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A REASSESSMENT OF THE

LEGAL BASES OF ZONING

— John E. Donaldson

The legal and conceptual premises underlying the land use planning and control enabling legislation contained in most of the state statutory codes in this country impose serious constraints on the formulation and implementation of effective land use plans and policies. The majority of such legislation is based upon the Standard Zoning Enabling Act, published by the United States Department of Commerce in 1926, and the Standard City Planning Enabling Act published by the same agency in 1928. These models, and the state enactments they spawned, reflect the trends, attitudes, values and planning notions of an era that has passed, and their utility in the field of land use planning is diminished by the present state of the art.

A well formulated and implemented land use plan requires a knowledge of what the community is, an understanding of what it wishes to become, an appreciation of the forces which may be present in the immediate and distant future, and a familiarity with the range of options and techniques for encouragement and control of development. It requires the skills of the engineer, attorney, statistician, demographer, economist and political scientist, as well as the synthesis and coordination of the professional planner. It also requires a legal framework and climate appreciative of its role and conducive to the realization of its objectives. It is the

adequacy of this framework and climate which I will explore.

Just as water can rise no higher than its source, the limits of the effectiveness of a regulatory system are defined by the range of choices and methods permitted by its legal foundations. When our system of employer-employee relations was premised upon stringent adherence of the principle of "freedom of contract" and abhorrence of "conspiracies in restraint of trade", its effectiveness was defined within a context of prevalence of "yellow dog" contracts and suppression of strikes. Because the system produced or afforded too great an advantage to the employer and placed the employee in too weak a bargaining position, the fundamental legal premises upon which the system was based had to be changed. It wasn't that the system was inherently wrong. It was merely unresponsive to the problems generated by the industrial revolution.

If the legal and conceptual premises underlying land use planning and control enabling legislation unduly limit or fail to afford the range of techniques and controls required for the formulation and implementation of effective land use policies, they should be carefully examined and appropriately modified. I believe the time for examination and alteration is at hand.

The first such premise to be examined is the assumption that Euclidian zoning is the model to be formed and implemented in the particular community. The term "Euclidian zoning" is derived from the case, *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), and its notion is expressed in Section 2 of the Standard Zoning Enabling Act, which states:

Sec. 2. Districts-- For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but

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the regulations in one district may differ from those in other districts.

On the assumption that qualitatively different land uses are incompatible, Euclidian zoning defines a well planned community in terms of a map whereon is drawn geometric patterns or districts to which qualitatively similar land use authorizations are assigned with the effect of separating "higher uses" from "lower uses". Thus, in a typical case, single family dwelling districts utilizing large lots are isolated from the intrusion of dwellings on smaller lots which are separately districted. Both are protected from the intrusion of higher density residential land uses, and these, as the ever expanding protected class, are protected from the respective intrusions of commercial, light industrial, and heavy industrial uses. Further within each of the districts employed, regulations are uniform as to like buildings permitted therein.

Euclidian zoning, in short, emphasizes the mutual repugnance of qualitatively different land uses and invites classification and districting along economic, aesthetic and functional lines with little regard to the interdependence of the activities permitted within the dynamic urban system. The Euclidian system, emphasizing the isolation of commercial and industrial activities and encouraging the segregation of "higher" residential uses from "lower" or more intense residential uses, is a major contributor to the problem of urban sprawl and to the boring symmetry of housing developments laid out in ticky-tac patterns characterized by block after block of houses on 12,000 square ft. lots set back 35 ft. from the road, having side yards of 20 ft. and each costing \$23,000. That the separation of "higher" residential uses from "lower" residential uses contributes to racial segregation of housing within a given community is self-evident.

The orientation of enabling legislation to the model of Euclidian zoning has caused the development of a number of doctrines inimical to the formulation and implementation of effective land use policies, chief among which are the following:

1. Uniformity of regulations pertaining to lot size, set-back, side yards, etc. as they relate to similar structures is essential. Development is to occur in accordance with a preconceived, static objective and a readily measurable spatial standard of what is tolerable for particular kinds of structures. Variances from the standard are not to be permitted merely because the variance is compatible; a variance is to be allowed only if there is undue hardship in compliance.

