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A Comment on the 1968 Amendments to Kentucky Planning and Land Use Controls Enabling Legislation

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In 1966 the Kentucky General Assembly enacted a complete revision of planning and land use controls enabling legislation,[1] thus giving the state uniform enabling legislation for the first time in its history. This revision was the subject of an article in the preceding issue of the *Journal*.[2] The purpose of this brief article is to supplement the previous discussion by commenting on amendments to the legislation enacted during the 1968 session of the General Assembly.

The reception of Kentucky Revised Statutes [hereinafter referred to as KRS] Chapter 100 among developers, lawyers, professional planners, and planning commission members has been mixed. Many lawyers consider it the product of a group of planners completely detached from reality and dismiss it as an unworkable "planners dream." Many of these comments are justifiable reactions to the numerous instances of poor draftsmanship which permeate the statute. Others, however, are motivated by hostility toward land use regulation and are oblique methods of attacking its substance. The Kentucky Department of Commerce is very sensitive to such criticism, and during the 1968 session introduced legislation designed to rectify most of the drafting errors and eliminate the ambiguities.[3]

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1 KY. REV. STAT. [hereinafter cited as KRS] §§ 100.111-991.

2 Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation: An Analysis of the 1966 Revision of KRS Chapter 100*, 56 KY. L.J. 556 (1968).

3 Senate Bill No. 383 (1968).

Among the more important changes proposed were more stringent standards for the exercise of extra-territorial land use controls,[4] a clarification of the alternative procedures for the adoption of a comprehensive plan,[5] clarification of the referral and publication procedures required for the adoption of a zoning ordinance,[6] and a clearer statement of the status during the transition period of plans and studies prepared under the previous legislation.[7] In addition, the Department proposed that several confusing duplications be eliminated.

The Department's bill was not enacted and thus the 1966 version remains intact except for a modification of Section 213. It is unfortunate that the reform bill did not pass, because most of the changes were needed and would have made the statute more workable. However, since the legislation does not become uniformly applicable until June 16, 1971,[8] the General Assembly will have another opportunity to enact needed revisions.

The General Assembly enacted only one amendment to Chapter 100 during the 1968 session. Section 213 previously required that both the planning commission and the local legislative body or the fiscal court find a map amendment to be consistent with the comprehensive plan before it would be given effect. This gave the planning commission a veto over the legislative body. The 1968 General Assembly rescinded the veto power and now a map amendment can be granted if either the planning commission or the local legislative body or fiscal court makes the finding.[9]

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[4] Senate Bill No. 383 § 3 (1968). The most important proposed reform would have precluded the exercise of extra-territorial jurisdiction until a comprehensive plan for the area was adopted.

[5] Senate Bill No. 383 § 10 (1968). The proposed amendment to KRS § 100.197 (1966) would have given a planning commission the option of either holding one public hearing when all elements of a comprehensive plan had been completed or a series of hearings as each separate element was adopted.

[6] Senate Bill No. 383 § 13 (1968).

[7] Senate Bill No. 383 § 18 (1968).

[8] KRS § 100.367 (1966).

[9] House Bill No. 398 (1968). The purposes and provisions of which are as follows:

AN ACT relating to planning and zoning.

WHEREAS, the 1966 General Assembly of the Commonwealth of Kentucky enacted House Bill No. 390, AN ACT relating to planning and zoning, a purpose of which was to encourage intergovernmental cooperation between cities and counties by encouraging them to form joint and regional planning units, and

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The double veto contained in Section 213 was one of the most significant innovations introduced by the 1966 revision of Chapter 100. The objective of its supporters was to protect the integrity of the adopted comprehensive plan. The planning commission was made coequal in authority with the local legislative body or fiscal court because the Legislature had delegated to them the power to approve or disapprove map amendments. The assumption behind Section 213 was that members of the commission would be less responsive to financial and political pressures to amend the comprehensive plan out of existence. The accumulated evidence concerning planning commission performance across the country tends to cast doubt on the factual validity of this assumption;[10] therefore, it is probable that the amendment will not unduly diminish the effectiveness of Chapter 100 in achieving its basic objective of tying the administration of land use controls to the

