

The Renaissance in Land Use And its Role in the Solution Of Environmental Problems

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ABSTRACT

The purpose of this paper is to summarize the recent actions taken by state legislatures, land use law revision study groups, and a number of key individuals in the area of land use law and planning and then to relate their implications for environmental systems planning and regulation. The review begins with a succinct summary of our current system of land use control and its primary deficiencies. Recent actions leading to wholesale revision of this framework are then described in terms of two major categories: 1) the direct entry of states into land development planning and control, and 2) state statutory revision of the legal framework within which local planning and land use controls operate. Finally, the implications of these two areas of change for environmental systems are identified.

Five years ago a young planner would rarely contemplate a career in land use. Today it is one of the most promising career directions to be found. The reason for this turn around is the advent of a number of trends, primarily at the state level, which promise to remove land use planning and regulation from its dismal posture of the past fifty years. States have begun to enter the land use control field in very substantial numbers in belated recognition of the fundamental interrelatedness between man-made land use patterns and the quality of the environment. Pressured by effective lobbying on the part of environmental coalitions, state legislatures are increasingly willing to supplement remedial approaches to past environmental degradation by seeking to prevent ecological destruction through sound land use policies. While emission control, effluent abatement, and river basin cleanup programs are the obvious direction for remedying our past mistakes, the underlying culprit, namely the location,

intensity, and character of land use, has been identified for the next phase of environmental action.

The purpose of this paper is to summarize the recent actions taken by state legislatures, land use law revision study groups, and a number of key individuals in this area and then to relate their implications for environmental systems planning and regulation. The review will begin with a succinct summary of our current system of land use control and its primary deficiencies. Recent actions leading to wholesale revision of this framework will then be described in terms of two major categories: 1) the direct entry of states into land development planning and control, and 2) state statutory revision of the legal framework within which local planning and land use controls operate. Finally, the implications of these two areas of change for environmental systems will be identified.

Historical Development of Land Use Controls

The United States' system of land use controls is unique among nations of even the Western world. This uniqueness derives from both the peculiar substance and the relative permanence exhibited by the legal framework for land use control. It is a system developed in the first quarter of the twentieth century to meet the needs of urban development as then perceived but which has not been substantially modified since that time. Despite this relative unchangeability, some states have begun to entertain the notion of wholesale restructuring of their systems of land use controls and the possibility is now very real that fundamental revision will take place in some states in the near future. Once this occurs, there is likely to be a wave of legislative action by other states to embrace the approaches adopted by the "leader" states. The following paragraphs will describe the existing framework of land use law as existing in the early 1970's and then proceed to describe the possible modifications to that framework which either have been tried already or are likely to be tried.

Although planning and zoning are common terms today, this was not always the case. At the turn of the century, the planning of cities was just beginning to enjoy a limited revival after a long hiatus since the colonial period when European planners were popular. The unofficial commencement of modern planning in the U.S. is placed as the 1893 Columbian Exposition in Chicago which demonstrated man's technological capacity to create large scale living environments capable of magnificence in comparison to the developments usually found in cities of that day.

Shortly after the rebirth of modern planning, zoning also appeared. In 1916 New York City adopted the first zoning ordinance in an attempt to exercise some control over the extensive overdevelopment occurring in that city. Subsequently, in 1926, the Supreme Court of the United States upheld zoning as a constitutionally valid exercise of the police power and from that point, zoning was accepted [1].

Despite the importance of previous landmarks, the event which dictated the nature of present-day land use systems more than anything else was the publication in 1926 and 1928 of two model state statutes by the U.S. Department of Commerce under the direction of, then, Secretary Herbert Hoover. These were the Standard Zoning Enabling Act (SZA) and the Standard Planning Enabling Act (SPEA) which suggested uniform language to states wishing to grant to their localities the power to plan and zone [2]. The availability of these two models facilitated the rapid adoption of a uniform approach to planning and zoning throughout the country as state after state adopted the model codes virtually verbatim.

