

4-1-1981

Fighting Municipal Economic Woes with Planning and Land Use Tools: Land Banking to Promote Urban Shrinkage; A Proposal

Susan Hedges Patton

United States Court of Appeals, Sixth Circuit

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Susan H. Patton, *Fighting Municipal Economic Woes with Planning and Land Use Tools: Land Banking to Promote Urban Shrinkage; A Proposal*, 30 Buff. L. Rev. 265 (1981).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol30/iss2/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

FIGHTING MUNICIPAL ECONOMIC WOES WITH PLANNING AND LAND USE TOOLS: LAND BANKING TO PROMOTE URBAN SHRINKAGE; A PROPOSAL

SUSAN HEDGES PATTON*

INTRODUCTION

Many large, older cities are losing population¹ despite a national trend toward metropolitan growth.² Tax revenues necessary to provide services³ and maintain the public infrastructure⁴ are lost as individuals and businesses opt for other locations.⁵ Reasons

* Law clerk to the Hon. Cornelia G. Kennedy, United States Court of Appeals, Sixth Circuit. B.A., University of Michigan, 1973; M.A. Wayne State University, 1976; J.D. Wayne State University, 1979.

1. U.S. PUBLIC INFORMATION OFFICE, DEP'T OF COMMERCE NEWS, BULL. NO. CB81-92, THREE CITIES OF 100,000 OR MORE AT LEAST DOUBLED POPULATION BETWEEN 1970 AND 1980, CENSUS BUREAU REPORTS (June 3, 1981). An awesome regional shift in population from the industrial northeast to the sunbelt in the south and west has taken place since the early 1960's. U.S. PUBLIC INFORMATION OFFICE, DEP'T OF COMMERCE NEWS, BULL. NO. CB81-62, MAJOR METROPOLITAN COMPLEXES SHOW SLOWER OVERALL POPULATION GROWTH DURING 1970's, 1980 CENSUS ANALYSIS REVEALS (April 8, 1981); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *reprinted in* SUBCOMM. ON THE CITY OF THE HOUSE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, 91st Cong., 1st Sess., HOW CITIES CAN GROW OLD GRACEFULLY 5 (Comm. Print 1977)(employment and earnings statistics)[hereinafter cited as *1977 Comm. Print*]. See also, Thompson, *Economic Processes and Employment Problems in Declining Metropolitan Areas*, in *POST INDUSTRIAL AMERICA: METROPOLITAN DECLINE AND INTERREGIONAL JOB SHIFTS* (G. Sternlieb & J. Hughes ed. 1975) [hereinafter *POST INDUSTRIAL AMERICA*].

2. Despite this trend, between 1970-1974, large metropolitan areas, while growing, have changed from the rapid growth of the 1960's to slow growth in the 1970's. U.S. PUBLIC INFORMATION OFFICE, DEP'T OF COMMERCE NEWS, BULL. NO. CB81-62, *supra* note 1. See *1977 Comm. Print*, *supra* note 1, at 21 (Exhibits 10 & 11).

3. Services include such activities as police, fire protection, trash collection, bus and other transportation facilities, libraries, schools, health care facilities, social services, etc.

4. Infrastructure includes public utilities, in place transportation systems (rail, subways), sewage treatment, municipal buildings, public schools, parks, municipal housing stock, commercial space (such as downtown shopping centers), residences, store fronts, industrial plants, and office space.

5. T. MULLER, *GROWING AND DECLINING URBAN AREAS—A FISCAL COMPARISON* (The Urban Institute 1975); Muller, *Service Costs in the Declining City*, in *1977 Comm. Print*, *supra* note 1, at 122-27. See generally Trolley, Graves & Gardner, *The Urban Growth Question*, 43 *LAW & CONTEMP. PROB.* 211 (1979); Keyes, *Channeling Metropolitan Growth: In What Direction, Toward Which End?*, 43 *LAW & CONTEMP. PROB.* 239 (1979).

for this flight are manifold. High unemployment rates cause individuals to relocate elsewhere, especially in the booming South.⁶ Individuals who can afford to move are no longer willing to cope with high housing costs, overcrowded urban school systems, aged physical facilities, crime and racial conflicts.⁷ Some businesses flee central city locations because of high taxes,⁸ obsolete physical plants,⁹ lack of open space for growth,¹⁰ and problems in attracting qualified personnel from a shrinking employment base.¹¹ Other businesses, such as the automotive industry in Detroit and the steel industries in Gary and Pittsburgh, have collapsed or shrunk in size due to high inflation, energy costs, a recessionary economy and stiff foreign competition. Life style preferences and energy costs draw some individuals back to the cities.¹² Businesses are coaxed with tax breaks and other amenities.¹³ Reverse migration, however, is

6. Outmigration extends beyond the suburbs to other regions of the country and to foreign nations, especially among businesses. Reuss, *Forward*, in *1977 Comm. Print*, *supra* note 1, at viii. See also Berry, *The Decline of the Aging Metropolis: Cultural Bases and Social Process*, in *POST INDUSTRIAL AMERICA*, *supra* note 1, at 175-77 (the author writes about an additional factor, the tendency to leave areas thought of as socially or environmentally undesirable for greener areas); Sternlieb & Hughes, *New Regional and Metropolitan Realities in America*, in *1977 Comm. Print*, *supra* note 1, at 28 (exhibit 17); Breckenfeld, *How Cities Can Cope With Shrinkage*, *id.* at 113. Patterns of employment change away from the north and east into the south and west are shown by the U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, *reprinted in 1977 Comm. Print*, *supra* note 1, at 8 (exhibit 2) (regional growth shares of total employment change: 1960-1975), at 9 (exhibit 3) (manufacturing employment change: 1960-1970 by region and division), at 11 (exhibit 4) (regional growth shares of manufacturing employment change: 1960-1975).

7. Reuss, *Forward*, in *1977 Comm. Print*, *supra* note 1, at viii.

8. Sternlieb & Hughes, *Prologue*, *POST INDUSTRIAL AMERICA*, *supra* note 1, at 13. See also Albin, *Complexity and the Case for Large Cities*, in *1977 Comm. Print*, *supra* note 1, at 62; Breckenfeld, *How Cities Can Cope With Shrinkage*, *id.* at 113-14. Between 1950 and 1975, New York lost one half of its manufacturing jobs, largely due to the heavy tax burden imposed on businesses. New York's Temporary Commission on City Finances (Dec. 1978), *cited in* Breckenfeld, *How Cities Can Cope With Shrinkage*, *id.* at 113.

9. Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 *CASE W. RES. L. REV.* 897, 915-16 (1972) [hereinafter *Public Land Banking*].

10. *Id.*

11. While there is high unemployment in central city areas, this is in part due to the poor educational background and lack of skills many central city residents have. See Thompson, *POST INDUSTRIAL AMERICA*, *supra* note 1, at 190-91, 194-95.

12. Muller, *Service Costs in the Declining City*, in *1977 Comm. Print*, *supra* note 1, at 130; Reuss, *Forward*, in *1977 Comm. Print*, *supra* note 1, at vii.

13. Coaxing, however, is not confined to central cities. See Kravitz, *The Other Neighborhoods—Building Community Institutions*, in *1977 Comm. Print*, *supra* note 1, at 91; Albin, *Complexity and the Case for Larger Cities*, in *1977 Comm. Print*, *supra* note 1, at 63.

For some heartening examples of urban renaissance, see Breckenfeld, *How Cities Can*

minimal.¹⁴

Since revenues are generated from city taxes on individual and business incomes, loss of these revenues from outward migration substantially impairs a city's ability to pay for the services and facilities its residents require.¹⁵ The option of leaving central cities lies more with those individuals who are economically productive and form a part of the city's tax base.¹⁶ Many of those left behind are the urban poor¹⁷ who drain a city's resources by demanding facilities and services without contributing proportionately to their cost.¹⁸ This results in an economic and fiscal crisis in cities where local government does not receive enough income, through tax revenues or grants, to sustain city services at the level expected by their residents.¹⁹

Cope With Shrinkage, in 1977 *Comm. Print*, *supra* note 1, at 105 (Pittsburgh, Minneapolis and Boston).

14. Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 67, 68. Since the demand for services created by the immigration of younger couples is small, this inflow of people makes an insignificant dent in reducing the cost of services. See Muller, *Service Costs in the Declining City*, *id.* at 130.

15. Muller, *Service Costs in Declining Cities*, in 1977 *Comm. Print*, *supra* note 1, at 122-23; Sternlieb & Hughes, *New Regional and Metropolitan Realities of America*, in 1977 *Comm. Print*, *supra* note 1, at 28. High per capita costs are incurred in providing services to urban areas. Wages and fringe benefits tend to be high and the costs of social services greater as population density increases. Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print*, *supra* note 1, at 120-21. T. MULLER & G. PETERSON, *ECONOMIC AND FISCAL COSTS* (1976); T. MULLER, *supra* note 5.

16. Sternlieb & Hughes, *New Regional and Metropolitan Realities of America*, in 1977 *Comm. Print*, *supra* note 1, at 26 (exhibit 15). See also Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 77. "[T]he exodus has progressed in general by order of income (from the top down), central cities have long ago lost those who pay more in taxes than they cost in public services, and the point has now been reached in the parade of out-migrants where those passing the central city limits are fiscal break-even households or lower." *Id.*

17. Many of the urban poor are unskilled and therefore lack the mobility to go elsewhere. Mobility is also reduced by the formalities and waiting lines that attend seeking new subsidized housing. The welfare program also locks in the urban poor because they must remain in certain locations in order to secure welfare benefits.

18. Albin, *Complexity and the Case for Large Cities*, in 1977 *Comm. Print*, *supra* note 1, at 63.

19. Starr, *Making New York smaller*, N.Y. Times, Nov. 14, 1976, §6(Magazine), at 32; Bulkeley, *Troubled City: How Cash Pinch Erodes Detroit's Civic Amenities*, Wall St. J., July 25, 1975, at 1, 17; Bahl, *Perspectives on a National Urban Policy*, in 1977 *Comm. Print*, *supra* note 1, at 153. See also R. BAHL, A. CAMPBELL & D. GREYTAK, *TAXES, EXPENDITURES, AND THE ECONOMIC BASE: CASE STUDY OF NEW YORK CITY* (1974). See generally *City Financial Emergencies: The Intergovernmental Dimensions*, Rep. No. A-42, Advisory Comm'n on Intergovernmental Relations (1973); Greenberg, *Municipal Bankruptcy: Some Basic Aspects*, 10 URB. LAW. 266 (1978).

Given this trend toward outward movement and its impact on the municipal budget and urban economic vitality, three choices are available to larger cities.²⁰ Local government can simply acquiesce in urban decline,²¹ try to reverse the trend by a massive infusion of public funds and private incentives,²² or anticipate shrinkage, plan for it and develop innovative techniques to cope with less.²³ City planners must consider these alternatives in light of the unique political, legal, financial, and organizational problems that each city faces. This paper will explore the feasibility of a "clustering and clearing" approach to planned shrinkage, with an emphasis on the land use techniques available to accelerate shrinkage. First, some traditional tools for coping with urban decline will be discussed. Second, the concept of planned shrinkage will be introduced. Third, this paper will suggest land banking as the planning tool most likely to achieve clearing in areas of high abandonment. Finally, the benefits and limitations of other land use techniques will be discussed. Important political and humanitarian limitations to a program of planned shrinkage are outside the scope of this paper.

I. TOOLS FOR COPING WITH URBAN DECLINE

A critical problem created by urban exodus unaccompanied by redevelopment is a shrunken municipal tax base and a financial inability to keep pace with outlays for municipal services.²⁴ Municipal expenditures have exceeded income since 1955.²⁵ The balance

20. Starr, *Making New York smaller*, *supra* note 19, at 32. See also Reuss, *Forward*, in *1977 Comm. Print*, *supra* note 1, at viii.

21. See Reuss, *Forward*, in *1977 Comm. Print*, *supra* note 1, at viii. Acquiescence in the decline of older metropolitan areas would be costly and in callous disregard of those individuals who continue to reside in them. Thompson, *Land Management Strategies for Central City Depopulation*, in *1977 Comm. Print*, *supra* note 1, at 67. Much of the existing central city infrastructure has a long period of useful life left. To the extent that it is duplicated unnecessarily in the metropolitan fringe, much of its usefulness goes unrealized. As energy, construction and labor costs increase it makes increasing sense to recycle these pre-existing structures. *Id.*

22. Thompson, *id.* at 67. Tax base sharing is a possible solution. See Susskind, *Revenue Sharing and the Lessons of the New Federalism*, 8 *URB. L. ANN.* 33 (1971).

23. Starr, *Making New York smaller*, *supra* note 19, at 32.

24. Muller, *Service Costs in the Declining City*, in *1977 Comm. Print*, *supra* note 1, at 119. *NEWSWEEK*, May 4, 1981, at 30-35 (NYC, Boston, Chicago, Detroit, Cleveland, St. Louis and Philadelphia); Hertzberg, *Balancing Act—New York's Finances Improve—but at a Cost of Decline in Services*. *Wall St. J.*, Mar. 19, 1981, at 1, col. 6.

25. Muller, *Service Costs in the Declining City*, in *1977 Comm. Print*, *supra* note 1, at

between municipal income and expenditures may be restored in several ways; increasing the tax rate, obtaining additional federal and state subsidies and grants, or making services more efficient and economical.

The most immediate possibility for restoring this balance is through increased federal subsidies and grants.²⁶ Federal commitment to the economic revitalization of cities, in principal, if not in funding, is reflected in the policies behind the Urban Development Action Grant Program,²⁷ the Community Development Block Grant Program,²⁸ the Public Works and Economic Development Act of 1965,²⁹ the Community Facilities and Advance Land Acquisition Act,³⁰ the Small Business Administration Act,³¹ the Urban Mass Transportation Act,³² and others. Federal grants and subsidies essentially allocate income from the middle class suburbs to the poorer cities. The benefit of this approach is that relief is relatively immediate and services need not be withdrawn or reduced. Although this is feasible as a means of helping cities make the transition to a smaller size, limits to the public purse and a belief

122.

26. NEWSWEEK, May 4, 1981, at 29. It is estimated that states and local governments receive around seventy billion dollars yearly in federal aid. Over \$450 billion had been spent as of 1977. Ironically, other non-urban subsidies and policies may have cut against revitalization of the inner cities. More than any specific urban program, federal subsidies and regulations for housing, transportation and energy have changed the relative cost of doing business between regions and between cities and their suburbs. See Kasoff, *Managing the City of the Future*, in 1977 *Comm. Print*, supra note 1; Kasoff, *The Urban Impact of Federal Policies*, in NATIONS CRISIS, Nov., 1977, at 29.

