The Oregon Example: A Prospect for the Nation

Panel Discussion

by

Edward J. Sullivan, Norman Williams, Jr., & Bernard H. Siegan

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CLOSING REMARKS

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PANEL DISCUSSION
WITH
EDWARD J. SULLIVAN, NORMAN WILLIAMS, JR., AND BERNARD H. SIEGAN

MR. SULLIVAN: In reviewing the progress of land use planning over the last ten years in Oregon, one would be amazed, and perhaps horrified, at the amount of change that has occurred in the very simple program (Senate Bill 100) enacted by the 1973 Legislature.[1] Almost every other year, we have had a ballot measure affecting land use.[2] At almost every biennial legislative session, major changes have been proposed, many of which have been radical and some of which have been enacted by the legislature.[3] There has been no shortage of criticism of the program. There seems to be, however, an occasional shortage of encouragement for it, perhaps because all of us tend to look at the program from the perspective of advancing our own particular interests.

I think it is time now for us to stand back a little and look at the land use program as it was originally conceived and as it actually is. An examination of the program from today's perspective will show that we have been reasonably successful in achieving the objectives we set in 1973. We did establish a structure whereby the state would set policies for local plans to meet. That structure is basically unchanged, although the goals themselves,

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1. 1973 Or. Laws ch. 80 (codified as amended at OR. REV. STAT. ch. 197 (1983)).

2. State mandated local planning was on the 1970 ballot. Efforts to repeal or eviscerate Senate Bill 100 by ballot measures were defeated in 1976, 1978, and 1982.

3. Major changes were adopted in 1977, 1981, and 1983.

with some exceptions, have been amended.[4]

To their credit, both the legislature and the Land Conservation and Development Commission (LCDC) have sought to refine the interpretation of those goals while dealing with terms which are purposely left vague. The legislature has insisted, I think rightly, that LCDC "flesh out" those vague terms by enacting rules.[5] The idea that only local governments should do planning and plan implementation for the most part has remained a cornerstone of the program. I call this a federal system, whereby a broad framework of state policy is implemented at the local government level. That, also, has been a successful approach to coordinated state and local planning.

There are problems with the state establishing policies that are sincerely opposed by some local government officials, citizens, and, most unfortunately, state agency officials. The program has been subject to undulating support from various groups, political and otherwise. But it has managed to survive both its enemies and its friends.

Oregon has put a tremendous amount of emphasis on its land use program. The state has expected the program to solve many problems of the state, and citizens may be disappointed on occasion when those problems are not solved. At times, we may expect too much from our land use program. Legislators expect too much when they pass broad legislation without "fleshing out" for the agency the exact direction a policy should take. This may be because legislators have constituents. These factors have caused political and administrative problems.

Unfortunately, several things predicted in 1973 have not taken place. For example, there has not been as much support for intergovernmental planning agreements as we had hoped. It was thought that local governments might enter into bi-state, tri-state, or regional planning agreements. But that vision has been unrealized.

On the other hand, some portions of the program have been refined. Beginning in the 1977 legislative session, and continuing to the 1983 session, LCDC has taken a hard look at the way plans

4. *But see* 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 52 Or. App. 703, 629 P.2d 831 (1981), *rev'd*, 292 Or. 753, 642 P.2d 1158 (1982).

5. OR. REV. STAT. § 197.040(1)(c) (1983).

were said to be in compliance with the goals. It was not until 1977 that the term "acknowledgment" was first used in the enabling legislation, although LCDC had used the term before to signify that a local plan conformed to goals. A structure was established to show exactly what would happen when a plan received that "laying on of hands" by LCDC to certify that the goals had been carried out. With one exception,[6] the legislature has reaffirmed the need for state agencies to "coordinate" their programs with local government plans[7] so that state policies are consistent with those acknowledged plans.

The legislature has spent a great deal of time and energy in developing the land use appeals process. In the mid-1970's, going to circuit court was the usual way to challenge local government land use plans or actions[8] or state agency actions.[9] That has changed so that Oregon now has a specialized administrative tribunal, the Land Use Board of Appeals (LUBA).[10] In the last four years, many different approaches for appeals have been proposed. What we have settled upon is less expensive and certainly faster than anything we had before,[11] aided by a reasonable modicum of efficiency and expertise from the referees who review local land use decisions. Instead of going to court and hoping to be assigned a judge who has been educated in land use law, we now have a board of experts and the hope that the court of appeals, by seeing such cases frequently, will be able to deal with the cases consistently and efficiently.

