development, and of providing public services so that there may be an orderly development in keeping with the master plans, and of more effectively meeting its governmental responsibility of preserving the health, safety, and welfare of the inhabitants of Puerto Rico at the highest level compatible with community resources.

In discussing the legal issues, the court stressed that strict limitations upon governmental authority would unnecessarily and unwisely exalt private property rights vis-a-vis the common needs. It found the views of the trial court "somewhat out of focus in these present times," and saw no need to distinguish the concepts of public use and public or social benefit. Instead, the court assumed that under the circumstances there could be little question that "social benefit" was synonymous with "public use," and that a showing of social benefit was sufficient to legitimate the exercise of eminent domain. Finding that the legislature might reasonably have con-
considered the indeterminate reservation of land for future, unspecified uses to be of social benefit to the Commonwealth, the court refused to interfere with "the ways and means which the legislature or its delegated organ [chose] to exercise the power of expropriation [or] with a selection they [had] made of the land to be expropriated."\textsuperscript{285}

The Rossos' appealed the decision of the Puerto Rico Supreme Court to the Supreme Court of the United States, but to no avail. In a short per curiam opinion without dissent, the Court granted the Commonwealth's motion to dismiss the appeal on the ground that the case failed to present a substantial federal question.\textsuperscript{286} Presumably, then, the Supreme Court of the United States is in full agreement with the High Court of Puerto Rico: land banking — while not factually identical to other examples of eminent domain cases that have received the sanction of the courts — falls easily within existing constitutional principles that have been established to regulate government takings.\textsuperscript{287}

Of course, the fact that the Federal Constitution is construed to permit land banking is not determinative of whether an individual state will approve the idea under its own constitution and legis-

\textsuperscript{285} Rosso v. Puerto Rico, 393 U.S. 14 (1968) (per curiam).

\textsuperscript{286} It is not entirely obvious what precedential value is entailed in a case dismissed by the Supreme Court "for want of a substantial federal question." But looking to Zucht v. King, 260 U.S. 174 (1922), where the Court first disposed of a case in this fashion, it appears that such a dismissal at least approaches a decision on the merits to the effect that the federal issue raised is rejected. One might even contend that these cases constitute unusually strong authority because the Court essentially is deeming the issues raised (whether they be of constitutional dimension or concerned with federal statutory law) to be patently frivolous.

An interesting aspect of the Rosso case that was never mentioned in either the Puerto Rican opinions or the briefs before the United States Supreme Court is whether the federal restrictions on government takings even apply to the Commonwealth. \textit{See} Brief for Appellant at 28-37, Brief for Appellee at 1-9, Rosso v. Puerto Rico, 393 U.S. 14 (1971). The extent to which the Federal Constitution applies in Puerto Rico is in no way a settled question. \textit{See generally} Helfeld, \textit{How Much of the Federal Constitution is Likely to be Held Applicable to the Commonwealth of Puerto Rico?}, 39 REV. JUR. U.P.R. 169 (1970). It seems completely implausible that the Court's dismissal of the appeal was predicated on the inapplicability of the taking restrictions in Puerto Rico, however, since their applicability would at least constitute a "substantial question." \textit{See id.}

It is peculiar that both the Rossos' and the Commonwealth's briefs never discussed this point. Instead, they simply discussed whether the condemnation was consonant with general due process — which no one disputes is applicable in Puerto Rico (\textit{see, e.g.,} Figueroa Ruiz v. Delgado, 359 F.2d 718, 722-23 (1st Cir. 1968)) — and then proceeded to discuss the legal issue as if it were wholly one of eminent domain, citing \textit{Berman v. Parker} and the like.
lation. The ultimate test will be in the state courts, but here, as in the Supreme Courts of both the United States and Puerto Rico, the legal stage seems set for a ready acceptance of this new extension of established programs.

