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Comment: Three Issues for the City in the 21st Century

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THE TITLE FOR THIS YEAR'S PROGRAM of the Section on Urban, State and Local Government Law of the Association of American Law Schools is *The City in the 21st Century*. These three articles provide a stimulating introduction to three issues that are likely to be central to the study of the city in the twenty-first century—as they were in the twentieth century and in the nineteenth century: the interplay of local and regional forces in land development, the battles among interest groups to control city hall, and the role of local government in promoting local economic development. These issues are frequently interconnected. Land use and economic development are usually the focal points of local political struggles, while the outcomes of local power struggles can affect land use and economic activity in ways unanticipated by local political actors. These issues also represent different facets of the difficult pursuit of the local public interest. As each author notes, private interests play important roles in the processes and products of local governance. Each understands the power of interest groups in local decision making and the fragility of the very notion of the local public interest. Yet, each also continues to look for ways of enhancing the possibilities for public-regarding local outcomes.

Bill Buzbee's careful and comprehensive analysis of the problem of urban sprawl places the city of the late twentieth and early twenty-first century in a regional setting. Sprawl—the movement of households and businesses from the urban core to previously less developed land on the edges of the metropolitan area—crosses multiple local boundaries and it results from decisions made at various levels of government. Thus, it is a problem that almost certainly cannot be handled at the local level alone, but requires action by federal, state, and possibly regional entities, as well.

Buzbee notes that sprawl is an “enduring feature of the American landscape.”¹ As Kenneth Jackson pointed out in *Crabgrass Frontier*,² the desire of American households for more space at lower cost long led Americans to push out the urban boundary. The accompanying desire of many families to separate themselves from other racial, ethnic, class, or income groups further contributed to the exodus from the urban core. When industry followed, the outward movement of families accelerated. Although public policies did not cause the impulse to move out, they facilitated and reinforced it. Federal and state financing of new highways, as well as subsidies for new construction, home ownership, water supply, and wastewater treatment infrastructure in outlying areas reduced many of the costs of sprawl to the residents of newly developed areas.³

The existing local governance system—created by state laws that determine local boundaries, local finances, and local zoning authority—contributes to sprawl. Local governments are largely dependent on the taxation of property within their borders for the revenues they need to fund local services. As a matter of local fiscal policy, each locality has an economic interest in using its planning and zoning powers to exclude new residents and activities that are likely to cost more in services than they contribute to the tax base. Local land-use regulations can be used to drive up the cost of housing in a locality, thereby creating a de facto price of entry that serves to exclude potential residents who would not add to the net per capita wealth of the community. Local decisions to restrict or exclude particular land uses—like apartment houses, townhouses, or smaller detached houses—or to drive up the cost of land, as by requiring large lots as a precondition for building, can displace less affluent people to other localities. Although an individual locality will be unlikely to affect the regional housing market, local land-use controls can have a ripple effect across a region, forcing new development away from more central, partially developed communities, to exurban and rural settings at the perimeter of the region. The leapfrog pattern of development so characteristic of sprawl is thus partially a result of local government fiscal zoning.⁴

1. William W. Buzbee, *Urban Sprawl, Federalism, and the Problem on Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999).

2. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 20–73 (1985).

3. The best description in the legal literature of the causes and consequences of sprawl, and of the difficulties of addressing those consequences, is William W. Buzbee, *Urban Sprawl, Federalism, and the Problem on Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999).

4. For a further description of the connection between the local government system and urban sprawl, see Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 8–10 (2000).

What can be done about sprawl? In the article that is the subject of this Comment,⁵ Buzbee proposes an investment in metropolitan green space as a “sprawl policy.” Specifically, he would encourage the federal and state governments to provide funds, financial incentives, or other regulatory enticements to promote the creation and protection of publicly accessible open spaces in our sprawling metropolitan areas. In his view, a green space initiative could offset some of the harms of sprawl, particularly the loss of natural habitat for animal and plant life. Moreover, providing “a common open space . . . could counteract the insularity”⁶ and loss of community that is one of the consequences of low-density, decentralized, sprawling development. Although he does not discuss it, a green space initiative could have equity benefits as well. Much of the new residential development in sprawling outlying areas involves single-family homes surrounded by yards, but some lower-income residents in these growing communities may live in denser developments that lack adequate recreational opportunities. Thus, more metropolitan area parks could be of real benefit to the poorer children and families on the urban fringe. To be sure, some of the goals of the green space initiative could come into conflict as the value of habitat protection may clash with the benefits of public access, but more public open space is almost certainly an attractive public policy goal.

