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Preface

Daniel R. Mandelker

In December 2004, the Center for Interdisciplinary Studies at the Washington University School of Law and the American Planning Association (APA) sponsored a conference on “Planning Reform in the New Century.” We called the conference to examine major issues in land-use planning and land-use policy made all the more urgent by proposals for model planning legislation recently published by the APA. The conference also met just after Oregon voters adopted a statute that makes clear the precarious nature of planning reforms, even those that seemed to enjoy widespread support. The statute threatens Oregon’s state planning program by requiring uncertain compensation for land-use regulations and decisions.

The Oregon vote was a wake-up call, but there are other indicators that planning has reached a critical turning point. Problems we have tried to solve for decades, such as the affordable housing problem, have not been solved. Programs we thought had succeeded, like growth management programs, need a new vision and a new direction. State legislation that powers the system by authorizing land-use planning and regulation is decades old and is not adequate for a new century. Model legislation proposed by the APA brings new ideas and challenges to lawmakers, public officials, and citizens.

The issues raised by these new demands on land-use planning include statutory reform, housing affordability, growth management, and the role of the comprehensive plan in guiding land-use decisions. To consider these issues, we brought together a distinguished group of planners, lawyers, and law professors with wide knowledge and expertise in land-use planning and planning law, and divided them into six panels to address the major topics that planning reform presents. We did not ask them to summarize the law on the
topics they addressed or to update us on the latest in planning practice. We asked them, instead, to look at the issues their topics presented and give us their perspective on what the problems are, what successes and failures we have had, and what policies and programs we need in order to deal with these issues more effectively. All of the panelists met this challenge, and we have collected their papers in this volume along with comments on their presentations by commentators for each of the panels. We have also included additional comments by observers who participated in the conference.

A major theme to emerge from the conference is that many land-use programs we adopted with great expectations are at midpoint, face problems, and need revision. Some have had unexpected consequences and some have not found the structure and policies they need to make them successful. We also learned that problems we have tried to solve, such as the housing affordability problem, also need new concepts and new strategies. We cannot continue to look to state leadership for planning reform. Local government may have to take the leadership role, and achieving progress at the local level can be daunting.

THE PANELISTS

The conference was divided into six panels. Panel I, “Political Leadership in Planning Statute Reform,” looked at political leadership in the reform of planning statutes. The APA’s model planning legislation will require state legislators to confront major changes in the statutory structure for their planning systems and land development codes. Statutory reform must also occur in local government through local legislation that adopts new programs or that implements state legislation at the local level.

This volume includes a paper from the first panel by John R. Nolon (see Chapter 1), a law professor at Pace University School of Law, where he teaches property, land-use, and environmental law, and is counsel to the Land Use Law Center and director of the Joint Center for Land Use Studies. The center has provided needed leadership on land-use issues in New York State through outreach programs, conferences, and publications. He is also a visiting professor in environmental law at Yale School of Forestry & Environmental Studies. John is also the author of numerous monographs and articles on land-use and environmental law topics.

As he states in his paper, he “begins with a brief look at the system’s familiar dysfunctions, continues with a lengthier examination of positive examples of reform, emphasizes the importance of coalition building in the reform process, and ends with the observation that reform efforts should be organized by the task of creating essential connections among the governments involved.” In an important section of his paper, John presents “several examples of land-use law reform that demonstrate clear roles for each level of gov-
ernment and shows how these roles can be coordinated to create a more integrated approach to land-use planning and regulation.”

Panel II, “A Survey & Critique of Contemporary Efforts/Growing Smart,” surveyed and provided a critique of contemporary efforts at statutory reform, and focused on the model legislation proposed by the APA. Stuart Meck (see Chapter 3) was the first panelist. He is a senior research fellow with the APA’s research department and has been the principal investigator for the Growing Smart project that produced the new model planning and zoning legislation in its Legislative Guidebook. Stuart is a former national president of the APA and has had a distinguished career as author and coauthor of articles and other publications on a wide range of planning issues. He is also the coauthor of a treatise on Ohio land-use law.