27. 42 U.S.C.A. § 5318 (Supp. 1980). The goal of the Urban Development Action Grant program is to aid financially distressed cities by strengthening their economic base. 42 U.S.C.A. §5301(c) articulates the objectives of the Housing and Community Development Act of 1974. A new objective was added by the 1977 amendments to the Housing and Community Development Act of 1974; "the alleviation of physical and economic distress through the stimulation of private investment and community revitalization in areas with population outmigration or a stagnating or declining tax base." 42 U.S.C.A. § 5301(c)(8)(Supp. 1981). See generally Greene, *Urban Development Action Grants: Federal Carrots for Private Economic Revitalization of Depressed Urban Areas*, 3 URB. LAW & POL. 235 (1980).

28. 42 U.S.C.A. § 5305 (Supp. 1981). See generally Salsich, *Community Development—Some Reflections in the Latest Federal Initiative*, 19 ST. LOUIS U.L.J. 293 (1975); Maffin, *Community Development: An Appraisal*, 32 J. HOUSING 411 (1975); Keating & LeGates, *Who Should Benefit from the Community Development Block Grant Program?*, 10 URB. LAW. 701 (1978).

29. 42 U.S.C.A. §§ 3121-3246h (1976).

30. 42 U.S.C.A. §§ 3101-3108 (1976).

31. 15 U.S.C.A. §§ 631-647 (Supp. 1980).

32. 49 U.S.C.A. §§ 1601-1618 (Supp. 1980).

that cities should take steps to help themselves militate against a dependence on municipal welfare in the long run.³³

To the extent that federal grant-in-aid programs are available for public welfare assistance, educational support, community development or low cost housing, cities may be limited in their ability to qualify for federal financial assistance because of specific conditions or requirements attached to these programs.³⁴ State or local governments may be required to contribute to the project cost by matching the amount of money the federal government is willing to contribute. Finite municipal resources may make this difficult or impossible.³⁵ Inability to obtain a suitable leveraging ratio, the number of private investment dollars in relation to the federal contributions, may restrict federal grants to cities for urban projects.³⁶ Conditions, such as requiring bilingual teachers to be provided as a condition precedent to federal aid to education, may be difficult to satisfy due to the unavailability of qualified personnel. Even general revenue sharing allocations are subject to some limitations and conditions imposed by the federal government which the city may have trouble meeting.

State assistance in the form of grants or loans is a means of restoring the balance between municipal expenditures and income in distressed municipalities. Taxpayer revolt coupled with public emphasis on economy and self-help suggest that state monies to meet the cost of municipal services are unlikely on anything other than an emergency basis.³⁷ Municipal property taxes and other revenues are already committed to financing current operating expenses. Significant increases in local property taxes are unlikely in light of voter resistance and the deleterious effects any such increase would have in further accelerating migration from impoverished cities. Municipal revenue raising techniques such as general

33. N.Y. Times, Dec. 15, 1977, at A-1 (statement of Senator Proxmire). Cf. NEWSWEEK, May 4, 1981, at 27-29. (One argument is that federal monies are merely the return of tax monies to the cities.) See also note 168, *infra*.

34. Note, *Federal Conditional Spending Power: A Search for Limits*, 70 Nw. U. L. Rev. 293 (1975).

35. See Miller, *Economics of Matching Grants: The ABC Highway Program*, 27 NAT'L TAX J. 221 (1974).

36. The leveraging ratio is an important criterion in selecting projects to receive federal assistance. 24 C.F.R. § 570.457(e)(1980). Projects receiving financial assistance from the state or other public entities receive more favorable consideration by HUD. *Id.* §§ 570.457(f) & (g).

37. See note 19 *supra*.

obligation bonds secured by *ad valorem* or property taxes and tax increment financing are inappropriate for dealing with deficits. Both are means of financing capital improvements or funding redevelopment.³⁸

Private economic redevelopment is a superior alternative to federal and state funding. A package of tax and other incentives may be created to lure back business and promote overall economic vitality.³⁹ The benefits of this approach are twofold. Tax revenues would be increased as large industries are coaxed back to central cities with tax incentives. Their employees would be subject to individual income tax. Smaller neighborhood businesses made possible through minority and small business loans would also generate taxable income.⁴⁰ Spin-off businesses, which provide goods and services to larger projects, and their employees would increase municipal tax revenues. In addition, social services would be reduced as employment opportunities increased. Private economic redevelopment is certainly the utopian solution, but it has neither worked on a large scale in the cities that have tried it, nor is it likely to do so in the future.⁴¹

The attempts of many cities to promote private economic redevelopment are frustrated by their inability to use a scarce municipal resource and by-product of outward migration, vacant land. Redevelopment, particularly with respect to heavy industry, is extremely difficult in large, older cities because of the unavailability of large tracts of undeveloped land upon which new, technologically competitive facilities may be erected. While the overall density of business and industry decreases as a result of business clo-

38. See generally Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L. J. 536 (1980).

39. Anderson, *Angling for Capital*, Wall St. J., July 11, 1975, at 1, col. 6. See generally Parker, *Adding Human Potential to Urban Economic Development, 1977 Comm. Print*, supra note 1, at 171; America, *Economic Development in Afro-America*, id. at 181.

40. 15 U.S.C.A. § 636(k) (1976).

41. See generally W. THOMPSON, A PREFACE TO URBAN ECONOMICS (1965). Most of the problems stem from inconsistent government positions on a variety of levels. For example, a New York City program offering tax abatements to incoming business was successful in bringing 5,000 new jobs between 1977 and 1979. These gains, however, were offset by government layoffs of over 40,000 employees, leaving the city with a net loss of 35,000 jobs just from these two situations alone. Many new businesses lured into central cities are professional firms or firms requiring the services of skilled personnel. These businesses, while they contribute to the tax base, do not help central cities cure their chronic problem of employing unskilled residents.

sure or outward migration, the geographical pattern that results is a patchwork of vacant and occupied land. Redevelopment opportunities are lost by a city's inability to aggregate vacant parcels into a sufficiently large package to attract new industry or to retain existing industry operating out of obsolete facilities.

Several factors account for the sluggishness of the central city economy. First, the economic health of large cities is tied to the overall health of the national economy.⁴² Decreases in the rate of economic growth on a national level are mirrored locally. Second, increases in real income following the Korean War increased the demand for low density housing.⁴³ High density urban real estate had difficulty competing with suburban spaciousness. Third, Congress encouraged suburban housing by making bank loans with small down payments and low interest rates available for moderate income families under section 203 of the National Housing Act.⁴⁴ The Internal Revenue Code promotes home ownership by allowing interest on mortgage loans to be deducted from gross income.⁴⁵ Fourth, the development of vast highway systems facilitated decentralization.⁴⁶ Improved automotive transportation led to the growth of residential, commercial and industrial sites far removed from the city center. Fifth, urban crime and racial conflict remain difficult to combat. Finally, despite governmental attempts to promote economic development, many private decision makers are unwilling to accept the burden of decay when presented with alternatives for location or expansion.⁴⁷ The rate of a city's decline is, at best, slowed by the limited influx of new business.⁴⁸

Changing the location of economic growth is difficult and slow, despite tax incentives, low interest loans, utility rate cuts or other benefits. Private decision makers have generally resisted attempts to entice their enterprises back into the cities.⁴⁹ Individuals have

42. Starr, *The Changing Life of Cities*, in 1977 *Comm. Print*, *supra* note 1, at 49.

43. Muller, *Service Costs in the Declining City*, *id.* at 122.

44. 12 U.S.C.A. § 1709(b) (Supp. 1980).

45. 26 U.S.C.A. § 163 (Supp. 1980). Income tax deductions for mortgage interest payments reduce the real cost of buying a house by about twenty percent and encourage residential location away from the central city. See Krasoff, *Managing the City of the Future*, in 1977 *Comm. Print*, *supra* note 1, at 143.

46. M. GELFAND, A NATION OF CITIES 222-30 (1975); Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print*, *supra* note 1, at 122.

47. Starr, *The Changing Life of Cities*, in 1977 *Comm. Print.*, *supra* note 1, at 49-50.

48. N.Y. Times, Jan. 15, 1978, at E-6.

49. Locational incentives are a game that unindustrialized areas play as hard as devel-

also shown little inclination to return. Failure to promote successfully economic development, as well as anticipated limits in federal and state subsidies and grants, mandate that other urban management tools be examined.

II. PLANNED SHRINKAGE: AN ALTERNATIVE

Planned shrinkage is a planning proposal for clearing businesses and individuals from targeted areas of high abandonment, as a matter of public policy, and clustering them in more viable areas. As an area is vacated, services would be withdrawn and the land cleared and left undeveloped until redevelopment opportunities arose. Withdrawn services and limited public resources would be concentrated and redirected toward more viable neighborhoods.

The essence of planned shrinkage or cut-back management programs, as recently espoused by economists⁵⁰ and urban planners,⁵¹ is that the cost of local government must be brought in line with cities' reduced abilities to generate operating revenues.⁵² Deficit spending is, to an extent, a necessary attribute of big city economics.⁵³ When public borrowing becomes so great, however, that cities cannot service their debt obligations, municipalities like New York and Cleveland come perilously close to bankruptcy.⁵⁴ Other

oped ones. Previously undeveloped jurisdictions adjust tax and service variables to bid for desirable residents who are often firmly established in other localities. Older, established industrial centers must counteroffer or lose an established producer of revenues and jobs. Albin, *Complexity and the Case for Large Cities*, in *1977 Comm. Print*, *supra* note 1, at 63. See James & Hughes, *The Process of Employment Location Change: An Empirical Analysis*, *LAND ECONOMICS* 404-13 (Nov. 1973).

50. See Thompson, *Land Management Strategies for Central City Depopulation*, in *1977 Comm. Print*, *supra* note 1, at 67.

51. Starr, *The Changing Life of Cities*, in *1977 Comm. Print*, *supra* note 1, at 47; Pratter, *Strategies for City Investment*, *id.* at 79; Sternlieb & Hughes, *New Regional & Metropolitan Realities of America*, *J. AM. INST. PLANNERS*, July, 1977, at 241.

52. Starr, *Whither Cities*, *NATIONS CITIES*, Oct., 1977, at 20. The concept of planned shrinkage was introduced by Roger Starr, former administrator of New York City's Housing and Development Administration, in the *New York Times*. *N.Y. Times*, Feb. 3, 1976, at 35. col. 1. The idea was expanded in Starr, *Making New York smaller*, *supra* note 19, at 32.

53. See Goldberg, Gillespie, Johnson, Plunkett & Dupre, *Municipal Fiscal Dilemma*, 25 *CAN. TAX REP. PROC. TAX CONF.* 561 (1973).

54. See generally *POST INDUSTRIAL AMERICA*, *supra* note 1; *1977 Comm. Print*, *supra* note 1; Greenberg, *Municipal Bankruptcy*, *supra* note 19. The problems of debt service and the municipal bond market are discussed in Hertzburg, *Balancing Act—New York's Finances Improve—but at a Cost of a Decline in Services*, *Wall St. J.*, Mar. 19, 1981, at 1, col. 6.

cities with less serious problems may suffer from severe fiscal instability. This instability jeopardizes jobs, the delivery of services, and the cities' ability to service their debt obligation and successfully promote new issues of their bonds. It further accelerates the emigration of taxpaying business firms and individuals who lack confidence in their city's long term viability.⁵⁵

Delivery of municipal services constitutes the most expensive and extensive component of a city's budget.⁵⁶ Despite economies of scale,⁵⁷ outlays for services are more costly in high density cities than they are in smaller, low density municipalities.⁵⁸ Means must be devised to bring the lion's share of municipal costs, city services, more in line with revenues received. This may be accomplished in several ways: through a reduction in services, a reduction in their cost, or through increased efficiency in their delivery.

It is highly unlikely that services would be cut enough to redress the present economic imbalance in major metropolitan areas. As society in general becomes more affluent, it becomes increasingly easy to view yesterday's luxuries as today's necessities. Once expectations are established as to a particular level of services, these expectations are difficult to remove. Services such as police and fire protection are difficult to reduce for safety reasons.⁵⁹ Hospital care and garbage collection affect health. Water, sewage treatment, and gas and electrical services, if owned by the municipality, are required by law to be maintained at certain levels.⁶⁰ The public and private infrastructure require a certain amount of replacement and maintenance. Despite cutbacks, cities must still budget for oc-

55. Sternlieb & Hughes, *Prologue*, in *POST INDUSTRIAL AMERICA*, *supra* note 1, at 17.

56. Muller, *The Declining and Growing Metropolis: A Fiscal Comparison*, in *POST INDUSTRIAL AMERICA*, *supra* note 1, at 197. See also K. GREENE, *FISCAL INTERACTIONS IN A METROPOLITAN AREA* (1973).

57. See generally Getz, *Optimum City Size: Fact or Fancy*, 43 *LAW & CONTEMP. PROB.* 197 (1979).

58. Bahl, *Studies on Determinants of Public Expenditures*, in S. MUSHKIN & J. COTTON, *SHARING FEDERAL FUNDS FOR STATE AND LOCAL NEEDS* 184 (1969). Density and size are not necessarily the same. New York and Los Angeles are both "large" cities but the density of New York is greater. Muller, *Service Costs in the Declining City*, in *1977 Comm. Print*, *supra* note 1, at 120, 122-29.

59. Police protection is the least likely public service to be reduced, even in the face of fiscal decline. Muller, *Service Costs in the Declining City*, *id.* at 128 (table 4: change in the number of municipal employees for selected services, 1962 and 1975). See J. HALL & M. KARTER, *FIRE RATES VS. COMMUNITY CHARACTERISTICS* (Urban Institute 1976).

60. Lineburry, *Mandating Urban Equality, The Distribution of Municipal Public Services*, 53 *TEX. L. REV.* 26 (1974).

casional investment above replacement and provide for gross investment to maintain certain physical assets.⁶¹ Some infrastructure assets can be allocated to other functions and some will be divested.⁶² Rising energy costs significantly affect the price of services.

Not only is it difficult to limit the kind of city services available, but it is also difficult to limit their quality. Central city residents tend to have special problems that increase the need for social services, remedial education personnel, police, and other services in disproportion to the overall population.⁶³ A reduction in services would, thus, be a difficult means of achieving fiscal health.

