Land Use Planning on the U.S.-Mexico Border: A Comparison of the Legal Framework

Sergio Peña*

Abstract: Missing....

Introduction

The objective of this paper is to analyze the legal framework of land use planning in the United States and Mexico and its implications for developing a strategy for urban management in binational cities located along the U.S.-Mexico border. The importance of the topic is twofold. First, the theme of land use planning is relevant because land use is the “glue that ties together the environment and the economy” (Herzog, 2000:144). Therefore, an understanding of the subject in both countries is relevant for binational planning at the border. Second, the paper contributes to the understanding of the legal planning framework in both countries with regard to land use by identifying similarities and differences that can help to design coordinated urban planning policies.

The topic in itself poses a great challenge because of the existing differences between the two countries. The differences are not only in terms of the degree of development but also the form of government, legal traditions, etc. Whereas the United States has had more than two centuries of democracy, Mexico is only just beginning to experience true democracy. Additionally, the legal system of the United States is based on case law or common law while Mexico’s system is based on civil law. It is important to understand the legal framework in which both countries operate in order to develop a planning framework to manage urban growth problems associated with border cities.

Following Herzog’s (2000) model, land use decisions are an important element that affect the built environment (housing, economic activities, etc.) and the way urban systems operate and grow. At the same time, the built environment, a product of human action, impacts the natural environment (air, water, etc.). The impact of human action

*Peña is XXXXXXX Professor at El Colegio de la Frontera Norte, Tijuana, Baja California, Mexico???????????????
on the natural environment in both countries, referred as “transborder spillover” (Herzog, 2000; Blatter & Norris 2000), has become the focus of attention of policy makers in both countries particularly after the passage of the North American Free Trade Agreement (NAFTA). Policies to manage or minimize “transborder spillovers” such as—air pollution, untreated sewage discharges into rivers and oceans—must incorporate a land use component; therefore, it is important to understand the legal framework to identify the actors or levels of government who have the legal jurisdiction to make land use decisions.

The central argument of the paper is to emphasize that a key constraint to implementing a cross-border planning strategy is that local governments, particularly in Mexico, have very limited powers to engage in formal inter-local agreements that would enhance coordination. Therefore, the key issue to enhance cross-border coordination, from a legal perspective, is to develop a framework where municipalities are empowered to develop inter-local agreements. Decentralization of decision-making is emphasized in the paper as an important component that would help to enhance inter-local agreements.

The paper is divided into three sections. The first section offers an overview of the literature on land uses and the law. The second section analyzes the general legal framework of planning in the two countries from a constitutional perspective, including a review of the role of the three levels of government (federal, state and municipal) in land use decisions. Finally, the third and last section explores and speculates about challenges and opportunities for developing a cross-border strategy to manage urban growth.

**Land Use and The Law**

In recent years, many scholars have pointed out that a system of well-defined property rights is a necessary condition for a market economy to succeed (De Soto 2000, Holcombe, 1996). Land use policies such as zoning define rights of an owner over an asset (land) that can be put into economic use to generate wealth to the person who holds the rights. Two approaches are used to justify the imposition of regulation on land uses—the transaction costs approach and the property rights approach. Barzel (1997) distinguishes between the Walrasian and the property rights model to deal with economic transactions. In the Walrasian model of perfect competition, it is assumed that the parties involved are well-informed regarding the exchange, the good in question is homogeneous or identical, and the terms of the transaction are clear. In short, the seller and the buyer will not incur any extra cost to determine all the qualities and value of the asset; therefore, the asset (land) will be allocated to its highest value or use. Barzel (1997) concludes that if economic transactions were free of costs then institutions such as government would be “superfluous and irrelevant.” However, in the real world any exchange imposes transaction costs in the form of assessing the quality of the asset’s (land) suitability for alternative purposes, seeking information about prices, etc. According to Barzel (1997), in a market economy, land is an asset in which two types of property rights can be identified—the economic rights and the legal rights. Economic rights are the ends or the person’s ability to benefit from or enjoy the asset. Legal property rights are the means to achieve the ends. From the perspective of ends and means as described by Barzel (1997), the function of land use regulations, such as zoning laws, is precisely a means to define the economic rights of the owner of the
asset (Azuela, 1989 & Azuela & Duhau, 1993). In other words, land use regulation is “a method of clearly defining rights” (Holcombe, 1996) and reducing the transaction costs that an unregulated land market would impose on the agents involved in the transaction. The need to balance public and private interests is another approach for analyzing the function of land use regulations. The argument goes that when the owner of a piece of land exercises economic (property) rights, this may impose externalities on third parties, therefore, regulations of the uses of the property are needed as a means to balance the private and the public interest. In summary, land use regulations are also intended to protect individuals and the community from harm that may result from economic activities. Urban planning analyzed from the above perspective becomes an instrument with a dual function. On the one hand, it is the instrument to define the economic (property) rights of the asset by deciding the economic use of the asset—housing, industrial, commercial, recreational, etc. At the same time, planning becomes the instrument to balance the private and the public interest.

An implicit assumption of the above theoretical framework is that the agent in charge of enforcing the regulations has jurisdiction over the entire territory where economic transactions and activities take place. An important problem in managing binational cities such as those along the U.S.-Mexico border is that the laws and regulations fail to take into account that urban systems may overlap or extend beyond national boundaries. This paper points out that neither nation contemplates in its laws the possibility of granting local governments the power to enter into agreements with a foreign government, meaning that transboundary issues are part of the diplomatic agenda dealt with by federal agencies. As a practical matter, there are various state-to-state and local-to-local agreements that exist, apparently outside of the existing legal framework. Since no one has challenged their legality, they do exist in a de facto manner but it is important to formalize the de facto planning to deal with cross-border issues in a less uncertain environment. An important issue for the paper and future research is to explore how local municipalities engage in the decision-making process; decentralization of power is an important component to engage local municipalities.