2. Non-conforming uses by definition are bad, should not be enlarged, and should either be encouraged to decay or to be removed. That a particular non-conforming use may be compatible, or may afford some desirable service or amenity is afforded little weight.

3. The introduction into a district of a dissimilar use either by special use permit or amendment to the zoning map contravenes the "ideal" of "symmetry of the same" and constitutes illegal "spot zoning", which in a number of states is presumed when symmetry is compromised.

Although Euclidian zoning is the model envisioned in enabling legislation, it is not the ideal of increasing numbers of professional planners and students of urban order. More and more modern land-use-planning thought asserts that the key to harmonious, functional, and responsive urban and suburban environments is planning that emphasizes the unity of the community, the interrelationship of qualitatively different land uses, and the need for imaginative and creative design and arrangement of

(Continued on page 17)



"... and the need for imaginative and creative design and arrangement of structures."

- 1 Hauser, *Implications of Changing Metropolitan Areas*, Planning (1958).
- 2 *Subdivision Exactions: Where Is The Limit?*, 42 Notre Dame Lawyer 400, 403 (1967).
- 3 Nichols, *Eminent Domain*, 87 (1964).
- 4 *Id.* at 90-91.
- 5 Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964).
- 6 Fagin, *Regulating the Timing of Urban Development*, 20 Law and Contemporary Problems 298, (1955).
- 7 Hanna, *Subdivisions: Conditions Imposed by Local Government*, 6 Santa Clara Lawyer 172, 191 (1966).
- 8 Cutler, *Legal and Illegal Methods for Controlling Community Growth On the Urban Fringe*, 1961 Wis. L. Rev. 370, 386.
- 9 *Id.* at 389.
- 10 *Id.* at 392.

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structures. The well planned community, under this approach, is not necessarily one in which like uses are first aggregated and then separated from different uses, but is instead one in which the uses permitted are so arranged and ordered that the dynamics of the urban system can function at the highest level consistent with the public welfare. The key to effectiveness under this approach is not symmetry and division, but performance and unity. Utilizing this key, it may well be possible for the planner, who sees the urban system as a dynamic interrelated process fed by change rather than as a static order, to envision a workable, non-Euclidian plan for a particular community. He may develop a practical design for a partially developed area predicated upon uniqueness, not uniformity, in which "non-conforming uses" may be enlarged and blended into the whole, and in which additional uses of a qualitatively different nature which afford needed amenities aesthetically compatible. But the legal climate in which most planners must function, heated by a Euclidian sun and made humid by uniformity, is too stifling for this kind of productive endeavor.

A number of studies have concluded that Euclidian zoning, with its static concepts, just does not work in areas where development pressures are strong. Increasingly, development occurs not under zoning, but by amendments to zoning ordinances and maps. Non-Euclidian planners-zoners, recognizing the need for flexible response capability in implementation ordinances in recent years, have introduced the concepts of "planned unit development", "residential planned communities", the listing of multitudes of uses permitted only by administrative discretion governed by a standard such as "hold zoning" "contract zoning", the "floating zone", and "performance zoning". While these more flexible implementation techniques afford advantages lacking in a purely Euclidian approach, they are, in the minds of many, incompatible with

the assumption that zoning should be in accordance with a comprehensive plan with map appended. Although judicial acceptance of these techniques is increasing, it remains nonetheless true that their legal underpinnings are insecure.

In summary on the point, I do not suggest that the Euclidian be outlawed, only that the non-Euclidian be more effectively accommodated by the legal system. This can be accomplished by eliminating from zoning enabling legislation requirements that regulations be uniform and expressly authorizing the use of performance standards and flexible techniques to guide, encourage and control land development and use.

The second premise underlying current land use planning enabling legislation is that the formulation and implementation of land use policies belongs entirely at the local level of government. With few exceptions, states have delegated the police power over land use to the localities without retaining or reserving power or procedural tools to protect the state interest from adverse local planning and implementation activity. Just as local planning and implementation proceeds from an awareness that the common weal can be served by subjecting individual tracts to land use controls, it would seem that state planning would assume that the interests of the state as a whole may require the developmental patterns of localities to be subjected to state influence and involvement. In England and several European countries, local planning is required to serve not only local needs, but broader needs as well. This is not so in the United States, with the possible emerging exceptions of Vermont, California and Florida.