The uniform state adoption of the SZA/SPEA models for planning and zoning was a blessing in that it avoided a proliferation of approaches which otherwise might have been undertaken. This fact alone simplifies research into the problem because it obviates the necessity to compile the statutes of all fifty states in order to develop a picture of the land development control system in the United States. But the uniformity in the adoption of legislation in this field has also come to be a disadvantage because it precluded the availability of substantial variations in approach which might have led to more experimentation with these laws in order to arrive at a legal framework more appropriate to handling urban development problems which have arisen since the 1920's. The net result is a set of land use laws which have remained almost totally unchanged since the early part of this century and which are very inadequate to deal with many contemporary development problems.

A later section of this paper will summarize the attempts which states have recently made to overcome the deficiencies in the current framework of land development controls. In order that the reader understand the implications of the material presented in that later section, it is necessary to spend some time discussing the details of the development control framework as it currently exists in the SZA and SPEA as adopted and judicially interpreted.

THE CONCEPTUAL CONSISTENCY OF THE SZA AND SPEA FRAMEWORK

The SZA provided a very awkward but specific structure for the regulation of development within municipalities. Its main provisions called for:

1. the zoning ordinance to be prepared by a zoning commission of citizens for recommendation to the local governing body for adoption,
2. the establishment of a Board of Adjustment to grant special exceptions and variances and to hold hearings on enforcement by administrative officers such as building inspectors, and
3. substantive modifications to be adopted by the governing body.

The purposes of zoning were enumerated as the standard police power purposes of health, safety, morals, and general welfare within which seven more specific

purposes were cited, including lessening street congestion, safety from conflagration, adequate light and air, prevention of land crowding and population congestion, and provision of public facilities such as transportation, water, schools, and parks. To achieve these purposes the zoning regulations could control building size, lot coverage, yard size, population density, and use, and all regulations were to be "made in accordance with a comprehensive plan."

The planning act was designed to complement the zoning act and empowered a planning commission to prepare and adopt a master plan showing the location and character of land uses, transportation facilities, parks and playgrounds, public buildings, and public utilities. The purposes of the plan were similar to the general police power purposes recited in the zoning statute.

To insure implementation of the master plan, a number of provisions tied the work of the planning commission to implementing procedures. First, the planning commission was empowered to be the zoning commission and, thereby, the preparer of the zoning ordinance to be recommended for adoption by the governing body. Second, the planning commission received mandatory review powers over all proposed construction plans for public buildings, transportation facilities, and utilities and the requirements for proceeding with construction in the face of an adverse review was the requirement of a two-thirds override vote by the governing body. Third, the planning commission was given the power to administer subdivision regulations and thereby control the location and standards of streets in accordance with the major thoroughfare portion of the master plan. Fourth, the preparation of a plan of mapped streets and submission thereof to the governing body for adoption and future acquisition was a power granted to the planning commission.

Together, the SZA and SPEA provide a clumsy but consistent framework for development control which anticipates the development of a master plan from which there flows a set of implementing linkages to insure that the plan is executed. Conceptually, the land use portions of the master plan are implemented by the zoning ordinance, the streets and transportation portions are followed up by subdivision control and street mapping, and the public facility portion is executed by means of the mandatory review and two-thirds override requirement. The unity of this framework derives from the fact that there is an intimate functional relationship between land uses and the underlying infrastructure facilities serving land uses. It is the type, location, and density of land uses which dictates the demand for street systems, schools, sewers, water systems, etc. This direct relationship between land uses and facility loading dictates the interdependent determination of land uses and facilities to avoid problems of traffic congestion, overcrowded schools, inadequate sewer systems, etc. Interdependence in the determination of land uses and facilities is especially important since decisions concerning the location and capacity of facilities serving land uses involve large expenditures, require substantial lead-time, and in some cases are virtually irreversible. The model code framework anticipated this

necessity to coordinate policy decisions concerning the location and density of land uses with decisions concerning the location and capacity of streets, schools, etc., by first requiring that they be planned comprehensively (i.e., interdependently) and then by establishing implementing mechanisms for each of the interdependent elements (i.e., zoning to implement land use, subdivision control to implement street plans, mandatory review to implement sewer plans, school location plans, etc.)

