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Introduction: Dedication to James A. Coon

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Introduction

John R. Nolon*

I. Dedication to James A. Coon

This issue of the Pace Law Review is dedicated to a man and an idea in which he believed. James A. Coon was land use counsel to the Department of State in New York when he died in 1992. For a quarter of a century he served as counsel to several New York State agencies, all involved in some way with providing technical assistance to those interested in the subject of land use law.

For James Coon, and those who learned from him, land use law carries with it a significant set of responsibilities. It establishes the rules that dictate when, where, and how land is developed. It determines whether land use patterns are economically competitive, protect the environment, provide adequately for employment and housing, preserve agricultural land, and allow for the creation of efficient transportation systems.

Land use law reflects the diversity and complexity of New York, unites a wide variety of groups with otherwise disparate interests, and provides a framework around which a strategy of responsible land use can be built for the benefit of future generations. James Coon understood all of this and during his career he exhibited a spirit of accommodation and optimism which helped others understand also. By listening to him and reading his many publications, one understood better the murky rules of the land use game, believed in its potential as a steady steward of the public interest, and learned that the land use system has to adapt, as any legal system must, to fit the needs of an evolving society.

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II. Introduction to the Articles

The selection of articles contained in this symposium captures James Coon's respect for New York's aging legal system, and his certainty that the system is adaptable to meet the challenges of the twenty-first century. These writings originated as speeches, most of which were presented in April, 1993 at a conference on Land Use Law Reform held at Pace University School of Law in White Plains, New York.

The original plan was to transcribe these excellent oral presentations for publication and compile the transcribed speeches in a symposium issue. However, the enthusiasm shown by the speakers at the conference and the editors of the Pace Law Review transformed the speeches into carefully edited, full-length law review articles. We are indebted to the legacy of James Coon, to whom our conference also was dedicated, and to the untiring work and good spirits of our authors and the editors of the Pace Law Review for this remarkable transformation.

By describing the foundation, functioning, and deficiencies of the land use system, these articles explain the frustration and despair of the developer advancing a project and the citizen groups in opposition, as they battle one another during late night sessions of local planning and zoning boards. The participants at these meetings feel all the pressure that is built into the land use system. This tension is experienced whenever disputes erupt over the use of the land; it stems from the dramatic conflict between the forces of change and of the status quo, of economic development and environmental conservation, and the conflict between private property rights and the public's interest in responsible use of the land.

Local governments have been unencumbered historically in their authority to determine the outcomes of these conflicts. Today, however, local control of land use has been eroded significantly by powerful regional market forces that transcend local boundaries and by preemptive federal and state laws designed to protect regional interests such as clean air, safe drinking water and fragile coastal areas, to name a few.[1] The highest court of

1. This topic is explored in a companion article entitled *The Erosion of Home Rule Through the Emergence of State Interests in Land Use Control*, by John Nolon, published in the Pace Environmental Law Review. 10 PACE ENVTL. LAW REV. 497 (1993).

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the state has joined the debate, resolving disputes and setting judicial standards for the proper functioning of the land use system. These trends have raised serious questions about the appropriate role of each level and branch of government in determining how the land is to be used. As Richard Babcock wrote in his seminal book, THE ZONING GAME, "[t]he question then arises who should and will referee the contest . . . ."[2]

III. *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma* by Henry R. Richmond

That zoning, planning and land use regulation involve a fundamental contest is obvious in the first entry in this symposium. It is written by Henry Richmond, the Executive Director of 1000 Friends of Oregon and a founding father of the National Growth Management Leadership Council. In his article, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma,* the powerful historical forces behind uncontrolled land development are explored. Mr. Richmond writes about how a young nation with sovereignty over an undeveloped continent collaborated with market forces to solidify its holdings and distribute its peoples.

