

Land Use And Land Use Planning—An Overview

By Norman L. Cooper

Exhibit 1

Those of you who are involved in right-of-way acquisition have an extremely important responsibility that has a very strong impact on the land use in this nation. It is your primary concern that right-of-way acquisition be done with competence and integrity.

The concern of this paper, however, is not the acquisition itself, but what happens as a consequence of that acquisition, months, years, and decades later. The concern here is whether those consequences are what we want as a locality, a state, and a nation. What can be done to plan for and anticipate the consequences that may result from right-of-way acquisition and the construction and operation of public facilities on that right-of-way?

In the early seventies, one approach to this question was a concerted effort to pass what was then called a National Land Use Policy Act. Some were making the argument that we have no national land use policy, therefore we should pass a law. I always viewed that as a myth. We have a national land use policy. It may not be the policy that we particularly want; we might want to make adjustments or changes in it or completely rewrite it. But we have a national land use policy. It is embodied in the Constitution of the United States and in the laws of the nation that affect land use (see Exhibit 1).

Heading the list are two key sections of the Constitution of the United States. Under the headings of various Federal departments are many statutes that impact land use in this nation. Those in highway agencies are most directly dealing with the statutes listed under the Department of Transportation's Federal Highway Administration (FHWA) (see Exhibit 2). The Federal government provides funds for the planning, design, construction, and, in some circumstances, maintenance and operation of highways, which have a very strong influence on land use across the nation. The Federal government is not the only level of our society that has an impact on land use. State governments, under our Constitution, are delegated all responsibilities that are not set forth in the Constitution for the Federal government. The Constitution of the United States is in fact

National Land Use Policy Constitution of the United States

Amendment V:

"No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are referred to the States, respectively, or to the people."

Laws of the United States

Department of Agriculture

Soil conservation land use safeguards (16 USCA 590)

Grants for water and waste facility projects (7 USCA 1926)

National Forests (16 USCA 472)

Department of Commerce

Coastal Zone Management (16 USCA 1451) State Coastal Zone Management Programs: Boundaries; permissible land and water uses; designation of areas of particular concern; adequate state statutory authority; priority of uses; organization and management; consistency of Federal programs; energy siting, coastal access, coastal erosion.

Marine Sanctuaries (16 USCA 1432)

Estuarine sanctuaries (USCA 1401)

Economic Development Administration—planning and infrastructure loans, grants, guarantees, in economically depressed areas

Department of Defense

Corps of Engineers

Water Resources Projects (33 USCA 401, 407)

Navigation Projects (33 USCA 401, 407)

"Navigable" Waters 404 Permits (33 USCA 1251) dams, dredging or any other impacting activity

Air Force

Air Installation Compatible Use Zone (AICUZ) by local government with AF acquisition

Department of Energy

Licensing of nonfederal power plants (16 USCA 791)

Department of Housing

And Urban Development

National Flood Insurance Program (Public Law 90-448) Land use restrictions required

Community Development Act (42 USC 69)

Community Development Block Grants (Title I) Requires Community Development Plan, etc.

Housing Assistance (Title II)

Local government must certify consistency with housing assistance plan.

Comprehensive Planning (Title IV)

"701" grants must provide:

Housing plan

Land use plan: Existing land uses; land use needs (projections); public service needs; (impacts on: locals, taxes, air & water, CZ, etc.); growth distribution; energy conservation; effect on areawide, local, state planning and development.

Interstate Land Sales Full Disclosure Act (15 USCA 1701)
Real Estate Settlement Procedures Act (12 USCA 2601)
Mortgage Insurance Programs
Noise Control

Department of Interior—Federally-owned land
Historic Preservation Grants and Federal Register (36 CFR 800)
Management of Federal land (43 USCA 1411)
Dams and water resources—Bureau of Reclamation

Department of Transportation
Coast Guard—bridge permits (49 USCA 1655), deepwater ports (33 USC 1501)
FAA — (49 USCA 1701)
 Airport system planning grants
 Airport and airways development grants
 Airport noise, liability & environmental requirements
FHWA — Continuing comprehensive cooperative planning (23 USCA 134)
 Highway systems, location, design, construction
UMTA — (49 USC 1601) planning
 Grants, rail and bus
FRA — Grants to states for rail planning
 (Railroad Revitalization & Regulatory Reform Act of 1976)

