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PATTERNS, POLICIES, AND PROBLEMS
IN COLORADO LAND USE AND DEVELOPMENT

An Assessment of Some Advantages and
Disadvantages of Current Techniques
in Land-Use Planning and Control



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IN COLORADO LAND USE AND DEVELOPMENT? (

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in Land-Use Planning and Control ✓

Presented at

Seventh Annual Statewide Land-Use Symposium

Albuquerque, New Mexico

October 15-16, 1975

Sponsored by Cooperative Extension Service

College of Agriculture and Home Economics

New Mexico State University

Las Cruces, New Mexico

by

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N E W M E X I C O

SEVENTH ANNUAL STATEWIDE LAND-USE SYMPOSIUM

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Sponsored by the Cooperative Extension Service, College of Agriculture and Home Economics, New Mexico State University, Las Cruces, New Mexico 88003.

An Assessment of Some Advantages and Disadvantages of Current Techniques in Land-Use Planning and Control--by Norman Wengert, Professor of Political Science, Colorado State University, Fort Collins, Colorado 80523, and Member of the Wisconsin Bar.

Almost three years ago at a conference on national land use policy sponsored by the Soil Conservation Society of America, I stated:

"In the decade of the seventies, the regulation and control of the land use will be extended beyond anything we have experienced in this field to date. The signs of change are everywhere apparent--if we will but read them. At the same time, the changes, which seem to me to be inevitable, will not occur without considerable controversy, conflict, and political struggle. At the center of the controversy, on the one hand, will be the owners of rural land--farmers, ranchers, land developers, and speculators--and, on the other hand, a more diverse, essentially urban-oriented group of conservationists, environmentalists, planners, and others who are responding to a need to preserve and restore outdoor landscapes and rural countrysides. Behind the emerging controversy are strong divergent values with respect to what constitutes a quality environment and a satisfying way of life. But to a large extent, the controversy will center on two very practical questions: (1) Can private land use be controlled for public benefits and purposes; and (2) Does the owner of open or rural land have a right to a monetary profit, not simply from the productivity of his land and his managerial inputs but from the unearned increments due to fortuitous location and population growth or movement (urbanization)?"

The quoted statement is as valid today as it was three years ago. Change continues to be a major aspect of land use policy, whether one examines the legislative situation, judicial decisions, or proposals of executive agencies at federal, state, and local levels. And land use planning and control policy remains a major issue of public controversy.

My topic today is concerned not so much with the grand picture of planning and land use control, but rather with assessing some current techniques in land use planning. I will summarize these rather briefly in the expectation that you will raise questions about those in which you are most interested.

Zoning and Subdivision Control

Zoning and subdivision control remain basic tools for land use plan implementation, but even the way in which these techniques are used has been changing. Zoning and subdivision control as well as local planning, were products of urban growth in the 1920's. At that time, the U.S. Department of Commerce, under the leadership of its Secretary, Herbert Hoover, proposed, first, a model zoning law and, a year or two later, a model planning act. Because of the real estate boom of the 1920's, most states felt the need for land use controls, even as these needs are apparent today under similar land boom situations. The major difference, perhaps, was that in the 1920's zoning and planning were often sponsored by real estate interests. And the reason is quite apparent. Zoning, as initially conceived, was designed to organize the land market. It sought to protect individual economic interest in particular pieces of land from encroachment by incompatible uses which might depreciate value. Avoidances of nuisances and a desire for homogenous neighborhoods were primary goals.

The original model zoning act, adopted by most states, provided that the application of zoning ordinances was to be "in accordance with" the master or comprehensive plan. In theory, zoning was to be a technique for implementing goals and policy statements incorporated in the master or comprehensive plan. But in fact, zoning went ahead on its own, and the courts did not insist that application of zoning regulations be preceded by a comprehensive plan. In retrospect, many commentators have expressed the view that this was a major deficiency in the approach to land use in the 1920's. Among other things, it contributed to a situation in which comprehensive plans were often not prepared, or if they were prepared, they were regarded as "pie-in-the-sky" dreams rather than basic policy statements to be implemented by local government decisions.

One of the changes which is occurring, and which is likely to affect all planning eventually, is the re-emphasis on the need for a comprehensive plan to precede zoning and other land use controls. Another development, typified by the Oregon Fasano decision Fasano v. Board of County Commissioners, 507 p.2d 23 (Ore. 1973)7, involves construing zoning changes as quasi-judicial with rather significant consequences for procedure, raising conflict of interest questions and burden of proof issues, as well as delimiting the kinds of facts to be presented to sustain a rezoning.

