

FRED BOSSELMAN'S LEGACY TO LAND USE REFORM

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I. INTRODUCTION

The division of authority between states and their local governments is a major issue in land use control. Historically, states are enablers. They authorize local governments to plan and regulate land use, but do not usually tell them how to do it.

All that began to change some thirty years ago when selected small and vulnerable states, like Hawaii and Vermont, modified their land use systems by adopting an overlay of state controls. These controls had an environmental tilt, and left the established local system in place subject to state overrides through state land use districts or permit systems.

Fred Bosselman chronicled this change when he coauthored a pathbreaking book with David Callies in 1971, *The Quiet Revolution in Land Use Control*.¹ Their book described the new movement in land use law that transferred power over land use decisions from local governments to the states and continues to have a critical influence on the design of state land use systems. At least a dozen

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1. This is enough of a citation. Fred and I had a mutual friend, the late Sir Desmond Heap, who was England's leading land use lawyer. Desmond once said, when commenting on an American law review article stocked with footnotes, that obviously the author was not capable of original ideas. The footnotes in this article will be limited.

states now have some type of state land use program, though the emphasis in many of the newer programs is on growth management rather than environmental preservation.

This tribute describes two state-level control techniques that Fred Bosselman pioneered: the regulation of areas of critical state concern and the control of developments of regional impact (DRI). The critical area technique has become an accepted method of land use regulation at both the state and local level, and several states have adopted it, either in comprehensive state land use programs or as a stand-alone control measure. The DRI proposal has also gained acceptance, though not as widely. Florida is the only state that includes the development of regional impact concept in its state land use program, but the Cape Code Commission in Massachusetts and some other land use systems have adopted it, such as the regional land use control program in Atlanta, Georgia and the comprehensive planning program in the Twin Cities of Minnesota.

Fred Bosselman is modest, and his contributions to land use reform are not as well known as they should be. They appeared for the first time in A Model Land Development Code adopted by the American Law Institute (ALI) in 1976 (hereinafter Model Code), and many of us who were active in land use matters at the time were aware that Fred originated these ideas in the code. This is an appropriate time to honor Fred's pioneer role in developing these important techniques for the regulation of land use.

II. HOW CRITICAL AREAS AND DEVELOPMENTS OF REGIONAL IMPACT CAME TO BE

The late 1960s and early 1970s were a heady time in land use regulation. By this time the early struggles to uphold the constitutionality of land use controls were over, and observers of the land use system began a more critical evaluation that examined the way in which land use controls functioned. Gradually, many came to believe that local land use regulation, though beneficial, also had a number of problems that called out for reform.

A number of concurrent yet related developments contributed to a perception that reform was needed. One was a sea change in how society viewed its obligation to preserve environmental and natural resources. Fred and David wrote *The Quiet Revolution* at the dawn of an era that brought new concerns to the management of land environmental resources. Conventional local land use regulation could not contribute effectively in the protection of environmental resources because it did not have an environmentally-sensitive focus.

The insular and self-serving administration of land use controls contributed to the environmental problem. Land use controls can be powerful, but they are concentrated in local governments that can advance local interests at the expense of larger public concerns they do not have to consider.² Local governments allowed developers to build in wetlands, for example, even though wetland destruction has a disastrous impact on wildlife habitat and environmental quality. Critics began to realize this kind of development was destructive, and that local governments would not have an incentive to take the larger public interest into account by rejecting development that could create environmental problems. There was a growing consensus that some form of state intervention was needed to deal with this problem, and the early land use programs in states like Hawaii and Vermont were a change in this direction.

Self-serving local governments can also use their land use powers to exclude.³ Critics coined the term LULUS, or locally unwanted land uses, to describe the kinds of uses local governments were likely to exclude as unwanted. They ranged all the way from low and moderate-income housing to public facilities such as prisons.

A substantial amount of state planning and financial investment goes into public facilities, and this state interest arguably requires some form of intervention at the state level to guard against local exclusionary tactics. The national system of interstate and limited-access highways is an example. Though most of the funding is federal, there is also a substantial state financial commitment. State condemnation powers can override local objections to highway construction, but there are also land use issues that cannot be handled through construction programs.

