Michigan Law Review

Volume 61 | Issue 3

1963

Mandelker: Green Belts and Urban Growth

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GREEN BELTS AND URBAN GROWTH. By *Daniel R. Mandelker.* Madison, Wisconsin: The University of Wisconsin. 1962. Pp. xi, 176. $5.00.

I

The town of New Castle, New York, is only a few whistle stops beyond "forty-five minutes to Broadway."[1] With a little bit of luck, and Alfred Perlman urging on the engineer, the New York Central can whisk a New Castle commuter to mid-Manhattan in seventy-five minutes. Equally important, it has occasionally made the return trip in about the same time. When at home, our exurbanite might contemplate a quiet, pastoral setting, rejoicing that the dimensions of time and distance had helped preserve New Castle's unhurried ways.

Or so it was until the metropolis exploded into his bedroom. In the post-World War II era, humanity, wanting out from full-time central

1 I have based this section upon testimony taken from the trial transcript of Albrecht v. Town of New Castle, 167 N.Y.S.2d 843, 8 Misc. 2d 255 (Sup. Ct. 1957).

city existence, has surged into the slumbering township. From 1950 to 1957, unincorporated New Castle watched its population jump 71.6 percent, the migrants generating the unprecedented phenomenon (for New Castle, that is) of thirty to forty-house residential tracts. Whether because of their natural instinct or a procreative air, the newcomers managed to overload the school facilities, despite an ambitious expansion program that spiralled school tax levies 621 percent in fifteen years. Increases in assessed valuation lagged far behind the newly-created demands upon it, not only for schools, but also for sewers, sidewalks, water and highways. The consequences were predictable: bonded indebtedness climbed 1000 percent and tax rates more than doubled.

Community growth, like fire, may be salutary when controlled, cataclysmic should it rage out of hand. So it seemed, at least, to the five members of the New Castle Town Board who began to worry about their charge's extended finances. Sensibility did not seem well-served if growth continued unabashed, mindless of the town's ability to furnish and to pay for the services which are expected of government. Yet, in view of the hydraulics of population movement, unchecked growth was likely to continue (65 percent of the residentially-useful acreage was still raw land) if Farmer Black could move up to a Cadillac by selling a milch-field to Builder Jones (who already owned a Cadillac), and Builder Jones, in his turn, could manufacture houses as demanded by consumer appetite. If the town was to pay the piper, should it not be able to call the tune?

Acting upon the expertise of a hired planner, and braced by the cheers of its dollars-conscious constituency, the New Castle Town Board, in July 1956, added to its zoning ordinance Article VIII-B. This ordered the town Building Inspector to restrict residential permits in a newly-created "Special Residence District" (an area roughly contiguous with the unincorporated township); thereafter, he was not to issue more permits in any one year than that number yielded by a formula which averaged building activity for a preceding six-year period. In its first year, Article VIII-B would make available throughout the district 112 permits for single-family units whereas, in the previous twelve months of unchecked energy, the town had issued more than 150 permits.

Article VIII-B may have been objectionable in its ends, but it lacked the bad grace of being devious in its means. "Slow-down" was its goal and "slow down" was its admonition to the builder. There was money to be made, however, and, surprisingly, builders (and Farmer Black) thought it unjust that their title to expanses of trees and shrubs might not include the legal right to replace natural with artificial monuments at unqualified speed. One farmer and two builders felt so bad about this undisguised scheme to shrink their bundle of rights that they did what unhappy people have been doing for centuries. They retained a lawyer and sued.

