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R. Marlin Smith

William M. Eichbaum Jr.

John M. Hyson

Daniel J. Snyder III

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ENVIRONMENTAL CONTROL: GUIDE OR ROADBLOCK TO LAND DEVELOPMENT?

I. AFTERNOON PANEL DISCUSSION

PROFESSOR DOWD: It is our custom at the afternoon session to invite statements from those of you who have been invited as special guests of the Law Review. Some of you have expertise and some of you may wish to make brief comments. At this evening's session we will have an opportunity to have a go-around between the panel and I expect a few disagreements. But if there is anyone who has come and would now like to shed a little more light on the subject, we welcome your comments.

QUESTION: Since you were talking about development and reasonable growth, would you consider almost doubling the population of a whole township on $1\frac{1}{3}$ square miles reasonable?

MR. SMITH: I think that depends on how many people you have to accommodate. If you have to accommodate that many then the population may have to double.

QUESTION: But, on $1\frac{1}{3}$ square miles?

MR. SMITH: I have never been one who has gotten too upset about density. It is a question, I think, of how you handle the development project, how you design it, and how you deal with the necessary incidents of developments, such as traffic. In many respects I think I sympathize with Frank Lloyd Wright, who would have preferred to stack everybody up in a mile-high building with plenty of green around it. I think there is as much to be said for that method as there is for sprawling little houses, little envelopes spread out over the acreage.

MR. BOWSER: I think we must always be concerned that to some extent the protection of existing densities is really a ratification of previous inequities. Where people feel that they have a right to exclude on the basis of density, what they are really saying is that they also have a right to confine other people in high density areas. It is not just a question of whether there will be a significant increase in population in a specific geographic area; we must also consider the effect such an increase will have on people in other areas. If we each take the position that municipalities are entitled to maintain their present densities, we are necessarily taking a position that confines

COMMENT: I would like to make one point. When people express the amount of new growth in percentages of what there is now, they are speaking to the effectiveness of prior exclusion. Although history is a little bit vague in recalling it, Adam is said to have spoken of Eve as a 100% increase. One additional comment: *Petaluma*¹ was not at all like *Ramapo*.² *Petaluma* had a very different twist to it. *Petaluma* said it would provide for 500 homes a year, and that, after all builders had submitted their plans, the city would choose the 500 to be built. If you want a system which by definition is inherently exclusionary that is it.

COMMENT: I would like to address myself to the topic of regionalization and regional control as mentioned by several of the speakers, and a conflict in that discussion by the representative of the Environmental Protection Agency, Mr. Snyder. I will address myself to the specific case of water quality regulation in Pennsylvania. We have the EPA, the state, and regional organizations, all with their own sets of regulations for water quality and for the amount of pollution allowed in any discharge. Local communities or private industries attempting to develop a particular area must satisfy this regulatory panoply. The federal government says it will not interfere with standards set at the local level as long as these standards are stricter than their own. In Pennsylvania, our regional organization has stricter standards than the state. The interplay and overlap of these various regulations make any attempt to comply with them a very confusing ordeal. Effective planning will be greatly facilitated by streamlining the myriad regulatory schemes now in existence.

QUESTION: Basically, it seems to me that permeating the entire discussion is a central thought — regionalization in the environmental area. However, it seems this is also going to have, in the near future, a very direct effect on zoning. I think zoning and environmental concern are so intertwined that they cannot be separated. I was wondering what some of the members of the panel think will be the future effect of regionalization on the zoning now done by townships and local municipalities.

MR. EICHBAUM: I tried to touch on this a little bit. I think what I tried to indicate was that there are legal mechanisms at a variety of levels to do regional and comprehensive planning. A good example with which I am familiar is Bucks County where you have a plan

1. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974).

2. *Goldfarb v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

developed with the assistance of the Delaware Valley Regional Planning Commission. Bucks County has gone down to the township level and tried to get the townships to develop the plan in greater detail. This is the kind of coordinated planning process in which reasonable values are represented. I think the impact of this will be that the planning process will become a control on the zoning, subdivision or PRD decisions that are made by the municipality. It is important to recognize that the Pennsylvania zoning cases decided by Justice Roberts in the last 4 or 5 years are very clearly limited to narrow factual situations where there was no real planning, where there was obviously no environmental problem, and where the purpose of the zoning regulations was exclusionary. Justice Roberts notes in dicta that zoning must relate to appropriate uses of the land, that a 4-acre zoning is not invalid per se, and, in a footnote in one of the later cases, that a moratorium on the issuing of building permits may be valid. You are going to see a real shift in the next few years in the pattern of planning in Pennsylvania. This change will be welcome because it will result in much more predictability about what can and cannot be done.

MR. BOWSER: I don't place much credence in permanent mechanical rules for environmental control because I think we are currently going through the experimental stage. Eventually we are going to have national policies as significant as the United States Supreme Court's decision which struck down federal aid to segregated schools. There is no effective regional or local method to create these policies. It was regrettable that the President avoided the initial step in this direction by rejecting the so-called "Urban Growth Plan." Ultimately we will have, either as a result of a United States Supreme Court decision or legislative enactments, a superseding national policy which will take us beyond the present, unworkable, planning patchwork and make planning a matter of applying one uniform law.

MR. EICHBAUM: Present methods are not going to work because nobody is going to provide funds. We can create all the plans we want, with areas for housing and various densities, but they are not going to be funded.

