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Problems of National Land Use Planning

G. Graham Waite*

Concern for the quality of the natural environment in the United States today, and realization that corrective measures must apply to large geographic regions to be effective, have led to talk of the federal government planning land use for the nation. President Nixon devoted a substantial portion of his 1970 State of The Union message¹ to problems of the environment and the part population distribution plays in creating or intensifying them. Among other things, the President said the migration from rural areas to urban centers must be reversed.² The President did not say how the reversal is to be accomplished, or how the costs of the reversal are to be allocated between the private and public sectors of the economy.

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1. 1970 U.S. CODE CONG. & AD. NEWS 7.

2. The message contained the following pertinent passage:

Between now and the year 2,000, over one hundred million children will be born in the United States. Where they grow up—and how—will, more than any one thing, measure the quality of American life in these years ahead. This should be a warning to us.

For the past thirty years our population has also been growing and shifting. The result is exemplified in the vast areas of rural America emptying out of people and of promise—a third of our counties lost population in the 1960s. The violent and decayed central cities of our great metropolitan complexes are the most conspicuous area of failure in American life.

I propose that before these problems become insoluble, the nation develop a national growth policy. Our purpose will be to find those means by which federal, state and local government can influence the course of urban settlement and growth so as positively to affect the quality of American life.

In the future, decisions as to where to build highways, locate airports, acquire land or sell land should be made with a clear objective of aiding a balanced growth.

In particular, the Federal government must be in a position to assist in the building of new cities and the rebuilding of old ones.

At the same time, we will carry our concern with the quality of life in America to farm as well as the suburb, to the village as well as the city. What rural America most needs is a new kind of assistance. It needs to be

The federal government can exert some influence over business and population distribution through its conduct of existing federal activities. Criteria consistent with the desired environmental goals might be established for use by federal agencies in procurement activities. Perhaps the agencies could first pay a premium if, and later require that, work on federal government contracts, both prime and sub, be performed in plants complying with pollution standards fixed by executive order. Bidders who promised to perform contracts in geographic areas designated by executive order as ripe for population expansion might be favored. Sites for federal installations might be selected for their congruence with national planning goals.

However, the conduct of federal government business is unlikely in itself to reverse population flow.³ There are "big businesses" in the country in addition to the federal government whose activities also affect population and business distribution, and whose plants and payrolls are the jealously guarded treasures of the various localities where they are now found. Furthermore, it seems safe to assume that the governments of those localities are striving to attract even more industry, particularly if it is "clean." Many Americans continue to prefer a higher income to a lower income; the center of their profession to an outpost; big city excitement to pastoral tranquility.⁴ Such considerations suggest the need for federal control of more than existing federal activities if a national land use plan is to be a reality.

A national land use plan presents a problem common to land use plans generally. How much of the initial costs of implementing the plan should be paid by government, and how much by the private persons immediately affected? The question is answered by a combination of the legislative intention that costs be distributed a certain way, and the constitutional mandate as interpreted by the courts that certain costs be borne by govern-

dealt with, not as a separate nation, but as part of an overall growth policy for all America. We must create a new rural environment that will not only stem the migration to urban centers but reverse it.

Id. at 12-13.

3. Much material needed by federal agencies can only be obtained from a few locations. Some examples are automotive vehicles, electric power generating equipment, naval ships, airplanes, and heavy equipment in general. Even if federal funds were made available for building new plants, drastically new locations may not be feasible. Large naval ships, for instance, must be built at locations having access to the sea. It may be physically possible to build other items at new locations, but this would greatly increase the costs of raw materials and delivery of the finished product. In these situations it would seem best to try to eliminate environmental pollution through existing federal activities rather than to relocate population.

4. Even the drop-out from society, although not pressing directly for economic development, creates some pressure for it so that he can be supported without lowering the standard of living of the rest of the community.

ment. The protagonists in the resolution of the problem usually are private land owners on the one hand and government on the other, and the problem is basically unchanged whether the government is local, state or federal.⁵ A national land use plan that includes population redistribution as an explicit goal, however, adds a new dimension. Should local communities, as distinct from private landowners, be compensated for being required either to accept an influx of population, industry and the like or to forego efforts to achieve it?⁶ And, if the population redistribution is not simply to spread the spoilation of nature evenly over the nation, a national land use plan requires with heightened urgency what local planners have long recognized—methods of preserving open space and freezing development of other areas at moderate cost to the government. Apart from compensation questions, there is the difficulty of incorporating detailed knowledge of local land use patterns into the national plan without allowing the national goals to be stifled by excessive localism. It is with these problems that this article is concerned.

