

-----  
The Rocky Mountain Land Use Institute  
*Thirteenth Annual Conference*  
-----

Session Handouts  
To Accompany Home Study Audio CD

*for*

***Innovative and Flexible Zoning Controls:  
A Survey of Recent Court Decisions***

Original Presentation  
Friday, March 12, 2004

Moderator: Daniel J. Curtin, Jr., Esq.  
Bingham McCutchen LLP  
Walnut Creek, California

Panelists: Prof. Orlando E. Delogu  
University of Maine School of Law  
Portland, Maine

Prof. Edward H. Ziegler  
University of Denver College of Law  
Denver, Colorado

RMLUI  
University of Denver College of Law  
2255 E. Evans Ave., Suite 404  
Denver, CO 80208  
Phone: (303) 871-6319 ? Fax: (303) 871-6051 ? Email: [rmlui@law.du.edu](mailto:rmlui@law.du.edu)  
Website: [www.law.du.edu/rmlui](http://www.law.du.edu/rmlui)

All rights reserved. No part of these materials may be reproduced in any form or by any means, electronic or mechanical, including photocopying, or by any information storage and retrieval system, without permission from the publisher.

-----

The Rocky Mountain Land Use Institute  
*Thirteenth Annual Conference*

-----

PRESENTER BIOGRAPHIES

**Daniel J. Curtin, Jr., Esq.**, is a member of the firm of Bingham McCutchen LLP in the Walnut Creek office. He concentrates his practice on local government and land use law representing both private and public-sector clients. Mr. Curtin served as Chair of the State and Local Government Law Section of the American Bar Association, 2001-2002. He was Past Chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly NIMLO). He is past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as President of the City Attorneys' Department of the League of California Cities, as a member of the Board of Directors of the League, and as Regional Vice President of the International Municipal Lawyers Association.

Mr. Curtin is the author of numerous publications on California land use and subdivision law, which have been cited frequently by the California Courts, including *Curtin's California Land Use & Planning Law*, published and revised annually by Solano Press; *Subdivision Map Act Manual*, published by Solano Press; and *Subdivision Map Act and the Development Process*, published by California Continuing Education of the Bar, Berkeley, California. He is a frequent lecturer for the University of California Extension and Continuing Education of the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law.

Mr. Curtin received his A.B. from the University of San Francisco and his J.D. from its School of Law. He has served as assistant secretary of the California State Senate, Counsel to the Assembly Committee on Local Government, Deputy City Attorney of Richmond, and City Attorney of Walnut Creek.

**Orlando E. Delogu**, a Professor of Law at the University of Maine School of Law, graduated from the University of Wisconsin with an M.S. degree in economics in 1963 and a J.D. degree in 1966. He teaches property law, land use law, environmental law, water law, administrative law, and state and local government, and he is the author of over 30 articles and books in these fields, including a current land use law casebook and, with Prof. John Davidson, a two-volume treatise on federal environmental law. Prof. Delogu has been a consultant to the National Water Commission, a consultant to ASPO, a member for five years of Maine's Board of Environmental Protection, a Portland city councillor, and he is presently a member of the City of Portland Planning Board. He has been a visiting faculty member at Lewis & Clark Law School, Vermont Law School, Galway University in Ireland, and LeMan University and Cergy-Pontoise University in France.

**Edward H. Ziegler** is a Professor of Law and co-founder and former President of The Rocky Mountain Land Use Institute at the University of Denver College of Law, where he teaches property, land use planning, and the growth management seminar in land development and design. He is a frequent speaker and nationally noted scholar on zoning and planning law. Prof. Ziegler has published in professional journals throughout the U.S., as well as in France, Spain, Chile, Colombia, and Great Britain. His writings, which include the five-volume treatise, Rathkopf's *The Law of Zoning and Planning*, are cited and quoted in leading teaching casebooks and widely cited in land use cases by appellate courts throughout the country. His consulting, research projects, and lectures on land use planning have ranged from the Port of Dutch Harbor on the Bering Sea and Anchorage, Alaska to New York City's special zoning districts and Florida's Reedy Creek Improvement District which manages development of DisneyWorld. He has been involved in research projects or symposia for the Lincoln Institute of Land Policy, The Conservation Foundation, the American Bar Association, the American Planning Association, the Urban Land Institute, the National Association of Homebuilders, and the U.S. Environmental Protection Agency. He has also served as a consultant to the U.S. Senate Judiciary and Public Works and the Environment Committees on matters related to land use and private property rights. Prof. Ziegler is a graduate of the University of Notre Dame, holds a J.D. degree from the University of Kentucky Law School, and received the advanced (LL.M.) degree in public law with highest honors from the National Law Center of George Washington University.

The Rocky Mountain Land Use Institute's  
Thirteenth Annual Conference

**Innovative and Flexible Zoning Controls: A Survey of Recent Court Decisions**

Friday, March 12, 2004

8:30 – 9:40 a.m.

Denver Marriott Southeast Hotel

Moderator: Daniel J. Curtin, Jr. Esq.

