Book Review. The Zoning Dilemma by D. R. Mandelker

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its law to protect him, unless the borrower sought out the lender in the lender’s state and the lender was entitled to rely on the law of that state. When the contract is not usurious under the law of the borrower’s state, the defense should not be allowed unless the contract is usurious under the law of the lender’s state, and (1) the law of the lender’s state reflects an admonitory policy, and (2) the borrower’s state (if suit is brought there) has no interest in applying its more liberal usury law to encourage the inflow of foreign capital.

IV. A Concluding Note

Brainerd Currie once observed, “I know of no sincere way to honor a scholar except to subject his scholarship to critical analysis.” My critical analysis of Commentary on the Conflict of Laws has produced some disagreement reflective primarily of my different approach to the resolution of the true conflict. But it has produced most of all a deep appreciation that the field of the Conflict of Laws has attracted scholars such as Russell J. Weintraub who have established a basic framework of scholarship upon which the rest of us can draw in hopes of developing our own solutions to the problems that arise in that “one litigated case out of every hundred which may involve a question of the conflict of laws.”

CARVING UP THE URBAN FRINGE


Reviewed by A. Dan Tarlock*

For many years Professor Daniel R. Mandelker has ranked among the most energetic scholars serving the law-in-action tradition of the University of Wisconsin. Based on a twelve-month examination of apar-


71 See, e.g., Dairy Equip. Co. v. Boehme, 442 F.2d 437 (Idaho 1968); Whitman v. Green, 289 F.2d 566 (9th Cir. 1961).

72 See Lyes v. Union Planters Nat’l Bank, 239 Ark. 738, 393 S.W.2d 867 (1966), where the forum reached this result, but solely on the ground that the contract was made there. For a discussion of the policies reflected in usury laws, see Seiler, infra note 59.


74 Wright, infra note 1.

ment house rezonings in King County, Washington, The Zoning Di-
lemma examines the relationship between zoning and comprehensive
planning as employed to control the development of raw land on the
urban fringe.1 To determine, primarily on a formal record, whether
zoning agency decisions were consistent with a comprehensive plan, the
author developed a computer program to analyze the effect of adjacent
zoning on apartment zoning applications. The study, however, does
more than merely assemble interesting data; it provides the framework
for a theoretical essay on the function of zoning and its relation to com-
prehensive planning.

The Zoning Dilemma is a welcome addition to zoning literature
for two reasons. First, it is one of the few systematic, empirical legal
studies of the zoning process. Secondly, and more importantly, the au-
thor has utilized the contributions of two related disciplines—city plan-
ning and economics—to fashion a comprehensive theory of zoning and
planning. He has made excellent use of recent studies of the city plan-
ning process that illustrate the limited capability of planners to influ-
ence pivotal development decisions.2 With reduced success Professor
Mandelker has incorporated the results of welfare economics research
that focuses on the widespread diseconomies in contemporary resource
utilization processes.3 In view of this general pessimism about the role of
planning in land development, Professor Mandelker’s most regrettable
omission is his failure to consider several recent economic studies that
propose alternative approaches to the administrative allocation of land
development opportunities.

One major source of contemporary concern with zoning is the lack
of a satisfactory theory of public intervention in the real estate market.
We have unquestioningly assumed that the present scale of zoning is
necessary to control widespread social costs of land development deci-
sions. The evidence, however, suggests that those social costs, or ex-
ternalities, are much less widespread than might be expected. Further,
there is no clear evidence that government distribution of development
opportunities results in efficient allocation of land. Finally, as Professor
Ronald Coase argues, if there are no significant transaction costs4 the
market itself will produce an efficient allocation of resources since in-

1 The importance of the problem is underscored by the 96% increase in apart-
ment construction in the suburbs between 1960 and 1970. N.Y. Times, Dec. 9, 1971, at 36,
col. 1.
2 State legislation often requires zoning to be in accordance with a comprehensive plan.
Most courts have construed these provisions to require only that all land in the city be
zoned. Moreover, they have generally held that the zoning map can constitute the plan.
4 Transaction costs are the expenses incurred in notification, meeting, and execution
of an agreement under the bargaining system.
individuals whose enjoyment of property is reduced by another's activity will bribe the actor to cease or modify his activity, assuming the gain in enjoyment exceeds the cost of the bribe. These considerations suggest that public intervention should be limited to remedying market imperfections that allow landowners to escape the full social costs of their development decisions.

