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Planning and Control of Land Development, Cases and Materials

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BOOK REVIEW

PLANNING AND CONTROL OF LAND DEVELOPMENT, CASES AND MATERIALS. By Daniel R. Mandelker and Roger A. Cunningham. Indianapolis, New York, Charlottesville; The Bobbs-Merrill Company, Inc., 1979. Pp. xxxiv, 1314.

*Reviewed by Richard W. Bartke**

I

The second half of the twentieth century has been a period of change and reappraisal in most areas of life: the legal system included. The rate of change, however, has not been uniform. One of the rapidly altering fields is that of land use planning; there is not even a consensus as to the appropriate term to designate this branch of the law or law school offering.¹ The perimeters of the subject matter are hotly debated,² and the applicable rules are con-

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¹ This may be gauged by the inspection of the titles of the leading casebooks. Professors Beuscher, Wright & Gitelman are satisfied with "Land Use." Professor Haar uses "Land-Use Planning," as does Professor Roberts. Professor Hagman's title is longer and indicates a different emphasis, "Public Planning and Control of Urban and Land Development." Professor Mandelker used to have a very different title, "Managing Our Urban Environment." Professors Mandelker and Cunningham jointly selected "Planning and Control of Land Development."

² *E.g.*, compare introduction to C. HAAR, LAND-USE PLANNING ix-xvi (3d ed. 1976), with introduction to D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 1-8 (1973).

tinuously challenged and altered.³ After a prolonged period of abstention in all zoning controversies,⁴ the Supreme Court has started deciding several cases during each term.⁵ In the latest opinion, after having granted certiorari, the Court affirmed summarily wondering, one may assume, why it accepted the case in the first place.⁶

That being the case, it is hardly surprising that the useful lifespan of a casebook in the field is decreasing rapidly and that volumes go through repeated editions.⁷ One example is *Planning and Control of Land Development* by Professors Daniel R. Mandelker and Roger A. Cunningham.⁸

This volume, however, is not in a true sense a new edition of Professor Mandelker's casebook.⁹ It is the result of a new collaboration by two authors with quite distinct scholarly backgrounds,¹⁰ which are reflected in the organization and content of the work. Similarly, the change in title indicates more than just an attempt to catch a reviewer's eye; it represents a distinct shift in emphasis. Having used the book in a land use planning course at Wayne State University during the winter 1980 semester, I am fully aware of its superior qualities. Any subsequent comments which may appear to be criticisms of the work are not meant as such, but rather are an attempt to initiate or continue a discussion on the basic assumptions underlying this course offering and the outer prime-

³ *E.g.*, *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 100 S. Ct. 2138 (1980); *Southern Burlington Cty. NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475 (1979); *Save A Valuable Environment v. City of Bothell*, 89 Wash.2d 862, 576 P.2d 401 (1978).

⁴ The period was 1929-1973. The Court decided *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) and *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) and did not accept a zoning case until *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) is not a zoning but a nuisance case.

⁵ *E.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *City of Eastlake v. Forrest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Arlington Cty. v. Richards*, 434 U.S. 5 (1977).

⁶ *See, e.g.*, Mr. Justice Powell's opinion in *Agins v. City of Tiburon*, 100 S. Ct. 2138 (1980).

⁷ Professor Haar's book has gone through three editions plus a supplement; Professor Mandelker's through two as did the Beuscher-Wright book; Professor Hagman's book is about to have a new edition.

⁸ D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* (1979) [hereinafter cited by page number only].

⁹ D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* (2d ed. 1971).

¹⁰ Professor Mandelker's background is in municipal corporation law, while Professor Cunningham is a property lawyer.

ters of the topic.