Panelists: Professor Edward H. Ziegler  
Professor Orlando E. Delogu

Remarks prepared by Professor Delogu

**Innovative and Flexible Zoning Controls—Curbing Sprawl: The Observations  
of a Pessimist—Few Decisions, Few Innovative Legislative Proposals**

## **Innovative and Flexible Zoning Controls—Curbing Sprawl: The Observations of a Pessimist—Few Decisions, Few Innovative Legislative Proposals**

### **Introduction:**

This workshop grew out of discussions Ed Ziegler and I had after last October's RMLUI conference; we both agreed that "sprawl" was the new buzzword; it was "in" in the planning and land use control world to be against "sprawl"; and if you expressed your opposition to "sprawl" in angry enough terms, or better yet, if you could document some of the "costs" that "sprawl" imposes, maybe no one would press you as to how one goes about dealing with, ending, or even slowing down "sprawl". In my view not much has changed in the intervening months—we're still loudly against it; but we have no idea how to end, or even how to seriously address it; and there is a growing body of evidence that the larger society, including many of our political and administrative decision makers have a distinctly schizophrenic attitude towards "sprawl"—they/we hate it—it's the enemy, but we continue to foment it in a wide variety of large and small ways: new interchanges on remote stretches of interstate type roads; water and sewer line extensions into the next tier of unbuilt upon suburban and rural landscape; new school construction on twenty acre sites on the edge of, or just beyond the edge of, the built-up portion of town; the continuation of "big box" developments in almost all parts of the country; the proliferation of 1, 2, 5, 10 acre minimum lot sizes in almost every state and in most jurisdictions within each state; severe limitations (if not, prohibitions) in most states on clustering, planned unit developments, mixed use developments, multi-family housing, townhouse and higher rise developments; few, if any, incentives in most states to build in-fill housing, or to build at higher densities within core areas of a community. I could extend this list, but the point seems amply

made. We are really of two minds with respect to “sprawl”; and though it’s currently fashionable to proclaim against it, many decision makers really don’t want to end it. There is no painless way to address “sprawl”; there are no quick fix solutions; and changing behaviors, changing historic development patterns is likely to be a difficult, a long-term proposition, and politically unpopular—who needs it. So in spite of the current rhetoric, “sprawl” is likely to be with us for a long, long time—things may have to get much worse, before they start to get better.<sup>1</sup>

### **A Few Brighter Rays:**

Having begun on this pessimistic (but perhaps realistic) note, it is appropriate to turn to a range of more optimistic undertakings. At a macro (national) level, the APA’s two-volume, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (2002) offers a range of legislative models and commentary for putting in place a wide range of sprawl prevention and sprawl mitigation strategies.<sup>2</sup> Several states and at least one group of states have also reexamined their legislative and policy approaches to development with an eye to reducing the propensity for sprawl. For example, Maryland in 2001 put together a short volume, *Smart Growth in Maryland*. The emphasis is on preserving open space and

---

<sup>1</sup> Many of these themes are more fully developed in Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 Va. J. Soc. Pol. & Law 26 (2003).

<sup>2</sup> Stuart Meck was the General Editor of these materials, but these two volumes, several years in preparation, are the work of literally hundreds of authors, commentators, committee and working group members drawn from a national array of organizations, planners, lawyers, academics, and political leaders dealing with these issues. The two volumes are available on disc or in looseleaf hard copy format; the cost is nominal; for e-mail information go to: [growingmart@planning.org](mailto:growingmart@planning.org). A careful reading of the Table of Contents, the Preface, and the Introduction is recommended.

channeling growth into existing communities.<sup>3</sup> In New England, the regional office of the EPA sponsored a six state examination of organizational (structural local government changes) and land use law changes aimed at facilitating better land use decision making and curbing sprawl; a useful volume, *Model State Land Use Legislation for New England*, was published in 2003.<sup>4</sup> Building on this research three participants in the effort refined and elaborated some of the points and suggestions made with particular reference to a single state, Maine. Their work is in the production stage of publication.<sup>5</sup>

In an effort to minimize (if not end) our propensities for further sprawl, all of these research undertakings, not surprisingly, have several points in common. To begin with, there is little if any continuing support for, or belief that, "large lot zoning" protects rural or agricultural landscapes (and at least to some degree prevents urban sprawl); indeed, it is now increasingly recognized that **1, 2, 5, and 10 acre minimum lot sizes are part of the problem**, one of several root causes of sprawl.<sup>6</sup> Instead of large minimum lot sizes, many municipalities are considering

---

<sup>3</sup> This volume can only be characterized as introductory; but it does give access to the state's website: [www.smartgrowth.state.md.us](http://www.smartgrowth.state.md.us) which provides far more detailed information. For example, to facilitate building rehabilitations in older neighborhoods, a new Maryland Building Rehabilitation Code was promulgated in October, 2001. The stated purpose is to overcome barriers to such rehabilitations caused by inconsistent, or frankly prohibitive, local codes.

<sup>4</sup> These materials were prepared by the New England Environmental Finance Center, a unit of the Muskie School of Public Service, University of Southern Maine, Portland, Maine.

<sup>5</sup> See Delogu, Saucier, & Merrill, *Some Model Amendments to State Land Use Control Legislation*, forthcoming in 56 Me. L. Rev., Vol. 2 (2004).

<sup>6</sup> The tug-of-war with respect to these issues is not over, however; see, *C & M Develop. Inc. v. Bedminster Tp. Zoning*, 820 A2d 143 (Pa. 2002)(state legislation sought to foster cluster and mixed use developments; the local zoning body sought to foster continued agricultural use by large lot zoning and agricultural use only set-asides; the state's highest court while expressing a

requiring clustering in rural settings as a way to allow the rural property owner to realize some of the development potential inherent in the land, and at the same time to preserve larger more meaningful blocks of the rural landscape.

Second, these research documents all recommend that a variety of steps be taken to **concentrate (and/or to increase the density of) development in already built-up areas of a municipality.** Mechanisms that facilitate so-called "in-fill" housing, that allow so-called "remnant" parcels of land to be utilized for development, that encourage higher density, clustered, planned unit, and mixed use development in these built-up areas; and that create more flexibility with respect to height, side yard, back yard, setback requirements, parking requirements, etc. are all urged.