Organization for National Planning

One way to develop a national land use plan is for a federal agency to set guidelines and to invite each state to submit a plan for its own development. The plans found by the federal agency to meet the guidelines would constitute the national plan. Senator Jackson has introduced a bill in the Senate that embodies this method.⁷ Certainly there are advantages to such an

5. It is true the fiscal power rests only with the federal government and hence its ability to pay the initial costs is far greater than that of other governmental entities. U.S. CONST. art. I, §§ 8, 10. One may argue that, having the greater means, the federal government should be required to pay a greater proportion of land planning costs than should local or state government. Occasionally courts have indicated excessive cost to the government is a reason for not compensating landowners for certain losses. See, e.g., *Springville Banking Co. v. Burton*, 10 Utah 2d 100, 349 P.2d 157 (1960); *Anderson v. Stuarts Draft Water Co.*, 197 Va. 36, 87 S.E.2d 756 (1955). However, the magnitude of demands on federal resources by urban needs, space exploration, and the like indicates that federal dollars must be conserved equally with local.

6. The problem is presented in some degree by existing county and regional plans. One method of resolving it has been to leave the option with local government, *i.e.*, to bring their community within the plan or not. WIS. STAT. ANN. § 59.97(5)(c) (Supp. 1969) (requires town board approval for the county zoning ordinance to be effective within the town); *id.* § 66.945(12) (allows approval of regional plan by local government). The method entails a weakening of the plan that may frustrate the goals of the larger region or, in the present context, of the nation itself.

7. S. 3354, 91st Cong., 2d Sess. (1970). All statements are based on Comm. Print No. 2, March 17, 1970. Section 401(d) of the bill finds the states have primary responsibility for land use planning; 401(f) declares it the responsibility of the federal government to develop a national land use policy which, among other things, "shall provide a framework for development of interstate, state, and local land-use policy"; and 401(g) includes within its declarations a statement that the national land use

approach. There is precedent for it.⁸ It reduces expansion of the federal bureaucracy. It preserves the appearance of state power in the planning field and thus may reduce political opposition to national land use planning. Perhaps other advantages are offered as well. However, such an organization for planning has at least one unfortunate feature. Since the states would promulgate and administer the plan, it is likely state law would control some questions arising in its administration. Thus, state law would determine when an attempted regulation was a denial of equal protection or became so drastic in its application as to be invalid.⁹ On the other hand, if promulgation and administration is by the federal government¹⁰ the question of permissible regulation becomes one of federal law. Diverse answers to the same law questions, seemingly inevitable when questions are controlled by 50 states, are avoided. And state decisional law would have only persuasive rather than controlling effect, thereby making it easier to avoid the effects of state court decisions deemed unfortunate for planning.

Perhaps national land use planning might be made a completely federal activity without adding great numbers of employees to the federal work force. Since 1913 the International Joint Commission has accomplished its tasks with a small permanent workforce supplemented by employees of other national, state or local governmental agencies. The Commission has functioned effectively and efficiently while relying on the voluntary cooperation of the governmental agencies concerned in providing persons with appropriate expertise.¹¹ These persons are organized as members or

policy should help state governments assume planning responsibility for activities within their boundaries which are of national concern. Section 402 states a national policy of encouraging the states to develop and implement statewide land use plans meeting federal guidelines, and designates the Land and Water Resources Planning Council to review the statewide plans for conformity to the federal guidelines.

8. See, e.g., the Water Resources Planning Act, Pub. L. No. 89-80 § 303, 79 Stat. 244 (July 22, 1965).

9. The national program of constructing the Interstate System of highways under the Federal-Aid Highway Act of 1956, 70 Stat. 378, as amended, has been executed by the states subject to federal approval. The compensability of losses landowners sustain in connection with government acquisition of right of way for the system is controlled by state law. See Waite, *Property and Just Compensation*, 2 URB. L. ANNUAL 43 (1969). The United States Supreme Court has not participated in developing the constitutional law of land use controls.

