Schroader, Kathy

From: Tilton, Rebecca
Sent: Monday, August 10, 2015 4:21 PM
To: Madore, David; Stewart, Jeanne; Mielke, Tom; Silliman, Peter; Orjiako, Oliver; Schroader, Kathy
Subject: Comments re: Comp Plan Update
Attachments: Susan Rasmussen_08-04-15.pdf; Carol Levanen comments_08-04-15.pdf

Follow Up Flag: Follow up
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Hello,

The attached written testimony was received from Carol Levanen and Susan Rasmussen during the public comment portion of the 8/04/15 BOCC hearing.

Thank you,
Rebecca

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Washington University in St. Louis
SCHOOL OF LAW

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IMPLEMENTING STATE GROWTH MANAGEMENT PROGRAMS: ALTERNATIVES AND RECOMMENDATIONS

by

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IMPLEMENTING STATE GROWTH MANAGEMENT PROGRAMS: ALTERNATIVES AND RECOMMENDATIONS

DANIEL R. MANDELKER*

I. INTRODUCTION

State growth management programs are a major part of the Quiet Revolution in land use control.[1] States now have forty years of experience with these programs, and it is time for an assessment to see what they have accomplished. What do they cover? How are their criteria implemented? How are they enforced? These questions raise a very important problem. Statutes, plans, and policies are not enough. State land use programs must be effectively implemented if they are going to be successful.

Implementation is an important issue because tensions often arise between states and their local governments that affect program success. The reason why tensions arise is clear. Land use regulation traditionally is a local government function, but state growth management programs insert a state interest those local governments must recognize. State mandates overlay existing local government responsibilities and require a substantial change in how local governments carry out their land use planning and land use regulation mandates.

A review of these state programs finds a highly eclectic variety. There is no clear model, there is no clear or accepted

* Stamper Professor of Law, Washington University in St. Louis. This Article is based on a speech given at the conference on The Quiet Revolution in Zoning and Land Use Regulation, held at the Center for Real Estate Law, The John Marshall Law School, Chicago, Illinois, September 20, 2011. I would like to thank Henry W. McGee, Jr., and Edward J. Sullivan for their comments on an earlier draft of this Article. I would also like to thank Judy A. Stark, Access Services/Government Documents Librarian & Lecturer in Law, Washington University School of Law in St. Louis, for her assistance.

1. I use the term "growth management program" to include all of the state-level programs adopted as part of the "Quiet Revolution" even though some of them, particularly the earlier programs, do not have growth management as an explicit program objective. On growth management generally see DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 767-835 (8th ed. 2011).

reserve" system for the Portland Metropolitan Region by which lands needed for growth, but not for at least twenty years, are designated and given first priority for additions to the Metro urban growth boundary.[29]

Washington State's Growth Management Act[30] adopted the administrative model in its critical area program. Counties must designate critical areas, and in doing so must consider guidelines for designation adopted by a state agency.[31] Courts apply the statute and agency guidelines when deciding whether critical area designations comply with the Act. In one case, for example, the court applied the statute and its interpretive rules to hold a county did not consider the "best available science" when designating a critical area and did not consider all critical habitats, as the statute required.[32]

Washington did not adopt the top-down Oregon approach by creating a state agency to review county compliance with the statute. Instead, they created a state appeal board that hears appeals on county compliance.[33] Appeal from board decisions is to the courts, which can correct board interpretations of statutory requirements.[34] As observers have noted, however, this method of review is not entirely successful, and creates compliance problems,

29. OR. REV. STAT. §§ 195.137-195.145 (West 2009 & Supp. 2011).

30. *See generally* DEGROVE, *supra* note 9, at 281-320; Symposium, *Guidance for Growth: A Symposium on Washington's Growth Management Act*, 16 U. PUGET SOUND L. REV. 863 (1993); Richard L. Settle, *Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5 (1999) (discussing the Growth Management Act).

31. WASH. REV. CODE § 36.70A.170(1)(d) & (2) (2011) (designation requirement); *Id.* § 36.70A.050 (state agency to adopt guidelines). For the guidelines see WASH. ADMIN. CODE § 365-190-080 (2011).

32. Stevens Cnty. v. Futurewise, 192 P.3d 1, 12 (Wash. Ct. App. 2008).

33. *See generally* Henry W. McGee, Jr. & Brock W. Howell, *Washington's Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*, 31 SEATTLE U. L. REV. 549 (2008) (arguing for better delineation of proof burdens and standards of judicial review); Henry W. McGee, Jr., *Washington's Way: Dispersed Enforcement of Growth Management Controls and the Crucial Roles of NGOs*, 31 SEATTLE U. L. REV. 1 (2007) (discussing the roles of nongovernmental organizations in Washington land-use planning).

34. *See, e.g., Thurston Cnty.*, 190 P.3d 38 (holding that appeal boards may not create bright line rule to determine market supply in urban growth boundary, which is to be upheld unless clearly erroneous); Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning under the Washington State Growth Management Act*, 36 GONZ. L. REV. 73, 138 (2001) (discussing the inconsistencies in judicial guidance provided throughout different Washington counties).

because it relies on citizen enforcement.[35]

IV. CONCLUSION AND RECOMMENDATIONS

This review of how state land use programs are structured and applied has found eclectic variety. No single program model is optimal. Statutes and state planning goals do not always provide detailed direction, and piecemeal and uncertain application occurs when judicial review is available without state agency participation. A state program can be substantially improved when a state agency is part of the process with the authority to adopt administrative regulations that interpret the statute. The agency can bring its expertise into the program and elaborate what the statute requires on a statewide basis that provides guidance in its implementation. With experience, regulations can be changed and improved. State agency regulations also add an administrative, interpretive level that provides consistency, uniformity, and certainty across the entire state. They should receive deference in court under conventional principles of administrative law when applied in individual cases.