**Decentralization: A Comparative Approach**

This paper makes use of Rodríguez’ (1997) decentralization framework to draw comparisons between the two countries, to begin analyzing the role that each level of government performs, and to discuss whether the current approaches could be redirected toward a convergence of objectives to facilitate cross-border planning. Rodríguez distinguishes two aspects related to decentralization—types and modes—and for each one creates a typology that can be useful to begin evaluating the planning approach in each nation.

The types of decentralization are: 1) political, 2) spatial, 3) administrative, and 4) market. Political decentralization is concerned with democratization, citizen participation, and representative governments. Spatial decentralization focuses on developing a balanced hierarchical urban system avoiding urban primacy and growth convergence among regions within a country. Administrative decentralization is concerned with the transfer of responsibilities for delivery of public goods or services with the objective of making government more efficient and effective in allocating resources. Finally, market decentralization is the transfer of responsibility for delivery of certain goods and services from the public sector to the private sector.
The modes of decentralization refer to the way in which governments achieve their objectives. Rodríguez (1997) identifies three modes of decentralizing functions: deconcentration, delegation, and devolution. Deconcentration is the transfer of functions, powers, and resources to sub-units of government where the central organization maintains normative and supervisory functions. Delegation involves the transfer of responsibilities for decision-making to semi-autonomous organizations not wholly controlled by but accountable to a central organization. Devolution is granting full autonomy and powers to sub-units or local governments.

Finally, Rodríguez (1997) identifies the different links that exist among organizations or units of government through which one organization is bound to another. The links between the center and sub-units of government can be through financial or technical assistance, formal or informal representation, or regulatory schemes. Using Rodríguez’ (1997) approach to analyze the planning framework in Mexico and the United States, we can identify the main characteristics of each system based on the form of the legal system as Table 1 shows.

<table>
<thead>
<tr>
<th>Type</th>
<th>United States</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mode</td>
<td>Devolution</td>
<td>Deconcentration</td>
</tr>
<tr>
<td>Linkages</td>
<td>Financial</td>
<td>Financial</td>
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<tr>
<td></td>
<td>Regulatory</td>
<td>Technical</td>
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<td></td>
<td>Informal</td>
<td>Regulatory</td>
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<td></td>
<td>Representation</td>
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In the United States, planning decisions with regard to land use can be described as following a decentralization scheme where, at the political level, the legal framework empowers local governments to make decisions regarding land uses. Furthermore, federal government linkages with state and local governments can be described mostly as financial and informal although in recent decades the federal government has become more proactive by passing comprehensive laws such as the Endangered Species Act, Clean Air Act and the Clean Water Act, to mention a few that indirectly relate to land uses. In Mexico, land use planning in recent decades has followed an administrative approach where the federal government has transferred to local government the responsibility for delivering public services such as water, sewer, solid waste, etc. However, urban planning in general, and land use in particular, follow a system that more closely resembles the deconcentration mode where local land use planning has to follow parameters set by the federal government in accordance with a nested planning approach. In this nested approach, local plans are within state plans, which at the same time are congruent with the national development plan. The influence or linkages of the federal government in local politics is very strong. State and local governments depend very heavily on federal money transfers. Only recently have local governments been allowed to retain property tax revenue while the sales tax is still collected and administered by the federal government. One could argue that cross-border planning in the past was to a great extent technical diplomacy dealing with boundary demarcation and allocation of resources such as water, with the International
Boundary and Water Commission (IBWC) as the lead agency (Lara, 2000; Mumme & Sprouse, 1999). In recent decades, due to the increasing economic integration between the two countries, new approaches have emerged. According to Mumme & Brown (2000), the more recent approach has been an administrative deconcentration where decision-making engages regional agencies and communities in project development and design. The Border Environment Cooperation Commission (BECC) best represents this new planning paradigm (Lara, 2000). Empowering local governments to undertake cross-border planning is an important concept. Based on Rodríguez’ decentralization framework, a policy similar to “administrative devolution” needs to be implemented as a tool to foster and institutionalize cross-border planning. Under this framework, local governments are granted autonomy to undertake formal inter-local agreements to manage the “transborder spillovers” in which, as Herzog (2000) pointed out, land use planning can play an important role.

The Legal Framework

This section analyzes the legal framework of land use decisions in Mexico and the United States in order to understand the complexity of managing urban areas that extend beyond national boundaries. The section is divided into four subtopics: 1) the constitutional framework, 2) the role of the federal government, 3) the role of the state, and 4) the role of local communities.

The Constitutional Framework

A country’s constitution is the most important legal document from which all laws and regulations are derived pertaining to the authority of every governmental unit (federal, state, or municipal). The constitution defines the sphere of action and constraints on government by granting certain inalienable rights to every citizen such as freedom of speech and freedom of religion, granted by both the Mexican and U.S. constitutions. Land use regulations are not different from any other law in that they are also framed by the constitution. Two questions emerge regarding land use decisions: 1) Which level of government has the jurisdiction and the a priori legal standing to regulate land uses? 2) What kind of constitutional powers are granted to government to regulate land uses?