Stuart’s paper discussed “(1) the evolution of planning statute reform in the U.S. through the classification into three periods; (2) an assessment of what recent planning statute reform has accomplished, as gauged by academic research; and (3) a discussion of a philosophy that should guide contemporary planning statute reform efforts.” Stuart reviewed what planning statute reform has accomplished, and discussed the quality of plans and their implementation, the impact on urban sprawl and urban form, the impact on housing affordability and the production of affordable housing, and the efficiency of the permit process and judicial review.

He then discussed the philosophy that should guide statutory reform efforts. One of his suggestions is his recommendation that statutes should be detailed and precise rather than general and open-ended as in the standard zoning and planning enabling acts. He believes that precise direction is needed because users of the statute at the local government level will be laypersons, and they should be able to pick up the statute and know what is required.

John Delaney (see Chapter 4), a land-use attorney from the Maryland suburbs of Washington, DC, has represented developers, utilities, and institutions in a wide variety of land-use matters. John has long been a leading figure in land-use law nationally, and he played an important role in the development of the APA model legislation, attending meetings of the project advisory committee where his advice and counsel were a major influence. He is a member of the adjunct faculty at American University Washington College of Law and coauthor of Handling The Land Use Case: Land Use Law, Practice & Forms.

John addressed a number of problems he sees as critical in the APA model legislation. He addressed eight major needs he sees as essential if smart growth is to succeed:

1. The need to reform the development review process so that it will become stable, predictable, and certain;
2. The need for greater involvement of the state in planning and development review;
3. The need to end the “tilt” against residential uses in land-use plans and regulations;
4. The need for a process that balances job growth with housing for the workforce;
5. The need for a meaningful remediation alternative to litigation when addressing obvious inequitable regulatory burdens on specific properties;
6. The need to immediately address the chaotic common law of vested rights—one of the most serious threats to the orderly planning and financing of development;
7. The need to stem the burgeoning use of initiatives and referenda to preclude affordable housing; and
8. The need to end the abuse of moratoria in the development review process.

Panel III, “Sprawl and Urban Growth,” addressed sprawl and smart growth, a high priority issue on the nation’s planning agenda. The APA model legislation has a number of recommendations on smart growth issues, including urban growth boundaries. Bob Freilich (see Chapter 6), a land-use attorney now practicing in Los Angeles, is a major figure in the development of growth management programs nationally and has represented more than 200 cities, states, and counties on land-use issues. He is the author of a book on growth management, From Sprawl to Smart Growth: Successful Legal, Planning, and Environmental Systems and litigated the famous Ramapo decision that still provides major constitutional support for growth management programs.

Bob’s first recommendation was that it is necessary “to assure that a comprehensive plan fulfills its 80-year-old prophecy of becoming the constitution guiding all development regulations and the development approval process.”

He believes that comprehensive planning is necessary as a basis for growth management and to prevent ad hoc and possibly arbitrary decision-making. Bob criticized the Growing Smart model legislation because it retreated from the mandatory planning principle. He also disagreed with the decision in the model legislation to provide detailed and specific authority, and argued that “Cities, counties, and regional agencies require simple, direct, and general authority in order to carry out appropriate smart growth management.” Bob believes that courts will interpret broadly based authority to provide the needed statutory basis for local programs, and that “may more severely restrict local government authority than confirm it.” He also addressed takings and public use issues as they affect broader economic initiatives to achieve smart growth management.

Gerrit-Jan Knaap (see Chapter 7), who is professor of urban studies and planning and director of the National Center for Smart Growth Research & Education at the University of Maryland, has written extensively on growth
management programs, including coauthored books. In his paper, he first discusses the origins of the smart growth movement and the recommendations in the Growing Smart™ legislation for growth management. Gerrit then reviews the Maryland smart growth program, which provides financial incentives for growth management programs, and national initiatives for smart growth. He then discusses five principles and strategies he believes growth management should adopt, and reviews national trends that can indicate whether smart growth has succeeded. Gerrit concludes that “evidence on development patterns, consumer preferences, and public policies suggests that not much is trending in the direction of smart growth,” and offers a number of insights to explain why this is so.