In ten years we have come a long way. No one in 1973 thought that the present program would turn out as it has with its very complicated system. The complexity is necessary to give everyone the right to participate and to deal efficiently with the

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6. *See id.* § 527.722 (exceptions to restrictions on local government adoption of rules regulating forest operations).

7. *Id.* § 197.180.

8. The writ of review process was used. *Id.* §§ 34.010-.100. *See* Sullivan, *From* Kroner *to* Fasano: *An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L.J. 358 (1974).

9. This method of review was withdrawn in 1973. League of Women Voters v. Lane County Local Gov't Boundary Comm'n, 32 Or. App. 53, 573 P.2d 1255 (1978).

10. OR. REV. STAT. §§ 197.805.850 (1983).

11. *Id.* § 197.830(2), (8); § 197.840; § 197.850(3), (7), (10), and (11) (these sections deal with review procedures, deadlines for final decisions, and judicial review).

many problems that land use planning must encounter.

Oregon has conducted a unique land use experiment and, if it has any lesson for the rest of the country, it is that other states cannot necessarily duplicate Oregon's experiment. First, Oregon is a unique state in the homogeneity of its population; its political and social traditions; the extensive use it has made of the initiative, referendum, and recall; and the concern it has for protecting agricultural and forestry resources, the economic base of the state. Second, Oregon's program is a unique experiment because it has not only developed a regional approach to unique resources, such as the coast and the Willamette River Greenway, but also because it has taken a statewide approach involving nearly every state agency. In addition, Oregon has a fairly solid policy direction from the statewide planning goals. There are, however, a number of major disappointments with some aspects of the program, which I share with you not to attack the program, but to present some points for discussion of further reforms that I think the program still needs.

The first one that comes to mind is the inevitable result of putting so many of our eggs in the basket of a single agency. By doing so, we increase the possibility that adverse political pressure will be applied to LCDC and the program itself. As a result, every two years when the Oregon legislature convenes, we run the initiative gauntlet to defend our program and to make sure that the program is not eviscerated by groups that oppose aspects of that program. In fact, over the past twenty years, only Oregon's farm tax laws have been changed more often than the land use laws.[12] Only the sales tax has evoked as much citizen and legislator emotion as land use legislation.

A cadre of skilled lobbyists has evolved, who, of necessity, come to Salem every two years to protect or advance their interests. Thus, the cities, counties, 1000 Friends of Oregon, the Association of Oregon Industries, and LCDC itself, as well as many other groups, send their representatives to lobby the legislature. Deals are made, not always in public, and purely cosmetic changes are made, with propaganda value so legislators may return to their constituents with something to talk about. Two ex-

12. *See* Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use*, 9 WILLAMETTE L.J. 1 (1973).

amples from the 1983 session are the economic development legislation,[13] and the marginal lands legislation.[14] Such measures are ballyhooed as reforms, but actually make little difference. They are the modern equivalent of ritual prostration before Baal, to give the appearance that the legislature has "done something" about a controversial issue.

On the other hand, major beneficial changes have occurred by legislative action. The land use appeals process,[15] the result of six years of work by legislative committees, is a major contribution that Oregon has made to the nation.[16] The use of enforcement orders to implement the goals, and the post-acknowledgment process,[17] are other major contributions by Oregon to planning methodology and jurisprudence.

Unfortunately, despite these contributions, the biennial sessions of the legislature often appear to be a cross between Baghdad's bazaars and a used-car market with the trading, shouting, and backslapping that goes on. The feeling is prevalent at the end of the session that everyone has put something over on someone else. LCDC is also subject to these kinds of pressures during its rulemaking.[18] There is now a cadre of people who lobby the agency and attempt to get their version of a rule passed, a process every bit as contentious as the activity during the legislative sessions. The right wing of this lobbyist cadre puts pressure on the Governor's office, and the left wing usually lobbies LCDC's staff.