10. Bases for federal regulation of land use, arguably, may be found in powers over commerce; to provide for the common defense and make war, and to provide for the general welfare. U.S. CONST. art. I, § 8. The rationale might be that the environment so affects all of life that its control is essential to the effective exercise of the powers mentioned. Other powers applicable in particular circumstances might include powers to manage federal property, U.S. CONST. art. I, § 8; to control compacts between the states, *Id.*; and to make treaties, *Id.*, art. II, § 2.

11. Waite, *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 BUFF. L. REV. 93, 98-100, 112-15 (1963). The technique has been used recently in matters closely related to national land use planning. See, e.g.,

staff of technical boards appointed and directed by the Commission.¹² Hence, in substance they are Commission boards although the salaries of members and staff are paid by their "home" agencies. Presumably, if the technique were used for national land use planning, the boards and staff would be deemed arms of the federal agency responsible for planning. Federalization of the planning activity might be further assured, and cooperation of state and local government stimulated, by federal cash grants to the affected governments to cover the salaries of their employees while working on the national plan.

After the national plan has been developed and adopted by the federal agency, however, its administration might be better accomplished by federal employees having no official ties with local land use planning than by persons currently administering local plans.¹³ At the planning stage detailed knowledge of local land use patterns is helpful and any tendencies to favor localities or regions unfairly may be filtered out when the plan receives federal approval. But the practical content of a plan is determined by its administration. Whatever parochialism exists among local administrators is unlikely to be brought to light quickly except as appeals are taken, ultimately to the federal courts. Since appeals are time consuming and expensive, it may fairly be anticipated that the effects of localism will largely go undetected until the resulting land use patterns become so obvious as to be recognizable frustrations of the national policy.¹⁴ The costs of eliminating such land use

Docket 76 Pembina River Conference to determine feasible plans for the cooperative development by Canada and the United States of the water resources of the Pembina River Basin, situated in North Dakota and Manitoba. The Pembina matter was referred to the Commission April 3, 1962 and its report to the two national governments was filed December 4, 1967. Docket 76 is filed in the Commission offices in Ottawa and Washington, D.C.

12. See Waite, *supra* note 11, at 98-100, 112-15.

13. Amending the plan is somewhat analogous to the initial formulation process, from which one might conclude the organization suggested for plan formulation should apply to it. However, the function of amendments, like that of variances, special exceptions, and the like is to introduce flexibility to the plan. See Green, *Are 'Special Use' Procedures in Trouble?* 12 ZONING DIGEST 73, 75 (1960). Giving amendment responsibility to the administrative organization assures that disposition of petitions for any type of relief from the plan will be by the same body, thereby promoting consistent administration.

14. For example, suppose the national plan designated an area to remain undeveloped and suppose a landowner applied for a use permit, asserting it to be necessary to earn a reasonable return on the land. It seems a local building inspector, member of a zoning board of appeals, or the like, the bulk of whose work is administering a local ordinance designed usually to accommodate growth of the local community, would be more likely to agree with the applicant than would officials whose entire concern is the administration of a plan designed for growth of the nation as a whole rather than of any particular part. This would be especially true if the federal officials were frequently reassigned to different parts of the country, thus discouraging localism from developing on their part.

patterns might be avoided if plan enforcement were exclusively entrusted to a bureaucracy having ties only to the federal planning agency.¹⁵ Excessive insulation from local mores might be prevented by including a non-voting membership in the various federal boards administering the plan, the membership to be filled by a person designated by the chief executive of the appropriate level of state or local government.¹⁶ Such a member might also help prevent lethargy from developing among the federal administrators.

Some Problems of National Planning

Regardless of organization, the national land use planning program will face difficult problems. First, in order to receive popular support, the plan must accommodate the land use demands of the bulk of Americans. The inclusion of population redistribution among its conscious goals suggests the plan must also preserve a variety of community types, from the country cross-roads to the metropolitan center. And if people are to be content living in their preferred community type, it must be freed of as many of its heretofore inherent disadvantages as possible. Persons liking country towns, for example, should not have to leave for lack of job opportunities, and persons preferring big cities should be able to enjoy them without smog. Presently underpopulated areas designated to receive new industry and population must be shielded from developing the habitability drawbacks of industrial towns. The persons moving to such areas must be assured first rate community services, and industries locating new plants in uneconomic places should be shielded from competitive disadvantages associated with the location. Urban sprawl must be contained everywhere to preserve farm lands, scenic areas, wildlife habitat, and the like. And everywhere, the adverse impact on the environment of existing activities must be reduced. Accomplishment of these goals involves restraint of private land development, sometimes to the point of complete prohibition, as much as it permits it. Additionally involved are restraint or new guidance of community development and the siting decision of private industry. Who is to pay the immediate costs of the restraints and of the new guidance?