MR. BOWSER: That is not the reason. It is not a lack of money. It is, as someone else said, political considerations. I have attended suburban fair housing conferences where all the commissioners said, "O.K., we're for it. We'll vote for your housing. Who wants his subdivision to be first?" Nobody raised his hand! This was a fair housing conference! You have to recognize that there are

lem. You should never believe that funding is the real problem in America. Just remember our response to Sputnik. I just think that no one will overcome the social and political forces. If the Supreme Court hadn't said separate but equal will not suffice, we would still be playing around with regional educational considerations.

PROFESSOR DOWD: We have time for one more question.

QUESTION: I wanted to call attention to the fact that we have much more planning and much more material that is somehow ignored in these discussions. All counties have sewer plans, and Chester County has more than enough land in our sewered area to satisfy the need of our projected future population. We are processing subdivisions, and we are actually processing in reserve far more land than we think we are going to need. Our big problem at the county planning level is that the builders are not building in the sewered areas, but are building PRD's in a random pattern all over the county wherever anybody wants to sell a farm. This gives us real worries about transportation and roads. Obviously, the builders are going to be attracted to the cheaper land, but we must get the builders to build in the sewered areas. I have, therefore, one question for the panel: Assuming we provide enough housing opportunities for everyone, how do we get the builders to build in the right places?

PROFESSOR HYSON: I would like to respond to that. The gentleman from Chester County has made a very good point. It is very interesting that one of the most recent cases in Pennsylvania, *Willistown Township v. Chesterdale Farms, Inc.*,³ involved a Chester County development. In this case, a developer attempted to construct luxury apartments in a part of the township which was not zoned for development. He went to court, successfully at the trial level, and convinced the judge that the Township of Williston was involved in exclusionary zoning. Less than 1% of the total land in the township was zoned for apartments. Now assume for a moment that this constitutes exclusionary zoning. The question then becomes what relief should be granted? There are two possibilities. A permit could be issued to the developer who successfully attacked the ordinance as exclusionary; the apartment will then be built in what may be, at least in the township's view, an undesirable location. In fact, a good argument was made by the Township of Willistown that this was not the best place for an apartment development. On the other hand, if the court does not order a permit to be issued, and, instead, tells the Township of Willistown to go back to the drawing board and come up with

a non-exclusionary ordinance that provides enough apartment development, I think one could be fairly certain that this particular developer will not have his land rezoned for apartment use. This is what happened in the *Girsch*⁴ case when Nether Providence finally enacted a new ordinance. Somebody other than Mr. Girsch had his land rezoned for apartment development. If this is the relief that is granted, what incentive does a developer have to attack the constitutionality of the zoning ordinance? It seems to me the Supreme Court of Pennsylvania has put itself in a bind. It has decided that a permit should issue with the end result that when a zoning ordinance is found to be exclusionary, apartments or whatever the particular development may be will be built wherever the developer chooses. The best laid plans of the planners will just be ignored.

MR. SMITH: Let me leave one question with our friend from Chester County, and maybe he can come back this evening and be prepared to answer it: How do we know where the right place is?

PROFESSOR DOWD: I am afraid it is time to conclude this afternoon's discussion. Thank you for being with us, and we look forward to seeing you again this evening.

II. EVENING PANEL DISCUSSION

PROFESSOR DOWD: Welcome to this open meeting of the Tenth Annual Villanova Law Review Symposium. As some of you who have attended any of the previous symposia conducted by the Law Review may know, in the afternoon we have a series of papers presented to an audience for their reactions, and in this, the evening session, we usually have a rather heated discussion about what happened in the afternoon.

The topic for this year's Law Review Symposium is *Environmental Control: Guide or Roadblock to Land Development?* We had this afternoon and we have with us this evening a number of different points of view in relation to this problem. Later, we will ask the panel to field questions from the audience, but let us begin this session by turning to each panel member for his reactions to this afternoon's presentations and the discussion period which followed.

MR. BOWSER: I would like to reemphasize something that I thought was important. There were at least two national studies, the so-called Douglas Report and the Kaiser Report, which reached the same conclusion, although they were conducted independently.

They both concluded that it is local governments that erect the barriers that exclude the underclass from non-urban areas and confine them to the inner cities.

I am concerned that if we leave the power to make the final determination on environmental control at the local level, this propensity to exclude will increase.

MR. EICHBAUM: I would like to make two points. First, I will attempt to elaborate on a discussion which I had with Mr. Weiner before dinner. Many of the questions about the relationship between the environment and controls are raised in a context where you have people who want to exclude other people, or people who want to do particular kinds of development, and maybe some of the real issues become obscured. I would submit that it is important to grapple with this question: To what extent does the natural environment impose restraints on human activity which we must view as fundamental limits upon how we resolve the social and economic problems with which we are attempting to deal? We have to answer that question or at least recognize that it is a real problem, and we must deal with it as we move toward resolving the other problems.

Second, in Pennsylvania we clearly need a better kind of planning than we've had in the past. This fact was developed in the discussion between Mr. Smith and Mr. Weiner. Two fatal defects of past planning have been that it has not had a sufficiently broad regional approach, and that it has not been sufficiently based in real facts either about our economic and social condition or about our environmental condition. One of the efforts in Pennsylvania which I hope will be philosophically and financially supported by both the state and federal government, and legally supported by article I, section 27, of the Pennsylvania Constitution — the Environmental Rights Amendment — is one in which we will institute a program of planning that recognizes the fundamental limits of the stage that the environment sets for the resolution of our immediate problems.