Attempts to reduce the cost of services by taking a hard stance on wage inflation and padded payrolls have been successful in a few cities. Despite the opposition of municipal unions, strong mayoral leadership and community support have pulled cities like Baltimore and Philadelphia through strikes and legal battles over personnel cutbacks and incremental wage and benefit packages. Inflation and fluctuations in the economy make these austerity measures difficult to achieve and maintain. Cost may also be reduced by purchasing new equipment which requires less manpower, such as one-man garbage trucks.

Another alternative is either to make city services and facilities more cost efficient⁶⁴ or transfer them to county or state authorities or to private contractors. Transfers, however, are not necessarily in the best interests of the city, even though the assuming entity can draw upon a broader base for the services' financial sup-

61. Kasoff, *Managing the City of the Future*, in 1977 *Comm. Print*, *supra* note 1, at 140. Kasoff gives the example of Baltimore's repair of the Port Terminal. The city was faced with the alternative of repairing or replacing the terminal at considerable municipal expense or losing its status as a city with a port facility. *Id.*

62. *Id.* For example, a city might sell a parking structure that was operating at a loss. Similarly, it might be possible to change a police or fire station to satellite status with a skeleton staff to cut operating costs.

63. For an explanation of the special problems of central city residents, see Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print*, *supra* note 1, at 123; Muller, *The Declining and Growing Metropolis—A Fiscal Comparison*, in *POST INDUSTRIAL AMERICA*, *supra* note 1, at 215-16.

64. Cleveland has had some noticeable success in revamping its Division of Waste Collection and Disposal. A three year liaison between the head of that department and city planners reorganized collection procedures, reassigned manpower, and purchased cost-saving equipment. As a result, the city saved several million dollars a year on this service. See Krumholz, *The Aging Central City: Some Modest Proposals*, in 1977 *Comm. Print*, *supra* note 1, at 101.

port.⁶⁵ Divestiture of control over municipal services and facilities may be impossible in the absence of fare or service guarantees. City pride and politics may also interfere. Efforts could be made to make existing workers more efficient. To the extent that the manpower level is excessive, cuts in personnel can be made to save the city money.⁶⁶ Then, instead of hiring new workers, surplus personnel could be transferred to other jobs as they open up.⁶⁷ If the level of manpower is not the primary problem in cost containment, a municipality may try to promote efficiency by making services easier to deliver.

At present, it is impossible for large, older cities to deliver services efficiently because of high abandonment in certain areas.⁶⁸ Even though there has been a substantial reduction in the population of many of these cities, the result has been a mere thinning out of overall population density.⁶⁹ It is costly to provide services in areas of high abandonment.⁷⁰ While low densities are attributable to suburbs as well as areas of high abandonment, the suburbs are capable of assuming the burden because of their strong local tax bases; the cities are not. In addition, the suburbs, unlike the cities, were intentionally planned and developed for low density living. Infrastructure, utility systems and public services are designed to accommodate a diffuse population as efficiently as possible. The opposite situation is present in central cities. The low

65. *Id.* at 101; Kasoff, *Managing the City of the Future*, in 1977 *Comm. Print*, *supra* note 1, at 134-35 (discussion of local government capacity buildings).

66. See Breckenfeld, *How Cities Can Cope With Shrinkage*, in 1977 *Comm. Print*, *supra* note 1, at 106-07 (Pittsburgh), 108-09 (Baltimore), 111-12 (Wilmington) (note how these cities were able to reduce manpower with few layoffs and little visible reduction in service delivery). See also Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print*, *supra* note 1, at 126 (table 3: capital outlays and debt service—rapidly growing and declining cities).

There is a tendency for municipal employment to increase in excess of growth in "growth jurisdictions" whereas a decline in population often results in municipal employment reductions at a lower rate than the city's loss of residents in "no growth jurisdictions." *Id.* at 126.

67. Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print*, *supra* note 1, at 126.

68. Starr, *Making New York smaller*, *supra* note 19, at 32.

69. *Id.* at 104-05.

70. D. SHOUP & R. MACK, *ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENTS* 1010 (U.S. Dep't of Housing and Urban Development 1968); Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 69. Cf. Kravitz, *The Other Neighborhoods: Building Community Institutions*, *id.* at 92 (Kravitz questions whether clustering actually reduces costs). See also T. MULLER, *EXPANSION AND DISTRIBUTION OF PUBLIC SERVICES* (The Urban Institute 1978).

density, diffuse population in central cities hard hit by abandonment is not intentional. Private buildings and public infrastructure built to operate efficiently under high density pressures are costly to maintain in relation to the benefit they provide if they are supplied only for the benefit of a few remote or sporadic users.⁷¹

The essential goal behind planned shrinkage programs is to bring the cost of government more in line with revenues primarily by attacking the cost of services.⁷² This is to be accomplished by accelerating population loss in those slum areas of the city where the rate of abandonment is already of epidemic proportions.⁷³ Positive relocation incentives such as moving costs, rent subsidies and employment opportunities would be used to relocate remaining individuals in suburbs or communities where they could be assimilated into the work force and achieve financial independence or where the community could absorb the cost of supporting them.⁷⁴ In lieu of relocation outside the city, efforts could be made to cluster people in viable neighborhoods.⁷⁵ In conjunction with positive relocation benefits, additional regulatory and non-regulatory techniques would be used to facilitate abandonment, such as tax foreclosure on delinquent properties, city purchase of real estate, and withholding of discretionary neighborhood preservation funds.⁷⁶ Only after the area's residents were completely relocated would municipal services be withdrawn.⁷⁷ The money saved from withdrawal of services would be reallocated to those neighborhoods

71. See generally REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL* (1974).

72. Starr, *Making New York smaller*, *supra* note 19, at 32; Fried, *City's Housing Administrator Proposes 'Planned Shrinkage' of Some Slums*, N.Y. Times, Feb. 3, 1976, at 35, col. 1. [Hereinafter Fried, *Planned Shrinkage*.]

73. Note 72 *supra*.

74. *Id.*

75. *Id.*

76. See text accompanying notes 215-86 *infra*.

77. A common misconception about Starr's proposal is that services are to be withdrawn as a means of accelerating abandonment. See Conway, *Planning Without Growth*, in DESIGN & ENVIRONMENT 16 (Summer 1976); Ferebee, *Urban Housing: Or No-Growth and How Cities Can Do More With Less*, in RECYCLING INNER CITY REAL ESTATE 154-55 (Practicing Law Institute, Course Handbook Series No. 127 1976). In addition, Felix Rohatyn's proposal to treat blighted areas as "virgin industrial territory" is not in keeping with Starr's proposal to hold land indefinitely until any one of many uses are feasible for it. *Blighted Areas' Use Is Urged by Rohatyn*, N.Y. Times, Mar. 16, 1976, at 1, col. 8. Rohatyn's proposal to displace affirmatively the poor was severely criticized in *Rohatyn Scored by Congressmen*, N.Y. Times, Mar. 17, 1976, at 18, col. 1; *City May Change Fiscal Priorities*, N.Y. Times, Mar. 21, 1976, at 27, col. 1.

designated for conservation or redevelopment. The savings to the city would come from more efficient provision of services to compact, high density concentrations of population. Manpower costs would be reduced. In addition, there would be a saving on resources that would have been expended to provide and maintain a duplicative public infrastructure. These resources would be reallocated to create new facilities in areas targeted for conservation or redevelopment. The high density of the area, brought about by clustering, would justify the expenditure of city funds for services and public infrastructure on a cost-benefit basis.⁷⁸ Vacant land would be marshalled together and held indefinitely until redevelopment became feasible.⁷⁹ It is this willingness to let the land lie fallow for indefinite periods of time that so sharply distinguishes planned shrinkage from urban renewal programs.⁸⁰

Planned shrinkage may also help neighborhood viability.⁸¹ The criteria that make a neighborhood viable are difficult to define. One consideration is sufficient density, stability and involvement to attract and maintain private enterprise at the neighborhood level.⁸² Private businesses tend to withdraw from an area of high abandonment as the financial return, due to thinning of the market for products and services, falls off.⁸³ Positive relocation incentives and disincentives to remain, imposed as a matter of public policy, force the displaced population to cluster in conservation and redevelopment neighborhoods. This benefits the neighborhoods as a whole by making it economically feasible for private business to remain or relocate in areas where the population concentration is high.⁸⁴ Physical separation and demarcation of neighborhoods by open tracts of land could also produce a clearer sense

78. Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 69.

79. Modern industrial and residential developments require large tracts of land. The modern trend in housing is to construct subdivisions, not individual homes. Planned Unit Developments, for example, require large tracts of land. *Id.* at 70.

80. Open spaces, however, are part of the urban renewal package in Detroit. Interview with Professor J.E. Mogk, April 6, 1979.

81. Fried, *Planned Shrinkage*, *supra* note 72; Starr, *Making New York smaller*, *supra* note 19, at 104-05.

82. See Stone, *Planned Shrinkage: Coping With Urban Decline*, 25 WAYNE L. REV. 987 (1979).

83. *Id.*

84. Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 69.

of community or neighborhood identity.⁸⁵

The application of economic theories to urban growth is well documented.⁸⁶ This same application of theory to the urban environment is not available, however, with respect to cities undergoing substantial population loss.⁸⁷ No data is available to determine precisely the size of an area which must be shrunk to result in a saving to the municipality. One theory suggests that economies of scale, savings due to a city's size, do not go on forever.⁸⁸ At some point the limits of efficient municipal operation are reached.⁸⁹ Once a city becomes too sprawling or complex, and the coordinating powers of city government are stretched, diseconomies of scale operate to increase the cost of services and infrastructure per unit of population. At this point costs are driven up and services are delivered less efficiently.

Because planned shrinkage deals with neighborhoods, economies of scale must be assessed at the neighborhood level rather than for the city as a whole, since it is this unevenness in population density that in part makes the delivery of services to certain neighborhoods economically questionable. The infrastructure and service areas of central cities were originally planned to provide maximum benefit at minimum cost.⁹⁰ A city built "big" operates most efficiently at the high density its services and infrastructure were designed to meet. Therefore, the city's fixed costs, such as police, fire protection, debt service, and infrastructure, can be spread over a broader population base, reducing the cost per unit of population.⁹¹

If the population exceeds this optimal level, the city may become so large that there is a diminishing marginal return on the municipality's investment in services and infrastructure.⁹² Disecon-

85. *Id.*

86. See R. HEILBRONER, *THE ECONOMIC PROBLEM* (1968); *READINGS IN URBAN ECONOMICS AND SPATIAL PATTERNS* (M. Greenberg, ed. 1974) [hereinafter *URBAN ECONOMICS*]; Getz, *Optimum City Size: Fact or Fancy*, 43 *LAW & CONTEMP. PROB.* 197 (1979).

87. Interview with Wilbur Thompson, April 16, 1979 at Wayne State University.

88. R. HEILBRONER, *supra* note 86, at 541-42.

89. Ullman, *The Nature of Cities Reconsidered*, in *URBAN ECONOMICS, supra* note 86, at 195.

90. Muller, *Service Costs in the Declining City*, in 1977 *Comm. Print, supra* note 1, at 119.

91. This is true even though central city fixed costs are higher than they are in neighboring localities. See text accompanying notes 56-58 *supra*.

92. R. HEILBRONER, *supra* note 86, at 542.

omies of scale also result when a system is designed for one level of use but is actually used at much lower levels. At sub-optimal levels of use, brought about by high vacancy rates and abandonment, even though the fixed costs are spread over the entire municipal population, it costs more money per unit of population to service low density, central city neighborhoods.

By decreasing overall population while maintaining optimal density via clustering, a municipality may take advantage of the savings produced by economies of scale.⁹³ While research has not yet been marshalled to establish the precise shape of savings under a program of planned shrinkage, the theory of economies of scale coupled with common sense indicates that municipal costs may be diminished by maintaining population at optimal levels in conservation and redevelopment areas, even in the face of overall municipal population decline. In short, while a well documented case of substantial savings is not possible, given the present state of the art, both intuitively and in theory, the contraction of cities makes good economic sense.⁹⁴

The concept of planned shrinkage outlined above has been attacked as a simple-minded skirting of the real issues in urban management today; curbing the tide of urban divestment,⁹⁵ acquiescence in the decline of city resources and job opportunities at the expense of the urban poor,⁹⁶ and the inability of municipalities to provide the services required by their inhabitants while keeping within their budgets.⁹⁷ Nevertheless, congressional rumblings are good indicators that major urban areas cannot rely on municipal welfare payments to redress their fiscal woes.⁹⁸ Economic development programs have neither reversed outward migration nor, for the most part, made an appreciable dent in improving central city

93. "On the demand side . . . the first problem is to be sure that there is always an adequate total demand to induce high level utilization of productive capacity." G. BACH, *ECONOMICS: AN INTRODUCTION TO ANALYSIS AND POLICY* 580 (8th ed. 1974).

94. Interview with Wilbur Thompson, *supra* note 87. Shrinkage would certainly work if we could empty a one mile square grade school district. An interim problem is the extent of the service areas for such activities as police and fire. This is because the longer the response time the less reason there is for going to the scene of the problem. *Id.*

95. Kravitz, *The Other Neighborhoods—Building Community Institutions*, in 1977 *Comm. Print*, *supra* note 1, at 91. See generally Stone, *supra* note 82.

96. Starr, *Making New York smaller*, *supra* note 19.

97. See generally Stone, *supra* note 82.

98. See note 33 *supra*. See generally Krumholz, *The Aging Central City: Some Modest Proposals*, in 1977 *Comm. Print*, *supra* note 1, at 99.

employment opportunities. If quality of life is to be maintained in central cities, politicians and planners must be willing to rethink ingrained attitudes regarding growth, personal freedoms, and property rights. If planned shrinkage can bring about smaller, but healthy urban centers, then society may discover that less is indeed more.

III. HOW TO IMPLEMENT A PROGRAM OF CLUSTERING AND CLEARING

A. *Designating Areas for Clustering and Clearing*

The success of a program of planned shrinkage is dependent upon the city's ability to cluster the population in certain areas and clear it in others. The first step a planning commission must take in implementing planned shrinkage is to divide the entire city into zones and classify neighborhoods according to viability. A threshold issue would be ascertaining the factors to be considered in making a viability determination.⁹⁹ Clustering would take place in areas designated for conservation or redevelopment. Clearing would be the goal in depletion zones.

