

The Zoning Dilemma (Daniel R. Mandelker)

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REVIEWS

THE ZONING DILEMMA, Daniel R. Mandelker, Bobbs-Merrill Company, Inc., 1971 pp. xvii, 196.

It is helpful to remember that planning and zoning as a system for the control of land use in this country were coined a little more than a half-century ago in the context of societal values and experiences of the nineteenth century. In retrospect, the times were then simpler and seemingly limitless land resources obscured the early signs of trouble that might come with headlong urbanization. In the intervening years, growth and change have strained and stretched the planning and zoning system, it has undergone modifications and adaptations, it has become a code-word in some quarters for social exclusion and racial separatism, and is sputtering as it is faced with the demands and needs of the problem impacted urbanized condition of the present era. We are grateful to Professor Mandelker for getting the patient to the couch for analysis, for reporting a specific American case history, and for suggesting that a legal strategy for change is overdue.

The author selected King County, Washington, a fast-growing urbanizing area whose central city is Seattle, for a study locus because of its apparent policy of exercising its zoning powers "in direct implementation of its comprehensive plan." In such a context, it appeared possible to determine whether and how the development policies of the plan, contemplating the harnessing of growth and the allocation of sites for apartment development in a series of urban centers, were implemented in the zoning process. Within this framework, as might be expected, compromise played a dominant role, with conceptual policy too frequently yielding to expediency as decision making occurred by amendment, variance or exception. In a sense, the study was concerned with applied zoning as contrasted with conceptual zoning, which is understood as the state of a zoning ordinance having prospective developmental incidence. Zoning inadequacies, as applied, are ascribed in good part to its legal origins, narrowly bottomed on the nuisance approach of adjusting use incompatibilities in an era when development control is required to perform additional societal roles.

Thus, arises the dilemma. Policies based on the narrow view have led to rejection by some courts of restrictive zoning strategies as lacking balance or comprehensiveness and to legal argument that they deny equal protection of the laws. Yet the exercise of zoning powers to achieve

broader societal goals might violate substantive due process protections of property rights, generate inequities or create financial windfalls.

The British model of development control, with its system of compensation and charges to level the economic impact of a development plan, is considered a possible method of reform. However, the British policies have not worked out as conceived in theory in 1947, and the differences in constitutional government structure, geography and scale would not suggest easy transferability to American practice. Proposal of a new land use control system in any event was beyond the scope of this book, but the author does not see that reform is imminent because he warns that we may "continue to expect the planning and zoning process to be deeply troubled by ambiguity and ambivalence."

Nevertheless, the American system of planning and zoning control continues its improvisations and the legal system continues to conjure the rationalizations and flexible interpretations to establish some certainty of decision making in development processes. Contract zoning, bonus or incentive zoning, floating zones, development permission for large land assemblages and new towns, and recent decisions¹ which redefine the validity of exclusion and segregation, seek redress for the inadequacies of the basic zoning and planning "fault" origins. It is not unusual for "deals" to be reported involving the donation of land for public or social use to induce a rezoning of the residue for a shopping center,² or other income producing use. However, these approaches are flawed by unpredictability and lack of coherence and more importantly by general default in giving weight to metropolitan or regional, and ultimately to national perspective for the exercise of public policy with respect to land use. The influence of tax policy has largely been neglected in the call for reform of planning policy and practice. Perhaps the time has come for states to recapture planning powers in whole or in part, at least to the extent of performing a review function to effect coherence among disparate local effort according to state-wide standards and values. In this way, states might assure substantive orientation of local plans and practices to regional or metropolitan considerations, and to national relevance. Seminal ideas of national land use policies are already discernible in the context of revenue sharing proposals which would employ the national spending power to implement national land use and growth policies.

¹ *Oakwood at Madison, Inc. v. Town of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971); *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

² Carter & Scovel, *Huntington Votes Housing for Aged*, *Newsday*, Feb. 16, 1972, at 3, col. 1.

Professor Mandelker has in this book provided keen insights into the American system of planning and zoning, has given us a provocative vehicle for viewing the system as a whole, has isolated its ideological weaknesses and inequities, and thus has established a background for consideration of the invention of a new system that will be more compatible to the needs of our trouble impacted urban situation as it evolves toward the turn of the next century. Planners who are sensitive to the legal role that must be played in the land use regulation process, lawyers who recognize that planning requires a legal component for decision making and urbanists in general, will find in this book abundant stimulation for considering planning and zoning problems with freshened critical interest.

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