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Review of Land Use Conflicts: Organizational Design and Resource Management; Environmental Impact Review and Housing: Process Lessons from the California Experience; Creative Land Development: Bridge to the Future; and Toward Eden

Nicholas A. Robinson
Pace University School of Law, nrobinson@law.pace.edu

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Book Review

Herman L. Boschken, **LAND USE CONFLICTS: ORGANIZATIONAL DESIGN AND RESOURCE MANAGEMENT** (Univ. of Illinois Press 1982), 275 pp.

Fred E. Case and Jeffrey Gale, **ENVIRONMENTAL IMPACT REVIEW AND HOUSING: PROCESS LESSONS FROM THE CALIFORNIA EXPERIENCE** (Praeger Publishers 1982), 155 pp. Text, and 96 pp. appendices.

Robert A. Lemire, **CREATIVE LAND DEVELOPMENT: BRIDGE TO THE FUTURE** (Houghton Mifflin Company 1979), 170 pp.

Arthur E. Palmer, **TOWARD EDEN** (Creative Resource Systems 1981), 417 pp.

Real property use and development has long generated controversy. Since the seventeenth century, contests over incompatible uses of adjacent land have increasingly absorbed the attention of the English Chancery and later courts.¹ Traditionally, land use was largely unregulated and left to the whims of land owners; more recently, land use and development has been subject to zoning² and other police power measures.³ Value judgments as to how land is used, whether made by property owners or regulators, are implicit in most types of land development. Common variables in the decision making process include siting, scale, density, and use. The impact of land development on the natural environment is emerging as a key variable in this process.

Four recently published books examine contemporary land use decision making. Interestingly, they are not written by members of the real estate bar. Instead, they are written by business school professors Herman Boschken, Fred Case and Jeffrey Gale; by a professional investment adviser, Rob-

1. William Aldred's Case, 9 Co. Rep. 576, 77 Eng. Rep. 816 (K.B. 1610).

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

3. E.g., Historic Preservation Controls; see Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

ert Lemire; and by a New York lawyer, Arthur Palmer, who studied land use design at the University of Pennsylvania Department of Landscape Architecture and Regional Planning. Gale is also a member of the California Bar.

The real estate bar may not be writing on contemporary land use decision making primarily because it did not produce the current land use controls which extend beyond "traditional" zoning. Rather, these newer controls are emerging from state and local legislatures. Elected representatives are under increasing pressure to protect public safety (which can be compromised by locating a housing development in a floodplain) and welfare (which can be enhanced by preserving historically significant sites).

These books share a common theme. They examine how contemporary real property regulations implement or shape society's value judgments about what is "proper" for land use and development. Each book provides case studies which illuminate the dynamics of choice as well as the constraints which prevent what would otherwise be the "highest and best use" for a given parcel.

In *Land Use Conflicts*,⁴ Boschken focuses on the management practices of both private developers and public regulators. In the past, these managers alone made land development decisions. Today, environmentalists, taxpayer associations, managers of other nearby properties or agencies, and other economic enterprises all participate in land use decision making. The resulting interplay stimulates a complex bureaucratic response designed to accommodate each party's interests. The environmental impact assessment process, required for all federal agencies by the National Environmental Policy Act,⁵ streamlines this response by synthesizing many of these viewpoints.

Boschken analyzes the dynamics of land use in three case studies from the late 1960's and early 1970's. The first case study describes the U.S. Forest Service's consideration of

4. H. Boschken, *Land Use Conflicts: Organizational Design and Resource Management* (1982) [hereinafter Boschken].

5. NEPA, 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981).

Mineral King Valley in the Sequoia National Forest as a possible ski resort. The second focuses on the siting of the San Onofre nuclear power plant on the California coast north of San Diego. Finally, Boschken chronicles the fate of the Nettleton Lakes recreation community proposed for a remote part of Kitsap County on Hood Canal in the Puget Sound region of Washington. Boschken identifies and compares how different organizational patterns, procedures, and management policies affect the outcome of land use control controversies.