Following World War II, this trend was accelerated by a population explosion, a national highway system and a federally-created system of affordable home finance. In a tick of the historical clock, forces that seemingly served the national interest were now responsible for the disappearance of prime farm land and valuable wetlands, the flight of economic activity from cities and the pollution of natural resources such as drinking water, estuaries, pine barrens, and wild and scenic rivers. Mr. Richmond's article explains how the forces of development marched out over the landscape, out-pacing the capacity of local governments to direct that growth.

The author offers an answer to Babcock's question by suggesting that Oregon's reformed land use system provides an antidote to the problems of sprawl, the modern legacy of manifest destiny. Oregon's legislature was one of the first to adopt a state-wide growth management system to provide a framework

2. RICHARD R. BABCOCK, THE ZONING GAME xvi (1966).

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for local land use regulation. That system designates urban-growth boundaries and rural districts and calls on local governments to design their land use plans to encourage development in the former and discourage it in the latter. Such a system provides a rational basis for determining where public investments in infrastructure and private investment in land and buildings should be made. The article concludes by explaining the success that the reformed land use system in Oregon has enjoyed by forging a partnership of local, regional and state decision makers.

IV. *Comprehensive Land Use Planning: Learning How and Where to Grow* by John R. Nolon

My article on the origins of the national and New York land use system, *Comprehensive Land Use Planning; Learning How and Where to Grow*, follows Mr. Richmond's. It traces the evolution of land use controls, which are as old as Roman Law, but became comprehensive only recently, during the last century in Europe and in this country in 1916, with the adoption of the nation's first comprehensive zoning ordinance in New York City. A rush to adopt zoning throughout the United States followed in the 1920s. There was a sense of urgency in that historical moment; the evidence indicated that without public controls to provide predictability, massive investments in land development would be lost.

The framers of this quickly-constructed land use system always intended that land use planning would precede its regulation; indeed, they declared that zoning must conform to a comprehensive plan in order to be constitutional. That principle found its way into state law throughout the country. But still, zoning came first and planning followed because of practical considerations, much as it does today in many cities, towns and villages.

Our review of the early land use system reveals that its creators never fully agreed about what a comprehensive plan was and how, precisely, zoning was to conform to it. However, their intent was never in doubt. The planning requirement was a serious one; the framers of the system stipulated that land regulation should be attended by a constant dialogue among affected interests about the public policies and objectives to be achieved

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by regulation. This dialogue, or evolving land use plan, was to be comprehensive in subject matter and geographical application, as these are defined by the changing exigencies of society.

New York's statutes, too, require that zoning be in conformance with a comprehensive plan, but they do not require that localities adopt land use plans before they adopt zoning ordinances. There is no requirement that the plans be kept up-to-date. Where a land use plan and a zoning ordinance are adopted by a community, the statutes do not specify how they are to be interrelated. Although the courts have held that local zoning must consider and be responsive to regional needs, there is no statutory framework, such as that provided in Oregon, for regional need identification or planning.

The article explains that these statutory flaws have been redressed, in part, by the courts. The judiciary has made it clear that land regulations that explicitly conform to a comprehensive plan will be immunized from all types of attacks by regulated owners, including claims that regulations constitute a taking of property without just compensation. Conversely, those that fail to conform are routinely struck down. This amounts to a judicial imperative to plan and, the decisions of the courts add, to plan with regional needs and objectives in mind. By failing to redress these problems statutorily, however, the legislature has left local regulators vulnerable to the vagaries of litigation.

V. *New York Land Use System Opinion Survey* by Dr. Alistair M. Hanna

Dr. Alistair Hanna's article, *New York Land Use System Opinion Survey*, reports on the results of a survey of over 2,100 experienced land use practitioners. Dr. Hanna, who is the Manager of the Stamford office of McKinsey & Company, discusses the results of the survey conducted by his organization, which asked practitioners not only how well the system is working, but what objectives they expect the land use system to achieve, how well it accomplishes each objective and what improvements in the system they would like to see. By a ratio of three to one, the respondents found the performance of New York's land use system to be unacceptable.