Perceptions of Land Use Problems

While those most vociferous in their opposition to any land use control may tend to interpret proposals for control as subversive of basic American traditions and institutions, I think we must recognize

that many proposals for more extensive land use planning and control, and particularly proposals for involving innovative techniques, reflect widely held perceptions of many people as to the nature of a range of land use problems confronting our society. A brief summary of some of those perceived problems provides an appropriate background for considering the variety of proposals for dealing with them.

In looking at land use problems as well as solutions, it is probably useful to distinguish between those which are urban related or urban instigated and directly involve urbanization and urban growth and those which concern open spaces, preservation of agricultural land, and outdoor recreation. The urban related problems include subdivision development where leap frogging and scatteration of subdivisions has been particularly apparent and is generally considered undesirable. Similarly, the growth of urban housing and business along highways, designated strip cities, are often considered as undesirable. Urban sprawl, which includes both scatteration and low density development, is often criticized particularly because of the social costs associated with it. Land development for urban purposes, of course, has housing as its primary objective. While most surveys still indicate that the American dream is the detached single family home surrounded with a substantial amount of land, present-day housing costs are said to exclude 80 percent of the population. It is in this context that mobile home development becomes an important factor.

In nonurban areas land use problems become considerably more complex. Of increasing concern in the last three or four years has been the question of preserving prime agricultural lands. This concern tends to be based upon a desire to protect the base for food production, but also on the desire to preserve agriculture as an effective way of life, and to keep job and other economic opportunities associated with farm

enterprise. Preservation of open space and attractive rural landscapes benefit people living in rural areas, but most of the interest in the subject tends to be urban based. Similarly, the interest in the development of second homes and of recreation areas, as for skiing, tends also to be urban based, but the positive and negative impacts of these developments is felt in rural or nonurban communities.

Both the urban and the nonurban situations raise concerns for patterns and quality of development. In some places the developer is considered an essential member of the community but in others he is looked at with suspicion, particularly since rates of bankruptcy among certain kinds of developers increased dramatically in the last 18 months.

Problems of water and sanitary facilities may be involved in both urban and nonurban areas. In any case, a major element in the demand for more effective planning and land use control is the need for changes in response to growth. To put it another way, land use problems are most acute where growth rates are high, most growth representing expansion of urban populations requiring new housing and related public facilities, including shopping centers, utilities, roads, and schools.

Growth Management and Development Timing

"Growth Management" or "Development Timing" are becoming popular concepts for designating a variety of approaches to urban generated and urban related land use problems. Basically, proposals for growth management rests on an assumption that the rate, the density, and the location of residential growth in urban areas must be slowed down and directed in accordance with specifically identified community interests. Ideally, growth management should not be separated from a larger concern

for development management since growth of a community is not unrelated to the economic opportunities which the community seems to offer. Most typically, however, growth management is defined simply in terms of regulating the conversion of rural lands to urban needs. Development management, on the other hand, addresses not only the problems associated with conversion of rural land for urban needs but also questions of central cities, of older suburban areas, and of the larger region of which a community may be part. Development management seeks relationships to the larger universe of which a community is part, whereas growth management tends to be introvertive in its concern for the growth problems of a particular community, and as will be suggested later, herein may lie difficult constitutional problems.

Among factors leading to a consideration of growth management are situations in which development of new lands (subdivisions) exceeds administrative or fiscal capacity of the local government in the face of rising costs and associated lag in the provision of adequate services. Another strong rationale for growth management is the desire among some communities to protect a way of life, often to remain small and rural, rather than being gobbled up by a highly urbanized area. Sometimes a concern for environmental damage and for the relationship of growth to the natural environment may be reflected in growth management plans. Related to this latter concern is that focusing on the loss of productive lands in agriculture, forestry, and perhaps in minerals. Growth management may also be motivated by a desire to adjust growth to available water and energy supplies. In summary, some would say that growth management deals with the management of change, seeking to direct forces of change to achieve community interests

and objectives.

Let me now turn to examine some of the developed techniques for growth management.