Another area of concern for the land use program is the lack of coordination between LCDC and other state agencies. There are many state agencies which have very good programs that coordinate well with LCDC—the Environmental Quality Commission is an excellent example. However, certain other agencies do not coordinate well. Particularly disappointing is the Oregon Department of Forestry, whose relationship with its "regulated industry" would be illegal at common law.

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13. OR. REV. STAT. §§ 197.707-.717 (1983).
14. *Id.* §§ 197.247, 215.317-.337.
15. *Id.* §§ 197.805-.850.
16. *Id.* § 197.320.
17. *Id.* §§ 197.610-.650.
18. *Id.* §§ 197.040(1)(b) and (c). *See, e.g.*, 1000 Friends of Oregon v. Wasco County Court, 67 Or. App. 418, 679 P.2d 320, *aff'd as modified*, 68 Or. App. 765, _ P.2d _ (1984).

A third area of concern is the relationship between Goals Four and Five (Goal Four deals with forest lands and Goal Five deals with natural resources). The inability to protect natural resources in forested areas is the single greatest disappointment in the program. No portion of the land use program is so politicized, and no review of acknowledged plans finds positions on goals so wildly inconsistent as a review of the interpretation of Goals Four and Five. No rule is so at odds with the goal it supposedly implements as the Goal Five Rule that appears to encourage filling in wetlands, destroying streambank vegetation, and eliminating fish and wildlife habitats. That these actions have yet to be examined by an appellate court is a tribute to LCDC timidity, county deference to timber barons, and the brute strength of the timber industry.

Another area that requires further examination is leadership. Yesterday, Mr. William Cox spoke of a "lack of professionalism" in the program. I respectfully disagree with his analysis. The difficulties faced by the program result from the hard-line approach of its first seven years, followed by a hasty and headlong retreat in the acknowledgment of plans, so that now almost anything with maps would be acknowledgeable. Local governments that did the job correctly the first time and were acknowledged, are given the impression that they were foolish. LCDC, far from "winking" at little flaws, has incurred permanent, total disability in its vision in dealing with most recent proposed plans.

A fifth area where problems exist is the biennial "battle of the ballot." Planning has been on the ballot by referendum four times since 1970. The effect of this on the program and the agency is great, and harmful. The agency tends to defer major policy decisions until after the November election and then worries about the next time such matters will appear on the ballot. The agency generally tries not to provoke anyone unless, of course, it would gain at the polls by harming someone.[19] But that is an unhealthy climate for managing an agency. It also leads to compromises being made at each legislative session following a ballot, so that the losers always get something they wanted even if they did not win. That is an absurd result.

The next area of concern is with the lack of information

19. The agency position on Rajneeshpuram is a good example.

about LCDC's acknowledgment orders.[20] There is no complete collection accessible to the public of all the acknowledgment orders of LCDC, unless one goes to the agency office in Salem and digs through them. In my own attempts to do just that, I found that some orders were missing from the files of the agency that issued them. Hence, there is no convenient way to verify whether LCDC has been consistent in its policy.[21] In addition, the publication of opinions of LUBA is often too slow. Unless a person travels to LUBA's office in Salem to get the opinions, there is no way of knowing how land use law has developed over the last six or eight months. This lack of information and delay are impediments to those who must deal with policy as it is developed. Most land use policy is developed through the acknowledgment order process as well as through LUBA decisions. The lack of information helps the small cabal of planners and lawyers, including myself, who regularly keep a watch on the agency and LUBA, but it does not help the general public or the lawyer or the planning practitioner.

The last area of concern is assuring conformity with the state Administrative Procedures Act.[22] One of LCDC's problems is that it has a small staff for the tremendous amount of paperwork it must do. The analyses that the staff does turn out are fairly good. However, given the legal task that they have to do, the reasons that policy is being made or changed are not always apparent and sometimes are contradictory. The agency has given some very poor rationales in acknowledging plans and in dealing with changes of policy. More codification of policy must be done through rulemaking. Furthermore, policy has to be more clearly articulated when a case developing new policy comes down.

