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## Review of “The Zoning Dilemma,” By Daniel R. Mandelker

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## BOOK REVIEWS

THE ZONING DILEMMA. By Daniel R. Mandelker.<sup>1</sup> Indianapolis: Bobbs-Merrill, 1971, Pp. xvi, 204. \$9.50.

Professor Mandelker is recognized as one of the leading figures of American land use law. His experience is vast, and he has been extraordinarily prolific.<sup>2</sup> This latest production generally maintains the high standard set by his previous work, and embodies a good deal of quite profound thinking about the crucial issues of zoning today.

Perhaps the most impressive feature of this book is its newness. Roughly two-thirds of the cases cited were decided in the 1960's and other references are equally current. Professor Mandelker's field research was conducted in 1968 and 1969. The overwhelming impression is one of modernity; the book gives the reader a remarkably up-to-date "feel" for the concepts and operations of American zoning as it approaches its fiftieth anniversary.<sup>3</sup>

The title seems a bit misleading, since the author has really written about a variety of dilemmas (though not all, to be sure) which zoning presents. Mandelker begins by reminding us that the American version of zoning is far from being the only system imaginable; indeed, its features, viewed objectively, seem quite odd. For example, our zoning operates primarily at a highly localized level. There are only the most limited federal<sup>4</sup> or statewide controls, and there is usually no provision for state or even county administrative review of municipal zoning decisions. Moreover, our system has no mechanism for compensating those whose economic values are diminished by zoning decisions; even in

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2. The flyleaf and footnotes of the instant book disclose eight law review articles, three books, and two chapters in symposia written by the author in the past decade.

3. Although there were earlier ordinances of limited scope, modern American zoning may be dated from the adoption of New York City's first comprehensive ordinance in 1916, or perhaps from the publication by the Department of Commerce of the Standard State Zoning Enabling Act in 1922. See R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.07-2.10 (1968).

4. Any serious attempt at federal intervention in zoning would be likely to encounter massive resistance. Illustrative is the quiet introduction by the Nixon administration of an amendment to its own 1970 housing legislation which would have over-ridden, under certain limited circumstances, local zoning which excludes low-income housing. See *Hearings on Housing and Urban Development Legislation—1970 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess., pt. 1, at 19-20 (1970); N.Y. Times, June 3, 1970, at 1, col. 5 (city ed.). The administration evidently concluded that the political costs of a genuine effort on the point were too high; little effort was made on its behalf, and it appeared in neither the House nor

Senate committee bills.

the unlikely event that a court finds a particular decision beyond the scope of the police power, zoning officials must ordinarily withdraw, and if compensation is to be paid, a fresh approach by local government via eminent domain is necessary. Similarly, zoning ordinarily makes no provision for recoupment of the economic benefits produced by a particular decision, or for that matter, by public projects or general urbanization and extension of municipal services. The American theory is that zoning is "mere" regulation, with the public agency legally unconcerned about either the costs or benefits the regulation entails.

Since the only non-local review of zoning decisions is judicial review, it is important to understand the scope of that review. On its face, the scope is narrow. A court is entitled to ask only three questions about a decision: first, is it constitutional; second, does it comply with state enabling legislation (or, in some cases, a city's charter powers); and third, does the decision comply with the city's<sup>5</sup> own ordinance? The judges have applied these tests with characteristic ingenuity, sometimes finding it convenient to insert themselves into issues of the wisdom or fairness of the zoning decision, and in other cases appearing to defer gallantly to local zoning officials. Among the devices contributing to the variability of the scope of judicial review are the concept of "spot zoning", the requirement of conformance to a comprehensive plan, and the presumption of constitutionality of legislative enactments. Professor Mandelker treats at length a series of Maryland cases involving the "rule" of that state that zoning amendments are proper only if conditions have changed or the prior zoning was a mistake. He shows the enormous ambiguity of the "change or mistake" rule and the latitude it gives for judicial intervention or deference as the court thinks necessary.

But Mandelker believes that courts generally avoid explicit discussion of broad-gauge planning policy, concentrating instead on the individual or neighborhood impacts of zoning decisions. This tendency may be a result of several factors: a hold-over of the pre-zoning era of judicial thought, in which the law of private nuisance was the judiciary's principal land-use tool; the difficulty of relating comments on planning policy to the traditional areas of judicial review; and perhaps an admission of incompetence by the judges in the wider sphere of planning policy.

