COMMENTS ON THE MODEL LAND DEVELOPMENT CODE†

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In law, land use planning and policy have moved to center stage. What was once a matter calling for planners to putter with zipatone and for lawyers to fret over gas stations has now become an issue to which such prestigious and diverse national institutions as the Sierra Club, the NAACP, the ACLU, the Audubon Society, the UAW, and the National Association of Home Builders direct their energies.

We are at a watershed. The dominant role the municipalities struggled to achieve in the last four decades is being challenged, not just in the scholarly journals but in the courts, the legislatures, and the market place. We may expect that local land use regulations, particularly as they affect low and moderate income housing, will become the occasion for legal struggles in the seventies on the same scale that school desegregation was in the sixties.

One would be rash this early in the contest to predict the outcome and that is not my purpose tonight. Rather I want to describe to you an ongoing effort to restate in model form the statutory framework within which the use of private land has been regulated by municipalities for almost five decades. I refer to the effort of the American Law Institute to draft a Model Land Development Code[1] usable in whole or in part by states which decide it is time to revise the rules

† The following is from an address by Mr. Richard F. Babcock to the 1971 URBAN LAW ANNUAL staff on April 23, 1971.

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1. MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 3, 1971) [hereinafter cited as MLDC].

by which land development is to be regulated. The reporters for this project are Professor Allison Dunham of the University of Chicago Law School and my partner, Fred Bosselman. I am Chairman of the Advisory Committee to the Reporters. I declare all this so my bias, if apparent, is at least explained.

I propose to describe the scheme of that part of the ALI code dealing with the relationship between the state and the municipalities. It appears in Tentative Draft No. 3.[2] However, some premises on which the Code is based:

First, land use regulation should be left to local decision-makers except where those decisions may impose external costs. Most decisions on land use development do not have an extra-municipal impact, as anyone who has nodded through the interminable agenda of boards of appeal and plan commissions knows. Besides, there are important benefits in having power exercised as close to the people as possible—an issue, by the way, on which the suburbanite and the ghetto resident share common ground. It follows, therefore, that the machinery of local administration, while crying for a major overhaul, should not be abandoned.

Second, to the extent that there should be a voice in some decisions that can speak for a constituency greater than the municipality, the state is the appropriate authority. This implies a rejection of at least two alternatives, the national government and metropolitanism of some sort.

I can only pause on the reasons behind our choice of the state—an elaboration of why we rejected these other alternatives is an evening's task in itself. Let it be left like this: The appropriate role of the federal government is to reward states that do demonstrate a willingness to take responsibility for growth policy, not to take on the hopeless role of decision-making in Washington. Metropolitanism, in its most innocuous forms—regional planning agencies or councils of governments—is on balance an exercise in futility, a "talk-talk" role that is bound to fail. America's experiments in the eighteenth and nineteenth centuries with policy making by confederation were notable for their inability to gain victory in tough conflicts, and I see nothing to suggest that such a system can do any better at the end of the twentieth century in the tense social and political arena of land

2. Tentative Draft No. 3 has not as yet been endorsed by the ALI. Copies may be obtained from American Law Institute, 4025 Chestnut Street, Philadelphia, Pa. 19104.

development policy. In short, planning without the attributes of sovereignty—the power to tax, to regulate, and to condemn—is nothing.

If, on the other hand, by metropolitanism we mean some new layer of general government that does enjoy those sanctions, then we have an entirely new ball game. The ALI reporters acknowledge the pitiful record of state government that leads some to demand a new system, but they suspect that the evils, if they do exist, will emerge under any system. Further they see evidence that the long sleep of the states is over; and they have reason to suspect that metropolitan government can be used—as the blacks in Atlanta so eloquently put it—to give the white suburbanites a last chance to hang on to power in the central city just when the blacks are about to seize it.

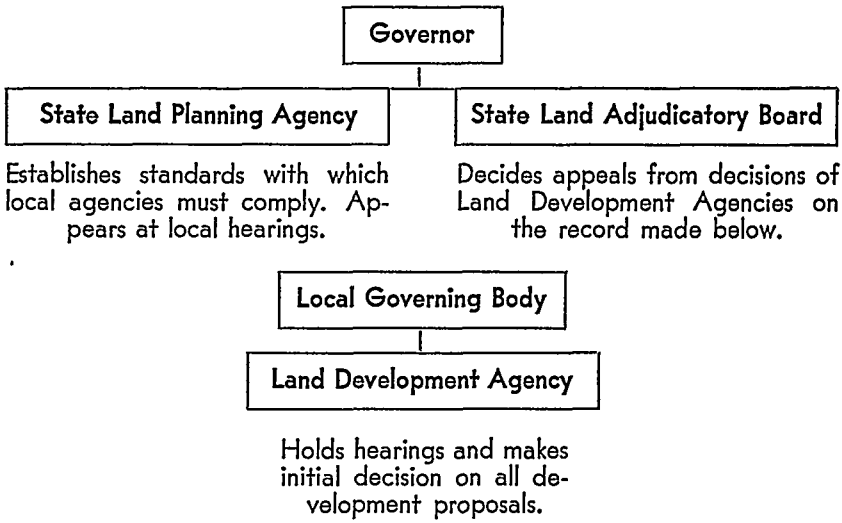
Tentative Draft No. 3 gives the state a voice in selected areas of land use development but does not require that the state first have prepared or have in process a state plan.[3] This scheme of state regulation may be faulted for the same reasons that 40 years of municipal regulation have been attacked: unprincipled regulation without guidelines. Indeed, the Code itself is internally inconsistent since Article 3 conditions a municipality's power to exercise some sophisticated types of regulation upon the existence of a planning process.

