

# The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation

Edward J. Sullivan<sup>\*</sup>

## I. INTRODUCTION

Perhaps the comfort and relative certitude of our present views on planning law allow us to overlook the role of our honoree, Professor Daniel R. Mandelker, in the development of that law in the United States. Those views, of course, relate to the importance of the comprehensive plan in the land use regulatory process and to the function of the courts in reviewing local, governmental rezoning actions in that process. It is indeed remarkable that so much has changed in these areas during one professional lifetime. It is even more remarkable that one man has played such a key role in those changes.

It has been over 50 years since Professor Mandelker received his law degree and over 25 years since he was appointed the Howard A. Stamper Professor of Law at Washington University in St. Louis. During that time, Professor Mandelker acted as an activist, author, and teacher, reminding his hearers that planning and land use regulation are not ends in themselves. Additionally, he has served as an expert witness and has authored, assisted, or commented upon numerous appellate briefs. Professor Mandelker's principal accomplishments reflect his uncanny ability to understand and influence the currents of planning law. In other words, Professor Mandelker has been, and continues to be, a consummate "big picture"

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<sup>\*</sup> B.A., St. John's University (N.Y.), 1966, J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham, 1998; Diploma in Law, University College, Oxford (1984); LL.M., University College, London, 1998. The author gratefully acknowledges the invaluable contribution of Kelly Hopper, J.D. 2000, Northwestern School of Law, in the preparation of this article.

scholar.

This article is one of many praising the life and work of Professor Mandelker. Because no single article could recount and explain the significance of Professor Mandelker's long and productive career, the various participants in this *festschrift* have sought to highlight various aspects of his outstanding career. Without ignoring Professor Mandelker's contributions to constitutional law, civil rights, social equity, and many other areas of planning law, this article focuses upon the skills of our honoree in presenting and advocating the fundamental organizing principles of planning law itself. Today, most scholars universally accept these principles of planning law as the dominant paradigm in the field, that is, that land use regulations and actions are subordinate to a separate policy document. This policy document, usually referred to as the "general" or "comprehensive" plan, provides the standard to judge the fidelity of regulations and actions, including rezonings. It is true jurisdictions do not universally or uniformly accept these principles. However, it is also generally true that most jurisdictions accept those principles and that legislation and caselaw show a definite trend towards such acceptance. No one, least of all Professor Mandelker, would claim to be the sole laborer in this effort. There is, however, a striking relationship between the advocated ideals of Professor Mandelker and the evolution of the law in these fields.

Before venturing further, the author wishes to disclose his long personal and professional friendship with Professor Mandelker and close familiarity with much of his work. The author has worked as an attorney, teacher, and writer in Oregon's land use system and has participated in a number of cases that have shaped that system and have influenced the national picture. Two of those cases, *Fasano v. Board of County Commissioners of Washington County*<sup>1</sup> and *Baker v. City of Milwaukee*,<sup>2</sup> have been used as examples of salutary developments in the law. In addition, the author has worked with Professor Mandelker on the American Bar Association's Advisory Commission on Housing and Urban Growth,<sup>3</sup> on the wording of the

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1. 507 P.2d 23 (Or. 1973).

2. 533 P.2d 772 (Or. 1975).

3. AMERICAN BAR ASSOCIATION, ADVISORY COMMISSION ON HOUSING AND URBAN

American Law Institute's *Model Land Development Code*,<sup>4</sup> and on a number of Continuing Legal Education presentations. More recently, the author and Professor Mandelker have taken different positions on takings law in a report to the State and Local Government Section of the American Bar Association.

In order to understand fully Professor Mandelker's role in these areas of planning law, one must understand the efforts to bring about a common recognition of the nature of the comprehensive plan, especially its relationship with land use regulations and the nature of judicial review of rezoning actions. The first efforts to impose order in this area arose out of the Standard State Zoning Enabling Act of 1926 (SZE A)<sup>5</sup> and the Standard City Planning Enabling Act of 1928 (SPE A).<sup>6</sup> A special advisory committee, under the direction of the Secretary of the Department of Commerce, Herbert Hoover, prepared both model acts. The now-famous Section 7 of the SZE A required zoning regulations to be "in accordance with a comprehensive plan," but did not define what factors constituted such a document. The SPE A vexingly referred to a "master" plan and a "city" plan, but not to a "comprehensive" plan.<sup>7</sup> Another noteworthy land use law writer, Charles M. Haar, in the 1950s, ably called attention to the definitional variances between the two enabling acts and to the resultant inconsistency.<sup>8</sup> Reconciliation difficulties were further evidenced by

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GROWTH, NEW DIRECTIONS IN HOUSING LAND USE AND PLANNING LAW: HOUSING FOR ALL UNDER LAW (Richard P. Fishman ed., 1978) [hereinafter "Fishman"].

4. AMERICAN LAW INSTITUTE, MODEL LAND DEVELOPMENT CODE (1975) [hereinafter "MODEL CODE"].

5. STANDARD STATE ZONING ENABLING ACT (SZE A) (U.S. Dept. of Commerce rev., ed. 1926).

6. STANDARD CITY PLANNING ENABLING ACT (SPE A) (U.S. Dept. of Commerce 1928).

7. SPE A § 6.

8. See, e.g., Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 L. & CONTEMP. PROBS. 353 (1955); Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Charles M. Haar, *Wayne Township: Zoning for Whom? In Brief Reply*, 67 HARV. L. REV. 986 (1954). Haar was not alone in his criticism. In his planning law classic, Richard Babcock stated:

I suppose that every city planning student is required to write on the blackboard a hundred times the Planner's Oath: 'Zoning is merely a tool of planning.' Walter Blucher asked some years ago if the zoning tail was wagging the planning dog. The question points up the view of the planner that zoning is only a minor appendage to the essential body, city planning.

the fact that the SPEA was adopted by only about half the states, while almost all the states accepted the SZEAs. The SZEAs also left unanswered what standard of review should apply for zoning map amendments, a separate legal issue related to the significance of the comprehensive plan. The adoption of a map amendment, as with the adoption of a zoning map itself, was usually accomplished through an ordinance. In the absence of any guidance from the enabling legislation, courts nearly always assume that a small-tract amendment is, like the adoption of the zoning map itself, a legislative action. The ease of that assumption was exceeded only by the significance of its perhaps unintended consequences. If the action were legislative, courts were necessarily limited from intervening because of separation of powers and other practical considerations. A point came, however, at which judges could no longer stand by and watch local governments use the shield of deference to withstand challenges to these so-called “legislative actions.” Those courts then turned to nebulous formulae that are not found in the Constitution or enabling legislation to separate ostensibly “good” from “bad” rezonings.<sup>9</sup>

It is not surprising that courts have been so innovative. Until recently, almost every state delegated all planning and regulatory authority to local governments with mixed, and largely disappointing, results. To “save” regulatory authority from the absence of, or inconsistency with, a comprehensive plan, the courts largely fudged, finding no requirement of a separate comprehensive plan.<sup>10</sup> In “upholding” small-tract rezonings as legislative acts and consequently rendering substantive judicial review difficult, the courts created a Frankenstein—the virtually unreviewable zone

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It is said that only when the community has, in its plan, set forth and exposed to public scrutiny its goals and desires can the arbiter, required to settle land use disputes, measure the reasonableness of the implementing ordinances. . . .

9. RICHARD BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 120-21 (1966). *See also* DANIEL R. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* 57 (1971) (arguing that the real policies of a community are not found in any document, but in the way the community responds to zoning change requests). This theme surfaces repeatedly in his work.

10. *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 8 (N.J. 1957).

change. The courts then over-corrected, again fudged, and created an anti-Frankenstein that either embraced criteria unrelated to the substance of the action,<sup>11</sup> was too mechanical and insufficiently flexible,<sup>12</sup> or was too susceptible to manipulation by judges.<sup>13</sup>

If confusion over the plan's role (including its separate existence) were not enough to ponder, land use law in America suffered from the silence of the United States Supreme Court from 1928 through 1978 on the effect of the Constitution in this area of law. The Court spoke only four times from 1926 to 1928. Perhaps it might be better had the Court not spoken at all, for two of those four cases, *Village of Euclid v. Ambler Realty Co.*<sup>14</sup> and *Nectow v. Cambridge*,<sup>15</sup> have been used to uphold, or overturn, zoning regulations, depending upon which case was chosen as authority. This is not surprising, as both cases were decided near the end of the era of substantive due process analysis. In that era, the Court's economic, social and political

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11. The Washington courts have adopted the "appearance of fairness" rule, under which, regardless of the merits of the action, the proceedings must not only *be* fair, but also *appear to be fair* to a disinterested observer, *viz.* a judge. *See, e.g., Smith v. Skagit County*, 453 P.2d 832 (Wash. 1969).

12. The Maryland "change or mistake" rule is another court-made rule, which a number of other states have adopted. Under that rule, the original zoning scheme is given credence, but [a change in physical circumstances or a showing of a mistake in the original zoning scheme] must justify changes to that scheme for small parcels. *See MANDELKER, supra* note 9, at 89-96.

13. Many courts developed "spot zoning," an extra-statutory review. This rule requires the court to strike down a zone if there is insufficient justification for locating a "spot" of an inconsistent zone in a "sea" of otherwise inconsistent zones. The difficulty with this criterion (in addition to its illegitimacy) is its lack of content. *Compare MANDELKER, supra* note 9, at 70-75 (criticizing this rule).