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WHEREAS, it was the intention of the General Assembly in so enacting House Bill No. 390 to make recommendations of planning commissions more responsible to the will of the people through their elective representatives by providing for the overruling of recommendations of the various planning commissions by a simple majority of the appropriate legislative body or fiscal court having jurisdiction, and

WHEREAS, Section 34 of said House Bill No. 390 (being KRS 100.213) has been improperly construed so as to indirectly limit the power of the legislative bodies or fiscal courts to overrule recommendations by planning commissions of disapproval of map amendments, thus encroaching upon and limiting the legislative powers vested by said House Bill No. 390 in the various legislative bodies and fiscal courts, all of which is deemed detrimental to the welfare of the people and contrary to the expressed intention of the General Assembly in its enactment of said House Bill No. 390.

NOW, THEREFORE,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 100.213 is amended to read:

Before any map amendment is granted, the planning commission *or* [and] the legislative body or fiscal court must find that the map amendment is in agreement with the community's comprehensive plan, or, in the absence of such a finding, that one or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission [and] *or* the legislative body or fiscal court.

(1) That the original zoning classification given to the property was inappropriate or improper.

(2) That there have been major changes of an economic, physical or social nature within the area involved which were not anticipated in the community's comprehensive plan and which have substantially altered the basic character of such area.

Senate Bill 97 (1968), which did not pass, would have made the change retroactive to June 16, 1966.

[10] *See* R. BABCOCK, THE ZONING GAME 19-61 (1966).

policies contained in the comprehensive plan. However, the double veto was a worthy experiment in making the administration of land use controls more responsive to professional planning. Before it is interred, the double veto concept merits analysis.

Section 213 was amended because the Lexington-Fayette County Planning Commission and the Fayette County Fiscal Court could not agree on a location policy for industrial parks and regional shopping centers.[11] The city-county land use plan divides the county into two service areas—urban and rural. Development is to be confined to the urban service area in order to preserve the surrounding horse farms as a private green belt.[12] The Commission's success in implementing this plan has been mixed. Major residential development has been deflected away from the horse farms,[13] although selected intrusions such as a research center have been allowed.

Unfortunately, the Commission has been less successful in coping with the development of land around the interchanges of the interstate highway which bisects the county. In 1962 an interstate service district was established for a large national motel. In 1966 the Commission received an application for a large industrial park to be located adjacent to a proposed interchange in the southern end of the county. The area was rural but was outside the horse farm district. The Commission found that the park was not consistent with the dual-service district policy and refused to approve a map amendment[14] while the Fiscal Court did approve the amendment. The deadlock could not be broken so the case was taken to circuit court which ruled that since Section

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[11] Letter from Robert A. Metry, Counsel, Department of Commerce, to author, April 8, 1968, on file with KENTUCKY LAW JOURNAL.

[12] CITY-COUNTY PLANNING COMM'N, LEXINGTON-FAYETTE COUNTY, KENTUCKY, A PLAN FOR LAND USE (1966).

[13] The Fayette Circuit Court has upheld the power of the Planning Commission to deny a map amendment for a subdivision on the grounds that it encroaches on the rural service area. Provincial Dev. Co. v. Webb. No. 7973 (Fayette Cir. Ct., Fayette County, Ky. 1961).

[14] LEXINGTON-FAYETTE CITY-COUNTY PLANNING COMM'N, MINUTES 9-10 (Sept. 29, 1966). The Fiscal Court maintained that the industrial park was consistent with the city-county green belt policy because it would not encroach on the horse farms and that the Court has consistently opposed development in the northern part of the county where many of the major farms are located. The Planning Commission recently recommended a twenty acre interchange service area on the edge of the horse farm area over the objections of the Fiscal Court. The Fiscal Court argued that the service area encroached on the horse farms and thus was inconsistent with the city-county land use plan. Louisville Courier-

213 required both bodies to approve the amendment and only one had done so, the amendment must be denied.[15] Unable to obtain relief in the courts, the disappointed applicants were able to secure relief through the Legislature.

The stated purpose of House Bill 398 was to restore exclusive authority to approve or disapprove map amendments to the local legislative bodies or the fiscal court in order to "make recommendations of planning commissions more responsive to the will of the people through their elected representatives. . . ." It should be noted at the outset that the choice made by the General Assembly was not constitutionally required. The zoning power emanates from the General Assembly and it is free to delegate the power to local legislative bodies, fiscal courts or to any other body, state or local.