Would a green space initiative ameliorate the costs of sprawl in suburban and exurban areas? The answer to that question is not clear. The value of green space for recreation and social interaction has more traditionally been associated with high-density, nonsprawling communities, like Central Park in Manhattan, than with low-density decentralized communities, which contain a considerable amount of greenery and space for recreation, albeit in neither a publicly accessible nor a natural habitat setting. Indeed, some of Buzbee’s specific proposals—such as the conversion of brownfield sites or “little used harbor or river dock space”⁷—deal with inner urban areas. These green spaces, however, would be not a remedy for sprawl as much as a side benefit from sprawl, as the exodus of commercial and industrial activity from older urban cores makes possible the conversion of formerly business property to recreational use.

Buzbee acknowledges that a green space initiative would not “actually stop[] sprawl,” but he asserts that it would “mitigate sprawl’s

5. In his earlier article on sprawl, Buzbee explored a variety of other public policy approaches. See Buzbee, *supra* note 1, at 107–28.

6. *Id.* at 77.

7. *Id.* at 70.

harm and pace.”⁸ Green space creation or protection would certainly take some land out of use for residential, industrial, or commercial development. Reducing the supply of land in turn could increase the cost of land in adjacent areas. But that could simply have the effect of forcing new development further out in metropolitan areas. In other words, it might cause more sprawl. This effect is not likely to occur in the urban core or in older suburbs that are currently losing population or business activity. There is no development to be pushed out of these areas; it is even possible that a pleasant and well-maintained park would be the kind of amenity that draws people or businesses back to the city. In these areas, a parks initiative could be of great recreational and community benefit for area residents. Similarly, a parks initiative would have little negative effect in outlying areas where undeveloped land is ample, and it could be useful in promoting habitat preservation for threatened animal and plant species.

In currently developing areas where land is both attractive to developers and limited in supply, however, a green space initiative might contribute to sprawl. The impact would turn on the amount of land devoted to parkland relative to the amount of land available for development, as well as the attractiveness of and ease of access to land in slightly more distant communities. Still, like exclusionary zoning, one effect of taking some land out of use for development could be to drive new development further out from the metropolitan area.

Buzbee implies that more suburban and ex-urban green space could contribute to “a somewhat denser urban form.”⁹ He notes that “proximity to green space tends to enhance property values, so rational developers may, if permitted by local zoning laws, adopt a higher density development form.”¹⁰ In other words, the presence of a park even in a suburban setting might induce people to cluster tightly near its borders rather than engage in low-density settlements throughout the area. That is certainly possible but, as Buzbee acknowledges, the green space would have to be accompanied by changes in local zoning laws, which need not occur automatically as a result of the protection of nearby green space. If zoning laws are not changed, the creation of a valuable amenity might lead to the construction of a small number of very large houses on very large lots near the amenity, rather than to a greater concentration of population generally.

More green space is almost certainly a good thing for the public as

8. *Id.* at 127.

9. *Id.*

10. *Id.*

a whole, as well as for threatened animal and plant species, and the various incentive mechanisms Buzbee puts forth seem like intelligent and useful ways of encouraging local governments to create more parks. But it is not clear that more green space will actually slow down sprawl or mitigate its social consequences, such as automobile dependence, population deconcentration, and loss of community. Certainly a green space initiative would have to be combined with greater state or regional initiatives concerning local zoning if greater density of settlement is to be achieved.