VIII. FINANCING AND OPERATING THE LAND BANK

To effectively control the pace and direction of urban growth, it is evident that the land bank must have a considerable inventory of land at its disposal. The amount of land required by the land bank, of course, will vary from city to city, depending upon the physical, economic, and social characteristics of the area and the bank's strategies and objectives. The intricacies of these variables render quantitative estimates of the magnitude of the necessary public investments extremely complex. In one effort to make such an estimate, however, the Urban Land Research Analysts Corporation did conclude that land banks would be financially feasible, even for the largest metropolitan areas. According to its estimate, the maximum investment required for a land bank to control the growth of a metropolitan area containing 2.5 million people would be on the order of $250 million, and with an investment of half that amount, a considerable impact might still be made.\[288\] While studies to refute or corroborate these calculations are not available, it is indisputable that land banking will entail substantial new public investments.

In view of the large sums of money required and the long-term goals involved, it is unlikely that a land bank could be expected to enter into a fully operational phase by immediately acquiring all the land necessary to actualize its objectives. Instead, both the financing and the operation of the bank must evolve in incremental stages. During the land bank's early stages,\[289\] before full operating

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\[288\] See W. LETWIN, supra note 3, at 236-37.

\[289\] The process of selecting parcels of land for acquisition during the initial phases of operation can be broken down into two components. Initially, on the macro-level, are those decisions which are determined by a comprehensive plan which sets forth the desirable development and growth pattern for the metropolitan area. This plan should, to a large degree, incorporate the individual plans of the municipalities within the land bank's jurisdiction. That is, the development and growth objectives of these cities, as reflected in their own plans, should be given the utmost consideration as long as they do not conflict with or infringe upon the desirable growth pattern of the region or metropolitan area as an integrated whole.

On the micro-level are those decisions to be made between individual parcels of land within the more broadly defined development areas. The inherent financial limitations imposed on initial acquisitions can make this an either-or, now or never decision. While no general formulas can be designed to make such decisions automatic or in-
status is achieved, there would be a continuing need for additional capital with little, if any, offsetting revenue.\textsuperscript{290} The length of this initial period may well be a number of years.\textsuperscript{291}

Once attaining an operational inventory, the land bank would begin the continuous process of selling or leasing land to private developers, as it becomes ready for development, and simultaneously acquiring cheaper land on the outskirts of the city to forestall premature development. By virtue of its lower holding costs\textsuperscript{292}

fallible, certain techniques, such as cost-benefit analysis, can be utilized to ensure that components of rational decision-making are present.

\textsuperscript{290} Interim uses might generate some revenue during this period. \textit{See} note 293 \textit{infra}.

\textsuperscript{291} In instances of advance land acquisition for public purposes, land has been held in reserve for up to 11 years. \textit{See} Shoup \& Mack \textit{supra} note 40, at 93. In urban renewal projects, it has not been unusual to have gaps of 10 to 15 years between site acquisition and disposition. Although these examples of public land acquisition are not identical to potential American land banking programs, they are indicative of the lengthy periods of time involved from the purchase of land to its ultimate disposition.

\textsuperscript{292} The federal tax exemption on the interest of the land bank’s obligations, under \textsc{int. rev. code} of 1954, § 103, would allow for low borrowing rates which, in conjunction with the public entity’s exemption from state and local property taxes, would yield lower overall holding costs. (To take full advantage of the tax exemption on the interest of its obligations, of course, the land bank’s obligations would have to be high-quality. Otherwise, investors would demand a higher rate of interest which could negate the value of the tax exemption and could push the borrowing costs of the public entity beyond those of a private developer.)

In comparison with private enterprises, the land bank also has a substantial cost advantage by virtue of its exemption from income tax. \textsc{int. rev. code} of 1954, § 115 excludes from gross income any income derived from the exercise of any essential governmental function and accruing to a state or a political subdivision thereof. The purpose of the exemption is to ensure that state and local governments will not be hampered in the performance of their functions by federal income taxes. Maryland Savings-Share Ins. Corp. v. United States, 308 F. Supp. 761 (D. Md.), reversed on other grounds, 400 U.S. 4 (1970) (per curiam). The purpose of this section, however, is not to exempt an enterprise carried on by the state which normally would be within the rubric of taxable private enterprises and is distinct from the usual governmental functions. Helvering v. Powers, 293 U.S. 214, 227 (1934). Thus, a state cannot withdraw sources of revenue from federal taxing power by engaging in businesses such as liquor sales. Ohio v. Helvering, 292 U.S. 360 (1934).