14. 272 U.S. 365 (1926). Although *Euclid* upholds a local zoning ordinance, Mandelker suggests it exemplifies one of the difficulties inherent in American planning law, that is, the difficulties of emphasizing individual over collective rights. In contrast to our English brethren, Americans achieve consensus on only a few matters, most of them directly related to health and safety. Mandelker suggests that this individualistic bias arises out of the role of nuisance law in the American legal psyche; furthermore, he notes the role of the nuisance analogy in upholding zoning in the *Euclid* case. Daniel R. Mandelker, *The Role of Law in the Planning Process*, 30 L. & CONTEMP. PROBS. 26, 27-31 (1965). *See also MANDELKER, supra* note 9, at 175-76.

15. 277 U.S. 183 (1928). *Nectow* perhaps illustrates Mandelker's thesis as it strikes down an ordinance because there was no justification for imposing different zoning designations on similar property. This approach makes compact urban growth boundaries and homogeneity of appearance all the more difficult, particularly because of its reliance on the nuisance analogy. *See Mandelker, supra* note 14, at 31-35. Similarly, Mandelker finds it against the American legal grain to enforce compaction after a low-density pattern has been established. *Id.* at 32-33. Mandelker's concept of a meta-legal ethic as a constraint on regulation appears to be a sound one.

preferences were often masked in formulaic incantations of constitutional law. Even after the demise of substantive due process,<sup>16</sup> the dead hand of this theory continued to influence various lower federal and state courts long thereafter.

The Supreme Court's other "contribution" to land use law is in the "takings" field. After nearly a century and a half of an understanding that the Takings Clause of the U.S. Constitution was limited to appropriation of title or physical occupation of property, Justice Oliver Wendell Holmes favored the world with his opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>17</sup> The court found that if a regulation went "too far," it was transmuted into a taking and required compensation to be valid.<sup>18</sup> Although largely ignored for over fifty years, *Mahon*, and its cousins, the dicta in *Agins v. City of Tiburon*,<sup>19</sup> and the unfounded (and largely unused) factors of *Penn Central Transportation Co. v. New York City*,<sup>20</sup> have been grist for the mill for thousands of commentators. Moreover, those cases have become the instruments of a new generation of jurists who have become tired of judicial restraint and seek to re-invent substantive due process under the takings clause of the U.S. Constitution.<sup>21</sup>

It is neither fair, nor accurate, to state sweepingly that Professor Mandelker strode on the scene of confusion and created order out of chaos. However, as the following portions of this article will show, Professor Mandelker assisted greatly in the understanding of planning law issues, as well as consolidating and evaluating proposed solutions

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16. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938). Mandelker notes that the Reagan Era, THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 200 (1982) questioned the presumption of validity of legislative judgments. The report suggests reversing the presumption of validity unless the regulation were "necessary to achieve a vital and pressing governmental interest." *Id.* The commission report went nowhere. It did, however, inspire Mandelker to defend the existing state of affairs. See Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation; Is Legislative Action Necessary?*, 30 WASH. U.J. URB. & CONTEMP. L. 5 (1986). Mandelker argued against the report because the use of a quasi-judicial standard in judicial review places the burden on the applicant and, if approved, the local government, to demonstrate conformity of the new zone to the plan. *Id.* at 14.

17. 260 U.S. 393 (1922).

18. *Id.* at 415.

19. 447 U.S. 255 (1980).

20. 438 U.S. 104 (1978).

21. See *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

to these problems. More importantly, he has helped us all understand land use law as a single entity, rather than as a series of disjointed, unrelated legislation and actions.

## II. MANDELKER THE PLANNING LAW SCHOLAR

Professor Mandelker's credentials as an academic are impressive. The abridged recitation of his academic achievements in the law include his receipt of an LL.B degree from the University of Wisconsin in 1949 and his J.S.D. from Yale in 1956. He was also named as a member of Phi Beta Kappa and the Order of the Coif. He has taught law at Drake University, Indiana University, the University of Washington, and Columbia University (as a Walter E. Meyer Visiting Research Professor of Law and Social Problems). He has also been a Ford Foundation Fellow at Yale University. Since 1974, he has been Howard A. Stamper Professor of Law at Washington University in St. Louis. He has also served as a Ford Foundation Law Faculty Fellow in London and has acted as an attorney for the Federal Housing and Home Finance Agency in Washington D.C.

Mandelker's awards are the envy of any academician or planning lawyer. He has been Senior Fellow, Research Fellow, or Visiting Fellow at the Urban Land Institute (1989-95), at the University College in London, and at the University of Copenhagen in Denmark. He has also been a visiting scholar at the Department of Urban Planning in Haifa, Israel, at the Institute of State and Law in Moscow, and has been a faculty member at the Brookings Institution Urban Program. He has also received the John C. Vance Award (with A. Kolis) for the Most Outstanding Paper on Transportation Law from the Transportation Research Board.

Space permits mention of only a very few of Professor Mandelker's lectures, but they illustrate not only the esteem in which he is held, but also the breadth of his compass in land use law. He gave the Inaugural Norman Williams Jr. Lecture at the Annual Symposium on Law and Public Policy at Rutgers University Law School in Newark in 1997. He was the 1992-93 National Distinguished Lecturer at the Journal of Land Use and Environmental Law at Florida State University, and he gave the Fifteenth Denman

Lecture at the Department of Land Economy at the University of Cambridge in England in 1992. Additionally, he has participated in the Annual Zoning Institute for the American Planning Association from 1981-90 and is a frequent speaker at planning and planning law conferences.

Professor Mandelker has consulted with local, state and national governments around the world, but much of his work has been for planning and planning-law related groups. For example, he has served the American Planning Association in the areas of constitutional law, housing, and revisions of state-enabling legislation. He has also served that organization by chairing its division council and its planning and law division. He has served the Transportation Research Board on legal issues related to transportation planning. He has reviewed and revised land use regulations for the Urban Land Institute. Finally, he has advised the American Bar Association's Special Commission on Housing and Urban Development Law and its Advisory Commission on Housing and Urban Growth.

In addition, Professor Mandelker has authored or co-authored more than 20 books dealing with planning law, including four textbooks used in law schools across the country. Professor Mandelker has written extensively on the role of the state in preventing discrimination in housing and in providing housing for the poor. On these issues, Mandelker has been a passionate and unwavering advocate. He also "walks his talk" by spending time with various task forces and advisory committees in this area. He has served on various task forces on housing affordability<sup>22</sup> and has participated in two federal studies on urban blight and tenant

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22. For example, Mandelker is presently on the Advisory Board for the Revitalization of Central Cities and has served on the American Planning Association's Task Force on Affordable Housing in 1992-1993. He advised the U.S. House of Representatives' Committee on Banking and Urban Affairs on hearings in connection with the effects of land use controls on housing affordability from 1989-1991. In addition to chairing the Subcommittee on Assisted Housing of the Housing Task Force Advisory Group of the U.S. House of Representatives' Democratic Caucus from 1981-1982, Mandelker served on the Special Committee on Housing and Urban Development Law for the American Bar Association from 1980-1982 and the Association's Advisory Commission on Housing and Urban Growth from 1976-1977. He has also served on Senator Alan Cranston's Ad Hoc Housing Policy Committee for the American Planning Association from 1987-1990.



relocation.<sup>23</sup> He has written a book on the use of housing subsidies<sup>24</sup> and chapters in books dealing with housing discrimination.<sup>25</sup> Finally, Mandelker has written a series of perceptive law review articles dealing with housing policy.<sup>26</sup> There is no question that Mandelker's brief stint with the Federal Housing and Home Finance Agency left an impression on his work; he has opposed discrimination and has advocated for a state role in providing housing.

Although a commitment to social justice in Mandelker's work is profound, it is by no means the only object of his attention in planning law. He has, in addition to the teaching and fellowships outlined above, undertaken a good deal of work in the international planning field, from the United Nations<sup>27</sup> to the United States Information Agency<sup>28</sup> in various countries around the world.<sup>29</sup>

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23. Mandelker participated in three United States Public Health Service research projects involving the Rationale for Public Powers Over Slum Housing from 1968-1969, Tenement Landlord Relocation from 1967-1968, and The Role of Blight Determination in the Urban Renewal Process from 1965-1968.

24. HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND (1973). See also DANIEL R. MANDELKER & ROGER MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES (2d ed. 1979).

25. See DANIEL R. MANDELKER, HOUSING ISSUES IN AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC (Scott Burris et al. eds., 1993); Daniel R. Mandelker, *Group Homes: The Supreme Court Revives the Equal Protection Clause in Land Use Cases*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN, §§ 3.01-3.05 (Janice R. Moss ed., 1986); Daniel R. Mandelker, *The Constitutionality of Inclusionary Zoning: An Overview*, in INCLUSIONARY ZONING MOVES DOWNTOWN (Dwight Merriam et al. eds., 1985).

26. Daniel R. Mandelker, *Making Difficult Choices for Lesser-Income Housing Subsidies*, 8 URB. L. & POL'Y 191 (1986); Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977); Daniel R. Mandelker, *Strategies in English Slum Clearance and Housing Policies*, 1969 WIS. L. REV. 800 (1969); Daniel R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing*, 67 MICH. L. REV. 635 (1969).

27. United Nations Centre on Housing, Building and Planning, Expert Meeting on Regional and National Development Planning (1972-73).