More generally, sprawl underscores the need for state or regional governance structures that can facilitate greater awareness of the regional consequences of local actions and provide mechanisms for addressing regional problems. Local land-use policies, state and local tax decisions, and federal, state, and local actions concerning local public investment and economic development all have significant regional effects in the metropolitan areas in which most Americans live. Sprawl is a regional issue calling for regional approaches. Buzbee's article underscores the need for more state attention to sprawl and more state oversight of local actions that contribute to sprawl. If not, the sprawling growth so characteristic of late twentieth century urban areas is likely to continue well into the twenty-first.

Bob Ellickson's article is concerned with the internal workings of local governments and with the power of special interest groups in local politics. Ellickson considers two issues: first, whether new information technologies make local officials more accountable, and, second, assuming they do not, whether structural alternatives can promote the local public interest. On the first point, Ellickson concludes that new technologies will exacerbate and not alleviate the difficulties of holding local governments, particularly big city governments, accountable to their constituents. He speculates that the digital revolution and the rise of the Internet will increase the cohesion of special interests, distract citizens from local affairs, and erode local social capital. As a result, special interest groups will enjoy even greater leverage over city hall than at present, while local residents will give even less attention to local problems or to maintaining social relationships with their neighbors.

Admittedly, as Ellickson puts it, forecasting the future is an "impossible art,"¹¹ but joining him in speculation, my own intuition about the impact of new information technologies on local governance is the

11. Robert C. Ellickson, *Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?*, 32 URB. LAW. 391 (Summer 2000).

opposite of his. I doubt that the new technologies will add to the political edge of special interest groups; if anything, the new technologies are likely to level the political playing field. The special interest groups that are Ellickson's focus already play a major role in local politics.¹² As beneficiaries of city grants, contracts, jobs, and investment decisions, they have a large stake in local politics and an incentive to overcome the costs of organizing, of monitoring government, and of attempting to wield political influence in order to keep the benefits they currently enjoy and get more from city government in the future. By contrast, ordinary residents, taxpayers, and service recipients have a relatively small material stake in local government. For them the time, effort, and monetary costs of organizing, monitoring, and mobilizing for political action are likely to be daunting relative to the benefits. As a result, organized political participation by these groups is likely to be limited. The Internet may make it easier for ordinary citizens to meet in cyberspace, obtain information about local actions, and lobby city government. It thus may enable a diffuse ordinary citizenry to reduce the transaction costs of organizing and politicking, and thereby reduce the edge of the special interests that are already organized.

Similarly, with respect to the increased distraction by nonlocal events and the weakening of local social networks, my sense is that much of this has already happened due to the rise of television, the growth of sprawl and metropolitan area commuting, and the greater mobility of the population. The Internet could make this worse. On the other hand, by enabling the small number of local residents who are interested in local matters to organize more easily, the Internet could facilitate the formation of local citizens' lobbies. And for those local residents concerned about local matters, the Internet will make it much easier to learn about the operations of their local government, to compare it with the operations of other localities, to communicate with other local residents, and to lobby city hall.

This is likely to be of particular benefit in large cities. Ellickson is probably right in suggesting that monitoring and accountability are more difficult to accomplish in large cities than in small.¹³ In large cities, city hall is more distant, and the numbers of residents who need to be organized in order to have some kind of an impact are much larger. The Internet could provide a means for like-minded city dwellers who are not residents of the same neighborhood and who do not belong

12. See *id.* at 395-97 (discussing the power of municipal employee unions, the "public works lobby," and the "poverty services industry" in New Haven, Connecticut).

13. *Id.* at 392-95.

to the same block-level institutions to come together over municipal matters.

Most local citizens in large cities are probably detached from local politics, and the Internet may exacerbate this detachment. However, for the small number of local residents interested in local government but unable to overcome the barriers to finding like-minded citizens, organizing, information-gathering, and lobbying, the Internet could be a boon. Poindexter's discussion of the impact of COPS on San Antonio suggests that citizen impact may be as much a matter of the intensity of interest and skill at organization as the number of citizens involved.¹⁴ The Internet *could* be a means of allowing ordinary residents to organize. In any event, given both the current level of organization of interest groups that Ellickson discusses and the low degree of citizen involvement in big city politics, it is hard to see how the new information technologies will make matters worse.