MR. SNYDER: I would like to mention something that Mr. Eichbaum and I also discussed. It is our concern that talking about environment in the broadest sense can obscure one of the key issues: environmental degradation, a term which encompasses injuries to the air, the water, and the land. I feel this must be given primary consideration in the land use planning process. Certainly there are other important things to consider — the economic effect of the choices made and the social choices that go into arriving at a land use plan.

But both Bill and I work for environmental agencies, and we feel a

need to be advocates for the preservation and improvement of the physical environment. The environmental thrust is diminished and discounted in the marketplace, where solutions are more likely to emphasize economic and social values.

If environmental agencies must also carefully weigh all decisions in terms of the economic and social effects, the physical environmental thrust will be further diminished. There will then be no advocate in the marketplace for the preservation of the physical environment. When one undertakes some kind of enforcement action or advocates some kind of environmental improvement, one is often asked the question: What are a few fish when valued against a given number of jobs and so many millions of dollars in economic benefit to a given area? But environmental preservation or improvement will always come out on the light side of the scale because the damage to the physical environment is almost impossible to quantify in financial terms. Frankly, we just do not know enough about the effects of our actions on nature. If my four years with EPA have convinced me of anything, it is that we probably are erring on the side of not doing enough to protect the environment, rather than on the side of doing too much.

MR. WEINER: Let me deal first with the question of "green." Yes, green is a very important color. However, it seems to me that in a discussion of the environment there is a tendency to talk constantly about value judgments and to assume that the value judgments of those of us in the private sector are necessarily limited to the short-range green.

If it makes anybody feel happier, we won't talk about profit, we'll talk about rewards or benefits. It's not profit, it's your pay check from the government or from a university or a fee from a client. With attorneys you don't talk about profits, you talk about fees. Sometimes we get hung up on that. My rewards are called "profits." I think the government taxes them pretty much the same way.

The tax loopholes — which I think ought to be closed up — are expressions of social policy. But, "green" is a delightful word and for those of you who weren't here this afternoon I ought to qualify my remarks by pointing out that my wife is an organic farmer and that I have a deep attachment to the other kind of green as well. However, my use of the term "green bigot" means precisely what it says, and I did not address it to anybody on the panel because I do not think any of us has that kind of approach to the problem. If you know anyone with that approach, you know whether the term fits or not.

There seems to be a continual stress on conflicts or differences of approach to the problems which exist between people in my business and those who call themselves environmentalists. I concede the fact that I am not an environmentalist by definition, although I make it clear that I am not an anti-environmentalist. As a developer and builder and a provider of shelter and communities I have a very serious role in creating environments in the narrower sense of the word, and a grave responsibility for the development's impact on the broader environment as well. I'm perfectly willing to say I am not an environmentalist in the narrow sense of the word. Now, recognizing that, I must say — and I don't want to get philosophical or theological about this — that when we talk about human settlement and the environment, we are trying to preserve or develop our natural and physical resources as they relate to human beings.

I think this is the fundamental starting point. I love the trees and the flowers because of what they do to me as a person, as a human being. Therefore, when we talk about the limits of the natural environment as the major determinant, or the only determinant, then I must say that Philadelphia is a lousy place to live, and Villanova stinks, and I will tell you the reason. It requires the use of important natural resources like fossil fuel to heat your house here, as compared to living in California where you would consume a mere 10 percent of the natural resources needed to live here. From a narrow environmental viewpoint, I would say that living in this whole section of the country is an adverse influence on the environment and that we ought to start from scratch in a different locale. I'm willing, but I don't know how many of you are. The only problem is that I have not figured out how to do it. It is not that simple.

Given the constraints of human development and settlement, as well as the limitations of comprehensive planning, and viewing it simply in its narrow, physical sense, without taking into consideration all of the social and economic relationships, I would say that I have a deep respect for the limits of the natural environment. We have long neglected considering these limits in making our decisions. I think the time has come, when advocates for the environment, even if they go to extremes in making their points, are desirable and important, because if we had not had the strong push and the strong advocacy of the last 18 years, our present consciousness of the problem would not exist.

However, the real problem is that the time has come to balance the total environment against the nation's overall objectives, and this balance is a matter of priorities. Clean air is important, but when

someone has to make the judgment, because children are starving and being bitten by rats in a slum community, as to whether to have clean air or food for the children and an anti-rat program, where and how is that decision to be made?

The answer to the problem is not in pitting one against the other, but in arriving at balances and making the changes needed to correct deficiencies and violations.

MR. SMITH: I have always thought of myself as a conservationist and environmentalist. Mr. Weiner announced earlier that he had been a member of the Sierra Club. I should point out that I am a practicing member of the Wilderness Society who spends such time as I can find camping and paddling a canoe around the waters of Minnesota. But I think the minute we start talking about environmental considerations as those involving physical degradation to water, air or land, we have loaded the question. In fact, we have begged the question. It's not so much a question of whether we are degrading the environment, but whether we are using it wisely. We have a highly complex civilization, and unless you are all going to join me out there in my tent by the water, we certainly will have an impact on our environment. Even out there in the tent we have an impact because we still build fires to keep warm at night, and we carry a trenching tool along, for obvious purposes.