Congress authorized the interstate system in 1956, and by the early 1970s enough of the system was completed to make its role in shaping development opportunities obvious. The system includes large numbers of highway interchanges throughout its length, and these interchanges are attractive to commercial and office developers, especially in urban areas, who depend on easy access to the interstate system to make their development economically viable.

2. For discussion of this issue see Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

3. Fred Bosselman included a provision in the Model Code to deal with this problem by providing a review process for developments of regional benefit. Unfortunately, this proposal has not had much success.

Here the danger was that local governments might do either too little or too much. Neighborhood opposition could block intensive development at interchanges, or force a developer to accept a project so reduced in scale that it was no longer economically attractive. Tax-hungry municipalities might also approve major projects at interchange locations that would congest highways. Nor would new development necessarily occur at the right place if exclusionary policies by some municipalities compelled developers to seek a less optimal location.

Finally, the magnitude of development projects had changed dramatically since the United States Department of Commerce proposed the first model land use laws in the 1920s. At that time, large-scale residential developments were unknown, and the shopping center had not arrived. By the 1960s, however, large-scale residential and commercial projects were commonplace. They created a new set of problems because decisions on the location of major development projects have spillover effects beyond local boundaries.

These are examples of land use issues that were apparent at the time the ALI code was prepared that transcend local concerns, and arguably demanded some kind of state intervention to correct local decisions that did not take the larger public interest into account. There was precedent for this approach in state management of land use in the Vermont state land use law, which created a state permit system for major developments as an add-on to local control. Developers of large housing developments, for example, were among those required to seek state permit approval. The Vermont system thus had two elements that also became part of the DRI and critical area ideas: the identification of major developments and vulnerable areas that required state review, and the implementation of that review through a separate system of review at the state level.

III. THE AMERICAN LAW INSTITUTE'S MODEL LAND DEVELOPMENT CODE

Legislative issues in land use also came to the attention of the American Law Institute in the mid-1960s. The late Dick Babcock, a leading Chicago land use lawyer and then Fred Bosselman's law partner, had undertaken a study funded by the Ford Foundation that led the Institute to undertake a major overhaul of enabling legislation for land use regulation. The Institute selected Fred as one of the reporters for that project who was responsible for the project's direction.

To understand the direction the Model Code took and Fred's role in its preparation, it is necessary to look at other issues that were

receiving attention in land use planning and regulation at that time. One important issue was the failure of comprehensive planning to take hold at the local level. Planning failure had occurred despite almost fifty years of experience with land use regulation, and a mandate from the early model laws that required land use planning. Local incentives to plan had been undermined, however, by the interpretation courts placed on a requirement in the model laws that zoning must be "in accordance with" a comprehensive plan. The courts took the starch out of this language by holding that the "plan" could be found in the zoning ordinance. As a result, local governments did not have to adopt a separate and independent land use plan in order to satisfy the "in accordance" requirement.

The failure of planning to take hold in a significant way at the local level was an important issue that faced the drafters of the Model Code. One solution to this problem, of course, would have been a statutory requirement that clearly made planning mandatory and that clearly required land use regulations to be consistent with the plan. For ideological reasons, the Model Code project stopped short of adopting that solution, although it held out incentives to local governments that did plan by authorizing them to adopt more sophisticated land use controls.

A mandate for comprehensive planning and the consistency of local controls with the comprehensive plan would have helped correct the problem of arbitrary decision-making at the local level, particularly if it had included a requirement for state or regional planning. State and regional plans, if binding, could have curbed local excesses. The drafters of the Model Code did not see a major role for regional planning, so they omitted it. They included requirements for a state plan but did not make it a binding document.

Fred Bosselman's solution to the problem of controlling local land use decisions was to propose an article in the code that, for the first time in model land use legislation, addressed the issue of state participation in local land use decisions. However, the absence of a mandatory state and local planning requirement, and the failure to require local land use regulations to be consistent with a mandatory plan, created problems in deciding how to draft the state intervention sections. Had the code included a requirement for mandatory land use planning, a proposal for state participation in local land use decisions could have used the plans as the basis for decision-making. The problem was complicated by the decision to omit regional planning from the code, though regional planning is closer to the local level and could have provided a detailed and responsive basis for planning policies that could drive state intervention decisions.