As for structural approaches for breaking the hold of private interests on city governments, Ellickson is interested less in enhancing the role of ordinary residents in city hall decision making than in shifting government power away from city hall altogether through such strategies as secession, charter schools and vouchers, and especially, the creation of small special-services districts within cities. His principal recommendation is the development of the block-level improvement district (BLID) which could impose mandatory assessments on all district property owners and use the proceeds to fund the provision of local public goods. Not only could such an initiative improve the quality of local public services and increase the accountability of those who provide local public services to those who use them, but to the extent that city service quality issues are a "push" factor that lead urban residents to exit to the suburbs, Ellickson's BLIDs could reduce the sprawl that is Buzbee's focus.

Ellickson's BLID proposal,¹⁵ as he notes, tracks recent urban initiatives like the Business Improvement District (BID) which enable sub-city districts to raise additional taxes to be used to pay for supplemental public services within the taxing district. Typically, the district's service program is determined and managed by a board dominated by representatives of the district's business or property owners.¹⁶ BLIDs would

14. George C. Poindexter, *Economic Development and Community Activism*, 32 *URB. LAW.* 401, 402-03 (Summer 2000).

15. Ellickson's BLID concept is more fully developed in Robert C. Ellickson, *New Institutions for Old Neighborhood*, 48 *DUKE L. J.* 75 (1998).

16. For a full discussion of Business Improvement Districts, see Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 *COLUM. L. REV.* 365 (1999).

shift the nature of these districts from business to residential areas and to much smaller units. Given the improved security, sanitation, tourism-promotion, and economic development services BIDs have brought to many urban downtowns, there is much to be said for the BLID concept. Nevertheless, BLIDs, like BIDs, raise two troubling issues.

First, Ellickson bases the formation of, voting in, and financial support for BLIDs on district landowners, not residents. Certainly, there is much to be said as a practical matter for linking taxation and voting in this setting. Moreover, to the extent that BLIDs are limited to supplementing a limited range of city services, lack lawmaking authority, and are subject to city monitoring, property owner suffrage is probably constitutional.¹⁷ But is it wise to disenfranchise residents? Residents are deeply affected by local services, infrastructure, and policing. Ellickson implies that tenants are transitory and highly mobile with little or no interest in developments in their community after the expiration of their current one-year lease. Yet, many residents have lived in their communities a long time and would like to remain beyond their current lease term. Conversely, landlords typically do not live on the blocks where they own residential rental property. While they have a stake in the return on their investment, that does not mean that they have an interest in improving services for current residents. To the extent that one of Ellickson's goals is to build social capital and strengthen communities, the residents who actually live in the community ought to have a role in its formation and operation.

Second, BLIDs, like BIDs, raise questions about inequality in the provision of local public services. BLIDs are most likely to form in more affluent neighborhoods. Certainly, more affluent areas are capable of raising more in supplemental assessments than blocks in poorer areas. BLIDs in affluent areas could have the advantage of inducing those residents to remain in the city, and thus continue to be part of the city tax base that supports municipal services in poorer parts of the city. However, once BLIDs are fully established these areas might become more inclined to rely on their own resources for local public services. This could reduce their interest in municipal services, thereby losing the affluent as a lobbying force prodding city administrations to im-

17. Cf. *Kessler v. Grand Central Dist. Mgt. Ass'n*, 158 F.3d 108 (2d Cir. 1998) (upholding New York law that gives district property owners the dominant voice in the election of members of a BID's managing board). See also Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993) (examining the scope of federal constitutional protection of the right to vote in local elections).

prove municipal service quality. To the extent that BLID services are supported from district-level resources, it could also lead them to oppose raising or maintaining city taxes which are used more to pay for services elsewhere in the city.