Department of Treasury—IRS
Tax law favors:
 Homeowners over renters (IRC * 163)
 Expensive, low density, detached single family homes (IRC 163)
 Investment in new construction over rehab (IRC 167)
 Disincentive to maintain in long run (IRC 167)
 Construction of new buildings where land is cheap (IRC 167)
 Conversion of open rural land to development (IRC 1014)
 Promotes leap frogging (capital gains after owner dies) (IRC 1014)

* Internal Revenue Code

Environmental Protection Agency
Clean Air Act (42 USCA 1857)
 Ambient standards, state implementation plans
 Permits for stationary and indirect sources
 Significant deterioration
 Transportation control plan
Water Pollution Control Act (33 USCA 1251)
 National Pollutant Discharge Elimination System (NPPES)
 State continuing planning process—permits, EPA can veto, or issue if no state process, applies to private and public (e.g., sewage treatment)
 Areawide waste treatment management planning process, including regulation of location of development
Safe Drinking Water Act (Public Law 93-523)
 Aquifer protection—no Federal funds if may contaminate
Solid Waste Disposal Act (42 USCA 3251)
 Planning for areawide implementation is required of applicants for grants
Noise Control Act (42 USCA 4801)
 Development of noise emission standards through land use and other means

Water Resources Council
Grants for development of water and related land resources plans

a limiting document. Amendment 10 of the Constitution reads "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are referred to the States respectively or to the people." So, the States play a role in varying degrees. On the local government level, zoning responsibilities come to mind most quickly concerning land use and its affects. Zoning is by tradition, but not by Constitutional requirement, a responsibility of local government. There are about 10,000 local governments in the United States that are either carrying out zoning responsibilities or in many ways are affecting land use and its consequences. But land use impact is not limited to government. The private sector certainly is important in this nation that has been founded on a private economy and free enterprise and the free exercise of private property rights. The market forces, and private developers' understanding of the market forces, determine to a large degree where and what kind of development takes place.

Constitutional restraints on the Federal government in the land use area notwithstanding, there is a proliferation of laws affecting land use that have been passed by Congress over the years, examples of which follow:

The U.S. Department of Agriculture (USDA) administers Federal laws affecting land use concerning rural areas of the country. USDA is managing millions of acres of lands owned by the Federal government, primarily through the Forest Service. Federal controls and incentives to grow or not grow certain crops affect rural land use.

The Department of Commerce administers the Coastal Zone Management Act which some consider the farthest reach of the Federal government into land use planning and control. The Coastal Act is constitutional in that it does not directly dictate land use controls. But the Act authorizes grant funds to states that they can accept or reject; but if accepted, the states must prepare plans and exercise certain controls of the land uses in coastal areas. Further, the participating states must designate areas for protection and other areas for development. A critical element of the Coastal Act is the consistency requirement. The Act says that once a coastal management plan is adopted by

the state, and is accepted by the Federal Department of Commerce, then all Federal activities must be consistent therewith. Some would say that is a reversal of sovereignty; that the state is thus dictating to the Federal government. If the state has an adopted coastal zone plan, highways, for example, proposed for the coastal zone must conform to that plan. The Department of Transportation (DOT) and its highway administration have developed procedures requiring that consistency determinations be made. The Department of Commerce is also in other areas of land use such as marine sanctuaries, and through its Economic Development Administration, is funding growth planning and development.

Some Federal statutes restrain growth, with the objective of protecting critical areas from adverse forces of development. Other laws and funding programs encourage development, the Federal highway program for example.

The Corps of Engineers of the Department of Defense has several responsibilities related to land use including the "404 permit" required by the Federal Water Pollution Control Act. The 404 permit must be issued by the Corps of Engineers prior to any dredging or filling in navigable waters anywhere in the nation. The courts have interpreted "navigable waters" very broadly. The Corps also constructs dams and coastal flood and erosion control structures, all of which affect land use.