Panel IV, “The Role of the Comprehensive Plan,” considered the role of the comprehensive plan in the planning process and its role in providing planning policy for use decisions. Making comprehensive plans mandatory, and requiring land-use codes and decisions to be consistent with a comprehensive plan, is a major planning reform that has occurred in recent decades. It is still a minority reform; only a limited number of states require mandatory planning and consistency. This panel asked what the mandatory planning and consistency reform has done and whether it has achieved its objectives. Both panelists are practicing lawyers, and both come from states where mandatory plans and consistency are required.

Ed Sullivan (see Chapter 9) is a practicing attorney in Portland and a leader in its land-use bar, and teaches planning law at Northwestern College of Law and Portland State University. Ed is a major advocate of mandatory planning and consistency, and his articles have been a major influence in the law that governs the consistency doctrine. His paper raises critical questions about how mandatory planning and the consistency doctrine have worked in practice.

Ed first reviews the history of the mandatory planning movement and how courts have treated comprehensive plans, and concludes that courts are accepting the view that plans are mandatory and that zoning must be consistent with them. He then discusses the difficulties the interpretation of comprehensive plans presents, and suggests how plan interpretation may be made easier by adopting a philosophy, or approach, to interpretation, and by using tools that are available to make interpretation easier. Ed concludes by discussing the important question of judicial deference and how it should guide judicial review of plans and consistency issues.

Tom Pelham (see Chapter 10) is an influential Florida land-use attorney who served as secretary of the Florida Department of Community Affairs (the state agency that supervises the state’s land-use program, which includes mandatory planning and consistency requirements). Florida has had a mandatory planning and consistency requirement for some time, and Tom reviewed lessons from the Florida experience.
Tom explained how the Florida system has achieved the intended purposes of the planning model, and how Florida has expanded that model through state standards and state review of comprehensive plans. He then discussed important lessons to be drawn from the unintended consequences that have occurred from Florida’s adoption of this planning model, which have led to major changes in Florida’s local government and planning systems. They include the judicialization of the local land-use decision-making process, the changing rule of the local legislator, the meaning of consistency, the interpretation of the local plan, and the polarization of state-local relations. He believes all these issues need to be addressed in any reform of planning legislation.

Panel V, “Housing and Regulatory Streamlining,” dealt with housing affordability questions. Anthony Downs (see Chapter 12) is one of the nation’s leading urban scholars. He is a senior fellow at The Brookings Institution in Washington, DC, and a visiting fellow at the Public Policy Institute of California in San Francisco. For years, Tony has been a leading student of housing affordability issues, and his writings provide the critical scholarship on housing affordability programs. His paper discusses the problem of removing regulatory barriers to affordable housing.

Tony concludes that many local governments deliberately adopt regulations that raise the cost of housing, and that it is a waste of time to urge local governments to act differently. Tony then discusses the issues raised by the housing affordability problem, which he considers serious, and describes five ways in which it occurs. He contends that structural conditions (e.g., greater citizen participation in decision-making and fragmented control over land-use decisions) and dynamic conditions (e.g., fast regional growth and the axioms of the smart growth movement) have produced the regulatory barriers that make it difficult to provide affordable housing, as well as the immense increase in homeowner wealth caused by a sizable rise in home prices. He then discusses the tactics that are available to attack housing affordability problems.

Charles Daye (see Chapter 13) is a Henry P. Brandis Professor of Law, School of Law, at the University of North Carolina at Chapel Hill, where he teaches housing and community development, and is the senior editor of a law school casebook, *Housing and Community Development,* now in its third edition. Charlie has long been active in housing discrimination issues and has written extensively on them, including racial discrimination in land-use regulation. Charlie brought a new dimension to the discussion of race and class problems in housing. He developed a housing social efficiency analysis to deal with these problems which, in his judgment, are nowhere near solved.

To get a perspective on this analysis, Charlie discusses the multiple dimensions of housing and points out that “housing is at the intersection where we encounter housing-related issues when we look at the social problems we face in virtually any domain toward which we travel.” He notes it is hard to get
and hold a consensus on solving race and class issues in housing, and suggests a new framework for social efficiency analysis that can get us out of this gridlock.