Regarding the first question, in the United States, local governments have the jurisdiction to regulate land uses. This right is recognized in the 10th Amendment and provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Significantly, this amendment only recognizes two units of government—the United States government and the States—while remaining silent about local units of government such as counties or cities where most land use decisions are made. This issue was clarified in 1868 in *Merrian v. Moody’s Executors*, commonly known as the “Dillon’s rule,”1 where authority is delegated to local government to exercise those powers indispensable for accomplishing its governing function.

Similar to the 10th Amendment on the U.S. Constitution, Article 24 of the Mexican Constitution states that powers that are not explicitly assigned to federal agencies are reserved to the state. But unlike the U.S. Constitution, Article 73, Section XXXIX-C of the Mexican Constitution states that Congress has the power to legislate on issues re-
garding urban settlements. Making use of this authority the Mexican Congress in 1976 passed the first law regarding urban settlements known as *Ley General de Asentamientos Humanos* or *LGAH* by its Spanish acronym. This law is the first general law regarding urban planning; according to Azuela (1989), urban planning is defined as an issue of coordination among the three levels of government. Additionally, a 1983 reform of Article 115 of the Mexican Constitution signaled a landmark change for urban planning and land use decisions. This reform was part of a strategy to promote decentralization policies and give more responsibilities to local governments in the context of the 1980s economic crisis (Rodríguez, 1997) and government fiscal crisis (Peña & Cordova, 2001). In section V of the same article, the constitution gives power to the municipalities to regulate land uses as shown in Table 2.

With regard to the second question about the kind of constitutional powers granted to government to regulate land uses, two powers are the most important: police power and eminent domain power. Police power gives governments the legal authority to pass laws and regulations to protect their communities. Eminent domain gives governments legal power to take land for a legitimate public purpose. From this perspective, a land use regulation is justified as an act to pursue a legitimate public interest or social function. As emphasized in the section on land use and the law, the state, through police power and eminent domain, tries to balance the public and private interest. For instance, a regulation could be designed to regulate the use of a public good such as air in order to protect the rights of people to breathe or enjoy clean air.

The 10th Amendment grants police power to local government in the United States to pass regulations to ensure “the comfort, safety, morals, health, and prosperity of its citizens…” (Black, 1993). In the United States, police power forms the basis for governments to regulate land use and impose public control on private property such as actions to ensure comfort, safety, public health, etcetera.

Eminent domain is the power to take private land to advance a legitimate public purpose (e.g. to build roads); however, government in the U.S. is bounded by two constitutional amendments—the 5th and 14th. The 5th Amendment, often known as the taking clause, recognizes that “no person…[shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The 14th Amendment emphasizes that no property shall be taken away without due process of law; furthermore, every person is entitled to equal protection under the law. A fundamental difference between the police power and eminent domain is the clause with respect to just compensation; if property value is affected by police power, owners are not entitled to compensation, whereas, under eminent domain, they are entitled to compensation. In cases such as *Penn Coal Co. vs. Mahon* in 1922 and *Lucas vs. South Carolina Coastal Council* in 1992 (Duerksen & Roddewig, 1994), the Court had to determine whether an action by government using police power could be considered for all practical purposes a taking. The Court agreed in the case of *Penn Coal Co. vs. Mahon* that government regulation claiming legitimate public purpose could go “too far” and therefore a taking had taken place. In the case of *Lucas vs. South Carolina Coastal Council*, the Court ruled that regulation had denied “all reasonable uses” and, consequently, should be considered a taking, entitling affected parties to compensation.

In Mexico, Article 27 explicitly deals with the topic of property rights. In general terms, the Article states that the land and waters within the national territory belong to the nation and the nation has the right to transfer the land to individuals to constitute
## Table 2
Constitutional Framework

<table>
<thead>
<tr>
<th>Constitutional Issues</th>
<th>Mexico</th>
<th>United States</th>
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<tbody>
<tr>
<td><strong>Power Delegation</strong></td>
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<tr>
<td>Level of government with authority to legislate on land use and property</td>
<td>Art. 73 (XXIX-C) The congress has the faculties to: Create laws to establish concurrency among the federal, state and municipal governments to legislate about human settlements.</td>
<td><strong>10th Amendment</strong> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.</td>
</tr>
<tr>
<td>Art. 124 Faculties that are not explicitly assigned by the constitution to the federal officials, are reserved to the states</td>
<td><strong>Dillon’s Rule</strong> “…[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable…” Merriam v. Moody’s Executors, 25 Iowa 163, 170 (1868) in Black (1991:314)</td>
<td></td>
</tr>
<tr>
<td>Art. 115 Gives municipal government the legal authority on the following issues related directly to land use:</td>
<td><strong>Police Power</strong> Public control of private property</td>
<td></td>
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<tr>
<td>• Zoning &amp; city planning.</td>
<td>Art. 27 The property of land and waters within the boundaries of the national territory, originally belong to the Nation, which has the right to transfer its domain to individuals creating private property.</td>
<td><strong>10th Amendment</strong> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.</td>
</tr>
<tr>
<td>• Open space</td>
<td></td>
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<tr>
<td>• Authorize, control, and supervise land uses</td>
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<tr>
<td>• Intervene in the regulation of urban land tenure</td>
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<td></td>
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<tr>
<td>• Authorize construction licenses and building permits</td>
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<tr>
<td><strong>Eminent Domain</strong> Taking of land for a legitimate public purpose</td>
<td>Art. 27 Taking of land can be made only for public interest and subject to compensation (2nd paragraph) The Nation will have at all time the right to impose on private property the modalities that the public interest required, as well as to regulate to advance the social benefit…. (third paragraph).</td>
<td><strong>5th Amendment</strong> No person…[shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.</td>
</tr>
<tr>
<td>Art. 14 No person can be deprived of life, liberty, properties and rights without a trial with all the formalities of procedure and according to laws established prior to the facts.</td>
<td><strong>14th Amendment</strong> No property shall be taken away without due process of law.</td>
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private property. Furthermore, the same article recognizes the nation’s right of public domain to take away land for a public purpose, compensating the affected party. The third paragraph of Article 27 states that, “at all times the nation has the right to impose on private property the type of tenure that the public interest dictates, as well as to regulate for the social benefit to improve living conditions of the rural and urban population…” In brief, Article 27 gives power to the federal government to impose controls and regulations over land to foster the public interest. Takings or confiscating power is exercised by executive decree or through a federal agency. As examples, the confiscation of foreign oil companies’ property in 1938 was achieved through a decree by President Lazaro Cardenas. Whereas, the implementation of agrarian reform, which confiscated large landholdings was done by a federal agency. Furthermore, coincidental to the 14th Amendment of the United States, Article 14 of the Mexican Constitution establishes that no person can be deprived of life and property without a trial following due process and based on the existing laws prior to the act.

