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Book Review

Daniel R. Mandelker: *The Zoning Dilemma: A Legal Strategy for Urban Change*. Indianapolis, Bobbs-Merrill Co., Inc., 1971. 196 pp., \$9.50.

Daniel Mandelker went to England a while ago and returned an advocate of land-use administration in the English style. He recently went to King County, Washington, and studied the planning and zoning efforts of that county, with a special emphasis on apartment zoning. *The Zoning Dilemma* is about his experience examining the King County plan and its execution, from which he draws several conclusions. First, planning and zoning are the salvation of the developing urban fringe, but only if they are beefed up and better handled. Second, a truly effective system of planning requires a decreasing emphasis on private rights in the development of land, primary emphasis on a "community" plan rather than on the effects of a zoning decision on a neighborhood or on individual parcels, and the eventual socialization of land development. Finally, we might as well give up on the cities and the built-up inner suburban ring, which are beyond saving through zoning and planning.

Mandelker's faith in planning is qualified, however, by his strong belief in equal protection and equal opportunity. Throughout the book Mandelker admits that planning and zoning are by and large enforcement of the "middle class" or "urban" aesthetic, favoring certain uses, and certain segregated living conventions. He is concerned that modern planning practices and zoning administration will perpetuate the growing racial and economic polarization in America. The "zoning dilemma" facing Mandelker is best expressed in the last paragraph of the book:

We now confront the problem of values and the manner of their implementation, with which we concluded the first chapter. We wondered whether the zoning system was as much an innocent regulator of potentially harmful activity as it seemed, and we have concluded that any zoning system which seeks real limitation on freedom of choice must carry well-delineated and value-laden policies with it. These are determined in the planning process, and expressed in the comprehensive plan. Unfortunately, we have not been as rigorous as we should in examining the impact of our planning judgments on our zoning strategies, and on the role the legal system should play in appraising, validating and limiting both. We are simply not sure of the values we wish to implement in our urban policies. Until we are, we can continue to expect the planning and zoning process to be deeply troubled by ambiguity and ambivalence.¹

I. D. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* 188 (1971) [hereinafter referred to as MANDELKER].

Planning, to Mandelker, is the best way to control urban growth, but the planners may not justify the faith that Mandelker would like to have in them.

The Zoning Dilemma is divided into five chapters. In the first, constitutional problems with uncompensated restrictions on land are examined in brief fashion, and current constitutional thinking on zoning as not "taking" is accepted dubitante. In chapter II, Mandelker justifies zoning as an amelioration of land-use inconsistencies and avoidance of external economies which benefit the developer and speculator instead of the producer of the benefit (here, the planning and zoning unit). He characterizes planning and zoning as the administration and allocation of land-development rights in the light of a comprehensive plan. Planning and zoning should be considered in terms of a rational distribution of uses, densities and the like throughout a "community," and should not be held up solely to a standard of equality of right to develop apparently similarly situated parcels. Moreover, the planner and zoner should be allowed to plan in a way which would force development to follow closely upon the planning decision. Chapter III examines the "law" of apartment zoning, discusses the way in which the judiciary occasionally intervenes in land-use planning, and readies the reader for a closer look at a planning and zoning process in action. In Chapter IV the King County plan is examined, with the assumptions and conclusions of the preceding chapters illustrated by data drawn from the study. The concluding chapter ties up the discussion, restating the basic argument. Zoning is and ought to be seen as the positive allocation of development opportunities. Planning and zoning should be considered as means by which development opportunities and their effects are allocated by the "community" in the "common interest." Mandelker concludes that land ownership and development ought to come under greater government control. Planners, he argues, should realize what they are and should be doing, and address themselves to their tasks with a greater awareness of the effects of their plans.

Mandelker makes several points in his quick introductory look at the legal and economic arguments for uncompensated impositions of planning burdens on individual property rights. First, there has been judicial recognition of an owner's interest in the development of his land, and this interest is entitled to protection. On the other hand, Mandelker notes a movement toward a planned economy and away from reliance on the "free" market for the allocation of, among other things, land development opportunities. The planning decision is one which is fraught with value and goal choices ungoverned by any intelligible set of external criteria. Therefore, community plans must of necessity impinge upon private choice without more justification than the planner's serving the "public interest." But this cliché does not explain why the deprivation caused by planning should not be compensated when it relates to what have been denominated

“property” interests such as development interests in land. Both Sax² and Reich³ argue that zoning and planning are properly seen as mediation of conflicts among private interests. Professor Sax distinguishes between the enterprise and mediating capacity of government. The former is present when government enriches or provides facilities to the public in general at the expense of an individual. Here, “government” (*i.e.*, the “public”) is enriched, and must pay for it. On the other hand, when government acts as an agency for the settlement of private disputes, no compensation is due the party who loses thereby:

