

Sprawl's Shepherd: The Rural County

Michelle Wilde Anderson*

On the far side of World War II, America commenced a revolution in land use. Between 1945 and 1960, something in the order of ten million single-family homes were constructed in suburban subdivisions on land at the urban fringe and in rural areas that was unincorporated prior to, if not after, its development. If counties had exercised stronger land use control over these areas, might our development patterns have turned out differently? What do we know of land use planning by counties, and what role did that legal development play in twentieth-century urban sprawl?

Our information about county land use planning is limited, but based on available research, this Essay argues that counties played an important role in passively enabling, if not actively courting, suburban development on greenfield (that is, undeveloped) sites. Counties were, in short, sprawl's shepherd. Other factors—like housing need, housing costs, consumer preferences, racial discrimination, lending practices, and government subsidization of mortgages and transportation networks—generated suburban development proposals, but the nature of county land use authority and engagement led those projects to seek rural pastures.

This Essay uses the occasion of the one-hundredth anniversary of the California Law Review to consider these questions. It uses a 1938 article published in the journal to glimpse early ideas on rural and county land use control and to provide an initial assessment of how far county land use planning has come, or failed to come, in the decades since.

Copyright © 2012 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* Assistant Professor of Law, University of California, Berkeley, School of Law. Senior Articles Editor, *California Law Review*, 2003–04. Research and analysis by Berkeley Law student Tony LoPresti made a significant contribution to this Essay. Holly Doremus, Dan Farber, Andrea Peterson, and Bill Falik offered wise comments and questions. I am also grateful for technical assistance from Leslie Stone.

Introduction.....	366
I. Early Rural Zoning and Zoning by County Governments.....	369
II. The Sprawling Postwar County.....	372
Conclusion	379

INTRODUCTION

In 1938, thunderclouds of black soil were still tumbling across the Southern plains, destroying the crops, structures, and lungs of everything in their path.¹ That poor land use decisions could lead to environmental catastrophe was news, not paranoia. Meanwhile, the country was poised in a fragile recovery from the Great Depression, which had strained the local public fisc with property tax delinquencies and other blows to revenue.² That local governments could not afford to spend public funds unwisely was self-evident. The streams of migrant families displaced from rural areas by both the Dust Bowl and the Depression made a third truth apparent as well: great human suffering attended the settlement of unviable land.³

For some commenters in the Dirty Thirties, diffuse and ill-considered land development seemed culpable in all three of these hard realities. An agricultural economist and attorney named Ralph B. Wertheimer, for instance, penned a 1938 article in the *California Law Review* (CLR) called the *Constitutionality of Rural Zoning*, arguing that better land use controls were needed to mitigate the environmental harms of erosion and land waste, the fiscal strain and inefficiencies of serving such areas, and the social harms of isolated and untenable rural homesteads.⁴ Rural zoning, he argued, could ameliorate these hardships by confining development to existing urban areas and prohibiting new settlement on land with poor or depleted soils.⁵ Counties would adopt such zoning regimes to govern their unincorporated territory—that is, land outside the boundaries of an incorporated municipality.⁶

1. See TIMOTHY EGAN, *THE WORST HARD TIME: THE UNTOLD STORY OF THOSE WHO SURVIVED THE GREAT AMERICAN DUST BOWL* (2006); DONALD WORSTER, *DUST BOWL: THE SOUTHERN PLAINS IN THE 1930S* (1979).

2. See BECKY M. NICOLAIDES, *MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING-CLASS SUBURBS OF LOS ANGELES, 1920–1965*, at 150–52 (2002) (describing the nationwide escalation in local tax delinquencies, which pushed many American cities to the brink of bankruptcy in the 1930s); RONALD C. TOBEY, *TECHNOLOGY AS FREEDOM: THE NEW DEAL AND THE ELECTRICAL MODERNIZATION OF THE AMERICAN HOME* 128–29 (1996) (describing soaring rates of tax delinquencies between 1932 and 1935, which led the California legislature to declare a sixty-day moratorium on tax collection in 1933).

3. See JAMES N. GREGORY, *AMERICAN EXODUS: THE DUST BOWL MIGRATION AND OKIE CULTURE IN CALIFORNIA* (1989); JONATHAN RABAN, *BAD LAND: AN AMERICAN ROMANCE* (1997); WORSTER, *supra* note 1.

4. Ralph B. Wertheimer, *Constitutionality of Rural Zoning*, 26 CALIF. L. REV. 175, 176–81, 185–202 (1938).

5. See *id.* at 175–76.

6. In most states, nonmunicipal land is “unincorporated”—that is, it lies outside of an incorporated municipality and thus relies on the counties for a single layer of direct, general-purpose

Wertheimer's ideas tell us something about his times, but more intriguing still are the questions they raise about the decades that came after him. Just seven years after he wrote, on the far side of World War II, America commenced a revolution in land use. Between 1945 and 1960, something on the order of ten million single-family homes were constructed in suburban subdivisions that lay beyond the grid of municipal infrastructure on land that was unincorporated prior to, if not after, its development.⁷

If counties had heeded Wertheimer's call for stronger land use controls at the urban fringe and in rural areas, might things have turned out differently? The present Essay uses the occasion of *CLR*'s one-hundredth anniversary to consider what became of land use planning *by counties*, and what role that legal development played in the chemistry of twentieth-century urban sprawl. It uses Wertheimer's article to glimpse early ideas on rural and county land use control and to provide an initial assessment of how far county land use planning has come, or failed to come, in the decades since.