II

The organization of the book is very good. It starts with an outline of some of the basic problems and issues underlying the land use planning process.¹¹ The following chapter¹² expands on this by giving an outline of the history and theory of the planning process in this country as well as introducing students to the concept of the comprehensive plan¹³ and its legal consequences, if any.¹⁴ While this is very desirable and the coverage is excellent, I would have preferred some additional elaboration. It should be made clear to students that land use planning—be it a discipline, a profession, a process or a branch of the law—connotes a specialized application of the term, namely plans, whether public or private, which are not directly formulated by the property owners affected and which are to be enforceable against potentially unwilling persons.¹⁵ This also serves as a springboard for a discussion of the legitimacy, desirability or validity of the process itself, which are still very much debated. Statements continue to be made that the process is constitutionally defective,¹⁶ economically indefensible¹⁷

¹¹ Pp. 1-29.

¹² Pp. 31-110.

¹³ The term comprehensive or master plan has many meanings, but it generally denotes a kind of blueprint for the future development of the community. It is supposed to be implemented by various legal and budgetary tools; e.g., zoning, subdivision regulations, building and occupancy codes, eminent domain, capital budgets. See 1 N. WILLIAMS, *AMERICAN PLANNING LAW* 40-62 (1974), for a general discussion of the nature and function of the master plan. The classical discussion of the nature, purpose and function of the master plan is still found in two seminal articles by Prof. Charles Haar, namely Haar, *The Master Plan: An Impermanent Constitution*, 20 *LAW & CONTEMP. PROB.* 353 (1955) and Haar, *'In Accordance with a Comprehensive Plan,'* 68 *HARV. L. REV.* 1154 (1955). For opposite points of view as to the role of the master plan and its relationship to implementing legislation such as zoning compare Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 *MICH. L. REV.* 899 (1976), with, Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 *URB. L. ANN.* 69 (1975).

¹⁴ For a completely inconclusive attempt to establish some guidelines as to the relationship between the master plan and the zoning ordinance, within a single jurisdiction, see *Biske v. City of Troy*, 381 Mich. 611, 166 N.W.2d 453 (1969); *Raabe v. City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970); *Sabo v. Twp. of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975); *Kirk v. Twp. of Tyrone*, 398 Mich. 429, 247 N.W.2d 848 (1976).

¹⁵ For elaboration see, Bartke, *The Trouble with American Land Use Planning Law—A Failure of Communication*, 1 *URB. L. & POL'Y* 387, 394-97 (1978) [hereinafter Bartke, *Trouble*].

¹⁶ E.g., Siegan, *Editor's Introduction: The Anomaly of Regulation under the Taking Clause*, in *PLANNING WITHOUT PRICES* 1 (B. Siegan ed., 1977).

and socially undesirable.¹⁸

An introduction might also stress, before preoccupation with detailed legal doctrines obscures the fact, that planning is not an end in itself; one plans to achieve certain goals. These goals, however, cannot, or should not, emerge from the planning process, although they certainly can be refined, redirected and clarified. The goals have to emerge from a public consensus as to societal priorities. The major problems and uncertainties besetting the whole process are due to an almost total lack of consensus as to national priorities.¹⁹

The venerable law of nuisance²⁰ is important in this context for two interrelated but distinct reasons. First, historically it provided a transition to and a justification for upholding public regulation of land use.²¹ This aspect is treated adequately in the book.²² Second, nuisance doctrines play today an important role in the settlement of many private disputes, either because of an absence of public regulations or because of their inadequacy.²³ The extent to which this branch of the law will continue to be vital is debatable. Judging from the coverage, the authors consider it of fairly minor importance.²⁴ However, increased environmental concerns lead to the use of nuisance doctrines to challenge proposed developments permissible under existing zoning²⁵ and this is likely to increase. Furthermore, there are those who advocate more reliance on nuisance law as a land use planning tool.²⁶

¹⁷ *E.g.*, Johnson, *Planning Without Prices: A Discussion of Land Use Regulation without Compensation*, in *PLANNING WITHOUT PRICES* 63.

¹⁸ *E.g.*, Hagman, *Land Use Regulation Without Compensation: A Mugwumpian View*, in *PLANNING WITHOUT PRICES* 121, 132-36.