Income generated by a land bank should be exempt under section 115 since: (1) the land bank would be engaged in such typical governmental activity as development of sites for parks, housing, and commercial uses, as well as construction of sewers, roads, water lines and other public utilities and services; and (2) the land bank, if properly constituted, would be a political subdivision of the state, and hence any income accruing to the land bank would accrue to a political subdivision of the state.

Public institutions generally have been exempt from local property taxation. \textit{See}, \textit{e.g.}, 42 U.S.C. § 1410(h) (1970). Since this exemption can significantly reduce holding costs, it seems that land banks too would seek to have their lands removed from the local property tax roles. While American property tax has been vociferously criticized over the last century as regressive and uneconomic, it still continues to account for almost one-half of local general revenues from all sources. D. \textsc{Netzer}, \textit{supra} note 160, at vii. This would indicate that the concentration by a land bank of tax exempt lands in suburban areas may have a noticeable impact on local tax revenues and hence on local spending power.

On closer examination, however, this apparent loss-of-tax may not occur at all.
and revenue accrued from leasing policies and ultimate disposal, the land bank may generate substantial profits. On the other hand, acquiring and holding land out of productive use indefinitely, or disposing of land at a price below market value to subsidize certain public or private uses, may create financial losses. Thus, whether the land bank would ever be financially self-sustaining depends on its overall objectives and implementing strategies.

A. Direct Government Funding

There are two possible sources for financing a land bank as a public corporation: direct government aid in the form of grants or loans, and the bank's own obligations of indebtedness. At least during the initial build-up phase, when capital costs and operating expenses would exceed revenue, direct government assistance would be particularly useful. In view of the serious fiscal constraints confronting most municipal governments, it is doubtful that significant funding could be provided at the local level. Some aid, however, may be available on the state level, either as long-term, low-interest loans or direct subsidies. Although state governments traditionally have been rather indifferent to urban problems, their attitudes are beginning to change. Many states are now engaged in programs for the financing and development of urban housing; others have programs to provide financial assistance to local governments for the acquisition of land to meet the recreation and conservation needs of expanding urban populations. Nonetheless, state governments

When the land bank eventually disposes of land, the property tax exemption will cease. Since much of the property transferred to private hands for active use will often have a much greater value than when it was acquired by the land bank (because of site preparation, capital improvements, and the announcement of development plans), the total value of the land on the tax roles will eventually be increased.

Alternatively, enabling legislation might provide for some form of payment in lieu of taxes to compensate the municipality for lost tax revenues. See, e.g., 42 U.S.C. §§ 1410(h)-(k) (1970). A formula which would allow the municipality to share in the appreciated value of land in the reserve would be one such approach.

Temporary use of the land, during the period between acquisition and disposition, may produce rents and revenues that can offset operating costs. Land in the metropolitan fringes that is currently in agricultural use, might be acquired and leased back for interim use. So too might irregular parcels of land closer-in be used for parking lots, etc.

Land acquired on the fringe in the path of urban expansion would be virtually ensured of increasing value as the demand for its development increased.


Land purchase programs exist in at least seven states. See G. EDWARDS, supra note 7, at 126.
alone would probably be unable or unwilling to meet the full burden of initial land acquisition needs, and thus a greater role for the Federal Government is indicated.

The Federal Government clearly has the financial capacity, and probably the inclination, to assist public land banking. In the past, billions of dollars have been expended through numerous federal programs to assist local government bodies in acquiring land for various purposes, some of which have been very similar to the purposes of land banking. Some of the current federal programs, in fact, might directly authorize federal assistance to local land bank programs, particularly if they were slightly modified by amendment.