This charge is well made and the only answer takes the form of a plea in abatement. The crisis of excessive localism in land use policy is immediate and serious. The sin is not that there is no planning but that there is too much planning by a multitude of local governments, each one trying to save for itself all the "goodies of life" in the metropolis while palming off on others as many of the "cheap cuts" as possible. What is needed now is an opportunity for a wider consensus to be injected into some areas of the decision-making even if that greater voice does not speak with the benefit of a five-year "study of the problem." One is tempted to speculate about the fate of this country in 1933 if Roosevelt's 100 days of reform by legislation had been put off for 1,000 days while a plan was being conceived. In any event, the drafters had to make a choice and I, for one, share their skepticism about the usefulness of a legislative model that would postpone all regulatory reform while the planners plan. The draft provides authority for comprehensive state planning in Article 7, but it does not withold the state's regulatory powers under Article 8 until the planning is completed.

3. This premise may be of little significance to the lawyers but may be the occasion for substantial critical comment from the planning profession.

Those, then, are what I see as the major premises. Now to the Code itself.

The system proposed by the reporters is a relatively simple one, but because it involves agencies with new names it may initially be easier to understand by reference to the following chart:



The reporters do not deny the importance of the planning function at the state level. Indeed, it has an essential and independent role in the regulatory process.

In general, the functions of the State Land Planning Agency include the establishment of rules and standards governing development having state or regional impact. However, anyone seeking permission to undertake such development applies to the municipal Land Development Agency where the hearing is held and the initial decision made. The State Land Planning Agency may participate in the hearing and, if the decision is unfavorable, may appeal it to the State Land Adjucatory Board, an independent state board created to hear such appeals. The developer or any other party to the local hearing also has a similar right of appeal.

The benefits of community control are retained because the local agency has the right to make the initial decision in each case. It allows the State Land Planning Agency to concentrate on policy-making functions, but it will participate in individual cases only to the

extent it feels such participation is necessary to defend its policies. Allowing the state board to review local decisions on the record made below avoids the necessity of creating an expensive and time-consuming procedure for new hearings at the state level.

The principle that the state would become involved only in the "big cases" is a key element of the Code's philosophy. As I said, probably 90 per cent of the local land development decisions have no real state or regional impact. It is important to keep the state out of those 90 per cent, not only to preserve community control, but to prevent the state agency from being bogged down in paperwork over a multitude of unimportant decisions.

Defining cases that will have state or regional impact thus becomes crucial to the entire system. The ALI Model starts with three basic principles:

(1) Some development has state or regional impact because of its *location.*

(2) Some development has state or regional impact because of its *type.*

(3) Some development has state or regional impact because of its *magnitude.*

Working from these three principles, the reporters have set up three categories of development that are subject to state review.

The first category is development in districts of critical state concern. Section 7-201 authorizes the State Land Planning Agency to define the boundaries of such districts, which may include

> . . . an area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.[4]

That section defines the term "major public facility" to include highway interchanges, airports, and other facilities servicing a state or region. Districts of critical state concern may also include

> . . . an area containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance.[5]

Finally, districts of critical state concern may also be designated for the sites of new communities shown on the State Land Development Plan.

The second category of case that is appealable to the state agency under proposed Tentative Draft No. 3 is "development of state or re-

4. MLDC § 7-201.
5. *Id.*

gional benefit." This includes development which serves important state or regional needs but may have some adverse impact on the immediate area. Section 7-301 provides:

> (1) development by a governmental agency other than the local government that created the Land Development Agency or another agency created solely by that local government;
> (2) development which will be used for charitable purposes, including religious or educational purposes, and which serves or is intended to serve a substantial number of persons who do not reside within the boundaries of the local government creating the Land Development Agency;
> (3) development by a public utility which is or will be employed to a substantial degree to provide services in an area beyond the territorial jurisdiction of the local government creating the Land Development Agency; and
> (4) development by any person receiving state or federal aid designed to facilitate a type of development specified by the State Land Planning Agency by rule.[6]

In each of these cases the developer is given the right of appeal to the state board if the local decision is unfavorable. The Massachusetts zoning appeals law offers perhaps the closest analogy under existing law.[7]

The third category is development which has a statewide impact because of its size. Part 4 of Article 7 of the proposed Code authorizes the State Land Planning Agency to establish for each broad category of development limits of magnitude which, if exceeded, allow the local decision to be appealed to the state board, either by the developer, by intervenors, or by the State Land Planning Agency. For example, the Agency might provide that residential developments of 100 or more units or commercial developments of more than 50,000 square feet of floor area might constitute "large scale development." These limits would undoubtedly be higher within incorporated municipalities than in unsettled areas.