From the constitutional point of view, both countries share similar principles in regard to land uses as Figure 1 and Table 2 show. The interpretation and application of the laws with respect to police power and eminent domain are what differentiate the two legal systems. In the United States, the judicial system has had an important function in defining the planning profession’s actions concerning land uses whenever a controversy arises about government’s use of police power or eminent domain. The judicial branch interprets whether the action constitutes a legitimate public interest. For instance, in 1926 the U.S. Supreme Court, in the case of *Village of Euclid v. Amber Realty Co.*, upheld zoning as a proper exercise of police power, making zoning a widely used urban planning technique. Another example is the 1978 case, *Penn Central Transportation Company v. City of New York*, where the court recognized the protection of historical landmarks as a valid use of the police power and denied the principle of highest and best use of property. In brief, the judicial system in the U.S. has played a fundamental role in shaping and defining the sphere of action of land use planners (Blaesser & Weinstein, 1989; Levy, 1997; Duerksen & Roddewig, 1994).

**Figure 1**

**Land Use Constitutional Framework**

![Diagram showing the constitutional framework for land use in Mexico and the United States.](image)

In Mexico, in contrast to the U.S., the checks and balances principle of the three branches of government has been absent for many years; the executive branch has held
overwhelming weight compared to the legislative and judicial branches. In the view of Rodríguez (1997), the lack of checks and balances among the branches of government is an indication of a lack of horizontal decentralization in the exercise of government. Furthermore, there was no clear separation between the ruling Institutionalized Revolutionary Party, known as PRI, and the executive, legislative and judicial branches of government. Consequently, the laws were interpreted and applied in a discretionary way with the objective of maintaining the political status quo. As a result, a “clientelistic-discretionary” decision model evolved and urban land decisions were made following political parameters rather than technical ones (Azuela & Dahau, 1993; Duhau, 1998).

The situation described above has begun to change as more states governments and congressional seats have been captured by parties such as the National Action Party (PAN) and the Democratic Revolution Party (PRD). The checks and balances principle among the branches of government has started to take root, particularly since the PRI’s loss of the executive branch to PAN candidate Vicente Fox in July 2000. Today, the tendency is to create a more institutionalized model of planning, discussed later in the paper, where a necessary condition is a credible judicial system. The judiciary recently has begun to exercise its function in land use disputes; for instance, in the State of Baja California in a landmark 1996 decision, the Supreme Court ordered the eviction of about 150 residents, most of them American, from Punta Banda for occupying land that had been illegally confiscated from its original owners by the Secretaria de la Reforma Agraria (Agrarian Reform Agency) and then subleased or subdivided.2

In summary, we can say that land use planning in the U.S. has followed an incremental legalistic model where the judicial system, through legal cases, has helped to clarify property rights issues, thereby shaping the sphere of action of land use planning. Mexico has followed the clientelistic-discretional approach where the social and political context, coupled with the interests of the ruling political party, have shaped planning.

The Role of the Federal Government

The role the federal government plays in land use decisions in both countries could not be more different. In the United States, the belief exists within conservative political circles that the best government is the least government, and since the nation’s foundation, states and local governments were empowered by the Constitution’s 10th Amendment to make decisions regarding land uses. Although the U.S. federal government does not have an explicit constitutional mandate to establish a national urban policy, it has played an important indirect role in how cities have been shaped by actively promoting home ownership through the Federal Housing Administration (FHA), giving tax advantages to home owners, and investing in infrastructure such as the interstate highway system through the Federal Aid Highway Act of 1956 (Levy, 1997). More recently, the government has set federal standards such as the 1990 Clean Air Act and the 1972 Clean Water Act; these standards can be enhanced but not lowered by states and local municipalities. At the same time, the federal government uses grants and highway monies to reward states that comply and punish those that do not.