The federal urban renewal program, for example, might provide a source for funds. To date, urban renewal has been the most significant federally initiated effort involving public acquisition and disposition of urban land. Title I provides federal assistance, in the form of grants and loans, to a local public agency for land assembly, clearance, and site preparation, among other things, pursuant to local programs designed to eliminate and prevent slums and blight and to renew and revitalize urban areas. The Federal Government generally pays for two-thirds of the aggregate “net project cost,” which is computed by subtracting the value of resold land (plus certain capital value of leased property) from the gross project cost. The remaining one-third of the project cost is absorbed by the local government. About $6 billion of federal

297 Although state governments have evinced a fairly substantial capacity and inclination to assist local governments making capital outlays for schools and roads, the states have been much more reluctant to provide assistance for any other kinds of capital outlays. See Adams & McLoone, State Aids for Local Public Facilities, in PUBLIC FACILITY FINANCING, supra note 188, at 77. This same study concluded that “State aid for capital outlay has been small and is not likely to increase considerably without a significant change in the role taken by the States with respect to local governments.” Id. at 91. For one thing, state governments, unlike the Federal Government, have a tradition of using their aid to local governments primarily to assist with payments for operating expenses, rather than for capital outlays. Id. at 78.

298 G. Edwards, supra note 7, at 124.


300 Id. § 1453(a) (2). The Government will pay three-fourths of the net project cost of any projects: (1) in a municipality of 50,000 or less; (2) in a municipality which is situated in a hardship or “redevelopment” area; or (3) which the Secretary of HUD may specifically approve for the higher rate. Id. § 1453(2) (B)-(C).

301 Id. § 1460(f).

302 Id. § 1454.
money has been spent in accordance with this formula in the years following the initiation of the program in 1949.\textsuperscript{303}

In the past, the urban renewal process has differed from the redevelopment component\textsuperscript{304} of land banking in two respects: urban renewal has been essentially concerned with the acquisition and disposition of \textit{developed} land — the proper use of which is inhibited by the presence of deteriorated structures or blighted conditions — and it has tended to focus on relatively small areas. A 1970 amendment to the urban renewal program, however, seems to go a long way towards eliminating these distinctions by modifying the old requirement that an urban renewal area be a slum, blighted, deteriorated, or deteriorating area. The program now includes projects for the acquisition of open land necessary for sound community growth which is to be developed for predominantly residential uses, or . . . land or space which is vacant, unused, underused, or inappropriately used . . . , which land or space the Secretary [of HUD] determines may be developed (at a cost reasonably related to the public purpose to be served) without major residential clearance activities, and with full consideration to the preservation of beneficial aspects of the urban and natural environment, for such uses as are consistent with emphasis on housing for low- and moderate-income families, including the provision of schools, hospitals, parks, and other essential public facilities, and, where appropriate, all uses associated with new communities in town or similar large scale undertakings related to inner city needs . . . \textsuperscript{305}

Such projects could reasonably be undertaken by a land bank. Indeed, the land bank entity would seem to easily fit within the definition of a "local public agency;"\textsuperscript{306} and the statute encourages the operations of such local public entities as the land bank which are established on a State, or regional (within a State), or unified metropolitan basis or [which] are established on such other basis as permits such agencies to contribute effectively toward the solution of community development or redevelopment problems on a State, or regional (within a State), or unified basis.\textsuperscript{307}

Other legislation might more directly authorize federal assistance

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\textsuperscript{303} \textit{The Nat'L Housing and Development Law Project}, \textit{supra} note 38, ch. III, pt. 1, at 10.
\textsuperscript{304} See discussion of a land bank's possible role in urban renewal, notes 163-71 \textit{supra} & accompanying text.
\textsuperscript{305} 42 U.S.C.A. § 1460(c) (1) (v) (Supp. 1972).
\textsuperscript{306} "'Local public agency' means any State, county, municipality, or other governmental entity or public body . . . authorized to undertake the project for which assistance is sought." 42 U.S.C. § 1460(h) (1970).
\textsuperscript{307} \textit{Id.} § 1451 (b). 
\end{flushright}
to a local land banking program. The Housing and Urban Development Act of 1970, authorizes grants to state and local public bodies for up to 75 percent of the acquisition costs of

undevolved or predominantly undeveloped land which, if withheld from commercial, industrial, and residential development, would have special significance in helping to shape economic and desirable patterns of growth (including growth outside of existing urban areas which is directly related to the development of new communities or the expansion and revitalization of existing communities) ... 308

An express purpose of this chapter is to help curb urban sprawl and prevent the spread of urban blight and deterioration in the face of rapid population growth and rapidly expanding urban areas.