Scant attention has been paid to land use policy by county governments, as either a modern or historical matter. Yet counties matter to land use and local government law—for what they are today, for what they have and have not been in the past, and for what they could become. Counties can influence land use policy in two distinct respects. The first is planning in unincorporated areas, which rely on counties or their subdivisions (i.e., townships) as their only general-purpose local government. The large majority of American states have considerable amounts of unincorporated land,⁸ and that land is populated by varied households, whether rich, poor, rural, or suburban.⁹ The second relevant

local government, including the exercise of police powers and policy making. In a smaller set of states, primarily Midwestern ones, counties are divided into subdivisions called townships or unincorporated towns, which govern all nonmunicipal land and serve as an added general purpose local government, thus giving these residents two tiers of general purpose local government (township and county). See 1 U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, at vi (2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf>. Counties and county subdivisions (like townships) are importantly similar for purposes of the present account, and thus the term “counties” will stand in for “counties and county subdivisions” in this Essay.

7. ADAM ROME, *THE BULLDOZER IN THE COUNTRYSIDE: SUBURBAN SPRAWL AND THE RISE OF AMERICAN ENVIRONMENTALISM* 88 (2001).

8. All land in the United States is located within a county. A small minority of counties, however, lack unincorporated land for one of three reasons: (1) the state lacks general purpose, elected county governments or county subdivisions (as in Rhode Island, Connecticut, and most of Massachusetts), (2) the city and county governments are consolidated (as in Hawaii, and in scattered cities like San Francisco, Denver, and Baltimore), or (3) the state has separate, functioning county governments, but it also has one or more incorporated, lower tier, general purpose governments (cities, towns, boroughs, etc.) over all territory within the state (as in New Jersey and Pennsylvania). See generally 1 U.S. CENSUS BUREAU, *supra* note 6 (cataloguing the structure of American local government nationwide).

9. As I have argued in prior work, to the extent that scholarship acknowledges unincorporated areas, it presumes that they are rural, with the exception of some middle- or upper-class suburban subdivisions near cities. Such assumptions overlook thousands of high-poverty unincorporated communities located just outside city boundaries. For a much more thorough account of the extent of

scale of land use controls is county-wide planning—that is, county authority to enact land use plans for its entire territory, including incorporated areas. In recent years, county-wide planning has received greater attention as some policy makers and scholars have sought regional growth control through comprehensive metropolitan planning by county governments.¹⁰

The present Essay focuses on county planning in unincorporated areas in order to preserve Wertheimer's focus on rural areas, while also seeking to understand the dynamics of sprawl and development at the urban and suburban fringe. I focus on unincorporated status immediately prior to or at the time of initial development, even though such land might become part of a municipality through incorporation or annexation at the time of development or at some point thereafter. Sprawl, after all, becomes an accomplished fact after land is first developed even if that property later joins or becomes a city.

Our information about county land use planning is limited, but based on available research, this Essay argues that counties played an important role in passively enabling, if not actively courting, suburban development on greenfield (undeveloped) sites. Counties were, in short, sprawl's shepherd. Other factors—like housing need, housing costs, consumer preferences, racial discrimination, lending practices, and government subsidization of mortgages and transportation networks—generated suburban development proposals, but the nature of county land use authority and engagement led those projects to seek rural pastures.

Part I of this Essay describes the state of rural zoning and land use controls by counties in the late 1930s through the window of Wertheimer's article and other historical accounts. Part II considers the development of county land use policy in the decades since and its relationship to suburban sprawl. I argue that weaker systems of planning and enforcement at the

development on unincorporated land at the urban fringe and the understudied importance of county governance of these areas, see Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1100–12, 1133–58 (2008) [hereinafter Anderson, *Cities Inside Out*]; Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 935–40, 979–95 (2010).

10. See, e.g., Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 979–95; Andrew Auchincloss Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101 (2004); David J. Harmon, Comment, *Problems and Opportunities for Progressive Comprehensive Land Use Planning in Richland County, South Carolina After McClanahan v. Richland County Council*, 54 S.C. L. REV. 837 (2003); Jeff LeJava, Comment, *The Role of County Government in the New York State Land Use System*, 18 PACE L. REV. 311 (1998). Several states have mandated or authorized comprehensive planning at the county level. See Harmon, *supra*, at 845–47; LeJava, *supra*, at 324–25. States are increasingly guiding county governments to assume a regional coordination role, but strictly limiting their authority to enforce the comprehensive plans that result against constituent municipalities. LeJava, *supra*, at 328–29; see Lundgren, *supra*, at 144 (noting that Pennsylvania's delegation of authority to counties is advisory only); see also Brian Goldberg, *New Reactions to Old Growth: Land Use Law Reform in Florida*, 34 COLUM. J. ENVTL. L. 191, 200 (2009) (noting that although Florida does require local compliance with its comprehensive land use plans, local governments can amend the plans as necessary to cater to development proposals).

unincorporated urban fringe, as well as counties' fiscal and political incentives, may have drawn subdivision development to this more loosely regulated edge. In conclusion, the Essay frames some questions worth considering in the modern era of county land use controls.