PROBLEMS RELATED TO THE PLANNING AND ZONING FRAMEWORK ESTABLISHED IN THE MODEL CODES

Despite their conceptual unity, a number of severe difficulties arise from the land use control framework as outlined in the SZE and SPEA which are worth reviewing at this time because they set the stage for the entry of states into land use and development control which we shall be discussing at a later point in this research. Some of these difficulties arise from the formal structure of the code framework, while others are the result of judicial interpretation of its language.

1. No Structure Within Which Extra-Local Interests Can Be Reflected

Both the SZE and SPEA delegate all development control and planning to the local unit of government under the assumption that there does not exist any facet of the public interest which cannot be adequately reflected in local development policy. Over time this has proved to be unworkable because there are certain types of interests which cannot be reflected in local policy decisions and therefore go without representation. Consider the case of large scale natural resources which should be protected from certain types of development, but which encompass an area beyond the territory of the individual unit of government. These are almost impossible to properly protect from overdevelopment because of the absence of a political structure within which to aggregate the larger public interest. Hence an important resource such as a unique mountain range is eventually overdeveloped because the individual municipal policy decisions reflect small group interests rather than the larger interest. This is one of the primary forces behind the recent entry of states into the land development field. Belatedly, states are realizing that some kinds of development control should be withdrawn from a purely local policy framework to facilitate the aggregation of larger interests and the implementation of controls based upon that larger interest.

2. No Structure for the Resolution of Inter-Local Development Conflicts

By granting to the local unit of government absolute authority for development control, the SZE and SPEA framework fails to anticipate the situation in which collateral units of government are unable or unwilling to recognize the effect of their development control actions on one another. Hence, a land use

decision by one unit can produce substantial spillover effects onto the other. Decisions of one local unit on a matter of residential density can have a substantial impact on traffic usage of the adjoining town's arterial road system. Yet, there is no structure built in to the contemporary land use control framework to either compensate the municipality receiving negative externalities from its municipal neighbor or to force the deciding unit to give due consideration to the effects of its decisions beyond its boundaries.

3. *Absence of a Mandatory Adoption Feature*

There was no feature in the model codes which *required* a local jurisdiction to engage in either zoning or planning. Hence, the community choosing to allow development to take place without any control could do so. While the conceptual unity of the planning and zoning framework remains, with the master plan as the basic guiding document which is then implemented by zoning, subdivision, and capital expenditure review, the actual operation of this scheme fell short because the framework was not mandatory.

4. *Judicial Subversion of the Status of the Comprehensive Plan in Zoning*

The wording of the SZEA called for the zoning plan to be "made in accordance with a comprehensive plan . . ." thus insuring the direct relationship of the plan to its implementing device in the form of zoning. There is no doubt that the persons drafting the wording of the standard act intended that the zoning ordinance should be drafted as a device to implement the land use portion of the master plan [3]. But subsequent judicial interpretation of this wording eliminated the necessity for the zoning regulations to reflect the considerations expressed in the master plan. Citing earlier legal opinion, Justice Weintraub states:

"It is thus clear that the "comprehensive plan" of the zoning statute is not identical with the "master plan" of the Planning Act and need not meet the formal requirements of a master plan. The Zoning Act nowhere provides that the comprehensive plan shall exist in some physical form outside the ordinance itself [4]."

5. *Permissive Separability of Implementing Features from Planning Features*

Although the model acts anticipated a unified approach to the planning of land uses and the location and capacities of infrastructure facilities serving land uses, the permissive wording of the models allowed a locality the option of choosing to implement whichever of the several elements it desired, disregarding the rest. Thus, a city could plan without any anticipation of implementing that plan through zoning, subdivision control or capital investment review or it could undertake zoning without having first decided upon the eventual pattern of land use which it desired. Therefore, the intimate relationship between land uses and community facilities could be ignored with the eventual result that development

densities could be chosen without any recognition of the underlying capacity of facilities to handle the densities, and vice versa. Without any obligation to plan the eventual capacities of facilities with a view to the eventual demand on those facilities generated by land uses, it should not be surprising that sewerage systems become overloaded, schools overcrowded, and streets congested.