28. U.S.I.A. Overseas Speakers Program, Israel and Yugoslavia.

29. CONSULTANCY ON MELBOURNE, AUSTRALIA, STRATEGY PLAN (1973-73); Daniel R. Mandelker, *City Planning in the Soviet Union: Problems of Coordination and Control*, 2 URB. L. & POL'Y 97 (1979); Daniel R. Mandelker, *Planning and Housing in the Yugoslav Republic of Slovenia*, 4 URB. L. & POL'Y 357 (1982); research project for the Lincoln Institute of Land Policy, *Housing and Planning in Yugoslavia* (1981); consultancy on Hong Kong Amortization Study (1993-94); research project on *The Role of Law in Facilitating Urban Development for Southeast Asia* Development Advisory Group (1970-72); *The Capacity of the Legal System to Facilitate the Urban Development Process: Korea and The Philippines*, SEADAG project No. 70101 (Daniel R. Mandelker ed., 1972).

However, Mandelker has been especially keen on the impacts of the common law traditions of real property as they affect planning law and has undertaken a number of scholarly projects to study this area.<sup>30</sup>

Professor Mandelker has also studied and written extensively on the relationship between planning and environmental law. He has also served on a number of high-visibility panels for government and professional associations on these issues.<sup>31</sup> In addition, Professor Mandelker has been a prolific author, both of books<sup>32</sup> and chapters in books,<sup>33</sup> monographs<sup>34</sup> and articles.<sup>35</sup> These works demonstrate his

30. In addition to his Ford Foundation Fellowship and the Denman Lecture noted above, Mandelker has authored a monograph entitled *Environmental Policy: The Next Generation*, the article arising out of the Denman Lecture (1993), Daniel R. Mandelker, *GREEN BELTS AND URBAN GROWTH: ENGLISH TOWN AND COUNTRY PLANNING IN ACTION* (1963); Daniel R. Mandelker, *Notes from the English: Compensation in Town and Country Planning*, 49 CAL. L. REV. 699 (1961).

31. Among other activities, Professor Mandelker has been a member of the Commission on Environmental Law of the International Union for the Conservation of Nature since 1997, has prepared a *Study of Effectiveness of the Implementation of the National Environmental Policy Act* for the United States Council on Environmental Quality from 1994-1995, and has consulted for the American Planning Association on *The Relationship of State Environmental Policy Acts to State, Regional and Local Planning* as part of the Association's Model State Planning and Land Use Regulation Legislation Project from 1996-1998. He has also written research papers for the United States Environmental Protection Agency, *Emission Density Zoning as an Air Pollution Control* (1973-75), and *The Contribution of Urban Planning to Air Quality* (1972-73). The Argonne National Laboratory also used the former paper in a study in 1977-1978.

32. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* (2d ed. 1999); FREDERICK R. ANDERSON ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* (2d ed. 1990); DANIEL R. MANDELKER, *ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* (1981); Daniel R. Mandelker, *Environmental and Land Use Controls Legislation* (1976 & 1992 supp.); GEORGE HAGEVIK ET AL., *AIR QUALITY MANAGEMENT AND LAND USE PLANNING LEGAL, ADMINISTRATIVE, AND METHODOLOGICAL PERSPECTIVES* (1974); Daniel R. Mandelker, *Managing Our Urban Environment: Cases, Texts and Problems* (2d ed. 1971).

33. See *Integrating State Environmental Policy Acts with Local Planning and Corridor Maps*, in AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE* (1998); Advisory Commission on Intergovernmental Relations, *The Legal Framework for Environmental Review of State and Local Public Works Projects in INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS* (1992); *Environmental Protection*, in THE PRACTICE OF STATE AND REGIONAL PLANNING (Frank S. Ho et al. eds., 1986); *The Clean Air Act: Land Use and Transportation Implications*, in Proceedings, National Conference on Land Use and Transportation Planning and Air Quality Management (1975); *Quality Standards for the Control of Air Pollution*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES (Norman Marcus & Marilyn W. Groves eds., 1970); Daniel R. Mandelker, *New Incentives and Controls in ENVIRONMENTAL LAW AND POLICY: THE NEXT*

broad understanding of national and state environmental legislation and the impacts of such legislation on planning practice.

Three other areas related to planning law demonstrate the breadth and depth of Professor Mandelker's grasp of planning law beyond the areas in which this article seeks to illuminate his contributions. This article relates only to the subjects of the role of the comprehensive plan to regulation and the views taken by the courts as to small-tract rezoning. Additional areas of substantial contribution include:

1. Constitutional Law—Professor Mandelker has been a member of the American Planning Association's *Amicus Curiae* Committee since 1995 and has served on that Association's Property Rights Task Force. He served as an expert witness in the Pyramid Mall case in Vermont<sup>36</sup> and co-authored a brief for the American Planning Association in *Suitum v. Tahoe Regional Planning Agency*.<sup>37</sup> His various law school textbooks deal at length with constitutional law questions. In addition, he has written chapters in books on constitutional law subjects<sup>38</sup> and authored numerous articles as well.<sup>39</sup>

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FIFTY YEARS (William R. Ewald, Jr., 1968).

34. See *Environmental Policy: The Next Generation*, supra note 30; *The Application of the National Environmental Policy Act to Highway Projects* (with G. Feder), National Cooperative Highway Research Program, Research Results Digest No. 165 (1987).

35. For example, see Daniel R. Mandelker, *Melding State Environmental Policy Acts with Land-Use Planning and Regulations*, 49 LAND USE L. & ZONING DIG. 3 (1997); Daniel R. Mandelker, *The Conflict Between Environmental Land Use Regulation and Housing Affordability*, 15 ZONING & PLAN. L. REP. 1 (1992); Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI-KENT L. REV. 479 (1989); Daniel R. Mandelker, *NEPA Alive and Well: The Supreme Court Takes Two*, 19 ENVTL. L. REP. 10365 (1989); Daniel R. Mandelker, *Cleaning the Air: The Costs and Benefits of Air Quality Control*, 5 Wash. Univ. Law School Magazine, at 30 (1983); Daniel R. Mandelker & Felice Taub, *Constitutional Limitations on Emission Quotas as an Air Pollution Control Strategy*, 8 ECOLOGY L.Q. 269 (1979); Daniel R. Mandelker & Thea A. Sherry, *Emission Quota Strategies as an Air Pollution Control Technique*, 5 ECOLOGY L.Q. 401 (1976); Daniel R. Mandelker & Susan B. Rothschild, *The Role of Land Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 ECOLOGY L.Q. 235 (1973).

36. *In re Pyramid Co. of Burlington*, 449 A.2d 915 (Vt. 1982).

37. 520 U.S. 725 (1997).

38. See, e.g., Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, in SOUTHWESTERN LEGAL FOUNDATION, 1994 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, ch. 7 (1995); Daniel R. Mandelker, *Principles on Due Process and Equal Protection*, in LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE (Brian W. Blaesser & Alan C. Weinstein eds., 1989); Daniel R. Mandelker, *The Constitutionality of Inclusionary Zoning: An Overview 31*, in INCLUSIONARY ZONING MOVES DOWNTOWN (Dwight Merriam et al., 1985); Daniel R.

He has also advocated for legislation changing federal ripeness standards in takings cases in testimony before congressional committees in recent years.<sup>40</sup>

2. Aesthetics and Sign Regulation—Professor Mandelker has served as Director (1981-84 and 1986) and President (1987-88) of the Coalition for Scenic Beauty and has participated as a member of the National Advisory Committee on Outdoor Advertising for the United States Department of Transportation (1980-82). In addition, he has co-authored one of the most thoughtful books on the ability to regulate signs and billboards<sup>41</sup> and an article on control of billboards.<sup>42</sup> Professor Mandelker's lifelong work in transportation planning is a natural springboard for his work in this sector of transportation and aesthetics in planning.

3. Antitrust Law—Because planning law has a significant impact on competition, it is only natural that Professor Mandelker has written in this area of the law as well. He has written a chapter on the potential antitrust liability of local governments in regulation of land uses<sup>43</sup> and an article on the legitimacy of regulatory control of competition.<sup>44</sup>

With his formidable breadth and depth of planning law expertise, it may seem incomplete to concentrate on only one area of Professor

Mandelker, *The Taking Issue in Land Use Regulation*, in *THE LAND USE POLICY DEBATE IN AMERICA* (1981).

39. Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 *MARQ. L. REV.* 9 (1997); *Property Rights and Takings*, with A. L. Strong and E. Kelly, 62 *J. AM. PLAN. ASSN.* 5 (1996); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 *URB. LAW.* 215 (1995); Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 *J. LAND USE & ENVTL. L.*, 285 (1993); Daniel R. Mandelker, *Takings: Trilogy II*, 44 *LAND USE L. & ZONING DIG.*, 3 (1992); Daniel R. Mandelker, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 *ZONING & PLAN. L. REP.* 49 (1988); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 *WASH. U.J. URB. & CONTEMP. L.* 3 (1987); Daniel R. Mandelker, *The Free Speech Revolution in Land Use Control*, 60 *CHI.-KENT L. REV.* 51 (1984).

40. Testimony before the House and Senate Judiciary Committees on H. R. 1534 (1998).

41. DANIEL R. MANDELKER & WILLIAM R. EWALD, *STREET GRAPHICS AND THE LAW* (1988).

42. Daniel R. Mandelker & Linda Reiman, *The Billboard Ban: Aesthetics Come of Age*, *LAND USE L. & ZONING DIG.* 4 (1979).

