7-1992

Local Land Use Control in New York: An Aging Citadel Under Siege

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As populations grow, land use controls become more imperative. The author believes New York State can improve its present law in this area and tells our readers how.

I. Introduction

In New York, local officials determine the shape and pace of land development, decide the economic fate of land owners and are the stewards of our natural resources. The system of local control of land use has remained relatively static since it was first created by the state legislature over seven decades ago. Today, however, it is under siege. Its strength is being sapped by preemptive state and federal regulations; it is being attacked by environmentalists and developers alike. The state's highest court has called for fundamental reform.[1]

The essential criticism of the system is that local officials cannot respond to the complex needs of rapidly developing regions or manage the escalating conflict between economic development and environmental preservation. Curiously, the critics have taken their frustrations to the courts instead of their state legislators, the gatekeepers of this now ancient citadel. While no meaningful reform proposals have been discussed in Albany, the courts have been besieged by complaints. The numerous suits brought by environmentalists to block development have been countered by an equal number of actions by landowners alleging that land use restrictions violate due process or effect a taking of property without just compensation.[2]

Litigation of this sort is a poor way to decide such important public policies. There is a better way, one that is being tested in a number of states with very similar land use systems. These legislatures have reformed the law by establishing a more coherent and integrated system. An analysis of the inadequacies of the present system and the forces that are reshaping it must precede an evaluation of how it should be changed.

II. The Horizontal Land Use System and Its Flaws

The legislative bodies of cities, towns and villages have been empowered to regulate land use principally through the adoption of zoning ordinances. Zoning ordinances contain finely-tuned prescriptions for the use and development of land throughout a municipality. In the city, town and village law, it is decreed that such zoning regulations *shall* be in accordance with a comprehensive plan. In other words, zoning must be consistent with local planning. This requirement makes obvious sense; how else are courts to judge whether a regulation properly advances the public welfare?[3] Curiously, however, these local governments are not required by statute to adopt comprehensive plans to which their zoning ordinances must conform. State law says that local planning boards *may* adopt "a comprehensive master plan" for the community. Land use planning in New York is discretionary.

This is the enigma of mandatory congruency and discretionary planning.[4] Zoning must be in accordance with a comprehensive plan to be legal, yet planning need not be done. The enigma is compounded in the state statutes' delegation of planning and zoning authority to different local bodies. Plans are to be adopted by an appointed planning board while zoning ordinances are to be adopted by the elected legislative assembly. This enigma is a major source of the land use difficulties in our state.

III. Definitions of the Comprehensive Plan

The mystery of New York's land use system is heightened by the lack of clear statutory definitions. Under current law, zoning ordinances must be in conformance with "a comprehensive plan" yet planning boards are given the authority to adopt "a comprehensive master plan." These terms are not the same and they are not clearly defined by the very statutes which place so much legal emphasis on them.

The statutes offer no definition of a "comprehensive plan" at all. Only a partial definition of the "comprehensive

FOOTNOTES

[1] See, *Golden v. Ramapo*, 334 N.Y.S. 2d 138 at 150 and *Berenson v. New Castle* 378, N.Y.S. 2d 672 at 682.

[2] Developer suits of this type are so numerous that they have been characterized as a "movement." See, *e.g.*, *The New York Times*, Jan. 20, 1992, p. 1.

[3] "...(t)he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." *Udell v. Haas*, 21 N.Y. 2d 463 at 469.

[4] Town Law, sec. 263 & 272-a, Village Law, sec. 7-704 & 7-722, and General City Law, sec. 20(25) & 28-a.

master plan" is provided.[5] The legislature has stipulated that a comprehensive master plan show desirable public facilities such as streets, parks, and public building. The content of such a plan has not been limited, but it must provide for capital facilities, at a minimum.

In the absence of a legislative definition of the comprehensive plan to which zoning must conform, the judiciary has been called frequently to probe this mystery. Judicial decisions have provided the following guidelines:

• Zoning can be legal even in the absence of a written plan.[6]

• The statutes are satisfied if, implicit in the zoning ordinance itself, there is evidence of rational planning.[7]

• Once a plan is adopted, it does not have to be kept current. In such cases, courts will not require "slavish servitude to any particular comprehensive plan," but look rather for "comprehensiveness of planning."[8]

• In the absence of any plan or the presence of an out-dated one, courts will "examine all relevant evidence" of comprehensive planning found in previous land use decisions of the locality including the zoning ordinance itself.[9]