6. Absence of a Feature to Control Timing or Phasing of Growth

While the SZEA/SPEA framework anticipated that interdependent policy decisions would be made on eventual land use configurations and infrastructure to serve and support those land uses, it ignored the question of conforming the staged installation of facilities to the timing of growth phases or vice versa. Land uses and supporting facilities, where coordinately planned, have been approached essentially as end statements. That is, the terminal configuration for land uses at some future date when the municipality is entirely developed, is planned and the location and capacity of streets, utilities and schools is determined on the basis of this terminal development configuration. But stages of development intervening between the contemporary situation and the terminal one are not specified. This results in an inability to systematically phase public sector investment decisions to conform to phased land use development. The municipality is then faced with the prospect of only being able to react to growth as it occurs, a difficult task given the long lead-time for project planning, financing, and construction of public facilities. Often this results in facilities not being available by the time private land use development takes place. Several jurisdictions have attempted to create systems of control which would phase land development with public facility installation. Until 1972 judicial attitudes have been consistently negative to these attempts. The case that appears to break the log-jam is the Ramapo case in New York in which the court upheld the town's prohibition of development permits in areas not scheduled for public facility installation until a later date [5]. More will be said about this case in a subsequent section of the research dealing with emerging new approaches to land development control.

Recent Entry of States Into Area of Development Control Policy

In the past 12 years, and primarily in response to the deficiencies in the existing development control framework, states have begun to take an interest in development control. Several have enacted statutes which substantially modify or supplement the legal framework of the SZEA/SPEA approach. The approaches taken thus far have been designed to handle the particular problems within each state, hence considerable variation in these approaches is evident from an examination of their statutes. While no definitive trend can be extracted from this legislative activity, other than the general one of increasing interest and action on the part of states in the area of development control, the actions taken

to date can be categorized according to their scope and major emphasis. The next few pages summarize the types of statutes adopted to date in a number of states and can be interpreted as a fairly complete sampling of the approaches which have been tried.

COMPREHENSIVE STATE ZONING SUPERIMPOSED ON LOCAL ZONING: HAWAII LAND USE LAW

Hawaii passed a land use law in 1961 with the primary intent of preserving Hawaii's dwindling supply of prime agricultural land. The growth of urban areas was pressuring owners of agricultural land to sell for urban development, thereby threatening to urbanize all of the islands in the long run. In addition, controlling the urban sprawl of Honolulu was another intent of the Act [6].

The law establishes a State Land Use Commission which divides the state into four districts: conservation, agricultural, rural, and urban. The state specifies the uses in the conservation and agricultural districts and these essentially preclude urban uses. Local areas can issue special use permits for agricultural areas and may specify uses in rural areas, subject to state review. In the urban areas the Commission specifies the boundaries, but the local community specifies uses according to local zoning codes.

In addition to specifying the four districts, the phasing and timing of development is controlled through several mechanisms. The use of urban reserve areas in urban districts specifies areas where growth is preferable and beneficial. Boundaries of urban districts are reviewed every five years to insure that rezoning and redistricting occur in systematic increments and that leap-frogging and sprawl are avoided.

The Hawaii technique, as yet untried in any other state, establishes a two-level hierarchy for land development policy. The higher level state policies are aimed at controlling the direction, pace, and overall intensity of future urban growth increments to foster more compact, contiguous development and to preserve a shrinking supply of agricultural land. Within these policy determinations, the local zoning ordinance specifies permitted uses, densities, coverage, etc., in the standard zoning approach.

STATE DEVELOPMENT CONTROLS IN THE ABSENCE OF LOCAL CONTROLS

In our earlier review of the SZEA/SPEA framework, we pointed out that one of the deficiencies was the lack of a mandatory feature requiring localities to engage in development controls. Faced with the dual problem of very rapid growth induced by the proposed 1976 olympic games and many local communities unwilling or unable to administer local development controls, Colorado enacted its Land Use Act which requires the state to impose land use controls where local controls are absent or inadequate [7]. In 1971 a similar act was implemented in Oregon [8].