It is one thing to talk about discharges that destroy the quality of water or make the air unfit to breathe, or about uses of land that render it thereafter unusable, such as strip mining, which turns over the topsoil and buries it 75 feet beneath a mound of dirt on which nothing can grow for years. Clearly, we may define this as degradation. But is it degradation of the land to talk about using it wisely to build housing, to build commercial facilities, or to build industrial establishments? In the past, we always talked about whether land was improved or unimproved. Improved land was defined as land that had structures on it. So I don't think it is meaningful to talk about wise uses of the land as physically degrading, even though, quite clearly, a subdivision is not as natural a use of land as a cornfield.

I would like to make one more observation. In many respects, what we are really talking about is not so much how land should be used and developed, but who is going to bear the cost of implementing the particular social policies involved. If what we want is open space and greenery for people's aesthetic enjoyment, then it is appropriate to insist that the financial burden of providing that open space be borne by the public generally. Too frequently, however, the cost that should

properly be public is shifted onto the private landowner through the simple device of telling him: "You can't use your land." I simply ask: Is that fair? Should we not, in those circumstances, say that if you cannot use the land, then the public ought to buy it.

PROFESSOR HYSON: I'd like to follow up on one point just made by Mr. Smith. In the course of a seminar that we had at the Law School this fall, an attorney spoke about this question of whether we should attempt to preserve open space by preventing the owner of the land from developing it. He said that at a public hearing, in response to points made by people who opposed the development, he had said: If you want open space, go out and buy it. If you want several acres of open space in this particular community, go out and purchase it, but do not tell me that I may not develop on my land, when you have developed on your land. I think this raises the question of just how far environmental controls can legally go before they become not merely unfair, but unconstitutional. The use of environmental controls to prevent real, observable, readily acceptable harm, such as development on flood plains or wetlands, is one thing. But what of the use of environmental control simply to preserve open space, when the environmental consideration comes very close to being an aesthetic consideration, desired to preserve a certain kind of very pleasant rural atmosphere?

However, the atmosphere or environment is being preserved at a particularly heavy cost to the particular landowner, who is being told that in order for the rest of the community to enjoy the beauty of his land, *he* will have to pay the cost. I think this goes to the question of the allocation of the burden of preserving the environment mentioned by Mr. Smith. If this is to be done, it seems as though it should be done by purchasing the land from that particular landowner, perhaps with public money — an idea which in itself may raise some questions as to whether public money can be used to preserve open space and thereby restrict the land that is available for development. But even assuming that this can be done, a non-compensatory regulation for the purpose of preserving a certain aesthetic environment is highly questionable constitutionally.

PROFESSOR DOWD: Now we are going to get some further responses.

MR. SNYDER: I would like to speak now as a lawyer or a professor of environmental law instead of as an official with the EPA. I think we are missing a big point in this "taking" issue, and that is the whole element of economics connected with land development.

The value of land is determined by its utility. A zoning change can increase the value of land fourfold, tenfold, fifteenfold, or even more. Essentially, the cost of high density development must be prefinanced by the taxpayers who live in the area. In other words, additional school space, transit facilities, street sewerage, and the like must be provided. To speak solely in terms of the preservation of existing zoning as some kind of "taking" without due process of law is, I think, simplistic, for it ignores the tremendous economic advantage which may accrue simply as a result of a zoning change. A change in the zoning, that is the utility, of a particular piece of land may often-times increase the value of the land disproportionately, making it many, many times more valuable.

PROFESSOR DOWD: Is there any response from the panel?

MR. WEINER: Just a question. What would you suggest as an alternative?

MR. SNYDER: When someone goes for a zoning change they are posing an alternative. The alternative is an increase in the density of that particular land as well as an increase in the value of the land. The alternative is not one which I must select; it is an alternative that someone else must select.

MR. EICHBAUM: I wanted to ask Mr. Smith something. I will give the background. Recently, there was a decision in the United States District Court for the Northern District of California in which the court reviewed the constitutionality of a comprehensive plan for the town of Petaluma.⁵ The judge found the plan unconstitutional, as I understand it, because any kind of a plan which in some way restricts the right of a citizen from somewhere else to move into a town restricts that citizen's right to travel.

Unfortunately, the decision makes sense to me. However, it raises the specter of using that same rationale to void any plan which provides for orderly, sequential development. How can you do meaningful planning with that decision?

MR. SMITH: First, the decision does not attempt to prevent Petaluma or any other municipality from engaging in traditional land-use planning. Indeed, it may compel more of it. One of the real problems has been the lack of genuine land use planning.

Mr. Snyder pointed out that zoning changes can increase the value of land enormously, and that is quite true, especially where there

has been *no* planning, and one is dealing with an area which is a blank slate so that no one knows what will happen. But if there has been an adequate and satisfactory planning process which took full account of *all* needs — not just those of the particular community but also the needs that impinge upon it from outside the community — then irrespective of what the particular zoning regulations require, the plan gives you a reasonable idea of the municipality's anticipated future growth. This in itself will have some impact upon the value of land.

Turn it around the other way: If one were to take a piece of land, as the community of Thousand Oaks, California did, and designate it as a site to be acquired for a future park, that action would have a tremendously depressant effect on the value of that property, because nobody wants to buy a piece of land that is simply going to get them a share of a condemnation award. Thus, planning can work both ways. Central to the problem is the need for planning which takes into account all the needs of the broad region. Too many present plans do not. Too many of them stop at the municipal limits.