The Congress is considering many legislative initiatives that could have major impact on the land use of the nation that would be administered by the Department of Energy. For example, the proposed Energy Resources Mobilization Board would, if some of the current legislative proposals were to be enacted, pre-empt and override local, State and Federal laws and decisions for purposes of siting energy plants which could have considerable consequences.

The Department of Housing and Urban Development (HUD) administers one of the early Federally funded planning programs (the 701 program) that encourages areawide land use planning. HUD also administers the Federal Housing Administration (FHA) loan program which has had a long, powerful effect on housing availability and choice.

The Department of Interior has a major responsibility of managing millions of acres of Federal lands. Federally owned land amounts to about one-third of the nation's total land resources, mostly in the western states and in Alaska. The Department of Interior is also building dams and water resources projects that impact land use.

In addition to highways, other agencies of the Department of Transportation affect land use. The Federal Aviation Administration (FAA) is involved in airport siting, construction and operation. The FAA is giving more attention to noise/land use relationships by encouraging the control or prohibition of development in areas within certain noise contours around the airports. The Urban Mass Transportation Administration's programs impact land use, particularly in areas surrounding subway stations.

Another set of Federal laws that affect land use is a little more indirect but can be powerful in affecting land use. Tax laws of the Federal government influence whether and where land is developed. Some observers say that Federal tax law favors homeowners over renters; favors expensive, low density detached single family homes over the alternatives; favors investing in new construction over rehabilitation; favors suburban growth over central cities; favors conversion of open rural land and "leap frogging" (instead of continuing to develop cities close in).

The Environmental Protection Agency (EPA) administers several laws which have a pervasive and growing affect on land use. The Clean Air Act increasingly determines whether certain land uses (industrial, for example) are allowed at all because of their air pollution consequences. The Clean Air Act requires that areas that have clean or pristine air must not be allowed to significantly deteriorate in air quality, limiting or prohibiting growth in undeveloped areas. The Water Pollution Control Act has pervasive land use affects. It discourages development through controlling discharges of pollutants into streams, lakes, and oceans. It also encourages development through a major grant program for sewage treatment plants.

This is only a partial list of a very pervasive Federal statutory and regulatory affect on the nation's land use. There are

means to bring more rationality into this Federal statutory influence on land use, to manage and make adjustments that are productive to the goals of the nation.

One example is the Urban Transportation Planning Process. The 1962 Highway Act was a pioneer in the Federal government's support and encouragement of local comprehensive planning. That act said, and it still says today, that Federal highway funds cannot be used in an area that has more than 50,000 people unless the expenditure is based on a comprehensive, continuous, and cooperative plan that is adopted by the jurisdictions of the local area. The FHWA and others have provided support to strengthen areawide institutions to accomplish this planning. Often these activities are housed in councils of governments or metropolitan planning organizations.

The urban transportation planning process is the beginning, the first point of rational planning for the acquisition of right-of-way and the construction and operation of transportation facilities. If this planning is effective, right-of-way is required to fit into a highway plan, that fits into a transportation plan, that fits into a land use plan, that is adopted by the elected officials of the area in coordination with all the other relevant planning. Each of the elements of the planning process has a purpose. A "unified planning work program" must be annually updated as a "plan to plan." It is an indication of where the planning funds will be spent and what activities will be accomplished by which planning organization. The "transportation plan" itself is an evolving, continuing document. The role of the FHWA under the statute is to assure that the process that produces the plan is done and is done well, but the actual plan itself is the responsibility of the local governments. The transportation plan must have at least two elements in it: First, a "transportation system management" (TSM) element must provide for the use of and improvements on existing facilities, making better use of what we have as opposed to major capital investment in new facilities. The second is the long-range element which is to provide for needs several or many years into the future. It may provide for major infrastructure development, major new highways and freeways or mass transit facilities as they may be needed. This transportation

Exhibit 2

Land Use Policy U.S. Department of Transportation

I. Urban Transportation Planning Process (23 CFR 450)

In order to receive the several billion dollars of annual Federal aid to transportation, all metropolitan areas over 50,000 population must have a continuing, comprehensive, and cooperative transportation planning process underway. The agency doing the planning must be a single metropolitan planning organization designated by the governor. Desirably, it should be the same organization that has a number of other responsibilities: Land use planning, the coordinating requirements of the Office of Management and Budget's Circular A-95, etc. This institution should be headed by elected officials representative of the general purpose local governments of the metropolitan area. The supported transportation activity must be consistent with metropolitan and local land use plans.