I.

EARLY RURAL ZONING AND ZONING BY COUNTY GOVERNMENTS

In 1917, a scholar referred to counties as “the ‘dark continent’ of American politics.”¹¹ Even by the late 1930s, despite some progress, “rural local government in the United States ha[d] failed to keep pace with the improvements in government organization and procedure which ha[d] been made in the national, state, and municipal fields.”¹²

Among the significant improvements in organization and procedure during this period were land use controls. By the 1930s, it was well understood that private market discipline alone could not ensure healthy housing and sensible use of land. From the conservation of public lands “as civic and utilitarian *res publica* and as a domesticated sublime”¹³ to the enactment of building and sanitation codes to pacify the dangers of tenement housing,¹⁴ we were decades into policy experimentation with conservation and land use controls.¹⁵ Urban zoning was already well established: all but four cities with populations of at least 100,000 had adopted zoning ordinances¹⁶ to protect the “privilege of quiet and open spaces for play, enjoyed by those in more favored localities” and limit the “congestion, disorder, and dangers which often inhere in unregulated municipal development.”¹⁷

Though widespread, land use controls remained limited in key respects. When Wertheimer authored his article in 1938, land use controls were

11. See Clyde F. Snider, *County and Township Government in 1935–36*, 31 AM. POL. SCI. REV. 884, 884 (1937) (citing H.S. GILBERTSON, *THE COUNTY: THE “DARK CONTINENT” OF AMERICAN POLITICS* (1917)).

12. *Id.* at 884.

13. See Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1159, 1137–59 (2010) (capturing, in moving language, the development of conservationist ideas and policies in the nineteenth and early twentieth centuries).

14. See ROY LUBOVE, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890–1917* (1962) (a history of building and sanitation codes in New York City); JACOB A. RIIS, *THE BATTLE WITH THE SLUM* 19 (1914) (describing the “filth, overcrowding, lack of privacy and domesticity, lack of ventilation and lighting, and absence of supervision and of sanitary regulation” in the late nineteenth century).

15. Roy Lubove, *The Roots of Urban Planning*, in *THE URBANIZATION OF AMERICA: AN HISTORICAL ANTHOLOGY* 315–29 (Allen M. Wakstein ed., 1970).

16. Wertheimer, *supra* note 4, at 183. Between New York City’s adoption of the first comprehensive zoning plan in 1916 and a Natural Resources Board assessment of zoning through 1930, more than 1,100 municipalities had written zoning ordinances. *Id.* (citing Certain Aspects of Land Problems and Government Land Policies, Supplementary Report of the Land Planning Committee to the Natural Resources Board (1935) Part VII, at 125–26).

17. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392–94 (1926).

predominantly employed only in urban areas, by municipal governments, and at the local (not metropolitan) scale. In rural areas under the unincorporated jurisdiction of county governments, such regulations remained rare and novel. Only twelve states had authorized counties or regions to establish planning commissions or enact zoning laws, and only Florida had granted such powers to every county in the state.¹⁸ California had granted police powers and zoning authority to its counties, but none as yet had interpreted their authority to include rural zoning.¹⁹ In the entire country, only forty-two counties (out of about 3,000 counties total) had adopted zoning ordinances by 1936.²⁰

Among these pioneering counties, land use controls were “confined almost exclusively to urban and suburban areas outside incorporated municipalities.”²¹ Indeed, the phenomenon of rural zoning by counties was so new that Wertheimer’s 1938 article announced it as an innovation hot off the legislative press from Wisconsin—one so novel that it required a defense of its state and federal constitutionality for application in California.²² According to Wertheimer, Wisconsin’s 1935 rural zoning laws were perhaps the first in the nation to bring full regulation of use and form to rural unincorporated territory.²³ These laws closed more than five million acres (nearly one-sixth of the state’s dry land) to legal settlement and agriculture.²⁴

Wertheimer’s argument for rural zoning articulated an early vision of the environmental, fiscal, and human values served by the concentration of urban development. He advanced the following justifications for rural land use controls:

[the] prevention and control of isolated and scattered settlement with its attendant evils of disproportionately high governmental expenditures for roads and schools, prevention of tax delinquency, curbing serious fire hazards, making police surveillance more effective, combatting inadequate regulation of public health, overcoming the lack of social and community facilities available to more compact settlement, control of erosion, conservation of natural resources and the desirability of making the “best use” of land.²⁵

The argument that unplanned, irregular settlement incurs public costs and environmental harms is a familiar criticism of sprawl. Such development requires expensive and diffuse networks of infrastructure for transportation,

18. These included California, Florida, Idaho, Illinois, Indiana, Michigan, New Hampshire, New Jersey, Tennessee, Virginia, Washington, and Wisconsin. *See* Snider, *supra* note 11, at 896–97; Wertheimer, *supra* note 4, at 177–79.

19. Wertheimer, *supra* note 4, at 177–79.

20. Snider, *supra* note 11, at 898.

21. *Id.*

22. Wertheimer, *supra* note 4, at 177–85.

23. *Id.* at 175 n.2.