Does a state need a ready capability to direct, influence and control local planning activity and the development undertaken pursuant thereto? Several examples, which I hope will constitute a sufficient answer, follow:

1. When all of the suitable farm and grazing land in a state is already put to agricultural uses, and the state's population is rapidly expanding, can it wisely permit to localities the determination of whether such land is to remain as part of the agricultural economy or be developed into subdivisions?

2. When a substantial segment of a state's population can afford housing no better than mobile homes, can a state wisely leave to localities the determination of whether mobile home parks are a permitted use in a community?

3. When there is a substantial unemployment in a region of the state that could be significantly ameliorated by the location of a prospective major industry in a particular locality, can the state wisely leave to the locality the determination of whether or not the industry is welcome?

4. In a region of the state where water resources for human consumption and industrial use are scarce, may the state wisely permit individual localities, through their land use plans, to determine the allocation which actual development under such plans will assure?

The list could be expanded. The point is that local land use plans reflect local values and perceptions of self-interest and may not reflect the broader needs of the state and region.

In a number of states a beginning awareness of the state interest in local land use practices is evident, as witnessed by the various wetlands statutes, coastal plains land use control codes, and, in Virginia, the undertaking of studies to identify "area of critical environmental concern". What is needed, however, is a candid acknowledgement to the effect that on a broader scale, land use practices in the localities are of sufficient potential significance to the general welfare of the state as to justify direct state involvement at the local level of planning and implementation.

Such involvement could take a number of forms, one of which might be expressly affording the state standing to enjoin developmental activity believed to be injurious to state or regional interests. The proposed oil refinery and industrial complex proposed for Nansemond, Virginia, of concern to the people of Norfolk, Newport News, Virginia Beach and Portsmouth, is an example of a situation to which a state response would probably be appropriate. Other approaches could involve requiring local land use plans and implementation ordinances to be submitted to an appropriate state agency for review and comment before adoption and amendment, requiring that they be in conformity with a state-wide land use plan, which would in effect be implemented through control and coordination of local plans.

In the context of this problem, one must keep in mind that any question involving relationships between the state and its localities, or their respective areas of jurisdiction, is essentially a political question which must find its resolution in the political arena. When the issue is state control over land use, the political question is highly controversial, if not explosive. Nonetheless, it needs to be resolved in the interest of the whole, not the parts.

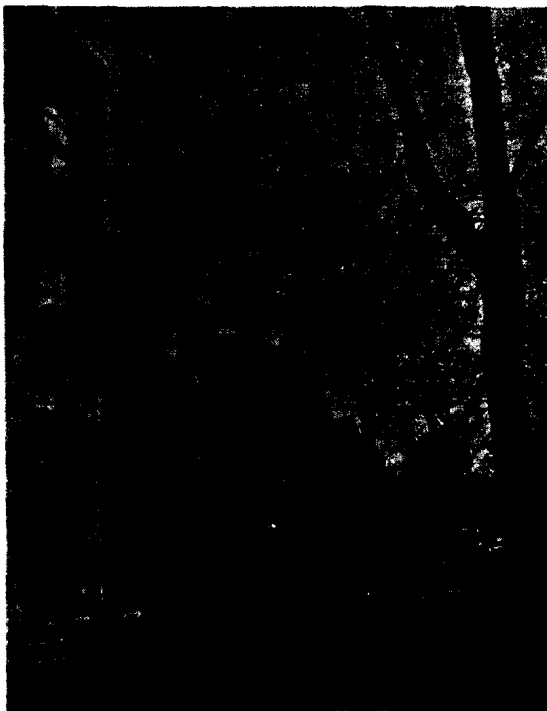
The third principle which I would question is the principle that land is the target towards which land use planning enabling legislation is aimed, and that as a consequence, traditional concepts of property rights, real property rights, limit the regulation and control of land uses. The emphasis on land has clouded the vision of the public, the courts, and the practitioners in the planning field with unnecessary

distortion and impairment. I submit that the true subject of regulation in land use planning and implementation is not land, but *activity*, and that a zone which permits a specific land use is, in reality, conferring a license to engage in that activity. If the orientation of the legal basis of land use planning related to the issue of the reasonableness of the licensing requirements and procedures applicable to the activities being regulated, rather than to the reasonableness of the "land controls", the air would be clearer and planning could occur in a better legal climate, with the requirement of "reasonableness" still being maintained. In substance, I believe land use planning to be primarily a process which attempts to allocate and coordinate, within a spatial context, the activities that are to be carried on in the community, and to promote physical harmony by the imposition of design criteria related to height, bulk, and open space. Land is entirely secondary. It is activity with which the planner and the community are primarily concerned.