A third approach almost all of these research papers recommend involves **the siting of low and moderate income housing.** They support it; they urge (and in some instances require) that sites be provided for such housing, through zoning, in core (more built-up) areas of the municipality, usually on small lots (5,000-10,000 sq. ft.) or in even more dense town-house or multi-family housing structures. The siting of such housing in close proximity to schools, shops, churches, public facilities, existing infra-structure facilities where both dependence on the automobile and development costs are reduced is an almost invariable component of these recommendations.

A fourth feature of these anti-sprawl research papers and the mechanisms they would employ focuses on **urban "brownfield" restoration.** There is hardly an urban city in the east and mid-

---

sympathy for agricultural land preservation found a 1 acre minimum lot size requirement impermissible as applied.

west (and, to a lesser degree perhaps, in all areas of the country) that does not have one or more such areas. They are (and for a long time have been) the target of environmentalists and the EPA for obvious health and safety reasons. But they have also become the focus of anti-sprawl urban redevelopment activists because these “brownfields” often sit on close-in, old, but prime industrial, waterfront, or rail yard properties. Their restoration is often technically and economically feasible, and can be a key component to downtown revitalization efforts.<sup>7</sup>

A fifth common feature these research papers recommend is **the creation of new fiscal support mechanisms** for both municipalities and private developers who participate in these new anti-sprawl (smart growth) urban core oriented development/redevelopment strategies. From shared cost arrangements, to direct state assistance, to TIF’s, the range of incentivizing mechanisms actually being fashioned is varied and increasing.<sup>8</sup>

A range of other recommendations that some, if not all, of these research documents suggest are worthy of brief mention; each is thought to be a part of the anti-sprawl effort. For example,

---

<sup>7</sup> This certainly has proved to be the case in Portland, Maine, a city of only 65,000 population, where three separate “brownfield” restorations all within the most densely settled peninsula area of the City are in various stages of progress, and where almost everyone agrees, these restorations are a critical part of the City’s current and future economic well-being.

<sup>8</sup> At least one of these mechanisms, the use of eminent domain powers to acquire land needed for redevelopment projects that seem more private than public, is (quite appropriately, in my view) reviving “public use, public purpose” debates that have been dormant for some time; see Kanner, Scrutinizing ‘Public’ Use, *The National Law Journal*, April 22, 2002, also Aaron v. Target Corp., 269 F. Supp.2d 1162 (Mo. 2003)(injunction stayed condemnation proceedings—taking for the Target Corp.was held not for a public use); Southwestern Illinois Development Auth. v. National City Environmental LLC, 768 NE2d 1 (Ill. 2002)(eminent domain taking for racetrack parking held not to be for a public purpose); Georgia Department of Transportation v. Jasper County, 586 SE2d 853 (So. Car. 2003) (taking for a private freight hauling company held not for a public use); but see General Building Contractors, LLC v. Board of Shawnee County Commrs, 66 P3d 873 (Kansas, 2003)(taking for economic development meets public purpose requirements).

revitalized public transportation systems, downtown improvement districts, strengthened community policing programs, urban open space and trail programs are all thought to be a necessary part of an enhanced (a more liveable) urban environment. Beyond the urban boundary, the preservation of what remains of our suburban and rural environment is increasingly sought to be achieved not by large lot or agricultural only zoning but by far more effective and wide reaching open space acquisition programs that rely on the spending powers of government, not its regulatory powers.<sup>9</sup>

### **Some Disquieting Regulations and Cases:**

If there are some hopeful signs in the overall effort to combat sprawl, there are still any number of land use regulations and cases that give one pause. For example in most states there are still any number of jurisdictions where no single family house can be built on a lot less than one acre in size, and the majority of land is zoned for much higher minimum lot sizes; in such towns cases like Board of County Com'rs of Teton County v. Crow<sup>10</sup> can arise—trophy lots give rise to trophy houses; how big a trophy house is big enough? Is this something government should concern itself with? Is this anti-sprawl, or about as far away from anti-sprawl as one can get? In this case the County said an upper limit of 8,000 sq. ft. was big enough; the landowner

---

<sup>9</sup> See Smart Growth in Maryland (2001), *supra* note 3, at 6, Preserving Open Space (noting that 1.1 million acres of Maryland open space has been permanently preserved—one-fifth of that in the last six years); see also, Maine Rev. Stat. Ann., tit. 5, §6200 et seq (creating a Land for Maine's Future Board and fund, which from 1987 to the present has been supported by over \$75 million in bonds issued to acquire easement and fee interests in unique, scenic, park, and/or open space lands in all areas of the state).

<sup>10</sup> 65 P3d 720 (Wyo. 2003).

wanted a 12,000 sq. ft. house, and was willing to combine two lots to obtain the approval he sought. The County said, No; it's regulation was sustained. But in my view, both the regulation and the case have an air of unreality; the issues raised are far removed from what most of us are dealing with when we talk about lot size, house size, density of development, etc.