24. *Id.* at 175.

25. *Id.* at 176.

water, and wastewater disposal, and it consumes natural resources, including land and open space. Wertheimer's answer, that such settlement "cr[ie]d out for planning, for social direction of individual efforts"²⁶ is equally familiar: reform of land use planning is the primary setting in which we debate how to make suburban growth more environmental, more fiscally responsible, and more equitable.

Indeed, Wertheimer's publication date marks a fulcrum of transition in which one set of public costs to diffuse development were understood, but others—most importantly, the greenhouse gas emissions caused by sprawling development and their implications for climate change—were as yet unknown.²⁷ His assessment of the environmental risks attendant to the failure to zone in rural areas was infused with the pain of the Dust Bowl and great fear for the future. He wrote that we were "squandering our soil resources more rapidly than any other nation civilized or barbaric," in ways that risked "catastrophic destruction wholesale throughout the land."²⁸ Rural zoning by counties, he argued forcefully, was critical for America's environmental future.

Wertheimer believed that counties could use rural zoning for three purposes: (1) to consolidate development near urban centers, thus increasing the efficiency of infrastructure and services; (2) to prevent unsuccessful settlement and tax delinquency that places a strain on the county coffers; and (3) to conserve natural resources for future economic exploitation and recreational enjoyment.²⁹ Key features of rural zoning included controls on "wild-cat land promotion schemes"³⁰ that would draw settlers to far-flung or unviable areas.

Indeed, the rural land use controls profiled in his article designated certain zones where human settlement would be prohibited, as well as zones to be spared of any use at all, including mining, forestry activities, and agriculture.³¹ This feature of rural zoning would not have survived over time, as it turned out, given developments in takings law that required local governments to pay just compensation to landowners faced with regulations that barred any use of their land.³² Nonetheless, Wertheimer's proposal offers a historically intriguing stewardship and specialization agenda for the preservation of fertile topsoil and other natural resources. His ideas would have put county governments in the business of large-scale land conservation.

26. *Id.* at 177.

27. Alexandra Lampert, *California's Fight Against Global Warming: Finally Getting Smart About Sprawl?*, 20 STAN. L. & POL'Y REV. 193 (2009).

28. Wertheimer, *supra* note 4, at 189.

29. *Id.* at 185–89.

30. *Id.* at 196.

31. *Id.* at 177–79.

32. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (establishing the "total takings" test to determine whether a regulatory action prevents all use of land, thereby constituting a regulatory taking that requires just compensation).

Counties' role evolved differently, however. Sprawl bloomed across the country during the postwar years. Did county land use policy have something to do with it?

II.

THE SPRAWLING POSTWAR COUNTY

What became of Wertheimer's call for land use planning of rural areas by county governments? How has county land use planning changed since the 1930s? If we accelerate to the present, the principle of rural zoning is ubiquitous. By 1995, arguably the only true free land markets in the United States—unfettered by laws governing zoning, subdivision, infrastructure, building form and methods, and the like—were in the impoverished rural borderlands of unincorporated Texas.³³ Rudimentary land use controls, primarily related to infrastructure, soon penetrated even this final frontier, ushered in by outbreaks of disease and exposés of the human and environmental costs of the absence or improvisation of wastewater and water infrastructure.³⁴

Although unincorporated land on the whole remains less strictly regulated than municipal land, most states today have granted counties the authority to deploy building and land use regulatory tools, including zoning, on their unincorporated land.³⁵ Some rural counties continue not to exercise such authority,³⁶ but it is fair to say that today, zoning of rural, unincorporated areas by counties is the norm.

But what did county land use controls look like in between the Dirty Thirties and the Millennium? Most importantly for the present account, what did they look like in the postwar decades, when subdivisions were multiplying

33. See Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 182 (1995).

34. See PETER M. WARD, *COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO: URBANIZATION BY STEALTH* 100–01 (1999) (describing the passage of model subdivision rules in Texas in 1989, which tied eligibility for state infrastructure dollars to county passage of subdivision codes requiring water and wastewater installations); Anderson, *Cities Inside Out*, *supra* note 9, at 1128–29.

35. See, e.g., Anderson, *Cities Inside Out*, *supra* note 9, at 1144; Lynn Blais, *LOCAL GOVERNMENT LAND USE AUTHORITY: A SURVEY OF 10 STATES* (forthcoming 2012) (on file with author) (describing county land use powers in Alabama, Alaska, California, Florida, Illinois, Montana, New York, Oregon, Texas, and West Virginia).

36. In such counties, statewide building standards and infrastructure codes would now apply, but counties have not added supplemental zoning or land use controls for unincorporated development. See, e.g., ADRIAN X. ESPARZA & ANGELA J. DONELSON, *COLONIAS IN ARIZONA AND NEW MEXICO: BORDER POVERTY AND COMMUNITY DEVELOPMENT SOLUTIONS* 70–74 (2008) (discussing particular New Mexico counties where “little or no land-use regulation applies to rural areas”); Michael T. White, *Curious County Zoning Law Gets Curiouser*, 645 J. MO. B. 300, 300 (2008) (noting that unincorporated areas of Missouri remain mostly unregulated by zoning laws; specifically, 84 of 114 counties have no zoning laws for unincorporated areas).

like cells and encasing tens of millions of rural acres in concrete, asphalt, and sod?