43. Daniel R. Mandelker, *Land Use Law and Antitrust Liability*, in *LAND USE LAW: ISSUES FOR THE EIGHTIES*, Part II (Edith M. Netter ed., 1984).

44. Daniel R. Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 *ZONING DIG.* 33 (1962).

Mandelker's work. Yet, as the many articles in this issue demonstrate, Professor Mandelker has both knowledge and vision. And, as set forth in the introduction to this article, it is our purpose to review and comment upon this vision and the impact of Professor Mandelker's seminal role of selecting and expounding upon ideas and making those ideas part of a coherent vision of planning law. The ideas are fairly simple when considered in light of the new millennium: (1) land use regulations must be based upon a coherent, binding policy, (2) delineated in an adopted plan, and (3) small zoning changes must be viewed as quasi-judicial, not legislative, actions. We now proceed to examine Professor Mandelker's treatment of these ideas.

### III. MANDELKER, AS PLANNING LAW VISIONARY

The role of visionary is not limited to originating new thoughts. Indeed, in a diverse field such as planning law, many thoughts swirl about in cases, statutes, and speculative writings. A visionary is one who can separate the useful wheat from the greater volume of chaff, observe and enhance new trends, and criticize the present with a view to the future. This portion of the article focuses on Mandelker's specific gifts of clear conceptualization and leadership.

As mentioned in part I, Charles M. Haar wrote about the logical disconnect between the SZEA's requirement that zoning be "in accordance with a comprehensive plan" and the reality of the situation when there is no plan or a proposed rezoning is inconsistent with the plan.<sup>45</sup> Similarly, Richard Babcock wrote tellingly of the

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45. Mandelker himself summarizes the difficulties inherent in the American "style" of land use regulation, as compared, for example, to our British counterparts in *The Role of Law in the Planning Process*. Mandelker, *supra* note 14. However, in 1971, in *The Zoning Dilemma*, he indicates that the American system was moving towards its British counterpart in establishing an administrative model for planning and regulatory actions. *Id.* at xii. Indeed, in a far-seeing article, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60 (1963), Mandelker points out the inherent limitations of viewing land use actions as administrative or quasi-judicial, rather than as legislative. *Id.* at 60-61. He suggests that an emphasis on better articulated policy standards would benefit zoning administration. He stresses the differences between policy making and policy application. *Id.* at 61, 64 (footnote omitted). The distinction was to become more pronounced in his later work; however, Mandelker recognized the issue of characterizing local land use decisions as well as the role of the comprehensive plan under the SZEA very early in his career, at 61-65. *See also id.* at 97-99.

tendency of courts to invalidate “bad” zone changes, guided only by their “sense of smell.”<sup>46</sup> Haar believed that the plan should be, as he termed it, an “impermanant constitution,”<sup>47</sup> while Babcock argued for greater procedural and substantive limitations, legislatively created, if necessary, to give legitimacy to judicial review.

In 1973, the Oregon Supreme Court’s ruling in *Fasano v. Board of County Commissioners of Washington County*<sup>48</sup> dealt with the structural issues that had plagued planning law for nearly half a century. These issues included the existence and role of the comprehensive plan and the role of courts in reviewing zone changes.<sup>49</sup> *Fasano* was decided immediately before Oregon enacted its distinctive land use program and might have been discounted as part of that unique legislative program had not Professor Mandelker and others seen the case for what it was—a sea change by the courts in planning law. Also, *Fasano* could have been distinguished because it arose under a statutory scheme in which a separate comprehensive plan was clearly required.<sup>50</sup> Professor Mandelker saw the significance of *Fasano* and its near-contemporary, *Baker v. City of Milwaukee*,<sup>51</sup> in which the plan was again upheld as the governing document under legislation similar to the SZEAs.<sup>52</sup> Moreover, *Fasano*’s singular contribution of holding *both* that the comprehensive plan is the governing document *and* that judicial review, undertaken with small-tract rezonings as quasi-judicial and as judged by the fidelity to the comprehensive plan, created a very different way of conducting business in land use law.

*Fasano* and *Baker* might have been shrugged off as a phenomenon unique to Oregon had not Mandelker’s seminal article, *The Role of the Local Comprehensive Plan in Land Use Regulation*<sup>53</sup> (hereinafter the “Mandelker article”), discussed the cases not only in

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46. Richard F. Babcock, *The Zoning Game*, *supra* note 9, at 101-11.

47. Charles M. Haar, *The Master Plan: An Impermanant Constitution*, 20 L. & CONTEMP. PROBS. 353 (1955).

48. 507 P.2d 23 (Or. 1973). *See id.* at 27-30.

49. *See id.* at 27-30.

50. OR. REV. STAT. ANN. § 215.110 (1991).

51. 533 P.2d 772 (Or. 1975).

52. *Id.* at 779.

53. Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976).

a major legal publication, but also in their proper context. In the first few pages of this article, Mandelker sets out the difficulties presented by then-contemporary views of the plan by courts and writers and proposes to point out new directions to resolve that confusion.<sup>54</sup> The situation in 1976 arose out of lack of clarity in the SPEA and SZEA as to the role of the plan, as discussed in Part I. He speculated that the ambiguity may have been caused by a disagreement among the advisory committee, which had formulated both acts, as to whether a separate plan was required.<sup>55</sup> Alternatively, the committee may have disagreed as to the plan's nature; whether it involved issues of capital improvement or whether it was strictly a "zoning plan."<sup>56</sup> Like Professor Haar, Mandelker accepts *Kozesnik v. Montgomery Township*<sup>57</sup> as the paradigm of a unitary view of planning, which

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54. *Id.* at 901-09.

55. *Id.* at 901-02.

56. *Id.* at 902-03. The SZEA was adopted before the SPEA and, among the states, more often than not, further complicated the situation. Mandelker suggests the real flaw was that communities did not "pre-zone" lands for their ultimate use, but rather adopted a policy of "watchful waiting," allowing developers to request increased densities or intensities of use. MANDELKER, *supra* note 9, at 103-05.

57. 131 A.2d 1 (1957). Mandelker wrote an article similar to his 1976 article in 1967 and noted the significance of comprehensive planning in the urban renewal process. He began this article by saying:

Comprehensive plans are prepared and adopted to guide and coordinate community growth. To be effective, they must apply to public as well as private development, a relationship suggested in state planning enabling statutes, but left largely without sanction in state law. Real impetus to control public development through comprehensive planning has come from federal legislation, which has conditioned a wide variety of federal grants on the adoption of local or regional plans. Urban renewal was the first program to impose a federal comprehensive planning requirement. Through urban renewal, local public agencies acquire substandard areas, clear them and sell the cleared land for redevelopment, in accordance with a project plan for the cleared area. The federal legislation, in turn, requires a local legislative finding that the project plan conforms to a general plan for the development of the locality as a whole.

Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 26 (1967) (footnotes omitted). Mandelker's concern, however, was that uncritical acceptance of that requirement without critical evaluation of results was not useful. Following a review of the planning requirements in urban renewal legislation for selecting and planning various sites and redeveloping them, this article reviews two specific urban renewal projects (in Nashville and St. Louis). Mandelker identifies the major planning problems in urban renewal as involving the disconnect between the planner and the decision-maker, the limitations of physical planning in resolving social issues, the difficulties of coordination among public agencies, and disagreement over the substantive role of planning in urban renewal. *Id.* at 64-68.

conflated the zoning ordinance and comprehensive plan, thereby avoiding the troubling statutory requirement that zoning be “in accordance with the comprehensive plan.” The *Kozesnik* court found the plan to be the product of a rational process and not piecemeal in nature, but did not require a separate document.<sup>58</sup> Confusion reigned in planning law, and Professor Mandelker thoughtfully analyzed that situation before proposing various remedies.

Mandelker’s analysis concluded that the confusion was caused by two interrelated factors: making the plan optional under the SPEA and the failure to require the plan as part of the land use regulatory process.<sup>59</sup> These failures were magnified by innovations in the regulatory process, such as the use of floating zones and planned unit developments, or the later addition of capital facilities plans, environmental and growth controls, and the like.<sup>60</sup> It was Mandelker who instinctively knew the significance of a case such as *Golden v.*

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58. *Kozevnik v. Montgomery Township*, 131 A.2d 1, 6-8 (1957). Mandelker also noted the short-lived reign of *Eves v. Zoning Board of Adjustment*, 164 A.2d 7 (1960), in which the Pennsylvania Supreme Court invalidated the use of a “flexible selective zoning” under the statutory requirement that zoning be “in accordance with the comprehensive plan.” 164 A.2d at 11-12. This position was overruled both by statutory law and other cases. See Mandelker, *supra* note 53, at 907-09.

59. Mandelker, *supra* note 53, at 909-10. In *The Zoning Dilemma*, Mandelker poses some additional reasons for the failure of the enforcement of the statutory comprehensive plan requirement:

The reasons advanced for this judicial emasculation of the statutory planning requirement have been many, and are often pragmatic, the most conventional being the point that many municipalities, especially the smaller ones, did not have plans until recently, and that to enforce the statutory requirement rigidly would have prevented municipal exercise of the zoning power. The explanation is suggestive, but it misses the point. What happened was that the courts were willing to accept the role of the zoning ordinance in adjusting land use interdependencies, but they were very reluctant to review the value preferences which the ordinance incorporated. To have done so would have involved the judiciary in the political function of evaluating community goals, and this they were unwilling to do. A narrow judicial reading of the statutory requirement avoided an appraisal of the community value judgments expressed in the zoning ordinance, an interpretation buttressed by judicial adoption of the conventional presumption that the zoning ordinance was constitutional unless proved otherwise. Also of interest from this perspective are judicial interpretations of the comprehensive plan requirement which emphasize a comprehensiveness in process as the essential component of the statutory test, rather than the substantive content of the plan’s goals and objectives.