Prior to the Housing and Urban Development Act of 1970, it was extremely difficult to convert vacant land acquired with grants under title VII of the Housing Act of 1961 to uses other than open space.309 With the new emphasis on rational and orderly development brought about by the 1970 act, however, Congress has demonstrated a much greater willingness to allow the conversion of open space, when such change is warranted by the exigencies of urban growth.310

The Urban Growth and New Community Development Act of 1970311 may also authorize funding for land banking. The Act provides for financial assistance to private developers and state and local public bodies, including regional or metropolitan public bodies and agencies, to encourage "the orderly development of well-planned, diversified, and economically sound new communities, including major additions to existing communities . . . ."312 A land bank, as a "state land development agency,"313 would be eligible to

309 Such conversions were allowed only if the Secretary of HUD found that the conversion was essential to the orderly development and growth of the area involved and only if the local body assured "the substitution of other open space land of at least equal fair market value and of as nearly as feasible equivalent usefulness and location." 42 U.S.C. § 1500c (1970), amended, Act of Dec. 31, 1970, Pub. L. No. 91-609, tit. IV, § 401, 84 Stat. 1782.
310 The new law reads:
In the case of any interests [in land] acquired pursuant to [section 1500c-2], the Secretary may approve the subsequent conversion or disposition of the land involved without regard to other requirements of this chapter but subject to such terms and conditions as he determines equitable and appropriate with respect to the control of future use . . . . Id. § 1500c-2 (emphasis added).
313 A "State land development agency" is defined as "any State or local public body
receive federal guarantees on its bonds and notes, as well as federal loans for the purpose of meeting interest payments on its indebtedness. Planning assistance, up to two-thirds of cost, would also be available, as would be direct grants to cover the costs of interim public services prior to the establishment of permanent services.

In addition, the land bank would be eligible to receive grants to assist construction of public facilities whenever it is conducting a “new community assistance project,” as defined in the Act.

B. Debt Financing

In the absence of a massive infusion of federal money into land banking programs, the principal source of funding would have to be debt financing. As a public corporation, the land bank would be empowered to issue negotiable bonds and notes in amounts sufficient to finance its land acquisitions. The debt would be secured by a pledge of any revenues or receipts of the corporation or by a mortgage covering all or part of its holdings. Because the land bank will probably operate at a loss during its early stages, it must have a source of funds available to cover its initial debt maintenance expenses, as well as its capital outlays. Some part of the interest costs can be met by overissuing at the time of the original bond offering — a common technique by which a public or private entity sells more debentures than necessary to finance a project, specifically intending to use the excess to pay the interest expenses on the bonds for the first few years.

The tax-exempt status of land bank bonds would make pos-
sible a relatively low borrowing rate which, when reflected in diminished monthly carrying charges, could lead to substantial savings. It is generally conceded, however, that bonds of newly organized public corporations and municipal authorities bear a higher rate of interest than municipal and state bonds backed by their respective governments. The new public corporation must pay higher rates because it has no taxing power, lacks a financial history, and may be subject to unknown difficulties in securing revenue. Not only would each of these considerations apply when a land bank is formed, but the fact that the land bank would not begin to generate its own revenues until a substantial inventory is built up would further tend to intensify the marketing difficulties associated with its bond issues. The land bank may thus find it difficult to raise capital at a low rate of interest, or even market its bonds in the first place, unless there is an ancillary pledge of security from some proven source such as the government.

One successful approach for providing such security to newly formed public bodies is illustrated by the act which created the New York State Housing Finance Agency (HFA), a public benefit corporation established in 1960 for the purpose of providing direct mortgage financing to limited profit housing companies. New York, like a number of other states, is constitutionally prohibited from guaranteeing the bonds of a public corporation without first securing approval in a referendum. To avoid this difficulty and still create financially attractive bonds, the act established a "capital reserve fund," into which the HFA must pay: (1) all money received from the state for the purposes of the fund; (2) the proceeds from the sale of certain bonds and notes; and (3) any