Moratoria on Development

In some situations where growth has clearly outrun the capacity of a community to manage it, a moratorium on housing starts or on new subdivisions has sometimes been declared. Most frequently this device is used where sanitary facilities lag behind development. In any case, the moratorium tends to be an emergency device, subject to rather severe legal limitations as to the period of time for which it may be utilized. Sometimes a moratorium on development may be declared as an interim control while planning is proceeding. Since the development of a master plan may take several years, and since that plan may shape development in the future, courts in some states have allowed moratoria to minimize the problem of subsequent nonconforming uses. Sometimes where a moratorium is used provisions are included for ad hoc case-by-case consideration of development requests.

Phased Growth

Phased growth is a major characteristic of most growth management proposals. Its central focus is the desire to slow the rate of residential growth. Pressures for phased growth develop particularly in communities where growth rates have been exponential, often outrunning the fiscal and organizational ability of the community to provide the necessary infra structure. It should be noted, in passing, that often this inability reflects institutional and temporary deficiencies rather than basic long term problems. Too often racial prejudice, economic discrimination against low income classes, and a hostility to

newcomers has been involved. Sometimes proponents of phased growth seem to be saying "Now that I am here, no one else should be admitted." In this connection, for instance, it should be noted that from the point of view of the larger community (the region), the state or the nation, costs to provide education and most infra structure facilities will occur no matter where the families may live or the growth occurs, and so attempts to keep people out of a particular community may in fact reflect an unwillingness to absorb a "fair share" of national, state, or regional growth. The "fair share" problem is particularly related to so-called exclusionary zoning which will be discussed further below. Some communities have deliberately sought to retain their small-town character in the face of urbanization all around them. In some instances (e.g. Pennsylvania and New Jersey) courts have rejected this as a proper community goal.

Techniques for Controlling Growth

The most obvious technique is that of setting population limits, either in terms of a total, as was proposed for Boulder, Colorado, some years ago, or in terms of the number of new dwelling units to be permitted each year. Four important cases come to mind in this connection. One is the Ramapo Case in New York Golden v. Planning Board of Ramapo, 30NY 2d 359, 295 N.E.2d 291, 334 N.Y.S. 2d 138 (1972)7, another is the Petaluma Case in California Const. Ind. Association v. City of Petaluma, 375 F. Supp 574 (1974); reversed on appeal, 9th Cir. (No citation)7, a third is the Mt. Laurel Case in New Jersey Southern Burlington County NAACP v. Twp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975)7, and a fourth is the Sanbornton Case in New England Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972)7. Time

permitting, each of these cases deserves a brief comment.

Exclusionary and Inclusionary Zoning

The courts have been particularly firm in deciding that land use controls which exclude what is called a "fair share" of poor and minority housing violate constitutional principles. At the same time, unless a community is itself deeply involved in the construction of housing, it can be difficult to develop inclusionary programs. It is in this context of exclusion, for example, that the effect of any kind of land use controls on the price of land must be considered. Since there is reason to believe that most controls have the effect of increasing the price of land, and thus may run counter to even a sincere interest to provide housing for low and moderate income groups.

Jurisdictional Limits

One of the most difficult problems for many communities arises from the fact they have no extraterritorial jurisdiction and are not able to influence what happens outside city limits except by means of first annexing an area. Annexation statutes vary from state to state. In some, the process is rather simple, but in others it can be very difficult. This means that responsibility for land use planning and control may fall on the next level of government, usually the county. But counties have authority to only do those things which are authorized by state legislation, except in the few situations where county home rule may have been authorized. Not all states have given county governing bodies the full and necessary authority for effective land use control in the vicinity of urban communities. Moreover, from a political point of view, county governing bodies have different constituencies and are concerned with a different hierarchy of problems, so that they may often not be interested in confronting problems of urban growth in the same

way that the cities are likely to.

Land Banking

In several Canadian provinces, in Australia, and in Sweden, "land banking" is an important adjunct of the planning and land use control process. In its simplest form, land banking simply means that government purchases land for later use in accordance with a long range master plan. When the land is ready to be used it may be leased or sold to private owners. In the meantime, however, the government has control of the land by virtue of its title and may rent it out for temporary uses. Several countries have adopted novel approaches to valuation of land to be put into the "Land Bank."