Some other examples: in many states there are jurisdictions that do not enable or that actually bar clustering, planned unit and/or mixed use developments; jurisdictions where in-fill development on small lots, or building on irregularly shaped remnant parcels, is all but impossible because setback, side yard, parking, and other requirements designed for larger lots are rigidly applied in these inapposite settings.<sup>11</sup> In other states outwardly committed to anti-sprawl strategies, sprawl is encouraged by allowing jurisdictions to impose annual building permit limitations, so-called "caps" which are almost always set with little or no regard for historic or present population growth in the town or region; such "caps" unless the enacting jurisdiction has been besieged with growth and needs a cooling off period seem motivated by little more than the exclusionary tendencies of the community, and they almost certainly contribute to sprawl as developers leap-frog the capped community in search of land not burdened by

---

<sup>11</sup> Even in settings where low and moderate income housing is being built, where lot sizes are relatively small and higher density, anti-sprawl strategies seem to be in place, municipalities at times become too rigid, too dogmatic; they run the risk of deterring (chilling) the very type of developer and type of development they would foster. see Rumson Estates, Inc. v. Mayor & Council of the Borough of Fair Haven, 795 A2d 290 (N.J. 2002)—here in a zone where lot sizes as low as 5,000 sq. ft. were permitted, and house sizes were limited to 2200 sq. ft., a developer with three 9,000 sq. ft. lots sought to increase the size of the houses he was building to 2500 sq. ft.—he was denied administratively; he litigates; he loses (the town's house size limitation is sustained even though there are internal inconsistencies with its rationale). But more importantly, why is the Borough being so rigid; why not impart some upward flexibility to house sizes, particularly on slightly larger lots; are its actions going to induce developers in the region to produce more and better low and moderate income housing—I doubt it.

such regulations. But in Maine the strategy has been sustained by the state's highest court with no consideration of the impermissible motives that drive the regulation, or the adverse consequences that flow from enactment, see Home Builders Association of Maine v. Town of Eliot.<sup>12</sup>

Finally, on these points: notwithstanding our anti-sprawl rhetoric, and/or the lessons of the Mt. Laurel cases,<sup>13</sup> there are states in which whole jurisdictions provide no appropriately zoned land for low or moderate income housing; no land for manufactured housing; no land for multi-family housing units; and where regulations bar or make it extraordinarily difficult to build elderly housing and/or rental housing units with three or four bedrooms. Such constraints on housing can hardly be characterized as anti-sprawl—other motivations are clearly at work, and more importantly, these are not rare (one-off) occurrences. They are all too familiar in many largely white, bedroom suburb type municipalities in all parts of the country.

#### **Conclusion:**

Being against “sprawl,” for “smart growth” is the planning rhetoric of the moment; like “designing with nature” and “sustainable growth” the buzz words of just a few years ago, it's easier said than done. And we're not quite sure how to do it; or even if we really want to do it

---

<sup>12</sup> 750 A2d 566 (Me. 2000). “Caps” in Maine run as low as eight building permits per year; initial legislative efforts to impose some limitations on the use of “caps” (a showing of need, limiting their duration, and a mechanism to determine what the “cap” limit in a given town should be) failed, see LD 1643, 120<sup>th</sup> Maine Legislature, August, 2001. Further efforts to constrain the use of “caps” are outlined in the Delogu, Saucier, & Merrill article, *supra* note 5. Some states are much less tolerant of “caps”; see, Beck v. Town of Raymond, 394 A2d 847 (N.H. 1978); Stoney-Brook Development Corporation v. Town of Freemont, 474 A2d 564 (N.H. 1984).

<sup>13</sup> See Southern Burlington County NAACP v. Township of Mount Laurel, 336 A2d 713 (N. J. 1975); Mt. Laurel II, 456 A2d 390 (N.J. 1983).

because it seems to impinge on so many things we also seem to want—our own home out of the hustle and bustle of the downtown, that second car, a bright new school with ballfields et al for the kids, a camp or cottage in the mountains or by the shore. In short, whatever the benefits of anti-sprawl regulations and/or policies, we are very ambivalent about such regulations and/or policies if they impinge on our way of thinking, on our behavior; the other guy—he needs to change his way of thinking, his behavior. But not me, and not now. One is reminded of the “Pogo” comic strip, wherein he says: “I have seen the enemy; it is us.”

**INNOVATIVE AND FLEXIBLE  
ZONING CONTROLS:  
A SURVEY OF RECENT COURT DECISIONS**

**By**

**Edward H. Ziegler  
Professor of Law  
University of Denver**

**8:30 a.m. – 9:40 a.m.  
Friday, March 12, 2004  
Thirteenth Annual Conference  
Rocky Mountain Land Use Institute  
Denver, Colorado**

A. AUTHORITY FOR ENACTMENT AND DEFERENCE TO LEGISLATIVE  
JUDGMENT

B. UPHOLDING FLEXIBLE CONTROLS

C. FLEXIBLE CONTROLS HELD INVALID

## AUTHORITY FOR ENACTMENT AND DEFERENCE TO LEGISLATIVE

Franchise Developers, Inc. v. Cincinnati, 30 Ohio St. 3d 28, 505 N.E.2d 966 (1987) (upholding innovative system of overlay zoning creating environmental quality districts as proper exercise of city's zoning authority to preserve and protect the character of certain neighborhoods); Huntzicker v. Washington County, 141 Or. App. 257, 917 P.2d 1051 (1996) (upholding planned development procedure allowing densities to be redistributed throughout land zoned planned development as long as total number of dwelling units did not exceed maximum allowed by underlying zoning district); Warner Co. v. Zoning Hearing Bd. of Tredyffrin Tp., 148 Pa. Commw. 609, 612 A.2d 578 (1992) (upholding quarry operation district); Booth v. Newton Planning and Zoning Com'n, 2001 WL 1429186 (Conn. Super. Ct. 2001) (upholding validity of upzoning of land to one-acre minimum lot size in and nearby Aquifer Protection Overlay District); Heithaus v. Planning and Zoning Com'n of Town of Greenwich, 258 Conn. 205, 779 A.2d 750 (2001) (holding that consideration of application for historic overlay zone designation allowing additional specially permitted uses was administrative decision that must be supported by substantial evidence).