¹⁹ See Bartke, *Trouble*, *supra* note 15, at 396-98.

²⁰ For an historical background see, *e.g.*, 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 64-67 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 550-65 (1941).

²¹ *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915).

²² Pp. 141-98.

²³ *E.g.*, *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904) and connected case, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), 237 U.S. 474 (1915), 240 U.S. 650 (1916); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972). These conflicts may also involve competing commercial interests, *e.g.*, *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847 (1948).

²⁴ Pp. 111-41. Suggestions for the use of nuisance law in novel ways are being made, *e.g.*, Note, *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 *YALE L.J.* 1130 (1976).

²⁵ *E.g.*, *Polygon Corp. v. City of Seattle*, 90 Wash.2d 59, 578 P.2d 1309 (1978).

²⁶ *E.g.*, Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land*

The choice of cases depends on the personal predilection of the compilers, except for a few landmark decisions which one would expect to encounter in any book.²⁷ I was nevertheless surprised that the authors did not include *Spur Industries v. Del E. Webb Development Co. (Sun City)*²⁸ which, although the court does not say so, in effect granted to a developer the power of eminent domain.

The treatment of zoning, up to now the most controversial of land use planning techniques,²⁹ is more than adequate.³⁰ As a matter of fact, it could have been cut down considerably and other material substituted. The relative importance of zoning is likely to decrease, as the site plan approval process becomes more prominent.³¹

In *Village of Euclid v. Ambler Realty Co.*,³² the Supreme Court declared zoning facially constitutional; two years later in *Nectow v. City of Cambridge*³³ a case involving a disproportional impact on a single owner, the Court held that the degree of regulation and deprivation inflicted upon the property owner must be balanced against benefits to the community and may amount to a taking within the meaning of the Fifth Amendment. The Court, thereby, indicated that there are limits on municipal zoning powers. The Court has never been called upon to decide how far a state legisla-

Use Controls, 40 U. CHI. L. REV. 681 (1973).

²⁷ *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) in zoning; *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848) and *Neponsit Property Owner's Ass'n v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938) in restrictive covenants; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) on the borderline between police power and eminent domain.

²⁸ *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972), noted in, 26 OKLA. L. REV. 383 (1973) (developer of large residential project moved to an area used by a feedlot. Held, feedlot operation enjoined as nuisance, but developer has to pay compensation for damages caused by the injunction).

²⁹ *See, e.g.*, Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71 (1970). *But See* Weaver & Babcock, *Zoning City Neighborhoods*, 5 REAL EST. ISS. 1 (Summer 1980), which advocates the use of zoning to revitalize central city neighborhoods.

³⁰ Pp. 199-782.

³¹ *E.g.*, *Polygon Corp. v. City of Seattle*, 90 Wash.2d 59, 578 P.2d 1309 (1978) (city entitled to deny a building permit on ecological and aesthetic grounds, although application complied with all zoning and building code requirements), *Bruni v. City of Farming Hills*, ___ Mich. App. ___, 293 N.W.2d 609 (1980) (a cluster development option, subject to site plan approval, saves ordinance from unconstitutionality).

³² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³³ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

ture may go in delegating its awesome police power. This would involve the delineation of the dividing line between public and private purposes. An ideal vehicle to have submitted these issues would have been *Village of Belle Terre v. Boraas*,³⁴ had it been properly argued and presented. Here was a municipality less than a square mile in size whose inhabitants numbered fewer than 700,³⁵ and which was devoted to a single use.³⁶ With a proper record and pleadings the question could have been posed whether the legislature by delegating zoning powers to such a tightly knit and homogeneous group was not really surrendering sovereign powers for a private purpose.³⁷

The duty of a municipality to take a larger perspective in making its land use planning decisions is more than adequately covered in the context of "exclusionary zoning"³⁸ which deals with housing.³⁹ It is, however, regrettable that the authors might not have had the time or opportunity to include *Save a Valuable Environment v. City of Bothel*⁴⁰ among the cases. This decision stands for the proposition that a municipality which makes land use planning determinations must take into account the ecological impact on the region.⁴¹

³⁴ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (as submitted the issue in the case was whether a zoning ordinance which defined a "family" as one or more persons related by blood, adoption or marriage, or two persons not so related, living and cooking together, was constitutionally permissible, as infringing on the rights of association and travel; the validity was upheld).