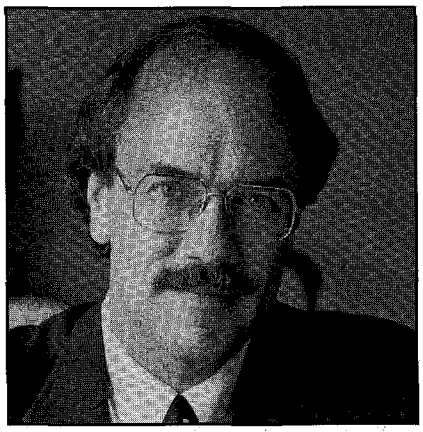
The circular and confusing nature of these judicial definitions is obvious. They stand for the general proposition that zoning must serve the public interest and that some expression of that interest, independent of the zoning enactment itself, is desirable, but not always necessary.

IV. The Flexible Nature of Zoning

One consequence of this vague statutory wording is that zoning in New York has evolved into a very flexible tool. What exactly constitutes zoning has been the subject of much debate. The conservative view is that zoning is a rigid, district bound tool which must clearly detail the rules in advance of development. Land use attorneys frequently state, for example, that zoning can control the "use" but not the "user" of property. These observations are logically derived from basic due process notions.

If this view is correct, how do we explain court decisions which have articulated the following rules?

• Zoning districts can be created and "float" subject to a request by a qualifying landowner for their application to his property.[10]



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• In proper cases, zoning can specify who builds, owns, manages and lives in certain types of developments.[11]

• Rezoning can be conditioned on the development meeting requirements demonstrably within the public interest, but not contained in the ordinance itself.[12]

• Uses can be permitted by special permit, also subject to such conditions.[13]

• Waivers of requirements can be given in the interest of achieving a planned unit development, integrating diverse land uses in an otherwise single-use district.[14]

• Variances from zoning requirements may be granted if the "spirit" of the law is not violated by them.[15]

These flexible devices are sustained by the courts where they meet the illusive requirement of being in accordance with the comprehensive plan. The courts cannot be blamed for the fuzziness of the standards that have evolved or the volume of litigation brought to challenge them. The more flexible the authority of government, the more subject it is to the discretion of public decision makers and to the whim of the constituents who influence them. The difficulty of securing land use approvals today and the extent to which land use decisions are challenged in the courts are caused, in part, by the lack of clear definitions in the law.

V. Legal Obstacles to Land Use Ordinances

Case law in New York has established several rules which govern land use decision making. There are a number of barriers which land use regulations must clear to be deemed legal. Zoning, as noted above, must be in accordance with the comprehensive plan. Other land use regulations such as wetlands controls, steep slope ordinances, and nuisance prevention laws do not suffer from this limitation. Nonetheless, like zoning enactments, they must meet other requirements:

• Land use regulations must be adopted within the delegated statutory authority of the local government. Some recent cases suggest that local government may have the authority to supersede state law and grant itself land use authority that it does not otherwise have. As a

FOOTNOTES

[5] See e.g., Town Law, sec. 272-a.
[6] *Daum v. Meade*, 318 N.Y.S. 2d 199.
[7] *Randolph v. Brookhaven*, 375 N.Y.S. 2d 315.
[8] *Bedford v. Mount Kisco*, 351 N.Y.S. 2d 315.
[9] *Udell v. Haas*, 21 N.Y. 2d 463.
[10] *Rodgers v. Tarrytown*, 302 N.Y. 115.
[11] *Maldini v. Ambro*, 369 N.Y.S. 2d 385.
[12] *Church v. Islip*, 203 N.Y.S. 2d 866.
[13] *Penny Arcade v. Oyster Bay*, 427 N.Y.S. 2d 52.
[14] *Ahearn v. Z.B.A.*, 304 N.Y.S. 2d 765.
[15] *Aurello v. Moylan*, 304 N.Y.S. 2d 765.

result, it is not clear just how much land use authority local governments possess.

• Land use regulations must be adopted in accordance with the rights of affected landowners as well as adjacent property owners. The number of procedural requirements designed to protect those rights is increasing steadily.

• Regulations must satisfy the jurisdictional requirements of law which give other public agencies a role in the regulatory process.

• The subject matter of the local regulation must not have been preempted by state or federal legislation on the same subject. Court decisions have recently changed the rules for discerning when local prerogatives have been preempted by the laws of higher governments.

• Local land use regulations must treat similarly situated properties equally; they may not violate the "equal protection" clause of the state and federal constitutions.

