NEW LAND USE CONTROL TECHNIQUES:

A SUMMARY REVIEW AND BIBLIOGRAPHY

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Since 1926 when the U.S. Supreme Court upheld the general principle of zoning in Euclid v. Ambler Realty Company, plan implementation in Oregon, as elsewhere, has been dominated by the two workhorses of land use control - zoning and subdivision control. Most jurisdictions have used the more or less standard classification of land into residential, commercial, industrial and other uses, supplemented by a variance and conditional use permit procedure. Modifications and refinements have been made over the years to adapt to changing conditions and new forms of development, but, overall, zoning has been a remarkably resilient and lasting land use control technique.

In recent years, however, certain economic, legal, political, and conceptual problems with the traditional zoning framework have motivated an investigation of a number of alternative land use control techniques. It is becoming increasingly apparent that the planner must have available a variety of techniques and be prepared to apply the appropriate combination to his particular planning situation.

Some of the factors contributing to the interest in new land use control techniques have been the need for controls with greater equity (i.e. controls which overcome the problems of "windfalls and wipeouts"), the need to harness economic incentives to land use goals, the need to protect resource lands, and the need for controls which permit greater flexibility in design and lifestyle.

The search for new planning implementation techniques which meet these needs has been nationwide in scope. During the past few years many planning

departments, private consultants, and universities have been engaged in research and trial applications of various techniques. The Land Resource Management Program of the Oregon State University Extension Service is currently in the process of collecting literature and studying various ordinances and techniques in regard to their applicability to Oregon. In addition, we are working with Clatsop County, Oregon in a cooperative project to work out methods for utilizing some of the new techniques in updating that county's comprehensive plan and ordinances.

The following list summarizes some of the techniques we have been examining. Additional literature on each of these techniques is presently available from the office of Land Resource Management Specialist, Room 202, Earth Science Building, Oregon State University, Corvallis, Oregon 97331. Detailed information on individual land use control techniques will be forthcoming in OSU Extension Service special reports. Two of these special reports will be available by September, 1974 on the topics Conservation Easements in Oregon and The Performance Approach to Plan Implementation.

Performance Zoning

One regulatory technique which is of interest to many planners is performance zoning or the use of performance standards as a partial alternative or supplement to Euclidean zoning. Euclidean zoning typically relies on a list of specific uses to define what activities may be permitted in the various zones. Generally, commercial, industrial, and residential activities are clearly separated, with further breakdowns within these categories for differing intensity and quality of development. Performance zoning approaches the problem of separating potentially incompatible land uses from a different angle. As the expression implies, with performance standards the planner looks at effect rather than use. As long as industrial, commercial, or residential activities can meet certain standards in regard to operation, environmental impact, and appearance, such uses are permitted in any part of the community. A performance-based bylaw might retain zones but they would be based on performance levels dictated by neighborhood characteristics or environmental capabilities rather than on use categories. The teeth of the performance approach are the standards which define impact or levels of performance which are permitted in various zones.

Performance standards can be used separately to address certain problems as a supplement to a zoning ordinance or, taken together, they can be used to replace zoning as a performance ordinance.

There are a variety of ways in which performance can be regulated in an ordinance. The earliest use of performance standards in a planning context

involved the regulation of industrial emissions. Many cities use standards for noise, odor, particulate matter emissions, and the handling of toxic materials in order to differentiate between "light", "medium", and "heavy" industries and to separate industrial from non-industrial uses.

Another type of impact which is well suited to performance-based regulation is traffic generation. Traffic is one of the greatest determinants of neighborhood character. Regulating land use by the traffic generation potentials of fixed activities can be as effective in controlling development as use restrictions. A considerable amount of research has been done on the traffic attraction ratios for activities which can be utilized in developing traffic performance standards.

Standards setting forth permissible floor-area ratios and landscape-area ratios are methods of limiting densities within designated zones without specifying particular uses or design features. The performance standards in this instance influence the open space character of a neighborhood.

Performance standards can also be developed to regulate impact on community services, utility demand, aesthetics, and demographic impact. The standards can be uniform across the jurisdiction or can vary according to the development patterns which are desired. The standards can be used as a minimum base level of performance for all activities or they can be used in a quality point system context for discretionary decisions by the planning commission.