Conservation zones, where clustering would occur, should be those areas where private involvement in business and housing is strong. In addition to strong private investment, other factors which indicate viability include extensive public investment in capital structure, insurance and banking commitments, relatively new and well maintained buildings, proximity to adequate and cost-efficient services and facilities and strong local leadership.¹⁰⁰ Since these areas manifest physical and social strengths they would be the critical focal points from which maintenance and revitalization efforts would flow.¹⁰¹

A high incidence of abandonment would be the single most important factor in mapping out depletion zones, those areas scheduled to be cleared under a program of planned shrinkage.¹⁰² The disruptive effects of planned shrinkage could be minimized by targeting those areas already hard hit by abandonment for clear-

99. See generally Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 80-81 (area types enumerated).

100. *Id.* at 81.

101. *Id.* at 81-82.

102. *Id.* at 84-87.

ing. A high abandonment and vacancy rate indicates weak private investment and shows a lack of commitment to the area.¹⁰³ Old and decrepit housing, absence of a neighborhood commercial district, inefficient or spotty public services and facilities, redlining, facilities vulnerable to deleterious neighborhood influences (such as vandalism) and municipal services with an inflexible service area may constitute factors which militate against saving a neighborhood.¹⁰⁴ Classifying depletion zones is almost certain to raise substantial political issues.

More difficult questions are posed when the boundaries of redevelopment areas are to be drawn. These marginal areas reflect neither the obvious redeeming qualities of viable areas slated for conservation nor the high abandonment typical of depletion zones.¹⁰⁵ In addition to the criteria considered for conservation and depletion areas, three additional factors are applicable to these "swing" neighborhoods. First, if a marginal area contains expensive capital improvements, such as a large public housing project, the threat of neighborhood deterioration may lead city planners to salvage the public's investment by designating the area for redevelopment rather than depletion. Necessary funds could then be pumped into the neighborhood to turn the tide of abandonment.¹⁰⁶ Less significant infrastructure is more easily sacrificed.¹⁰⁷ The second factor is the suitability of the area for eventual recycling.¹⁰⁸ Proximity to water or transportation systems may suggest industrial or commercial use.¹⁰⁹ A third consideration is whether designation as a depletion or conservation area would complement surrounding land use patterns or whether such designation would create an island of use inconsistent with the surrounding area.¹¹⁰ Neighborhoods adjacent to depletion areas would be poor choices for redevelopment since the existence of a large tract of cleared land tends to promote further abandonment in the surrounding fringe. This would allow even larger parcels to be assembled for

103. *Id.* at 84.

104. *Id.*

105. *Id.* at 82-84.

106. Stone, *supra* note 82.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

future redevelopment.¹¹¹

B. Clustering: Promotion of Movement from Depletion Areas to Those Designated for Conservation and Redevelopment

Depending upon the time framework in which city planners hope to effectuate clustering and clearing, an active or passive plan of shrinkage may be pursued. An active plan of shrinkage would compel the removal of people out of depletion zones. The passive approach would utilize non-coercive incentives to promote relocation in conservation or redevelopment areas. Disincentives for remaining in depletion areas would be employed in conjunction with relocation benefits.

1. *Recommendation: Passive shrinkage as a means to promote clustering.* Clustering may be achieved directly or indirectly by using a passive, non-coercive approach to shrinkage. Offering positive relocation benefits or employment opportunities is a direct means of achieving clustering.¹¹² By offering depletion area residents better housing and other neighborhood amenities the benefits of relocation could be sweetened.

It is recommended, however, that clustering be achieved indirectly through the allocation of scarce municipal, state and federal resources.¹¹³ Neighborhood decline is an exponential phenomenon.¹¹⁴ Once substantial depopulation occurs, with no compensating inflow of new business or residents, it is likely that the downward trend will continue absent a substantial infusion of public funds.¹¹⁵ By granting discretionary neighborhood preservation funds¹¹⁶ to conservation and renovation areas, those locations are made comparatively more desirable to business and individuals. Attractions such as good schools, recreational opportunities, modern public facilities, and a strong private business community may be used as an inducement to relocate in favored areas. Neighbor-

111. *Id.*

112. Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 86.

113. Stone, *supra* note 82. A substantial amount of money must be available to demolish abandoned buildings in clearing areas. However, at present over 80% of the Community Block Grant funds are being used for the demolition of existing structures.

114. See generally G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* (1973).

115. Stone, *supra* note 82.

116. For example, Community Development Block Grants under 42 U.S.C.A. §§ 5301-5317 (Supp. 1980).

hoods where abandonment is pandemic and where discretionary neighborhood preservation funds are withheld may be expected to decline further as the comparative benefits of living in these neighborhoods diminish. Clustering may further be promoted indirectly by assuring that Federal Housing Administration subsidies and mortgage insurance is available in cluster areas.¹¹⁷ Federal programs could be augmented by state and municipal programs.¹¹⁸ Clustering will also be a by-product of clearing techniques. A benefit of these approaches is that no additional bureaucracy, over and above the city's own planning department, need be established to implement the program.¹¹⁹

2. *Limitations on passive shrinkage as a tool to promote municipal fiscal integrity and neighborhood viability.* To the extent that passive shrinkage is accelerated through the use of relocation benefits, the cost to the state or city of providing these benefits would be the most limiting factor in the use of this clustering technique.¹²⁰ Expenses incurred in demolishing old buildings would also add to the total cost. Federal relocation assistance, however, is not triggered until federal funds are used to acquire and clear land.¹²¹ At the onset, private enterprise will need coaxing to reen-

117. To an extent, red-lining exists on the federal level and is not confined to private lending institutions. See regulations issued under 12 U.S.C.A. § 1715(b)—24 C.F.R. § 203.

118. While it is hoped that these programs could be coordinated, it is possible that consistency in policy is impossible on the federal level.

119. Stone, *supra* note 82, at 998.

120. Note, *Relocation—The Uniform Relocation Assistance Policies Act of 1970—An Empirical Study*, 26 MERCER L. REV. 1329 (1975). Basic benefits may be expected to include moving expenses, replacement housing for tenants and homeowners and relocation assistance advisory services. See 42 U.S.C.A. §§ 4622-4625 (Supp. 1980).

121. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. §§ 4601-4655 (Supp. 1980). Federal relocation assistance is not available, however, when a municipal urban development corporation acquires land without using federal funds for real property acquisitions, even though federal funds are ultimately used in the redevelopment of the area. *Young v. Harris*, 599 F.2d 870 (8th Cir. 1979). Neither are federal benefits available for relocations caused by a private developer or agency when federal funds are not received. See *Moorer v. HUD*, 561 F.2d 175 (8th Cir. 1977), *cert. denied*, 436 U.S. 919 (1978) or when federal aid comes in any form other than that specified by the Act. *Conway v. Harris*, 586 F.2d 1137 (7th Cir. 1978) (federal rent subsidies do not constitute federal aid within the meaning of the Act). See generally *Uniform Relocation Assistance and Land Acquisitions Policies—1970: Hearings on H.R. 14893, H.R. 14899, S.I., and Related Bills Before the House Committee on Public Works*, 91st Cong., 1st & 2d Sess. (1969-70); ADVISORY COMM'N ON INTERGOV'T RELATIONS, *RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS* (1965); Note, *The Uniform Relocation Act: Eligibility Requirements for Relocation Benefits—Young v. Harris*, 19 URB. LAW ANN. 207 (1980).

ter redevelopment areas, necessitating a package of tax, employment and low interest loan incentives.¹²²

Many low income families live in areas where abandonment is high and housing deteriorated because they cannot afford to live elsewhere. Designation of clearing areas will increase the demand for housing in cluster zones, driving up its cost and making it effectively out of the reach of many low income families. The market mechanism must not be allowed to exacerbate the plight of low income families or foreclose their ability to find adequate housing. Critical to the political success of planned shrinkage is the ability of government or a private developer to supply relocation benefits and subsidize adequate housing for displaced low income residents. Otherwise, the costs of clearing will be shouldered by those displaced residents who are least able to afford it.

Provision of these benefits may also be time-consuming. Bringing redevelopment neighborhoods up to par requires the construction and rehabilitation of suitable housing and the provision of adequate public services and facilities.¹²³ Just as relocation is not expected to take place all at once under a passive approach, neither may total redevelopment be expected instantaneously. The credibility of a clustering policy will depend, to some extent, on the government's carrying out its commitment to conserve and rehabilitate.

Cost limitations on planned shrinkage are second only to the serious political problems that may be expected to attend relocation. The plan has been decried as inhumane and as an assault on certain racial and economic groups.¹²⁴ The poor and minorities are the target of relocation since these groups tend to live in depletion areas where decay and abandonment are the most rampant.¹²⁵ The residents of these neighborhoods have many serious social problems. A high crime rate, indigency, substandard educational

122. Anderson, *Angling for Capital: States Redouble Effort to Lure New Industry and Provide More Jobs*, Wall St. J., July 11, 1975, at 1, col. 6.

123. Stone, *supra* note 82; Thompson, *Land Management Strategies for Central City Depopulation*, in *1977 Comm. Print*, *supra* note 1, at 73.

124. Starr, *Making New York smaller*, *supra* note 19, at 32; Pratter, *Strategies for City Investment*, in *1977 Comm. Print*, *supra* note 1, at 87-88.

125. Sternlieb & Hughes, *New Regional and Metropolitan Realities of America*, in *1977 Comm. Print*, *supra* note 1, at 25 (exhibit 14: population by race and type of residence 1970-74). See Barabba, *The National Setting in POST INDUSTRIAL AMERICA*, *supra* note 1, at 39.

backgrounds, large families, monolingualism in a language other than English, and health problems are disproportionately present in these neighborhoods.¹²⁶ Passive relocation may simply transfer the aggregation of these problems from depletion areas to cluster zones, causing new social problems in the relocatees' new neighborhoods or otherwise creating a negative impact.

3. *Affirmative shrinkage as an alternative.* The affirmative approach to planned shrinkage through forced relocation to cluster zones within the city or other areas of the state or country is a less desirable alternative. Serious constitutional problems are encountered with programs that compel people to leave their homes when they do not wish to go.¹²⁷ Mandatory relocation constitutes sufficient state action to trigger constitutional protection of individual freedoms and property rights.¹²⁸ The right to travel,¹²⁹ equal protection,¹³⁰ and substantive due process¹³¹ are arguments raised to counter relocation attempts. All of these challenges invert the presumption of constitutionality by demanding that the state justify its action as necessary to achieve a compelling state interest.¹³²

A problem encountered by urban renewal programs, which could carry over to planned shrinkage, was that city officials and housing authorities failed to provide adequate relocation opportu-

126. K. TAEUBER & A. TAEUBER, *NEGROS IN CITIES* (1965); N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* (1963); J. JACOBS, *THE LIFE AND DEATH OF GREAT AMERICAN CITIES* (1961); *America, Economic Development in Afro-America*, in 1977 *Comm. Print*, *supra* note 1, at 181.

127. Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 *Nw. U.L. REV.* 635 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 *STAN. L. REV.* 767 (1969); Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 *CALIF. L. REV.* 567 (1966).

128. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

129. The right to travel is not specifically enumerated in the federal Constitution although it was expressly listed among those rights to be protected in the Articles of Confederation. U.S. Art. Confederation, art. IV. The right is now construed to emanate from various constitutional provisions including the privileges and immunities provision of article IV and the fourteenth amendment, the due process clauses of the fifth and fourteenth amendments, the commerce clause, the ninth amendment and as being implicit in the Constitution taken as a whole.

130. U.S. CONST. amend. XIV, § 2. Cf. *Snowden v. Hughes*, 321 U.S. 1 (1944) (the unlawful administration by state officers of a state statute fair on its face, resulting in an unequal application to those who are entitled to be treated alike is a denial of equal protection if an element of purposeful or intentional discrimination is shown).

131. U.S. CONST. amend. V, XIV.

132. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

nities for low income families. While people were forced to move out of their old neighborhoods, the relocation of low income housing outside the city coupled with the discriminatory character of the private housing market in the city forced low income residents to move out of central city areas. The court in *Norwalk CORE v. Norwalk Redevelopment Agency*¹³³ held, on equal protection grounds, that the Urban Renewal Act required that alternative housing be provided in a same or similar neighborhood and that units be made available in relation to the numbers of those displaced. To shirk the responsibility of providing non-discriminatory alternative housing for low income families, the court found, would be a violation of the fourteenth amendment and in derogation of the then effective urban renewal legislation.¹³⁴ *Norwalk* had a substantial impact on urban renewal and slum clearance projects. The same problems are present with an affirmative approach to planned shrinkage and, as such, make this approach undesirable.

C. Clearing

A variety of legal tools are available to expedite clearing, the acceleration of population loss from areas with high abandonment rates. The goals of clearing are twofold. First, clearing promotes movement away from depletion areas so that services may be withdrawn and redundant infrastructure abandoned at a saving to the city. Second, clearing enables large tracts of land to be assembled for future constructive use. It is important to select a legal tool to accomplish clearing that will not merely result in the vacation of land, but will enable the acquiring entity to hold and develop this vacant land in accordance with well defined, long range goals.

1. *Recommendation: Land banking to acquire and hold depletion zone property.* It is recommended that clearing be accomplished by land banks,¹³⁵ public entities given the resources and

133. 393 F.2d 920 (2d Cir. 1968).

134. *Id.* at 924.

135. See generally *Public Land Banking*, *supra* note 9; Kraus, *Land Banking: New Solutions for Old Problems*, 39 ALB. L. REV. 771 (1975) [hereinafter *Land Banking: New Solutions*]; Note, *Land Banking: Development Control Through Public Acquisition and Marketing*, 6 ENVIRON. L. 191 (1975) [hereinafter *Land Banking: Development Control*]; FITCH & R. MACK, *LAND BANKING IN THE GOOD EARTH OF AMERICA* 134 (1974); D. SHOUP & R. MACK, *supra* note 70. Land banks were specifically recommended by the Commission on Urban Problems for planning orderly growth, development and re-development of urban areas. NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 251-52

power by state enabling legislation to acquire land in depletion zones, amass it and hold it in reserve indefinitely. Land banks would acquire land in areas of high abandonment by foreclosure on tax liens, outright purchase of the fee, and condemnation. Mere acquisition of land by a public body is insufficient to accomplish the dual goals of clearing. The land must be held until the time is ripe for redevelopment. This means that the land bank will not be self-sustaining financially, especially in its early years of operation, since it will not be able to accomplish its overall objectives if it is required to sell previously acquired land to perpetuate its operations. For this reason the bank must be sufficiently funded to cover acquisition costs, demolition of existing structures and any carrying charges that might be incurred in the period between acquisition and redevelopment.

a. Objectives of land banks in a program of planned shrinkage. Land banks in Europe¹³⁶ and the United States¹³⁷ have primarily been used to cope with the problems of urban growth.¹³⁸ They are similarly well suited to accomplish the shrinkage and eventual redevelopment of central cities.¹³⁹ The primary advantage of land banks is that governmental ownership of land facilitates implementation of long range socio-economic policies as a by-product of comprehensive land use plans. In central city areas where a program of planned shrinkage is in effect, the primary objective of

(1969); ALI MODEL LAND DEVELOPMENT CODE §§ 6-102-103 (Proposed Official Draft, 1975).