The defendant Town Board of New Castle, however, made a prudent gesture to salvage Article VIII-B shortly after the lawsuit began. It in-

serted a variance procedure which would have erased the limits upon lands purchased or partially improved in reliance upon pre-July 1956 zoning. In this amended form, by stipulation, Article VIII-B was before the court. But, for Judge Supple, it was even then strictly a no-contest.[2] Article VIII-B exceeded the power granted New Castle by the New York legislature; hence the town was unable to regulate directly its rate of growth. Nor would it have mattered if the town enabling law had tendered this power, since its exercise would have been unconstitutional. The plaintiffs, according to the court, had been deprived "of *all* beneficial use of their land" and would be unable to reap any "reasonable" return on their investment.[3] Judgment for the plaintiffs. Injunction granted.[4]

One needs only modest perception to sense the court's disbelief that a town should dare assail the folk view that private enterprise can best decide where and how fast new development shall take place. To the court it seemed abundantly clear that the "general welfare, etc." generalities which underlie the exercise of the police power do not justify permit-rationing by reference to a non-marketplace standard. At the heart of the court's analysis is the equation: a property owner who must gear his building rate to the town-imposed standards (and who may not be able to build upon *all* his land *all* at once) has been deprived of *all* beneficial use of some of his land; and this constitutes a "taking" without just compensation.

II

The County of "E"[5] is one of the Home Counties which ring London and, together with the central city, comprise the Greater London region. English population increases have been gentle during the 1950's; five percent compared with America's more robust percentage of 18.5.[6] But echoing our experience, population pressures did not diffuse evenly about the island. There, too, the major urban areas, especially London and Birmingham, exerted a pulling force in the movement of people and jobs. But within the London region (or Birmingham) a counterthrust carried people away from the central core, as evidenced by a drop in the population of London proper during the 1950's.[7] Its displacees (many the by-

2 167 N.Y.S.2d 843, 844, 8 Misc. 2d 255, 256 (Sup. Ct. 1957).

3 *Id.* at 845, 8 Misc. 2d at 256. (Emphasis added.)

4 The Town of New Castle filed a notice of appeal to the appellate division on June 17, 1958, thereby suspending execution of the judgment. No steps have been taken, however, to perfect the appeal. Although Article VIII-B has remained viable, a tightening mortgage market during 1957 and 1958 curtailed new home construction; the permits available exceeded the demand. In the meanwhile, the town upzoned 2,000 acres to a two-acre minimum lot size requirement and, in doing so, has blunted the edge of the next building onslaught (telephone conversation with Arthur Green, Supervisor of the Town of New Castle, May 1959).

5 P. 23. The author has invoked his own mantle of secrecy by veiling selected governmental units behind letter labels.

6 STATESMAN'S YEAR BOOK 68-69, 565 (1962 ed.).

7 *Id.* at 69.

product of urban redevelopment or reduced crowding), and those attracted from beyond the region, sought housing in the surrounding Home Counties. Were "E" New York's Town of New Castle, the sum of many private decisions (builder, consumer, lender) would have settled the stock of new housing—in numbers and location—to accommodate this "overspill." That "E" was unprepared for this new-resident onslaught, or that sites elsewhere were better suited for immediate housing development, would have made an interesting, but irrelevant, footnote.

The British, however, do not accept for themselves the relatively free run with which we allow private decision to affect the land development process. Perhaps it is their greater tolerance for an overtly-planned society, fortified in this context by an earlier appreciation for the finite quality of land and wealth resources. Whatever the temperamental or cerebral underpinning, restraint upon the private developer is now a widely accepted axiom. Its credo is straight-forward: the right to own land is constitutionally protected; but not so for the right to build a dwelling place or other structure upon it. This also applies even for one's own occupancy.

To be sure, the American builder is hedged in customarily by assorted building codes, zoning ordinances, and subdivision regulations; but these all presuppose a right to develop once their "reasonable" demands are met. In England, on the other hand, the builder must await a critical preliminary evaluation, principally involving the question: does the community wish to allow development on the site proposed? Should the local planning authority decide not, and if review does not bring reversal, one skyline in particular will remain unchanged.