Our knowledge of the historical development of county land use planning on unincorporated land is sparse and irregular. Scholars have largely failed to look specifically at county land use policy over unincorporated areas, and county administration more broadly, as an ingredient in postwar (sub)urban development.³⁷ As part of a larger failure to differentiate counties from cities,³⁸ literature on land use planning and local governance in the age of sprawl generally fails to study county land use planning or investigate whether and how the economic, administrative, legal, or environmental conditions differ between cities and counties. We do have some data points, however. Using those, I offer here a necessarily impressionistic representation of the development of county land use controls and their impact on suburban and exurban development,³⁹ with theorization as necessary to fill gaps in the accessible historical record.⁴⁰ Of course, these observations would not hold in every county—as noted, some counties lack unincorporated land, and others do not have open land susceptible to low-density development. Some counties have been strong land use regulators for decades. Moreover, every region had its own development dynamics rooted in state and local law and politics. Those caveats in mind, I nonetheless offer some observations to explore counties' distinctive place in the history of twentieth-century land use.

At the broadest level, we know that states acted slowly and varied widely in conferring land use authority to counties, and counties were slow to use those powers to limit development.⁴¹ The reason for this delay is that, at the

37. Notwithstanding their other considerable merits, the dominant accounts of the history and causes of suburbanization and sprawl in the United States make no mention of any particular role for county governments. *See, e.g.*, ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 96–112 (2005); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). Some lesser-known accounts, however, have made important contributions to our understanding of land use controls in unincorporated areas. *See* TOM DANIELS, *WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE* (1999) (taking account of county land use planning as an element of governance distinct from municipal controls or metropolitan land use planning in general); PAUL G. LEWIS, *SHAPING SUBURBIA: HOW POLITICAL INSTITUTIONS ORGANIZE URBAN DEVELOPMENT* (1996) (carefully considering counties as distinctively relevant local governments in guiding and managing suburban growth in Colorado and Oregon).

38. *See* Anderson, *Cities Inside Out*, *supra* note 9, at 1120–24, 1140–45.

39. “Exurbia” is generally defined as prosperous rural commuter areas just beyond the contiguous urban and suburban area. *See* AUGUSTE SPECTORSKY, *THE EXURBANITES* (1955).

40. On this point, I can unfortunately quote a caveat offered by Paul Lewis, as long ago as 1996, that remains true today: “The scant literature on county governments in metropolitan areas, . . . particularly with respect to land-use issues, does not allow decisive generalizations to be drawn about the role of such institutions.” LEWIS, *supra* note 37, at 37.

41. *See, e.g.*, LeJava, *supra* note 10, at 319–20 (noting that counties in New York played a role in land use since the 1920s and 1930s, but have only slowly expanded that role over the last thirty-five years); David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon’s Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 674–76 (2000) (noting that county governments in North Carolina did not

outset, the concept of zoning itself was explicitly local in scale and municipal in forum. Early rationales for zoning were simply seen as unrelated to those matters lying within the purview of county governments and rural areas. Zoning had developed in response to early industrialization, which created urgent health, safety, and quality-of-life impacts in cities.⁴² Nuisance law, covenants, and other existing tools for controlling land use had proven inadequate to combat the urban concentration of both housing and industry.⁴³ These controls only reached interactions among neighbors, and thus affected land use at a parcel-by-parcel level. Early zoning laws telescoped out only one level, moving from the parcel-by-parcel scale to the zone-by-zone scale, where land use controls could be applied to larger units of urban territory like blocks and neighborhoods. This was fundamentally a local endeavor, not a regional one, just as it was fundamentally an urban endeavor, not a rural one. For reasons of efficiency (among other values), states delegated zoning powers to their cities as the legal entities closest to industrial nuisances.⁴⁴ The most important rationales for Euclidean zoning⁴⁵—to separate noxious industry from housing, to create pleasant and safe residential communities—seemed irrelevant in rural, agrarian settings, and states and counties were slow to conceive of the value of zoning on unincorporated land.

One consequence of counties' delay in imposing land use controls on unincorporated land may have been, cyclically, the heightened need for such controls. Weaker land use controls on unincorporated land attracted development, which "follow[ed] the [path] of least resistance to the countryside."⁴⁶ Although some greenfield land lay within the jurisdiction of

receive the authority to zone land until 1959 (compared to 1923 for cities), and the power to regulate subdivisions and carry out building inspections came even later). We can also make the inference of delayed (or at least unenforced) county land use controls from the existence of the thousands of unregulated, unincorporated subdivisions that grew up across the South and the West during the twentieth century. See Anderson, *Cities Inside Out*, *supra* note 9, at 1100–12; Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 937 n.15; see also ESPARZA & DONELSON, *supra* note 36 (identifying the unincorporated subdivisions of Arizona and New Mexico); WARD, *supra* note 34, at 23–32, 50–57 (documenting *colonias* neighborhoods in Texas); Vinit Mukhija & Paavo Monkkonen, *What's in a Name? A Critique of 'Colonias' in the United States*, 31 INT'L J. URB. & REGIONAL RES. 475, 476 (2007) (documenting *colonias* communities in Southern California); *infra* text accompanying notes 52–61 (describing suburban growth with lax or absent subdivision controls on infrastructure).