136. See *Public Land Banking*, *supra* note 9, at 908; *Land Banking: Development Control*, *supra* note 135, at 195; Roberts, *Land Storage—The Swedish Example*, 38 *Mod. L. Rev.* 121 (1975); Lefcoe, *The Right to Develop Land: The German and Dutch Experience*, 56 *ORE. L. REV.* 31 (1977).

137. Richmond, Virginia presently has a limited program of advance land acquisition. See D. SHOUP & R. MACK, *supra* note 70. Limited land acquisition for narrowly defined purposes is carried on by one-third of all United States cities of over 50,000 in population. *Id.* at 4. Philadelphia, Pennsylvania has an industrial land reserve program carried out by the Philadelphia Industrial Development Corporation (PIDC). PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION, PIDC'S BIG YEAR IN NEW PLANT CONSTRUCTION (1968). See also *Public Land Banking*, *supra* note 9, at 915.

Puerto Rico's Bureau of Land Administration carries out extensive land banking pursuant to P.R. LAWS ANN. tit. 23.311(f) (s) (1980). See also (Ohio) OHIO REV. CODE ANN. §§ 349.02-349.16 (Page Supp. 1980); (Illinois) ILL. REV. STAT. ch. 67-½, §§ 303-330 (1980); (North Carolina) N.C. GEN. STAT. §§ 113A, 135-143 (1980).

138. See H. FLECHNER, *LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT* (1974). Industrial development, housing and urban renewal and advance land acquisition for public facilities are typical uses of land banking. *Id.* at 61-63, 65, 66, 195-96.

139. *Land Banking: New Solutions*, *supra* note 135.

a land bank would be to clear land in depletion zones so that services may be withdrawn and the population forced to cluster elsewhere. Even if the possibility of recycling the banked land is remote, the savings to the city from clearing and the benefits to the community from clustering justify the operation of the land bank. Outright ownership gives the government absolute control over the future use of land.¹⁴⁰ In comparison, "[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."¹⁴¹ All of the prerogatives associated with private ownership of land could frustrate attempts to clear an area and control its future use.

An ancillary objective of land banking in a program of planned shrinkage would be the promotion of orderly and economically sound urban redevelopment.¹⁴² One of the many reasons why industry has sought suburban locations is the scarcity of urban land and the prohibitive cost of purchasing and preparing available land for industrial use.¹⁴³ In addition to its primary goals of shrinking services and clustering central city populations, land banking would create industrial, commercial, and residential land reserves of sufficient size to accommodate even the most sprawling uses of land.¹⁴⁴ If a use is eventually suggested that would contribute to the economy or quality of life in the central city, the banked land could be reparable, supplied with appropriate utilities and sold or leased complete with a package of tax, employment, and other incentives all in place. By controlling the nature and direction of subsequent redevelopment, city planners could promote orderly regrowth and avoid past land use mistakes by dispersing the land in accordance with a comprehensive plan for the area, complete with controls and restrictions limiting its use.¹⁴⁵ Social and economic objectives could be furthered by dispersing land to labor in-

140. U.S. NAT'L RESOURCES PLANNING BOARD, PUBLIC LAND ACQUISITION PART II: URBAN LANDS 11 (1941).

141. *Id.*

142. See generally *Public Land Banking*, *supra* note 9, at 915.

143. *Id.*

144. See text accompanying notes 79 & 80 *supra*.

145. See generally Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732 (1960).

tensive industries, for example, which would draw on neighboring clusters housing unskilled and unemployed workers. As much as economic redevelopment is desirable, delay is necessary when it is not yet possible to develop the land to its fullest potential.¹⁴⁶ Premature redevelopment or spotty resettlement by business firms and individuals who are incapable of shouldering the service and infrastructure costs associated with reopening the area would only repeat the mistakes of the past.¹⁴⁷

b. *Mechanics of land banking in a program of planned shrinkage.* The choice of an appropriate entity to establish and operate the land bank is important for political, legal and economic reasons. It is recommended that a public benefit corporation be established to bank the land in depletion areas.¹⁴⁸ There are several limitations imposed on municipal corporations or state agencies that make these entities undesirable as land banks. Since planned shrinkage is largely a response to municipal fiscal crises, it is unlikely that cities would have the financial resources to buy and hold land indefinitely as is required by a program of clustering and clearing. In addition to cost considerations, a municipality is limited by state constitutions in the amount and type of bonds it may issue.¹⁴⁹ Consequently, bonds would be of little value to augment municipal resources for intensive land banking. Revenue bonds would be impractical because the land bank would not necessarily engage in immediate resale operations. Another important limita-

146. *Public Land Banking*, *supra* note 9, at 933.

147. A major problem in urban renewal efforts in the 1960's was that the time limitations of five to eight years for redevelopment resulted in "wasteful, extravagant, hurried, and piecemeal development inadequate for the city's future." Brownfield, *supra* note 145, at 760.

148. Public corporations are legislatively created. They are defined as "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." Shestack, *The Public Authority*, 105 U. PA. L. REV. 553 (1957). Alternatively, an authority or commission having municipal powers could acquire land in depletion zones and hold it for eventual private redevelopment. See MO. REV. STAT. §§ 99.010-99.715 (1980) (Land Clearance for Redevelopment Authority Law). Another possibility is that a private redevelopment corporation be given the powers of purchase and eminent domain. Eventual redevelopment plans of the private corporation would be subject to approval and supervision by an administrative or legislative agency. See MO. REV. STAT. §§ 353.010-353.180 (1980) (Urban Redevelopment Corporations Law).

149. *Public Land Banking*, *supra* note 9, at 940. See generally Dawson, *Patterns of Obligation Bonds*, in *State and Local Public Facility Needs and Financing*, 89th Cong., 2d Sess. 148, 153-55 (1966).

tion is the vulnerability of municipalities to local political pressures.¹⁵⁰ Land banking may be expected to be rife with conflicting views on what should be done and when. Political pressure to redevelop land prematurely and return it to the tax rolls could result in a perpetuation of the problems planned shrinkage was designed to prevent. State agencies are similarly ill suited.¹⁵¹ Reliance on yearly legislative appropriations would be an unpredictable way of funding such an important urban project. Management by gubernatorial appointees would also be inimical to the need for consistent long range planning.

Public benefit corporations offer several advantages over state or locally run land banks. These corporations are separate entities from the state.¹⁵² They may sue or be sued in their own name.¹⁵³ They generally enjoy freedom from constitutionally imposed debt limitations, tax free status, exemption on interest from their bonds, freedom from local political control, and independence in administrative and management matters.¹⁵⁴ Autonomy is their most striking virtue¹⁵⁵ since the success of clearing will be largely dependent upon decision makers resisting redevelopment before the optimum time and making public rather than private decisions.¹⁵⁶

Public benefit corporations must be legislatively infused with sufficient legal powers to buy and condemn land through the exercise of eminent domain.¹⁵⁷ Land banks must also be funded at a level that will allow them to keep land out of productive use indefinitely. Funding a land bank to promote planned shrinkage may require a higher funding level than funding a land banking program to promote orderly growth.¹⁵⁸ Since the object of land banking in

150. *Public Land Banking*, *supra* note 9, at 940.

151. *Id.*

152. *See id.* at 943; Shestack, *supra* note 148, at 555.

153. Shestack, *supra* note 148, at 555.

154. *Public Land Banking*, *supra* note 9, at 943-44. I.R.C. § 103.

155. MSHDA and MSHEA, however, are political organizations which are not totally autonomous.

156. S. SCOTT & J. BOLLENS, *GOVERNING A METROPOLITAN REGION* (1968).

157. Whether payment may be subsequent to the taking is discussed in Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958). Infusing public benefit corporations with the power of eminent domain does not convert them into a government agency or instrumentality. *See United States v. Orleans*, 425 U.S. 807 (1976); *Zurn v. City of Chicago*, 389 Ill. 114, 120-21, 59 N.E.2d 18, 22 (1945).

158. D. SHOUP & R. MACK, *supra* note 70, at 48-50. This is because the resale of land is

planned shrinkage is clearing of depletion areas rather than immediate redevelopment, debt financing through negotiable bonds and notes is not practical.¹⁵⁹ A land bank organized to clear depletion areas and implement shrinkage would operate at a loss since it would incur capital expenses without the benefit of compensating resales or leases, at least in the immediate future. Debts secured by a blanket mortgage on the bank's entire holdings would similarly be impractical.¹⁶⁰

Whereas private investors could not realistically be expected to find a land bank's security for bonds very attractive, the federal government, as a matter of public policy, could be expected to fund the bank's acquisition of depletion area land with repayment of the monies to take place in the future. This would be necessary because the impoverished budgets of large, older cities make municipal funding unrealistic. Even with state funding of land banking, like the New York State Urban Development Corporation,¹⁶¹ the Puerto Rico Land Administration,¹⁶² and the Michigan State Housing Development Authority,¹⁶³ resources of the magnitude required are unlikely absent federal contributions. Existing legislative projects and proposals suggest that the federal government is receptive to the concept of public land banking.¹⁶⁴ Funds are presently authorized for this purpose by the Community Development

only an ancillary goal. Costs are not recouped. The costs of land assembly and management constitute a large share of a growth oriented land bank's cost.

159. *Public Land Banking*, *supra* note 9, at 964. It is highly unlikely that a bond issue would be successful because of the entity's innovative goals, techniques, and dubious financial future, in spite of its eligibility to receive federal guarantees on its bonds and notes, as well as interest payments on its indebtedness. *Id.*

160. *Id.*

161. N.Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney Supp. 1980). For a discussion of New York's UDC, see Amdursky, *A Public-Private Partnership for Urban Progress*, 46 J. URB. LAW 199 (1969).

162. P.R. LAWS ANN. tit. 23, § 311(f)(s) (1980) (Puerto Rican Land Administration Act of May 16, 1962, No. 13).

163. MICH. COMP. LAWS ANN. § 125.1401-125.146 (1980).

164. See note 161 *supra*. Support for advance land acquisition programs has come from other influential sources. ALI MODEL LAND DEVELOPMENT CODE (1968); Haar, *Wanted: Two Federal Levers for Urban Land Use—Land Banks and Urbank: Hearings before the Subcomm. on Housing, Panels of the House Committee on Banking & Currency*, 92d Cong., 1st Sess. 932 (1971). NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1969). THE PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME (1969). ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH (1968).

Block Grant program¹⁶⁵ and under Title I of the Housing and Community Development Act of 1974.¹⁶⁶ It is likely, however, that the vast sums of money necessary for such a land bank would require new legislation with federal funding provisions akin to those provided under the old urban renewal programs. As a general rule, the federal government paid for two-thirds of the net project cost of those programs with local government absorbing the remainder.¹⁶⁷ While monetary bailouts by the federal and state governments to cure budget deficits are unlikely, except in emergency situations,¹⁶⁸ the posture of government for dealing with a long term solution to the problem of municipal fiscal integrity by planned shrinkage may reasonably result in the commitment of substantial federal and state funds. This is because the emphasis on planned shrinkage is economic viability and self sufficiency on a smaller scale, rather than municipal welfare on a larger one.¹⁶⁹ The anticipated result would justify the initial expenditure.

Lack of funds is not the only problem. A public benefit corporation is generally immune from local property taxation.¹⁷⁰ Purchase of productive land by the land bank takes this land off the tax rolls and results in a further loss of revenues by money-hungry cities. There are several possible answers to this quandary. One is that enabling legislation waive this exemption and in funding the land bank, consider these charges part of its operating costs. Another answer is acquiescence; the tax contribution of land in depletion areas before they were classified as such is so minimal that removal of these blocks from the tax rolls entirely will make little difference in the city's net revenues.¹⁷¹ Tax assessments in depletion areas would be low to begin with due to low property values and the poor condition of private capital. Loss assessments

165. 42 U.S.C.A. § 5303 (Supp. 1981).

166. 42 U.S.C.A. §§ 5301-5317 (Supp. 1981).

167. 42 U.S.C.A. § 1453(a)(2).

168. THE PRESIDENT'S URBAN AND REGIONAL POLICY GROUP, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, A NEW PARTNERSHIP TO CONSERVE AMERICA'S COMMUNITIES I-10-15, III-22-28 (1978).

See Howell, *The Evolving National Urban Policy: The Role of the Private Sector—Moneychangers of the Northeast*, 11 URB. LAW. 270-71 (1979).

169. 42 U.S.C.A. § 5301(c)(8) (Supp. 1981).

170. See generally *Land Banking: New Solutions*, *supra* note 135, at 779-81. Act of July 15, 1949, ch. 338, § 305(b), 63 Stat. 428 (repealed).

171. Tax loss is determined by the assessed value of the property and property tax rates. D. SHOUP & R. MACK, *supra* note 70, at 50-51.

coupled with delinquency means that the tax contribution of depletion areas is insubstantial when compared to that of viable neighborhoods. A third possibility is that owners of healthy private businesses could be expected to pay slightly higher property taxes since they reap the benefits of clustering. This could be accomplished merely by raising the tax rates. As assessments go down due to area-wide abandonment, so should they go up in neighborhoods where density is high and land is productively used. Clustering in redevelopment areas essentially consolidates the business and residential population of two marginal areas into one viable area. Instead of a thirty percent occupancy rate, landlords enjoy more tenants. Instead of folding, the neighborhood store is able to survive once the demand for services and products is increased. In exchange for the sacrifice of depletion zones and the concomitant loss of tax revenues, cluster area residents should pay for their viability. A final approach to loss of municipal funds is to solicit indemnification from the federal government to the extent of actual revenue loss. The money could eventually be repaid out of proceeds from the sale or lease of cleared property. This solution was used in urban renewal areas.¹⁷² Congress could once again authorize this activity.

Three acquisition tools are available to help land banks assemble land in depletion zones: tax foreclosure, purchase, and condemnation. City foreclosure on liens created by tax delinquencies could be an inexpensive and non-disruptive means of acquiring property in depletion areas.