MR. EICHBAUM: Some of the counties and municipalities in this area are developing plans that start out with population projections made by a 5-county, regional planning entity. They say, "We'll take this slug of population in our county and distribute it around on a percentage or pro rata basis in relation to existing population densities; then we'll take a look at our environmental restraints and jiggle them around a bit." Do you think that kind of "plan" would stand up to the test?

MR. SMITH: It did. The tension is between the Ramapo and the Petaluma solutions. Petaluma's planning, as I understand it, was nowhere near as careful as Ramapo's. The problem in the *Ramapo*⁶ case was that they were really dealing with an area too small to make a sensible planning unit. If you took Ramapo's approach and applied it regionwide, you would feel much more secure that genuine planning was involved instead of only an elaborate yet subtle attempt to lock the door.

MR. EICHBAUM: I had heard that the Petaluma idea had been one of the best planning efforts in California. That rumor was one of my reasons for great fear.

MR. SMITH: Is that a comment on California or on planning?

MR. EICHBAUM: Maybe on planners.

MR. WEINER: Before you open the discussion to the floor: I had asked Mr. Snyder a question about alternatives. Mr. Smith answered it in part. Perhaps I can carry it one step further. Just as I object to moratoria or bans on anything because to simply "stop the world till we get it cleaned up" is to offer no real solution, so do I also object to a critic who does not have some alternate proposal or solution to the problem.

I think Mr. Smith began to lay the groundwork for a situation where the simple process of an unfair incremental increase in the evaluation of a piece of land can be averted. The fact remains that there is a tremendous scarcity of land either planned or zoned to meet our population needs. You've got to start with that assumption.

In Chester County, they are now taking a poll which asks "Do you want growth?" I saw one of the questionnaires because I live in Chester County. Now, who is going to say "Yes"? Very few. Perhaps a few Chamber of Commerce types or a few developers. Very few others would indicate in a referendum that they want growth. The same poll then asks, "What kind of growth would you like": Middle density? high density? and a whole series of other questions, all completely loaded. Every community that I know of that does planning is concerned about limiting growth. I quote from President Nixon's message to the Congress last September when he labeled land use as "perhaps the most pressing environmental issue before the nation." He endorsed the development of local control over land use decisions, stating, "Local responsive leaders [and you know what a local responsive leader is, don't you?] are most likely to understand the choices that have to be made." He went on to say, "Through such actions as sewer moratoriums and bans on building permits, communities in all parts of the country are taking steps to place limits on their growth." And he lauded this process in his report.

This type of planning avoids addressing the problem. The fact remains that where land is zoned for high density use — and I am not using "high density" as a dirty word; I am using it in the sense that I think all of us here would accept — it can be made to be good land use, effective land use, with real consideration for natural constraints. We would also agree that land should not be so scarce as to create an economic impossibility, and that it should be used to provide housing not only for low-, not only for modest-, not only for lower-mo-dest-, but for middle- and even, in some communities, for what might be called upper-middle-income families, which are now being excluded because of the scarcity of land, and because when you do get

it zoned — and I am assuming you do it lawfully — the price is increased unduly.

One problem is that it is misleading to talk simply in terms of a percentage of a community's present situation when measuring the regional effect of a "big slug of growth." As somebody pointed out earlier today, it would be a 100 percent increase if there had been a density of one person per 10 square miles, and that was increased to two persons for every 10 square miles — this is not really the kind of growth relationship that makes sense in terms of the needs in the area.

Secondly, one cannot speak solely in terms of environmental constraints. If one is planning for a total area, there must be a balancing of environmental considerations against those of a social and economic nature. If comprehensive planning means planning sufficiently ahead so that we provide maximum opportunities for freedom of choice to the majority of our citizens, then I submit that that type of planning will remove the pressure of the prohibitive land cost that we have seen generated. That is real, long-range, comprehensive planning.

Finally, there is this item. I will not name the planning firm that made this report, nor will I tell you in what community it happened, because that would not be fair. A planning firm said that it took into consideration the physical and natural environmental conditions, the social conditions, and the economic conditions in a report which manifestly showed a detailed analysis and consideration of all of the natural and physical conditions. When asked about the social conditions, however, it said, "We took a survey by sending a postcard to the existing residents in that given area to find out what they wanted." If that is the measure of the social determination, that is doing exactly what Mr. Bowser talked about: that is, perpetuating whatever system of exclusion existed before. That is simply saying, "That's what the people in that area want and that's what they will get."

I say to you: Do not work that way. Political boundaries — politically conceived and mechanically drawn around given pieces of land — are anathematic to effective planning in our modern, civilized, and highly affluent society. Incidentally, as far as economics are concerned, the answer is that it will take its natural course, whatever that means. The pressures of business in the marketplace will make the determination.

If we are to talk about real planning, we must talk about comprehensive planning in the full sense of the word "comprehensive." Finally, planning must not be construed as a negative influence but as a positive way of meeting the needs of our society.

MR. BOWSER: I would like to add one thing. The role of an environmental agency should be one of advocacy in the preservation of the physical and natural environment. I guess the implication there is that in an adversary relationship, these things will balance out. I suggest that if our environmental agencies, which are accumulating greater and greater power, actually assume that posture, they will end up preserving and protecting the existing good environments. But, by so doing, they would severely limit the opportunities for improving those environments which have been deteriorating for generations and have simply been ignored.