A. Unified Work Program

- (1) Describe all transportation related planning activities
- (2) Document work to be performed

B. Transportation Plan

- (1) Transportation Systems Management (TSM) Element
 - (a) Provide for efficient use of existing facilities
 - (b) Provide for improvement of existing facilities
- (2) Long Range Element
 - (a) Provide for long range needs
 - (b) Identify new facilities and major changes in existing facilities
- (3) Transportation plan must be consistent with comprehensive land use plan for areas

C. Transportation Improvement Program (TIP)

Annual adoption of a staged multiyear program of transportation projects from the transportation plan

D. Elements of the Planning Process must include:

Projections of demographic and land use activities consistent with urban development goals
Monitoring and reporting of urban development and transportation indicators and regular reappraisal of the transportation plan

E. Certification of the Planning Process Annually (by FHWA/UMTA)

II. Environmental Impacts Statements (DOT Order 5610.1B)

Under the Department of Transportation's environmental impact statement requirements, no project is to go forward without consideration of its land use consequences. Specifically, the impact statement must identify the population and growth characteristics and secondary impacts of land use change. It must state how the project conforms or conflicts with adopted or proposed land use plans, policies, and controls of the area. It must discuss and consider any probable adverse impact on land use patterns and how these are to be mitigated. It must explicitly detail the project's impact on public park and recreation land. It must identify impacts related to community disruption, to relocation of people, and to environmental consequences such as noise, air, water pollution. The environmental impact statement must identify public facilities that would be needed to serve any induced increase in population as a consequence of the transportation facility.

plan must be consistent with comprehensive land use plans developed for the area. The transportation planning process must also include development of a Transportation Improvement Program (the TIP), a document that is annually adopted and updated and provides a staged multi-year program of projects from the transportation plan. The TIP controls when right-of-way will be purchased for a particular facility. The planning process must include projections of demographic and land use activities that are consistent with urban goals. It can't be simply a projection of past trends. It must be a projection that is based on goals officially adopted by the metropolitan area. The planning process must provide for monitoring and reporting of urban development as it actually takes place, including a feedback loop into the planning process. If things don't go the direction the plan is indicating, the plan must be adjusted to acknowledge that fact. Finally, the process, not the plan, must be annually certified by the Federal government (FHWA and UMTA) if Federal planning funds are to continue to flow.

The document the DOT/FHWA employs that requires consideration of land use consequences is the environmental impact statement (EIS). Among other things, the National Environmental Policy Act requires that an EIS be prepared on all significant Federal actions affecting the environment. To carry out the requirement, the EIS must give evidence that land use consequences have been considered. More specifically, it must identify the population and growth characteristics that are existing and projected and it must identify the secondary impacts of land use change. This means that before we can approve a project, before we can buy the right-of-way, we must know what that right-of-way and that highway are going to do to the surrounding land uses. Is it going to create more development? Where and when? The state of our knowledge and capability to make that prediction is meager, and we hope it is improving, but we have to address these land use consequences in the environmental impact statements to the best of our ability. I know of no group of professionals that has more competence to address this subject than people with right-of-way expertise.

The EIS must state how the project con-

forms to or conflicts with other plans, including land use plans for the area. It must give evidence that it is not being done independently of them. It must discuss and consider any adverse impacts on land use patterns, say what they are going to be and describe mitigation measures. It must explicitly detail the project's impact on public park and recreation land, the section 4f requirement of the Department of Transportation Act. Section 4f essentially says that you cannot take park or recreation land unless (1) you can prove that there is no alternative, (2) you can prove that you have taken all steps to mitigate adverse impacts. It puts park and recreation land in a special highly protected category under Federal statutes. The EIS must identify impacts related to community disruption, to relocation of people, and to other environmental consequences such as air, water and noise pollution. In each of these subjects—noise, air and water, there is a growing state of knowledge, and a growing list of requirements that must be met to assure that these objectives are dealt with. Finally, the EIS must identify public facilities that would be needed to serve any induced increase in population. In other words, you not only need to predict what kind of land use growth is going to be a consequence of the highway, but also you need to deal with how that land use growth, that population you are bringing in, is going to be served with public facilities. This is no simple task; I think this is quite apparent.