Fred Bosselman's proposal for state participation in local land use decisions contained two solutions to the problems created by the absence of mandatory planning. One was an idea he called the regulation of Development of Regional Impact.⁴ This proposal was a response to the regulation of major developments, such as shopping centers, whose size created problems that extend beyond the local community.

To take care of this problem, Fred proposed a process that would allow objectors who were displeased with a local government's decision on a DRI to appeal that decision to a state agency. The problem was to provide a basis for state review of DRI in the absence of a binding state plan. The Model Code solved that problem by requiring the state agency to apply a type of cost-benefit analysis when it reviewed the local DRI decision.⁵ Florida adopted this idea as part of its state land use control system, and other jurisdictions use it as well, notably the Cape Code Commission in Massachusetts.

The Area of Critical State Concern proposal was a twin to the DRI proposal.⁶ The critical area proposal was a response to the problem of regulating areas, such as environmental areas and areas around highway interchanges, whose development would create issues of state importance. However, although the critical area proposal covered more than environmental areas, its usefulness as a technique to preserve these areas has become its dominant application. Several states have adopted the critical area concept in their state land use programs.

The critical area idea was straightforward. The state planning agency would have the authority to designate specified areas in the state, such as environmental areas, for which it would adopt a set of guidelines. Local governments would then have to adopt local land use regulations consistent with the state guidelines. The state agency had to approve local comprehensive plans, and local land use

4. MODEL LAND DEV. CODE § 7-301 (1976). This section also contained a proposal for state intervention in local decisions that affected Development of Regional Benefit, which included developments of affordable housing.

I am not suggesting that Fred Bosselman was responsible for every detail of the DRI and critical area proposals in the Model Code. The code was a team effort, and I have not queried Fred in detail on his responsibility for particular code provisions, and whether he agreed with every legislative decision the code made.

5. The model also contained a requirement that a DRI not "substantially or unreasonably interfere with the ability to achieve the objectives" of a local or state plan, but state and local planning was not made mandatory. MODEL LAND DEV. CODE § 7-304(2)(b) (1976).

6. *Id.* § 7-301. I reviewed the critical area concept in *Critical Area Controls: A New Dimension in American Land Development Regulation*, 41 J. AM. INST. OF PLANNERS 21 (1975). See also DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 63-126 (1976 & Supp. 1982).

decisions would have to apply local land use regulations adopted to implement the guidelines once the state agency approved these regulations.

Fred hoped through these two proposals to enable states to intervene in important local land use decisions without a major revision in local land use regulation, and without mandating land use planning. He accomplished this purpose for DRI projects by specifying a set of standards the state agency had to use when reviewing them. He accomplished this purpose for critical areas by authorizing the state agency to adopt specially tailored guidelines for the control of development in these areas. These guidelines would not be plan-driven, but policy-making problems would be eased in environmental areas because physical necessity would determine, to some extent, the policies the state agency should adopt.

IV. WHAT THE CRITICAL AREA AND DEVELOPMENT OF REGIONAL IMPACT IDEAS WERE INTENDED TO DO

A word is in order here on the implicit regulatory philosophy behind these proposals, and how they fit with the American system of land use controls. The DRI and critical area proposals were incremental and pragmatic. They did not require wholesale reconstruction of the land use regulation system, which might have encountered opposition. Instead, they are overlays on the existing system that seek to correct identified decision-making problems.

Fred's decision to move incrementally and pragmatically was perceptive. American political agendas often organize around single issues, and environmental protection is one of them. Proponents of protective land use regimes usually prefer enactment of a specific legislative solution to remedy the problems they perceive, rather than comprehensive revision of land use systems. The federal Highway Beautification Act adopted in 1965 is an example. The DRI and critical area proposals are another, though the popularity of environmental causes has made the critical area proposal the more popular of the two. Incremental and piecemeal change creates problems of coordination and internal consistency, but is inevitable in a political system that often fragments responsibility and avoids extreme centralization.

The critical area and DRI proposals also remedy an eternal tension in land use decision-making between the making of policy and the application of that policy. The absence of binding state or regional plans in the Model Code meant there would not be a planning policy as the basis for administering critical area and DRI controls, but Fred's proposal attempted to deal with this problem by

providing decision criteria for DRI and state guidelines for regulating land development in critical areas.