OVERRIDE OF LOCAL PERMIT DENIAL BY MEANS OF STATE APPEAL PROCEDURES

Recognizing that local zoning has often been used to block certain types of development at the local level, thereby thwarting higher level policy and public interest, Massachusetts passed what has been called its anti-snob zoning law [9]. Essentially aimed at the problem of suburban exclusionary zoning, this law provides a state level appeal mechanism whereby a developer of low or moderate income housing can appeal the denial of a development permit if he feels that the municipality is discriminating against this form of housing. If the state appeals board agrees with him, it can issue the necessary development permits, thereby overriding the local denial.

REGULATION OF SPECIFIED KEY FEATURES, RESOURCES, OR CRITICAL AREAS EITHER DIRECTLY OR BY THE LOCALITY WITHIN STATE GUIDELINES

Specific key features or resources have come under the control of state development regulations with increasing frequency in the past few years. The features selected for regulation vary from state to state, depending on the individual circumstances. In Delaware the coastal zone is regulated [10]. In Minnesota it is flood plains [11]. Vermont protects its mountains by regulating development above an elevation of 2,500 feet and its lakes by regulation of shoreline development [12]. In Massachusetts both coastal and inland wetlands are protected, and in Wisconsin the shoreland areas are controlled [13]. In California the state established the San Francisco Bay Conservation and Development Commission to exercise control of the Bay's shoreline [14].

Several approaches to the local-state sharing of responsibility for the control of these features are evident. In Massachusetts direct regulation of wetlands is the responsibility of the state. In Minnesota flood plain ordinances are adopted by local jurisdictions subject to the review and approval of the state which also provides technical standards. In the case of San Francisco Bay, regulatory authority is delegated to an independent authority with territorial limits conforming to the area to be regulated.

REGULATION OF MULTI-JURISDICTIONAL IMPACTS OR SPILLOVERS

In a previous section we cited one of the problems of the SZEA/SPEA framework as being the lack of a structure for handling inter-local spillovers, where the land use decisions of one municipality could result in discernible impacts on adjoining jurisdictions. Florida has recently enacted a statute in which it regulates "developments of regional impact," defined as certain types of development (e.g., airports, housing developments above a minimum size) which must undergo a regional impact analysis before a final decision is made on granting development permission [15].

The Trend Toward Comprehensive Revision of Enabling Statutes For Local Development Control

In contrast to actions involving *direct* state entry into the area of development regulation, there is a growing trend among states to consider the revision of their local planning and zoning statutes as a means of improving development control. While this is a less direct means of handling the problem, it is likely that it will have more impact than direct action because most development controls will probably remain local. While no state has adopted a comprehensive revision of its enabling statutes for local planning and zoning, substantial pressure has begun to build and considerable attention has been paid to this question by planners, legal scholars, and legislatures. In 1968 the American Law Institute published its Model Land Development Code, Tentative Draft Number One, followed in subsequent years by draft numbers two, three, and four [16]. The completion of the ALI work is expected in the next year at which time they will collate their work on the previous drafts into one document offering a model for revision of the local zoning and planning statutory framework, as well as for state involvement in planning and development regulation. The ALI procedure in the preparation of their model code has been one of open, systematic debate and careful consideration of reactions and comments to the drafts. This method, combined with the substantial prestige of The Institute, will give their proposed code a public standing at least equal to that previously enjoyed by the Commerce Department models of the 1920's and, therefore, should have a direct impact on state legislative action in this area.

In addition to the ALI work, several other groups and individual scholars have proposed large scale revisions to the planning and zoning enabling statutes. The American Society of Planning Officials (ASPO, hereafter) prepared a 1967 study, authorized by the Connecticut legislature, which proposed major revisions in that state's planning and development laws [17]. In 1968 the Douglas Commission very thoroughly indicted the existing structure and proposed a set of policies to guide subsequent efforts to draft new legislation [18]. A committee of prominent land use lawyers and planners in New Jersey developed a new land use law for that state which was introduced into the 1969 legislature [19]. Jan Krasnowiecki, Professor of Law at the University of Pennsylvania, prepared a "Model Land Use and Development Planning Code" for the Maryland Planning and Zoning Law Study Commission [20]. In the same year the Canadian Federal Task Force on Housing and Urban Development published its recommendations on the matter and ASPO, following up its earlier effort, published its report, "Toward a More Effective Land Use Guidance System [21]." New York sponsored a Planning Law Revision Study which published its 1970 recommendations for comprehensive revision of the planning and zoning law, and ASPO devoted the 1971 issue of its Land Use Controls Annual to a

symposium on the matter [22]. In Florida, at this writing, the Commission on Local Government and the Environmental Land Management Study Committee are both developing studies which will recommend fundamental modifications in the local planning and zoning framework. Similar work is underway in New Mexico [23].