15. S. 3354, 91st Cong., 2d Sess. § 406(a)(1) (1970) provides that a single state agency designated by the Governor will administer the plan within each state. Nothing appears to prevent the state agency from using local administrative machinery.

16. The number of federal boards necessary to administer the plan seemingly would depend on the intensity of control of land use the plan effects. If the plan is only concerned with population distribution, for example, it might be sufficient to have relatively few boards, perhaps with national jurisdiction, since relatively few activities significantly affect population distribution. Control of highway construction and of the placement of large industrial plants might suffice. If the plan is concerned with environmental problems, as well as with population distribution, however, the number of land uses significantly bearing on the matter to be controlled is greatly expanded and

Paying for Planning

It is doubtful that federal taxpayers in the United States are sufficiently pliant to accept the tax increases necessary for the federal government to pay all land planning costs without reducing the funding of existing federal programs, even if the money were to be raised by borrowing. State and local governments have found it too expensive to pay all planning costs,¹⁷ and their plans have not aimed to achieve large scale population redistribution. Thus one may expect some costs will have to be paid by private persons and industry, by state and local government, or by some combination of these groups. Economic analysis may help determine a just, politically feasible distribution of costs between the federal government and the various other groups, although any particular distribution is likely to be debatable. It would seem, however, that costs of population redistribution and of environmental protection—programs not previously emphasized in planning—will swell the total to be distributed to such a figure that every group mentioned will have to absorb higher costs than has been true where local and regional plans have been involved. Just as one of the costs of a pollution-free automobile may be that automobiles may be higher priced or less luxurious, so the costs of a better distributed population and a cleaner environment may include higher state and local taxes, higher costs of production for industry generally, and, for landowners, the acceptance of land use regulation without compensation in some situations where compensation is the rule today.

Payments From Landowners

There are reasons for expecting the planning costs placed on landowners to be especially large. There are practical limitations of state and local ability, just as there are of federal, to finance the national planning costs. The very community most needing improved public services is likely to have a tax base least capable of producing revenue to pay for them. And it seems unlikely that the economic impact of siting new facilities of private business pursuant to the national plan would fall with equal severity on each industry, or on each company within an industry. To avoid giving a gratuitous competitive advantage to industries or companies not needing

the number of federal boards needed is correspondingly higher. At some point the national plan may preempt state and local powers to control land use.

17. See note 5 *supra*. Apart from limits on federal fiscal capabilities as a whole, particular federal career programs operate within particular budgets. Public opinion and the dedication of career government officials results in real pressure on the administering agency to accomplish as much of the program as possible for the taxpayers' dollars. Since compensation of landowners is not itself the program, an agency administering a land use plan is unlikely to elect to purchase more rights than absolutely necessary.

to establish new facilities it may be necessary to compensate those that do, for the increases in their cost of doing business caused by the plan-required, uneconomic locations of their new facilities. Such needs for federal compensation will tend to increase the pressure to pass planning cost to private landowners, a pressure countered by the constitutional prohibition against taking property without compensation.¹⁸ The urgent need to spend federal compensation dollars on governmental and business entities will not and should not remove the protection against confiscating private property, but it is a factor tending to reduce the number of situations in which courts would require compensation to be paid.¹⁹

Preserving Vacant Lands

One endeavor which may no longer require compensation and which is particularly pertinent to public efforts to influence population distribution and to preserve environment is the preservation of certain types of vacant lands or of stages of land development. Another is the effort to establish communities of a certain "character." Let us first consider the freezing of land development.