And see Canal/Norcrest/Columbus Action Committee v. City of Boise, 136 Idaho 666, 39 P.3d 606 (2001) (involving approval of planned development project in mandatory overlay design review zoning district); Coscan Washington, Inc. v. Maryland-National Capital Park and Planning Com'n, 87 Md. App. 602, 590 A.2d 1080 (1991) (upholding decision involving design review approval under Comprehensive Design Plan and upholding conditions that portion of residential subdivision building shave all-brick facades and that 60% of the total units be of a single facade material, including brick, stone, wood or stucco as an exterior finish as reasonably related to limiting use of vinyl aluminum siding and improving quality of

housing and protecting approach to and vistas from an historic site); Gondelman v. District of Columbia Dept. of Consumer & Regulatory Affairs, 789 A.2d 1238 (D.C. 2002) (upholding design review decision involving construction of rowhouse garage in special historic district).

See also KCI Management, Inc. v. Board of Appeal of Boston, 54 Mass. App. Ct. 254, 764 N.E.2d 377 (2002) upholding the validity of the operation and implementation of the City of Boston's Greenbelt Protective Overlay District (GPOD) that was adopted to protect and preserve vegetation, open space, and scenic resources along the city's greenbelt roadways. Zoning code provisions set forth the procedures pursuant to which an area may be designated a GPOD and describe areas that have been so designated, define the building projects to which the GPOD regulations apply, and set forth "general" as well as "specific requirements" and "standards" applicable to proposed projects. Zoning regulations governing a proposed project together (1) allow the use as of right, (2) require that a conditional use permit be obtained, and (3) regulate the use through site plan review.

And see *Kimberk v. Boston Zoning Com'n*, 53 Mass. App. Ct. 1109, 759 N.E.2d 1232 (2001), review denied, 436 Mass. 1102, 766 N.E.2d 70 (2002) (unpublished disposition) where the court upheld the due process validity of a planned development overlay rezoning to all the development of a large mixed-use project in downtown Boston. This project, known as Millennium Place, would consist of two residential towers, a hotel, a health and sports club, a movie theater and entertainment complex, and retail stores and would be sited on a tract of land on lower Washington Street in downtown Boston. The court ruled that the rezoning was not arbitrary, but reasonably promoted the general welfare. The court quoted the record testimony of a city expert witness that: "Taken as a whole, the project would transform a moribund locus in an important area at the heart of Boston's downtown core into a vibrant mix of residential, retail and entertainment uses." The project was expected to create 750 permanent jobs, up to 2000 temporary construction jobs, involve the investment of about \$400 million in the Midtown Cultural District, which would significantly add to Boston's tax base. Moreover, the developers of the project had committed to provide millions of dollars for a series of improvements and services in the surrounding area.

Rejecting the spot zoning claim, the court quoted the passage in the opinion of Judge Sullivan appearing in *Manning v. Boston Redevelopment Authority*, land court misc. no. 117622, slip op. at 31-32 (May 6,

1986) (Sullivan, C.J.), *aff'd.* on other grounds, 400 Mass. 444 (1987): "The element on which the validity . . . turns is not whether a parcel has been singled out for less restrictive treatment than that of surrounding land of a similar character, but whether this has been done for the economic benefit of the owner of the lot, not to serve the public welfare." The court also cited *Sullivan v. Town of Acton*, 38 Mass. App. Ct. 113, 115, 645 N.E.2d 700 (1995) ("If the rezoning is adopted in accordance with a well-considered plan for the public welfare and was not designed solely for the economic benefit of an owner of the locus . . . the zoning is not invalid").

See also *Carron v. Board of County Com'rs, Ouray County*, 976 P.2d 359 (Colo. Ct. App. 1998) upholding the validity of a zoning code's "delineation" procedure whereby parcels in a special Foothills Valley preservation zone are presumed to have certain allowed uses (Valley) until the Board of County Commissioners should approve for a particular parcel "delineation" based on an on-site assessment which, if granted allows (Valley) greater residential density and development. The intent of the Foothills Zone is to preserve the visual landscape while directing residential development into areas not traditionally used or productive for crops or pasture. Valley zone areas are those where visual quality and traditional agricultural uses will be preserved, while accommodating low density residential uses. The zoning requires the County to consider whether:

1. The land is irrigated by ditches or other means that support agriculture and . . . has been . . . for any period of time.
2. The land has been cleared of native vegetation and is or has been irrigated for the growing of crops.
3. Areas of the land are sub-irrigated or are classified as wetlands.
4. The land is alluvial valley fill either directly deposited or reworked by water, that has not been irrigated and has an aerial canopy of low lying vegetation that is greater than fifty (50) percent of the canopy cover.

See also "San Francisco's Residential Rezoning: Architectural Controls In Central City Neighborhoods," 13 San Francisco L. Rev. 945 (1979); Babcock & Banta, New Zoning Techniques for Inner City Areas 16 (1973) (American Planning Association, PAS Rept. No. 297) (discussing special overlay design zones utilized by Portland, Oregon that establish authority to require changes in appearance or impose conditions on development as are necessary to protect scenic, historical or architectural values in the designated area).

# B. UPHOLDING FLEXIBLE CONTROLS

## FLEXIBLE CONTROLS HELD INVALID

See, e.g., *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St. 3d 28, 505 N.E.2d 966 (1987) (upholding innovative system of overlay zoning creating environmental quality districts as proper exercise of city's zoning authority to preserve and protect the character of certain neighborhoods). The court ruled that where the legislative body determines that such special "overlay" zoning is necessary to "protect the public and property owners . . . [f]rom blighting influences which might be caused by the application of conventional land use regulations to properties and areas of sensitive environmental qualities," such zoning will be permitted even though it departs from the underlying zoning scheme. The court further ruled that land use regulations were a proper subject of the overlay zoning provisions, and that there is a legitimate governmental interest in maintaining the aesthetics of the community.