In short, the intensity of interest in the matter of overhauling present enabling statutes in this area indicates the likelihood of adoption of a new set of statutes by states in the foreseeable future. This is supported by the substantial increase in public displeasure with the abuses under contemporary development regulations. The revision of statutory frameworks, when it comes, will not be an instantaneous one, but a trend which starts in a small group of states and, over time, spreads to the rest. In the author's opinion, the initial adoption by the first states will take place within the next five years.

As in the section dealing with state direct intervention into development controls, it is not our intention to examine the details of each model, proposal, or study. Rather, the following paragraphs will extract from the group of proposals made to date the major features which they embrace and contrast them to the SZEA/SPEA framework.

Summary of the Major Features of the Proposed Land Use and Zoning Law Revisions

1. PERMISSIBLE TYPES OF DEVELOPMENT REGULATIONS

Virtually all of the proposals for revision of the local planning and zoning laws permit regulation by means of the classical "specification" ordinance in which the permitted uses and bulk regulations are exactly specified without room for flexibility. In addition, many of the more flexible approaches to large scale development which states have experimented within the recent past such as planned unit developments, floating zones, and contract zoning are enabled. A more substantial departure from classical regulations is the proposal to permit the control of the timing of development to conform to the locality's ability to install sufficient facilities and services. This would involve the permission to deny development permits if adequate facilities are absent and the payment of "development exactions" by developers as a means of equitably distributing the cost of facilities necessitated by the development. Development exactions have been permitted in some states under certain circumstances in the past and have grown in their judicial acceptability. But the control of the timing of growth has only been sustained in one case decided in 1972 [24]. Two additional proposed regulations concern the role of counties in the planning and zoning process. The first would permit the county to designate development sectors and specify these sectors as falling within the categories of urban, agricultural, conservation, and rural in a fashion similar to Hawaii's state land use law. Local zoning

regulations would specify the detailed regulation of land use within these overall categories. In effect, this establishes an intermediate level of control between the state and municipality. The second county proposal would permit land reservation mapping in which the land for future facilities could be designated through a mechanism similar to the official map approach of the SPEA.

2. ADMINISTRATIVE PROCEDURE

A frequently mentioned proposal embodies the unification of the zoning code, subdivision regulation, and planning law into one ordinance to be adopted by the governing body and then administered as a single permitting procedure by one agency. This would abolish the separate ordinances dealing with development control and would combine the functions of planning, zoning ordinance preparation, subdivision permitting, zoning permitting, and zoning variances in one agency. Further, the plan would be adopted by the governing body in contrast to the existing practice of adoption by an independent commission, thereby forcing more policy attention on the plan which, upon adoption, becomes the policy of the municipality.

3. SUBSTANCE OF PLANS AND PLANNING PROCESS

All proposals for statutory revision retain the earlier emphasis of the plan of the interrelatedness of land use and community facilities. But a frequently mentioned modification is that of supplementing the long-range time horizon and the preoccupation with terminal land uses by requiring that the movement toward the terminal situation be programmed by short-range plans for land development and public facilities. This would permit the concurrent installation of facilities in conformity with the needs of new development as it is permitted to occur.

4. LEGAL STATUS OF PLANNING FUNCTION IN RELATION TO REGULATIONS

While the original SZEA requirement for land use regulations to be in conformity with a comprehensive plan was judicially subverted, the proposals for statutory revision are frequently very specific about the legal impact of the plan on regulatory action. Some proposals call for the demonstration of the conformity of the regulatory device to the plan, while others require an extraordinary majority of governing body for adoption in the face of a negative recommendation by the administrative agency charged with planning and permitting. These requirements, while not guaranteeing that the plan will be strictly adhered to, make more difficult the purposeful ignoring of the plan, especially in view of the fact that the plan would be adopted by the governing body as opposed to an independent commission.