Central to Boschken's analysis is how the government agency views its own responsibility for the decision. The "decision rules" of an agency guide the agency in structuring its strategy and operations. Boschken's commentary is heavily annotated and dry in its dissection of the respective administrative processes illustrated by the case studies. Moreover, in his narrative, Boschken insufficiently evaluates the differences among his three cases. While the Kitsap County Planning Board decisions on the Nettleton Lakes project were archetypical local land use debates, the San Onofre and Mineral King cases involved the elaborate bureaucracies of the Atomic Energy Commission and the U.S. Forest Service respectively. Apparently, Boschken favors the patterns of local governmental decision making. These procedures typically involve conflicts "among different and independent collectives of public expertise. While conflict frequently causes delay and may increase allocation costs, these can be offset by the advantages of mitigating longer-term adverse [environmental] effects."⁶

Boschken concludes by urging us to seek a new element in land use decision making. "As the Nettleton Lakes case shows, we need an explicit bargaining mandate in which agencies are given the discretion they need to work toward a consensual approach to land use policy and enforcement."⁷ Unfortunately, Boschken does not offer a model to illustrate his consensual approach.

6. Boschken, *supra*, at 245.

7. *Id.* at 251-52.

There are many who view the environmental impact assessment process as the approach best suited to achieving a consensus on the appropriate design for new land development. Using statistical analysis rather than case studies, Case and Gale in *Environmental Impact Review and Housing*⁸ examine a decade of experience with new housing projects under the California Environmental Quality Act (CEQA).⁹ These authors examine how CEQA has operated and posit suggestions for improving the efficiency of the environmental review process.

The environmental impact review process ensures informed decision making. As Case and Gale observe, "public and private decisions about the treatment of natural resources must be based on the best possible information about costs and outcomes. Armed with this knowledge, decision makers can make choices about what they are willing to pay to accomplish given outcomes."¹⁰ Since the costs related to environmental factors vary greatly from project to project, this relationship can be important.

Case and Gale focus on how environmental reviews can be improved "to decrease the uncertainty of the process and to emphasize full environmental impact review only where effects are significant enough to warrant such review."¹¹ They do not find in the review procedure the ultimate guidance for striking a balance between land development and control. According to Case and Gale, neither developers nor the proponents of environmental controls have demonstrated how best "to provide clues for deciding how much health, welfare, and safety is being protected nor how well the added costs equal the added benefits for either individuals or society."¹² The authors, however, have no answer themselves: "Admittedly, trying to quantify the benefits involves varieties of personal

8. F. Case and J. Gale, *Environmental Impact Review and Housing: Process Lessons from the California Experience* (1982) [hereinafter Case and Gale].

9. CEQA, Cal. Pub. Res. Code §§ 21000-21069 (West 1977 & Supp. 1982).

10. Case and Gale, *supra*, at 75.

11. *Id.* at 150.

12. *Id.* at 156.

value judgments, which heighten the arguments on control rather than resolving them. On the other hand, identifying costs is equally fraught with imprecision and large numbers of value judgments."¹³

Case and Gale acknowledge that environmental controls have increased the market prices for new homes. They extensively survey the statistics for housing starts, construction costs, sales and related information from 1967 to 1980. The CEQA process is carefully delineated; of interest to Boschken's thesis is Case and Gale's evaluation "that a very important aspect of dealing with the review process for both developer and local government is the close, ongoing contact of developer and planning staff. Indeed, the rapport between the two may be crucial to the flow of information needed to negotiate the process successfully."¹⁴

Case and Gale seek an efficient procedure for decision making in land development, as does Boschken. While Boschken dwells on the managerial and political aspects of environmental land use decision making, Case and Gale examine and quantify the costs of environmental impact reviews on the housing industry. Both studies fail to provide a solution that will avoid land use disputes because they make the wrong inquiry. Lemire's *Creative Land Development*¹⁵ offers a partial answer.

Lemire does not focus on specific cases or statistics, but on the carrying capacity of the land to sustain ecologically sound development. His case study is Lincoln, Massachusetts, where "we have learned to protect natural resources while stimulating needed development."¹⁶ He outlines the patterns of soil erosion, conversion of prime agricultural land, pollution of potable water, and diminution of adequate water supplies for the developments available. He notes that "[o]nly thirteen of our fifty states require comprehensive planning or zoning, and approximately three-fourths of the private land in the

13. Id.

14. Id. at 66.

15. R. Lemire, *Creative Land Development: Bridge to the Future* (1979).

16. Id. at 10.

United States is without any zoning or planning whatever, giving individual owners broad leeway in determining the future use of their land.”¹⁷

At the same time, Lemire recognizes that “[i]t’s going to take a lot of new houses, work places, and public facilities to accommodate a 40 to 85 million increase in our population by the year 2000.”¹⁸ He projects that housing units needed to meet population demands, costing \$50,000 per dwelling unit, will generate an economic potential of over \$2 trillion in land development.