In addition to its enterprise capacity, in which government acquires resources for its own account, government also plays another and quite different role. It ‘governs’. That is, it mediates the disputes of various citizens and groups within the society, and it resolves the conflict among competing and conflicting alternatives. Typically in this function it says, as between neighbors, that one fellow must cease keeping pigs in his backyard or must cease making bricks at a certain location; The essence of this function is that government serves only as an arbiter, defining standards to reconcile differences among private interests in the community.⁴

Sax approves of the result in *Hadaceck v. Sebastian*,⁵ where a city was held to have the right to stop a brickworks from operating without paying the brickmaker compensation when the city was acting to protect an area of single-family residences. The brickworks, when established, had been well outside the limits of the city. However, the city came out to meet it and then reserved that area for single-family units. It is hard to justify this decision and thereby accept a classification system which would allow a brickmaker to lose his investment because the city wants his land for the benefit of homeowners who settle there.

The application of Professor Sax’s argument to zoning becomes even more difficult when the zoning process is used not only to harmonize private uses, but also to (1) increase the amount of open space for the benefit of the community through large-lot zoning; (2) exclude multiple-unit uses because of social and tax considerations; and (3) impose other restrictions on land use for aesthetic or “amenity” purposes. At this point, the city is making a decision, not only as between neighboring or nearby parcels, and not only as to tangible external harm from a use of land, but also as to the “character” or “integrity” of the community. If a city forces an owner either to sell his land or to use it as a park or school, the owner is entitled either to be paid or to ignore the limitation.⁶ If such action is

2. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

3. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

4. Sax, *supra* note 2, at 62-63.

5. 239 U.S. 394 (1915).

6. See *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (1961).

characterized as the government's "enterprise" activity, how can forcing an owner not to develop a goodly chunk of his land for the public enjoyment of open space and beauty be characterized as merely its "mediating" activity? The exclusion, through a zoning ordinance and a building code, of the poor, of public housing or of businesses which attract the "wrong" kind of persons would also seem to go well beyond mere dispute settlement.

Professor Mandelker is also bothered by the analyses of Sax and Reich because he views planning and zoning as positive controls for the allocation of development opportunities and the creation of the "optimum" utilization of urban land. While he does not say that the Constitution of the United States requires it, he does indicate that he favors a system whereby imposition of burdens through the planning process is followed by compensation to the person who loses thereby.⁷ Of course, it is extremely difficult to figure just what base should be used to determine loss.⁸ Land uses are not independent, according to Mandelker, but gain or lose value depending upon surrounding uses either in effect or permitted by law. Since Mandelker doesn't like private developers to get a windfall through capture of "external economies"⁹ resulting from government action, it follows that he doesn't want the developer compensated for opportunities created, but not allowed by government through either planning or zoning.

Professor Mandelker also has an answer for those who object to zoning because it is easily used to support the efforts of government-subsidized homeowners to exclude persons who fall into the category "them" not only from a side of town, but from the town itself. His idea is that there is a "new equal protection" which protects not only race but station in life as well. *Village of Euclid v. Ambler Realty Co.*,¹⁰ of course, sanctioned separation of classes through separation of uses. People disliked apartment houses for their inhabitants even then. Light, air, and traffic problems were secondary and euphemistic objections.¹¹

A footnote to *Euclid* was written by the Supreme Court in *James v. Valtierra*,¹² decided after Mandelker's book was published. A group of Californians sought a judgment declaring invalid as contrary to the fourteenth amendment a provision in California's Constitution, which provided:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project

7. MANDELKER at 13-14.

8. *See id.* at 185-86.

9. *See* discussion of external economies and diseconomies *infra*.

10. 272 U.S. 365 (1926).

11. *See* S. TOLL, ZONED AMERICA 232-33 (1969), and the decision of the trial court in *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924).

12. 402 U.S. 137 (1971).

by voting in favor thereof at an election to be held for that purpose, or at any general or special election.¹³

The amendment went on to describe what was meant by "low rent housing," identifying the persons excluded by a negative vote as "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings . . ." "Turnkey" or other subsidized housing projects are within the scope of the amendment. While the use of the referendum is protected and quite broad in California, this is apparently the only case where a referendum is required by the Constitution of California, outside of constitutional amendments, municipal annexations and bond issues.