The courts of several states have considered the validity of ordinances based on the police power aimed to preserve a natural condition, such as a swamp, that was of little private economic value but that was of considerable value to the community as a source of flood control, habitat for waterfowl, and the like.²⁰ The decisions usually have required compensation where no use of private economic value was possible as long as the land

18. U.S. CONST. amend. V.

19. New sources of public revenue may be developed, of course, to help provide funds from which to compensate communities, industries and individuals. An example might be a tax on the value added to real estate by actions of public planning authorities at whatever level of government. In areas of active land development such a tax might produce considerable revenue and substantially counteract the pressure to reduce compensation of landowners.

It must also be admitted that the idea of community and industry compensation entails difficult administrative problems. For instance, what particular community facilities are essential to habitability? Who determines them? The local community? Its citizens under 30 years old? Is the government to be given a say in a private company's determination that the company needs a new plant in order that the company qualify for government compensation of competitive inequities? Perhaps the compensation for both the local community and the private company could be offered in the form of lump-sum grants-in-aid. But, how to determine the size of the grants? Clearly expert guidance is necessary.

20. *State v. Johnson*, 265 A.2d 711 (Me. Sup. Jud. Ct. 1970); *Comm'r of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965); *MacGibbon v. Bd. of Appeals*, 349 Mass. 690, 200 N.E.2d 254 (1964); 255 N.E.2d 347 (1970); *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

remained in its natural state.²¹ A remarkable feature of some of these cases is that the uses permitted by the regulation have been the ones a court in a nuisance action would likely find appropriate.²² Thus, the deci-

21. The exception among the cases cited in note 20 *supra* is *Natural Resources*. In that case the court considered the validity of the regulation unripe for decision because certain questions of fact had not been resolved. Among these questions were the price the owner had paid for his land, the return he earned from certain land in the tract he had already filled, the assessed value of the unfilled land, its present market value with and without the restrictions, and the practical uses to which the land could be put in its natural state. *MacGibbon v. Bd. of Appeals*, 349 Mass. 104, 111-12, 206 N.E.2d 666, 671-72.

22. Some question might be raised in a nuisance action as to whether any part of the swamp or marsh was being used so as to be properly considered in determining the appropriate uses of the area. *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937) (vacant lots not counted in finding neighborhood character). However, the vacant land in *Parkersburg* was comprised of scattered lots in an area already developed for residential or business purposes; therefore the vacant lots themselves might be presumed ultimately to be similarly developed, not only because of the existing development but also because there was no reason to anticipate public action to change neighborhood character to something other than residential or commercial. As long as a particular lot remained vacant, the court refused to guess whether its development when it occurred would be to residential or commercial use. In the swamp situation the vacant land is a sizeable, contiguous area with an ecology of its own, susceptible to distinctive uses which may or may not have private economic value. Commercial muskrat farming has been conducted in fresh water swamps, *Munninghoff v. Wisconsin Conservation Comm'n*, 255 Wis. 252, 38 N.W.2d 712 (1949), and cranberries are grown in a similar setting. *Kanneberg, Wisconsin Law of Waters*, 1946 Wis. L. REV. 345, 373. The raising of fish, the growing of aquatic plants, and the maintenance of a wildlife sanctuary and nature study refuge provide other examples of swamp land use. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

The public also must have an interest in land to be protected, in order to sue on the theory of private nuisance. It is said an easement will suffice. 5 R. POWELL, REAL PROPERTY § 705, at 321 (P. Rohan rev. 1970). The requirement may often be fulfilled where swamps are concerned by the public rights that typically exist in relation to navigable streams and lakes and waters covering ocean tidal flats, and which are typically expressed in property terms. *Waite, Public Rights in Maine Waters*, 17 ME. L. REV. 161, 172-78 (1965). Where vacant lands are to be preserved that are not adjacent to such waters or if the public rights mentioned are not deemed a property interest for purposes of maintaining a nuisance action, the requisite interest may be provided by nearby publicly owned lands devoted to uses consistent with the uses sought to be preserved in the privately owned tract. An example might be a wildlife refuge, or perhaps the bivouac area of an Army camp. Public purchase of a vacant tract should give the public standing later to maintain a nuisance action to abate uses threatening the newly acquired land so long as the newly acquired tract is usable itself. 5 R. POWELL, *supra* § 706, at 335-36.