Tax delinquency is prevalent in central city areas where the incidence of abandonment is high.¹⁷³ Low property values due to abandonment in the surrounding neighborhood, coupled with property tax and maintenance costs that exceed the owner/landlord's ability to yield a return, work to produce owner disinterest and tax delinquency.¹⁷⁴ The higher the incidence of abandonment,

172. 42 U.S.C.A. § 1460(e)(Supp. 1980) (federal indemnification to city for land removed from tax rolls).

173. See Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 79.

174. G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* 319 (1973); Sternlieb & Burchell, *Residential Property Tax Delinquency: A Forerunner of Residential Abandonment*, 1 *REAL ESTATE L.J.* 256 (1973). See S. OLSON & M. LACHMAN, *TAX DELINQUENCY IN THE INNER CITY* (1976). Nachbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 *How. L.J.* 3 (1971).

the more likely an area will be targeted for clearing. Foreclosure on tax liens and land banking tax delinquent property would be a logical starting place for clearing areas hard hit by outward migration. The cost of public acquisition of tax delinquent land would be less than the cost of either purchase or condemnation.

The least expensive means of obtaining public ownership of tax delinquent properties is that adopted by Missouri and Ohio. These jurisdictions have attempted to solve part of the problem of central city abandonment and tax delinquency by streamlining the proceedings for foreclosure of tax liens and land banking tax delinquent lands which remain unsold after foreclosure sales for future development.¹⁷⁵ Missouri's Land Reutilization Law¹⁷⁶ enables the city of St. Louis to foreclose on tax delinquent property within two years using *in rem* proceedings. A public Land Reutilization Authority has been established to hold, manage, sell, or lease foreclosed property for which a minimum bid is not received at a foreclosure sale.¹⁷⁷ Once a parcel has been certified as delinquent, the auditor sets a minimum bid which is determined by the full amount of taxes owing, penalties, attorney(s) fees and administrative costs. This constitutes the minimum amount for which the parcel may be sold at a foreclosure sale. In St. Louis if a minimum bid is not received at the time the parcel is first offered for sale, the Land Reutilization Authority bids the minimum amount and takes title regardless of whether the property is vacant or occupied.

Under Ohio Law,¹⁷⁸ an electing municipal corporation with a Land Reutilization Program automatically makes a minimum bid on non-productive lands only after the land has been offered twice at foreclosure sales without receiving a minimum bid from a private party.¹⁷⁹ If a municipality has no Land Reutilization Program or the land is productive, the parcel is forfeited to the state after the second unsuccessful sale. If state-held productive lands become

175. See generally Note, *Land Banking Tax Delinquent Property: Reform and Reutilization*, 27 CLEV. ST. L. REV. 517 (1978).

176. MO. ANN. STAT. §§ 92.700-92.920 (Vernon Supp. 1980). See generally Langsdorf, *Urban Decay, Property Tax Delinquency: A Solution in St. Louis*, 5 URB. LAW. 729 (1973); Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, supra note 1, at 86.

177. MO. ANN. STAT. § 92.700 (Vernon Supp. 1980).

178. OHIO REV. CODE ANN. §§ 5721.181, 5721.191, 5722.01-5722.14 (Page Supp. 1980). The express purposes of the Ohio law are to restore tax delinquent property to the tax rolls and to help rejuvenate and redevelop abandoned areas of cities. *Id.* § 5722.02.

179. *Id.* § 5722.03.

unproductive, an electing municipality may acquire them by making the minimum bid.¹⁸⁰ An automatic minimum bid system limits the land bank's acquisition costs to assessments, penalties and charges due on the parcel.¹⁸¹ The primary drawback to such a system of land acquisition to achieve clearing is that only tax delinquent parcels may be acquired and then only those for which no minimum bid was made by a private purchaser. To enable the land bank to acquire all necessary tax delinquent property in an area targeted for clearing, the sales price of the property should be set by appraisers and only the municipality or state given the opportunity to bid this amount at the time of the foreclosure sale. Since the cost of acquiring tax delinquent parcels in this manner is little different from outright purchase, it should be resorted to only when necessary to effectuate clearing in a particular area. Alternatively, if a private bid exceeded the amount of the minimum bid, the municipality could be given a preemptory right to acquire certain property at the price set by the private bidder.

Acquisition of tax delinquent properties would give the land bank free title to the property with the exception of recorded easements and covenants. If the land bank is organized in the form of a municipal corporation, non-profit corporation or other public entity, the property could be exempt from taxation.¹⁸² The loss to the city from property tax revenues would be minimal since the land was tax delinquent to begin with.

A final benefit of land banking tax delinquent parcels in clearing zones is that acquisition of such parcels returns to the public some of the investment it has made. City residents and municipal governments pay in terms of lost revenues, expenditures for demolition, and administrative costs incurred in foreclosure proceedings.¹⁸³

A second acquisition technique is outright purchase of depletion zone land by the land bank without exercising eminent domain. Financial barriers to land acquisition in depletion areas are not so formidable as in redevelopment areas since these zones are characterized by abandonment, weak private investment commit-

180. *Id.* § 5722.04.

181. *Id.* § 5721.19.

182. See generally 71 AM. JUR. 2d *State & Local Taxation* §§ 336-349, 477 (Supp. 1981).

183. S. OLSON & M. LACHMAN, *supra* note 174, at 15, 40.

ment, and old and decrepit housing. These factors significantly depress real estate values and reduce the cost of acquisition. Initial capital outlays may be reduced by purchasing land under installment contracts.¹⁸⁴ The land bank would have the benefit of immediate possession and the use of more of its money for a longer period of time. The seller would benefit by spreading his tax liability over a number of years. Tax savings could be used as a bargaining lever to further reduce the purchase price.¹⁸⁵ To some extent, private land owners may be less willing to resort to expensive and time consuming litigation to stave off acquisition of their property by the land bank because low property values create no other market for their property. This too would expedite clearing.

Condemnation through the exercise of eminent domain is the most crucial and controversial acquisition technique available to a land bank.¹⁸⁶ Eminent domain is the power inherent in a state to take property in its jurisdiction for the public benefit.¹⁸⁷ Through enabling legislation the state must give the land bank the power to condemn land for the purpose of effectuating a program of planned shrinkage. This power may be used to compel sale of a fee interest or lesser estate. Without the power of eminent domain the objective of a land bank could be frustrated by property owners refusing to sell or demanding inflated prices.¹⁸⁸ Expensive and time-consuming court challenges to the constitutionality of a "taking" or to the land bank's offer of "just compensation" suggest that the powers of eminent domain be exercised sparingly and only as a last resort to oust hold-out property owners who have resisted foreclosure on tax liens or offers of outright purchase.

Two important considerations which limit the use of condemnation powers are cost and constitutionality. Condemnation awards based on the fair market value of the property at the time of condemnation traditionally have not included compensation for incidental damages suffered by the property owner.¹⁸⁹ Failure to

184. *Public Land Banking*, *supra* note 9, at 973.

185. *See generally* A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE, CASES AND MATERIALS* 275 (1969).

186. N. ROBERTS, *THE GOVERNMENT LAND DEVELOPERS* 232 (1977); H. FELCHNER, *supra* note 138, at 33. *See generally* *Public Land Banking*, *supra* note 9, at 948.

187. 1 P. NICHOLS, *THE POWER OF EMINENT DOMAIN* 1 (2d ed. 1917); J. LEWIS, *EMINENT DOMAIN* 1 (3d ed. 1909).

188. *Public Land Banking*, *supra* note 9, at 948.

189. *Land Banking*, *supra* note 136, at 795. Hagman, *Planning, Condemnation, Blight*,

compensate for moving expenses, loss of business goodwill, and rental income¹⁹⁰ increase the likelihood of an appeal by the landowner to the more sympathetic judicial system. Voluntary compensation by the land bank for these incidental damages could remove landowner reluctance to challenge the compensation. Because eminent domain would be exercised to clear areas marked by high abandonment, low rental rates, and low real estate values, this additional compensation would not significantly increase a land bank's acquisition costs. Expenditures could also be minimized by using an official map to establish depletion zones.¹⁹¹ The map statute would limit condemnation awards to the present fair market value of buildings and structures in existence at the time the official map was enacted unless the planning commission granted an exception for new construction or improvements.¹⁹² The land bank's ability to deny compensation for unapproved construction or improvements within depletion areas would reduce the costs of acquiring this property by condemnation many years after the adoption of a plan of planned shrinkage and enactment of the official map.¹⁹³

Legal challenges to the exercise of eminent domain by land banks are primarily constitutional in nature. The power to condemn is limited, by federal and state constitutions and by judicial interpretation, to takings for public use out of public necessity.¹⁹⁴ The public use requirement is satisfied when land is condemned for a project that is intended to benefit the public at large.¹⁹⁵ This is true even though the project is undertaken by private develop-

Participation and Just Compensation: Anglo-American Comparisons, 4 *URB. L.J.* 434 (1972).

190. *Land Banking: New Solutions*, *supra* note 135, at 795.

191. *State ex rel. Miller v. Manders*, 2 *Wis.2d* 365, 86 *N.W.2d* 469 (1957). See Kucirek & Beuscher, *Wisconsin's Official Map Law*, 1957 *Wis. L. REV.* 176; Note, *Problems of Advance Land Acquisition*, 52 *MINN. L. REV.* 1175 (1968).

192. 2 *Wis.2d* 365, 86 *N.W.2d* 469 (1957). *Kirschke v. City of Houston*, 330 *S.W.2d* 629 (Tex. Civ. App. 1960) (property owner alleges denial of building permit constituted a taking of property and its beneficial uses).

193. D. MANDELHER & G. WAITE, *A STUDY OF FUTURE ACQUISITION AND RESERVATION OF HIGHWAY RIGHTS-OF-WAY* 130 (1963).

194. *Berman v. Parker*, 348 *U.S.* 26 (1954). See generally *Public Land Banking*, *supra* note 9, at 948-58. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 *B.U.L. REV.* 615 (1940).

195. *New York City Hous. Auth. v. Muller*, 270 *N.Y.* 333, 340, 1 *N.E.2d* 153, 155 (1936). See generally J. SACKMAN & P. NICHOLS, *THE LAW OF EMINENT DOMAIN* 627 (3d ed. 1963). See also Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1176-86.

ers.¹⁹⁶ The use of condemned property must bear a reasonable relationship to the overall goals of a government's project.¹⁹⁷ Courts have attached strong presumptions of validity to legislative determinations of public benefit and the means proposed to secure that benefit.¹⁹⁸ It is not necessary that the public have actual access to or use of the condemned parcel.¹⁹⁹ Broad judicial construction of the public use requirement has allowed condemnation of blighted areas for slum clearance,²⁰⁰ rehabilitation²⁰¹ and prevention,²⁰² and the creation of open spaces.²⁰³ Condemnation of a non-blighted area for industrial redevelopment has been sanctioned by both the Michigan Supreme Court²⁰⁴ and the New York Court of Appeals because the areas involved were economically deficient and impaired the overall growth of the community.²⁰⁵ Condemnation for the sanctioned public purpose has met with approval even though a private party will also, ultimately, receive an incidental benefit.²⁰⁶ Planned shrinkage does not differ significantly from these permissible public goals. Planned shrinkage benefits the public at large by promoting efficiency in allocating scarce municipal resources to maintain public services and infrastructure. By clustering the population it promotes viability. These are permissible public purposes. It is unlikely that a court would conclude that land banking is an unreasonable, arbitrary or capricious means of accomplishing these goals.

196. See *Conway v. Harris*, 586 F.2d 1137 (7th Cir. 1978); *Moorer v. HUD*, 561 F.2d 175 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978); *Parlene Sports Co. v. Weinberger*, 513 F.2d 835 (1st Cir. 1975).

197. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

198. *Id.* at 32-33.

199. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, supra note 194, at 618-19.

200. *Berman v. Parker*, 348 U.S. 26 (1954).

201. *People ex rel. Adamowski v. Chicago Land Clearance Comm'n*, 14 Ill.2d 74, 150 N.E.2d 792 (1958).

202. *People ex rel. Gutknecht v. Chicago, Regional Port Dist.*, 41 Ill.2d 363, 123 N.E.2d 92 (1954).

203. 42 U.S.C.A. § 1500 (Supp. 1981).

204. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 635, 304 N.W.2d 455, 459 (1981).

205. *Cannata v. New York*, 11 N.Y.2d 210, 212, 182 N.E.2d 395, 397, 227 N.Y.S.2d 903, 906 (1962).

206. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 632, 304 N.W.2d 455, 458 (1981). In *Poletown* it was held that the city's condemnation of land which would eventually be conveyed to the General Motors Corporation for the construction of new factories was an intended and legitimate objective of the legislature. *Id.*

A second constitutional requirement is that of public necessity.²⁰⁷ To accomplish shrinkage a land banking enabling statute must allow land taken by eminent domain to be held in reserve for an indefinite period of time without any specific use being designated at the time of the taking.²⁰⁸ Two problems are presented by this language. Non-use and unspecified use are very different concepts. Condemnation for unknown future uses are disallowed as unnecessary.²⁰⁹ Non-use of condemned land, however, is a goal of planned shrinkage. There is a clear public necessity for the non-use of land. Non-use is a specific, articulable use for cleared land and should be construed as an integral component of the shrinkage concept. It is crucial to a favorable outcome that enabling legislation clearly state the goals of clearing.

A corollary of the specific use requirement is the requirement that the proposed use of the condemned land be implemented within a reasonably specific period of time.²¹⁰ When it is necessary to acquire land now for a public use in the future, the question arises of what constitutes a "reasonable" time. If non-use is respected as a necessary means to achieve the goal of planned shrinkage, no problem with time exists because the purpose of condemnation is realized at the time of the taking since services may be withdrawn at that time. Barring this construction, planners would have to fall back on court approved uses such as urban renewal or industrial redevelopment. To accomplish the immediate goal of planned shrinkage and the ancillary goal of deferring development until it is socially and economically sound, cities must be allowed to wait, indefinitely if necessary, for sound redevelopment opportunities to occur. Under a shrinkage program the future need for condemned land is not for redevelopment *per se*, but only for redevelopment capable of shouldering the entire social and eco-

207. See generally Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1177.

208. See Stone, *supra* note 82.

209. See *Board of Education v. Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1954), where the court disallowed condemnation for a future public use which would not be affected for thirty years or more. The court said the necessity requirement does not mean an indefinite, remote or speculative future necessity but means a necessity now existing or to exist in the reasonable future. *Id.* at 269, 65 N.W.2d at 811.