Mandelker's point here is that formulating planning policy involves

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5. This discussion assumes that the zoning entity is city government. But there is a growing trend toward delegation of zoning powers to counties and other governmental units as well.

the making of hard judgments on social values, and that there is something of a vacuum of power in the making of such judgments. He quotes Professor Reich's view<sup>6</sup> that such judgments can never be neutral, nor even fair in any absolute sense. Almost every imaginable planning decision harms some interests in society and aids others; the judicial image of blindfolded justice with scales is simply not meaningful in this context. Nor have the other participants in zoning systems found it easy to articulate these value judgments. Professional planners, in particular, appear to be in the throes of a major identity crisis over the issue of their proper role in the making of planning value judgments.<sup>7</sup>

The first half-century of American zoning has seen a major shift in legal rationale. Initially, zoning took its cue from private nuisance law, which was concerned with curbing external diseconomies<sup>8</sup> of a highly sensate nature: excessive noise, air and water pollution, odors, vibration and the like. Zoning's judicial Magna Charta, the *Euclid*<sup>9</sup> opinion, draws heavily on nuisance analogies, and contains some remarkably strained language depicting multi-family apartment buildings as nuisances. The hierarchical structure of traditional zoning ordinances, with the single-family home at the apex of the pyramid, reflects the nuisance-law orientation of the designers of zoning. Today's planners intend to use zoning for much broader purposes—to require internalization of not only such external diseconomies as odor, noise, and pollution, but also diseconomies reflected in matters of taste, convenience, and the smooth and efficient functioning of a whole community. Nuisance focused on an immediate neighborhood, while modern planning is broader, more regional, in scope. Mandelker

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6. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

7. See A. ALTSCHULER, THE CITY PLANNING PROCESS 392-405 (1965); F. RABINOWITZ, CITY PLANNING AND POLITICS 11-14 (1969); Ozbekian, "Can" Implies "Ought", in PLANNING FOR DIVERSITY AND CHOICE 208-09, 212-19 (S. Anderson ed. 1968); Rein, *Social Planning: The Search for Legitimacy*, 35 J. AM. INST. PLANNERS 233 (1969).

8. The term "external diseconomy" here means any cost or economic hardship imposed on neighboring owners by a particular land use. A common objective of public policy is to require "internalization" of such externalities—i.e., the imposition of the costs back against the landowner whose activities produce them. This may be attempted in a variety of ways: by compensatory payments made to those who suffer from the externality; by police-power regulation of the "offending" use; by zoning which excludes it entirely; by tax policy, etc. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), pointing out that in an economic sense it is not meaningful to regard either of two neighboring land users as "offending" or as "producing" the external cost; the problem is simply one of the proximity of two land uses incompatible with one another. Yet, where one of the uses is a single-family residence, the American scheme of social values usually regards its owner as the "offended" party, deserving of protection.

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

suggests that judicial thinking may not have kept well up with this shift in the viewpoint of zoning decision-makers.

Zoning's ability to compel the internalization of external diseconomies may be conveniently considered in two situations: existing urbanized neighborhoods and newly-developed areas. Zoning has proved rather weak in the reduction of pre-existing non-conforming uses in developed areas, a weakness Mandelker attributes primarily to constitutional restraints on the amortization of such uses. The constitutional limits are not well developed, and amortization is no panacea in any event,<sup>10</sup> but the power to eliminate nonconformance seems a little like some wag once said of religion—its problem is not so much that it has failed as that it has not been tried.

But clearly, zoning's greatest opportunity for impact is in newly-developing areas. Here, it would seem, zoning has the opportunity to serve as a tool of positive planning, without the limitations of nuisance concepts in the types of uses to be controlled or the spatial area of their impact. The classic model of zoning for developing areas consists of a series of steps something like the following:

1. A plan (read "general plan" or "master plan" or the like) is formulated by professional planners and adopted by the local legislative body.
2. The legislative body then enacts a zoning ordinance which zones all sites in accord with the plan previously adopted.
3. Private entrepreneurs then develop these sites at intensities of land use approximating the maximum permitted by the zoning ordinance.
4. The sites are occupied for their developed residential, commercial, industrial and institutional uses, and a pleasant, well-functioning environment results.

Even a novice is likely to suspect that this model is naive and improbable. A major part of Professor Mandelker's thesis is a step by step investigation of the planning-zoning process in a real metropolitan area, King County (metropolitan Seattle), Washington, with the intent of comparing it with the ideal model discussed above. The King County experience, of course, may not be entirely generalizable, but Mandelker's observations seem to me to have wide application.

Mandelker concentrated on the specific problem of zoning and development of multi-family apartments in newly-developing suburban areas of the county. In King County, he discovered, pre-zoning of

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10. See I R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 6.62-6.71 (1968).

apartments was almost never done. Although the county had a fairly sophisticated general plan, the plan did not locate specific sites for apartments, but only gave general verbal criteria for their location. These criteria were broad enough so that pre-zoning of all qualifying sites would have produced far too many apartment locations for the market to absorb. Moreover, pre-zoning would probably have opened the zoning authorities to heated charges of favoritism and "spot zoning". So the zoning authorities adopted a policy which Mandelker calls "watchful waiting". Virtually no undeveloped land was zoned for apartments until the owner made application for re-zoning to multi-family use. The zoning authorities then considered the particular site's qualifications in the light of the general plan's criteria (and perhaps in the light of other factors as well), and granted or denied the application.