Mandelker, *supra* note 9, at 58-59 (footnote omitted).

60. *Id.* at 910-11.



*Planning Board of the Town of Ramapo*,<sup>61</sup> in which a regulatory scheme based on well-considered and integrated, albeit imperfect, capital facilities and land use plans survived highly intensive statutory and constitutional challenges.<sup>62</sup> It was also Mandelker who pointed out the tendency of federal agencies to require planning as a prerequisite for federal funding in the 1960s and 1970s.<sup>63</sup>

In a brief digression, Mandelker's article turns to an abiding issue in planning law, i.e., the relative certainty of "end-state" map plans and more flexible, yet less precise, "policy plans."<sup>64</sup> Mandelker suggests that, as the planning area widens and options increase, the use of policy plans greatly assists planners, especially as information becomes more detailed.<sup>65</sup> Indeed, states have recognized roles for comprehensive plans beyond that of the standard acts and require both policy and map elements for those plans. The transition from the map plan to the policy/map plan was a significant planning and legal innovation, which Professor Mandelker predicted and encouraged through his writings.

Moreover, the emphasis on growth controls following *Ramapo* and statutory innovations arising out of the environmental movement were facilitated by the use of policy plans. For example, consider the policy plans of Oregon and California. California's legislature has traditionally set standards for local plans, and local governments implement those standards, subject only to challenge in the California court system. With regard to housing, local governments are required to accommodate a fair share of regional need and to quantify that need in local plans. On the other hand, in Oregon, the legislature has set general standards, but largely delegated policymaking and implementation to the state's Land Conservation and Development Commission. In both states, there is a statewide policy, implemented

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61. 285 N.E.2d 291 (N.Y. 1972), *app. dismissed* 409 U.S. 1003 (1972). See also Mandelker, *supra* note 53, at 911.

62. *Id.*

63. *Id.* at 915-18.

64. *Id.* at 915-20.

65. *Id.* at 918-20. Mandelker also cites *Fasano* and *Baker*. He might have added that *Fasano*'s "plan" was a map on the wall with density guidelines for residential uses, without policies. This may explain the Oregon Supreme Court's grafting of two additional standards for zone changes, i.e., that there be demonstrated "public need" and that no other available properties be present. *Id.* at 920 n.86.

by a plan, with quantified expectations. Here again, Professor Mandelker's observations and encouragement have pointed out and enhanced these trends.

Professor Mandelker took on the *Kozesnik* rule, which was the majority rule at that time, that is, that there need not be a separate comprehensive plan with which the regulations must comply. However, he advocated change through legislation and suggested that the, "in accordance with the comprehensive plan" language be applied very differently than in *Kozesnik*: "This article argues that for effective implementation of a mandatory planning requirement the courts must give presumptive weight to the policies of the comprehensive plan as they are applied in land use control administration, unless special circumstances indicate that the plan is not entitled to such authority."<sup>66</sup>

Mandelker suggests that the recent and documented value judgment of a community as expressed in a comprehensive plan would, and should, be given great weight when the regulatory scheme is attacked.<sup>67</sup> This position has proved prescient, especially in growth-control cases, as a plan normally survives such challenges, as exemplified by the well-documented plan in *Ramapo* and in the justifications given in the upheld plan in *Construction Industry Ass'n v. City of Petaluma*.<sup>68</sup>

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66. Mandelker, *supra* note 53, at 922. Mandelker suggests these "special circumstances" include landowner attacks on the plan (such as constitutional invalidity) or its use in rezoning. *Id.* Nevertheless, in advocating legislative change over judicial efforts at reform, Mandelker realized that political consensus was necessary before any reform could take root. He also knew that litigation was often dispositive only among the parties involved and that legislation and administration were necessary to resolving significant social problems. Daniel R. Mandelker, *Legal and Political Forums for Urban Change*, 405 ANNALS AM. ACAD. POL. & SOC. SCI. 41 (1973). However, in *The Zoning Dilemma*, Mandelker quotes with approval from the work of his colleague Professor J. J. H. Beuscher:

Too often, we think of the roles of law in our society in static rather than dynamic terms. Law as it is made by our courts, legislatures, and administrative agencies is not an end in itself; it is a means to policy goals, particularly in the allocation of resources. It is a myth . . . that law's only role is that of constraint, of putting on the brakes. Instead, many legal rules and devices are efficient, flexibly adjustable conduits for change and development.

MANDELKER, *supra* note 9, at vi.

67. *Id.* at 922-31.

68. *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

However, the *tour de force* in an otherwise remarkable article was Professor Mandelker's peroration on the role of the comprehensive plan and the zoning amendment process.<sup>69</sup> Mandelker begins by noting evolution of "spot zoning" and the "change or mistake" and "appearance of fairness" rules intended to halt ill-advised zoning changes. However, he also notes a reversal of the presumption of legislative validity, which otherwise might apply.<sup>70</sup> Then, using *Fasano* as an example, Mandelker suggests another alternative, i.e., treating a small-tract zone change as a quasi-judicial act and thus placing the burden on the proponent to demonstrate conformity with the map and policies of the "comprehensive plan."<sup>71</sup> Mandelker perceived a mixed role for the comprehensive plan, so that reliance on the plan might be less necessary when the proposed development is consistent with the surrounding area, but more necessary when the use is new to an undeveloped area or out of character with these surrounding uses.<sup>72</sup> That proposition has not resonated in states requiring conformity of the comprehensive plan by statute or caselaw, but has raised the consciousness of those states that follow

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69. MANDELKER, *supra* note 53, at 931.

70. *Id.* at 932 (footnote omitted). Mandelker does not note the third judicial innovation in this field, i.e., the "appearance of fairness" rule, which developed in Washington. However, he did anticipate that rule in a book centering on the use of the zone change in the Seattle area in the 1960s, where plans had policies, but noting the practical skepticism of courts to both "legislative rezonings" and plans:

The amendment is more difficult. We have noted that the courts apply a presumption of constitutionality to legislative actions in zoning, and are extremely reluctant to look at the fairness with which zoning allocations are made much less the criteria on which they are based. When courts do intervene to review the zoning amendment they may be confused about their role. One problem is that a zoning amendment may appear to have singled out one developer for special treatment. . . . If one developer receives a zoning amendment for apartment development in one quadrant, why can't another developer likewise receive a zoning amendment for apartment development in another quadrant? The situation suggests favoritism and discrimination, and the courts are skeptical. They exhibit their skepticism by characterizing a rezoning of this kind as a "spot" zoning, with overtones that it is presumptively invalid. But judicial handling of these cases is often confused, and gets lost in the formalisms of the zoning system.

Mandelker, *supra* note 53, at 932-34.

71. *Id.* at 933-35. Mandelker correctly states that the *Fasano* court "adopted a qualified version of the Maryland change-mistake rule." *Id.* at 934 (footnote omitted). However, Mandelker might have added that this version was never used again.

72. *Id.* at 935.

*Kozesnik*, so that the plan is at least a factor in analyzing rezonings.<sup>73</sup>

Mandelker continues with his discussion of the role of the plan and discusses the significance of the *Baker* case, in which the presence of the plan (which was optional at the time) nevertheless required a city to conform its regulations thereto, a “polar opposite” to *Kozesnik*.<sup>74</sup> Finally, Mandelker ends this meditation on the role of the comprehensive plan in the rezoning process by considering the possible amendment of the plan itself and the rules that must be used to undertake such a development on a small-tract basis.<sup>75</sup> He again suggests the use of the quasi-judicial process and fidelity to the remainder of the plan, particularly its policies.<sup>76</sup> With the notable exception of Florida, which has not passed finally on this matter, the advice seems to have been taken.<sup>77</sup> Again, presciently, Mandelker suggests that states adopt standards and procedures to deal with plan amendments.<sup>78</sup>

Mandelker then discusses how these common-sense ideas may be implemented and recommends that reform be undertaken at the state level via revisions of planning and land use regulations and their enabling legislation. He also recommends that states become more involved in the adoption and review of plans.<sup>79</sup> Mandelker suggests that the state legislature require adoption of comprehensive plans in order to utilize some or all of the regulatory schemes that the plan

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73. See, e.g., *Udell v. Haas*, 235 N.E.2d 897 (1968). See also Mandelker, *supra* note 53, at 937-39. Mandelker also discusses the utility of a reasoned basis in studies, data, and other plan-like materials in upholding local regulations, while noting that some states mandate planning. Daniel R. Mandelker & Edith M. Netter, *Comprehensive Plans and the Law*, in A PLANNER'S GUIDE TO LAND USE LAW 17, 17-18 (Stuart Meek & Edith M. Netter, eds. 1983).

74. Mandelker, *supra* note 53, at 936 (footnote omitted).

75. *Id.* at 945-57.

76. *Id.* at 946-51.