210. For a discussion on the imminence of public use and the requirements of a "reasonable time," see Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1177-81.

conomic burden of reopening the neighborhood. A reasonable time for redevelopment under these circumstances should be construed leniently. In *Commonwealth v. Rosso*,²¹¹ the Supreme Court of Puerto Rico respected this need when Puerto Rico's land banking program was challenged.²¹²

A final constitutional limitation to the exercise of eminent domain is that only that interest in property which is necessary to accomplish the public purpose may be taken.²¹³ The land bank may not condemn more of an estate than it needs to accomplish the clearing of depletion areas. As to vacant or unimproved property it may be argued that the bank could only condemn development rights or a negative easement.²¹⁴ The apparent limitation to this proposal is that condemnation of these rights would still leave the landowner capable of continuing a lesser use so that services and public capital could not be withdrawn. This result would be so contrary to the objectives of a land bank in a program of planned shrinkage that condemnation of the entire estate would appear justifiable.

A surge of interest in land banks by state and federal government, planners, and academicians suggests that this land use tool might be accepted as a means of achieving clearing. The land bank may accomplish clearing directly, whereas other alternatives may result in indirect and partial clearing. By clearing depletion areas and withdrawing services and infrastructure, costs can be contained and favored neighborhoods made stronger. Land banks are ideally suited to accomplish clearing because they may purchase real estate and hold it indefinitely.

2. *Alternatives to land banking as a means of clearing neighborhoods.* Land banking is geared to accomplish two objectives, clearing the population from depletion zones so that services may be withdrawn and holding the land indefinitely until redevelopment is feasible. Regarding the first goal, several land use tools are available to accomplish indirectly what land banking may do

211. 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968).

212. *Id.*

213. Note, *Excess Condemnation—To Take or Not to Take—A Functional Analysis*, 15 N.Y.L.R. 119 (1969).

214. See *State v. Larsen*, 54 Wash. 2d 86, 338 P.2d 135 (1959); Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights (TDR) as a Technique to Preserve Open Space*, 6 URB. LAW. 919 (1974).

directly—promote movement away from depletion areas. These techniques do not directly clear land. Instead, they put limits on a property owner's freedom to use his land through the adoption of a comprehensive plan or through the imposition of use zones. Another alternative operates to withhold discretionary funding so that improvements, repairs, and new construction are not affordable. Taxation may be an instrument of shrinkage if either cost based property taxes are imposed or landowners are given a tax break for clearing property. Code enforcement may also expedite clearing by cracking down on substandard dwellings and facilities. These techniques do not, however, result in property being withdrawn from private ownership and residents evicted and relocated as in a land banking program. Alternative land use techniques merely make bad neighborhoods even less desirable places to live by withdrawing public support and curtailing private land use flexibility. Implementation of these alternatives is intended to have a snowball effect on pre-existing outward migration so that the voluntary abandonment of these areas is accelerated.

Although these alternatives accelerate clearing in a cost free manner, in contrast with the expense of land banking, they have serious drawbacks. They do not preclude habitation in slum areas and, as a result of withdrawing public support and curtailing private land use flexibility, only make living in these areas even less convenient and enjoyable than it already is. Complete clearing, a necessary prerequisite to the withdrawal of services, is probably impossible. Even if almost total clearing were to be achieved, it is unlikely that public services could constitutionally be withdrawn from privately held property, even if vacant. As a result the primary objective of clearing is not capable of being met. Lack of control over vast tracts of privately held, vacant land make it similarly unlikely that redevelopment would occur at an optimum time but rather indicate that trickle development in and out will always create some demand for services and infrastructure without a concomitant ability to pay for their maintenance. For these reasons, alternatives to land banking as a means of clearing neighborhoods are unsatisfactory. These limitations enhance the strength of the land banking approach to clustering and clearing. These alternatives must be surveyed, however, because of their value as interim clearing tools and their ability to be used in conjunction with a program of land banking. Moreover, if land bank-

ing is not economically or politically possible, these tools may be employed to achieve some sort of clearing and realize a limited savings to the city.

a. *Comprehensive plan.* Any type of governmental policy statement which states or implies that some areas are viable while others are not will promote instability in the real estate market.²¹⁵ In slums and areas of high abandonment, property values may be expected to drop even further when government declares, through public policy statements or a municipal comprehensive plan, that: city resources for central city revitalization are limited; different areas of the city have unique needs and must be treated differently; and, not all areas have redevelopment potential, and therefore not all can be saved.²¹⁶ The effect of a comprehensive plan or redevelopment strategy that is not yet anchored to a zoning ordinance, for example, because a subdivision of the city and an evaluation of individual neighborhoods has not yet been undertaken, is to promote market uncertainty in marginal neighborhoods that could be classified either as depletion or redevelopment zones. It is difficult to ascertain the value of property when neighborhood status remains uncertain. When a plan is implemented through legislation, market paralysis may be expected in marginal neighborhoods, making this real estate relatively worthless.²¹⁷ This may result in a bailout by both residents and property owners, such that existing services and infrastructure could be contracted or withdrawn.

From a constitutional standpoint, a master plan has been judicially construed as having no legal effect until adopted by the governing board of the municipality in the form of a zoning ordinance.²¹⁸ Until that time, a comprehensive plan has been construed as merely "representing the best judgment of the planning agency as to the proper course of action to be followed."²¹⁹ Prior to legislative implementation, a comprehensive plan remains flexible and

215. Market instability caused by federal courts is discussed in Hagman & Misczynski, *The Quiet Federalization of Land Use*, 9 CALIF. REAL EST. 14, 16 (1975). See also Zumbum & Hookano, *No-Growth and Related Land-Use Legal Problems: An Overview*, 9 URB. LAW. 122 (1977).

216. Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 8.

217. See note 215 *supra*.

218. *Cochran v. Planning Board of Summit*, 87 N.J. 526, 210 A.2d 99 (1965).

219. *Id.* at 531, 210 A.2d at 104.

does not bind the municipality or its residents.²²⁰ The adoption of a master plan does not result in a taking of private property in violation of either the fifth or fourteenth amendments.²²¹ For these reasons economic uncertainty could be used by the city to accelerate movement away from run down neighborhoods without running the risk of a compensable taking under the federal or state constitutions.

b. *Withholding discretionary public funds.* A second type of governmental policy statement that indirectly promotes clearing is federal, state and municipal guidelines for allocating funds or discretionary decisions that limit public investments to viable areas. Explicit or implicit designation of a particular area implies that others are not viable.²²² Minimum occupancy rates and real estate values may be artificially sustained in dilapidated neighborhoods with a high incidence of abandonment by an infusion of public funds. A semblance of a real estate market may be present because, in buying slum area real estate, a buyer acquires two interests—the property itself and a traditional promise of public assistance. A program of planned shrinkage questions whether all neighborhoods are entitled to more than the minimum level of service and support every citizen has a right to expect. Application of cost-benefit analysis by city planners reflects a feeling that all neighborhoods do not have a right to maintenance at the public expense to the extent this is augmented by the allocation of discretionary public funds. Some neighborhoods require such massive infusions of public funds to counteract the accumulated effects of abandonment and decay that the benefit to private capital investment is far exceeded by the detriment to the city, state, and federal governments of having to allocate scarce resources, more profitably directed elsewhere, to provide a temporary reprieve for terminally ill neighborhoods.

When these supplemental funds are withheld from a neighborhood that has insufficient private investment or social commitment to keep it socially and economically viable, property values and private commitment may be expected to further deteriorate. With the loss of discretionary public funds for construction, mainte-

220. See 87 N.J. 526, 610 A.2d 99 (1965).

221. *Id.*

222. Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, *supra* note 1, at 73 (statement by the President of the Detroit City Counsel).

nance or improvement and loss of funds by failing to satisfy viability requirements for mortgage insurance or subsidy programs, the non-viability policy determination becomes a self-fulfilling prophecy.²²³ Residence and investment made possible only by the grace of public aid is redirected to more established areas. Private choice, unaffected by governmental subsidies or assistance, is exercised in favor of more economically, socially and aesthetically desirable neighborhoods. This facilitates clustering and clearing by accelerating movement away from depletion areas to clusters where the withheld funds are reallocated to improve redevelopment areas and maintain conservation zones. The sounder view is to save those neighborhoods which are already strong or can be turned around.

c. *Purchase or condemnation of development rights or a negative easement.* An alternative to land banking in fee is the purchase or condemnation of lesser estate interests such as negative easements or development rights.²²⁴ Both interests limit property to its present use, precluding further development in the case of negative easements²²⁵ and confining development to the holder of development rights in the latter situation.²²⁶ The benefits of this over acquiring an interest in fee are that the acquisition of easements and development rights is less costly, allows the land to be retained on the tax rolls, eliminates public maintenance, and allows the land to remain productive in private hands.²²⁷

Although inexpensive and non-disruptive, these two land use tools do not solve the problem that the shrinkage concept was designed to correct. They are incapable of clearing neighborhoods because the landowner is entitled to continue his present use of the underlying fee. Low profit or loss enterprises may continue to operate and apartments to exist at low occupancy rates while requiring that expensive services and infrastructure be provided. These tools may, however, serve the ancillary objective of foreclosing redevelopment of the area until the city feels the area can be self-

223. *Id.*

224. See generally Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1192-97; Wagenlander, *Urban Open Space Game*, 6 *URB. LAW.* 950, 956-58 (1974); *Land Banking: New Solutions*, *supra* note 135, at 795-96.

225. Whyte, *Securing Open Space for Urban America, Conservation Easements*, in *Urban Land Inst. Tech. Bull. No. 36* (1959).

226. See Rose, *supra* note 214, at 919.

227. Whyte, *supra* note 225; Wagenlander, *supra* note 224, at 956.

supporting.

There are problems in attempting to further either objective. The cost of condemning a lesser interest in land that is already developed may approximate the total value of the land so that no savings is realized over fee simple acquisition.²²⁸ Furthermore, if a lesser interest is condemned, rendering the remainder useless or non-productive, the landowner could institute inverse condemnation proceedings to require compensation for the whole at additional cost to the municipality.²²⁹

d. Zoning as a tool to promote shrinkage. A property owner's right to use his land is subject to the paramount right of the state to impose reasonable regulations on that use through the police power.²³⁰ Zoning may be used in a number of ways to facilitate shrinkage. Exclusive zoning for agricultural, recreational or other open space purposes is the most extreme means by which a municipality could use zoning to prevent redevelopment in areas of high abandonment. Since zoning is a prospective land use control that guides future land use rather than a retrospective one, existing occupied dwellings would have to be condoned as prior non-conforming uses.²³¹ These hold-out uses preclude the withdrawal of services and defeat the goal of shrinkage through clearing. As these parcels become vacant or are amortized, they could, however, become part of the open space accumulated by operation of the zoning restrictions.

There are problems with zoning land for use as open space. While this type of zoning controls future development,²³² it does not alter existing land use. In exclusive zoning for open spaces, a higher use is zoned for future low use.²³³ The impact of exclusive

228. See Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1192-93; *Land Banking: New Solutions*, *supra* note 135, at 796.

229. See generally Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CALIF. L. REV. 2 (1970).

230. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); U.S. CONST. amend. XIV.

231. Anderson, *Amortization of Non-Conforming Uses—A Preliminary Appraisal of Harbor v. City of Buffalo*, 10 SYRACUSE L. REV. 44 (1958).

232. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* §§ 3.01-3.10 (2d ed. 1977); Heyman, *Innovative Land Regulation and Comprehensive Planning*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES* 23, 24-26 (N. Marcus & M. Groves, eds. 1970). The prospective nature of zoning is discussed in *Public Land Banking*, *supra* note 9, at 906.

233. See Heyman, *supra* note 232.

zoning is very harsh on landowners. It prohibits virtually all use and development and significantly lowers property values. Property owners will inevitably challenge open space zoning on equal protection grounds as an unreasonable and impermissible exercise of police power because it impacts on a suspect classification or interferes with the exercise of a fundamental freedom.²³⁴ Two different standards of review apply, depending on whether the landowners allege discrimination on the basis of wealth or, as in many central city areas, race. The rational basis test, which presumes constitutionality,²³⁵ is the standard which applies to most social and economic legislation.²³⁶ Planned shrinkage to reduce municipal costs and increase neighborhood viability is a valid police power objective. Whether zoning is a valid means of achieving this socio-economic objective is questionable. If any facts can be shown that make the choice of zoning a reasonable means of achieving the objective of shrinkage, then, under the rational basis test, the ordinance will be upheld.²³⁷ If the landowners allege that the ordinance discriminates on the basis of race, because it operates disproportionately against minority landowners or that its dislocatory effects disproportionately affect minorities, then it would have to withstand strict scrutiny under the compelling state interest test.²³⁸ The likelihood of the ordinance being upheld under this standard is remote since the municipality would have to prove that the desired shrinkage cannot be achieved through any other means that do not work the same discrimination.²³⁹ Although all clearing techniques result in the dislocation of large numbers of poor, and probably minorities, voluntary clustering techniques such as relocation benefits achieve a similar result without a constitutional taint.

Another constitutional challenge threatens the success of open land zoning. This is the due process claim that open space zoning results in a taking of private property without just compensa-

234. U.S. CONST. amend. XIV.

235. *Nebbia v. New York*, 291 U.S. 502 (1934).

236. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1972) (no discrimination on the basis of wealth alone).

237. 291 U.S. 502.

238. *Brown v. Board of Education*, 347 U.S. 483 (1954).

239. *United Farmworkers of Fla. Hous. Project v. City of Del Ray*, 493 F.2d 799 (5th Cir. 1974) (municipal services cannot be refused individuals outside of municipal boundaries on the basis of race).

tion.²⁴⁰ Resolution of this allegation requires a careful balancing of competing interests. On one hand, courts recognize that private property interests must occasionally yield for the benefit of the general public. An open space zoning approach to shrinkage works hardship on a few individuals, but the benefits inure to all city residents and state and federal taxpayers, to the extent these levels of government are called upon to aid deteriorating cities. On the other hand, it is beyond the permissible scope of the police power to restrict the use and limit the development of land to the point where it is economically worthless.²⁴¹ To make shrinkage work, land would have to be cleared and services withdrawn. This would preclude virtually all uses but recreation and would assuredly be construed as a compensable taking. Down zoning and attempts at open space zoning have already given rise to several successful inverse condemnation lawsuits.²⁴² "Zoning to decrease the cost of future land acquisition has also met with judicial disapproval."²⁴³ However, in the landmark open zoning case of *Agins v. City of Tiburton*,²⁴⁴ the Supreme Court held that a zoning ordinance which limited the use of land to single family dwellings, accessory buildings, and open space uses was facially constitutional and not a taking under the Fifth Amendment.²⁴⁵ The court did not consider whether the zoning ordinance would be unconstitutional if applied to prevent maximum development of the land for single family dwellings.²⁴⁶

The use of more typical restrictions to curb existing use, such as large lot sizes, area minimums based on occupancy, set backs, and use prohibitions present the same problems as open space zon-

240. U.S. CONST. amend. V. Private property shall not be taken for public use without just compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

241. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). See Note, *New York's Changing Conceptions of Land Use Law: Penn Central Transportation Co. v. City of New York*, 27 BUFFALO L. REV. 157 (1978).