Development Rights

Two basic types of development rights are currently being discussed. The first type involves the purchase of development rights by a governmental unit, leaving the land owner with certain limited rights. Thus in Connecticut and Suffolk County, New York, it is presently being proposed that the state in the one case and the county in the other purchase all rights to development of certain lands, leaving only agricultural use rights in the hands of owners. Development rights thus are analogous to resulting in certain covenants running with the land. Similar approaches are being considered in New Jersey and Maryland. The major limitation of this approach to land use control is, of course, that of fiscal capacity. I have not seen any estimates of the possible cost of this technique, if it were to be used to preserve particular uses around the borders of major cities, but it is to be noted that the Connecticut proposal to preserve less than 16 percent of the area of the state involves an estimated cost of \$500 million (\$1,000 to \$1,500 per acre) and in Suffolk

County, the sponsors of the purchase program are talking in terms of \$4,000 to \$6,000 per acre for a County total of about \$120,000,000.

An imaginative proposal has been made to establish transferrable development rights systems, which, it is thought, would involve little or no public funding, although in some proposals a residual public land banking function is recognized. To my knowledge, this approach has had very little experimental development, and it is not at all clear that it will work as proposed.

Federal Programs

This paper would not be complete if it did not recognize that some of the more drastic effects on land use may originate from environmental programs concerned with energy, water, air, and other major resources. Both the Air Quality Act of 1970 and the Water Pollution Control Act Amendments of 1972 recognize that these two major environmental problems have their origins in land use patterns. A Federal Court has ruled that Section 208 "area-wide waste treatment plans" must be developed for the entire area of each state. Similarly, it has been charged that our inefficient use of land in the suburban areas of major cities accounts for the waste of substantial quantities of energy. Thus anyone considering trends in land use planning must take into account the way in which these federally dominated programs may influence state and local actions, which in turn may impinge on land use.

Preserving Agricultural Land and Open Spaces

Preservation of open spaces can be secured by a variety of acquisition techniques ranging from eminent domain and fee simple purchases through land banking, less than fee acquisition, leaseholds and compensable regulations. Direct regulation to preserve open space frequently will

encounter the problem of taking without compensation. Subject to that constitutional limitation, however, ten common techniques have been identified as useful for open space preservation: (1) bonus and incentive zoning; (2) conditional zoning; (3) contract zoning; (4) density zoning; (5) environmental controls; (6) mandatory dedications; (7) official mapping; (8) PUD ordinances; (9) subdivision regulations; and (10) rural and urban service districts.

The recent emphasis on areas of critical state interest indicate that protection of such areas as floodplains, wetlands, coastal zone, and geologic and other hazard areas is probably within the scope of the general welfare and health and safety definitions of police power. This approach designating areas and activities of critical state interest, although fairly new, appears to be gaining support for accomplishing a wide range of land use objectives. Another approach that has been tried in a number of jurisdictions involves special taxation policies, primarily differential assessments or the taxing of the use value as against the market value of the land. Nine states have preferential assessment based on use value with no penalties if the uses are changed. Eighteen states have a kind of deferred taxation system with a kind of penalty or reachback tax assessed at the time use is changed from the favored use to some other use. And finally, several states have restrictive agreements whereby the land owner contracts to use his property in a particular way for a particular time (California and New York).

Although touted as very significant, studies of differential taxation systems seem to indicate that they have been less than impressively successful in preserving land for desired uses. Preservation of agricultural land, particularly prime land, is becoming a political issue

of considerable importance stemming in part from the concern about world hunger and our capacity to meet our own needs for food and fiber. Three techniques have been important in the attempts to preserve prime agricultural land. One of these is large lot zoning and limitations on parcelization, the latter related to subdivision controls.

A second approach is the designation of agricultural zones which often may include a contractual relationship between the land owner and the governmental unit. There is little evidence that this approach, if not supported by the purchase of development rights, goes very far in preserving prime agricultural land. Designating certain areas as agriculturally zoned looks good on maps, but the record indicates that as soon as pressure develops to allow a variance or to change the zoning this usually is permitted. There are, in addition, some legal-constitutional questions as to the ability of a local government to restrict land to agricultural uses by the zoning technique.

The differential assessment approach, discussed above, is a third technique for preserving agriculture, but the record of results (e.g. in California) is less than impressive. In the West, a particular problem arises in connection with the preservation of irrigated land in agricultural use. The land itself or the water rights, indispensable to continued agricultural uses may be purchased. In either case, farming is ended. There is some reason for concern, moreover, that the loss of irrigated land has severe consequences for the region in which this loss occurs. In this connection, the taking of irrigation water for urban uses has been slowed down in Colorado by a recently enacted statute requiring a thorough analysis of alternatives and impacts by the local government seeking such water, with ultimate court approval of its action.