State administrative guidance is not a panacea. State agencies may not perform well, as happened in New Jersey's state affordable housing program where the court struck down a major program regulation.[36] A hostile state administration can also produce regulations that are unsympathetic to the program. Neither may state agency regulations avoid remands for lack of compliance, as the Washington State experience indicates. Nevertheless, if the state agency does its job well and is politically supported, it can produce a statewide interpretive layer that very much assists the way in which the program is carried out.

How should a state program be implemented? Providing consistent and workable administrative guidance at the state level, together with a system in which the review of local land use plans and regulations is mandatory and does not depend on voluntary appeals in specific cases, should work best. Mandatory state review of local plans and ordinances for compliance with

35. *See generally* McGee & Howell, *supra* note 33 (arguing for better delineation of proof burdens and standards of judicial review).

36. *See In re* Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d 445, 493-95 (N.J. Super. Ct. App. Div. 2010) (invalidating state agency's rule for complying with fair share housing mandate); *see also* Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 853-55 (2011) (arguing that the New Jersey Appellate Court's decision to strike down part of the rule was a step backwards); *see generally* John M. Payne, *The Paradox of Progress: Three Decades of the Mount Laurel Doctrine*, 5 J. PLAN. HIST. 126 (2006) (discussing the fair housing doctrine in the *Mount Laurel* cases).

state planning goals, as in Oregon, eliminates the problem of episodic litigation, This type of program structure may not find many takers in today's political environment, however. Washington State's adoption of an appeal board system shows there can be resistance to mandatory state administrative review.

What is sometimes forgotten is that programs must change over time and respond to new problems and policies. Unfortunately, politics is never easy, and program review is not always successful.[37] Change may still be possible through a redefinition of statutory goals and criteria, as happened in the revision of criteria for urban growth boundary expansion in the Portland, Oregon area.[38] The Quiet Revolution is an experiment, and the experiment continues.

37. A program review by a state-appointed task force in Oregon was not helpful. *See* OR. TASK FORCE ON LAND USE PLANNING, FINAL REPORT (Jan. 2009), *available at* http://library.state.or.us/repository/2009/200901230940315/.

38. OR. REV. STAT. §§ 195.137-195.145 (West 2009 & Supp. 2011).

Clark County Board of Councilors
P.O. Box 5000
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August 4, 2015
For the Record

EIS and the Courts

The Superior Court decision by Judge Edwin J. Poyfair, **Case 96-2-00080-2** item number 6 reads, *The Comprehensive Plan EIS issued by the County violates the State Environmental Policy Act (SEPA) RCW Ch. 43.21C.....The Boards decision to uphold the adequacy of the EIS absent additional environmental analysis regarding the Agri-forest designations and changes to the pattern of rural development was clearly erroneous.* In the **State Environmental Policy Act RCW 43.21C.020 (1)** *it states, (a) Foster and promote the general welfare; (b) create and maintain conditions under which human beings and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens..* and in *(2) (d) Preserve important historic, cultural and natural aspects of our national heritage; (e) Maintain, wherever possible an environment which supports diversity and variety of individual choices; (f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities..*

On August 11, 1997 the Western Washington Growth Management Hearing Board sent Clark County an **Order of Remand** for **Case # 95-2-0067** Achen-Clark County Citizens United, inc. vs Clark County. It says, *Therefore, it is ordered that Clark County is not in compliance with the Growth Management Act as to those matters set forth in the separate appeals and the matter is remanded to Clark County to achieve compliance consistent with earlier orders of the Board as modified by the Superior Court orders referenced above which are incorporated herein.....compliance shall be achieved by March 2, 1998. The County shall submit a report on the progress it is making toward compliance by December 15, 1997.* The county never complied with the court orders or the Order of Remand. No progress reports can be found and the Hearing Board only conducted a few compliance hearings for agri-forest and rural centers. They failed to assure the county complied with ***all*** of the court orders, which also included items **(3) Statutory Mandate, (4) Agri-Forest Lands, (6) Comprehensive Plan EIS**, and **(7) Rural Land Densities.** This resulted in the 36,000 acres of Agri-Forest land and the rural centers never having an EIS to support changes that did occur later.

Clark County Citizens United, Inc. has reviewed writings by Attorneys, Daniel R. Mandelker and Brent O. Lloyd that discuss a **Quiet Revolution in land control.** Interestingly, these writings discuss CCCU's court cases. Particularly they discuss the March 12, 1999 **Court of Appeals** case **22164--1-II** that confirms OFM projections are to be used for urban planning, not rural planning. They state a great deal of incorrect information, that diminishes the importance of that court ruling and questions the credibility of their reports. They acknowledge John Karpinski for contributions to one of the articles, but , based on the document, it appears they were given the wrong information. They state the Washington Supreme Court refused to hear an appeal on the Court of Appeals decision, but CCCU is not aware of that happening. Our recollection is that Mr. Karpinski informed CCCU he no longer wanted to pursue Washington courts, and instead was going to file in federal court. He did so shortly after his announcement, basing legal actions against Clark County on non-compliance of the Clean Water Act. It's alarming to see Futurewise and Friends of Clark County recommend these articles to their membership, when the content is incorrect and suspect. These authors would need to make corrections to their documents, for them to be considered credible information. Since CCCU was the benefactor to the court cases, we are well aware of what actually happened.

Clark County remains in non-compliance and has ignored the court orders for many years. The time has come for the county to obey the courts in the 2016 update of the Comprehensive Land Use Plan.

Sincerely,

Carol Levanen, Ex. Secretary
Clark County Citizens United, Inc.
P.O. Box 2188, Battle Ground, Washington 98604