I would like to suggest that as difficult as it may be, the only legitimate approach to environmental protection, control, and development is one which does consider the total environment and does not limit itself to the physical and natural environments. In my view, that type of limitation could lead to some very severe restrictions.

MR. EICHBAUM: I would like to pick up on one point which relates to something that was said by Mr. Weiner. He made the comment that there is not enough land readily available or presently zoned to provide housing and other services. That is probably true if you look only at the vacant land. But we do have tremendous amounts of land in our urban and suburban areas which, by any criterion, is poorly utilized. This is certainly true in the core areas of the cities. There is a tremendous amount of work that could be done there. I think it would be a gross failure for a comprehensive planning process to look only to vacant land as the place to build our new housing, and not look, in the first instance, to the areas of our society which have available land traditionally used for housing.

Secondly, experience indicates that more people can live well in our cities than do now. I think the experience of some European cities indicates this. If there are reasonable restraints on the development of farm land in bucolic Chester County, for instance, then we should look to the areas we have already used and rebuild them. I think that is a more important issue if only from a social perspective.

MR. BOWSER: Oh, my! I really could not disagree more. What you are saying is that we are going to make it pleasant for people to stay where they are, when they have never had a chance to leave. That would be a very good argument if we were talking about a situation where everyone is there by choice. The fact of the matter — and I don't think anyone can dispute this — is that quite the opposite is true. Ninety percent of this nation's minorities (the most recent survey would bring it up to 95 percent, but let us be conservative),

upwards of 22 million people, are in place not by choice, but as a result of very severe restrictions. For you to come along now and say, "Rebuild where they are, so the cities will be nice and they will not come out here and disturb our farm land" — that just won't wash.

MR. EICHBAUM: I would counter that with two comments. First, it is clear that there must be a substantial amount of mobility and input of income on a reasonably distributed basis, if people are to be able to move to the housing where they would like to be. If the current gasoline crunch worsens and it is no longer possible to drive around in the suburbs from shopping center to hair parlor to job to vacation home, there are not going to be as many middle class suburban white folks wanting to live out there. There are many people who want to live in Philadelphia that are white and have money. So I agree. I do not think the underclass ought to be told that it has to stay in the city. But I do think we ought to make it a place where that is at least a rational choice that anybody could make. I live in the city of Philadelphia and—

MR. BOWSER: But doesn't that clash with the environmental restraints in — as you put it — "bucolic Chester County"? Whether restraints are reasonable would depend upon whether they limit access. So you have contradictory statements here. You say we ought to have access for people to move out, but if there is a reasonable restraint, they can not.

MR. EICHBAUM: I recognize that after what has been said about the problem of growth, we are going to have to move into some of these areas. I am suggesting, though, that a significant thrust ought to go into rebuilding our cities, because I think the evidence in most cities is that affluent people will move into the cities and stay there if there is a decent place to live.

I suggest that it is possible to achieve a balancing. I do not know for sure, but I would hate to see us abandon the cities, when some people say that civilization *is* the cities. If the sociologists are right about that, then we must preserve them.

PROFESSOR DOWD: May we have some questions from the floor now?

QUESTION: I'm a third-year student at Villanova Law School. I think we have been talking about some sort of Maginot line between the cities and the suburbs and the counties, when the real battle should be taking place in the large areas of vacant land where everybody, including minority groups, has a right to live. This is where second-

home developments and subdivisions are destroying everybody's rights. I would like to ask the panel how these vacant areas, adjoining parks, or just flood plains and wetlands can be protected for everybody's use?

MR. BOWSER: I do not know if they can. They can be protected, but not necessarily for everybody's use. The problem is one of accessibility. I became very unpopular in Philadelphia long before ecology was a national issue, because after looking at our very serious housing problems I suggested — even got a bill introduced in the legislature — that we build housing in Fairmount Park, the largest municipal park in the world. My idea was, rather than tear down neighborhoods and rebuild them, to create new parks. One of my arguments was that Fairmount Park is not readily available to all of the citizens of the city because of its location. There is a certain economic burden in using Fairmount Park. If you are a welfare mother with four children, the cost of public transportation to Fairmount Park represents a trade-off, perhaps for the cost of bread and milk. There are people in some sections of Philadelphia to whom Fairmount Park is not available, and by spreading the park around, it would be available to more people.

So the idea of parks and wilderness is a great idea, but you can not look at it without simultaneously looking at the question of accessibility. That is why I say I do not know if you can protect it, because I do not know if you would be protecting it for all people or only for those who find it economically accessible.

PROFESSOR HYSON: If I may follow up on that. There is a case right now that is wending its way up through the Pennsylvania courts. It involves the validity of the withholding of park funds by the Department of Community Affairs of the Commonwealth. Upper St. Clair Township is a high-income suburban community outside Pittsburgh. Secretary Wilcox of the Department of Community Affairs withheld money which Upper St. Clair was going to use to develop land as park land. Secretary Wilcox said he thought that since the state had a limited amount of park funds available to give to local governments to help them acquire park land and develop it, and considering the priorities — or what he considered to be the priorities — in allocating this money, that it was much more important that this park land go to communities which had a need for open space. He felt the funds should go to communities where there was very high density development and where more people would have access to the park lands, rather than to a community like Upper St. Clair, which

The case is now at the Commonwealth Court level and it is absolutely certain that there will be an attempt to bring it before the Supreme Court of Pennsylvania.