The facts stated in the decision of *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963), appear to have made an action in private nuisance particularly appropriate. The swamp sought to be preserved was 1500 acres or more in area, with practically no active land uses in it, and about 75 percent of the swamp was owned by a private corporation, *Wildlife Reserves, Inc.*, holding it as a public or quasi-public wildlife sanctuary and nature study refuge. *Id.* at 542, 193 A.2d at 234. The area where a conflicting use was sought to be established was only 66 acres. It was part of a larger tract belonging to the same owner that was located in an adjoining township. Most of the tract in the adjoining township was high ground on which the owner operated a sand and gravel business.

sions prevent the legislature from effecting through zoning what the courts might accomplish by using the nuisance doctrine.²³

It is hard to defend such results without countenancing land planning with a focus so local that it virtually assures omission of relevant community considerations. Evidence in a nuisance case of the character of existing land development will consider only the land surrounding the sites of the particular uses in conflict. Any expert planning opinion offered in the case will be that of a witness called because of the support his testimony will give the land use of one of the litigants, and no opportunity will be given for the public at large to express their opinion of the planning decision. In contrast, the legislative process applied in land planning contemplates consideration of relatively large geographic areas,²⁴ the use of planning experts employed to advance the entire community and the expression of lay opinion before many planning decisions become final.²⁵ The New York Court of Appeals recently was so impressed by the superior ability of the legislature to ameliorate certain clashes of land uses equitably, that it allowed a defendant in a nuisance case to pay permanent damages rather than to suffer abatement.²⁶

Id. at 543, 193 A.2d at 235. The only practical use of the 66 acres, unless filled, was as a hunting or fishing preserve or wildlife sanctuary. *Id.* at 552, 193 A.2d at 240. The Wildlife corporation asserted any filling of the area had an "adverse biological effect on the water and the swamp creatures in its sanctuary." *Id.* at 552, 193 A.2d at 240. The only evidence the court mentioned bearing on the future use of the land if filled was the owner's assertion that industrial use was feasible, the fact that the adjoining land in the other township was zoned industrial, and the presence of access roads to the land. *Id.* at 557-58, 193 A.2d at 243. There was no evidence or contention that the existing sand and gravel business was not prospering even while carrying the unproductive 66 acres, which it may have done for several years. (The entire tract was purchased in 1952; no attempt to use the 66 acre portion was made until 1959. The court does not state when the sand and gravel business was started, but it was operating in 1959. *Id.* at 544, 193 A.2d at 235.) Thus an injunction against filling would only have prevented the owner from speculating on the creation of new land uses and values. There would have been no closing or even restriction of the existing business. If the township had acquired a portion of the Wildlife tract it would have been in good position to cause the fill work to be enjoined on a nuisance theory.

23. Grounds for enjoining uses destructive of the swamp are readily developed, assuming the remedy is sought before the destructive use becomes established. The swamp is a unique asset, irreplaceable if destroyed; the cost to the owner seeking to make the destructive use of being barred from the use is insignificant in comparison since the swampland undeveloped must have little private economic value and therefore the owner must have a relatively small investment in it. Also, the swamp owner may be able to apply the land to a swamp use such as described in note 22 *supra*.

24. Not only do the zoning enabling acts require the zoning ordinance to be in accordance with a comprehensive plan, *e.g.*, D.C. CODE ANN. § 5-414 (1967), but also in many communities the zoning ordinance is developed and administered in conjunction with a master plan or official map and a subdivision control ordinance as well.

25. For a functional consideration of modern nuisance law, *see* Beuscher and Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440.

26. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d

The result in the swamp cases is the recognition of a private property right to change the physical characteristics of land whose natural condition renders it unsuitable for private uses having economic value. In practical terms the swamp decisions themselves contribute to environmental destruction in two ways. They have confronted the government, whose attempted regulation they voided, with an unexpected need to purchase the desired public control. Often the funds of the government agency will all have been budgeted for other purposes and the purchase cannot be made.²⁷ The decisions also have left the swampland free of any land use control,²⁸ hence even when the agency has money available or can obtain it through a supplemental appropriation, there will be a period of time during which any land use is permissible. Once established, the use has destroyed the natural characteristics that gave the land its public value, the reason for public purchase has gone, and once again the natural environment has been sacrificed to private economics.²⁹ Considering the threat environmental

312 (1970). The case involved air pollution by defendant cement company in an area where many other air polluters operated that were not parties to the litigation. The court in its opinion acknowledged the rising public and governmental concern with air pollution, but considered the main function of a court to be the settling of controversies. The court said:

It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court. . . .