Two additional proposals are extant. The first would require a consistency

analysis to be undertaken by the planning agency to determine if the facility plans of each of the operating agencies responsible for the installation of public facilities to determine if they are consistent with the overall plan and with each other. This would help to keep each facility agency moving with its sisters and with the development regulations. The second suggestion is that the flexible development controls be exercised only by those municipalities which undertake annual assessments of the status of development and its control within their jurisdiction.

5. PROVISIONS RELATING TO JUDICIAL REVIEW

A long-standing principle in zoning law has been that of "presumptive validity" in which the actions of a governing body in the regulation of land use is presumed to be valid unless very substantial evidence can be presented to demonstrate that the action is arbitrary or capricious. In some proposals for revision of local zoning and planning statutes, this presumption would be forfeited for those actions taken when a plan does not exist and/or in the absence of a governing body finding to the effect that the adopted regulation is in substantial conformity with the recommendations of the plan. A second proposal which seems to be gaining in popularity is that of enabling inverse condemnation in which a municipality exercising the police power through zoning would be permitted to compensate the owner of a property if the courts find that the regulation actually exceeds the police power and constitutes a taking of land. Up to now, if the court found that the regulation constituted a taking it granted the necessary development permits and the municipality was effectively blocked from switching its action to one of an eminent domain proceeding. A final proposal is that of permitting the courts to request that the state planning agency review a development regulation and perform essentially as an *amicus curiae* to the court in advising the court of the desirability of the development regulation.

6. INTERGOVERNMENTAL PROVISIONS

Many authors working on land use law revisions recognize the need to require conformity of lower level development regulations with higher level policies. Hence, most suggest higher level review of all regulations and specify at least the necessity for an extraordinary majority for adoption in the face of an adverse higher level report. Some proposals do not involve the mandatory referral and review of regulations, but the referral of all development permit applications for certain kinds of developments which impact on the state or regional interests to be referred and reviewed by the higher level jurisdiction and passed by extraordinary majority in the face of adverse comment or recommendation.

The above summary of the major provisions of recommended revisions in the local zoning and planning enabling statutory framework does not, of course,

represent what will be adopted. The list has been culled from the many revisions which have been proposed and is a "1972 basket" of suggested options available to states considering the matter. Which combinations of provisions are adopted by any particular state will depend upon the planning and development problems extant within that state, its political process, and the provisions which leader states have adopted previously.

Nevertheless, several generalizations can be made about the likelihood of certain features being adopted. First, the streamlining of organization and procedure is almost certain. No one benefits from the current fractionalized structure for approval of building permits, subdivision plats, zoning changes, and utility locations. Neither the developer nor the public in general should object to unification of development controls in a single ordinance and their administration by a single agency.

Second, it is likely that a more intimate relationship will be achieved between planning, regulation of land use, and the programming of development-related public investments. Clearly, the current divorcement of planning from policy adoption, the singular emphasis on end-state conditions in master planning, and the lack of a mechanism for intermediate planning and programming within an overall policy decision as to end-state has been a regrettable and substantially fruitless endeavor. Although there will be some anguish over how this change is to be made, public awareness of where the problem lies, namely in the decision structure written into the enabling statutes seems to have matured to the point where it is politically feasible to achieve substantial change in this direction.

Third, state intervention which has already taken place in many states demonstrates the timeliness and likelihood that some sort of hierarchy of planning and development control will be established in most states, thereby permitting expression of greater-than-local interests and requiring local planning and development regulation to reflect the higher level concerns.

And last, there will probably be somewhat more flexibility permitted in the administration of regulations. Planned unit developments and similar techniques for handling large-scale developments with more flexibility than is permitted in a pure "specification" ordinance have been established as workable devices to encourage better land planning, but have sometimes been blocked by the necessity to enact a separate statute. The incorporation of these features in any comprehensive revision will probably go almost unchallenged because of substantial support from the development industry and neutral attitudes in the general public.