QUESTION: I would like to get back to the issue of urban development. As I understand the environmental regulations, they are set up to designate certain priority areas which coincide with the urban communities. A high priority area requires certain timetables to be met, but does this not in itself negate the redevelopment of the urban areas, since industry going into an urban area would have to meet a more stringent environmental standard than if they went into a lower priority area?

MR. EICHBAUM: That is wrong. The highest standards for treatment of water, for example, are for already clean water. Where you have good clean water that supports a wide variety of uses, you make the person who is going to discharge treat the most. Where you have the Delaware or the Schuylkill, you do not move as far, as fast. In fact, practically the reverse is true. You try to save what you have. If it is clean, you try to keep it that way. In the dirtiest areas, you try to lessen the pollution to some economically reasonable level.

On the air pollution side, any new source has to meet the same standards, no matter where it is located in the Commonwealth.

MR. BOWSER: I am a little disturbed by some of the allowances which were made because of the energy crisis. I think industry's answer is technology. As long as we delay in requiring industry to meet the standards, it will not meet them. If we begin to bend and twist and shuffle regulations, so that industry can avoid making the necessary technological improvements, it will oblige us and avoid making them because ecological research and development is a cost item which may not be too easily written off. If government subsidies are instituted, they will create a different situation. I believe this is an area where we ought to hold the line, because regulations are needed to motivate the research and development necessary for technological advancement. I think that shuffling the criteria and the standards around to accommodate industry would be wrong, even though I would like to get industry back into the city.

COMMENT: I think there is a misunderstanding of the way in which the zoning system operates. A comment was made about "zoning windfall." I suggest that the amount of zoning windfall is directly related to the degree of exclusion. The greater the monopoly created, the greater the profit brought to that municipality. Second,

I think the windfall concept presumes the validity of the original zoning, perhaps mistakenly. I think the mistake in that presumption is best demonstrated by a study I did of Delaware County. I discovered that 97 percent of the development that occurred over a 5 year period involved zoning changes. This can mean only that when one looks at a zoning map today, it may represent precisely the opposite of the pattern which will ultimately result. The concept of zoning for land use is not supported by history.

QUESTION: In Chester County, what a lot of people have been talking about is academic. If you go into the Recorder of Deeds' Office in any county, I think you will find that a great deal of land, thousands and thousands of acres, is purchased under various names by developers. They are the ones that create the zoning for themselves. Does that make any sense?

MR. SMITH: It makes no sense at all to me, because I never knew a developer who purchased land until he knew that he could get it rezoned. We routinely tell him that he'd better purchase contingent upon getting it rezoned or he'll lose his money.

QUESTION: I'm sure you are right. That is my point. How do developers get thousands and thousands of pieces of land that they know is going to be accessible?

MR. SMITH: But they don't. The usual procedure is for the developer to find a site of land that he thinks will make a good development. He finds out who owns the land and he goes to that individual and says, "I'll give you a thousand dollars for a 6-month option to buy the land, and during that 6 months we will try to get it rezoned. If I get it rezoned, I buy the land. If I do not, I walk away." He does not know what will happen.

MR. BOWSER: Mr. Smith, you may be under a disability, because you come from Illinois. In Pennsylvania there are other beneath-the-table considerations which may enter into that process.

MR. SMITH: Let me assure you that these things also happen in Illinois. In fact, we recently have been jailing those involved in such practices.

MR. WEINER: Let me deal with that idea for a moment. Any developer that I know, and having been President of the National Association of Builders, I know a fairly large number, who would buy land and acquire thousands and thousands of acres, would be an idiot. He will normally deal with it as if it were inventory that has

to be turned over and put into use in a very short time. There are "speculators" in land; but that, in most instances, is not synonymous with "developers." They may be buying hundreds of acres of land and making deals. It has not been unknown for a developer to make a deal with a local authority. This is what I referred to earlier as the corruption process which occurs when the supply of zoned land is inadequate to deal with growth. If there were adequate zoning and adequate planning, you would not have the scarcity that creates the corruption.

I think what is really important here is that our land use patterns have to be planned comprehensively. I do not think there is any argument about that at this table. But I think that the standards, policies, and the objectives in comprehensive planning have to be carefully understood in order to meet the greater social need.

And finally, while I've got the floor, on the question of the central city areas, I completely agree with Mr. Bowser. I am not sure that this offers any real solution to the other problem. On the other hand, I am a developer who has been building in the central city. I am involved in four or five urban renewal areas, and I have to use my suburban development to subsidize my profit in order to continue to do urban renewal work. This is simply because the marketplace for returning middle income or upper income families to the central city has not yet been developed. It is still theoretical. It may well be that gas rationing and a few other factors will have some effect on this, but we are actually talking about maximum freedom of choice in determining where one shall live. At least I think that is what Mr. Bowser was talking about.

The solution must come from both the central city and the suburban and vacant land areas, and not in pitting one against the other. I think it has to happen simultaneously, so that we begin to get a free flow to maximize opportunity of choice.

QUESTION: I am sorry, but my question was not answered. When a developer has bought or has secured an option on land, and then that particular land is rezoned, how do you have land use for anyone except the developer?

MR. BOWSER: That's right, it is zoned for his convenience. The answer would be more honest zoning boards. The answer lies within this audience, because people do not pay close enough attention to anything but presidential elections.

COMMENT: Mr. Bowser, it isn't a question of attention if you do not know about something until after the fact.