77. See *Dalton v. City and County of Honolulu*, 462 P.2d 99, 108-09 (Haw. 1969) (holding that an ordinance to amend city and county plans was void due to noncompliance with chapter safeguards for such amendments). Also, Florida has certified for review the question of whether small-tract plan amendments must meet quasi-judicial standards.

78. Mandelker, *supra* note 53, at 950-51.

79. See *id.* at 951-65 (discussing revision of the neighboring legislation). *Id.* at 966-971 (discussing regional and state review of plans). Mandelker correctly poses three questions that must be answered in legislative revisions: (1) “the form and content of the planning process to be required at different governmental levels within the state;” (2) consistency of land use controls to the comprehensive plan; and (3) the extent to which local planning programs should be subject to review by other units of local government. *Id.* at 951.

articulates.<sup>80</sup> He further suggests that state aspirations be used throughout the planning process, as opposed to the complete delegation of authority, as in the standard acts.<sup>81</sup> He also urges that the state legislatures require local consistency to a comprehensive plan, giving the California and Florida statutory schemes (both of which fully define “consistency”) as examples.<sup>82</sup> Finally, he urges that legislatures provide the theory for determining fidelity to state policies and local plans and regulations, utilizing the examples of Oregon, Florida, and other states.<sup>83</sup>

Not content in advocating these significant changes in planning law Mandelker also foresaw a number of the implications of these changes, such as the need for greater state assistance to local planning efforts, use of hearings officials, and the development of the machinery to assure compliance with state policy.<sup>84</sup> Again, Professor Mandelker was prescient in understanding the implications of the theoretical need for change, as well as its practical effects.

Not only did Mandelker offer the definitive article in the role of the comprehensive plan and land use regulation, he also advocated his views strongly in other forums, albeit with mixed reviews. Mandelker wrote and spoke at the American Law Institute proceedings that resulted in the adoption of *A Model Land Development Code*, ALI’s model act designed to update the standard acts of the 1920s. While this model act does give greater authority to local governments that have comprehensive plans, Mandelker and his allies were disappointed to find insufficient sympathy for the requirement of a comprehensive plan as a precondition for land use regulation.

Similarly, Mandelker was generally responsible for authoring a chapter on the role of the plan as a means of providing housing for low- and moderate-income households, urging that local plans include and articulate state housing practices. An American Bar

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80. *Id.* at 952-53.

81. Mandelker cites the Florida Local Government Comprehensive Planning Act (1974) as an example. *Id.* at 935 n.208 (citing FLA. STAT. ANN. § 163.3177 (6)(a) (1975)). See also Mandelker, *supra* note 45; MANDELKER, *supra* note 9, at 63-70.

82. Mandelker, *supra* note 53, at 956-65.

83. *Id.* at 966-67.

84. *Id.* at 972-73.

Association report on housing contained these suggestions, although as just one of many possible means of providing greater housing opportunities.

Mandelker has been the weaver of theory from cases and statutes, one who has recognized and enhanced developments in the law by his clear and analytical writings. More than any other author, he has brought about acceptance of a significant, if not governing, role of the comprehensive plan, land use regulation, and the treatment of small-tract zoning (and plan) amendments as quasi-judicial.

#### IV. MANDELKER AS PLANNING LAW LEADER

This section reviews the influence of Professor Mandelker in planning law, with special emphasis on his work in the two aforementioned areas: the role of the comprehensive plan in the regulatory process and the method of judicial review of small-tract zone changes. Other contributions will be mentioned, particularly where Professor Mandelker has left his mark in planning law. As has been demonstrated in previous sections, Professor Mandelker has an impressive educational background and academic career. His fields of research in planning law have been important and his results fruitful. He has been a leader in both the planning and legal professions and has been especially helpful where those two fields intersect. He has also been a trusted consultant to many public and private organizations.

We now look to Professor Mandelker's particular work in the role of the comprehensive plan and the review of small-tract rezonings in three particular areas.

1. The American Law Institute's Model Land Development Code—In 1963, some members of the American Law Institute proposed crafting a successor to the SZEA and SPEA, the model state-enabling legislation for land use regulation. As discussed above, this legislation was assembled during the 1920s and was the basis for most state-enabling legislation on planning and land use regulation.<sup>85</sup> The Institute adopted various articles, including one in 1964 on the

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85. See also Fishman, *supra* note 3, at 39 n.196.

role of the plan, until the Model Code was completed in 1975.<sup>86</sup> Aside from the allocation of power between state and local governments, the thorniest issue that the Institute faced was whether a formal plan should be a prerequisite to land use regulation. To the disappointment of Mandelker and others, the Institute chose not to require such a plan, although it did give additional authority to those local governments that did adopt a plan.<sup>87</sup>

Mandelker urged the Institute to require a plan before regulations were adopted.<sup>88</sup> He prevailed, in a sense, although the Institute did not require a plan. Instead, the Institute recognized that the plan was a separate document from the regulations and promoted enhanced planning by giving additional authority to local governments with such plans.<sup>89</sup> In addition, the Model Code gives greater deference to

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86. The Institute's introduction states that the analogy for this code should not be the national uniformity of the Uniform Commercial Code, but rather the Model Penal Code "designed as source material for re-thinking and improvement of prevailing norms." MODEL CODE, *supra* note 4, at xi.

87. The introduction summarizes the disposition:

[T]hough it was urged with ardor (and still is) that any authority to limit land development should be conditioned on the drafting and approval of a local land development plan, in the sense of Article 3, this position was rejected after long consideration. The Code focuses instead on the required content, procedure for adoption, and methods of administration of ordinances regulating land development (essentially zoning and subdivision controls), forging new safeguards in these areas to promote fairness and rationality. The adoption of a local land development plan is, however, made a precondition of authority to grant special permits for planned unit development or to permit the designation of specially planned areas – both as an incentive to planning where it is most urgently demanded and as a protection against arbitrary action. Beyond this, it was though unwise to mandate formal local planning rather than to leave to local judgment estimation of the land planning need. This seemed particularly sound in a system that envisages the possibility of state intervention when local values are outweighed by larger state or regional concerns.

MODEL CODE, *supra* note 4, at xii. Mandelker's hand can be seen in this excerpt from the comment to the Model Code: "A person who looks at the text of the zoning ordinance or the zoning map in order to ascertain the community's policies toward land use may be accumulating only meaningless information. . . . 'The community's real land use policy comes to be expressed in the zoning amendment.'" *Id.* at 152 (quoting Jan Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in *The New Zoning: Legal, Administrative and Economic Concepts and Techniques* 3, 6 (N. Marcus & M. Groves eds., 1970). Fishman, *supra* note 3, at 46 n.224.

88. Mandelker, *supra* note 50, at 954-55.

89. See MODEL CODE, *supra* note 4, at § 3-101 nn.1 & 3. In addition to the ability to regulate planned unit developments (§ 2-210) and specially planned areas (§2-211), the Model Code also authorizes criteria in its plan to be used in its development ordinance for certain

decisions of local governments that have plans.<sup>90</sup>

With respect to judicial review of the Model Code's equivalent to rezoning, the Mandelker influence is also apparent. If review of an administrative hearing decision is allowed, that review is conducted on the record made below.<sup>91</sup> More importantly, an amendment to a local development ordinance is treated as an administrative order (rather than as legislation).<sup>92</sup>

Finally, the Model Code contemplates that significant reallocation of power among levels of government might be undertaken in order to fulfill state policy goals. Mandelker and the other members of the ABA Advisory Commission on Housing and Urban Growth note that planning can be an effective instrument of state housing policy and urge consideration to that end.<sup>93</sup>

2. The American Bar Association's Advisory Commission on Housing and Urban Growth—Mandelker served as a member of this Commission, which was created in 1974 with the purpose of: “. . .

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development permission (§ 2-212), special preservation district regulations (§ 2-209), reservation of land for future acquisition (§ 3-201), and discontinuance of existing land uses (§ 4-102). These are not inconsiderable powers and were likely conceded as part of the price for not requiring a plan in order to regulate. *See also* Fishman, *supra* note 3, at 230-32, 237-38.

90. MODEL CODE, *supra* note 4, § 9-110(3) states:

In a proceeding concerning the relationship of an order, rule or ordinance to the public health, safety or welfare, the court shall give due weight to the fact that the order, rule or ordinance was adopted by a local government having a Land Development Plan and to the consistency of the challenged action with the applicable State or Local Land Development Plan.

The comment to this section cites cases usually identified as “planning factor” cases, where the plan is a significant, though not exclusive determinant of the validity of the land use action. Similarly, § 8-503(b) accords no deference to a plan that has been rejected by the state planning agency, which is charged with review of plans. Fishman, *supra* note 3, at 398-99 n.223.

91. MODEL CODE, *supra* note 4, § 9-101(3). The notes to this section indicate that this is the same approach taken by the ALI's Model State Administrative Procedure Act, so that the administrative record provides the factual predicates for review of the order. *See* Daniel R. Mandelker, *Judicial Review of Land Development Controls Under the ALI Model Code*, 1971 LAND-USE CONTROLS ANNUAL 101.

92. MODEL CODE, *supra* note 4, at § 9-101(7). In the ABA Advisory Committee Report on Housing and Urban Growth, the Commission noted the possibility that procedural unfairness may be exacerbated by the Model Code, which expands the discretionary powers of local governments. On balance, however, the Model Code was seen as providing “greater fairness and predictability in [the] . . . land use regulatory process by proposing explicit standards and detailed procedures” for adoption of rules and the issuance of development orders. Fishman, *supra* note 3, at 223.