I have spoken mostly of difficulties that I perceive with the program. Yet, the program has been no mistake. The problems which exist are those endemic to agency development and maturation, and of dealing with the nonacademic world, a political world in which people's interests clash and policy resolution of those conflicts must be made.

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20. OR. REV. STAT. § 197.251(5) (1983) (describes contents of a Commission order).

21. *Id.* § 197.830(15) (describes the Board's provision for publication of orders).

22. *Id.* §§ 183.025-.725.

There is hope that in the next ten years the Agency will retain its ability to make an independent and professional review of plans, assure that state policy is implemented, and be able to do so without so much pressure placed on it. The only way that can happen is if public officials and citizens continue to support the program. The political capital that must to be expended in making a hard decision requires that those who believe in the Oregon land use program put their beliefs in articulate form, ensure that the overall benefits of the program are made known, accommodate where accommodation can be accomplished, and attempt to be as consistent as possible with policy.

I am very pleased to be associated with Oregon's planning program. I hope that the next ten years will be as successful as the last ten in implementing the program envisioned and enacted by the Oregon legislature in 1973.

PROFESSOR WILLIAMS: I have been thinking about the problems with being the second-from-the-last man in the batting order, and trying to figure out how best to deal with this. I am reminded of my experience at the second oral argument of the *Mt. Laurel* case[23] before the New Jersey Supreme Court. I rose to say my piece. Chief Justice Hughes said, "Well, Professor Williams, we've got to adjourn for lunch soon, and you've got ten minutes to explain the whole problem to us." That is about the present situation.

I think the only appropriate way to open a review of the Oregon land use system, in its national context, is to show you a cartoon, which I am submitting as part of the proceedings of this Symposium. This is a typical *New Yorker* cartoon—a lady and a gentleman are at a cocktail party. She is looking at him rather angrily and saying, "Well, if they do everything so much better in Oregon, why don't you flee to Oregon?"

I have learned a lot in the last few days. I knew something about this system before, and I had written about it at some length—but, as Ed Sullivan pointed out, it has been changing rapidly. Compared with the national perspective, the Oregon story seems almost too good to be true. All sorts of remarkable

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23. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*); 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*).

things are happening, certainly compared with the local zoning which covers almost all the rest of the country. We have heard a lot about Houston and Harris County, which together constitute one percent of the United States population. Interesting things are going on in the other ninety-nine percent, but the best we have is right here.

The Oregon combination of favorable features is extraordinary. Plenty of land in Oregon is now planned and zoned for industrial development—though zoning is far from the whole picture on encouraging industrial development, and the amount of potential "high-tech" development is limited. What is more unusual, plenty of land is zoned for more intensive residential development. In both instances, land is zoned for the specified use as of right, so there is no need to go through elaborate political negotiations and, perhaps, pay-offs to get moving. This has been accomplished in Oregon without land costs getting out of line, as compared to some western cities. (Incidentally, this is an interesting commentary on conventional economic theory. With all the restrictions against building on good agricultural land, the price of land might well be going way up. The fact is that this has not happened.) Moreover, Oregon has a unique statute on housing—the sort of thing everybody in New Jersey has been praying for for years. Finally, Oregon's provisions on procedural speed-up are, I think, unique in the country.

What impressed me most was the striking contrast with Florida, which has a statewide permit system, highly touted in some quarters.[24] Quite a lot of litigation on this law has come down in Florida, almost all of it on procedural questions—who the devil is supposed to make this decision, and how? Almost every case I have looked at in Oregon has involved substantive questions—how should we use this land, and for what? That is a big change, a big difference, and a tribute to the program.

I have been asked to talk about how Oregon's program fits into the national picture. The 1970's and early 1980's have been a period of marked transition in planning law nationwide. Three features are, I think, particularly striking. First, the courts have been looking into planning more carefully—and high time it was,

24. Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. §§ 380.012-.25 (West 1974 & Supp. 1984).

in this field of law. During the 1950's and 1960's, almost anything would get by, with all sorts of unhappy results. Now the courts have become curious about what is really going on. If you have a good answer to their questions, all is well, but you can no longer depend on the presumption of validity.

