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IMPLEMENTING METROPOLITAN REGIONAL PLANNING

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There is an old Chinese curse: "May you live in interesting times." And that curse, I sense, is placed not only upon those of us who are interested in land use practice, but more certainly upon developers and municipalities. In other words, in our field we are in bad shape and rapidly getting worse. And in that doleful conclusion, I place not only such cautious states as my own Illinois and its brethren, Michigan, Wisconsin and Indiana, but also the more imaginative or daring states such as Florida, California and indeed, even Oregon.

In all of these jurisdictions, we are playing costly games with each other at a time when it is well past the game playing stage. I am beginning to regret the use of the word "game" in a couple of my books.[1] The contest is of course between developers and local municipalities, the latter either as a protagonist or as a surrogate for neighboring residents. And in the past decade or two, the stakes have become higher and the plays more serious. It is as though each of the contestants trumps his opponent's ace with a new and unexpected card. The plays go back and forth. I believe that the scholars who focus on conflict of laws use the French word "renvoi" for this practice. Consider the following:

1. Back in the early seventies, developers were discouraged by what Professor Norman Williams, Jr. terms the third stage of land use law—the growing dominance of municipalities in the use of clever techniques.[2] Therefore, developers resurrected the Sherman Antitrust Act,[3] enacted almost one hundred years ago, to threaten communities with treble damage lawsuits. And although Congress gave the municipalities some protection by insulating them from damages,[4] it left

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1. R. BABCOCK, THE ZONING GAME (1966); R. BABCOCK & C. SIEMAN, THE ZONING GAME REVISITED (1985). *See also* 8 ZONING & PLAN. L. REP. 145-52 (Sept. 1985); 15 REAL EST. L. J. 284-85 (Winter 1987).

2. N. WILLIAMS, AMERICAN LAND PLANNING LAW 105-06 (1974).

3. 15 U.S.C. §§ 1-7 (1982).

4. *See, e.g.*, Chambers Dev. Co. v. Municipality of Monroeville, 617 F. Supp. 820, 822 (W.D. Pa. 1985).

available the injunction and the threat of costly lawsuits facing municipalities.

2. The municipalities, faced with shrinking revenues and loss of federal funds, responded with exactions or impact fees—the latter a more gentle term for what Webster's dictionary, Justice Rehnquist and numerous commentators have labeled "extortion."[5] The simple and old on-site municipal demands have leaped exponentially to embrace many exotic demands. Even though the planners, as always, come up with the soothing term "linkage" to ease the pain, Justice Scalia now insists there must be a clear nexus.[6] Many developers grudgingly pay the municipal demands to obtain their permits immediately instead of litigating for years. In 1982, Hilton Hotels in San Francisco grudgingly agreed to pay one million dollars for the Planning Commission's permission to add five hundred rooms to a hotel. The money went into a fund to build low and moderate income housing. Because Hilton agreed to pay, it obtained its permit to build. Otherwise, it would have faced years of uncertain litigation and substantial attorney's fees. There are few Mr. and Mrs. Nollans around who are fortunate enough to have pro bono attorneys to take their cases to the United States Supreme Court. Recall all their neighbors who had granted beachfront easements to the Coastal Commission.[7] There have been many learned articles on exactions. Few dwell on this factor of "municipal leverage."

3. The developers' responses have been to resurrect Justice Holmes' aphorism in *Mahon v. Pennsylvania Coal Co.*[8] that if a regulation goes too far, it is a taking.[9] A few of us on and off the bench still believe that the word "taking" was a short cut for "invalidity," and that Holmes used the term metaphorically.[10] After ducking the

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5. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 431 (1986); Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148 (1987).

6. *Nollan*, 107 S. Ct. at 3148.

7. "The Commission also noted it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land. . . ." *Id.* at 3144.

8. 260 U.S. 393 (1922).

9. *Id.* at 415.