Either proposal is easily included in a land use system that mandates comprehensive planning. The critical area idea fits easily into a land management system based on comprehensive planning, as indicated by the inclusion of a critical area requirement in the Washington state growth management legislation, which has a mandatory planning requirement.⁷ Within the planning context, critical area planning and control is simply another application of subarea planning and regulation. Downtown design planning is another example.

Comprehensive plans can also provide policies for the review of development of regional impact. The Washington state growth management statute, for example, requires county plans to include a process for identifying and siting "essential public facilities" that are typically difficult to site, such as airports and correctional facilities.⁸ This requirement implements the DRI proposal that Fred included in the Model Code.

V. THE CRITICAL AREA IDEA IN FLORIDA AND ELSEWHERE

Once the critical area idea gained inclusion in the Model Code proposals, developments at the national and state level brought Fred Bosselman into the limelight as its proponent in new legislative proposals that gained public and political support. One such proposal was a national land use law that came before Congress in the early 1970s, and that would have provided a program of financial assistance to enable states to adopt land use programs that included the critical area idea.

Fred played an important role in the drafting of the national legislation, and was asked by the Department of Interior, which would have administered the new program, to draft model state legislation to incorporate expected federal program requirements. However, although the national land use law passed by an overwhelming vote in the Senate, it died in the House where the delegation from Fred's own city of Chicago voted against it. This happened because Chicago's mayor Daley was in a dispute with the state over an expressway that was to go through the city. He urged the Chicago delegation to vote against it because he thought it would transfer power over the expressway to the governor.

7. WASH. REV. CODE § 36.70A.200 (2001). See *Whatcom County v. Brisbane*, 884 P.2d 1326 (Wash. 1999).

8. WASH. REV. CODE § 36.70A.200 (2001).

At the same time that Congress rejected the proposed national land use law, however, it considered and adopted a National Coastal Zone Management Act that included for coastal areas of coastal states many of Fred's ideas in the Model Code for state participation in local land use regulation.⁹ The national coastal act compromised, however, on state participation in local decision-making. The act requires a state agency, but only to receive and administer federal grants for coastal management. The state may choose, and almost all have, to leave land use regulation in the coastal zone to local coastal governments.

However, the act does require local governments to consider "the national interest ... including the siting of facilities, such as energy facilities, which are of greater than local significance." States are directed to inventory and designate "areas of particular concern" in their coastal zones.¹⁰ Enforcement of these requirements is carried out through "means" of state control, and some states have adopted a system of appeals on land use decisions to a state agency. Other states, such as North Carolina, have explicitly included the designation of critical areas as part of their coastal management program.

The next test for the critical idea came in Florida in the early 1970s, just as the Model Code was under development. The state had experienced a prolonged water drought that threatened saltwater intrusion of its freshwater aquifers on which the state relies for its drinking water. Rapid development and the problems it brings were another major issue.

The governor at the time saw the need for urgent reforms, and appointed a statewide commission to study the need for legislative change. Fred played an important role in the drafting of the state land use legislation the legislature finally adopted, and that included both the DRI and critical area proposals contained in the Model Code.¹¹ Fred believed both proposals met planning and regulatory needs presented by the Florida land use system at that time. Despite intense population growth, local planning and land use control in the state did not exist or was limited, ineffective, or a political sellout. The authority to regulate critical areas was especially acute in Florida because critical natural areas were threatened by development pressures and by the lack of effective

9. Rumor has it that the authors of the Coastal Zone Management Act retired to the basement of the federal executive offices building in Washington one evening with the Model Code and used it as the basis for a draft of the coastal law they then prepared. For discussion of the adoption of the act and its history see Daniel R. Mandelker & Thea A. Sherry, *The National Coastal Zone Management Act of 1972*, 7 URB. L. ANN. 119 (1974).

10. 16 U.S.C. § 1455(d)(8) (2000).

11. FLA. STAT. § 380.05 (2000).

local control. The Florida Keys were a prime example. Although the new state land use law was intended to build up the planning capabilities of Florida local governments, the need for authority at the state level to deal with immediate land use problems was apparent.