Second, in all states except one (or possibly two or three), we have a consensus on a nationwide rule—that every landowner has a constitutional right to a reasonable return from the land, but no more. An owner's claim that some other land use would bring him a bigger return does not present a serious legal question. This is the rule everywhere except Illinois. This nationwide rule requires some interpretation because a "reasonable return" can be defined in different ways, but the rule does settle a lot of questions. (One must recognize, of course, that developers' lawyers usually prefer to ignore this.)

Third, at both the legislative and the judicial level, there has been a major change of emphasis from purely local land use controls to some form of statewide and regional land use controls. Of course, most planners have been arguing for decades that local government could not cope successfully with region-wide problems; that is true, in all sorts of obvious ways. The clearest examples involve air and water pollution, but the point is equally clear (and equally important) on access to good housing. In 1971, a famous book called *The Quiet Revolution in Land Use Control*[25] noted that this change was occurring. Some regional or statewide controls have supplemented local controls in twenty states, and that is the point I want to emphasize the most.

Let me run through half a dozen major features of the Oregon system and compare them with what exists elsewhere. The state and regional basis of land use controls in Oregon, together with LCDC procedure, is far more sophisticated and far more advanced than anything else anywhere. The only possible exception is Hawaii, the only state that has statewide zoning—every piece of land in the state is zoned into one of three districts—urban, agricultural, and conservation.[26] In some ways, that is a more advanced program than Oregon has, but it is unique to Hawaii.

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25. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

26. HAWAII REV. STAT. §§ 205-1 to 205-37 (1976 & Supp. 1983). There is also a rural district, not widely mapped, permitting small farms.

Many other states have legislation with some features resembling the Oregon arrangements, but almost always less complete. Several states have state-level administrative agencies authorized to review proposed developments, either on a statewide basis or by region, and to grant (or deny) permits for developments on the basis of specified criteria. Such a system is far advanced in Vermont[27] and fairly well advanced in Maine.[28] Several states have regional systems of land use controls, covering parts of the state. For example, the unincorporated northern half of Maine is zoned from Augusta, in a very interesting series of forest development and forest protective districts.[29] I do not know whether any of those who are interested in the forest part of the Oregon program are familiar with the Maine system, but I think you might find it well worth looking into.

Land use in the Adirondack Mountains, the whole northern part of New York State, is controlled by a regional agency; a large part of the local population was very hostile at first, but this seems to have worked itself out.[30] Wisconsin,[31] Minnesota,[32] and a number of other states have regulated the use of land around the lakes in their north country by elaborate systems of county land use controls, which may be superseded by statewide controls.

Other states use a regional system of issuing permits, after an environmental review, for development in particular regions. California has three of these in operation. The most successful of these has been the San Francisco Bay Commission,[33] regulating waterfront development, which has almost stopped the long practice of widespread filling of the Bay. The California Coastal Commission has carried on for a long time now, amid continuing controversy.[34] Florida has a system of regional permits covering parts

27. VT. STAT. ANN. tit. 10, §§ 6001-6092 (Supp. 1983) ("Act 250").

28. ME. REV. STAT. ANN. tit. 38, §§ 481-488 (1978 & Supp. 1983-84).

29. Maine State Zoning and Subdivision Control Law, ME. REV. STAT. ANN. tit. 12, §§ 681-689 (1981 & Supp. 1983-84).

30. New York Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-820 (Consol. 1982 & Supp. 1983-84).

31. WIS. STAT. ANN. § 59.971 (West Supp. 1983-84), *id.* § 144.26 (West 1957 & Supp. 1983-84).

32. MINN. STAT. ANN. § 105.485 (West 1977 & Supp. 1984).

33. San Francisco Bay Planning Act, CAL. GOV'T CODE §§ 66600-66661 (West 1983 & Supp. 1984).

34. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1977 & Supp. 1984).

of the state, which apparently has been less successful,[35] and the Lake Tahoe system on the California-Nevada border is notoriously less effective.[36]

Thus statewide and regional land use controls are widespread, with varying degrees of success. Oregon is ahead of everybody else on this.

A second feature of the Oregon system: planning is mandatory, not permissive; so is zoning; so is subdivision control. As far as I know, that is unique in the country, except that planning is mandatory in California. Oregon is ahead of practically everybody on that, too.