Though the urban fringe—the subject of The Zoning Dilemma—poses special problems, a narrowly defined governmental role is equally appropriate there. Because the tracts are often undeveloped and held for speculation, the overall attractiveness, or amenity level, of each tract has not yet been set, and those who will be most affected by subsequent location of a major development do not yet own the surrounding land. Therefore, planners have considered public regulation more essential in the urban fringe because by building without considering the impact on nearby property, early developers may rob their latecoming neighbors of the full enjoyment of their land. The standard planning response to this problem is adopting a comprehensive community land use plan. To control development on the urban fringe, planners have recommended creating low-density holding zones to defer decisions on more permanent classifications until a sufficient number of rezoning requests are made. Because of the resulting tension between the current owner's development plans and the municipality's projected use for the area, the plan often fails to exert a consistent influence on future development.

Professor Mandelker precedes his discussion of King County's efforts to fix criteria for the location of apartment houses with an analysis of the contemporary argument that comprehensive plans adopted in advance of specific zoning decisions should be the basis for testing the reasonableness of subsequent rezonings. His chapter on "Zoning and the Management of Change" contains a good discussion of the critical problems in tying planning to zoning. Generally, planning is oriented toward a fixed "end-state" (pp. 61-62). The final product is a land use map that describes existing patterns and attempts to project developing trends while avoiding obvious clashes of activity. Because of equal protection problems and concern that local government will

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6 The plan . . . takes cognizance of the future; it explores it to isolate and identify the economic, social, and physical forces at work in the shaping of the community—changes in technology, in resources, in regional and national influences. Having identified these trends and appraised them in terms of impact and probability, the plan is itself a conscious master strategy to optimize the future of the community. It orientates public policy in a predictable way. It endeavors to liquidate the caprice of circumstance and thus provides businessman X, his competitors, the public, and property owners with a rational framework within which each can pursue his interests, protected to some extent from the attrition of the unexpected—certainly so far as public policy is concerned.
C. Haar, Land-Use Planning 753 (2d ed. 1971).
lack flexibility to respond to changing development patterns, the planning concept has not been well received by the courts. Although the essence of planning is discrimination among land uses, planning commissions and legislative bodies as well as the courts have been particularly concerned with guaranteeing equal protection to development applicants. These bodies have focused less on community-wide and fiscal effects than on the compatibility of proposed and surrounding uses. Consequently, few legal principles have been developed to guide planners and decisionmakers although courts are beginning to decide what weight should be given to master land use or comprehensive city plans.

To isolate the influence of these plans on judicial review of zoning cases, Professor Mandelker analyzed every apartment rezoning decision of the Maryland Court of Appeals in the past five years. His conclusions verify the fragmentary studies of other jurisdictions:

We found that the comprehensive plan was simply one element in the court’s handling of apartment zoning. Partly impressed by the fact that the plan operates on a more distant time horizon, partly committed to a point of view which accords the plan an advisory role, the Maryland court was more attentive to physical change in the immediate environment of an apartment rezone than it was to the proposals of the plan. If there is any lasting impression from the Maryland cases, it is that the dynamics of development in fast-growing areas soon outruns both the plan and the zoning ordinance, leaving the court with the need to exercise a judgment which must often be ad hoc (p. 104).

The King County study suggests that these conclusions apply as well to planning commissions and local legislative bodies. The King County plan attempted to control apartment location by formulating general policy criteria and then mapping desirable sites in advance of development. The maps, Professor Mandelker points out, proved hopelessly inadequate. No more than vague reflections of general policy considerations, they were drawn on a scale “too large to reflect adequately the plan’s proposals . . . .” (p. 116). On the basis of general policy criteria, the plan recommended the concentration of high density development around urban centers to “increase living choice, to preserve natural beauty, and to separate major portions of the urban area” (p. 117). The mapping, however, failed to specify the precise locations for these centers. The plan suggested no more than that the centers

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7 A study of Maryland is particularly apt for three reasons: (1) zoning is generally handled by county-wide authorities; (2) theoretically, Maryland restricts local legislative discretion more than any other jurisdiction; and (3) a long-range master plan was in effect during most of the important cases.
should be somewhat scattered and placed with reference to the highway network.