• They must not violate the constitutional due process rights of property owners. Regulations must pursue some legitimate public objective and the means chosen must bear a reasonable relationship to accomplishing that objective.

• Land use regulations must not effect an unconstitutional "taking" of private property in violation of the just compensation requirements of the fifth amendment of the U.S. Constitution. The case law is notoriously unsettled as to when a land use regulation constitutes a taking.

In meeting these requirements, local legislators confront the same lack of definition that they face in defining and being in conformance with the comprehensive plan. This lack of definition begins to explain why land use regulation is so tedious, expensive and time consuming. It makes a strong case for fundamental reform of the legislative system under which it operates. Unfortunately, there are additional complications.

VI. Environmental Protection and Regional Need Considerations

By statute and judicial decision, local legislators must review the impact that land use regulations have on the environment. They must also determine whether such regulations accommodate regional needs.

A. Environmental Review:

The State Environmental Quality Review Act (SEQRA) requires that all public agency decisions which affect land use be subjected to a thorough review of their impact on the environment.[16] A failure of the public agency to analyze the environmental impact of a land use regulation is a jurisdictional defect which renders that regulation invalid.

Under SEQRA, the "environment" is defined very broadly. For example, a steep slope ordinance in the Town of Cortlandt, adopted to lower the density of development, was set aside because it did not address its impact on the supply of affordable housing, an aspect of the "environment" as defined by the statute.[17]

The range of actions subject to such review is extensive, making the scope of the SEQRA statute nearly coextensive with the scope of land use regulation itself. An argument can be advanced that the power, under SEQRA, to impose conditions on development in mitigation of its negative environmental impact, greatly expands the substantive power of public agencies to regulate development under other provisions of law. Under SEQRA, public agencies are authorized to perform Generic Environmental Impact Studies in advance of more particular decisions later on. This authority is remarkably similar to the authority of local planning boards to adopt "comprehensive master plans."

In this environmental law, there is a built-in disincentive to carry out traditional comprehensive planning. The SEQRA statute requires environmental planning, broadly defined, of all individual land use actions, at the expense of the applicant. The statute provides that the cost of area-wide Generic Environmental Impact Studies may be imposed on later applicants. In this indirect way, the cost of land use planning may be transferred from the public sector to the private sector.

There is no requirement that such studies conform to the local comprehensive plan. Ironically, under existing case law, locally and regionally adopted environmental impact studies become part of the "relevant evidence" courts look for in discovering the "comprehensive plan" with which zoning actions must conform.

We may be moving toward a time when SEQRA planning will replace comprehensive planning and land use regulations will be judged based on their conformance with environmental legislation, rather than the comprehensive plan. Desirable or not, this is not the result intended by the legislature and is inherently confusing to local regulators and the courts, further building the case for reform.

B. Regional Need Consideration:

The highest court in the state has required that local planning and land use bodies consider regional needs and accommodate them in the adoption of land use regulations.[18] The court's decisions stand for the propositions:

• That growth naturally occurring in the private market must be accommodated by localities, subject to reasonable growth management requirements.

• That meeting the needs of the people of the state generally must be an objective of local land use regulation; the welfare of the land owners and citizens within the geographical boundaries of the community is not the sole end of land use regulation.

• That local governments are not competent, by themselves, to measure regional needs and decide how to accommodate them.

• That state and regional agencies should articulate such needs and explain to local governments the extent to which they must meet such needs.

The response of the state legislature to these judicial tenets has been tepid, at best. Area-wide land use plans may be adopted by county governments, but few have entered the field.[19] The legal effect of county land use plans is not clearly defined, although court decisions give them a presumption of legislative validity, if adopted by the county legislature.[20] Counties may comment on local actions which affect land proximate to county facilities and municipal boundaries, but

FOOTNOTES

[16] N.Y. Envtl. Conserv. Law, secs. 8-0101-0117.
[17] *Ginzberg v. Cortlandt*, 565 N.Y.S. 2d 371.
[18] See, *supra* note 1.
[19] Gen. Mun. L. sec. 239-d.
[20] *Blitz v. New Castle*, 463 N.Y.S. 2d 832.

the effect of their negative comment is only to require a supra-majority vote on the matter at the local level.[21] It is hard to tell whether this is helpful or simply a further complication, particularly in the absence of a county land use plan.