A third feature in Oregon is the elaboration by LCDC of a series of statewide development goals, in part pursuant to direction by the legislature, in part on LCDC's initiative. There is an elaborate system for state review of plans and of lesser decisions, to ensure that the plans conform with the goals. The most important of these policies reflects the notion that additional development in metropolitan areas should be compact and contiguous, instead of spattering across the landscape at random. This policy is carried out in Oregon by the establishment of urban growth boundaries. Planners all over the country have been advocating this for a long time, and a number of states have been implementing it in various ways. It is the key feature of the Hawaiian arrangements, whose prime purpose is to prevent Honolulu from scattering across (and using up) good agricultural land. The Vermont environmental permit system ("Act 250") has a strong bias along the same lines. Under that law, if a proposed development is not a part of contiguous municipal settlement, then different and more stringent regulations apply. Essentially, the development has to pay its own way, as far as public costs are concerned. It was in part on this basis that a major shopping center outside Vermont's big city of Burlington was disapproved. This decision was upheld in the courts, and the shopping center developers finally gave up.[37]

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35. Florida Environmental Land and Water Management Act, FLA. STAT. ANN. §§ 380.012-.25 (West 1974 & Supp. 1984).

36. California Lake Tahoe Regional Planning Compact, CAL. GOV'T CODE §§ 66800-66801 (West 1983 & Supp. 1984).

37. In Re Pyramid Co. of Burlington, Application No. 4C0281, Dist. Envtl. Comm'n No. 4, Oct. 12, 1978, *aff'd*, Chittenden Super. Ct. Docket No. 59-73 C n

Another major feature of Oregon's policies is the notion that, along with urban expansion, services should be provided at the time expansion is contemplated. Henry Richmond described yesterday the ways this has worked in relation to the infrastructure for industrial development. It is a central point in most planning in northern Europe. I have not seen much along these lines in the rest of this country, either by judicial fiat or by legislation. The most interesting example of this is in the Minneapolis-St. Paul metropolitan area, where a central planning agency controls most of the development of the infrastructure for that metropolitan area.[38]

A third major goal involves the protection of prime agricultural land. Almost all states are trying to do the same thing. There are some shortcomings in the way Oregon has done it, and the scheme as recently revised is extraordinarily complex. My strong impression confirms what John Keene wrote in an agricultural report;[39] the Oregon program has been the most innovative and promising of such attempts. Many of these schemes have not been particularly successful.

The next major policy requires the protection of forest lands and their development. This is the essence of the northern Maine scheme, and also plays a role in Vermont.

On industrial promotion, Goal Nine has been given much emphasis recently—of course, almost everybody is in that game. There is nothing new about that, except that you plan systematically to provide the public infrastructure.

On the question of equal access to housing—the *Mt. Laurel* question—Oregon has by far the most advanced statute in the country. There are a few others, and only a few. Vermont has one.[40] Vermont towns are forbidden to treat mobile homes differently from other homes, and the enabling act also contains general language about planning for housing for everybody. Under a

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M, Jan. 9, 1980, *aff'd on procedural grounds*, 141 Vt. 294, 449 A.2d 915 (1982).

38. Minnesota Metropolitan Government Reorganization Act, MINN. STAT. ANN. §§ 473.01-.121 (West 1977 & Supp. 1984).

39. R. COUGHLIN & J. KEENE, THE PROTECTION OF FARMLAND: A REFERENCE GUIDE FOR STATE AND LOCAL GOVERNMENTS (1981).

40. VT. STAT. ANN. tit. 24, § 4445(a) (Supp. 1983). *See also* MASS. GEN. LAWS ANN. 40B, ch. §§ 20-23 (West 1979 & Supp. 1983-84) (Massachusetts "anti-snob zoning" law).

new statute, which I drafted with some satisfaction and which eventually was passed, if someone has a complaint that their town has not complied with those provisions, the State Attorney General is commissioned to represent plaintiffs. The point is that consumers of housing at that economic level usually cannot afford lawyers.