In Mexico, a federalist system is recognized on paper in Article 40 of the Constitution, but the federal government has a strong influence in planning decisions. Unlike in the United States, Article 26 of the Mexican Constitution gives power to the execu-
tive branch through the federal government to create and coordinate national planning following democratic principles. Article 73, Section XXIX-C gives power to the federal government to create laws to coordinate urban policy among the three levels of government. Furthermore, it is through this concept of national planning that general laws are developed to deal with specific issues. The Ley General de Asentamientos Humanos (LGAH) provides the general guidelines and concepts for urban planning and land uses at the national level. The LGAH addresses four themes:

I. Concurrency among the plans of the different levels of government for the organization and regulation of cities.

II. Determination of the basic norms and regulations of land use planning.

III. Establishment of general principles for the determination of open space and land use regulation.

IV. Determination of the bases upon which the population will participate in the planning process

In summary, in the case of the United States, the role of the federal government has been indirect through expenditures on infrastructure and fiscal incentives. While the role of the federal government in Mexico can be described as proactive by setting national mandates with which states and municipalities conform. Legally speaking, local communities cannot enter into formal binational agreements because the power to enter into such international agreements is reserved to the federal government in both countries according to Article 89 Section X of the Mexican Constitution and Article I, Section 10 and the 10th Amendment of the United States Constitution. To some extent, this constitutional impediment has fostered the role of the federal government in planning issues along the border and limited inter-local agreements.

Border planning by the federal governments in Mexico and the United States has focused on issues such as water and boundaries, under the International Boundary and Water Commission (IBWC). The IBWC, under different names, has been operating for more than a century in applying the boundary and water treaties between the two countries. The function and priorities of IBWC have been adapted to the changing circumstances and context of the bilateral relationship. One of the first projects the IBWC carried out was the demarcation of the boundary. The Convention of March 1, 1889 established the International Boundary Commission (IBC) to apply the rules in the 1884 Convention dealing with the location of the border, rules that were modified by the Banco Convention of March 20, 1905 to retain the Rio Grande and the Colorado River as the international boundary. In the middle of the 20th century, under the 1944 Water Treaty for the “Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande” dam projects became another priority for the IBWC, and the Commission took the first steps to address sanitation issues on the border. In recent years, the U.S. under the IBWC has pledged the incorporation of sustainable development and public participation as part of its mission statement: “Our mission is to provide environmentally sensitive, timely, and fiscally responsible boundary, water, and environmental services along the United States and Mexico border region. We pledge to provide these services in an atmosphere of binational cooperation and in a manner responsive to public concerns and our stakeholders.”

Recently, there has been a shift in approach toward handling border issues, from the bilateral approach of cooperation and coordination to a binational approach of co-
management (Lara, 2000) through the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADB). BECC and NADB are the result of a side agreement during the NAFTA negotiations to deal with the negative environmental impacts of free trade. The role and function of BECC is to certify projects to receive financing from the NADB and to provide technical support to local municipalities and stakeholders. BECC certifies water supply, wastewater treatment, solid waste and other related projects along the United States-Mexico border. The mandate was expanded last year to include projects related to air quality, public transportation, clean and efficient energy, municipal planning and development, and water management.

This writer concurs with Mumme and Brown (2000), who also use the Rodríguez (1997) typology in their assessment, that border planning has moved from a highly centralized model, where federal governments had a great deal of power, to a model of “administrative deconcentration” where federal governments grant some administrative and planning function to a sub-unit (BECC, NADB, etc.) while at the same time maintaining some degree of control through regulation and financial links.

The Role of the States

In Mexico, the LGAH gives authority to the States to be involved in the coordination of urban policy. The LGAH contemplates not only coordination among the three levels of government but also coordination between states and municipalities. Article 115, Section VI of the Constitution also contemplates the issue of coordination among the different levels of government. According to Azuela (1989), the reforms made to Article 115 of the Mexican Constitution weaken the role of the states in urban planning matters due to the fact that this article gives the authority to regulate land uses directly to local governments, taking it away from the states.

As explained previously, the United States Constitution, through the 10th Amendment, gives states the power to legislate since the Amendment does not delegate powers to the United States to legislate on land uses nor prohibited to the States. Legally speaking, based on the 10th Amendment, states have the authority to legislate and develop statewide standards and guidelines for land uses and urban management policies within their jurisdiction. Two questions are important to ask: Do states develop statewide land use plans? What has been the approach of states located along the U.S.-Mexico border?

The answer to the first question is yes. Since the 1970s, there have been efforts to pass statewide mandates and laws to develop comprehensive plans to deal with urban sprawl in states such as California, Florida, Oregon, Hawaii, Vermont, and Georgia (Kelly, 1993). These efforts mainly focused on protecting environmentally sensitive ecosystems and reducing the fiscal burden to local municipalities from urban sprawl. According to Holcombe and Staley (2001) the “smarter growth” movement in recent years has fostered a strong intervention by the states in land use matters by imposing statewide mandates.

Regarding the second question, statewide urban growth management strategies in states bordering Mexico varies. For instance, California and Texas have taken very different paths. California has been very proactive in terms of growth management initiatives, where a governor’s Office of Planning and Research exists to assist local governments to comply with state laws. The State of Texas has played a weaker role,
allowing cities like Houston to take a *laissez-faire* approach in land use decisions. Lack of subdivision restrictions also fosters unplanned development such as the rise in the border counties of unplanned communities known as *colonias*.

In Arizona, in November 1998, voters rejected an initiative that would have set statewide growth management standards, instead approving Proposition 303 known as the “Growing Smarter Act,” where state funds are used every year to buy or lease land for open space. Proposition 303 gives local communities the power to adopt their own growth management policies.

New Mexico presents a mixed approach. For example, Santa Fe, a strong advocate of urban growth management, imposes strict building codes to maintain the character of the community and city. Other communities like Doña Ana County have very lax subdivision controls and a significant number of *colonias*. Also, there are innovative projects such as the one approved by the New Mexico legislature in 2002 to create a water bank to incorporate market mechanisms to allocate the scarce water resources of the lower Pecos River basin. This decision could have significant implications for land use issues.