10. Justice Breitel, while on the New York Court of Appeals, held invalid New York City land use restrictions that zoned land in Tudor City on 42nd Street for a public park. The plaintiff had also asked for money damages. Justice Breitel, in denying that remedy said:

> True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a 'taking' or a 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .
>
> The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the Pennsylvania Coal case [*supra*] was there an actual 'taking' under the eminent domain power, despite the use of the terms

issue in at least three cases,[11] the Supreme Court finally bit the bullet and held there could be a temporary taking in *First English Evangelical Lutheran Church v. City of Los Angeles.*[12] Even the *First English* decision has left a host of questions unanswered. Is a moratorium a taking? When does the temporary taking begin? What does loss of "all use" really mean? Whatever else it may mean, the *First English* decision has sobered many city councils.

4. Now, looking into the clouded ball, I can foresee the next step by developers who sense Rehnquist's opinion in *Nollan* as restricting what a city may demand, and hence probably leading cities to be disinclined to grant approvals because they are limited in what they may demand in return from developers. Instead of the city making the demand, why does the developer not make a "voluntary" proffer of a gift? Must there be a nexus if there is a written offer? At the extreme, imagine a developer who requests a rezoning so that he can construct a 500,000 square foot shopping center. He offers the city a piece of the equity, say ten percent. The developers understand the financial bind the cities are experiencing. Would not the temptation to be an entrepreneur be overwhelming? The problems raised by this prospect are formidable. Will the city turn down a later application for a competing shopping center? Does this raise an alleged selling of the police power and probable loss of the city's ability to be responsible for the health, safety and general welfare of its constituents? In short, can a city be both a regulator and an entrepreneur?

A similar case arose in New York City in 1987.[13] The City decided to sell the Coliseum site—consisting of about two blocks at Columbus circle—when the Javits Convention Center was built.[14] They invited bids and Boston Properties was awarded the sale on a bid of about $455.1 million.[15] The contract required Boston Properties to apply for a bonus regarding floor area ratio (FAR), which it would receive if it

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> 'taking' or 'confiscatory.' Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric. . . .

Fred F. French Investing Co. v. City of New York, 39 N.Y. 2d 587, 594, 350 N.E. 2d 381, 385 (1976). *See also* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 208-214 (1984).

11. *See* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986), *reh'g denied*, 107 S. Ct. 22 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

12. 107 S. Ct. 2378 (1987).

13. Mun. Art Soc'y of New York v. City of New York, 522 N.Y.S.2d 800 (Sup. Ct. 1987).

14. *Id.* at 801.

15. *Id.* The City had paid approximately $2.1 million in 1952.

built a connection with an adjoining subway.[16] The twist in the contract was that if Boston Properties did *not* receive the bonus, the purchase price would be reduced by $57 million![17] The contract was with the City of New York; New York City granted the bonus.[18] Surprise! Boston Properties received the bonus and New York City pocketed $57 million.[19] The trial court labeled the deal as selling zoning and threw it out.[20] The case is being appealed.

A more thorough examination of that issue must be saved for another occasion. I merely want to indicate the response and rejoinder practices that are today occupying builders and cities. What will be next? We have resurrected laws of 1890[21]and decisions from 1922[22] in our litigation involving land use. Will the Alien and Sedition Acts be next? My interest is in a broader and more structural issue. Will any system of land use controls operate to minimize this vicious game playing? I believe that much of the problem lies in our system of land use controls which focuses on municipalities. If we were to widen the scope of the decisionmaking system, then the opportunity for "honest graft" (as it is called in Chicago) would be lessened.

Some experiments have been tried and most of them have failed. Certainly, the joint city-county plan commission is not the answer. Such a body is still accountable to two legislatures—the city council and the county board of supervisors—and in its deliberations each constituent lets the other decide those matters attesting it, leaving only moral suasion to work.