322 See Alderfer, supra note 201.
323 Other reasons that have been listed include: the absence of mortgage features; the extra-long life of the bonds' and the magnitude of the bond issue. See id.
324 On the other hand, the land bank will be dealing with real estate — which time has proven to be a commodity virtually certain of increasing in market value — and this should be one factor tending to increase the attractiveness of its bonds.
327 The included notes and bonds are all notes and bonds except for a number of special kinds which are listed in N.Y. PRIV. HOUS. FIN. LAW § 47(1) (a) (McKinney Supp. 1971).
other money made available for the purposes of the fund. Also, the HFA is allowed to withdraw from the fund only to the extent that the total amount in reserve is sufficient to cover all of the principal and interest becoming due on certain bonds in the succeeding year; and it cannot make further issuances unless the reserve is adequate to cover what would be the increased amount of principal and interest becoming due in the succeeding year. The critical feature of the capital reserve fund lies in the state's purported obligation of support. Should the reserve fund not reach the level required to meet the succeeding year's payments, the legislature is committed to appropriate such amounts as are necessary to restore it to that level. This technique is a legislative obligation short of a pledge of the full faith and credit of the state, but adequate to transform relatively speculative securities into very marketable bonds. In fact, as of 1970, approximately $1.9 billion worth of bonds had been issued by the HFA pursuant to the reserve fund scheme, and they sold at rates well below New York City's bonds and just slightly higher than the state's own bonds.

328 Id.
329 See note 327 supra.
331 Id. § 47(1)(b).
332 Id. § 47(1)(d).
333 Professors Quirk and Wein cogently argue that this "blank check" on the state treasury violates no less than four state constitutional provisions. The most significant violation is that of article VII, section 8, which they read as expressly forbidding such guarantee by providing that the "credit of the state" shall not "be given or loaned to or in aid of any individual, or public or private corporation or association . . . ." N.Y. CONST., art. VII, § 8. Their position, with regard to the Housing Finance Agency statute, is that it provides in unequivocal terms that the state shall guarantee the debt of the HFA. The guarantee is not direct; rather, it provides that if the HFA reserve for the payment of principal and interest is insufficient then the HFA shall draw a "blank check" on the state treasury and the needed amount "shall be annually apportioned and paid to the agency." It requires a peculiar mind to draw a distinction between a direct guarantee of the bonds and a guarantee of a fund out of which the bonds will be paid. That, however, is the theory of the statute. Quirk & Wein, supra note 208, at 591, 585-629.
334 Quirk & Wein, supra note 208, at 586.
335 Recently, those bonds of the HFA that were secured by the reserve fund sold at one-quarter percent higher than the state's bonds, and up to one and one-quarter percent lower than New York City's bonds. Reilly & Schulman, supra note 325, at 135.
Approximately $6.5 billion of bonds had been sold by 1970 in New York under similar schemes. Quirk & Wein, supra note 208. See also N.Y. Times, March 14, 1972,
This scheme has been used to make marketable the bonds of a number of other public corporations in New York, most notably the New York State Urban Development Corporation (UDC). The UDC is authorized to create reserve funds under constraints similar to those applying to the HFA, and the legislature is again committed to appropriate any amount necessary to restore the funds to a level that would cover the principal and interest becoming due in any succeeding calendar year on the bonds secured by the funds. The UDC has enjoyed success similar to the HFA's.

Whether other state legislatures will follow the New York lead in supporting the bonds of public corporations will clearly depend on prevailing political moods, as well as the applicable constitutional frameworks. But even without action on the state level, some federal support can be expected. For example, the Urban Growth and New Community Development Act of 1970 is one pertinent source of federal assistance already in effect. It authorizes certain loans to "[s]tate land development agencies for the purpose of assisting them to make interest payments on indebtedness incurred by them to finance [approved] new community development programs." Moreover, the Secretary of HUD is authorized "to guarantee, and to enter into commitments to guarantee, the bonds [etc.] issued by or on behalf of . . . State land development agencies for the purpose [inter alia] of financing real property acquisition and land development . . . pursuant to [approved] new community development programs," with the full faith and credit at 1, col. 1, which discusses the relative quality ratings of HFA, UDC, and New York State's own bonds.

at 1, col. 1, which discusses the relative quality ratings of HFA, UDC, and New York State's own bonds.