The major gain in this area has been the judicial change described at some length an hour ago. The *Mt. Laurel*[41] rationale on "regional general welfare" has been explicitly adopted by the two other most important state courts in the country, New York[42] and California.[43]

However, the single most important problem in American land use controls is the impact of the tax system—the dependence on local real property taxes for many important public services. This system is visibly breaking down all around us, but meanwhile the land use control system continues to be distorted in an attempt to make up for the shortage of revenue. As a result, zoning has become in large part a vehicle for encouraging good ratables (lots of revenue, not much need for public services) and for discouraging bad ratables (inexpensive housing, the kind we need most.) Similarly, subdivision control has become a device for shifting the costs of new development to the purchasers of new housing, who are not yet there to object; urban renewal became a device for kicking around the poor and minorities. As far as I can see, very little attention has been given to that tax problem in this enormously interesting Oregon experiment. On that one big problem, I think, Oregon whiffed. But Oregon has done so many other things that that lapse is more than forgivable.

I would like to say a few things about constitutional law generally. This Symposium is the first time I have met Bernie Siegan, and I must say it has been a pleasure personally, even though I doubt that we could find anything which we agree on. (If we had several more days, perhaps we could turn up *something*.)

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41. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*); 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*).

42. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, (1972).

43. Associated Home Builders Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

I do not want to enter the debate about whether we should overrule a decision from the 1790's, or from 1926, but I do want to address Professor Siegan's main point. What he and his Committee have suggested, the shifting of the presumption in land use cases so that the courts practice "intermediate review"—more than the "rational test," but not quite "strict scrutiny"—is not a proposal that we never heard before. It is, quite precisely, the system under which American land use controls operated for thirty years, from the mid-1920's to the mid-1950's. It is also the system still in effect in Illinois. (In Illinois, towns rarely win land use cases.) But what is now only the Illinois system was tried for several decades by most of the other forty-nine states and discarded by almost all, for good reason, several decades ago. So it is not a new thought.

The second constitutional point of law I want to make is that there is nothing unusual about the system normally used in land use cases, whereby there is a presumption of validity of legislative action. This is the normal rule, applying all through American constitutional law. It is usually regarded as a polite expression of comity, for one branch of government (the judiciary) to assume that a co-equal branch (the legislature) had some good reason for what it did, unless the contrary is shown. Some major exceptions to the presumption of validity have been carved out in constitutional law since 1937. Under these exeptions, certain favored activities are given preferential treatment ("strict scrutiny")—civil liberties, freedom of speech and the press, and so on.[44] What Professor Siegan argued was that economic rights, as defined by (and for) developers, should be elevated to the same level as civil liberties. We tried that for a long time, and, I think entirely correctly, the courts and the legislatures decided it was a bad system and abandoned it. However, if President Reagan gets re-elected, it seems that we may be hearing a lot more about this.

PROFESSOR SIEGAN: Norman, we do agree about one thing—the way we pronounce O-R-E-G-O-N, and I was delighted to hear the way you pronounced it.

I will start where Norman left off. It is true that at one time property was given much greater recognition in constitutional

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44. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942).

law. It lost that recognition in 1926 in the *Euclid*[45] case. Protection of economic liberties was abandoned by the United States Supreme Court beginning in 1937. In those days, the intellectual community had a different orientation; an orientation that prevailed for a lengthy period of time until rather recently. I am referring to the view that economic matters were best resolved when government exercised control over them. The intellectuals thought, and the academic journals reported, that when government got into the economic area, it knew the right things to do. However, in the civil liberties area, the government knew nothing or it was stupid and oppressive. We had a lot of economic regulation as a result of that kind of thinking—zoning was just one example. Much was regulated: from airlines and trucking to eyeglass advertising. The Supreme Court acted sympathetically because most justices seemed to feel the same way about economic regulation.

In the last ten or fifteen years, the academic community has seen otherwise. In my book, *Economic Liberties and the Constitution*,[46] I summarized fifty-three studies of economic regulation covering everything from airlines to zoning. I tried to pick the most prestigious studies available and covered the gamut of regulation. The vast bulk of these studies concluded that regulation was counterproductive or was not working. The common finding was that regulation raises prices: first, by restricting the market from competition, and second, by imposing a variety of requirements on producers and sellers that increase costs.