³⁵ *Id.* at 2.

³⁶ *Id.* (The entire area of the village was less than one square mile, and was zoned exclusively for single residences, which numbered about 220).

³⁷ See, e.g., discussion in Note, *The Constitutionality of Local Zoning*, 79 YALE L. J. 896 (1970). The failure to bring the important issue before the Court was due to the counsel for the plaintiffs, who concentrated on the silly and trivial, rather than the important; see also Bartke, *Trouble*, *supra* note 15, at 406 n.96.

³⁸ Pp. 445-638. The term "exclusionary zoning" is a misnomer since by definition all zoning excludes and is meant to exclude somebody. It will be employed in this review, however, because of its widespread usage.

³⁹ For an extensive discussion, see *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1624-1708 (1978); Nok, *Zoning For the Regional Welfare*, 89 YALE LAW JOURNAL 748 (1980).

⁴⁰ *Save A Valuable Environment v. City of Bothel*, 89 Wash. 2d 862, 576 P.2d 401 (1978). For an excellent discussion of *Save*, see Comment, *The Duty of a Municipality to Consider the Environmental Effect of Its Land Use Planning Decisions upon the Regional Welfare: Judicial Balancing in the Absence of Interjurisdictional Planning Legislation*, 25 WAYNE L. REV. 1253 (1979). The case is only cited in a note, at 488.

⁴¹ Cf. Ellickson, *Public Property Rights: A Government's Rights and Duties When Its Landowners Come Into Conflict with Outsiders*, 52 S. CAL. L. REV. 1627 (1979), which suggests a creation of "property rights" between neighboring governmental units as a vehicle

Another Washington case, *Polygon Corp. v. City of Seattle*,⁴² decided the same year, held that ecological concerns might justify the denial of a building permit even where the proposed site plan complies with all the requirements of zoning and building code regulations.⁴³ It will be interesting to see whether *Polygon* might indicate an interest on the part of the courts in the English doctrine of implied easement of light and air.⁴⁴

Growth management problems are covered extensively and well.⁴⁵ The materials, however, are being outdated by new developments such as *City of Boca Raton v. Boca Villas Corp.*,⁴⁶ and the last word has not been said.⁴⁷ The court held invalid a downzoning ordinance which was passed to implement an initiative which imposed a cap of 40,000 dwellings on the city on the ground that the imposition of population limitations required a justification.⁴⁸ This is difficult to accept since all bulk and height zoning restrictions affect directly or indirectly the population density in the municipality and are passed pursuant to plans which presumably target a desirable number of people.⁴⁹ These projections have very important implications for most municipal planning particularly in the area of capital budgeting since they determine the kind of sewer,

for dispute resolution in the context of externalities, where the actions of one municipality, within its own borders, affect adversely the inhabitants of a neighboring one.

⁴² 90 Wash. 2d 59, 578 P.2d 1309 (1978).

⁴³ *Id.* at 61, 578 P.2d at 1311.

⁴⁴ The major objections were that the proposed thirteen story building would have blocked the view and cast a shadow on adjoining structures, depriving them of sunlight; *id.* at 70, 578 P.2d at 1315. In this country the English doctrine of an implied easement for light and air has been uniformly rejected; e.g., *Lynch v. Hill*, 24 Del. Ch. 86, 6 A.2d 614 (1939) which overruled prior cases to the contrary; *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fla. Dist. Ct. App. 1959); *People ex rel. Hoogasian v. Sears, Roebuck & Co.*, 52 Ill.2d 301, 287 N.E.2d 677 (1972) (interference with television signals). Because of the current interest in solar energy, there are those who call for a reevaluation; e.g., A. MILLER, G. HAYES & G. THOMPSON, *SOLAR ACCESS AND LAND USE: STATE OF THE LAW*, 1977 (Env. Law Inst. 1978); Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94 (1977). Cf. *Matter of Katz*, [1979] 7 HOUSING & DEV. REP. (BNA) 142 (N.Y. Sup. Ct.) (order permitting solar collectors on roof which were held by municipality to violate its zoning ordinance).