If the Code insists that state or regional interests be weighed in decisions involving "large scale development" and "development of state or regional benefit," what statutory criteria are available to guide the decision-makers first at the local and then the state level? The test that is common to both types of development is that permission shall be granted if the probable net benefit to the state or region ex-

6. *Id.* § 7-301.

7. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (Supp. 1971).

ceeds the net detriment to the local community. Section 7-502 tells the administrators what the drafters had in mind when speaking in terms of cost-benefit, and it would be difficult to summarize that section:

> In reaching its decision the Agency shall not restrict its consideration to benefit and detriment within the local jurisdiction, but shall consider all relevant and material evidence offered to show the impact of the development on surrounding areas. Detriments or benefits shall not be denied consideration on the ground that they are indirect, intangible, or not readily quantifiable. In evaluating detriments and benefits under § 7-501 the Agency may consider, with other relevant factors, whether or not
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> (1) development at the proposed location is or is not essential or especially appropriate in view of the available alternatives within or without the jurisdiction;
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> (2) development in the manner proposed will have a favorable or unfavorable impact on the environment in comparison to alternative methods;
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> (3) the development will favorably or adversely affect other persons or property and, if so, whether because of circumstances peculiar to the location the effect is likely to be greater than is ordinarily associated with the development of the type proposed;
>
> (4) if development of the type proposed imposes immediate cost burdens on the local government, whether the amount of development of that type which has taken place in the territory of the local government is more or less than an equitable share of the development of that type needed in the general area or region;
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> (5) the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their place of employment;
>
> (6) the development will favorably or adversely affect the provision of municipal services and the burden of taxpayers in making provisions therefor;
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> (7) the development will efficiently use or unduly burden public-aided transportation or other facilities which have been developed or are to be developed within the next [5] years;
>
> (8) the development will further, or will adversely affect, the objectives of development built or aided by governmental agencies within the past [5] years or to be developed in the next [5] years;
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> (9) the development will aid or interfere with the ability of the local government to achieve the objectives set forth in any Land Development Plan and current short-term program; and
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> (10) the development is in furtherance of or contradictory to objectives and policies set forth in a State Land Development Plan for the area.[8]

8. MLDC § 7-502.

Section 7-405 of the Model Code should be of special interest to those who are concerned with the imbalance between the increasing suburban job opportunities and the lack of low and moderate income housing in the suburbs. This section provides that a Local Development Agency shall not grant a permit for "large scale development" that will create more than "[100]"[9] opportunities for full-time employment not previously existing within the municipality unless the Land Development Agency also finds that

> (1) adequate and reasonably accessible housing for prospective employees is available within or without the jurisdiction of the local government; or
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> (2) the local government has adopted a Land Development Plan designed to make available adequate and reasonably accessible housing within a reasonable time; or
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> (3) a State Land Development Plan shows that the proposed location is a desirable location for the proposed employment source.[10]

That concludes my description of the ALI draft as it relates to the role of the state in land use policy. I do not believe I am guilty of overstatement when I state that this Model Code will be the first legislative model for land use policy of national scope since Secretary of Commerce Herbert Hoover submitted to the nation a Model Zoning Act in 1923. It does not disparage that remarkable effort to say that it is past time that we change policies of land use that were adequate for a quieter, less crowded era.

Let me conclude on a sensitive point that is too frequently overlooked in this age when "Cry Environment" is on thousands of lips. There is a serious risk in the current agitation over the state of ecology. That risk is that a total preoccupation with dirty air, foul streams, and poisoned estuaries may blind us to the dismal fact that for too many millions of our citizens the threshold test of a decent environment is adequate housing reasonably accessible to jobs. Too many proposals for state participation in land use regulation, with their emphasis on what "environment" connotes to the white middle class, may operate to exclude even more persons from adequate housing. Tentative Draft No. 3, particularly in its reference to state responsibility in the areas of "large scale development" and in "development of regional or state benefit," recognizes that the states must act

9. The brackets indicate that the precise number is a matter of choice.

10. MLDC § 7-405.

not only to protect our *natural* resources from improper growth but also to encourage growth necessary to benefit our *human* resources and to rectify long-standing abuses of land use regulation. One can do nothing but welcome states' attempts to halt the rape of our natural resources. But we should not allow a righteous concern for the moose and goose to blind us to more critical environmental issues. Adequate housing for humans in an area reasonably accessible to jobs must surely be as legitimate an endeavor in an ethical society as resting places for terns. I see in Tentative Draft No. 3 a remarkable degree of sensitivity to the difficult choices between housing and salt marshs.