III

As is usual in the affairs of man, a simple principle has needed intricate machinery for its execution. And it is largely machinery, rather than principle, with which Professor Mandelker is concerned in his recent study of English land-use control, *Green Belts and Urban Growth.* His choice is a useful one. Concept and its execution are handmaidens in the pursuit of policy goals, but somehow legal scholarship has preferred the intellectual to the pragmatic for its close-ordered study. We have been slow in appreciating that administration is often the weaker link in the "authority-control" chain, and that some of our past failure in managing our land-wealth resources arises from a neglect to pay close enough attention to the detail of management. Green Belt—an undeveloped ring about her urban centers —is a significant expression of Britain's approach toward land husbandry. After describing the Green Belt's mixed parentage and motivation, the author then explores the myriad of separate decisions which transform concept into response. (Alas, I fear that our guide does not scintillate.) In working his vein, Professor Mandelker has interviewed Ministry officials and local planning authorities, attended planning inquiries (hearings), and pored over local registers, transcripts, development plans, maps and

appeal files. He has extracted much solid stuff, but his report suffers from its listless recital of detail. A journalist's hand, to complement his scholar's eye, would have helped.

Many of the book's potential readers will have had an earlier acquaintance with contemporary British land-use control. Its statutory midwife, the Town and Country Planning Act of 1947,[8] has already excited considerable curiosity on this side of the ocean.[9] Although later measures have mutilated the act's financial features and their predicating assumptions, the planning component has solid acceptance and the pragmatic benefits of a half-generation of experience.[10] The sine qua non is the act's insistence upon a development plan, formulated, in the first instance, by each local planning body, but subject to central review and revision within the Ministry of Housing and Local Government. An articulation of a community's goals, and the intellectual process from which goals are fashioned, have now become a national imperative. The 1947 law further directs a periodic five-year revision of the development plans, thereby in effect imposing continuity upon the planning process at the local level. But the constant exposure to Ministry review sensitizes the local plan to the farther reaches of national goal-thinking.

Let us demonstrate by example the workings of British planning control. Squire Black owns a four-acre plot near the Village of Y in County "E." Several years before, the County development plan located Black's land within its green belt zone. After making some preliminary engineering and marketing surveys, Developer Jones has decided to erect ten cottages on the Black parcel, and has persuaded the Squire to part with legal title if development permission is available. A local bank is anxious to arrange the interim and permanent financing, thereby rounding out the private decisions that are prelude to a building program.

The interested parties apply to the local planning committee for permission to erect the ten dwellings. The committee refers the application to its technical staff and a report including a recommendation follows which, in at least 95 percent of the cases, foreshadows the final disposition. Armed with the report, the planning committee meets in closed session, which not even the applicant attends, and there is no hearing. Deliberation is summary. Estimates of two minutes per agenda item recall the dispatch with which the United States Supreme Court presumably rushes through petitions for certiorari.[11] A standardized form mailing notifies Squire Black of the committee action. If planning approval is denied, the usual conclusionary language buries the variables which might expose the process of decision:

8 10 & 11 Geo. 6, c. 51.

9 See HAAR, LAND PLANNING LAW IN A FREE SOCIETY (1951); POOLEY, THE EVOLUTION OF BRITISH PLANNING LEGISLATION (1960); Comment, *Land Value and Land Planning: British Legislation and American Prospects*, 60 YALE L.J. 112 (1951).

10 See generally POOLEY, *op. cit. supra* note 9, at 88-98.

11 Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 87-90 (1959).