⁴⁵ Pp. 987-1083. For a recent provocative analysis of the growth management phenomenon, published after this review was written, see Roberts, *An Appropriate Economic Model of Judicial Review of Suburban Growth Controls*, 55 IND. L.J. 441 (1980).

⁴⁶ 371 So.2d 154 (Fla. Dist. Ct. App. 1979).

⁴⁷ See comments in Bartke, *Trouble*, *supra* note 13, at 389.

⁴⁸ 371 So.2d at 156-57.

⁴⁹ All land use plans and most implementing enactments are concerned with densities; e.g., 5 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 34.02[1][b] (1978); 1 N. WILLIAMS, *AMERICAN PLANNING LAW* 49-52 (1974).

water, transportation and other public facilities which will be needed to service the areas.⁵⁰ It remains to be seen whether *Boca Raton* stands for much more than the proposition that candor may not be the best policy in this context.

The vital issue of subdivision regulation receives its due share of attention.⁵¹ In fact, there are those who believe that its importance may now exceed that of zoning, since a subdivision once constructed is likely to be there for quite a while.⁵² The question of the financing of capital improvements, disguised as subdivision exactions⁵³ is actively litigated⁵⁴ (e.g., requirements that certain public improvements be made by the developer, or that land be dedicated to the public, or that a payment be made *in lieu* thereof, as a condition precedent to plat approval).

The chapter dealing with environmental concerns is very good indeed.⁵⁵ It covers a great deal of material, statutes and cases, and brings to the attention of students selected excerpts from an exploding literature.⁵⁶ The extent to which these matters should be integrated into a course on land use planning or covered in a separate offering on environmental law remains one of the unanswered questions.⁵⁷

⁵⁰ E.g., Stein, *The Relevance of Density Controls*, 1 URB. L. & POL'Y 51 (1978). Cf. Getz, *Optimum City Size: Fact or Fancy?*, 43 L. & CONTEMP. PROB. 197 (1979) (relationship between size, density and quality of life).

⁵¹ Pp. 783-851.

⁵² Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 392-93.

⁵³ While the cases are argued in terms of constitutionally permissible impositions, the real issue is who is to pay for necessary capital improvements. For a discussion by one of the authors, see Cunningham, *Public Control of Land Subdivision in Michigan: Description and Critique*, 66 MICH. L. REV. 1, 25-33 (1967).

⁵⁴ The battles increasingly center on improvements outside the subdivision itself; e.g., *Arrowhead Dev. Co. v. Livingston Cty. Rd. Comm'n*, 92 Mich. App. 31, 283 N.W.2d 865 (1979).

The interrelationship between zoning and subdivision regulation is also being examined. E.g., *Delight, Inc. v. Baltimore Cty.*, [1980] 8 HOUSING & DEV. REP. (BNA) 82 (4th Cir.) (refusal to approve plat because of developer's inability to post security, which meant that proposed plat became subject to a downzoning amendment, not denial of equal protection).

⁵⁵ Pp. 1085-1205. For a recent example of the use of zoning to preserve ecological values see *Chokecherry Hills Estates v. Denel Cty.*, ___ S.D. ___, 294 N.W.2d 654 (1980).

⁵⁶ There are, of course, those who deplore environmental concerns because they think that they interfere with their own hobby-horses; e.g., Babcock, *Ecology and Housing: Virtues in Conflict*, in R. BABCOCK, *BILLBOARDS, GLASS HOUSES AND THE LAW* 140 (1977).