The respondents, however, hold high hopes for the land use system. They believe that it should protect the natural environ-

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ment, enable the efficient expenditure of public infrastructure dollars, protect community character, support business development, preserve agricultural lands, maintain property values, provide affordable housing and protect developers' rights. Incidentally, these interests are among the critical public interests that the framers of the land use system thought should be included in comprehensive land use plans. The respondents to the McKinsey survey found the New York land use system lacking, particularly with respect to the provision of affordable housing, the efficient use of infrastructure dollars, support for business development and the protection of community character and the natural environment.

In responding to questions about what should be done to improve New York's land use system, the great majority of the respondents said that:

1. land planning should precede land regulation;
2. land regulation should be tied to the accomplishment of the objectives of a comprehensive plan;
3. local governments should adopt comprehensive plans;
4. the state should require localities to adopt plans;
5. there should exist county or regional land use plans;
6. local land use plans should have to respond to county or regional land use needs;
7. local land use plans should be consistent with regional land use plans;
8. regional plans should designate some areas for development and other areas for conservation;
9. the infrastructure needed for development should be planned before development occurs; and
10. planning for infrastructure development should be coordinated with land use planning.

VI. *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence* by John Kincaid

The article following the survey, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, is written by John Kincaid, the Executive Director of the national Advisory Commission on Intergovernmental Relations. Mr. Kincaid suggests that the discontent discovered by the McKinsey survey arises from our inability to fashion a successful

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system for governing the nation's expanding metropolitan areas. Today, there are nearly 87,000 units of local governments in the United States, the existence of which makes management of most problems difficult on a metropolitan scale.

The connection between the proliferation of local governments and the movement of population described by Henry Richmond is intriguing. Our tradition of local self-determination, combined with sprawling development patterns, leads to the formation of so many municipalities which have spawned, in turn, various inefficiencies in the provision of services and the development of public infrastructure. The author examines a number of devices that have been used to mitigate the inefficiencies of municipal proliferation, including annexation, city-county consolidation, metropolitan federation, transfers of functions, boundary review commissions and regional councils. Mr. Kincaid reports that these attempts at metropolitan consolidation have enjoyed very limited success, primarily because of local resistance.

His article concludes with an impartial examination of "regulatory regionalism" in the land use context as a potential antidote to the inefficiencies of proliferating localism. An example of regulatory regionalism is found in the attempt of Congress through the Intermodal Surface Transportation Efficiency Act of 1991 to tie transportation planning to land use planning. From this required connection between transportation planning, which must be done regionally, and land use planning, which is often prepared locally, a type of regional land use plan could emerge. Mr. Kincaid notes, however, that regulatory schemes that attempt to induce regional land planning must be sensitive to the power of suburban voters and general public resistance to big government. He suggests that such resistance must be overcome through the sensitive administration of regional incentives and requirements if regulatory regionalism in the land use field is to achieve metropolitan consolidation where other strategies have failed.

VII. *State Growth Management: The Intergovernmental Experiment* by Douglas R. Porter

Regulatory regionalism has been accomplished in some states through the adoption of statewide growth management

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statutes. The next article, *State Growth Management: The Intergovernmental Experiment*, written by Douglas Porter, reviews the experiences of the nine states that have adopted such laws. Mr. Porter has vast experience with the development of these statutes, first as Director of Public Policy Research at the Urban Land Institute and then as the President of the national Growth Management Institute. He has authored several publications on the subject; his article in this symposium issue is supported by references to his other writings and to the statutes discussed.

Mr. Porter reminds us that New York is not unique in its firm commitment to home rule. The tradition of local control in the land use field, emerging as it does from the national experience described above, is very strong in each of the nine states that have adopted growth management statutes. In these states, a combination of sensitivity to local prerogatives and a vigorous coalition of organizations committed to reform, convinced state legislators to provide a larger framework to guide local land use decision-making. Although there are many differences among these statutes, they incorporate generally the types of reforms supported by the respondents to the McKinsey & Company land use survey described by Dr. Hanna.