From the above, we can make some inferences about the difficulty to coordinate some border initiatives. Managing urban growth on the U.S.-Mexico border is extremely difficult because of the large number of political jurisdictions and the different approaches to setting urban policy. The border extends more than 3000 kilometers (nearly 2000 miles) from the Atlantic to the Pacific coast, and is shared by ten states (four in the U.S. and six in Mexico) and 64 municipalities (39 in Mexico and 25 in the U.S.).

In Mexico, general laws such as the *LGAH* allows some coordination among the states of Baja California, Sonora, Chihuahua, Coahuila, Nuevo León and Tamaulipas. The watershed councils or *consejos de cuenca* in Mexico are an example of this inter-state coordination. The watershed councils are coordinated by the *Comisión Nacional del Agua* (National Water Commission) known as *CNA*. Some authors have suggested adopting this inter-state planning model for managing the Rio Grande and Colorado Rivers “to serve the many users of hydrologic resources, to establish hydrologic infrastructure, and to preserve water resources.” (Brown & Mumme, 2000:905).

However, in the United States, where the role of the federal government is limited in land use planning issues and there are no national laws such as the Mexican *LGAH*, initiatives for coordination would have to come from states, local governments, and specific federal programs. Examples of inter-state coordination are few such as the Western Governors’ Association with a mission to advance the role of western states in the federal arena; however, specific border issues are neither an issue nor a priority. The Border XXI program—when it existed—and the Border Governors’ Conference are two examples of coordination initiatives of border states in both countries. Unfortunately, neither program addresses urban planning or land use coordination issues *per se*.

The objective of the Border XXI program was to promote sustainable development along the border. The strategies to achieve the objectives were public participation, capacity building, decentralized environmental management, and interagency cooperation. The program also included nine binational work groups to identify needs and programs in the areas of air, water, solid waste, pollution, contingency and emergency planning, cooperative enforcement and compliance, environmental information resources, natural resources, and environmental health—but absolutely nothing in the area of land use planning or urban growth management.
The Border Governors’ Conference, which includes the governors from the ten border states, focuses on economic development and promotion of the welfare of both countries. There also exist some neighboring state commissions such as the Arizona-Mexico Commission whose mission is “to improve the economic well-being and quality of life for the citizens of the Arizona-Mexico region by promoting a strong, cooperative relationship with Mexico.” The commission develops indicators to help assess the impact of NAFTA on the economies of Sonora and Arizona.

Texas and California perhaps have explicitly given more attention to border issues considering that two of the biggest binational cities, San Diego-Tijuana and El Paso-Ciudad Juarez, are located in the states. In California, the San Diego Association of Governments (SANDAG) through its Committee on Binational Regional Opportunities is very proactive on border planning issues on the San Diego-Tijuana area. In Texas, the Rio Grande Council of Government (RGCOG) was created to promote intergovernmental cooperation. Although, unlike SANDAG, the RGCOG does not have a border committee or something similar.

This brief analysis of state initiatives on land use coordination corroborates Herzog’s (2000) assessment that land use policies are the least coordinated binationally in the U.S.-Mexico border region. The next section discusses the role of the municipalities on land uses.

The Role of the Municipalities

Even though Mexico and the United States explicitly have adopted a federal and republican form of government, their practices have been quite different with respect to land use policies. A key difference between the two countries is that local communities in the United States have a very strong role in land use and urban growth management. In contrast, municipalities in Mexico have had a weaker role managing urban growth. Mexican planning practice for years followed the clientelistic-discretionary model (Azuela & Duhau, 1993) as noted before; however, this has begun to change. Recent efforts have been made by municipalities, mainly those municipalities governed by the National Action Party (PAN) such as Ciudad Juárez, Chihuahua with the creation of the Municipal Institute of Planning and Research (IMIP), the Municipal Planning Institute (IMPLAN) in Tijuana, Baja California, and a similar entity in León, Guanajuato. In addition, reforms to Article 115 have increased the role of municipal planning through the Municipal Development Planning Committees (COPLADEMUN) since 1995 (Rodríguez, 1997).

Another important difference is that in Mexico the LGAH offers the standards for municipal planning following the one-size fits all approach. In contrast, municipal land use planning in the U.S. often is more of a custom-made or negotiated practice between market and social/community values, between the “growth machine” (Molotch, 1976) and the environmental advocates. The way local officials are elected to city government is another key difference between the two governmental systems. In the U.S., city council members are generally elected directly by specific constituencies within a district or area and can be reelected; this system also allows voters to vote out a council member whose decision making pattern goes against his/her constituency interests. In Mexico, council or cabildo members are elected as part of a party slate. As a result, the council reflects the proportion that each party obtained in the election with voting patterns based on party lines and interests rather than constituencies or a district base.
What are the advantages or disadvantages of one approach versus the other? The approach in the United States has offered many opportunities for local communities to experiment with different land use techniques adopted according to local goals such as promoting, curbing, or financing growth. For instance, impact fees, urban boundary limits, building permit moratoria, and development agreements have become common practices to manage urban sprawl and to ease the financial burden on local communities. There are also land use regulations to promote higher density, mixed use development, etc. (Schiffman, 1989).