Under the inducement of the federal government in the late sixties, many regional agencies, known as Councils of Governments (COGS), were established.[23] They were designed to plan for a region, say, the metropolitan area of Chicago, and plan they did; the problem was they had no power to implement the plan except what little power was given to them through the A-95 program of the federal government.[24] We have tried these federations twice in this country in the last two hundred years and each trial has failed.[25] I see no reason why we should expect such a system to work in the field. I served on a COGS

16. *Id.*
17. *Id.* at 802.
18. *Id.*
19. *Id.*
20. *Id.* at 804.
21. The Sherman Act, 15 U.S.C. §§ 1-7 (1982).
22. *Mahon*, 260 U.S. 393 (1922).
23. R. BABCOCK, BILLBOARDS, GLASS HOUSES AND THE LAW 20 (1977).
24. *Id.* at 16.
25. *Id.* at 20.

in the Chicago area and everything went swimmingly well until it came to dealing with low and moderate income housing or locating a landfill. Then it was NIMBY (Not In My Backyard) with a vengeance. No more should have been expected: a majority of the members were appointed by their respective counties or the city of Chicago. Members felt primarily accountable to their respective constituencies.

A few metropolitan areas tried a different tactic, the consolidation of the city with the surrounding county: Jacksonville and Duval County, Florida; Indianapolis and Marion County, Indiana; Nashville and Davidson County, Tennessee. These efforts were intended to bring a wider consensus to decisionmaking and reduce costs, but they did not always work and at times they were done for the wrong reasons, for example, to bring a white majority to the municipal elections, (which may be why Atlanta, with its black electorate, has consistently opposed consolidation with Dekalb County). The problem with such a solution is that it simply pushes growth beyond the edges of the county boundaries. And, as we shall see with Nashville-Davidson County, there are additional headaches.

I cannot overlook state-established regional commissions such as the Adirondak State Park, New York; the Pinelands, New Jersey; the California Coastal Commission; or that unfortunate misalliance between Nevada and California, the Lake Tahoe Commission. For the most part, these areas were made up of small hamlets, second homes or cranberry farmers, and they had little clout in the state legislatures, where vast open spaces had few votes compared to the overwhelming metropolitan areas of those states. The possible exception is the Hackensack Meadowlands across the Hudson from Manhattan. At one time, the Hackensack Meadowlands was one of the world's largest pig-raising areas because much of Manhattan's garbage was dumped there under the careful supervision of the Mafia (so it is said). That area may have been metropolitan, but it was no one's Valentine and it was with little difficulty that the legislature created a commission to control its three county development.

Unfortunately, the real land use crisis is in our metro areas, and the basic problem is not so much land use as it is the infrastructure intended to serve those land users. If that statement is a bit circular, I am the first to acknowledge that circumstance. Typically the problem does not affect only one city nor one county, but a cluster of metropolitan counties. I refer to our crisis in sewer, water, transportation and solid waste disposal. These problems do not respect, nor honor, city or county boundaries. If Indianapolis and Marion County merge, growth simply leaps beyond the county's boundary. When Nashville

and Davidson County merge, the "collar" counties[26] must endure the residential growth, as the highways into Nashville in the morning hours resemble the Dan Ryan or the Kennedy Expressways into Chicago.

Some form of metropolitan control over the *functional* services is required. Give me control over sewer, water and roads, and I will be happy to leave to you the endless jousts over neighborhood zoning. We all know growth follows the availability of the infrastructure. There is only one metropolitan area in this country that has adopted such a system—that is the Minneapolis-St. Paul area—and this year it celebrates its twentieth anniversary. The regional organization, known as the Metropolitan Council of the Twin Cities Area (Metro Council), exercises jurisdiction over seven counties. [27] There has always been strong local municipal resistance to attempts to shift responsibility for governance to a higher level of government. Metro Council has succeeded in doing this without seriously altering the powers of local governments.