Mr. Porter's article notes that these reformed, state-wide land use systems are embryonic and evolutionary. Most states have done a good job of articulating the state's interest in land use, providing incentives to encourage local and regional planning, and arranging for the emergence of regional plans sensitive to local needs as prescribed by John Kincaid. Most of these states provide for the designation of some areas for development and others for conservation and provide a hopeful beginning for intergovernmental cooperation regarding land use. Mr. Porter catalogues a host of beneficial results of these statutes, raises some critical questions about them and ends with the thoughtful conclusion that these statutes provide a menu of options for states like New York to consider, rather than a blueprint to be copied.

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VIII. *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination* by Patricia Salkin

The final two articles in this series of seven discuss what the New York State Legislature has done to respond to the growing need for land use law reform. Patricia Salkin, the Director of the Government Law Center of Albany Law School, authors an article entitled *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*. Sheldon Damsky, Counsel to the Legislative Commission on Rural Resources, with the early collaboration of his long-time associate James A. Coon, and considerable assistance from Dianne L. Rosen, a 1993 graduate of Pace University School of Law, authors *The Land Use Recodification Project*. Their contribution documents the incremental, yet important reform effected by the State Legislature in its last several sessions. These two articles show both the progress that has been made in New York and the distance that remains to be travelled.

Ms. Salkin's article demonstrates that the State Legislature has made a clear commitment to providing a regional framework for land use planning, but that it has not done so comprehensively, uniformly, or forcefully. She traces the commitment of every Governor of the State, from Alfred E. Smith in 1923 to Mario Cuomo in 1993, to regional approaches to land use planning and regulation. Her article describes the numerous regional agencies created by the Legislature, from the powerful Adirondack Park Agency to the gentle Hudson River Greenway Communities Council.

The void identified by Ms. Salkin's article is the lack of firm leadership at the state level regarding land use policy and program implementation. There has been no attempt to articulate the State's interest in responsible land use planning. No state agency has been empowered to coordinate the State's activities in this area or to further the work of the numerous regional agencies that have been created. Few incentives have been provided to encourage local governments to cooperate with the largely voluntary regional programs that have been created. Little funding has been made available to support land use planning at any level of government. Funding that is available is not

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managed to encourage creative intermunicipal or regional land use efforts.

IX. *The Land Use Recodification Project* by James A. Coon, Sheldon Damsky, and Dianne L. Rosen

The article by James Coon, Sheldon Damsky, and Dianne L. Rosen traces the recent record of legislative reform in Albany in rationalizing the land use statutes. Recent statutes have significantly improved the efficiency of the administration of the land use system at the local level, provided needed definitions and made the statutes more readable and manageable. Their article concludes, however, with a story of the successful, although lengthy and frustrating, struggle to pass a bill defining, for the first time, what a comprehensive plan is.

So it is, at the end of the symposium issue, that we return to the enigmatic nature of the land use system in New York. After nearly eighty years, the Legislature finally has passed a bill that ventures a definition of the comprehensive plan. The statute, however, confirms that planning is still discretionary, not required. It confirms that planning is still a local prerogative, unencumbered by any requirement that larger interests be considered. The new definition of a comprehensive plan provides a listing of discretionary elements that a plan may, not must, include. Zoning, the statutes say, must conform to a comprehensive plan, but land use planning is still discretionary, ill-defined and unguided.

X. Conclusion

This symposium issue of the Pace Law Review provides a resource to those many local officials, citizens, advocates, legislators and scholars who are interested in improving New York's land use law. These articles suggest an answer to the question: "Who shall decide?" Through their consideration of the solutions emerging in other states, and by drawing on New York's considerable experience, new partnerships of local, regional and state interests will emerge. It is here that James Coon's confidence in the land use system will serve us best.

In other states, useful reforms have occurred, matured and persisted because a coalition of interest groups has evolved

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around their common interest in an efficient and inclusive land use system. It is our hope that this issue of the Pace Law Review will serve to encourage and assist such a coalition of interests in the State of New York.

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