The "performance approach" has a number of advantages over traditional zoning. First, performance standards allow greater flexibility in terms of both the type of activity permitted in a particular location and the design

of the activity. For example, cluster designs can be handled without recourse to floating zones. Second, performance zoning has generally met with broad public acceptance because it is a rational land use control - that is, the objectives of the plan and the criteria for zoning are closely related and are explicitly set forth in the ordinance. Third, land use controls need a rational basis in order to be legally defensible. Although the case law in regard to performance zoning has not been fully developed, courts have a consistent history of acceptance of performance standards. Finally, performance zoning is adaptable to a wide variety of circumstances. The criteria a community chooses to evaluate on the basis of performance can be tailored to best reflect community characteristics.

There are some problems with using performance standards. A good data base and special expertise are needed to draw up the standards. To be effective, the standards need to be quantitative. Although methods exist for measurement of performance, special equipment and expertise may be required. Administration of the standards often requires field checks so that increased staff may be necessary. The question of whether preparation and administration of performance standards is more costly than zoning preparation and administration has not been settled, since there is little experience with the performance approach.

Transfer of Development Rights

Transferable Development Rights (TDR's) is the generic name given to a number of existing and proposed techniques by which permitted density

(i.e., the amount of floor area that can be developed on a given lot as determined by the applicable zoning restrictions) is transferred from one unit of land to another. The purpose of the transfer is to preserve the land (e.g. agricultural land) or building (e.g. historical landmark) from which development rights are transferred, without depriving the landowner of property rights. A market is created for the development rights by permitting higher density somewhere else where development is desired. The developer is then permitted to build at a higher density in the development area than zoning allows by purchasing development rights from the preservation area. The owner of the land in the preservation area is compensated by the purchaser of the development rights. The public benefits from the transfer insofar as it is able to restrict land use in certain areas without having to absorb the cost of compensation.

The use of development rights transfers had its origin in the protection of historic landmarks in urban areas. The idea has been expanded recently to provide a mechanism for protecting agricultural lands, environmentally sensitive areas or other valuable open space lands which are threatened by market pressures for more intensive development. A proposal has been made in Fairfax County, Virginia to assign TDR's to all lands within the jurisdiction and to concentrate or disperse development rights according to policies and criteria established in the comprehensive plan. In this latter case, the TDR technique represents an alternative to zoning for implementing the plan.

TDR deals directly with the economic consequences to private landowners and to government of stringent land use controls, a serious "blind-spot" of most zoning programs. The economics of market place supply and demand are allowed to operate within a structure established by planners to accomplish planning objectives.

Ideally, TDR compensates a landowner for not developing his land, at no cost to the public; it creates an opportunity for the developer to build at higher density, and therefore more profitably, at a location specified in the plan; the public gains open space and protects valuable resources without paying for it, at least directly; and the plan is given a better chance of being implemented by working with, rather than against, the market place.

However, there are difficult problems to overcome before the TDR technique will be available for general use. To avoid becoming unmanageable, TDR needs to be balanced with reasonable police power measures, which requires such matters as right to a jury trial and procedures for determining damages (eminent domain vs. police power criteria) to be settled. Creation of an active market for transfer rights is essential to its success, which may require a cooperative arrangement between cities and counties. Decisions need to be made on the planning implications of a two-tiered density system, and on the tax liabilities involved in TDR.

There is much groundwork to be done on TDR's legal, planning, and economic ramifications. Experiments with variations of TDR are now underway in Vermont, California, Virginia, Puerto Rico, Colorado, New Jersey, and Illinois. Perhaps the single most significant contribution of TDR is its recognition of the economic consequences of land use regulation.

Conservation Easements

Easements are, of course, a well-tested means of acquiring a less-than-fee-simple interest in land. Land ownership includes a bundle of rights

that run with the land. One or several of these rights may be sold or donated in the form of an easement. The easement can be for part or all of the land and may last for a certain number of years or in perpetuity.