The most crucial problems in the Twin Cities area were sewer and transportation. The 1967 Act[28] created the Metropolitan Transit Commission[29] (MTC) and gave it power to acquire the facilities of the privately owned Twin Cities bus lines and to develop and operate a transit system[30] in the seven counties.[31] The MTC budget and plans are subject to approval of the Metro Council.[32]

In 1969, a sewer law was passed which authorized the Metro Council to develop a comprehensive plan for a regional disposal system.[33] A sewer board, the Metropolitan Waste Control Commission, was established as an operating subsidiary of the Metro Council.[34] Gradually, as the legislature has shown increasing confidence in the Council, its authority has been enlarged.[35] In 1976, it received authority to suspend, for one year, developments in the seven county area deemed to be of metropolitan significance,[36] not unlike the Florida system. Also in that

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26. Cheatham, Robertson, Sumner, Wilson, Rutherford, Williamson, and Dickson counties. 112 COMMERCIAL ATLAS & MARKETING GUIDE 194 (Rand McNally & Co. 1981).

27. MINN. STAT. ANN. § 473.123(1) (West 1977).

28. *Id.* at § 473.01.

29. *Id.* at § 473.404.

33. *Id.* at § 473.405(1)(b).

31. Ramsey, Dakota, Scott, Hennepin, Anoka, Washington, and Carver counties. *Id.* at § 473.403.

32. *Id.* at § 473.163(2).

33. *Id.* at § 473.149(1). *See also id.* at § 513.

34. *Id.* at § 473.503.

35. *Id.* at § 473.181. *See also* MINN. STAT. ANN. § 473.181 (West 1988).

36. *Id.* at § 473.173(4)(2) (suspension is removed if conditions are incorporated or are in compliance).

year, the legislature gave the Metro Council authority to prepare a plan for collecting and processing solid and hazardous waste[37] The 1976 Waste Act also assigned the implementation of the plan to the seven counties and authorized the Council to finance the counties' acquisition of landfills through the use of regional bonds.[38] Other powers were also gradually assigned to the Council between 1969 and 1986.[39]

Perhaps the most important aspect of the Metro Council is that its membership is appointed by the Governor of Minnesota.[40] The members do not have to look over their respective shoulders to see if local constituents approve of their actions. At least twice, efforts have been made in the state legislature to elect the members of the Metro Council, and each time these attempts have failed.

Metro's budget in 1986 was $12,261,000 based upon a levy on all property in the seven counties, limited to eight-thirtieths of one mill on each dollar of assessed valuation of all taxable property.[41] The operating subsidiaries of the Metro Council depend upon fees, grants from the legislature, and bonding power, all of which must be approved by the Metro Council.[42]

There have been tensions on the Council, both with the operating agencies and with the external agencies. Professor Arthur Naftalin states in his book:

> Few government bodies are as vulnerable to external demands and pressures as is the Council. It is in a constant struggle for its soul. At any moment the governor, a legislator, a state agency head, a municipal or county official, a federal bureaucrat or a citizens group can place the chair and/or the Council in the line of fire. Lacking a defined political constituency, it is always in a state of jeopardy, being challenged and constrained by at least five external relationships: 1) the governor, 2) the legislature, 3) the federal government, 4) local governments and 5) special interests and the general public.[43]

There is one important fact. For such a concept to get started, it is essential to get the support of some officials of the collar counties.

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37. *Id.* at § 473.149(1). *See also id.* at § 473.803(1). In 1980, authority over hazardous waste was transferred to a statewide board.

38. *Id.* at § 473.811(2).

39. *Id.* at § 473.181. *See also* MINN. STAT. ANN. § 473.181 (West 1988).

40. *Id.* at § 473.123(3).

41. *Id.* at § 473.249.

42. *See id.* at § 473.163(2).

43. A. NAFTALIN, MAKING ONE COMMUNITY OUT OF MANY 45-53 (1986).

Naftalin states, "[i]t was the critical support of key municipal officials that ultimately made the Council politically feasible."[44]

The Twin-Cities Metro Council is an operation that should be examined by other metropolitan areas, but with caution. The seven-county area in Minnesota contains about one-half of the four million population of the State;[45] it has a population that is ninety-five percent Caucasian;[46] the area has many home-based corporations;[47] and it has two central cities.[48] There is now a single urban imperialist colossus "about to engulf its neighbors."[49]

One other metropolitan area is examining the Minneapolis-St. Paul metro system. Or, I should say, at least one other organization is looking closely at the Metro Council. That organization is the Greater Nashville, Tennessee Chamber of Commerce. The intriguing question is whether such a unique program of controlling regional infrastructure can be carried out in a southern state.