339 Id. § 6270(3).

340 See N.Y. Times, supra note 335.


342 Id. § 4515(a). Note that the Act forbids guarantees on obligations of any state land development agency if the income from such obligation is exempt from federal taxation. Id. At first blush this poses a dilemma in that the INT. REV. CODE OF 1954, § 103(a) provides a blanket exemption for obligations issued by any political subdivision of a state. The apparent difficulty is obviated by a rather obscure provision which mandates inclusion in gross income of interest received by the purchaser of a state land development agency obligation whenever the issuer has elected to receive federal guarantees on these obligations pursuant to section 4514. See 42 U.S.C. § 4530 (1970). But the tax exemption is still maintained, in effect, for the entity because grants are au-
of the United States pledged to the payment of such guarantees.\textsuperscript{343} In combination, these features would virtually ensure bond marketability and low borrowing rates.

Of paramount significance in formulating a debt-financing structure is a recognition of the possible constraints debt dependence might impose on the flexibility of a land bank in achieving its public objectives. In order to attract the necessary investment capital, there must exist on the part of private investors a reasonable expectation of payment of principal and interest. While government guarantees would tend to dispel the doubts of investors, the likelihood of obtaining guarantees would be similarly reduced when the financial potential of the land bank appears questionable.\textsuperscript{344} Thus, to secure debt financing, a land bank must pursue policies likely to generate at least enough revenue to service its debt. On occasion, such policies might conflict with optimal land use policies.

For example, a land bank may be confronted with choosing between two bids for a single site within its reserve: one of $100,000 from a private developer, the other of half that amount from the park department. The substantial intangible benefits rendered by an open-space recreation area might reasonably provoke the land bank to sell the land at the lower price, even though it would “do better” by “doing worse” from the investor’s perspective. While this inherent limitation of debt financing cannot be eliminated entirely, it may be obviated in part in a number of ways—for example, by requiring the land bank to sell to the highest bidder willing to use the land in ways generally consistent with the master plan for the area’s development.

Another example might arise where a land bank is pursuing a developmental subsidy strategy—\textit{i.e.}, “writing-down” land costs by selling land at a loss or at cost, so as to make low- and moderate-income housing more feasible.\textsuperscript{345} If such an approach were to be utilized frequently, the land bank’s bonds may not be self-liquidating, or even marketable in the first place. One obvious answer to this problem could be a statutory restraint on the extent of write-down subsidies.

\textsuperscript{343}Id. § 4514(b).
\textsuperscript{344}See, \textit{e.g.}, id. § 4517.
\textsuperscript{345}The New York State Urban Development Corporation has not yet attempted write-downs because of debt-financing considerations. Roberts, \textit{supra} note 7, at 37 n. 209.
C. **Optimizing the Use of Available Capital**

A wide array of land acquisition techniques are available to a public land bank to assist it in meeting its financial and operational needs. By using these techniques creatively, a land bank could significantly reduce the amount of land that otherwise need be acquired and minimize the amount of capital necessary to effect its objectives. One method of acquiring land which could be used to advantage by a land bank is the installment land purchase. Used frequently by private developers who prefer to keep their money productive as long as possible so as to increase their overall rate of return, this method of purchase would allow the land bank to take possession under terms requiring a relatively small initial outlay of capital. Moreover, an installment sale would give the seller the advantage of postponing his tax liability by spreading it out over several years and being taxed only as he receives the sale proceeds.\(^3\)

This tax advantage to the seller would in turn allow the land bank to purchase at a lower price. The advantages to the land bank would thus be twofold: deferment of capital needs and obtainment of bargaining leverage with sellers.

In periods of tight credit, an immediate cash payment by the land bank could also result in substantial price concessions.\(^4\)
While the seller may subject himself to capital gain taxation on the entire gain in the year of the transfer, a consideration which may be entirely outweighed by the need for cash in a tight money period, the disadvantage may be obviated or at least alleviated to the extent of special tax treatment if the sale is made as the result of condemnation proceedings or under the threat or imminence of condemnation.\(^5\)

Where a land bank's principal objective is to forestall premature development, its capital can be conserved by utilizing the presence of speculators holding unused land. Where a speculator de-


\(^4\) Cash payments in combination with large-scale acquisitions have made it possible for the UDC to purchase land at prices substantially less than the going market price. NEW YORK STATE URBAN DEVELOPMENT CORPORATION, MEMO: UDC LAND ACQUISITION (1971).