Giving local communities the power to decide for themselves on appropriate land use regulations allows them to adopt policies according to their preferences and economic circumstances. The main disadvantage is that ecosystems do not necessarily follow political boundaries so some coordination among communities needs to be in place to prevent damage to the environment resulting from isolated decisions. The fundamental issues are who should be in charge of coordination and what should be the mechanisms. As explained in the previous section, one approach has been to pass statewide legislation. At the same time, the federal government’s role has generally been limited to setting standards such as those of the Endangered Species Act, Clean Water Act and Clean Air Act that communities must meet in order to access federal funds. In Mexico, the federal government assumed the role of coordinating and facilitating federal urban policy through the LGAH.

Opportunities and Challenges on the U.S.-Mexico Border

Planning on the U.S.–Mexico border has been mainly in the federal arena. Local planning has been more a de facto activity based on good intentions rather than an institutionalized way with formal agreements. Formalization and institutionalization of crossborder planning between local municipalities in two different countries—implicitly means having clear rules of cooperation and enforcement mechanisms—is among the most important challenges and necessary conditions for coordinating crossborder land use planning. The reason why is that formal inter-local agreements between communities on both sides of the border would be unconstitutional since only the federal government can sign formal and legally binding agreements with a foreign government as shown below.

Article 115, Section III of the Mexican Constitution allows municipalities to establish coordination agreements with other municipalities with the objective of finding efficient and effective ways of improving service delivery and urban management. However, an issue that remains unsettled is whether local agreements with municipalities in a different country would be recognized because Article 117 of the Mexican Constitution explicitly denies to states or municipalities the ability to conclude treaties or alliances with foreign governments. The same applies to the United States Constitution in Article I, Section 10. Local communities on the border often cooperate and have written or informal agreements with their Mexican counterparts; however, these agreements are not legally binding because they are not treaties. A recent example relates to transportation across the border. Due to the events of September 11 and its impact on border crossing times, the mayor of El Paso, Ray Caballero, and Ciudad Juarez, Alfredo Delgado, proposed the use of a designated bridge lane to facilitate the crossing of pedestrians using the El Paso’s city buses. They had to go to Mexico City to get the approval from the federal government to address an issue that normally could be solved
locally. What alternatives exist to overcome the hurdles that hinder local municipalities from developing and institutionalizing a cross-border planning framework? Once again, looking at Rodríguez (1997) decentralization framework and Mumme & Brown’s (2000) analysis, the response to assist local communities with cross-border planning resembles that of an “administrative deconcentration.” As a matter of fact, the Border Liaison Offices (BLO) in El Paso, San Diego and Brownsville within the Border XXI program had intended to assist local communities with environmental information and to facilitate sharing public information. Another approach has been to involve the general consular offices as facilitators to coordinate community initiatives under a program named Border Liaison Mechanism (BLM) whose main focus is “to prevent and solve border incidents and thereby adopt strategies for protecting the safety of persons along the border” by coordinating immigration, customs and law enforcement authorities in five border areas (Tijuana/San Diego, Ambos Nogales, Juárez/El Paso, Nuevo Laredo/Laredo, and Matamoros/Brownsville and Mexicali/Calexico). Institutions such as IBWC and BECC have also started to acquire the function of facilitator or broker for border communities. An IBWC example of this is Minute 301 to facilitate a binational aqueduct feasibility study for the Colorado River for Tijuana and San Diego County and Minute 306 to address ecosystem needs of the Colorado River delta or Minute 294 to establish binational technical committees to develop wastewater infrastructure plans for certain border communities. Another important challenge confronting efforts to implement cross-border planning concerns access to resources by local communities, especially those in Mexico. In the U.S., revenue raised from property taxes is locally controlled whereas sales taxes are controlled partly by the state and local communities. For instance, Texas allows cities over 500,000 people to adopt a sale tax as long as the combined sales tax rate does not exceed 8.25 percent at the time of the election. Also, local communities in the U.S. have fiscal power to impose new taxes or sell bonds to raise revenue to finance some infrastructure. In Mexico, local communities control property tax but lack authority to levy taxes; for instance, sales taxes are controlled by the federal government through the value added tax known as IVA by its Spanish acronym. Local communities depend heavily on the assignment of resources from the federal government. In 1990, for example, more than half (56%) of local revenue came from federal transfers (Moreno-Ayala, 1995). Finally, local communities in Mexico by law cannot incur debt (Article 117, section VII) and do not have access to the bond market.

The greatest challenge to implement cross-border urban planning is to give autonomy to local communities to engage in cross-border inter-local agreements. Both countries fail to recognize the special circumstances and problems that border cities face and grant them power to engage in inter-local diplomacy. In the Rodríguez (1997) decentralization framework, this would be the “administrative devolution” approach, where local governments are given full autonomy for planning and management of their jurisdictions. Making it unnecessary, for example, for communities to go to Mexico City or Washington D.C. to get approval of a public transit project.

**Conclusions: A Future Agenda for Cross-Border Planning**

Three issues are fundamental to the development of a cross-border agenda to coordinate land use decisions in the future. The first issue is the lack of vision about the direction that border cities should follow. A second issue is the need to encourage more inter-local cross-border planning institutions. And finally, new mechanisms must be
established to finance the infrastructure demands that rapid urban growth imposes on border communities.

Lack of a Vision

The lack of vision regarding the direction that border cities should follow, refers to what kind of city border residents on both sides want. Considering options or models for border cities as a continuum, at one extreme there is the approach of a totally fragmented city where no cooperation at all takes place while at the other extreme is a totally integrated city where resources are shared and the city is co-managed (Lara, 2000). In the experience of the European Union (EU), examples of co-management or integration exist; for example, cities share revenues and residents of the city can vote in local elections on either side as long as they are citizens of a EU member country. Another example is that of twin cities in East Europe where one side is part of the EU and the other is not but the city is managed as one and receives funds from the EU (Pallagast, 2001).