A setback occurred in the critical area program when the Florida Supreme Court invalidated the critical area provision in the state law as an unconstitutional delegation of power,¹² but the legislature remedied that problem. The state has since designated several critical areas, including the Keys, and the program survives as an important element of the state land use program.¹³

A number of other states have seen the value of the critical area concept. Maryland adapted this concept in its program for the preservation of Chesapeake Bay.¹⁴ Washington State, as noted earlier, has included a mandatory requirement to designate critical areas as part of its state growth management program.

12. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

13. For an excellent discussion of the critical areas program in Florida see John M. DeGrove, *Critical Areas Programs in Florida: Creative Balancing of Growth and the Environment*, 34 WASH. U. J. URB. & CONTEMP. L. 51 (1988).

14. See Paul D. Barker, Jr., Note, *The Chesapeake Bay Preservation Act: The Problem With State Land Regulation of Interstate Resources*, 31 WM. & MARY L. REV. 735 (1990).

VI. THE AMERICAN PLANNING ASSOCIATION'S CRITICAL AREA AND
DEVELOPMENT OF REGIONAL IMPACT PROPOSALS IN ITS MODEL
LAND USE LEGISLATION

History was not kind to the American Law Institute's Model Land Development Code. Although states have included a few of the ideas in the code in state legislation, the DRI and especially the critical area proposals are the only ones that have received serious legislative attention. The failure of the Model Code, and the failure of most states to reform their planning and land use legislation, soon made the need for new model land use legislation apparent.

With funding from federal agencies and private support, the American Planning Association (APA) began a major project for the preparation of model legislation for land use planning and regulation in the 1990s. This model legislation includes proposals for the regulation of areas of critical state concern and developments of regional impact at the state level that build on the ideas Fred had included in the Model Code years before.

The APA's proposal for critical area legislation builds on and improves Fred's original recommendations. I had offered some comments on the ALI critical areas proposal when it first appeared, and the APA noted them in its in commentary on its model legislation:

Some of [the] problems arise from the geographical extent of critical areas, which are likely to be smaller than the local governments in which they are located. Development policies in critical areas may not be well coordinated with the land development policies in the remainder of the community. Other problems arise from the inability of state critical area controls to effectively guide local government decisions on specific development applications¹⁵

These concerns identified problems likely to arise in an overlay system of state controls that was not integrated into a comprehensive system of state planning and regulation. The APA responded to these criticisms by keeping the original structure of

15. DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 76 (1976). This passage was quoted by the AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK, MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 5-27 (Phases I and II Interim Ed. 1998) [hereinafter LEGISLATIVE GUIDEBOOK]. The Guidebook discusses the ALI proposal and critical area legislation adopted in various states. See LEGISLATIVE GUIDEBOOK.

Fred's critical area proposal and by making some changes in the original concept.¹⁶ For example, under the APA model legislation a state, before it can adopt a critical area program, must adopt a state plan that contains goals, policies and guidelines to "provide a framework and priorities for the administration of the program."¹⁷ Basing a critical area program on a state plan should provide needed direction from the state level that can integrate the designation of critical areas with development problems in the remainder of the community. The state plan also provides an opportunity to provide detailed development policies to guide local development decisions.¹⁸

The APA proposal for critical areas also adds to the Model Code by requiring local governments to submit their comprehensive plans as well as their land development regulations to the state planning agency for review.¹⁹ This change will also allow local governments to integrate their planning and land development programs with the designation and control of critical areas.

VII. CONCLUSION

The origin of ideas is always a fascinating subject. In land use regulation, especially, many ideas compete for attention, and change is difficult in a system that has won the approval of time and that has acquired fixed constituencies with frozen agendas.

The source of ideas that gain public approval and political endorsement is also a subject of fascinating study. Good ideas require common sense, good intuition, and political judgment. The critical area idea is a tribute to Fred Bosselman's common sense, good intuitions, and political perceptions. The survival of our environmental resources is the better for it.

16. LEGISLATIVE GUIDEBOOK, *supra* note 15, at 5-30-5-32.

17. *Id.* at 5-30.

18. The APA model also calls for the use of environmental risk assessment techniques to designate biological, not political, boundaries for critical areas. This proposal takes account of the possibility that critical areas may be located in more than one political jurisdiction. *Id.* at 5-32.

19. *Id.*