\(^5\) INT. REV. CODE OF 1954, § 1033 (a). Where an authority which has power to condemn property notifies an owner that his property will be taken and the owner sells the property to the authority, the sale is considered to be transacted under threat or imminence of condemnation. The fact that the authority buys the property before it is actually needed is irrelevant in determining whether an involuntary conversion has taken place. 5 CCH 1972 STAND. FED. TAX. REP. § 4625 (2).
mands a reserve price which exceeds the current market value of the land, he is, at least temporarily, effectively removing his land from the market and preventing its development. No purpose would be served if the land bank used its capital to buy land that was already protected by other means from premature development. To prevent such development, the land bank need become involved only when a buyer appears who intends to develop the site and who is willing to pay the speculator's reserve price. The land bank can then condemn the property to prevent development, which means, of course, that the bank's capital must finally be called upon.349

If the land bank is reluctant to become entangled in condemnation proceedings, its capital can still be used more judiciously than by outright purchase from the speculator. By buying a long-term purchase option from the speculator, premature development again can be precluded, and for a fraction of the capital necessary to purchase the land.350

IX. Conclusion

The nation's population has grown and urbanized dramatically over the last generation. By conventional standards, many Americans have prospered; better living conditions and a broader range of choice have accompanied rising incomes. Millions of Americans, however, have not even had the choice of a life style. Technology has pushed many off the land and into deteriorating cities where they have been confined by prejudice and dwindling opportunities. Others have been left behind in the dying villages of rural America.

Urban sprawl has devoured large regions and left many without the services, utilities, and amenities necessary for decent living. With jobs separated from housing, individuals and the environment

349 By maintaining a building permit process as in Richmond, Virginia the land bank would be apprised of any contemplated development. See note 72 supra.

350 The cost of such an option would depend on a number of variables, including the length of the option, the exercise price, the present and projected market value of the land, and the speculator's present and projected reserve price for the land. The position of a speculator who sells an option is changed in two ways: he loses flexibility and liquidity, and he risks the possibility of losing some speculative profit (which could occur if the market value rose above the exercise price). The price at which he would sell an option would have to compensate him for these two factors. Thus, as the term of the option is extended, the speculator will demand more for the option. And if the exercise price is lowered so that there becomes a reasonable chance that the market value would transcend the exercise during the life of the option, he will similarly demand more for the option (by roughly the amount that would be necessary to compensate for the lost investment profit). Clearly, then, if the land bank's principal objective were to forestall development, it would include a very high exercise price. The cost of the option would then be a minimum, reflecting only the first of the two factors.
have been subjugated to the automobile. Zoning and local governmental devices have not worked well to create rational land use to promote the general welfare. Instead, land has largely become a negotiable commodity, to be despoiled at will and speculated on for profit, its use and enjoyment subordinated to the highest bidder and effectively removed from society at large. A new praxis is in order.

Urban land should be treated as a resource to be developed and conserved for its value to society's basic economic and social well-being. To this end, government should have primary responsibility, in the same manner as in education and other services, for controlling the mechanisms of the land market and for maximizing its public utility. Public ownership of land, by a land bank, could be a viable means for achieving this control. To advocate land banking, however, is neither to advocate socialization of land, nor even to espouse a particularly radical notion. As Professor Roberts points out:

Within the traditions of property law . . . there is nothing particularly radical in visualizing land being owned by the sovereign and being channelled out to persons who would hold it only as long as they performed the requisite duties which went with the land. In this instance, of course, instead of knighthood service, the landholder would have to hold and use his parcel according to the purposes set forth in the regional or state-wide master plan.\(^ {351} \)

Land banking, of course, is not a panacea to all the urban ills which beset our nation, nor is it even a well-tested method of accomplishing the specific objectives for which it aims. It is, however, firmly grounded on the lessons we have learned from the land use mistakes of the past and represents a promising means of achieving a more liveable urban environment.

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\(^ {351} \) Roberts, \textit{supra} note 7, at 43.