⁵⁷ The proliferation of uncoordinated ecological enactments, at different governmental levels, creates problems for developers and their counsel. See, e.g., Schwenke, *Environmental and Land Use Laws, Regulations and Permits: How They Affect Real Estate Transactions, Financing and Lawyers, and What to Do About It*, 14 REAL PROP., PROB. & TR. J. 851 (1979); Smith, *Ethical and Liability Delimmas of Environmental Requirements*, 14 REAL PROP., PROB. & TR. J. 885 (1979).

Similarly, the chapter on state and regional planning,⁵⁸ one of the emerging and hotly debated areas,⁵⁹ is more than adequate. My only reservation in this connection is the failure to indicate the role which interstate compacts may play in this context. We already have models in this area and hopefully they might portend things to come.⁶⁰

The final chapter in the book on property taxation and land development is woefully inadequate.⁶¹ Whether this is due to a realization by the authors that the book was already longer than could be accommodated in a one-semester course or to their determination as to the relative importance of the subject it is impossible to say. It is, however, increasingly recognized that the interrelationship between taxing policies and land use decisions is a very complex and intimate one and that the two areas have to be integrated if we want to start dealing effectively with many of our problems.⁶²

III

One of the major regrets as to underinclusiveness of the book is the omission of restrictive covenants or equitable servitudes.⁶³ These private land use planning devices are of continuing and even possibly growing importance. They have a profound influence on the development and permanence of neighborhoods⁶⁴ and sugges-

⁵⁸ Pp. 1207-70.

⁵⁹ *E.g.*, Babcock, *Let's Stop Romancing Regionalism*, in R. BABCOCK, *BILLBOARDS, GLASS HOUSES AND THE LAW* 11 (1977). Bagne, *The Parochial Attitudes of Metropolitan Governments: An Argument to a Regional Approach to Urban Planning and Development*, 22 ST. LOUIS U. L. J. 271 (1978); Godschalk & Brower, *Beyond the City Limits: Regional Equity as an Emerging Issue*, 15 URB. L. ANN. 159 (1978); Huffman & Plantico, *Towards a Theory of Land Use Planning: Lessons from Oregon*, 14 LAND & WATER L. REV. 1 (1979).

⁶⁰ Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969). See Bartke, *Trouble*, *supra* note 15, at 401 n.28.

⁶¹ Pp. 1271-94.

⁶² *E.g.*, Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L. J. 27 (1975); Hirsch & Hirsch, *Exclusionary Zoning: Local Property Taxation and the Unique-Ubiquitous Resource Distinction*, 52 S. CAL. L. REV. 1671 (1979); Lefcoe, *How Taxes Affect Urban Design—And How to Make Them Do a Better Job of It*, 4 REAL EST. L. J. 244 (1976); Zimmerman, *Tax Planning for Land Use Control*, 5 URB. LAW. 639 (1973).

⁶³ See generally, C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* (2d ed. 1947); Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12 (1978); Dunham, *Promises Respecting the Use of Land*, 8 J. L. & ECON. 133 (1965); Stoebeck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861 (1977).

⁶⁴ *E.g.*, Cosigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612; Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199 (1973); Paulus, *The Use of Equitable Servitudes in Land Planning*, 2 WILLAMETTE L. J. 399 (1963).

tions are being made to utilize them in novel ways.⁶⁵ In certain jurisdictions which do not employ zoning, public enforcement of private restrictions serves as a substitute.⁶⁶ Furthermore, those covenants are employed not only in the residential or recreational but also in the commercial context⁶⁷ increasing their flexibility and creating new problems.⁶⁸

Private and public land use planning schemes tend to come into collision.⁶⁹ Students should be aware of some of these problems and the methods of resolution. They should also be attuned to distinguish between a true conflict situation, that is, the case where one set of regulations permits what the other one prohibits,⁷⁰ and the spurious type of conflict, that is, the situation where one set of regulations is more restrictive than the other.⁷¹