How then did the King County plan control the location of apartment houses? Professor Mandelker observed a “surprising fidelity to the urban centers concept” (p. 232), but then found that many decisions of the Planning Commission and the county undercut the concept. For example, the initial distinction between high and low density projects was “all but dropped.” Apartment projects were clustered along major arteries, but reversals of planning staff decisions moved potential development centers further into the county’s undeveloped areas, contrary to the plan’s concentration policy (p. 136). The planners attempted to adhere to their design, but because of the inapplicability of the plan’s criteria to specific parcels, they were often reversed when rezoning requests satisfied traditional judicially developed equal protection criteria.

The conclusion that plans are too ineffective to control land speculation is hardly surprising. Planners are forced to assume a passive role. They have no power to compel development consistent with their objectives; instead, they must rely on individual initiative and then test the private decision against their plan. Nevertheless, land use planning and real estate speculation must somehow come to terms if planning is to become anything more than a sterile and costly exercise. In Professor Mandelker’s terms, planners must decide whether the community or developers will reap the rewards—the positive externalities—generated by zoning. Most plans fail because they attempt to secure the benefits for the community, but as in King County, local governmental units seem “more responsive than the planners to private pressures to capitalize on these development opportunities.”

In arguing for land use planning, Professor Mandelker still adheres to two critical assumptions. First, he assumes that planners can articulate a community’s goals and weld them into a “single hierarchy of community objectives.” Secondly, he assumes that planning commissions or local legislative bodies will distribute benefits of zoning more efficiently than private markets. For example, in the difficult situation “in which an intensive land use has been indicated by the comprehensive plan or zoning ordinance, but the market is not yet ready to respond to the planning or zoning proposal at that level of development,” he opposes large lot zoning to defer development:

A more straightforward approach is simply to use the zoning process to reject an applicant on the ground that the area is more suitable for a more intensive use. In economic terms, the municipality simply decides that the discounted value of the future use is at present more valuable to the municipality
than the present value of the use for which a zoning change has been requested. What the municipality has on its hands is a developer with a high discount rate who cannot afford to wait out the uncertainty of the future return. My argument is that the municipality is entitled to say that the developer's discount rate should be lower! (p. 52).

I would argue that both of Professor Mandelker's assumptions are wrong. The first presupposes an extension of the planner's professional role, and the second is likely to be demonstrably false.

Planners have never satisfactorily defined their political role. Early city planners assumed that their judgments were purely technical and that community leaders, if properly educated, would surely accept them. In practice, the planners' innocent assumptions have proved hopelessly inaccurate. Planning is more than a technical exercise: it involves fundamental value judgments for the community. The decision to concentrate development so as to preserve spaces is an aesthetic judgment, not a technical one. The expert's job, narrowly defined, is to measure the costs and benefits of alternative means of achieving an objective that has been fixed by the political process. Planners can define the consequences of particular land use patterns on surrounding land and, to a lesser extent, on the community or region. But though they also claim expertise in gauging the public interest, the final answers to such questions must be found in the political process.

Other studies, such as Alan Altshuler's The City Planning Process, have shown that a major reason that plans fail is a lack of strong political support for their general objectives prior to the time that the objectives must be applied to a specific decision. Although The Zoning Dilemma does not explore in any depth the political context in which the planning commission and county commissioners operated, Professor Mandelker's observation that planning officials were not "all that favorable to developers" confirms prior studies. His remark suggests that conflict will develop between the planners and elected or appointed officials even when developers do not exert a high degree of influence over decision-making bodies.

Adoption of Mandelker's proposal that the zoning process should be used to reject low intensity development may lead to inefficiency since, by denying a rezoning request on the ground that the land will be underutilized, the community has, in effect, acquired an option on the property that allows it to veto development until a suitable user is found. Yet because the zoning authority does not sacrifice any resources

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8 See M. Scott, American City Planning Since 1890, 121 (1969). Scott's work is an excellent history of city planning.