42. See Lundgren, *supra* note 10, at 119.

43. *Id.* at 119–20.

44. *Id.* at 126.

45. Euclidean zoning, named for the Supreme Court's decision upholding such regulations, is characterized by the segregation of land uses into defined geographic districts and limitations on development activity permitted within each type of district. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

46. Lundgren, *supra* note 10, at 137–38; see also William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 77–91 (1999) (carefully analyzing the political economy of sprawl, including developers' incentives to build on greenfields if infrastructure costs are borne by the public, and county and local governments' incentives to permit that development if the "public" carrying most of those costs is federal and state taxpayers).

incorporated cities, other greenfields were unincorporated.⁴⁷ Developers had reason to favor this unincorporated land, which offered large sites with few neighbors to contest development. In addition, counties' weak or nonexistent role in both annexation and incorporation law meant that unincorporated property often offered developers jurisdictional options: at the time of development, the land could remain unincorporated, or it could become incorporated through annexation to an existing city or the formation of a new city.⁴⁸ We lack good data on the issue, but we can reasonably guess that planning permits under such circumstances came faster and at lower cost, and developers could decide whether to bargain with cities, counties, or both.

Greenfield land characterized by county land use jurisdiction also offered something more than administrative ease for developers: it meant weaker subdivision requirements regarding wastewater disposal infrastructure and other costly features.⁴⁹ Development on unincorporated county land minimized infrastructure costs for landowners, because they could obtain permits for massive suburban developments that relied only on septic tank systems.⁵⁰ From 1945 to 1960, the number of homes with septic tank systems rose from 4.5 million to 14 million.⁵¹ Between 1946 and 1960, more than half of the new population of metropolitan areas relied on septic tanks.⁵² Septic tanks were unnecessary in urban areas served by sewage lines, so the proliferation of septic systems indicate the degree to which postwar sprawl occurred on rural land.

For decades, the threat that the rising use of septic tanks posed to farmland and more rural areas was largely overlooked.⁵³ Public health and environmental problems from soil and water contamination quickly emerged in septic tank suburbs, but the most densely settled areas presented the most imminent dangers.⁵⁴ Further, city governments in larger metropolitan areas had public health officials on staff who recognized the problem and took steps to ban or regulate septic tanks.⁵⁵ As late as 1965, when the Department of Housing and Urban Development finally responded to the increasing crisis by prohibiting septic tanks in subdivisions, they included an exemption for areas

47. See, e.g., LEWIS, *supra* note 37, at 95–97 (describing growth pressures on unincorporated land in Colorado and Oregon and the range of county responses to that pressure).

48. See Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 979–84.

49. Anderson, *Cities Inside Out*, *supra* note 9, at 1144. Among the most significant subdivision requirements unrelated to water and wastewater are park dedication requirements. Here too, counties are much less likely than cities to require the dedication of recreational open space in subdivisions. See *id.*

50. ROME, *supra* note 7, at 87–118.

51. *Id.* at 88.

52. MARTIN V. MELOSI, *THE SANITARY CITY: ENVIRONMENTAL SERVICES IN URBAN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 193 (abridged ed., 2008).

53. *Id.* at 91–103.

54. ROME, *supra* note 7, at 91.

55. *Id.* at 95–97.

beyond the reach of municipal sewers.⁵⁶ Developers migrated to those areas—by definition more rural—where they could still build using septic tanks, because costs were a fraction of the capital required for sewage-treatment systems.⁵⁷ The public eventually bore the costs of this weakness in rural land use controls, as major public subsidization was required to retrofit suburbs with safer wastewater systems—most notably through billions of dollars in federal grants made pursuant to Title II of the Clean Water Act.⁵⁸

Once this dynamic was set in motion (that is, weak land use controls attracting private development), counties may have developed incentives to actively perpetuate the dynamic by enabling sprawling subdivision and retail development on unincorporated land near city employment centers. In particular, counties found they had two powerful reasons not to take up zoning authority or strong land use controls: (1) their need for property tax revenue to fund county government, and (2) the increasing levels of responsibility delegated from the state down to understaffed and overburdened county administrations.

Taking the first of these reasons, counties had economic incentives to encourage the development of retail and single-family housing—the lower-density growth that characterizes sprawl.⁵⁹ Retail and commercial development imposed limited public service costs, and in most states, brought in critical sales tax revenues.⁶⁰ Residential development could be attractive as well, if its public service costs could be held down. When permitting housing development on greenfield sites, the most significant public expenditure to follow was public education for new residents.⁶¹ Where local governments restricted that development to large-lot subdivisions, relatively lower numbers of school-age children followed, and the higher property tax from the more expensive lots was better able to cover the costs of education imposed by the new residents.⁶² Smaller lots and multifamily housing, by contrast, were more

56. *Id.* at 111.

57. *See id.* at 114–17.