Moreover, unlike BIDs, BLIDs are unlikely to generate spillover benefits for other city neighborhoods or the city as a whole. BIDs are commercial districts that flourish by drawing other city residents, tourists, convention-goers, and suburbanites into the districts to work, to shop, to seek entertainment, or to enjoy public amenities. All city people who come into the districts, whether or not they reside in the BID, benefit from BID programs that make the districts cleaner, safer, and more vibrant, just as the city as a whole benefits from the visits and purchases made by nonresidents. BLIDs in residential districts are unlikely to be places where other city residents work, shop, or seek entertainment, and BLIDs are unlikely to draw shoppers, workers, or tourists from outside the city.¹⁸

The service inequalities likely to result from Ellickson's BLID proposal seem modest, and some inequality may be acceptable for services that are truly supplemental to an adequate base of municipally provided programs. Moreover, by demonstrating that high quality local public services can be provided, BLIDs, like BIDs, may raise the standard that local residents will require local governments to meet. It is thus far from certain that BLIDs would create a serious inequality problem. Yet, the BLID approach of empowering block or neighborhood organizations in an urban context of sharply differing block-level or neighborhood-level resources, raises the prospect of formal intramunicipal differences in the quality of public services based on intramunicipal differences in taxable wealth.

Ellickson's BLID proposal, along with his reference to charter schools and vouchers, nicely illustrates the growing merger of the public and private at the local level today. BLIDs would have the coercive taxing power of governments, but with their focus on property values in very small areas, they would also have the feel of private organizations. Ellickson captures the BLID's quasi-private nature in his characterization of the district as a "retrofitted residential community association."¹⁹ Dissatisfaction with the functioning of late twentieth century municipal governments in big cities is likely to produce further

18. See Briffault, *supra* note 16, at 466–67 (contrasting business and residential area improvement districts).

19. Ellickson, *supra* note 11.

experimentation with public-private hybrids and sublocal organizations in the city of the twenty-first century. This is likely to result in greater attention to the difficulties of accommodating these experiments to the norms of democratic participation and service equality within local units.

Georgette Poindexter's article on San Antonio's living wage law suggests just how pervasive special interests are in urban government. In her view, the notion of special interests encompasses not just Ellickson's villains—municipal employee unions, poverty services agencies, and the growth coalition—but also community-based coalitions of low-wage workers when those workers successfully push for the adoption of policies that are bad for the economic well-being of the city as a whole.²⁰

Poindexter suggests that San Antonio's recently enacted living wage requirement for the recipients of city tax abatements is a bad policy for the city. The living wage movement has spread dramatically in American cities in recent years. Living wage proponents contend that in these relatively flush economic times, firms should be required to share the benefits of growth with their workers. The living wage concept tests the question of whether in the age of the global economy, mobile capital, and the relentless search by firms for the cheapest location for production, the city of the twenty-first century can do anything to extend the benefits of economic growth to all its residents.²¹

Poindexter seems skeptical about living wage initiatives in general, but she is particularly critical about the one adopted by San Antonio. She points out that the high level of living wage required by the San Antonio law is at cross-purposes with the city's official economic development strategy of promoting the convention and tourism business, which is an industry characterized by low wage positions.²² More subtly, she suggests that the San Antonio living wage law creates a conflict among low wage workers within the city. Manufacturing workers—whose firms are more willing to pay the wage will benefit, but retail and hospitality workers may suffer if firms in those industries reduce their hiring in the city.

Poindexter points to the critical role of Communities Organized for Public Service (COPS), a church/community-based organization, in se-

20. Poindexter, *supra* note 14.

21. *Id.* at 403.

22. *Id.* at 402.

curing the passage of the living wage law over the opposition of the city's political and business establishments.²³ Rather than describing this as the rare triumph of the public interest over special interests, or concluding that the living wage law may in fact be in the local public interest, she suggests that COPS' success is, instead, just one more victory by one interest group over another, with the public interest as the loser. If even a group like COPS is a special interest group pursuing its own self-interest, what hope is there that local governments will break the domination of special interests and pursue the local public interest?

Poindexter does not answer the question, except to urge greater dialogue between business and neighborhood representatives. Certainly, the conflict among competing interest groups is the stuff of local—and state and national—politics. Poindexter is certainly right in suggesting that community-based interest groups may be just as capable as business, labor, or bureaucratic interests in actions that are mistaken, short-sighted, or self-interested. Given the ease of exit from local jurisdictions and local dependence on local resources for local revenues, there is likely to be a strong economic incentive to correct the most serious mistakes made by local governments. Workers and businesses disadvantaged by the living wage law may be able to move elsewhere, reducing jobs, population, and tax base within the city. If the living wage law does result in driving economic activity away from San Antonio, there is sure to be substantial pressure from within the community to revise the law.