The Court upheld the referendum provision, noting that there was no apparent racially discriminatory purpose behind the provision and distinguishing *Hunter v. Erickson*¹⁴ on that basis. The Court emphasized the importance of the referendum to California's scheme of government. The decision did not hold that exclusion by zoning of specific economic groups or social classes from a given part of town, or from the town in general, is permitted. However, the Court did indicate that unless the issue is clearly one of racial discrimination, where a city is especially clumsy about the way it does things,¹⁵ few Black Jacks¹⁶ will fall before Mandelker's "new equal protection."

Having considered the equity and constitutional issues, Mandelker goes forward to do battle for bigger and better planning. He concedes that no planning will save the cities or, for that matter, any fully developed urban or suburban areas. Moreover, zoning as it is presently set up is an inadequate tool for planners. Mandelker asserts that what planners and zoners are doing, or should be doing, is organizing land uses through the adoption of principles and general notions of what goes where, subject to change over time, but always complete at any given time. The land-use zone should be scrapped in favor of land-use administration, where a case-by-case approach is taken to determine whether a given kind of development will conform to the specific goals and directions of the plan. At

13. CAL. CONST. art. XXXIV, § 1.

14. 393 U.S. 385 (1969).

15. As was the case in *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971). So long as some poor whites are excluded with the blacks and the city council is fairly adroit in its handling of the case, it should avoid the problem of *Kennedy Park*. Similar, better-handled cases going the other way include *Deerfield Park Dist. v. Progress Dev. Corp.*, 26 Ill. 2d 296, 186 N.E.2d 360 (1962), and *State ex rel. City of Creve Coeur v. Weinstein*, 329 S.W.2d 399 (St. L. Mo. App. 1959). Note, however, that both cases involved condemnation, not zoning.

16. Black Jack is a municipality in St. Louis County, Missouri, which incorporated in order to prevent construction of low-cost, federally assisted housing within what are now its corporate limits. Litigation is pending to force Black Jack to allow the low-cost housing to be constructed as and where originally planned.

present, land-use administration is carried out through various devices, none of which has the flexibility or specificity which Mandelker argues is needed. Moreover, the legal framework in which planners and zoning officials operate is seen by the author as one in which a relatively uninformed judiciary will occasionally intervene, and when it does, will insist on taking a narrow temporal and spacial view of the problem. Judicial reaction to both "spot zoning" and stringent restrictions on land use which may appear in the short run to be a deprivation of all or most of the land's value is a problem for planners. Mandelker suggests that this problem could be alleviated if the court would look at zoning and planning in the context of a whole series of "trade-offs" and development decisions throughout the "community" or region. Although he does not say so in the book, Mandelker would probably favor abolition of zoning authority for small municipal units, and the establishment of "regional" zoning and planning if his ideas were to be put to practice.

Mandelker also considers the problem created when developers and investors do not agree with the planning decision, or when, if there is general agreement, the zoning decision is not followed in due course by development. Mandelker devises an interesting model¹⁷ of developer and investor behavior and suggests that by limiting opportunities in a given area for development of apartments, the planner might force the developer to build those apartments sooner. On the other hand, a narrow limits policy which underestimates the pressure for apartments might encourage the developer or investor either to hold back until he gets his price or to bank a sure thing against possible losses on other land ventures. If the market doesn't indicate development where the planner plans, the planner, constitutional limitations aside, might simply force the development as planned by leaving no alternative. This might force land to remain undeveloped for a while, but if the planner is firm enough, and if the developer needs the money now, Mandelker believes the planner will win. In this way, Mandelker also allows the planner to prevent the developer from profiting from the "external economies" produced by the efforts of

17. Mandelker's "model" of developer behavior and land transactions in urbanizing areas is developed at 47-50. First, he assumes that urbanization requires changes in ownership of that land and involves a good deal of speculation. Land is "banked" against contingencies involving other land. Owners may be of two types in the urbanizing area—the speculator, who buys to sell, and the developer, who normally buys to develop. In either case, owners are usually willing to hold land until the most profitable arrangement can be made. This willingness to postpone present gain for future gain depends on how large the present value of that future gain is *vis-a-vis* how long he may have to wait for it. The planner's job is to make sure that (1) the owner's discount rate is forced down and (2) the expectation of the greater future gain is relatively remote. Hence, Mandelker's model boils down to a narrow urban limits policy, uncertainty in the length of time a development opportunity will remain open, and relative certainty as to the limits placed on the number of opportunities that will be open at any time in the foreseeable future. Of course, this brings a certain amount of rigidity into a plan which, by the nature of its function, ought to be rather fluid.

planners, which he otherwise would have "captured" by utilizing the land in a way more profitable to him but less reasonable to the planner.