Finally, there is a growing interest in the scope of public intervention in the enforcement of these private schemes. For a long time judicial scrutiny was exceedingly limited.⁷² The first major limitation imposed on such contractual or consensual arrangements was in the context of racially restrictive covenants which, while not illegal, were held unenforceable.⁷³ Of late, however, more

⁶⁵ *E.g.*, the suggestion to use them to regulate the surface use of water bodies for recreational purposes; see Bartke & Patton, *Water Based Recreational Developments in Michigan—Problems of Developers*, 25 WAYNE L. REV. 1005, 1048-50 (1979).

⁶⁶ *E.g.*, Houston, Texas. For elaboration see Bartke, *Trouble*, *supra* note 15, at 392, 403 n.53.

⁶⁷ *E.g.*, 165 Broadway Building v. City Investing Co., 120 F.2d 813 (2d Cir.), *cert. denied*, 314 U.S. 682 (1941); Sound Ship Building Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252 (D. N.J., 1975), *aff'd on other grounds*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976); Coomes v. Aero Theatre & Shopping Center, 207 Md. 432, 114 A.2d 631 (1954); Sun Oil Co. v. Trent Auto Wash, 379 Mich. 182, 150 N.W.2d 818 (1967).

⁶⁸ The main problems involve the possibility of anticompetitive effects. For elaboration see, *e.g.*, Alterman, *Trade Regulation in Michigan: Covenants not to Compete*, 23 WAYNE L. REV. 275 (1977).

⁶⁹ *E.g.*, Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449 (1964).

⁷⁰ *E.g.*, Grubel v. MacLaughlin, 286 F. Supp. 24 (D. V.I. 1968); Rofe v. Robinson, 93 Mich. App. 763, 286 N.W.2d 914, *remanded for reconsideration*, ___ Mich. ___, 295 N.W.2d 228 (1980).

⁷¹ *E.g.*, City of Gatesville v. Powell, 500 S.W.2d 581 (Tex. Civ. App. 1973).

⁷² *E.g.*, Comment, *Validity of Rules Concerning Public Zoning and Private Covenants*, 39 S. CAL. L. REV. 409 (1966).

⁷³ *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants not enforceable by injunction); *Barrows v. Jackson*, 346 U.S. 249 (1953) (money damages may not be collected for breach of racially restrictive covenants). See also *Capital Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957) (a possibility of reverter based on racial grounds may not be enforced); *contra*, *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) (no state action involved). *Cf.*

and more cases come to the attention of the courts. Age limitations on occupancy,⁷⁴ definitions of family,⁷⁵ and the question of whether statutes supervening public regulations in order to permit nursing homes or rehabilitation centers for the aged or mentally retarded⁷⁶ should by analogy be made applicable to restrictive covenants,⁷⁷ all come before courts. This interaction between public and private controls is going to continue or even intensify⁷⁸ and, therefore, students must be alerted.

The other major omitted area is that of eminent domain. While the book indicates the relationship between regulation and taking,⁷⁹ it does not tackle the law of eminent domain as such. Granted that we are dealing with a vast body of substantive law, but it is one which is generally not treated anywhere else in the curriculum. The importance of condemnation powers to the realization of public land use plans is increasingly being appreciated.⁸⁰

Evans v. Abney, 396 U.S. 435 (1970) (charitable trust declared invalid because of racial restrictions fails and land reverts to testator's heirs).

⁷⁴ Cf. *White Egret Condominium, Inc. v. Franklin*, 379 S.2d 346 (Fla. 1979) (the condominium rules prohibited any child under 12 from living on the premises. Rule not enforced because of lack of uniformity of enforcement).

⁷⁵ *E.g.*, *Bellarmino Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978) (one foster parent and six mentally retarded children constituted "family" within meaning of covenant which restricted the subdivision to "single private family dwellings").

⁷⁶ *E.g.*, Mich. Comp. Laws Ann. § 125.286a (Supp. 1979-80).