MR. WEINER: I think it unfair to say that all zoning boards are crooked or that all politicians are dishonest. I think we have had some bad examples at the national level, but I really do not think it is fair to make that kind of an assertion. You have got crooked politicians and crooked zoning boards, as well as crooked builders and crooked lawyers and crooked citizens.

I think the real question to be asked is: What is a land use policy? Now, I submit that if I, as a developer, get a piece of land zoned, it is not for my personal use. Permit me for a moment to cloak myself with that mantle of respectability and say I am providing shelter for human beings. You want to talk about my profits? Instead, we should talk about my rewards. If I provide housing, a socially useful commodity, important to the survival of the human race, I do not do it for myself alone — I also do it for ulterior, loftier motives. I'm over-emphasizing that idea just to put things back into perspective. If the community were to do the planning and the zoning in advance, so that when a developer came into the community and said that he wanted to build there, the land would already be zoned and the community could tell him the choices that existed — that makes a lot more sense than the kind of process we go through now.

COMMENT: The process we go through now is that we do not know until after the fact.

QUESTION: I am curious about this new development idea in the counties. Does anyone want to talk about development rights, as was suggested in the newspaper in Bucks County?

MR. EICHBAUM: The concept of "development right" — and I guess it really goes to the "taking" issue — is that if we are going to tell a farmer, "You've got to be a farmer, and you can't go to Florida when you reach the age of 65 like everybody else with a pension plan," then we must give the farmer something else. You buy whatever the development rights are, and I guess there are a number of ways to define them. It is an attempt to keep the land in a use which the community values, while not working an economic hardship upon the individual owner. I do not know how far Bucks County and the townships within that county have progressed towards that goal. A lot of people think it is a fairly acceptable way of meeting the problem across the country. I do not know about Bucks County.

COMMENT: I understand that in Bucks County most of the

land is owned by developers already, so *they* have the development rights.

MR. BOWSER: Mr. Smith referred to the trend toward defining the public welfare or the community good as something broader than the township, the county, or any local situation. I think Bucks County may be flying in the face of that idea if it is going to buy up development rights in order to preserve what Bucks County believes should be the development pattern. One of the problems we face in this whole question of environmental development — I like that word better than “control” — is that we cannot permit a fragmented definition of “public good.”

QUESTION: What about the ability of counties to assess farmland?

MR. SMITH: One of the problems that has tended to drive land out of agricultural use into development has been local assessment practices. The assessor is supposed to take into account the fair market value of the land, which means the price a willing buyer would pay a willing seller for the land. If someone has just built an expressway interchange next door, it is much more likely that the land will be available for some use more intensive than growing soy beans, so that, as a result, the market value of the land increases.

There have been a number of different systems proposed to deal with this problem. One of the most interesting was enacted in California, which must preserve its scarce prime agricultural land. That system involves a certain amount of landowner choice. Without getting into the complexities of California’s assessment practices, it is limited to “prime” agricultural land, as defined by the California statutes — the landowner can either permit his land to be assessed at its fair market value, or enter into a contract with the government to preserve the land in an agricultural state (I think, for a term of 10 years). When he does the latter, that entitles him to have the land assessed at its actual-use value — at the value it would have for its agricultural use rather than at its market value. The landowner can terminate that contract at any time during the 10-year period, but when he does, his assessment rises again. You have to find some way of making sure that the landowner does not take the benefit of a reduced assessment for agricultural purposes while putting the land to another productive use.

COMMENT: In Chester County this is also a problem. The farmers are going to be able to plant their crops, but they are not going to be able to harvest them, because of the assessment.

had the power to end differential assessments and have the rate of taxation changed, by local choice. Very few counties have elected to do so, however. Bucks County has. We litigated a case about three years ago in which some school districts challenged the constitutionality of the local option because they weren't getting enough money. They sustained the statute in the Supreme Court of Pennsylvania.

The fact that very few counties have elected to follow the process already available does not portend much hope for future use of the so-called "green and clean amendment" to the state constitution that the voters approved in the election last fall. That amendment also said that counties could implement the differential assessment of land as farmland rather than as development land. Right now there are a variety of bills in the General Assembly, none of which have yet passed, and unless those bills *mandate* that local governments shall tax differentially, I suspect the same choices will be made under the new law as were made in the past. Thus, there will not be much improvement in most areas of the Commonwealth as far as the tax structure for farmers is concerned.

MR. SNYDER: I think that comment raises some real questions of fundamental values which I cannot answer, even in my own mind. On the one hand, there is the desire to preserve open-space land, land thus being preserved at public expense because someone else is going to have to come up with the tax money in terms of higher assessment. Sure, the public gets an indirect benefit from the land, but the direct benefit really goes to the landowners — the people who own that farm and will keep it intact.

The question I have trouble with in my own mind is whether our traditional Anglo-Saxon notions of private property, which say that you can keep everybody off your piece of property, can coexist with the kind of system which dictates that for the benefit of the public a certain amount of land ought to be put away.

PROFESSOR DOWD: I am sorry that I must end our discussion but our time is gone. Before we adjourn, however, I would like to extend the heartiest of thanks to all of our participants, panelists and audience alike. The free exchange of ideas, such as takes place at these yearly symposia, is essential to the resolution of many pressing problems, not the least of which is the one upon which we have dwelt today. But that exchange cannot take place without the interest and cooperation of all those who gave us their best thoughts and efforts today. As I bid you good evening, I again thank you on behalf of the