And see *Northfield Development Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743 (2000), *aff'd in part*, review dismissed in part, 352 N.C. 671, 535 S.E.2d 32 (2000) (upholding denial of floating zone approval for manufactured home overlay district); *Homart Development Co. v. Planning and Zoning Com'n of Town of Watertown*, 26 Conn. App. 212, 600 A.2d 13 (1991) (upholding denial of rezoning planned regional shopping center district. The court commented on nature of legislative discretion involved in a floating zone rezoning:

The plaintiff assumes that if its proposed use of the land in question met all of the requirements of the PRSD regulations, then the commission was bound to grant the application for a zone change. This assumption, however, is fundamentally flawed. The inclusion of a floating zone within a town's comprehensive zoning regulations does not alter the basic fact that when passing on an application to apply a floating zone, the zoning authority continues to act legislatively. *Sheridan v. Planning Board*, supra, 159 Conn. at 16, 266 A.2d 396. Nothing in our case law concerning the floating zone concept even remotely suggests that a zoning authority cannot refuse to apply a floating zone to a particular piece of property simply because the applicant has complied with all of the requirements of the regulations establishing the floating zone. By establishing such zones, the zoning authority has not thereby ceded any of its broad authority to exercise its legislative judgment with respect to the competing needs and demands presented by a request for a zone reclassification.

See also *Heithaus v. Planning and Zoning Com'n of Town of Greenwich*, 258 Conn. 205, 779 A.2d 750 (2001) the Supreme Court of

Connecticut ruling that town denial of historic overlay zone designation and site plan approval and special permit was similar to, but not identical, to the floating zone rezoning, since the overlay zone did not change the basic zoning district or comprehensive plan and approval, therefore was an administrative act which had to be supported by substantial evidence. The court explained quoting from the trial court's decision:

The trial court noted that "[t]he [historic overlay] zone is similar to a floating zone in that its location is undetermined, and the type of property to which such a designation would be granted is pre-approved." Cf. *Sheridan v. Planning Board*, supra, 159 Conn. at 16, 266 A.2d 396. The trial court concluded that "[u]nlike a typical floating zone, however, the property in an [historic overlay] zone continues to bear its original zone designation, but adopts an overlay . . . . All of the regulations, responsibilities and controls associated with the underlying zone continue to apply to the property except as amended by § 6-109.1(4). [Thus] if a property is granted an [historic overlay] designation, there are few additional regulations, responsibilities or controls placed upon the site unless the owner applies for a special permit that would allow additional uses of the property not normally allowed in the underlying zone but allowed in the overlay zone."

*Save Pine Bush, Inc. v. City of Albany*, 512 N.E.2d at 530. The criteria in the ordinance for approval of development in the district, in addition to the Pine Bush district's provision for "single-story office buildings or otherwise conforming to the land contour as determined and approved by the Site Plan Review Agency," were as follows:

- (1) Location, arrangement, size, design and general site compatibility of buildings, lighting and signs.
- (2) Overall impact on the neighborhood including compatibility of design considerations.
- (3) Adequacy and arrangement of vehicular traffic access and circulation, including intersections, road widths, pavement surfaces, dividers and traffic controls.
- (4) The location and arrangement of off-street parking, delivery and loading areas.
- (5) Adequacy and arrangement of pedestrian traffic improvements and overall pedestrian convenience.
- (6) Adequacy of stormwater and drainage facilities.
- (7) Adequacy of water supply and sewage disposal connections.
- (8) Type and arrangement of trees, shrubs, fencing and any other improvements proposed as a visual and/or noise buffer between the subject parcel and adjoining lots.
- (9) Adequacy of fire lanes and other emergency zones.
- (10) Adequacy of exterior storage areas and their fencing or screening.
- (11) Special attention to the adequacy and impact of structures, roadways and landscaping in areas with susceptibility to ponding, flooding and/or erosion.

see *Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 215 Cal. Rptr. 439 (1st Dist. 1985), wherein an ordinance precluding uses that would be detrimental to the "general welfare" and precluding developments if "there is insufficient variety in the design of the structure and grounds to avoid monotony in the external appearance" was upheld as not unconstitutionally vague on its face or as applied. The court rejected the plaintiff developer's challenge that objective criteria are necessary for aesthetic regulations, holding instead that such regulation need only be reasonably related to the public safety and welfare. The "general welfare" standard has long been upheld by California courts against a vagueness claim, while the "variety" standard is justified, said the court, by the legislative intent to "avoid ticky-tacky development of the sort described . . . in the song, 'Little Boxes.'" Enforcement of the ordinance served to prohibit construction of a 48-unit condominium project consisting of eight four-story buildings. A permit would have been granted had the developer complied with certain mitigation requirements, including avoidance of "linear monotony and massive bulky appearance" and achievement of "a small scale village atmosphere characteristic of [the city]." The court found that the developer clearly understood these requirements, but "deliberately chose to litigate rather than mitigate."

In *Groch v. City of Berkeley*,<sup>21</sup> a California Court of Appeals upheld the validity of the discretionary permit scheme created by that city's Neighborhood Preservation ordinance. The ordinance required that a use permit for the construction or demolition of most types of residential structures in the city be obtained from the board of adjustment and established the following standard for the granting of permits: that "the use or building applied for will not be detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements in the neighborhood

or to the general welfare of the City."<sup>22</sup> In an opinion that evidences the usual deference shown by California courts to legislative permitting schemes involving vague decisional standards for development approval,<sup>23</sup> the court held that this "general welfare" standard was constitutionally adequate and did not involve the unlawful delegation of power to the board. The court noted that such a permitting scheme might be held invalid if it delegated power to the board "to effectively transform the character of a zoning district."<sup>24</sup>

<sup>24</sup>*Groch v. City of Berkeley*, 173 Cal. Rptr. at 538.