Two statements illustrate the point I wish to make. Both statements are credible and have a wide following. The first is: *A man should not be deprived of his property without compensation.* The second is: *A contemplated activity genuinely and materially affecting the public interest is a proper subject of regulation.* Suppose that the legal issue is whether the developer of a proposed shopping center adjacent to a major artery can be legally required to construct and maintain a parallel artery to accommodate the traffic problem which his development would create. The Courts are divided in their response to the issue, some regarding the question as essentially a property matter, to be resolved in the context of traditional notions of property rights, while others recognize the question as essentially one in which the issue is the reasonableness of a condition attached to the licensing of an activity. I subscribe to the latter view, and believe that government may properly regard development as an activity, which, in a spatial as well as a broader context, can be subjected to reasonable licensing requirements.

In summary and conclusion, I believe that the fundamental legal underpinnings of state land use planning enabling legislation require examination and modification if land use planning and implementation is to be effective. The shortcomings of the Euclidian concept, the negligence of state non-involvement, and the limitations of, the misplaced emphasis on land, as opposed to activity, as the critical subject of concern must be remedied. Attention to these problems has not been lacking. Responsible critiques and suggestions for improvement of the state of the art and practice of

land use planning and control techniques abound in current literature in the field. Perhaps the most noteworthy attack on the inadequacy of state enabling legislation is the undertaking of the American Law Institute to develop a model act, which in tentative draft is known as "A Model Land Development Code". The project, begun in 1963, may produce a final draft in 1974. Although the language of the tentative draft is just that, tentative, I would note that the draft abandons Euclidian terminology, recognizes a broader state role in the formulation and implementation of local land use plans, and regards developmental activity, rather than land as the subject of planning and implementation. Among other things, the draft seeks to improve administration, authorizes localities to offer development incentives, permits condemnation for purposes of encouraging development, expressly authorizes the imposition of land dedication requirements and of fees to defray public expenses that may need to be incurred in response to development, and provides a system for making public land use decisions affecting individual parcels public records that may readily be examined in a "title" search. The Code, when adopted and published in final form by the American Law Institute, is certain to have a major impact on the reformation of enabling legislation across the county—certainly a delightful prospect. §



BEAUTY

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extensive and probably the most successful effort. The National Trust and other societies are working to catalogue important structures so they won't be demolished. New York City has an innovative program which lists landmarks and prohibits their destruction or changes without prior approval. This has been suggested to be an unjustified interference with property rights. An alternative could be the purchase of negative easements against the destruction of historic areas. Robert L. Montague III in an article at 51 Va. L. Rev. 1214 (1965) suggests a system of tax incentives to be used in Virginia for the preservation of its many antiquities. Even with these efforts to catalogue and preserve, the loss of important landmarks continues. Under a program inaugurated in the 1930's the Historic American Buildings Survey listed more than 10,000 buildings worthy of preservation. It was estimated in 1963 that 50% of these buildings, significant in America's history and culture had already been destroyed.

Another unfortunate development is demonstrated by *Seagram & Sons v. Tax Commission*, 200 N.E.2d 447 (1964). The Seagram building in New York City had been built with unusual care and the result was a beautiful structure that promoted the economic interests of the owner and enhanced the beauty of the city. The Tax Commission chose to adopt a different appraisal system which increased the owners tax bill. This was an obviously self-defeating and short-sighted action, but it was affirmed.

CONCLUSION

The most attractive method for enhancing the appearance of our communities is the adoption of architectural boards of review. These have been rejected in several cases, but the time is ripe for their acceptance. Whatever the method adopted, aesthetic control is a vital field and one worth the efforts of the legal profession. The wealth and know-how are available. The question remains whether the courts and the legislatures will provide the legal framework for protecting the beauty of our communities. The alternative is for our generation to be remembered only as the innovators of "shopping center row."

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