Certainly, the Nashville area could use it. Nashville was consolidated with Davidson county about twenty years ago in the belief that prospering economies would result. Unfortunately and perhaps predictably, growth did not stop at the county line. The Nashville metropolitan area is exploding. Nissan has a plant operating in one of the collar counties. The much publicized Saturn plant will be constructed in a nearby county and while General Motors may not yet know what kind of a car will be built there, it is in the process of laying a cement foundation one-half mile wide and four miles long.

There are seven collar counties in metropolitan Nashville and they all are suffering the consequences of uncontrolled and unplanned growth. Between 1970 and 1980 the Nashville-Davidson County population grew only 6.7%.[50] By contrast, surrounding counties each grew from 27.2% to 68.8%.[51] In 1976, the average tax rates of the surrounding counties was 3.88, whereas the tax rate for Nashville was 4.44.[52] In 1986, the tax rates decreased to 3.64 and 2.89, respectively.[53] The ratio of debt to assessed value of real estate was substantially

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44. *Id.* at 49.
45. *Id.* at 7.
46. *Id.* at 5.
47. *Id.* at 6.
48. *Id.* at 7.
49. *Id.*
50. TENNESSEE ASSOCIATION OF BUSINESS, ANNUAL SURVEY OF STATE AND LOCAL GOVERNMENT IN TENNESSEE 29 (November 1, 1987) (a copy of this survey is available from the Tennessee Association of Business, 222 Capitol Blvd., Ste. 200, Nashville, TN 37213).
51. *Id.*
52. *Id.* at 40-41.
53. *Id.*

higher in the surrounding counties than in Davidson,[54] as was the amount of property tax allocated to debt service.[55]

It is apparent from the foregoing that the collar counties were the ones in trouble, but the trouble does not stop there. Sewer service and water are serious problems in a number of the collar counties. Nashville has the Cumberland River, but its water company is already selling that resource to some of the outlying counties. Much the same can be said for sewer, solid waste and public transportation. Clearly, something drastic needs to be done. I proposed to the Chamber last fall that a functional metropolitan planning and implementation system be established to control the infrastructure in the seven counties.

The attitude of government officials towards such a system is, as expected, mixed. An official in one of the collar counties put it this way: "We're part of Davidson County, like it or not."[56] Another official from a different county said: "When I hear talk of regional planning, I think it's a Davidson County plot."[57] A mayor in a third collar county said: "When Davidson County sneezes, we all catch a cold."[58]

These views represent a composite of the attitudes of most of the surrounding counties. They will probably acknowledge the need for some form of functional regional planning with power to implement, but are anxious to preserve the local autonomy. The attractive feature of some form of functional regional planning is that it deals with matters that are of regional influence, are beyond the resources or the jurisdiction of each municipality and county, and leaves to each locality issues of greatest concern to its residents, namely zoning, subdivisions, police and fire. I do not suggest a regional agency undertake all of these programs at once. The counties may believe one is most crucial and the agency should start slowly and demonstrate the ability to plan and implement fairly and with financial responsibility.

There are dozens of other metro areas such as Phoenix, Houston, St. Louis, Tampa and Fort Lauderdale that require the same inquiry. Perhaps the crisis will become so severe that we will put aside our intrametropolitan political rivalries and do something about it.

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54. *Id.* at 55-56.
55. *Id.* at 42-43.
56. Interview conducted by the author (name of official withheld at the author's request).
57. Interview conducted by the author (name of official withheld at the author's request).
58. Interview conducted by the author (name of official withheld at the author's request).