242. *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). See also *Zumbrum & Hookano*, *supra* note 215, at 153-56.

243. Note, *Problems of Advance Land Acquisition*, *supra* note 191, at 1186. See also *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (1961) (zoning to depress land values to facilitate future exercise of eminent domain held unreasonable).

244. 447 U.S. 255 (1980).

245. *Id.* at 259. The Supreme Court recognized that open space zoning served a legitimate government interest by discouraging the premature and unnecessary conversion of open space land to urban uses. *Id.* at 261.

246. *Id.* at 259.

ing and are less effective in promoting clearing.

Zoning is not a satisfactory means of achieving the primary goal of shrinkage, clearing land, and withdrawing services. It does serve the ancillary goal of redevelopment very effectively. Once clearing is achieved by other means the land could be rezoned to suit residential, commercial, and industrial demand and be restricted to promote orderly and aesthetically pleasing regrowth. A redevelopment strategy tied to zoning could condition redevelopment on the availability of modern, cost-efficient services.²⁴⁷ In *Golden v. Planning Board of Ramapo*,²⁴⁸ approval to develop was linked to the availability of adequate public services.²⁴⁹ Developers considering cleared central city areas would have to await a threshold level of support services and facilities or agree to construct some infrastructure themselves. Public reinvestment in facilities would be modern, cost-efficient, and tailored to the new use being made of the area. Specialized capital improvements could lure specific industries into the area to enhance the economic base.²⁵⁰ In *Ramapo* the court found that the restriction conditioning development on the availability of services was not a taking because the restriction was temporary.²⁵¹ If a land bank owns the cleared land a *Ramapo*-type plan is not necessary because an objective of the bank is to control the timing of redevelopment.²⁵² If cleared land remains in private ownership, either because of the chilling effects of a comprehensive plan on property values or because of tax incentives to hold land as open space, then a zoning ordinance such as Ramapo's would be of questionable value in promoting ordered and sound regrowth. "A temporary restriction promising that the

247. See Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 85-86.

248. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). See Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 *LAW & CONTEMP. PROB.* 5, 38 (1979). In *Ramapo* the five essential services or facilities were drainage systems, sewers, parks, schools and recreational areas, and roads and firehouses. A permit could be issued after 15 development points were accumulated. 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 144.

249. 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 144.

250. See Deutch, *Capital Improvement Controls as Land Use Devices*, 9 *ENV'T'L L.* 61 (1978); Hirst & Hirst, *Capital Facilities Planning as A Growth Tool*, in 2 *URB. LAND INST.* 461 (R. Scott ed. 1975).

251. 30 N.Y.2d at 366-68, 379, 285 N.E.2d at 294-96, 296, 303, 334 N.Y.S.2d at 142-43, 154.

252. *Public Land Banking*, *supra* note 9, at 929-30.

property may be put to profitable use within a reasonable time"²⁵³ may force the city to provide services before sufficient redevelopment interest is generated to justify the expenditures. For these reasons zoning is of limited value in furthering the shrinkage of central cities.

e. Taxation as a means of promoting clearing. Real estate taxes have a tremendous impact on the way land is used.²⁵⁴ There are two ways the power to tax may be used by a municipality as a planning tool to encourage clustering and clearing. Cost based property taxes, utility charges, and other user costs could be imposed on a city-wide basis.²⁵⁵ People living in low density areas, where the cost of delivering services and maintaining infrastructure is high, would pay proportionately higher taxes and user fares.²⁵⁶ By making each neighborhood bear its own costs, disincentives to sprawl would exist with respect to low density neighborhoods.²⁵⁷ This sprawling, however, occurs in very different parts of the city and has very different socio-economic consequences. The low density areas of the city are the repositories of the poor, who cannot be expected to financially shoulder premium costs for the efficient delivery of services in their low density neighborhoods. The other low density neighborhoods are at city edges, close to the suburban rings. These households are more capable of handling premium charges and may be able to rationalize them better since the added amenities of these quasi-suburban neighborhoods, such as better schools and larger homes, may make the added costs worthwhile.

Imposition of such taxes on low density central city neighborhoods would raise the cost of home ownership, rental or doing business in these areas. Unlike homes on the suburban fringe, no countervailing benefits are realized by remaining in these areas. Since incomes are low, cost based property taxes and other charges that would increase the cost of living would encourage clustering in higher density areas and clearing out low density ones. Disadvan-

253. *Golden v. Planning Board of Ramapo*, 30 N.Y.2d at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.

254. See generally Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 Wis. L. Rev. 628.

255. Thompson, *Land Management Strategies for Central City Depopulation*, in 1977 *Comm. Print*, supra note 1, at 73-75.

256. *Id.*

257. *Id.* at 73.

tages are that the high cost of residence on the city fringe, due to high land values and premium charges for low density services, enhance the difficulties of moving to better areas near the suburban fringe.²⁵⁸ This locks the poor more soundly into the central city at the expense of a socio-economic and racial mix in outlying areas. In short, cost based property taxes operate unevenly to promote clustering only by the poor who are unable to pay the same premiums their low density suburban neighbors do.

Tax breaks, such as general directive, tax preference, or tax deferral, may encourage the use of central city land for undeveloped open spaces.²⁵⁹ As a general rule, property is assessed and taxed for its highest and best use.²⁶⁰ In central city areas where abandonment and decay is prevalent, failure of the market destroys the development potential of land. Landowners are forced to pursue inappropriate and unprofitable uses to defray the cost of their tax burdens. By reducing the tax on open spaces the financially and socially desirable goal of clearing may be met. Tax reduction could be based on an arbitrary reduction of the assessed valuation on use as open space, "as restricted by zoning, contract, scenic easements or restrictive covenants."²⁶¹ Public resistance to non-development controls may be expected unless they are accompanied by advantageous tax treatment.²⁶² Owners of dilapidated and unprofitable real estate, relieved of the need to pursue improper or unprofitable uses to generate income to offset "highest and best use" tax and other liabilities, could profitably demolish any structures and hold the land as open space until redevelopment is economically feasible.

If central city land is subject to zoning restrictions, private covenants, or negative easements, either a general directive or tax preference may be used to foster clearing.²⁶³ Tax assessors presume that restricted land will be relieved of its burdens if the market

258. *Id.* at 73-74.

259. Hagman, *supra* note 254, at 633-45. The tax system has frequently been invoked to achieve public policy objectives. *Id.*

260. See e.g., MICH. CONST. art. VI. See also NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 603,605-06 (1959)(requires full value, market value, true value, etc.); Wagenlander, *supra* note 224, at 964; Hagman, *supra* note 254, at 641.

261. Wagenlander, *supra* note 224, at 965.

262. Hagman, *supra* note 254, at 657.

263. Both of these taxing methods take into account present low use and restrictions on use in making an assessment. See Hagman, *supra* note 254, at 633-34.

can accommodate more intensive uses.²⁶⁴ Even though land is presently limited in its use it is taxed as though it were uncontrolled.²⁶⁵ If land is zoned for recreational uses, but taxed as though it were zoned for commercial, the assessment creates financial burdens on the landowner to rezone to a higher, more profitable use which tends, in itself, to break down the existing zoning use.²⁶⁶ A general directive requires that assessors consider the restrictions permanent and levy tax accordingly.²⁶⁷ A lower assessment eliminates the need to convert property to more intensive, but inappropriate uses to pay property taxes. With land taxed at its present use rather than at an increased value due to development potential, constitutional problems of just valuation are avoided.²⁶⁸ Constitutional problems with special classifications or partial exemptions are avoided because there is no classification of land by use, only an awareness on the part of assessors that certain high intensity uses are prohibited because present restrictions do not allow them.²⁶⁹ Land restricted to use as open space precludes virtually all uses. It would be assessed very low because its redevelopment potential may not be taken into account under a general directive. Landowners engaged in unprofitable uses could demolish structures and enjoy tax relief while waiting for suitable redevelopment opportunities. This would expedite clearing in slum neighborhoods and clustering in viable ones. Incentives to prematurely redevelop would be diminished by the imposition of substantially higher taxes for uses of the land other than open space. Only economically profitable redevelopment could bear the additional tax burden.

Preferential taxation is available to keep open land in its present state by reducing the tax burden for land restricted to specific classifications of use.²⁷⁰ There is no assumption that the land is permanently restricted in its use.²⁷¹ A specific grant of tax relief for open land use is subject to constitutional challenge on the ground that it is an unreasonable classification and partial exemption from

264. *Id.* at 633.

265. *Id.*

266. *Id.* at 638.

267. *Id.* at 641-42.

268. *State Tax Comm'n v. Wakefield*, 222 Md. 543, 161 A.2d 676 (1960). See Hagman, *supra* note 254, at 641-42.

269. Hagman, *supra* note 254, at 641-42.

270. *Id.* at 639-40, 642-45.

271. *Id.* at 639.

state requirements of uniformity in taxation.²⁷² If a state becomes sufficiently involved in solving the problems of its large cities, this potential constitutional challenge could be avoided by amending its constitution.²⁷³ The same clustering and clearing results could be accomplished as with a general directive.

A tax deferral allows land to be assessed at its present low intensity or restricted use.²⁷⁴ Subsequent higher or more intense use subjects the property to an additional tax based on the market value of the land as a high intensity use, retroactive to the imposition of the tax deferral program.²⁷⁵ The total tax recovered is equal to the sum of the tax that would have been paid had the land been used at its highest and best use for the entire period.²⁷⁶ The advantage to land owners is that they only pay partial tax so long as the lesser uses are engaged in. The remainder of the tax liability is deferred indefinitely until the use is changed. A drawback is that in long periods of low intensity use, a backlog of tax liability builds up so that an eventual change of use which triggers collection of the deferred remainder of tax liability may be so great that the owner is unable to pay it.²⁷⁷ In a program of planned shrinkage this result is desirable because it retards redevelopment of open spaces until a strong market demand for the real estate improves central city values to the point that owners can sell or lease their property for a price in excess of the outstanding back taxes.

f. Building, safety and health code enforcement. Building, safety, and health code enforcement may be used to clear depletion zones. Obsolete structures with poor maintenance typify depletion areas. Code infractions may be expected to increase with the age of the building and neighborhood. Abandonment could be accelerated by strict code enforcement since the resources necessary to bring buildings in compliance with the codes are not available.²⁷⁸ Inspectors have the authority to close down buildings where the code violations are so numerous or serious that they imperil the life or

272. *State Tax Comm'n v. Wakefield*, 222 Md. 543, 161 A.2d 676 (1960) (state constitution does not permit special assessment for land used only for agriculture).

273. This was done in both California and Maryland. See CAL. CONST. art. 28, § 2; MD. DECLARATION OF RIGHTS, art. 5 (1980). See also Wagenlander, *supra* note 224, at 965.

274. Hagman, *supra* note 254, at 638-39, 645.

275. *Id.* at 638-39.

276. *Id.* at 639.

277. *Id.*

278. Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 87.

safety of a dwelling's inhabitants. Evicted owners or tenants must relocate elsewhere. Strict code enforcement can be used to eliminate substandard structures and promote clearing so that services may be withdrawn. Code enforcement is state action which bears a reasonable relation to valid police power objectives, even though it may be used as a tool in implementing socio-economic policy.²⁷⁹

Code enforcement may be used to maintain high standards in conservation areas.²⁸⁰ Maintenance may be fostered by correcting signs of deterioration and age as they occur. Ironically, in St. Louis code enforcement was strict in conservation areas, but lax as a matter of public policy in areas of high abandonment.²⁸¹

g. Federal environmental legislation as a tool to retard redevelopment. The National Environmental Policy Act of 1969,²⁸² the Clean Air Amendments of 1970,²⁸³ and the Water Pollution Control Act Amendments of 1972²⁸⁴ do not promote clearing, the primary goal of planned shrinkage. This environmental legislation does, however, have an effect on the ancillary goal of redevelopment. The acts superimpose federal regulations on local and state land use controls. Compliance with the high standards for air and water quality increase the cost of redevelopment or preclude it altogether where the environment would be irreparably compromised by yet another source of air or water effluent.²⁸⁵ Further, the acts require environmental impact statements which may reduce redevelopment by drowning it in a sea of costly and burdensome procedural requirements.²⁸⁶ Only developers with strong reinvestment commitments would be able to absorb the cost of compliance; impractical or unprofitable projects are likely to be scrapped at the planning stages. Developers who have the commitment and resources to surpass these predevelopment barriers will have a greater incentive to make their investments pay off. These well planned and financed developments will warrant the reopening of cleared neighborhoods.

279. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

280. Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 82.

281. *Id.* at 87.

282. 42 U.S.C.A. § 4321 (Supp. 1980).

283. 42 U.S.C.A. § 1857(b) (Supp. 1980).

284. 33 U.S.C.A. §§ 1251-1376 (Supp. 1980).

285. *Id.* § 1311.

286. Zumburum & Hookano, *supra* note 215, at 139-40.

CONCLUSION

Our large cities are losing population and, consequently, revenues. Many of those left behind are the urban poor who cost more in services than they contribute in revenues. Cities face huge deficits in their budgets for many reasons. Renewed efforts must be made to bring city expenditures in line with revenues. A program of planned shrinkage, where central city populations can be persuaded to move away from sparsely populated areas and into high density conservation and redevelopment areas would allow services and facilities to be withdrawn from cleared areas and reallocated more efficiently to cluster areas. The clearing of land can best be accomplished by land banking. Other land-use controls are inadequate to accomplish shrinkage, although they may be of some assistance if the area is eventually redeveloped.

Despite the economic benefits of planned shrinkage and the feasibility of implementing such a program with existing legal tools, the ultimate test of the practicality of planned shrinkage is a political one. Plans aimed at relocating central city residents have been decried as inhuman, racist, and assaults against the poor. In excising soft spots from the city's economic base, critics have charged that planned shrinkage "places the burden of reinvestment and relocation on those least able to afford it."²⁸⁷ Despite political and humanitarian objectives, some tough new answers are needed to curb the decline that plagues these cities.

287. Pratter, *Strategies for City Investment*, in 1977 *Comm. Print*, *supra* note 1, at 87.