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health.

It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. . . .

Id. at 220, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

27. See J. BEUSCHER, *SOME TENTATIVE NOTES ON THE INTEGRATION OF POLICE POWER AND EMINENT DOMAIN BY THE COURTS: SO CALLED INVERSE OR REVERSE CONDEMNATION* (1964), appearing in J. BEUSCHER & V. WRIGHT, *CASES AND MATERIALS ON LAND USE* 722 (1969), and in 1 *URB. L. ANNUAL* 1 (1968).

28. An exception is *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963). In that case the court delayed the effective date of its invalidation of certain zoning regulations for the length of time the trial court should find reasonably necessary for proper regulations to be enacted.

29. Some apology may be made for the environment-destroying impact of the swamp cases, considering them in their own context. They are state court decisions passing on the validity of state and local regulations which at best could affect the environment only locally. Yet the environment is all pervasive, with particular effects and causes often crossing governmental boundaries; thus the controls could not give effective protection to the environment anyway. For example, the value of an inland swamp as habitat for wildlife might be as effectively ruined by activities on the high land surrounding the swamp, activities that pollute the water of the swamp or that prevent water from reaching the swamp, as by draining and filling the swamp itself.

destruction poses both to life styles and to life itself, society can scarcely tolerate such sacrifice to be continued in the administration of national regulations protecting the environment.³⁰ The high value to the nation of regulations similar to those struck down in the swamp cases, when imposed as part of a national land use plan, argues in favor of their validity.³¹

Establishing and Preserving Community Character

Another serious danger to an effective national land use plan is created by state decisions which have invalidated the use of police power to create and maintain communities distinctive from others in the residential amenities offered. Although the litigant may be a landowner seeking to free his land from the regulation, the court may use equal protection language³² in finding the regulation invalid. Should similar regulations in a

If the swamp has an interstate or international watershed, the regulations of the state where the swamp is located will not by themselves afford it effective protection. However, one may feel that some protection is better than none. Actually, the regulations were not conceived to protect the environment in the broad sense, but limited features of it and for specific purposes such as providing flood control, wildlife habitat, and space for the safe run-off of floodwaters.

30. Elimination of vacant land, without more, disturbs the balance of nature by destroying habitat for various types of insects and wildlife. The imbalance, in turn, affects economic activities of man. For example, destruction of habitat of insect eating birds tends to force farmers to buy insecticides. Use of insecticides may result in contamination of the crops or of animals that eat contaminated vegetation, with the ultimate result that humans consume contaminated food. The poison popularly called DDT is considered to have such cumulative effects. For a general, popular discussion of pollution effects, see Young and Blair, *Pollution, Threat to Man's Only Home*, 138 NAT'L GEOGRAPHIC 738 (Dec., 1970).

31. In discussing zoning ordinances, the Maryland court, for example, has said, "[c]onstitutionality depends on overall reasonableness, on the importance of the public gain in relation to the private loss." *Grant v. Baltimore*, 212 Md. 301, 315, 129 A.2d 363, 369 (1957).

32. Recent Pennsylvania cases afford examples. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) found a township zoning ordinance unconstitutional for failing to provide for apartment buildings, to be built on land in the residential zone. The court remarked that the failure to provide for apartments was in effect a decision by the township "to zone out the people who would be able to live in the Township if apartments were available." *Id.* at 242, 263 A.2d at 397. Other language suggests the ordinance was invalid because lacking public purpose. "[P]rotecting the character—really the aesthetic nature—of the municipality is not sufficient justification for an exclusionary zoning technique;" *id.* at 244, 263 A.2d at 398, a sentiment previously expressed in *National Land and Investment Co. v. Bd. of Adjustment*, 419 Pa. 504, 528-29, 215 A.2d 597, 610-11 (1965). Finally, the court considered the township to be trying to stand in the way of the natural spread of population out from a large city and refused to permit it, saying that otherwise, if every municipality followed the same course, "population spread would be completely frustrated." If the township "is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden." *Id.* at 244-45, 263 A.2d at 398-99. In a footnote, the court acknowledged that if planning and zoning were regional, a given community might have apartments and an adjoining one not. *Id.* at 245, 263 A.2d at 399, n.4.