And see Canal/Norcrest/Columbus Action Committee v. City of Boise, 136 Idaho 666, 39 P.3d 606 (2001) (involving approval of planned development project in mandatory overlay design review zoning district); Coscan Washington, Inc. v. Maryland-National Capital Park and Planning Com'n, 87 Md. App. 602, 590 A.2d 1080 (1991) (upholding decision involving design review approval under Comprehensive Design Plan and upholding conditions that portion of residential subdivision building have all-brick facades and that 60% of the total units be of a single facade material, including brick, stone, wood or stucco as an exterior finish as reasonably related to limiting use of vinyl aluminum siding and improving quality of

housing and protecting approach to and vistas from an historic site); Gondelman v. District of Columbia Dept. of Consumer & Regulatory Affairs, 789 A.2d 1238 (D.C. 2002) (upholding design review decision involving construction of rowhouse garage in special historic district).

And see Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 A.D.2d 677, 741 N.Y.S.2d 274 (2d Dep't 2002) upholding denial of site plan approval for a large retail store (Wal-Mart) since the proposed development was out of character with surrounding campus-style development and would result in the irretrievable removal of a large forested hillside due to the development being "shoehorned" into an inadequately-sized development site.

## C. HOLDING FLEXIBLE CONTROLS INVALID

In these cases, the zoning ordinances allowed business or industrial uses in residential areas throughout the community as "special uses" subject to broad discretionary standards. In *Rockhill v. Chesterfield Township*,<sup>2</sup> for example, the New Jersey court in holding such a "zoning" scheme invalid noted in this regard:

Reserving the use of the whole of the municipal area for "normal agricultural" and residence uses, and then providing for all manner of "special uses," "neighborhood" and other businesses, even "light industrial" uses and "other similar facilities," placed according to local discretion without regard to districts, ruled by vague and illusive criteria, is indeed the antithesis of zoning. It makes for arbitrary and discriminatory interference with the basic right of private property, in no real sense concerned with the essential common welfare. Zoning is a separation of the municipality into districts for the most appropriate use of the land, by general rules according to a comprehensive plan for the common good in matters within the domain of the police power. And, though the landowner does not have a vested right to a particular zone classification, one of the essential purposes for zoning regulation is the stabilization of property uses. Investments are made in lands and structures on the faith of district use control having some degree of permanency, a well considered plan that will stand until changing conditions dictate otherwise. Such is the nature of use zoning by districts according to a comprehensive plan. . . . The regulations here are in contravention.<sup>3</sup>

For example, a Massachusetts appeals court has ruled that a zoning bylaw making development of all uses in a business district subject to the issuance of a discretionary special permit by the planning board violates two provisions of the state enabling act. The only standards limiting the board's discretion were general guidelines pertaining to health, safety, and welfare listed in the purposes clause of the bylaw. The court found that the bylaw conflicts with the uniformity and special permit provisions of the state Zoning Act, which, like enabling legislation in 46 other states, is patterned on the Standard Zoning Enabling Act. The first provision requires that zoning ordinances apply uniformly within a zoning district to each class of structures or uses permitted. The requirement is based on the principle of equal protection of laws. All property in similar circumstances must be treated equally. Thus, the uniformity requirement does not, said the court, contemplate the "conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." The court also held that any ordinance conditioning all uses in a district upon the issuance of a special permit violates the Zoning Act provision which authorizes special permits only for "specific types of uses." *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 472 N.E.2d 269 (1984).

<sup>2</sup>See *Rockhill v. Chesterfield Tp., Burlington County*, 23 N.J. 117, 128 A.2d 473, 479 (1957) ^

## UPHOLDING FLEXIBLE CONTROLS

Louisville and Jefferson County Planning Commission v. Schmidt, 83 S.W.3d 449 (Ky. 2001), as modified on denial of reh'g, (Sept. 26, 2002) holding invalid an innovative zoning scheme as inconsistent with state zoning statutes. The zoning scheme provided for waiver of a number of zoning restrictions on residential development if the proposed subdivision was found by the Planning Commission to be an "Innovative Residential Development" under specified guidelines set out in the comprehensive plan. The court held the standards for such waivers were unconstitutionally vague and held that such waivers violated state statutory provisions governing variances. The waivers amounted to the impermissible grant "of nothing less than the authority to rezone". The waivers, it should be noted, did not allow for changes in the nature of allowed uses or overall increases in residential density. The problem here, perhaps, could have been addressed by planned development zoning coupled with more specific standards for approval. The court commented:

[W]e are very troubled by the general effect of the IRDRJC. As previously described, setting up a zoning plan is a painstaking, complex process, requiring the development of goals and objectives, consideration of the realities of the property involved, and the collection of public input and concerns. Once a comprehensive plan is adopted, it can only be avoided through rezoning or variance, neither easy to obtain as both are strictly circumscribed. The IRDRJC permits a change in a carefully designed zone on a large scale basis, not a single lot, as is usually found in a variance, but, as in the case at bar, the size and shape and density of more than 250 lots spread over 68 acres. The niceties of the variance requirements are disregarded and the comprehensive plan tossed aside. Zoning requirements become a set of suggestions, easily avoided.