⁷⁷ *E.g.*, compare *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978) (adult foster care facility for elderly women not permitted where covenant stated that residences "shall be occupied by not more than one single family unit;" statute inapplicable to private restrictions); *with Malcolm v. Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 (1980) (foster facility for five mentally retarded adult women not prohibited by covenant restricting lots to "one detached single family dwelling;" analogy to the statute used).

⁷⁸ See, *e.g.*, *Conn. v. Hossan-Maxwell, Inc.*, [1980] 8 HOUSING & DEV. REP. (BNA) 284 (Conn. 1980) (restrictive covenants tying real estate brokerage services to the sale, resale, or lease of subdivision lots held to be a *per se* violation of state anti-trust law).

⁷⁹ Pp. 141-98. Developments are very rapid. The authors include (p. 252) *Eldridge v. City of Palo Alto*, 57 Cal. App.3d 613, 129 Cal. Rptr. 575 (1976), which represented an attempt by California intermediate courts of appeal to develop a concept of compensable regulation. This process was halted shortly after the book was published by the supreme court of the state in *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 100 S. Ct. 2138 (1980), which held that the only remedies available to an aggrieved property owner are a declaratory judgment action or a mandamus proceeding. The Supreme Court will have another chance to take a look at this issue having granted certiorari in *San Diego Gas & Electric Co. v. City of San Diego*, No. 79-678, 146 Cal. Rptr. 103, 48 U.S.L.W. 3814 (1980).

⁸⁰ *E.g.*, *McShane v. City of Faribault*, — Minn. —, 292 N.W.2d 253 (1980) (eminent domain, not zoning, proper way to secure unobstructed approaches to airport); *State, by Powderly v. Erickson*, — Minn. —, 285 N.W.2d 84 (1979) (demolition of historical row

That being the case, it has somehow to be fitted into the overall picture.

IV

The book's size is awesome and imposes considerable demands on the students who use it. Many of the cases could undoubtedly have been edited to a greater extent. Overediting has its drawbacks since it compresses matters to such an extent that the students may lose the flavor of judicial opinions. On the other hand, a student's time is limited and I generally prefer two or three edited cases to one unedited one, because of the added exposure to variations on a theme. While using the book I suspected that this lack of editing might have been due to deadlines and time constraints; this has since been confirmed by Professor Cunningham. The race between keeping abreast of new developments in the law and preparing a book for publication is becoming more and more demanding or confining.

The book's coverage represents a more restricted conception of land use planning than my own conception. In an ideal world we could have students exposed to separate courses on land use planning, environmental law, eminent domain, private land restrictions, land development, land financing, property taxation, with a seminar or workshop tying all the pieces together. Unfortunately, the constraints of a three-year law school education, size of faculty, number of offerings, not to mention the fact that students should be encouraged to get as broad an exposure to legal topics as possible, make this a practical impossibility. Under these circumstances, overinclusiveness in a casebook may indeed be preferable to underinclusiveness.

The boundaries of curricular offerings can and will be decided by faculty committees as well as individual faculty members; this part of the task is relatively simple. The resolution of the underlying assumptions of the function of land use planning as a discipline, as a process or as a branch of the law is much more intractable. It will depend not on an agreement as to definitions or on interdisciplinary discussions, but rather on the resolution by the people at

houses enjoined). The last paragraph of the opinion reads in part: "[W]e realize that Erickson cannot be forced to renovate the row houses . . . [n]or can demolition be enjoined indefinitely . . . It would seem to be more fair and more efficient in such a case as this for the relevant legislative or administrative bodies to initiate condemnation proceedings . . ." *Id.* at —, 285 N.W.2d at 90.

large of the basic question of the kind of society and environment we want to live in and bequeath to our children. Until and unless we achieve a semblance of a consensus as to our national goals and priorities, land use planning will continue to be amorphous, preoccupied with mechanics and processes rather than with the attainment of long range objectives and resource allocation.