One way to address the problem posed by Poindexter may be to consider the broad pattern of local economic development policy. American cities have long sought to provide an environment conducive to business, but in the past, government programs focused on the construction of public infrastructure—roads, bridges, wharves, streets, parks, schools, libraries, and utilities—and the protection of property and maintenance of order.²⁴ These programs provided public benefits generally, even as they enhanced the ability of a city's businesses to compete with firms elsewhere. In recent decades, however, governments have turned to providing direct assistance to individual firms and specific private projects. Local governments have used eminent domain

23. *Id.* at 403–04.

24. See, e.g., HENRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730–1870 (1983) (stating that government's "most important function" was to "create a predictable and consistent environment within which th[e] private market economy would flourish").

to clear and assemble land for developers, helped developers and firms secure a mix of public and private financing for individual projects, and provided tax abatements for certain economic sectors or even particular firms. In effect, the nature of local economic development policy has evolved from enhancement of the business climate generally to targeted assistance intended to retain or recruit individual companies or groups of companies.²⁵

In this context, it is significant that San Antonio's high living wage is imposed only on those firms that receive tax abatements. Such a linkage may reflect COPS' judgment that under those circumstances the wage will not coerce any firms since it is essentially up to each individual firm to decide for itself whether to accept the abatement/living wage package. This could undermine the economic recruitment and retention benefits of the abatement program, but at least it does not make firms worse off relative either to their external competitors or to wage regulations in the city prior to the adoption of the living wage law. Moreover, tying the living wage to the tax abatement may mean that local taxpayers are essentially paying the extra costs of the living wage. Alternatively, the abatement-living wage linkage may also reflect a distrust of targeted tax breaks and firm-specific incentives as an economic development technique.

The use of the tax abatement as an economic development strategy is indeed quite debatable.²⁶ As a means of recruiting or retaining business investment, the money lost to the municipal treasury as a result of the abatement might be better spent on improving municipal services, infrastructure, or schools, reducing local regulatory burdens, or reducing the tax rate generally rather than providing a benefit to a particular firm. But at a time of frenzied intermunicipal competition for jobs or investment, when the loss of (or failure to win) a large employer is trumpeted in the local headlines, local governments are under enormous pressure to use whatever tools are at their disposal to secure high profile investment.

The living wage, then, forms an ironic counterpart to the tax abatement. It, too, is an economic development strategy that attempts to use local government action to provide targeted benefits to a discrete group rather than to focus local government efforts on the improvement of local public services, the local physical environment and economic in-

25. See Briffault, *supra* note 16, at 421-22.

26. See, e.g., PETER K. EISENGER, *THE RISE OF THE ENTREPRENEURIAL STATE: STATE AND LOCAL ECONOMIC DEVELOPMENT POLICY IN THE UNITED STATES* 216-24 (1988).

frastructure, or the overall attractiveness of the city as an attractive place to live, work, or do business.

The choice between targeted incentives and benefits on the one hand and more diffuse development strategies on the other has been a central issue for local economic development policy. Targeting assistance leads to a more intensive interest group struggle, with the attendant danger of private capture, whether by particular sectors or firms or, as Poin-dexter implies, even by public interest groups with arguably misguided economic ideas. Moreover, there has been a new interest, epitomized by the rise of BIDs in the enhancement of basic local services and the role of improved public safety, sanitation, schools, and public amenities—including the parks that are Buzbee's focus—in recruiting and retaining business investment. On the other hand, focusing solely on improving public services and amenities generally raises the danger of doing too little to compete with communities that are able to use abatements or other targeted incentives to woo investment. So, too, relying on improvement in general economic conditions may seem inadequate to those groups interested in steering some of the benefits of growth to the poor and low-wage workers.

The overall economic decline of our central cities, and the growth of income inequality, even within cities with stable or growing economies, suggests that the cities did not figure out how to resolve the question of local economic development in the late twentieth century. It, thus, remains another central issue for the city of the twenty-first century.