93. *Id.* at 578-83.



formulating legislative, administrative, and judicial alternatives and reforms that will increase housing opportunity and choice and promote a more rational urban growth process.”<sup>94</sup> The Commission said that it would provide the starting point for its efforts of the American Law Institute’s *Model Land Development Code*, but its effort would be narrower in focus. The Commission concentrated on “the special needs and character of desirable community development,” dealt “more broadly with the socioeconomic considerations that increasingly affect and are affected by local urban growth and land use policies;” and addressed “courts as well as legislatures with recommended approaches to urban growth.”<sup>95</sup> Indeed, with respect to the areas under consideration, Mandelker’s views on planning law were well received by his well-respected colleagues on the Advisory Commission.

The Advisory Commission tackled perennial, difficult questions of race, social justice, and regional general welfare. The Commission traced the legal and economic trends in the United States. They accurately predicted the difficulties of finding sufficient housing near employment and associated that result with an outdated land use system. Mandelker’s work can be seen in the prediction and advisability of mandatory comprehensive planning, both as a way of explaining fulfillment of the “in accordance with a comprehensive plan” provision of section 7 of the SZEPA and as a typical federal tool of policy.<sup>96</sup> Similarly, Mandelker’s hand can be seen in a portion of an extensive chapter dealing with judicial remedies to ensure inclusionary housing programs, anticipating the New Jersey Supreme Court’s second iteration of *So. Burlington NAACP v. Township of Mt. Laurel*<sup>97</sup> by several years. Much of the second *Mt. Laurel* case can be seen in the recommendations of the advisory commission. However,

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94. *Id.* at ix.

95. *Id.* at xii.

96. *Id.* at 49-51. Mandelker’s work is especially apparent here, as he draws upon his environmental and transportation background in federal law to note that the federal government typically requires state and local planning as a prerequisite for receipt of federal funds. He suggests that binding local planning be mandatory for the receipt of federal housing funds.

97. *Southern Burlington Cty. N.A.A.C.P. v. Township of Mt. Laurel* 336 A.2d 713 (N.J. 1975) (*Mt. Laurel I*), *rev’d* 456 A.2d 390 (1983). *Mt. Laurel II* Justice Frederic W. Hall, the author of the first *Mt. Laurel* opinion, was a member of the Advisory Commission, along with Mandelker.

one particular reform associated with Mandelker found its way into the Report, that is, that courts should re-examine their scope of review for small-tract zoning changes so that they are seen as quasi-judicial actions, in the same way that variances, special exceptions, or conditional uses are reviewed by courts.<sup>98</sup>

The Commission revisited the comprehensive plan later in the Report when it noted the work of the American Law Institute to provide a policy consensus for land use regulation and recommended that the use of such regulations be contingent on adoption of such a plan.<sup>99</sup> In addition, the Commission used another Mandelker theme, the characterization of rezoning decisions as quasi-judicial to provide a more effective judicial review than the non-statutory and highly suspect “spot zoning” or other result-oriented judicial construct.<sup>100</sup>

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98. Fishman, *supra* note 3, at 145. Mandelker used the *Fasano* case to illustrate the point. At another place in the same report, the Commission noted Justice Stevens dissent in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 693-95 (1976), which used *Fasano* to indicate that small-tract rezonings were not legislative acts referable to the electorate. Similarly, the Commission notes the procedural safeguards that follow the characterization of small-tract rezoning decisions as quasi-judicial. These safeguards include notice and an opportunity to be heard, the right to present and rebut evidence, the right to an impartial tribunal, and the right to a decision that is justified by findings based on the record. *Id.* at 280-87.

99. Fishman, *supra* note 3, at 231, 408-10. The Advisory Commission notes that the ALI did not require adoption of a plan in order to regulate land use, though it did give more power to those local governments that did so. *Id.* at 231 (footnote omitted). The Commission also noted that support of a rezoning in an adopted plan enhanced the success of that action on judicial review, along with reasons being given for the action taken, both hallmarks of quasi-judicial activity. Mandelker had hoped that the ALI Model Code might present a point of departure for rethinking the role of the plan and the use of an administrative model for evaluating regulations. MANDELKER, *supra* note 9, at xiii-iv. The Model Code turned out to be a compromise that likely disappointed Mandelker.

100. Fishman, *supra* note 3, at 263-70. In deciding small-tract amendments are quasi-judicial, the *Fasano* court relied on, Michael S. Holman, Comment, *Zoning Amendments: The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972); neither the court nor Mandelker originated the concept. More likely, it arose out of two early Supreme Court administrative law cases: *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City and County of Denver*, 210 U.S. 373 (1908). But Mandelker, more than any other source, however, publicized this change in the land use field. Mandelker concluded as early as 1971 that confusion reigned in the courts as to how to deal with small-tract rezonings:

Perhaps reflecting the difficulties we have been discussing, the courts are simply not clear in deciding how to treat their review of a legislative rezoning. There are strong statements that the only justification for a rezone is found in the community plan. On the other hand, many cases examine rezones on a narrower neighborhood scale without getting involved in the larger community issues. The result is a confusion in which it is

Given his extensive writing in the area, it is highly likely that Mandelker was the catalyst for the recommendations of the Advisory Commission on the role of the plan in land use regulations and the role of the courts in reviewing small-tract rezonings. The wording of the rationale is similar, as is the use of caselaw and statutes. The Commission recommended, *inter alia*, that:

a. The grant or denial of development on a particular parcel of land is an adjudicatory decision where due process considerations mandate a modicum of fairness to the parties, rather than assignment of a presumption of legislative validity.<sup>101</sup>

b. State land use enabling legislation should be amended to provide “for administrative review of individual requests” for development, including zoning changes.<sup>102</sup>

It is not surprising that an entire chapter of this Report deals with the role of the comprehensive plan in resolving the urban housing

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difficult to say just what the courts should be talking about in rezoning litigation. . . .

When a rezone has been granted to the developer, we usually find an argument that the zoning is a “spot” zoning which is invalid. But just what makes the spot zoning unconstitutional is not clear, and we did not get much guidance from our Oregon cases. Is it the size of the area rezoned? Many observations to this effect appear in the cases, and a judicial preference for large rezones supports our own observations that larger tracts permit the developer to internalize his externalities and take advantage of the size of the site to protect neighbors from harmful consequences. The thought also appears that the spot zone is arbitrary, that a denial of Equal Protection in the constitutional sense occurs because the developer is allowed a rezone in circumstances in which it is denied to others. Then the comment is made that the rezone can be justified and these objections overcome, but only provided the rezone is found to be justified in the community interest. When this approach is taken, reliance on the comprehensive plan as an expression of that community interest is made explicit. What the courts are saying is that they will examine the development tradeoffs that have been made at the community level to determine if the policy underlying the rezoning decision justifies the rezone at the specific site, and forecloses the allegation that the rezone arbitrarily favors the fortunate developer. Nothing prevents the courts from making the same kind of inquiry when the issue is a denial of a zone change to the developer, but the concentration on the developer’s alleged deprivation of property without Due Process probably diverts the court’s attention from the larger issues. See MANDELKER, *supra* note 9, at 82-84 (footnotes omitted).

101. Fishman, *supra* note 3, at 320-21. The Policy Statements suggested a *Fasano*-type approach to ex-parte or pre-hearing contacts to require that such statements be made on the record and that findings be based on the record made, so as to avoid the “second-guessing” that often accompanies *de novo* trial court review.

102. Fishman, *supra* note 3, at 321. The preference for the use of legislative, as opposed to judicial, changes to reach this goal is also a Mandelker hallmark. The Commission suggested the use of hearings examiners (Policy Statement 6) and regional and state review, if deemed necessary (Policy Statement 9), as well. *Id.* at 322-23.

problem. The chapter cites many of the same works and cases that Mandelker previously used to explain the history, nature, and legal status of the plan. It is also not surprising that the chapter builds a careful case for the plan's political and legal legitimacy as the basis for land use regulation.<sup>103</sup> The Advisory Commission also recommended mandatory planning requirements for local governments (and suggested that certain elements, including housing, be included in such a requirement), along with a consistency requirement so that regulations conform to the adopted plan.<sup>104</sup> Each of these conclusions has Professor Mandelker's indelible stamp.<sup>105</sup>

3. The Snyder Case—Mandelker's work in the ALI Code is well known. Florida is the only state that adopted major portions of the ALI code and faced the issue of whether a small-tract rezoning is a legislative act in *Board of County Commissioners of Brevard County v. Snyder*.<sup>106</sup> In *Snyder*, the county commissioners denied a rezoning request that was consistent with the local plan.<sup>107</sup> The county urged a

103. See Fishman *supra* note 3, at 325-410. In *The Role of the Local Comprehensive Plan in Land Use Regulation*, *id.* at 358-70, in which the role of the plan in rezoning is once again discussed with the Oregon cases *Fasano* and *Baker* in the forefront.