> "Inside a Green Belt approval should not be given except in very special circumstances for the construction of new buildings or for the change of use of existing buildings, and it is considered undesirable that a [development of ten houses] should be introduced on this site." (p. 77)

Somewhat daunted, Squire Black may seek Ministry review. About one-quarter of the disappointed applicants do so. The appellate process is in four stages: the pleadings, wherein the local committee must detail more precisely its basis for rejection; the inquiry, a hearing before a Ministry inspector at which the developer, his real estate agents, the area planning officer and district engineer will probably testify; the inspector's on-site visit; and, finally, within the Ministry, the decision officer's evaluation of the appeal, relying heavily, it seems, upon the inspector's report. Here again, secrecy shrouds official action, since the report (which may include facts or attitudes not presented at the inquiry) is confidential, and the Minister's decision, when announced, resembles in its abstraction the initial refusal:

> "Decision: Dismissed. 'The appeal site is in a rural area which it is proposed shall form part of a Green Belt. [The Minister has] attached great importance to the Green Belt principle. . . . [T]he circumstances of this case are not such to justify its being treated exceptionally.'" (pp. 124-25)

Have Squire Black and his developer vendee exhausted their remedies? With respect to this venture, yes, at least for the moment. Whereas the American judiciary hovers about a zoning and planning administrator like a jealous suitor, the British courts have been contrastingly stand-offish. Once the Minister establishes that the intended building is subject to permit (not even debatable in our example) and that compliance with statutory procedure has occurred, the "reasonableness" of his decision is beyond a court's concern. Some time later, Squire Black may reapply for a permit with the same or modified plans or he may seek to qualify for compensation upon a showing that his land has been stripped of development value. (The difficulties that this latter course implies tend to discourage it; but this is a matter for another book.)

At first blush, this all seems terribly high-handed for our tastes, as *in camera* decisions, shunning of precedent, lack of judicial review, even the inability of a disgruntled neighbor to appeal what he considers the unwise *issuance* of a permit are all foreign to the American approach. But the system is not especially footloose. Checks and balances do exist which leaven the risk of wholesale abuse, largely predicated upon the integrity and devotion of Britain's civil service, the continuity and central direction of the island's planning control, and Parliament's power, occasionally exercised, to challenge Ministry policy or action. Nevertheless, some procedural reform to make the checks more explicit is taking place and is likely to continue. Furthermore, the quality of developmental planning

and control has been spotty. The promise of a plan for each community has been diluted by the unevenness in local fact-finding surveys (the stuff of which plans are made) and delays in gaining final Ministry approval. Uncertainty about Ministry attitudes (and indeed about their own objectives), inadequate mapping, and the pressures of population itself have often made it difficult for local committees to pursue a steadfast tack. All of these variables are within Professor Mandelker's focus, and he has gathered together thoughtfully an abundance of resources to illumine planning administration.

IV

It is concept with which I should like to conclude. We have watched, in our time, a steady extension of American land-use measures in forms such as subdivision regulations, architectural design controls, performance standards, and floating zones. Perhaps some of this would have seemed unsafe to the not-so-radical instincts of Mr. Justice Sutherland, whose Supreme Court opinion validated primitive zoning in the *Village of Euclid* case.[12] But, although suburban communities understand generally that they may or, in some instances, must adopt maps designating allowable land uses in each of their several districts, and may thereafter edit a builder's plan, they do not have (or do not think they have) the legal tools to make *candidly* increasingly urgent preliminary decisions, such as: should building take place at all; if so, should it concentrate in the north-east or the south-west quadrant of the township; if residential, are dwellings in the 15,000 dollar or 40,000 dollar range more consistent with the long-term needs of the area; what, if any, of our pristine heritage do we wish to preserve from the builder's axe?

I stress the adverb "candidly" because considerable hanky-panky passes muster in our land-control process. It is a humble ordinance, for example, that does not feature a one or two-acre minimum lot size requirement and, indeed, nearly half of the residentially-zoned vacant land in the New York metropolitan region is so encumbered.[13] Such out-sized minimums bear directly upon the development choice, since pyramided land and installation costs demand dwellings realizable only by the upper reaches of the consuming public. That this is likely to chill many would-be developers, or redirect their efforts elsewhere, is neither surprising nor unforeseen by local governing bodies. What is surprising, however, is that a governmentally-imposed "slow-down" is considered "uncricket"; and if a minimum lot size ordinance were to profess this aim, courts almost certainly would give it the same short shrift Article VIII-B received from Judge Supple.[14]

12 Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

13 REGIONAL PLAN ASSOCIATION, SPREAD CITY 11 (Bull. 100, Sept. 1962).

14 See, *e.g.*, Simon v. Needham, 311 Mass. 560, 566, 42 N.E.2d 516, 519 (1942), where the court in validating a one-acre lot size minimum wrote: [W]e assume in favor of the petitioner that a zoning by-law cannot be used primarily as a device to maintain a low tax rate."