58. *See* Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 998; Clean Water Act tit. II, §§ 201–219, 33 U.S.C. §§ 1281–1301 (2006) (the Title II sewage infrastructure grants program). Title II has been largely replaced by the Title VI State Revolving Fund. *See* Clean Water Act tit. VI, §§ 601–607, 33 U.S.C. §§ 1381–1387.

59. *See* DANIELS, *supra* note 37, at 140–43 (1999). Scholars have long recognized such preferences in the context of cities. They are generally referred to as the “fiscalization” of land use, i.e., shaping zoning law to draw or deter development according to its estimated cost-revenue impacts on the jurisdiction. *See* Edwin S. Mills & Wallace E. Oates, *The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, in *FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES* 1, 6–11 (Edwin S. Mills & Wallace E. Oates eds., 1975).

60. *See, e.g.*, Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 197–204 (1997) (describing the dependence of local governments on sales tax revenues in California, where strict caps on property taxes limited the revenue potential of residential development).

61. DANIELS, *supra* note 37, at 141.

62. *Id.*

likely to leave a negative cost-revenue picture—that is, lower property tax yield per parcel would fall short of funding education costs for a higher number of children.⁶³ Such fiscal incentives applied to all local governments, but there is reason to suspect they were even more influential for counties' land use policy in unincorporated areas due to counties' even smaller, tighter budgets for services on unincorporated land.⁶⁴

If cost-revenue projections may have made counties susceptible to the attractions of suburban development, so too might their administrative burdens and capacities. Over the course of the twentieth century, counties acquired a growing portfolio of responsibilities. In the 1950s and 1960s, constituent citizens and municipalities developed a taste for new countywide programs, including consumer protection, energy conservation, job training, park and library systems, and the like.⁶⁵ From 1980 through 1997, federal and state governments decentralized a number of economic development and service provision responsibilities to counties.⁶⁶ Over those seventeen years alone, county governments grew faster than any other general-purpose government, requiring a 31 percent increase in the number of county employees.⁶⁷ These increased responsibilities imposed additional fiscal burdens, particularly in more rural counties.⁶⁸ Such strain further encouraged counties to deemphasize their role as a land use regulator, both because they had to prioritize resources for more immediate service provision needs, and because a less restrictive land use regime allowed them to compete for lucrative development that could increase revenue.⁶⁹

Weak land use controls also operated in synch with other domains of state and local government law that gave unincorporated land an even stronger advantage over municipal land in the competition for development. Boundary change laws, for instance, could have allowed cities to tax development at their fringes by giving cities broad annexation rights. But the consent-based annexation regime that states settled on instead constrained municipalities' abilities to capture growth at their fringes through annexation.⁷⁰ States then

63. *Id.*

64. Herein lies one of many things we have yet to understand about county governments as distinct from municipalities: the rules and peculiarities of their finances, which must operate in unincorporated and countywide domains, as well as the political economies that select among competing expenditures.

65. See HERBERT S. DUNCOMBE, *MODERN COUNTY GOVERNMENT* 29–31 (1977) (providing a list of county service responsibilities added in these decades and empirical analysis of the transfer of functions from the subcounty level to the county level during this period).

66. See Linda Lobao & David S. Kraybill, *The Emerging Roles of County Governments in Metropolitan and Nonmetropolitan Areas: Findings From a National Survey*, *ECON. DEV. Q.* 247–48 (2005).

67. *Id.* at 246.

68. *Id.* at 247–48.

69. See *id.* at 248 (noting that the increase in governmental responsibilities “places ever-greater pressure on localities to engage in competitive economic development activities”).

70. See, e.g., Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 *URB. LAW.* 247,

reduced the possibility of higher municipal property taxes even more by making incorporation of new suburban municipalities both inexpensive and legally straightforward.⁷¹ Since unincorporated areas could resist annexation by larger cities by remaining under county rule or incorporating defensively, they could keep down property taxes in suburbs over both the short and long runs. Fiscal pressures and administrative burdens, in combination with other factors, thus incentivized pro-growth land use policies that attracted new construction to the urban fringe, centrifugally propelling growth away from city centers.⁷²

It is hard to know exactly when the shift to greater sophistication in land use planning by counties began. I hope that a legal historian will one day tell us. We have some indications that the era of modern county land use planning, which was described at the beginning of this Part, began in the late 1970s and the 1980s. At this point, many states and counties began to engage in some form of regional planning, and subdivision controls on unincorporated land became stronger.⁷³

Concern over sprawl in the environmental community surely contributed to these reforms. But so too, reduced infrastructure subsidies to county governments by the federal government may have contributed to increasing sophistication in county planning. Falling levels of intergovernmental funding for infrastructure initiated a “pay for what you get” ethos in local finance for cities and counties both, in which local governments transferred the costs of collective infrastructure to private developers seeking permits to build new subdivisions.⁷⁴ Like cities, counties had to ensure that their neighborhoods would meet statewide health and safety standards and environmental controls, and they had to provide transportation access and roadway infrastructure for basic public safety.

Under this new pay-for-what-you-get regime, counties lost one of their main competitive advantages over cities in the fight for middle-class development. If a developer can choose between a local government that can

247–48 (1992) (describing that annexation laws in nearly every state require the consent of residents or owners, and the concern that this procedure impedes municipal growth).

71. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 72–81 (1990) (describing the dominance of local consent and self-interest in determining municipal boundaries, as determined by both incorporation and annexation law).

72. In prior work, I have referred to an “economic gravity pattern of urban development” in which “employment magnetism, housing necessity, and suburban aspiration” incentivized development in unincorporated areas just outside city boundaries. See Anderson, *Cities Inside Out*, *supra* note 9, at 1129–30.

73. See DANIELS, *supra* note 37, at 161; Goldberg, *supra* note 10, at 197–98 (Florida’s Growth Management Act passed in 1985 after fifty years of unprecedented population growth); see also DUNCOMBE, *supra* note 65, at 203–11 (highlighting several examples of counties engaged in comprehensive planning and growth management, both county-wide and on unincorporated land alone).

74. Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 953–59; Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373 (2004).

supplement private infrastructure investment with public dollars (either from the existing local fisc or from the successful competition for intergovernmental grants) and a local government that cannot do so, then the first—more likely to be a city—is a better development partner. Cities have bigger revenues and more staff for competitive grant seeking; they are, quite simply, more sophisticated players when it comes to sharing public-private costs for infrastructure.⁷⁵

Whenever the precise point of transition in county land use planning, it would seem that between the 1930s and the 1980s, many states and counties did little to heed Wertheimer's call for strong land use controls on unincorporated rural property. I think it is fair to surmise that in many rapidly growing counties, a vacuum of land use controls may have drawn growth to unincorporated greenfield sites, contributing to the metropolitan expansion characteristic of twentieth-century sprawl.

None of this is to say, of course, that county land use policy singularly caused sprawl. Numerous other factors were also in play.⁷⁶ Many scholars have explored these motivations, providing some sense of proportion and interrelationships among them.⁷⁷ My argument here is simply that county land use planning of unincorporated areas—as distinct from land use planning in general, planning by municipalities, or countywide land use planning—warrants a place in the story as well. Once given this place, I think we'll find that the dynamics of twentieth-century sprawl involved the weakness of land use planning controls on unincorporated, rural land.

CONCLUSION

Combining an early concept of bounded urban growth with a preservation agenda for undeveloped areas, Wertheimer's article in *CLR* offered a fledgling policy agenda to control urban sprawl. What a prescient moment *CLR* thus captured: as early as 1938, a scholar offered a vision for serving environmental, fiscal, and human values through the concentration of urban development.

Now, more than seventy years later, Wertheimer might be impressed with the degree of land use planning on unincorporated land. Rural and suburban areas are today governed by a much more comprehensive network of state and local regulations. But if he were to judge our times more broadly against his purposes for rural zoning—urban containment, land conservation, strategic land settlement, efficient public investments in infrastructure—he would find little solace in the passage of time.

75. Anderson, *Mapped Out of Local Democracy*, *supra* note 9, at 996–1001.

76. See *supra* Part I.

77. See, e.g., BRUEGMANN, *supra* note 37, at 96–112 (critically presenting the primary accounts of why sprawl happens).

Misuse and waste of fertile topsoil did not turn out to be as harmful as a Dust Bowl writer might have feared, but the larger threat of land loss that Wertheimer dreaded certainly did come to pass. Perhaps that fact is best illustrated by the model state Wertheimer relied on for his analysis: Wisconsin. Between 1950 and 2002, Wisconsin lost more than 32 percent of its farmland to development.⁷⁸ By some estimates, the state has less than 0.5 percent of its original grassland ecosystem remaining, and less than 0.01 percent of its oak savanna acreage.⁷⁹ Of course, the very fact that development occurred at such a rate in a state where some counties had pioneered rural zoning shows that such laws could not alone have stopped the momentum of sprawl, and that rural zoning laws are limited by the geographic scope of their application and the particulars of their content.

Yet Wertheimer's analysis nevertheless draws our attention to zoning in rural areas and by counties as an important legal and institutional force in the story of postwar housing development. In so doing, it should refocus our attention on those same legal and institutional conditions today. I hope that our eventual understanding of these dynamics will be more precise than the generalized observations possible in this Essay. In particular, a political economy exploration of land use control in unincorporated areas will need to be sensitive to differences among counties, in particular, their attitude toward growth (including local financing laws that determine a county's incentives to enable suburban development); the location and quantity of unincorporated land; the level of urbanization in the county as a whole and in unincorporated areas; the balance of power between a county's incorporated and unincorporated constituencies; and other factors. "County" can mean many things: rich, poor, pro-growth, no-growth, rural, urban, and the spectrum of variation and interrelation across all of these.

Influenced by Wertheimer, I offered two propositions here as a modest step towards refining our discussion of county land use planning: (1) cities and counties are not interchangeable when it comes to land use control, and indeed the hydraulics between them are critical for understanding how development occurs at the fringe of incorporated land, and (2) modern land use control came later to rural areas that lay within the unincorporated jurisdiction of county governments. Both ideas belong in the conversation about the causes of urban sprawl.

78. Clean Water Action Council, *Land Use & Urban Sprawl*, CWAC.NET, <http://www.cwac.net/landuse/index.html> (last visited Jan. 5, 2012).

79. *Id.*