Panel VI, “Evaluating the Impacts of State and Local Programs,” evaluated the effects of state and local programs. The first speaker was Shirley Abrahamson (see Chapter 15), Chief Justice of the Wisconsin Supreme Court. Chief Justice Abrahamson is president of the Conference of Chief Justices, chair of the board of directors of the National Center for State Courts, and a member of the council of the American Law Institute.

She first noted that land-use cases are an important part of an appellate court’s docket, and claimed that courts are “the bulwark between the government and the individual” in land use as in other cases. She “finds a battle raging regarding governing regulation of property between an ideology that emphasizes individualism and one that “emphasizes environmental considerations and communal health and welfare.” Chief Justice Abrahamson recommends that the role of the legislature and the courts in the land-use field should be analyzed, and concludes with a number of observations on land-use cases, including a comment that the distinction between quasi-judicial and legislative land-use actions is an important one that will need clarification, and that amicus briefs are very helpful if they take a different position from that taken by the parties.

Michael Berger (see Chapter 16), a noted California land-use attorney who also specializes in eminent domain and other varieties of real property litigation, also spoke on this panel. He is active both as a lecturer and legal commentator on land use and eminent domain, and devotes most of his time to appellate practice, including several appearances before the Supreme Court in land-use takings cases.

Mike provides a final wake-up call. He argues that it is time to take a “hard look” at how planning is practiced and at the constitutional consequences of planning decisions. After revealing his personal biases and discussing land-use regulation in California, Mike concludes that “we already have too much planning; we need less, not more.” He then provides biting criticism of the organized planning community with numerous examples, followed by case studies from California where Mike believes planning and regulation have gone wrong. He does not believe that planning is all bad, however, but finds an “unfortunate zealousness” that permeates city halls in this field.

COMMENTS BY OBSERVERS

A number of observers attended the conference as participants. This volume includes papers by two of these observers. Robert Einsweiler (see Chapter 18) is past president of the APA. During his career, Bob focused primarily on urban growth management, strategic planning, environmental policy, and transportation planning. He worked in the public sector, ran his own consult-
Bob commented on a number of themes raised in the conference. The first is whether detailed enabling legislation will lead to better planning. Bob does not believe it will, and concludes that specifying plan content may cause planners to lose sight of major issues in planning and development control. The second part of his paper examines a framework for considering competing views of how land is used. He develops a conceptual framework for looking at this issue that considers the relative balance between the community and the individual in land-use decisions. He then applies this framework to examples such as Oregon’s compensation measure, the recent *Tahoe-Sierra* takings case in the Supreme Court, and the affordable housing issue, and concludes with comments on what the appropriate role for planning enabling legislation should be.

Rachelle Alterman (see Chapter 19) holds the David Azrieli Chair in Town Planning at the Faculty of Architecture and Town Planning–Technion, Israel Institute of Technology. She is internationally recognized as an authority on comparative land policy, planning law, and planning theory. Rachelle provides an international perspective. Her paper offers a critically important discussion on the role of cross-national learning in land-use law reform. She first notes that American land-use law, from an international perspective, is in a class of its own because it grew through a “bottom-up” evolution that is different from the European model. With this history in mind, she then notes several strengths and weaknesses embedded in land-use law and practice in the United States.

Rachelle first notes several strengths in the American system, including the absence of a federal law that allows room for decentralized innovation, built-in competition among alternative land-use instruments that leads to survival of the fittest, a growing export of American programs, and federal legislation that affects many areas related to land use. Rachelle then notes the absence of a federal land-use law as one of the weaknesses and targets for reform, as well as other issues including the ambivalent status of comprehensive plans, the large differences in state laws born in “The Quiet Revolution,” and the low import rate of planning-law concepts from other countries.

**CONCLUSION**

The new century presents many opportunities for planning reform. Many of these opportunities, and the problems and issues that will have to be faced, are discussed in the papers in this volume. We believe they contain a critical blueprint for approaching questions of planning reform in the new century.
DANIEL R. MANDELKER NOTES