An occasional tongue-in-cheek might not matter if suburbia's oblique attack on the generous limits of developer choice had only succeeded. Unhappily, it has not. We are becoming grimly aware that the communities we produce about the central core are no more satisfying, functional, economically feasible, or durable than the central core itself, as fashioned by our ancestors two to four generations ago. The evidence takes many forms. The financial troubles of New Castle and other similar communities is one —with the usual end-products: overcrowded schools and under-privileged education.[15] Consider also the pattern of "urban sprawl,"[16] characterized by a landscape pock-marked with clusters of unrelated development, prodigal in the land consumed, unconcerned with the future direction of the land passed over. Or the newly-christened phenomenon, "spread city."[17] By having decreed unsuitably large minimum-sized lots, zoners tend to divert development even farther from the central core, to those areas where raw land is either cheaper or as yet unzoned. But by 1985, to use New York as an example, much of the intermediate ring (25-50 miles from Times Square) will have been peopled, and under present zoning, each one-family home to be built on the region's vacant land will occupy a lot averaging two-thirds of an acre.[18] One can also expect backyards too large to keep trimmed without grumble, too cut-up to provide meaningful play area. And together, "urban sprawl" and "spread city" will have lengthened the journey from home to job, or to the central city, resulting in even heavier demands upon our highway network on which Uncle Sam alone now spends three billion dollars yearly.[19] We have not learned, and perhaps we can not, how to accommodate far-flung settlement to the relatively-fixed routing of mass transit.

We hear much talk now about "open space,"[20] or its lack, about how badly we are preparing for the recreational, aesthetic, and watershed needs

15 For a second example, see N.Y. Times, June 17, 1962, § 1, p. 52, col. 5, where enrollment in the Lakeland, N.Y., School District had jumped from 954 in 1951 to 4,420 in 1962. A proposed $5.724 million bond issue to relieve school housing pressures requires a two-thirds approval since the district's bonded indebtedness will then exceed the ten percent statutory limit.

16 See, *e.g.*, Whyte, *Urban Sprawl*, THE EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 133-56 (Doubleday ed. 1958); Woodbury, *Impact of Urban Sprawl on Housing and Community Development*, 50 AM. J. PUB. HEALTH 357-63 (1960).

17 See REGIONAL PLAN ASSOCIATION, *op. cit. supra* note 13.

18 *Id.* at 11-15.

19 See *Hearings on Title II of H.R. 6713 Before the Senate Committee on Finance*, 87th Cong., 1st Sess. 31 (1961).

20 For some written examples, see SIEGEL, THE LAW OF OPEN SPACE (1960); Clawson, *The Dynamics of Park Demand* (Regional Plan Ass'n Bull. No. 94, 1960); Whyte, *Securing Open Space for Urban America: Conservation Easements* (Urban Land Institute Technical Bull. No. 36, 1959); Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961). For some governmental partial responses, see Open Space Land Act, 75 Stat. 183, 42 U.S.C. § 1500 (Supp. III, 1961); Park and Recreation Land Acquisition Bond Act of 1962, N.Y. UNCONSOL. LAWS §§ 1621-22 (McKinney Supp. 1962); Park and Recreation Land Acquisition Bond Act of 1960, N.Y. UNCONSOL. LAWS §§ 1601-02 (McKinney Supp. 1962); Park and Recreation Land Acquisition Act of 1960, N.Y. CONSERV. LAWS §§ 875-85.

of the coming decades. Yet, as a vast untouched shoreline within easy access to New York City's millions faces imminent development, government seems unable to muster resources to preserve its virginal aspect.[21] And once lost, it is beyond retrieval.