It is primarily when some environmental resource is critically affected that some means of providing regional coordination of local land use decisions is created by the legislature. Often this is in response to federal legislation, such as statutes which protect clean air, clean water or coastal zones, where compliance with federal dictates is obligatory. It is also in response to individual problems such as wetland disappearance, scenic and wild river degradation, or the erosion of the quality of drinking water. This type of single-subject legislation is so pervasive that its cumulative effect threatens the autonomy and control of local governments in the land use area.[22]

An example of these difficulties is instructive. Federal estuary protection regulations prohibit an increase in the amount of nitrogen flowing into Long Island Sound. Nitrogen is, by and large, a by-product of development on the land. The drainage basin of the Sound includes 15,820 square miles extending over a five state area which includes ten New York State municipalities. Under our current land use system, based on local prerogatives, how can regional environmental agencies comply with federal mandates limiting nitrogen build up? One recent response was to threaten a moratorium on all development in these ten communities: an example of the extent to which local control is at risk.

What the state legislature has not done is now easier to evaluate. The list of omissions is impressive:

- State-wide planning objectives have not been defined.
- Capital budget planning has not been coordinated with the accomplishment of such objectives.
- Regulations which deal with single subjects, such as water quality, are not coordinated with other regulations.
- Cogent planning regions of the state have not been delineated.
- Regional needs have not been defined.
- The extent of local responsibility for accommodating such needs has not been articulated.
- Local planning is not mandatory, even in developing areas of the state.
- What a local plan is and what it must include are not defined.
- There is no administrative review of whether local plans are consistent with state-wide or regional objectives.

VII. The Path of Reform Efforts

Today's land use regulatory system, represented by zoning authority and the comprehensive plan requirement, still respects the preeminent place of local government in the public regulatory scheme. However, SEQRA, county planning, and state and federal environmental statutes constitute a series of vertical intrusions into the formerly undisturbed sanctuary of local land use control. This irregular horizontal plane is now intersected by so many vertical planning mandates that the geometry of planning has become too intricate to be managed by local officials without guidance and assistance. This tension between local control and sound regional planning and development must be resolved.

While the New York legislature has remained content to operate without a comprehensive land use planning system, other states have adopted state-wide plans.[23] Progress in these other states has been widely noted, but has generated no movement in this direction in Albany. Recently, a gathering of land use planners at Cornell University in Ithaca endorsed the general pattern of reform in these other jurisdictions.[24] The assembly's consensus statement contained the following observations and recommendations which clearly mark the path for land use reform in New York:

- There must be a concise statement of land use planning goals adopted by the Governor and the legislature.
- Planning must include both vertical and horizontal consistency; all decisions which affect land use, at all levels of government, must be consistent with the state's overall goals and policies.
- There must be mutual respect for state and local plans.
- The state must assist in the implementation of locally developed and regionally coordinated land use solutions.
- County planning agencies should coordinate state and local planning.
- The state must clearly define cogent regions for the purposes of need identification, planning and coordination.
- The state should provide financial incentives for the development and implementation of plans which are coordinated in this fashion.

Consensus on the need for such a strategy is the prerequisite of reform. We are witnessing the collapse of an ancient citadel. Our historic land use control system is not protecting adequately either the public interest or private rights. There is uniform discontent among environmentalists, developers, local officials and concerned citizens over the weaknesses of this system. The emerging consensus that it must be redesigned represents an opportunity, if not an imperative, for the state legislature to deal with problems identified by the courts over 20 years ago.[25] The trend toward state-coordinated growth management is responsive to those problems. It must be studied and evaluated. These emerging strategies offer a blueprint for reform, a method of balancing environmental protection and development rights, harmonizing local and state interests and coordinating the use of limited public resources with a uniform vision of land development.

FOOTNOTES

[21] Gen. Mun. L. sec. 239-m.
[22] *Long Island Pine Barrens Society v. Brookhaven*, N.Y. App. Div. Lexis 3252. Because of the failure of three adjacent towns to review the cumulative impact of 224 development projects, including 12,000 housing units involving $11 billion in value, these projects were not allowed to proceed.
[23] Florida, Georgia, Maine, Hawaii, New Jersey, Oregon, Rhode Island, Vermont and Washington.
[24] A position statement on these issues was drafted to reflect the consensus of the participants in the 1990 Spring conference on The State of Planning in New York, sponsored by the New York State Association of County Planners, the Cornell University Department of City and Regional Planning, in collaboration with the Regional Plan Association, the Upstate and Metropolitan New York Chapters of the American Planning Association, the New York Planning Federation, and the Upstate New York Chapter of the American Society of Landscape Architects.
[25] *Supra*, note 1.