I hope you will make known your views as we attempt to make land use development and control at all levels of government and the private sector meet our highest aspirations.

Questions And Answers

Q. Are there any other pending legislation and/or government regulations?

A. The efforts of the mid-'70s to pass a National Land Use Policy Act have faded in the sense of a comprehensive single statute that does the whole thing. I am not aware of such legislative activity now, but wouldn't be surprised to see it introduced again. There were extremely close votes for two years running in the mid-'70s. Legislation passed the Senate and failed in the House by one

or two votes. There was considerable Congressional support for going in that direction and I am sure that that still exists in some form. But the people who were the leaders in the effort decided to back off awhile and concentrate their efforts on the separate statutes, which they have done. Numerous laws have come out of the Congress in the last few years that have land use consequences. One under consideration now that could really impact land use is the one I mentioned earlier, the Energy Resources Mobilization Board.

Q. I was wondering if there has been any thought or legislation on ways and means of having the other major agencies of the government, like the Corps of Engineers, work more closely in achieving national, urban or state goals, rather than going separate ways. What about the multi-agency means to achieving national/state goals?

A. In my judgment we are a long way from dealing with this question very effectively. There are attempts being made to acknowledge the fact that we do have to work together more effectively between these various programs that might otherwise pull in different directions. But these attempts are not very comprehensive. DOT, for example, has attempted to create institutional mechanisms to cause more coordination to take place. The Intermodal Planning Groups (IPG) created a few years ago in each regional office, have representatives from each of the Administrations of DOT, highway, airports, so forth, and have someone from EPA and HUD and others. The IPG's meet on a regular basis to try to deal with the problem that you are addressing.

Another mechanism for coordination is the Federal Regional Council which is composed of the regional chiefs of

the different Federal departments. But all these have very limited capability to overcome some very difficult problems. When you talk to some local people, say councils of government, that have the responsibility of carrying out planning programs from several different departments, they are very frustrated about the problem of having to be pulled in so many different directions by Federal agencies. The National Land Use Policy Act was in part an effort to deal with that and get some more comprehensive and coordinative things to happen. The National Land Use Policy Act would have done what I described under the Coastal Zone Act in terms of the reversal of sovereignty. It would have required all Federal programs to conform to the State plan as is now true in the coastal zone. This would have been a forcing mechanism to get the Federal agencies to work more closely with state and local governments. Of course, not everyone was in agreement with that consequence. The DOT and the EPA recently signed agreements to integrate the planning programs for the transportation elements of air quality planning into transportation planning. Before this, EPA was proceeding to create a whole new transportation planning institution and mechanism to meet Clean Air Act transportation requirements. As a result of the agreement signed between DOT and EPA, which the FHWA is heavily involved in, now there is only one planning process. There are not separate regulations that govern.

Q. Have there been any efforts made to coordinate planning of alignments with the environmental process so that you might be able to make decisions prior to development and still be in compliance with environmental requirements?

A. Some of us have been grappling with this over the years. One of the criticisms of the EIS process is that it comes too late and that part of the decisions have already been made. We haven't dealt with that in the sense of requiring environmental impact statements at an earlier planning stage. However, the transportation planning process does require that environmental consequences be considered at an earlier general system planning stage rather than waiting until you write the EIS about the time you are planning a right-of-way purchase.

Future Seminar Sites

1981—June 12-25

27th Annual International Educational Seminar

Red Lion Inn/Sea Tac

Seattle, Washington

Host: Chapter 4

1982—June 13-17

28th Annual International Educational Seminar

MGM Hotel

Reno, Nevada

Host: Chapter 46

1983—June 19-24

29th Annual International Educational Seminar

Albuquerque, New Mexico

Host: Chapter 53

1984—June 17-22

30th International Educational Seminar

Disneyland Hotel

Anaheim, California

Host: Chapter 1

1985—June 15-20

31st International Educational Seminar

Opryland Hotel

Nashville, Tennessee

Host: Chapter 32

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