These, and others, are the ailments festered by the relatively unplanned structure of metropolitan growth: the dreary sameness of the tract home; the developer's too-frequent disregard of the beauty that is a tree; the shortage of community facilities to satisfy the cultural, academic, or activist needs of the suburbanite; the one-class economic "ghettoes" produced by narrow ranges in price and style; the color curtain separating the outer rings from the central core; the proliferation of governmental units; the disorderly competition among these to annex unaffiliated areas.

Perhaps this plight is necessary—the price we pay, so to speak, to preserve that precious something we call "free choice." But is it clear *whose* free choice we are preserving? Is it not the developer's free choice—his "own sweet will," to use Professor Haar's phrase,[22] perhaps not so sweet as it once was, but still of considerable impact in setting the tone for the growth about us? And is the developer's choice, even when tempered by the critical judgment of the marketplace, a mirror of the felt preference of the larger community? We are not likely to put the matter of preference to a vote; but were one held, is it likely that metropolitan man would vote for more of the same, when apprised of the ailments described above and their implications for himself and his children? Undeniably the developer has title to Blackacre and the willingness to take a commercial gamble. In the year 1962, are these reasons sufficient that so dominant a role in the origination and execution of land-use decisions be his?

What seems needed for our emerging urban fringe is thoughtful attention to the respective roles of government and private developer in initiating land-use decisions. Such soul-searching for the central city helped to launch the Housing Act of 1949, perhaps the most significant post-war domestic legislation we have had to date. Its program of urban renewal has given new dimension to a community's responsibility for the shaping of its land resources. Each renewal project is predicated upon a workable plan—a fairly precise statement of the community's goals for the redeveloped area and its environs. Private builders are free to avoid project areas. But if they choose to participate, they are subject to the details of the project scheme. And the more ambitious a community's urban renewal

21 The area is Breezy Point, Queens, at the western tip of the Rockaway Peninsula. One of the several parcels now in private ownership is being readied for a $20 million housing project. City, state, and federal officials have joined in praise of Breezy Point's recreational usefulness, but at this moment there has been only concerted talk and no concerted action. See N.Y. Times, Oct. 19, 1962, p. 33, col. 8; N.Y. Times, Oct. 12, 1962, p. 27, col. 1; N.Y. Times, Oct. 5, 1962, p. 35, col. 8. Even if Breezy Point is spared and its park potential realized, government's twelfth hour move evidences the lack of community initiative in preserving open space.

22 HAAR, LAND-USE PLANNING 347-92 (1959).

program, the greater is *its* decision-making power with respect to the patterns of land use.

Are not the assumptions underlying urban redevelopment also tenable in the context of suburban development? Must we repeat our mistakes and suffer with them for one or two generations before we are prepared to allow a community to prepare intimately for its future? Should we not devise additional legal tools and allocate our financial resources so as to avoid the currently unplanned and haphazard quality of metropolitan growth?

This is the essential premise of Britain's Town and Country Planning laws. They far transcend the piecemeal and fairly narrow-based attack that is epitomized by New Castle's Article VIII-B. They are far more candid than the subterfuge we trot out in the guise of minimum lot size zoning or related dubious techniques.[23] That the British effort has worked imperfectly, that it has undergone extensive change, that it may not be entirely adaptable to our economic or political structure, do not undercut, in my judgment, the ultimate need for far greater community direction of the patterns of land use. By his scrutiny of the British experience, Professor Mandelker has added to the insights we will need to fashion an American counterpart.

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[23] See, *e.g.*, N.Y. Times, Sept. 18, 1962, p. 33, col. 4, which describes taxpayers' efforts to incorporate as the Village of North Clarkston [New York] to forestall a proposed housing development in the unincorporated township.