(see Board of Tp. Trustees Ridgefield Tp. v. Ott, 1994 WL 17542 (Ohio Ct. App. 6th Dist. Huron County 1994) holding invalid a zoning scheme wherein an entire township was zoned "agricultural" but the ordinance created five other separate districts not delineated on the zoning map. The court held that such zoning was not in accordance with a comprehensive plan. The court stated:

[T]he system employed by appellees creates a procedure which requires every applicant who wishes to engage in a nonagricultural/nonresidential use on his or her land to seek a variance or an amendment to the township zoning ordinance. An ordinance requiring these types of requests acts as a stimulus for "spot zoning", an unlawful creature. *Clegg, supra*. "Spot zoning" describes an ordinance which is invalid because it singles out a lot or small area for different treatment than similar surrounding land. *Willott v. Beachwood* (1964), 175 Ohio St. 557, paragraph two of the syllabus. An ordinance that purportedly provides for five different districts but actually consists of only one district promotes spot zoning because there is no assurance that similarly situated land areas will be equally treated. *Clegg, supra*. Thus, in a case, such as the one before us, the failure to designate a specific business/commercial area is unreasonable and arbitrary and is not related to any comprehensive plan.

See also *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. Ct. App. 1995) wherein a Kentucky court held invalid a zoning scheme that provided for only one mapped zoning district allowing for agricultural and residential uses but that provided for other land uses by conditional use application based on a "growth guidance assessment" and numerical score, and incompatibility with neighborhood determination. The court held that such a scheme was not zoning in accordance with a comprehensive plan and failed to provide meaningful standards and notice to owners in its administration and implementation. The court further explained:

It is a corollary to the notice requirement that a zoning ordinance must contain standards to be used in determining whether to permit or deny a conditional use, so as not to vest absolute and arbitrary power in the administrative agency. *Carlton v. Taylor*, Ky. App., 569 S.W.2d 679, 681 (1978). While application of growth guidance assessment can place a prospective property owner on notice as to what uses cannot be made of the property, it cannot tell him with any degree of certainty whether any particular use can be made of the property. Even if the proposed use totals 150 points under those guidelines, the use still can be denied if enough neighbors can convince the planning commission members that the use is "incompatible" with their neighborhood.

Basing zoning decisions solely on the complaints of neighbors ignores the basic premise of planning and zoning. "The effect of a zoning change on the value of neighboring property is only one factor to be considered, and the purpose of zoning is not to protect the value of the property of particular individuals, but rather to promote the welfare of the community as a whole." *Fritts v. City of Ashland*, Ky., 348 S.W.2d 712, 714 (1961).

Although KRS 100.202(1) permits a zoning ordinance placing all property within a single zone and addressing all land use proposals therein as conditional use permits, that statute does not purport to authorize other deviations from the statutory scheme. Nor can this ordinance be saved by application of KRS 100.203(1)(3), which authorizes districts of special interest. Whether called "floating zones," *Bellemeade Company v. Priddle*, Ky., 503 S.W.2d 734, 738 (1973), or "planned unit developments (PUD's)," *Cetrulo v. City of Park Hills*, Ky., 524 S.W.2d 628 (1975), it is clear that the special use is pre-approved, i.e., pre-deemed compatible with the location in advance of any individual application for the permitted use. *Bellemeade Company v. Priddle*, *supra* at 740; Griffin and Becker, *Kentucky Law Survey: Zoning*, 67 Ky. L.J. 659, 661 (1979). Under the Development Guidance System, no conditional use is pre-deemed compatible with any location prior to an application for a conditional use permit, i.e., zoning without planning.

897 S.W.2d at 595-96.

/see Peterson Outdoor Advertising v. City of Myrtle Beach, 827 S.C. 230, 489 S.E.2d 630 (1997) (holding that while city could delegate discretion to Community Appearance Board to be exercised under specific ordinance criteria, city could not act on permit application based solely on ordinance's subjective objectives of prohibiting "unsightly and inharmonious development" since such standards are unconstitutionally vague); FSL Corp. v. Harrington, 262 Ga. 725, 425 S.E.2d 276 (1993) (county commissioners cannot deny special permit for sanitary landfill based on spirit of preamble to zoning ordinance); Kosalka v. Town of Georgetown, 2000 ME 106, 752 A.2d 183 (Me. 2000) (holding that standard of "conserve natural beauty" for conditional use permit in special residential-recreational district was unconstitutionally vague).

See Route 22 Properties v. Town Board of Town of Southeast, 2003 WL 22873036 (N.Y.A.D. 2 Dept.) (holding denial of sign permit to be arbitrary and capricious as finding that proposed sign would be "ugly" and "offensive" was not supported by evidence that sign would be out of character with the surrounding area).

And see Anderson v. City of Issaquah, 70 Wash. App. 64, 851 P.2d 744, 751-52 (Div. 1 1993), wherein the court held that the aesthetic standards in the city's building design code were unconstitutionally vague since individuals would largely have to rely on subjective "feelings" as to "statement" city was trying to make on its "signature streets." The court therein stated:

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive . . . transition" to adjoining properties. IMC 16.16.060(B)(1)-(3). As is stated in the brief of amici curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earth tones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "[h]armony in texture, lines and masses" is certainly encouraged. IMC 16.16.060(B)(2).

# **INNOVATIVE AND FLEXIBLE ZONING CONTROLS**

- 1. Special Permits**
- 2. Floating Zones**
- 3. Planned Development**
- 4. Development Agreement**
- 5. Special Zoning Districts**
- 6. Overlay Zoning Districts**
- 7. Site plan review**
- 8. Design review**
- 9. TDRs**
- 10. Impact Assessment**
- 11. Discretionary Standards**
- 12. Mitigation measures**
- 13. Site-specific conditions**
- 14. Contract Zoning**