A major flaw in this system, as in a system of complete pre-zoning, is the fact that the public body merely zones, but does not develop the land. There is no compulsion for the developer to move forward with construction, and many successful applicants for re-zoning do not in fact develop within a reasonable time after apartment zoning is approved. Such land owners are, Mandelker believes, making a purely economic decision to forego a present profit in the expectation that the present value of anticipated future sale or development is greater. Such a decision obviously involves risk to the owner, but the fact that re-zoning has been obtained reduces the risk substantially. This stockpiling of re-zoned land by owners complicates the planning process enormously, first because public planners cannot predict the timing of development, and second because they cannot even predict with certitude the nature of the use to which the land will actually be put—this last uncertainty deriving from the fact that an owner may procure multi-family zoning and yet later decide that, say, single-family use will be more profitable. These uncertain linkages between zoning and actual development greatly reduce the precision with which an on-going planning department can function.

Other problems arise in the translation of a general plan's concepts into a specific zoning ordinance. Such plans are usually far more generalized than ordinances are obliged to be. The plans may contain maps, but if so, their scale is too large and their boundaries too indistinct to permit their direct correlation with a zoning ordinance. Whether or not the plan contains a map, the zoning ordinance and re-zoning decisions usually are made primarily with reference to the textual statements of policy in the plan. Mandelker found that the King County

plan failed to adequately guide the zoning ordinance in several respects. It did not account, for example, for the timing of apartment development—its policy statements referred only to the spatial location of apartments. And although the plan mentioned proximity to arterial highways and business developments as appropriate criteria for apartment sites, it gave no quantitative information on *how* close to highways and business developments a proposed apartment site must be to qualify.

Mandelker also faults the King County plan for its failure to make explicit its societal value judgments. For example, the plan called for apartments only in the relatively high-density “centers” of urbanization within the county. Yet the plan not only failed to define precisely the locations or boundaries of these centers, but it also failed, at least on its face, to consider the social impact of such a policy on apartment location. Mandelker suggests that land costs in such centers are likely to be relatively high, thus producing higher rents and working hardship, perhaps unnecessarily, on the relatively lower income tenants who cannot afford home ownership and must live in the apartments. And to the extent that the newly-built apartments become the most attractive homes available to members of the minority races, the plan’s result may be the building of new ghettos. This last criticism goes to the merits of the plan itself, and Mandelker may be somewhat unfair in assuming that these objections to the “apartments in centers” plan were not fully aired and found acceptable when the plan was developed. The “centers” concept has obvious advantages, especially for rapid-transit utilization, but because the concept is becoming increasingly popular,<sup>11</sup> it is well to make its potential problems as explicit as possible.

Professor Mandelker observed a genuine effort by zoning officials to make their decisions accord with the comprehensive plan insofar as its ambiguities allowed, although the lay political agencies tended toward somewhat more leniency to developers than did the professionally-staffed planning department. Little corruption was discernable in the system. The principal problems in King County planning-zoning were twofold: first, the inadequacies and inexplicitness of the plan itself, and

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11. Mandelker refers at some length to MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, A PRELIMINARY MASTER PLAN FOR BOWIE-COLLINGTON AND VICINITY PLANNING AREAS 71, 74 (1969). Other “apartments in centers” proposals include LOS ANGELES DEPARTMENT OF CITY PLANNING, THE CONCEPT FOR THE LOS ANGELES GENERAL PLAN (1970); MINNEAPOLIS-ST. PAUL METROPOLITAN PLANNING COMMISSION, TWIN CITIES AREA

second, the intrinsic weaknesses of zoning as a tool to control, rather than merely to permit, development of a given type.

At this point Mandelker disappoints his reader, who hopes to be presented in the book's concluding pages with a program of reform. But the author demurs. He seems to believe that solutions to these dilemmas will require heroic measures—measures which he doubts American society is presently ready to accept. Although he makes some cursory comments on proposals such as general programs of public acquisition of undeveloped lands, the author seems content, for the present, to have delineated the problems.

Unfortunately, the book is not a highly readable one. The author's hope, expressed in the introduction, that the book will prove attractive and useful to urban planners and other professionals, seems unlikely to be fully realized, for the prose is often difficult to follow, particularly in those portions analyzing trends in judicial decisions. The strong hand of an experienced editor would have been welcome here. And the discussion of the statistical evidence of factors bearing on zoning decisions in King County was rough sledding for this reviewer, in part at least, because of its manner of presentation; the reader is sorely tempted to pass over the elaborate tables of figures and hurry on to the textual discussion of results.

But these minor flaws should not discourage the serious student of zoning, for Professor Mandelker's slim volume will yield generous insights not available elsewhere. *The Zoning Dilemma* is a genuinely valuable contribution to the literature of American planning law.

DALE A. WHITMAN\*

COURT AND CONSTITUTION IN THE TWENTIETH CENTURY, THE NEW LEGALITY. By William F. Swindler.<sup>1</sup> Indianapolis: Bobbs-Merrill Co., Inc., 1970. Pp. 479. \$12.95.

In a sense, the Supreme Court is like a multi-sided prism in that when light is cast on any of its facets, it is reflected, defused and refracted to illuminate all of its facets. William Swindler has cast the light of his own peculiar inquiries upon the court and its jurisprudence in a way that

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