Implications for Environmental Systems

The renaissance in land use has four potential effects which will assist in the protection of environmental systems. The first is the possibility of much greater degree of protection of natural resources from private actions which destroy or

deplete them. At long last, there is growing recognition, especially at the state level, that certain types of resources can only be saved by limiting or prohibiting the types of development which are permitted in and around them. Recent state actions to protect wetlands, mountains, forests, the Everglades, etc., from the damaging effects of development point in this direction. But there is a limit to the degree of control which can be exercised through police power regulation. The fundamental principle of land law which states that a land owner may not be denied a reasonable use of his land without compensation will act to limit the effective use of new state regulations of development in areas of critical resources. Therefore, the regulation of land development directly by state action will achieve its purpose of withdrawing regulation from parochial local interests, but is not likely to be very effective where the nature of the resource to be protected requires denial of development altogether. In these cases acquisition of the land by eminent domain or inverse condemnation is the only method which will be effective. Nevertheless, this still leaves a considerable list of resources which are tolerant of modest levels of development and, therefore, can be protected by well drafted land use regulations while still allowing the land owner a reasonable use of his property. (It is a well established principle in land law that the land owner is not entitled to the most profitable use of the land, but only that use which permits him some economic return).

The second effect which the new land use approaches are apt to have on the environmental area is that of opening the question, heretofore legally unapproachable, of relating the land use capacity of an area to the ability of natural systems to support that quantity of land use. It makes little sense to allow a metropolitan area to grow so large that the capacity of its proximate hinterland is exceeded for purposes of food production, water supply, major recreation facilities, etc. Some of the recent state approaches to land development control have begun to realize this interrelationship between population concentrations and the capacity of supporting nonurban natural systems. The possibility of this concern expanding in the near future is very great.

A third area of land use/environmental interrelationships which is evident in the reawakening of land use concerns is that of conforming the land use pattern to the assimilative capacity of receiving ecosystems, given the state of treatment technology at any point in time. If certain types of revisions are made in state and local land use control it will be possible to place limits on the location and intensity of land use on the grounds of insufficient assimilative capacity of airsheds, drainage basins, ground water recharge areas and the like. The recent Ramapo case provides judicial weight to the argument that development should not be allowed in those areas where facilities are insufficient [25]. While that decision did not examine the question of limiting development where facility capacity *is sufficient* but assimilative capacity *is not*, that is the next logical extension of the argument.

The fourth and final effect of land use revisions on ecological systems is associated with the third, but relates the intensity of land use to the handling capacity of supporting facilities for treatment of waste. Regulation of the eventual population density of an area to conform to the assimilative capacity of proximate natural systems requires an assumption about the contemporary state of treatment technology. But, if the capacity of that treatment technology is exceeded prior to development to terminal population, the assimilative capacity of the natural systems may be destroyed along the way. Hence, the concept of relating the timing or phasing of growth to the installation of supporting facilities so that development does not out-pace the capacity of facilities to handle waste, is a very important one for the environmentalist. This is the precise issue addressed by the Ramapo court. One can relate the terminal population or land use of an area to the assimilative capacity of receiving natural systems assuming a given state of treatment technology, but unless the installation of that treatment system is phased to stay ahead of the growth which is loading the system, the receiving system may become substantially degraded even before terminal population is reached.

Conclusion

The previous paragraphs describe an emerging revolution in land use controls at both the state and local level which has considerable potential for assisting in the protection of environmental systems. It must be emphasized very strongly that these changes are, at this time, an unachieved potential. Whether or not they are actually adopted as law depends upon the workings of the political process in each of the states and in that regard, those interested in the environment must be diligent in the identification of the role which land use plays in environmental considerations so that legislation will be framed in a way which recognizes the intimate relationship between the two. The public agenda is now open to consideration of these problems for the first time since the 1920's when our contemporary land use control system was cast in the form of the two standard enabling acts described earlier. Land use experts and environmental experts have a conjoint responsibility for assisting in the drafting of whatever new land use framework will emerge from the public debate.

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3. Footnote 22 of the *Standard Zoning Act*, referring to the provisions that

regulations shall be made in accordance with a comprehensive plan, states, "This will prevent haphazard or piecemeal zoning. No zoning should be done without a comprehensive study."

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