Binational cities on the U.S.-Mexico border have been perceived as two separate cities or as fragmented urban landscapes and this perception has influenced the practice of planning. Planning has been reactive rather than proactive; that is, planning has focused more on problem solving—mainly related to environmental externalities such as air pollution, water shortages, and hazardous waste—instead of offering an alternative vision and creative solutions (Blatter & Clements, 2000; Herzog, 2000). Cross-border planning has been defined more as an issue of intergovernmental coordination and cooperation where local actors co-operate voluntarily and informally with little decision-making power and enforcement instruments. The present approach to cross-border planning on the U.S.-Mexico border can be placed at some intermediate stage between the fragmented and integrated model where cooperation takes place under “administrative deconcentration” and where local interests in many instances are represented through agencies such as IBWC and BECC or by a broker like the BLM.

Development of Inter-Local Cross-Border Planning Institutions

It is important to emphasize that moving toward an “administrative devolution” approach would involve granting full autonomy to local border municipalities to develop their own planning and management institutions, putting local interests at the same level as national interests instead of subordinating the local interest to the national interest.

The “administrative devolution” approach already exists in a very incipient and informal way. For instance, the San Diego Association of Governments (SANDAG) has a Committee on Binational Regional Opportunities (COBRO) that includes on its board not only the consuls general and federal and state agency representatives, but also local agencies, academic and business leaders. COBRO is involved in the review of programs related to energy, water, and other infrastructure needs. Another example of cross-border planning at the local level is the joint urban land use plan of the Dos Laredos (Herzog, 2000; Mele et al., 2000). In this regard, El Paso-Ciudad Juarez has been slower in developing inter-local planning programs, although in recent years there have been efforts to address cross-border issues by having joint sessions of the two city
councils and developing studies for a transportation plan in which El Paso’s city planning department and the Ciudad Juarez planning agency IMIP are involved.

More cross-border planning mechanisms should be fostered involving planning agencies from both sides. Local planning agencies and institutions already exist on both sides, some more developed than others. For instance, the Borders Committee within SANDAG provides policy direction to the SANDAG Board regarding issues or activities related to planning and coordination between the San Diego region and its surrounding neighbors including those in Mexico.

The city planning department and IMIP in El Paso-Ciudad Juarez however are behind in institutionalizing cross-border planning similar to COBRO or Borders Committee. For instance, the board of directors of IMIP does not include representatives from across the Rio Grande. It is important for El Paso-Ciudad Juarez to create institutions such as COBRO to address cross-border planning issues where land use plays an important role.

Development of Financing Mechanisms

The need to develop more financing alternatives in Mexico has been emphasized throughout the paper, particularly to finance infrastructure in the Mexican border cities. The few revenue options that local communities in Mexico have is one of the main problems. In the U.S., local communities have access to revenues from property tax, sales tax, user fees, impact fees, bonds, etc. However, local communities in Mexico by law cannot assume debt (Article 117, Section VII), therefore, they do not have access to bond money; also local communities cannot impose taxes because it is a power of the federal government. To finance infrastructure projects, cities on the Mexican side need to implement mechanisms similar to their U.S. counterparts such as impact fees, development agreements, etc. In addition, a new idea that has been put forth by President Fox, though not endorsed by the U.S., is issuance of bonds backed by the governments of the two countries to finance border infrastructure. This financing option could solidify the role of NADB as a development institution by financing the implementation of plans certified by BECC.

Revenue sharing by border communities is another option worthy of consideration. For instance, in Texas, state law entitles Mexican shoppers to a sales tax rebate. An option would be for the sales tax revenue generated by Mexican shoppers in a border city, say El Paso, be earmarked to finance infrastructure that would benefit El Paso and Ciudad Juarez, rather than being rebated to the shopper. Mexico needs to modernize its legislation and should consider, perhaps as a pilot project, allowing local communities to contract debt or issue bonds to help finance their needs. Also, changes in Article 115 and the LGAH are needed to give local communities more fiscal powers such as application of impact fees as a valid tool for communities to manage urban growth and internalize the costs of urban sprawl to developers. The U.S. needs to be more committed to border communities and to stop thinking of the border only as a law enforcement problem. The border should be looked upon as an area that free trade can transform into a prosperous region. A necessary condition to achieve this vision is to have well-planned binational cities where local governments and planning institutions can play an important role.
Endnotes

1 “[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable…” Merriam v. Moody’s Executors, 25 Iowa 163, 170 (1868) in Black, 1991 (314).

2 In 1996 Mexico’s Supreme Court ruled in favor of the plaintiffs arguing that the Agrarian Reform Secretary’s confiscation of 100 hectares of land in 1973, to create Ejido Colonia Estebán Cantú was illegal. Since 1973 the land had been subdivided and leased by the ejido people to Americans who built their homes. With the eviction order many risk losing their investment and it is unclear if they are entitled to compensation.

3 The treaty of February 3, 1944 Water Treaty for the “Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande” distributed the waters in the international segment of the Rio Grande from Fort Quitman, Texas to the Gulf of Mexico. This treaty also authorized the two countries to construct operate and maintain dams on the main channel of the Rio Grande. The 1944 treaty changed the name of the IBC to the International Boundary And Water Commission (IBWC), and in Article 3 the two governments entrusted the IBWC to give preferential attention to the solution of all border sanitation problems. http://www.ibwc.state.gov/ FORAFFAI/.

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