The breadth of the General Assembly's power to delegate zoning authority is illustrated by *Southeastern Displays, Inc. v. Ward.*[16] To comply with the Highway Act of 1965, the General Assembly delegated the power to control billboards within the corporate limits of Commonwealth municipalities to the Department of Highways.[17] In sustaining the delegation of power, the Court of Appeals dismissed the argument that this contravened the inherent police power of the city stating that, "[T]he city's power to zone is derived solely from express authority conferred on the municipality by the state legislature. It has no inherent police power."[18] The delegation in *Ward* was made to a non-elective state administrative agency, but the same reasoning should apply to a delegation of all or part of the zoning function to a non-elective local body.[19]

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[15] Sexton v. Thompson, No. 19840 (Fayette Cir. Ct., Fayette County, Ky. 1966).

[16] 414 S.W.2d 573 (1967).

[17] For a discussion of the federal and state legislation *see Zoning, 1967-68 Court of Appeals Review,* 56 KY. L.J. 429-34 (1968).

[18] *Id.*

[19] *Cf.* Baltimore County v. Missouri Realty Co. 219 Md. 155, 148 A.2d 424 (1959). The state enabling act empowered an administrative official to change use district boundaries and the Supreme Court of Maryland upheld the delegation, reasoning in part that the doctrine of separation of powers does not apply to the local level and thus the legislature is free to delegate zoning functions to legislative bodies or administrative officials. In short, "the problem is one of vires, not constitutionality." Mandelker, *Delegation of Power and Function in Zoning Administration,* 1963 WASH. U.L.Q. 60, 87. The article contains a thorough discussion of the delegation problem. It appears that *Ward* adopts this approach. Journal, May 24, 1968, § B, at 2, col. 4.

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Popular control over the administration of land use controls is consistent with democratic values and should be encouraged. However, one could argue that, over the long run, the 1966 version of Section 213 would have been more effective in achieving such popular control. The 1968 version may not give members of the general community any more control over planning and land use controls than they now have, but it will give disappointed applicants one more forum in which they can appeal before resorting to the courts or state legislature. It is too soon to predict what effect this may have on the integrity of plans prepared under Chapter 100. The revision may make it easier to amend them out of existence or it may make it possible to temper the plans with the necessary practicality which they sometimes lack.

The important point to consider is whether more popular control might have been achieved under the previous version of Section 100. One could argue that it would have helped to shift attention to public participation in the formulation of the plan. This author believes that popular control can best be achieved if the values and, prior to adoption, strategies contained in the plan, receive widespread public debate by interested developers, property owners, and the general public. Too often plans are prepared by a staff or outside consultants, and served up in packaged form to the general public which is then invited to the required public hearing and comment.

The objection most often heard is that a proposed plan does not make sufficient land available for industrial sites, which in reality means that the landowner is concerned because his tract has not been projected for industrial zoning. The values of the community and their relation to the plan are seldom given extensive debate. If the planning commission were given the power to control implementation of the plan rather than being relegated to an advisory function, perhaps interested members of the community would take a more active role in the formation process and exert more influence over the final result than at present. These thoughts are, of course, speculation but do indicate that the

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The state may not, of course, delegate the zoning function to judicial bodies. American Beauty Homes, Corp. v. Louisville and Jefferson County Planning Comm'n, 379 S.W.2d 450 (Ky. 1964) (trial de novo: unconstitutional delegation.)

original version of Section 213 was an experiment worth conducting.

The only other planning amendments passed during the 1968 session were to Chapter 147, which governs area planning commissions. KRS §§ 147.670 and 147.700 were amended to include in area planning commission master plans all incorporated and unincorporated territory within its jurisdiction. The commission was given the choice of preparing a land use plan or minimum requirements for zoning ordinances in addition to their text and graphic portrayals of minimum subdivision regulations. These standards or the plan may then be submitted to the county.[20]

A rational system of land use controls can contribute to Kentucky's economic improvement. The first step is the passage of a modern and workable enabling act. Chapter 100 is a reasonably modern statute but many minor revisions are in order. It is hoped that such a revision will receive high priority during the 1970 session of the General Assembly.

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[20] Senate Bill No. 279 (1968).

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