National Land and Investment Co. v. Bd. of Adjustment, *supra*, is the root of some of

national land use plan be found to deny equal protection, the plan might sustain a fatal blow. The suggestion is that government action to maintain the differentiation between communities in size and character, which appears to be one of the major goals of national planning, is itself unconstitutional because it is seriously discriminatory.

To the extent that the denial of equal protection arises from an arbitrary classification, it would seem that community-character-preserving regulations in the national land use plan would be protected by the fact that they would be the product of super-regional planning.³³ But a regulation may also deny equal protection if one of its effects is to exclude individuals from enjoying some desirable end.³⁴ It might be argued that regulations designed to preserve the character of a community—whether the character be small population, urban sophistication, bucolic charm, or other attribute—have the effect of excluding some persons outside the community from enjoying its amenities and thereby deny them equal protection. The argument would seem to have its greatest force if the regulations, in addition to preserving the character of a community, materially increase the cost of housing, or tend to set up racial barriers to residence.³⁵

Assuming honest planning, free of racist taint, there are grounds for believing regulations forming part of a national land use plan and designed to preserve community character would not deny equal protection, if other-

the equal protection language in *Appeal of Girsh*. *National Land* struck down a township's 4-acre zoning, again at the behest of a landowner whose desired use the zoning frustrated. The court remarks that an issue is raised of "the township's responsibility to those who do not yet live in the township but who are part, or may become part, of the population expansion of the suburbs. . . . The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not." 419 Pa. at 532, 215 A.2d at 612.

33. The Pennsylvania court in *Girsh*, *supra*, acknowledged that if planning and zoning were regional, a given community might have apartments and an adjoining one not. 437 Pa. at 245, 263 A.2d at 399, n.4. And in *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967), invalidating zoning that barred quarrying from an entire community, the court said such zoning is suspect "for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community." *Id.* at 59, 228 A.2d at 179.

34. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state poll tax held a denial of equal protection through tending to exclude the poor from voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state practice of charging defendants in criminal cases for trial transcript held a denial of equal protection in that it excluded the indigent from taking criminal appeals); *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969) (amending zoning ordinance to eliminate a variance allowing a low rent, federal housing project in a white, single-family residential area denies equal protection through tending to exclude non-Caucasians from living where they please.)

35. See Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

wise reasonable. The boosterism characteristic of Americans seems to assure a tendency for most communities to become more commercial and larger, both in population and in geographic area. Thus, communities of small population and vacant lands require protective regulations of some sort if they are to be preserved at all, short of public ownership. Given the pressing need to improve the quality of life for all living creatures in the United States, regulations reasonably likely to achieve an improvement could be justified in spite of incidental exclusionary effect, assuming they be held to a minimum, on the basis of the extreme importance to the nation of the ends they achieve.³⁶

Summary

National land use planning will have the best chance of success if the validity of its detailed provisions is controlled by federal rather than state law. The traditional refusal of the United States Supreme Court to review state court decisions of constitutional questions in the planning field means that, as a practical matter, freedom from state law can best be achieved by making the plan itself a federal program. Promulgation of the plan by the federal government, rather than by the individual states, in accordance with federal standards, will tend to assure the plan being deemed a federal program. The planning should be done by personnel of state and local planning bodies, detached from those bodies to work on the plan, but the plan should be administered by persons whose only job ties are with the federal planning agency.

Assuring that federal law will test the validity of the plan's regulation encourages rethinking of the scope of permissible regulation. Two areas in which such rethinking is particularly desirable are the freezing of land development and the preservation of distinct community characteristics. The need for federal funds to compensate communities and industries for costs imposed by the plan creates some pressure for widening the permissible scope of regulations freezing land development—assuming tax increases adequate to cover the community and industrial compensation fully are not feasible. Preservation of distinct community types is the essence of a national land use plan having as professed goals the preservation of the environment and the halting of population flow from smaller to larger centers of population. Given the national geographic framework of the planning, community preserving regulations should meet equal protection standards.

36. *Id.* at 791-92, suggests the validity of "snob" zoning by local government be tested by the balance struck between "the serious harm done to accepted egalitarian ends" and "the effectuation of governmental ends of overriding importance."