9 See A. Altshuler, The City Planning Process 299-405 (1965). This is the foremost study of city planning in operation.
to acquire or hold the option, it is not required to calculate constantly the opportunity costs of holding the land. Thus, the danger arises that the municipality will not develop sufficient information to determine the most efficient use of the land. As Harold Demsetz has argued:

The costs and benefits of a prospective change in resource allocation cannot be treated as given datum. The marginal cost and benefit curves associated with a prospective realignment of resources are not known by the government. Each affected individual knows his benefit or cost, and, in the absence of high exchange cost, this information would be transmitted to others in the form of market negotiations. The primary problem of the government is the estimation problem.¹⁰

The failure of comprehensive planning to improve the location process for specific developments suggests three possible reforms of existing methods of land development regulation. First, planning could be strengthened by delegating decisionmaking power to planners rather than local legislative bodies. Secondly, the government could expropriate all land on the urban fringe¹¹ or adopt the English model, which assigns levels of development to land and partially compensates landowners whose development opportunities are severely restricted. Finally, government could abandon specific development decisions to the market, confining itself to defining property rights in amenity levels on the urban fringe and coordinating urban services. The third alternative seems the best to me. The first alternative may well perpetuate the high administrative costs and capricious redistribution of resources associated with zoning rather than promote efficient utilization of property. The second alternative is unnecessary because once these property rights on the urban fringe have been defined the free market will insure the optimal rate of development.

A market system supplemented by minimal public regulation is both a desirable and workable way to allocate residential development on the urban fringe. Commercial and industrial development might be administered initially through conventional zoning techniques because they present special problems. The government's function in residential development would be to define the desired amenity level in a given area, primarily in terms of population density. To avoid the common suburban practice of employing low density zones to exclude the poor and minority groups, the state could establish minimum density levels.¹²

¹⁰ Demsetz, Some Aspects of Property Rights, 9 J. Law & Econ. 61, 68 (1966).
Next, a market in development rights would be established where developers could purchase the right to construct a certain number of residential units. Conventional subdivision regulation would be maintained, and developers would have to meet high sanitation and traffic control standards for their projects. The establishment of an amenity level would require a determination, through the political process, of what the population density for a region should be and of which tracts should be withdrawn from development. For example, construction might be prohibited in flood plains and other open space areas, which could be purchased with funds obtained from the sale of development rights. Establishing a density ceiling would be desirable so that early purchasers could be relatively certain of the amenity level that would prevail after the area was completely developed. The rights packages should be sizeable enough to encourage the development of large projects since they are more easily buffered from conflicting uses. A person purchasing construction rights for a given number of units could build any type of housing he desired. If he decided that the market demanded lower densities, he could sell his unused development rights. Furthermore, public concern with oversupply of zoning classifications and underutilization of land is needless if the function of speculation is seen in its proper perspective. The proposed system would encourage the large speculator for the assemblage of large blocks of land by speculators promotes the orderly development of urban areas by reducing price fluctuations and rendering large tracts of land available at one time in response to market demands.

In addition, these proposals would tend to concentrate the housing construction industry. For example, a developer selling single-family homes would be unsuccessful unless he controlled a sufficient quantity of land to insure that the project would be buffered from higher density development in the surrounding area. Such concentration is desirable since large-scale development imposes fewer external costs on adjacent property. Moreover, the present severe fragmentation of the housing industry in this country accounts, in large part, for the poor quality of housing construction, the unimaginative design of most residential projects and the difficulty in accommodating different land uses. Large development projects would have advantages of economies of scale and greater flexibility regarding aesthetic considerations.

Government establishment of a restrictive covenant scheme in

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13 For a cogent argument that market allocation of rights to use common resources within politically defined ceilings is the most efficient method of internalizing external costs, see J. DALES, POLLUTION, PROPERTY AND PRICES (1968).
developed areas and an initial definition of amenity ceilings on the urban fringe can accomplish the following desirable objectives: maximization of choice, internalization of major external costs, and production of superior information for efficiency calculations. Moreover, the scheme would secure a greater degree of certainty for property owners. In developed areas change would occur only if the initiator chose to bear the full costs of his activity; this should hold true for the urban fringe as well. The nondeveloping property owner would have greater assurance that the immediate neighborhood would remain unchanged. Should redevelopment ensue, he would be compensated for any diminution in property value.

The Zoning Dilemma is a provocative appraisal of the major theoretical underpinnings of contemporary zoning and the reasons for its ineffectiveness. Professor Mandelker concludes that the inefficacy of zoning stems from the attempt by planners to control urban development through means inconsistent with the original zoning rationale. The failure, however, lies with zoning itself. Zoning neither shifts economic costs to the developer, nor promotes efficient use of land. Instead of imposing ever more complex zoning schemes, governments should limit their intervention in the real estate market to curing inherent market imperfections.

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15 The administration of a publicly imposed covenant scheme is described in N. Tide- man, Three Approaches to Improving Urban Land Use (Ph.D. Dissertation, University of Chicago, 1969).