Lemire’s book is a synthesis of his own views, experiences, and research. Much of his experience involved the planning of growth in Lincoln. Open land was bought by the town for conservation purposes. A natural resource inventory, based upon the U.S. Soil Conservation Service soil survey, delineated wetlands, soils, slopes, and rock outcrops. This inventory “showed where development could and could not take place if the town were to remain in balance with its natural systems.”¹⁹

Lincoln revised its allowed land use densities to concentrate housing on sites naturally suited to increased development and to curb development elsewhere. Cluster residential design was required, preserving open space without the need for municipal purchases of private property for open space preservation of parks. Lemire labels the use of land use controls to facilitate new housing and conservation of natural resources “creative development.”²⁰

He credits the success of Lincoln’s land use controls to careful study of the natural resource base and to extensive education of the town’s residents. Town Planning Board and Conservation Commission programs were “dovetailed into one comprehensive program for the town.”²¹ Owners and developers worked with the town, or went elsewhere. Lemire’s

17. *Id.* at 23.

18. *Id.* at 29.

19. *Id.* at 70.

20. *Id.* at 75.

21. *Id.* at 88.

study is notably silent on the land developers' reaction to Lincoln's programs.

Lemire outlines a philosophy of land development which the landscape architect Ian McHarg calls "Design With Nature."²² Like Lemire, McHarg offers a way to make land use value judgments which would anticipate and eliminate environmental disputes. He proposes the preparation of thorough natural resource inventories and the tailoring of allowable land development patterns to correspond with nature.

Palmer's *Toward Eden*²³ systematically reports how Medford, New Jersey, retained Ian McHarg to prepare its resource inventories and engaged Palmer to adapt its laws accordingly. Palmer's work combines an insider's historical account with an anecdotal recital of Medford's experience, not unlike Lemire's discourse on Lincoln, only in finer detail. The book's twenty appendices make Palmer's study valuable to the bar. He offers a model of how Medford changed from traditional zoning to resource-based land controls.

Medford completed "An Ecological Planning Study" of the township's geology, soils, hydrology, and related biota in 1973. Four land use categories emerged: (1) inherently hazardous to life (prone to forest fires or floods), (2) hazardous to life and health (water and soils), (3) irreplaceable and unique (historic sites, cedar swamps), and (4) vulnerable (subject to soil erosion or aquifer contamination).²⁴ Thereafter, a master plan was developed by the town and the various regions were mapped to suggest the intensity or type of land use development appropriate to each site.

The techniques of cluster zoning and Medford's new subdivision law are outlined in terms which both a planner and a lawyer can appreciate. Equally important, the political process of educating the town's officials and citizens is described. Three years passed before there was consensus on a master plan, and several more passed before the new land use ordinances could be adopted.

22. I. McHarg, *Design With Nature* (Natural History Press, 1969).

23. A. Palmer, *Toward Eden* (1981).

24. *Id.* at 59-60.

Palmer proposes that Medford's experience be refined for municipalities which have not yet established natural resource-based land use controls. In lieu of hiring consultants, he would create an environmental protection office in the local government to plan and design the controls.²⁵ Palmer does not explain how such an office would educate or build the requisite political consensus.

The heart of Palmer's study for a real estate lawyer is the appendices. These twenty documents are the original source materials showing how Medford developed its new natural resource-based zoning. The appendices illustrate the scientific data collection in the field, the analysis, and the factual projections on sustainable land uses. The final ordinances are reprinted as Medford adopted them.

While Lemire and Palmer do not provide an ultimate answer to Boschken's quest for a consensual approach to land use, they do explain how the many contemporary conflicts regarding environmental issues can be averted through careful study and planning. The preparation of a study describing a region's natural resources also facilitates a more efficient environmental impact review process, as sought by Case and Gale. Admittedly, it is time consuming for local governments to engage in such planning, but land developments will ultimately proceed with fewer disputes and a more stable infrastructure.

These four books, taken together, afford the reader a valuable survey of contemporary land development law and policy. Boschken and Case and Gale illustrate the current shortcomings of most real property regimes; Lemire and Palmer point to a resolution for many of these shortcomings but do not themselves explain why prevailing land use controls fail to produce ecologically sound realty development. Each book is a valuable contribution to the literature of environmental land use controls.

*Nicholas A. Robinson**

25. *Id.* at 182-83, 186-87.

* Professor of Law, Pace University School of Law; A.B., Brown University; J.D., Columbia University.