104. Fishman, *supra* note 3, at 381-97 and 403-08.

105. See *id.* at 408-10. Note the following excerpts from some of the Policy Statements at the end of chapter 5 in the Role of the Comprehensive Plan:

1. [The] plan should be an independent, comprehensive document expressing the collective planning judgment of the community.
2. State enabling legislation, traditionally permissive in its approach to local planning, should be amended to require local comprehensive planning and to require that the exercise of local land-use controls be consistent with local comprehensive plans. . . .
6. . . . It is concluded in this Report that the effective implementation of mandatory local planning requires the courts to give presumptive weight to the policies of the comprehensive plan as they are applied in land-use control administration, unless circumstances exist that indicate the plan is no longer entitled to this preference.
7. Local planning that is required by state enabling legislation raises the question of whether state enabling legislation should contain guidance for the local planning process, either by specifying the necessary linkages among the statutory planning elements required to produce an acceptable plan, or by prescribing goals for the planning process (without prescribing the contents of the local plan). Legislative direction is required that at least will mandate the development of a local plan in which these policy issues will be considered and resolved.

*Id.* at 408-10.

106. 627 So.2d 469 (Fla. 1993).

107. *Id.* at 471.

deferential standard of review, the “fairly debatable” rule, which was used to uphold the legislative act of adoption of a zoning ordinance in *Village of Euclid v. Ambler Realty Co.*<sup>108</sup> In support of its decision to use greater scrutiny, the Florida Supreme Court cited Mandelker, along with his colleagues, Richard Babcock and Charles Haar.<sup>109</sup> The court’s views on the history of planning law could have been written by Mandelker himself.

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners have been critical of the local zoning system. Richard Babcock deplored the effect of ‘neighborhoodism’ and rank political influence on the local decision-making process. Richard F. Babcock, *The Zoning Game* (1966). Mandelker and Professor Dan Tarlock recently stated that ‘zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits.’<sup>110</sup>

The court determined that the approach of *Fasano*, that is, to treat small-tract zoning amendments as quasi-judicial actions, was the better approach. Not surprisingly, this too was the approach that Mandelker had championed.<sup>111</sup>

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108. *Supra* note 15. *Id.* at 472 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

109. *Id.* at 471.

110. See *Snyder*, 627 So.2d at 472-73. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2 (1992).

111. *Id.* Indeed, it may have well been that *Fasano* was the product of Mandelker’s trenchant criticism of previous Oregon caselaw on rezoning. MANDELKER, *supra* note 9, at 72-75. The following excerpt is illustrative:

Moreover, the court ignored the fact that the very nature of the planning process leads to land use proposals that are more general than the zoning ordinance classification. Not to give meaning to the plan in view of this tendency is to dilute the effect of the planning process and give a superior position to the ordinance in spite of the statutory command that the plan has preference.

*Id.* at 75. In other areas of planning law, i.e., the Americans with Disabilities Act and the Fair Housing Act, Mandelker’s work has been cited by the United States Supreme Court in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995). *Edmonds* determined that single-family district regulations themselves could not be used to keep out the disabled and cited Mandelker’s work on the nature of the single-family zone. Like *Snyder*, the result was one favored by Mandelker. See Daniel R. Mandelker, *Housing Issues*, in *AIDS LAW TODAY* (Scott Barris et al. eds., 1993).

These three examples demonstrate only some of the fruits of the work of Professor Mandelker in the two planning law areas discussed in this article. The acceptance of the leading role of the comprehensive plan in land use regulation and the view of small-tract zoning changes as quasi-judicial are favorite topics of Mandelker's work. Both are seen as the emerging majority viewpoint, owing in no small part to his vast labors.

## V. CONCLUSION

In 1982, Professor Mandelker and a colleague reviewed the work of the late Professor Donald G. Hagman, following the latter's untimely death.<sup>112</sup> The article describes the work of another great planning law writer, discussing in some detail Professor Hagman's contributions to the understanding of land use, local government, and environmental law, as well as stressing the work of Hagman as teacher and scholar.<sup>113</sup>

To some extent this same effort must be extended in reviewing and evaluating the work of Professor Mandelker, who has been active for more than fifty years, as compared with Professor Hagman's nineteen. Although planning law is the poorer for the loss of Professor Hagman, Professor Mandelker's colleagues are able to celebrate Mandelker's work as teacher, writer, and scholar while he is able to enjoy and participate in those celebrations.

Many of those qualities that brought praise to Professor Hagman may be found in Daniel Mandelker. Like Hagman, Mandelker is a teacher and prodigious author. Like Hagman, he has played the role of prophet, often in the academic wilderness, advocating rationality in planning law against an entrenched world-view. Like Hagman, he has a strong sense of social justice. Like Hagman, he organized and explained complex cases and statutes.<sup>114</sup> Finally, like Hagman, he has

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112. Daniel R. Mandelker & A. Dan Tarlock, *Professor Hagman's Legacy to Legal Scholarship*, 29 U.C.L.A. L. Rev. 770 (1982). See also Mandelker, *In Memoriam: Donald G. Hagman*, LAND USE L. & ZONING DIG. 3 (1982).

113. *Id.*

114. In particular, Mandelker says that law professors especially are called upon "to use the great mass of legal and non-legal secondary literature to reconceptualize problems in an effort to provide fresh insight into the role of the legal system, if any, in improving existing methods

often thought “outside the box” of conventional land use views.<sup>115</sup> Mandelker is an original thinker who took up the “disconnect” between the requirement that zoning be in accordance with a comprehensive plan and the actual planning practice. But he went far beyond Charles Haar’s raising the issue by suggesting remedies.

Regarding the role of the comprehensive plan, Mandelker has spent much of his academic career advocating conscious adoption of public policy as the basis for land use regulations. Generally, his advocacy is aimed at legislative reform. However, Mandelker has also selected, analyzed, and emphasized those cases in which courts have interpreted existing land use enabling legislation to give significance, or priority, to the comprehensive plan in evaluating land use regulations or changes thereto. Similarly, Mandelker has used the same approach of case selection, analysis, and emphasis to deal with the method of review of small-tract rezonings, an issue that has perplexed courts and academics alike. Rationality in formulating and applying public policy has been the hallmark of Mandelker’s career.<sup>116</sup>

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of conflict resolution.” Mandelker & Talock, *supra* note 112, at 775 (footnote omitted). They add that breaking down the dichotomy between doctrinal and theoretical legal scholarship has been upsetting to many of those teaching law. *Id.* The authors also state that one of Professor Hagman’s most important contributions to the law was his explanation of the role of plans in subsequent land use decisions, even if Hagman was opposed to the need for mandatory planning. *Id.* at 776.

115. One of Professor Hagman’s major contributions to planning law was his seminal *Windfalls for Wipeouts*, which he co-edited with Dean Myscynski in 1978. WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman et al. eds., 1978). This work suggested a brilliant solution to the takings issue in the compensation of those severely damaged by land use actions. This compensation was to come from a tax on those who did well by public policy decisions. Mandelker’s advocacy regarding the role of the plan and the method of review of small-tract zone changes is at least as comparable as that of Hagman on the takings issue.

116. Mandelker stresses this rationality himself: We clearly need to sort out more rigorously just what it is we are trying to achieve in out-planning for an urban environment.

This point needs to be underscored, for public intervention in the land development market carries heavy penalties for the losers and substantial gains for the winners. If zoning is not to result in arbitrary decision-making, it must be based on a policy which sensitively discriminates between cases of refusal and cases of approval on grounds which are supportable in matters of substance and of equity. If the King County zoning study teaches anything, it teaches the need for a reexamination of the postulates of our planning and zoning process, and of the legal framework which we employ to carry it out.

Although Mandelker was not the originator of these two ideas, he extensively used his visible forums of lectures and law review articles to shape solutions to difficult problems. He also used these forums to advocate solutions beyond their academic or judicial incipience. The high regard in which he is held at the academy and the bar have lent credence to those ideas, placing them in greater circulation and giving them support. Mandelker's long service to the American Planning Association, American Bar Association, Urban Law Institute, and his long tenure at Washington University in St. Louis make him a fixture in those organizations and provide a considerable base for his contributions.

Mandelker's academic work is without comparison in its volume and quality. For most of his career, he has been in the classroom interacting with bright young minds and proposing provocative law reform. But just as importantly, Mandelker has labored in the vineyards of planning law in endless committee meetings, peer reviews, and academic study. He has written in criticism and praise and authored legislation. For all this, we celebrate him and his work. As mentioned, much of Mandelker's work has been in planning law activities other than those covered in this article. His work in transportation law, environmental law, and in social justice in land use regulation is particularly important.

However, it may be argued that Mandelker's most significant and long-lasting contribution to the reform of planning law is refocusing planners and planning attorneys on the necessary role policy plays in formulating and administering land use regulations. In particular, he has redirected these decision-makers to the precise function undertaken when small-tract rezonings occur. This structural understanding of the relationship between planning and land use

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*Id.* at 167-68. Mandelker then gives his own thoughts on policy implementation:

Unfortunately, we have not been as rigorous as we should in examining the impact of our planning judgments on our zoning strategies, and on the role the legal system should play in appraising, validating, and limiting both. We are simply not sure of the values we wish to implement in our urban policies. Until we are, we can continue to expect the planning and zoning process to be deeply troubled by ambiguity and ambivalence.

*Id.* at 188.



regulation has shifted the dialogue to the nature of using appropriate policy. During Mandelker's "watch," due significantly to his efforts, plans have moved from being aspirational and ineffective to being the necessary predicate of regulation. Moreover, by replacing the formalistic, "legislative" character of rezoning with a functional view of how zoning implements state, regional, or local policy in the plan, Mandelker has changed the way we think about planning law. We, his colleagues, are forever grateful for his work.