Two types of easements are commonly recognized: positive and negative. Positive easements acquire the right to do something with part of a person's property; for example, a public agency may purchase a right-of-way for fishing access or a bicycle trail. Negative easements obtain rights from a property owner in order to prevent him from engaging in certain land use activities, such as not cutting vegetation or not erecting billboards. Easements have been extensively used by state agencies and utilities for right of way acquisitions and public access.

Conservation easements are simply a variation of the basic easement concept. Conservation easements are designed to protect the value of the land in terms of its natural resources, visual characteristics, cultural or historical significance, or recreation potential. The two subcategories of a conservation easement are scenic and use easements. A scenic easement is a negative type intended to preserve the visual qualities of a landscape, while a use easement is a positive type used primarily to provide recreational opportunities.

Conservation easements may be acquired by purchase or as a gift. Purchase of easements to preserve open space or to restrict development in critical environmental areas has certain advantages over outright purchase of the land in that the cost is less than fee simple, and the land remains in production and on the tax rolls.

In certain cases, a landowner may benefit financially by donating a conservation easement and entering it as a charitable deduction on both the Federal and Oregon income tax returns. To qualify for a deduction,

it must be a charitable donation, as defined in the Internal Revenue Service Code, in perpetuity. Property tax is also subject to a reduction after an easement is sold or donated.

The planner may be able to combine the benefits of a conservation easement donation with the cluster technique to achieve open space objectives while assisting the developer in increasing his overall profits. The cluster design-conservation easement combination represents a technique presently available to the planner.

OSU Extension will publish as a special report a paper on the legal and institutional policies in Oregon relating to conservation easements. This publication will be available by September, 1974.

Capital Gains Tax On Land Sales

The 1973 Vermont legislature passed a graduated capital gains tax on land held for less than six years. The Vermont tax applies only to the sale of land and is based on two variables: the length of time the property was held and the percentage of gain. The chart set forth below indicates how tax liability is calculated in the Vermont tax:

Years Land Held by Transferor		*Gain, as a Percentage of Basis (Tax Cost)		
		0-99%	100-199%	200% or more
Less than 1 year	Tax on Gain	30%	45%	60%
1 year, but less than 2		25%	37.5%	50%
2 years, but less than 3		20%	30%	40%
3 years, but less than 4		15%	22.5%	30%
4 years, but less than 5		10%	15%	20%
5 years, but less than 6		5%	7.5%	10%

(*Gain, as percent of basis, shall be rounded to the next highest whole percentage.)

It can be argued that a number of benefits derive from this kind of land tax. The public recaptures some of the windfall profits made in land speculation, especially where the land value has been increased by publically financed services or by zoning amendments. The tax revenues can be used to purchase open space by conservation easements or fee simple. It may reduce land speculation and preserve low value uses such as agriculture and forestry.

It is too early to tell whether the Vermont tax will be successful in reducing speculation or preserving agriculture. There are some indications that the tax is simply being passed on to land purchasers, with no real impact on the market itself. However, the Oregon Local Government Relations Division, Executive Department, will be evaluating a land tax, such as the Vermont tax plan, as a means of raising funds for compensating landowners and to finance land acquisition by the public.

Public Corporations

Another type of institutional land use control is the public planning and development corporation. This technique involves a public or semi-public corporation purchasing land and then leasing it or selling it back to the same owner or to different owners with restrictions on its use.

The clearest advantage of purchase and disposal of land by a public corporation is that it provides an active means of securing the right kind of development, at the right time, in the right place. Regulatory powers can limit and shape development, but they do not enable the public to specify where, and when, and under what conditions development is to occur. Purchase and disposal of land allows the efficient programming of public improvements and facilities, overcoming expensive leap-frogging, and

scatteration of development. The technique has been widely used for industrial sites and to a lesser extent, for preserving open space. There are many variations as to form and purpose of the public corporation.

The Oregon legislature will be examining this form of land use control along with the Vermont-style capital gains tax as a means to compensate landowners for restrictions placed upon the use of their land.

Other Controls

In addition to the aforementioned controls, we will be collecting information on the impact of siting public facilities, taxation policies, PUD and cluster zoning techniques, and certain kinds of special assessments for controlling land use in Oregon.

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