Mandelker doesn't believe that "optimality" in developing urban land is achieved by the "market." He "proves" this by noting that land uses are interdependent; that is, the best and most profitable use of Lot A depends to a large extent on what goes on around it. Furthermore, the value taken by the Lot-A owner or developer is often derived not from his efforts, but from public improvements, such as highways, or other planning or zoning. Hence, since the market cannot produce some desirable end state called "optimality," planning must come in to save us. The planner's sword against blight and evil is zoning. At first blush this all looks very convincing. Interdependencies are taken care of by abolishing them in favor of planned interrelationships. Externalities are taken care of by enlarging the frame of reference and hence internalizing them. Decisions as to land use and development are then no longer a matter of merely avoiding "use incompatibilities" but rather of identifying and forcing the best way to use each piece of land in the "community." (The "community" is Mandelker's urban firm.)

But before we are carried off by the hopeful image of a socialized land-use system, and a plan developed and carried out by new guardians, it is well to refer ahead to chapters IV and V, where Mandelker explores some doubts and some problems with planning as it is carried out today. Planners might not understand the full effects of their plans, or they might not be willing to take them into account. But as to one thing, Mandelker has no problem. Planners can do what the market can't—if they would and could only do it!

But there is still a doubt. Leaving aside the city and the inner suburban ring, which Mandelker abandons to wanton market forces, there is still good reason to think that the developer, with his money on the line, is in a better position to judge what is most desirable, in terms of current and future demands and needs, in any given place; and that the people who buy and use land are in a better position to judge what is best for them than a planner or two. First of all, zoning may make no difference in some areas.¹⁸ Planners might be too responsive to the needs expressed by land users and consumers. Second of all, in suburbia the market hasn't had a chance! If the land market had been free of benign government interference, through loan and mortgage guarantees, tax benefits to homeowners, highway programs which gave value to open space which neither government nor the developers could resist, and zoning and planning in little, easily incorporated islands of subsidized grandeur, many urban ills which Mandelker wants to cure with even more government intervention

18. See, e.g., Siegan, *Non-zoning in Houston*, 13 J. LAW & ECON. 71 (1970). The author points out that land use is easily controlled by private arrangements and that "uses" tend to go where street and other facilities make them most profitable. The table he tells, of course, is of a city, not an outer urban fringe.

might never have become as great as they have. Septic tanks and inadequate sewage, under-financed schools and broken cities are a product not only of the horrible, selfish, speculative land developers and interdependent land market; but also the planner's art, the zoner's craft, and the highway builder's industry, aided by government largesse for its most needy citizens—upper middle class whites.

Mandelker believes in planning as a solution to the misuse of urban land. Yet, even if planners were above it all, they would get nowhere. In King County as soon as an apartment plan was begun, Bellevue, Washington annexed part of the plan's unincorporated area to keep the apartments far away from that suburban town.¹⁹ The King County plan itself, as Mandelker indicates, would limit if not eliminate chances for low-cost housing in the "urban centers" which the plan imposes on western King County. In another general plan which Mandelker examines, Bowie-Collington in Maryland, the poor are relegated to a single, dense, small part of the area planned.²⁰ The planner serves the interests of the community; but those interests are easily translated, as they have been by suburban planners and zoners in many parts of the country, to be low taxes, no poor aesthetic and social amenities, and no urban problems. Regional planning which does not support the pretensions of subsidized island dwellers is deemed evil, communistic and un-American, and no suburban area will adopt such planning very easily. It is Pollyanna to suppose otherwise. As Mandelker points out, zoning has long since passed the stage of nuisance avoidance, and has moved on to positive enforcement of public aesthetic and value decisions. Zoning is, in large part, for "amenity."

An alternative to zoning involves the utilization of a pricing system in land, which might produce more "optimality" than a planner's dreams. Require those who wish exclusivity to *buy* it. Now, zoning and planning forces a landowner who wishes to use his land for a more intensive use to forego that opportunity because of the wishes of his neighbors. He must pay for their amenity. Why not make the public pay for the desired amenity by purchasing a negative easement on his land or negotiating and establishing a restrictive covenant? The price should not be greater than the amount which is lost to the seller by foregoing an alternate, more profitable development opportunity. Moreover, such covenants would probably be more durable than zoning. If the people in a given area are forced to pay for the amenities they seek,²¹ they might well choose to be more egalitarian. Optimality in any proper sense of the term is more likely to come from a system in which all scarce goods are to be paid for and no one gets a price break, much less a free ride.

19. MANDELKER at 166.

20. *Id.* at 180-82.

21. Those who buy in after the amenities are extorted do, of course, make such a payment, but probably in a much lower amount than would be the case had the transaction discussed *supra* occurred.

When something done by *A* harms *B*, *A* is said to be visiting an "external diseconomy" on *B* when *A* doesn't have to pay for that harm. When what *A* does benefits *B*, then *B* is said to be obtaining an "external economy" if *B* does not have to pay for it. It is assumed that in an efficient pricing system, no externalities will last for long. Deals can be made, or forced by law, whereby either the beneficiary pays for, or is prevented from benefiting from, the production of the externality. Now, there are all kinds of external diseconomies in the context of land-use planning. If the house next door is ugly, the neighbor suffers by a constant shock to his aesthetic sensibilities. If his neighbor is ugly, then a person must take added trouble to avoid aesthetic shock. Zoning and building ordinances of some municipalities have attempted to deal with the ugly house. They have not yet dealt with the ugly neighbor. The more mundane and usual example of diseconomy relates to incompatibilities which result in gross destruction of property values. The smoky factory next to the vine-covered cottage and the airport next to the hospital are likely examples. Now, if the zoning and planning processes should force internalization of these external diseconomies, how should such internalization proceed? Damages could be assessed, injunctions could be issued, or the incompatibility could be prevented. But if *A* must stop pouring smoke on *B*, then *A* loses because of *B*'s favored use; if *A* continues smoking, then *B* must take his lumps or move. The nuisance abatement, incompatibility prevention, and other ameliorating functions of planning and zoning all involve choices which are essentially economic. Yet these choices are made in terms of essentially distributive criteria—*e.g.*, the preferred status of detached single residential uses and large set-backs, and side and backyards. It may make more economic sense just to let things ride and force people to make choices on their own. It may be cheaper. It is certainly fairer in some cases.²²

When *A* does something that helps *B*, and *B* gets it free, then *B* enjoys an "external economy." It may cost more to make *B* pay for it or prevent him from using it than it benefits *B* and others to let him have it free. Prevention of enjoyment of external economies can be accomplished by forced development through a hardnosed land-use administration system. While there is apparently something unjust about enjoying free what another has paid for, it matters whether the payment is made by a private, neighboring developer, on one hand, or by a city or a highway department on the other. Mandelker advocates forcing payment for, or prevention of enjoyment of external economies only in the latter case. One reason, I expect, is that by preventing external economies, he can force developers to do the bidding of the planner. The developer might not hold out if no gain is in the offing, so he will build and take his, now.

22. The problems of externality and choice of the "bad guy" are handled clearly and well, at least to this non-economist, in a series of articles in the *Journal of Law and Economics*. In particular, see Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. LAW & ECON. 11 (1964).

All this is for the benefit of the "community" and Mandelker's concept of "optimality" is in terms of the "community." Now the "community" is presumably the constituency served by the planner. The best "community" to Mandelker is the "region," so we'll ignore villages, towns, and the like. A region is probably not static; rather it is a geographic construct which changes with population and economic changes. A plan should also change with time. A wrong guess as to the rate of change, the shifting of needs or the proper spatial context of planning causes the whole thing to fall apart. What helps one "community" can injure others. Communities might specialize, but this will be without consultation or cooperation unless a new, "super community" is devised. The validity of Mandelker's planning depends in part upon the way in which "community" is defined, and how change is handled by the planners. The variables are very numerous, and the temptation to adopt and hold on to static, simple concepts derived from parochial concerns and intellectual and academic biases is great. Mistakes in the "market" probably are taken care of more easily by the "market," than are planning errors by planners, given the size of their task. No wonder they are unprepared to take into account the value and social variables affected by their plans except to restate and serve those values adopted by the "communities" which they serve!

Professor Mandelker's book is well worth reading by lawyers, planners and others who are concerned with the problems of controlling urban development. The book is addressed to lawyers and non-lawyers, and as a result handles many matters a bit too quickly. In all, however, it is successful for what it purports to do—neither to propose reform nor to provide answers, but to present a point of view and some experience in the field for the sake of acquainting those who need it with urban planning problems and of jogging minds and getting some of us sufficiently disturbed to think some more about the future of urban America. Moreover, this is no dry, academic book. It is an argument for a greater degree of control in planners and in government over the use of urban and urbanizing land. The free market, if it ever really existed since World War II, is condemned as inadequate to the prevention of blight, pollution, and inequality of opportunity. The planned society, it is argued, would get us closer to a more ideal land use and land-use opportunity system, if the planners were only more able to understand and fulfill their function. Of course, both Professor Mandelker's solution and my counter-suggestion of a freer market in land are rather dreamy. But in the presentation of his argument, Professor Mandelker has provided an interesting look at specific problems in land-use planning from the point of view of a practical and experienced lawyer, teacher and student of urban America.

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