We have had an enormous rethinking about regulation, and the thinking has been very different from what it once was. I remember when Friedrich Hayek published his book, *The Road to Serfdom*[47] in the middle 1940's, there was a great uproar. It was said, "What is this person trying to do? He is criticizing regulation, and regulation is what will allow the poor to compete more effectively with the rich; it will allow the society to elevate the condition of the poor." Yes, we have learned a great deal. Not only has this occurred in the academic world, but it has been applied in the practical world.

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45. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
46. B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).
47. F. HAYEK, THE ROAD TO SERFDOM (1944).

One result of this rethinking is airline deregulation. We now have airline deregulation adopted by Congress by an overwhelming vote. The main beneficiaries of airline deregulation are the less affluent. I recall asking my professors in undergraduate school, "Why do we need airline regulation?" The answer invariably was, "To keep those powerful airlines from exploiting average people." Well, we have learned the reverse. The only thing we know for sure about airline regulation was that it increased airline fares. That information started with the academics, and was later accepted by consumer advocates such as Ralph Nader.

Interestingly, Senator Edward Kennedy, not exactly a free enterpriser, is probably the person most responsible for airline deregulation. The principal opponents of airline deregulation were most of the big airlines. That is a scenario my professors never would have believed. The principal opponents of trucking deregulation are the big trucking companies—and so it goes. We have learned an enormous lesson about regulation and deregulation.

However, I come to the State of Oregon and find that there must be great soundproof walls here because the lesson does not seem to come through. Instead of deregulation, there is more regulation. At least, that is what I have heard at this Symposium. The regulation-deregulation lessons of the last ten or fifteen years seem to be ignored in Oregon, with the same adverse results that we saw in the airline industry and across the regulatory spectrum. The cost of housing is greater than it otherwise would be. In fact, the welfare of the state is probably impeded. I do not say this idly. I say this on the basis of the enormous amount of research that has gone into this question. The University of Chicago Law School has been a leader in this research. Its *Journal of Law and Economics* has published many studies of regulation that support my conclusions that economic regulations frequently do not work.

We have continually referred to the courts during this conference. The United States Supreme Court has reacted favorably in some areas to these deregulation trends. It held that advertising, which is, of course, an economic activity, is protected by the first amendment. That protection means that much advertising has been deregulated. For example, "for sale" and "sold" signs were

put within the protection of the first amendment.[48] And, for the lawyers here, you also have benefitted from judicial deregulation. You now can advertise.[49] That has been a great change.

Who benefits from these changes? Who benefits when lawyers can advertise? The people who ordinarily would not consult lawyers; who thought lawyers were too expensive; who now know much more about the legal profession than they did before. The big corporations may be affected only as defendants in lawsuits that otherwise would not have been filed. Deregulation has been, in the instances I have mentioned, very favorable to people at the lower economic levels.

We have seen this approach enter the zoning area. In the *San Diego Gas and Electric*[50] case, four or possibly five justices noted that the remedy for invalid zoning, that of voiding the ordinance, did not achieve the constitutional purpose of protecting property. These justices told us that a proper remedy is compensation. When one reads Justice Brennan's dissenting opinion in that case, it is clear that he understands the adverse impact zoning regulation can have upon our society. Many of us have been saying this for a long time, and it is satisfying to see it set forth by a Justice of the Supreme Court. When an appropriate zoning case comes to the United States Supreme Court, I think it would be an even bet as to how it would be decided. It is very possible that the Court will return to the days when it gave much more protection to property use.

Let me conclude my remarks by pointing out what the role of the court should be. I have been talking about the judiciary in my remarks at this Symposium and looking to it to protect the property rights of users and developers of land. Yet, what I see in New Jersey is the judiciary abusing its role. The Supreme Court of New Jersey has neither vetoed nor annulled laws—it has created a new land use system.[51] That is *not* what courts are supposed to do. Courts should protect us from the legislature. They are *not*

48. Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

49. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

50. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

51. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*); Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*).

legislatures. Courts are not supposed to write laws establishing new rules and procedures.

I have never heard so many nice things said about the legislature as I have heard at this Symposium. But despite what has been said, legislators are not all nice people. We would not need constitutions if they were all nice people. The purpose of a constitution is to make sure that legislators do not abuse us or oppress us. The courts should serve that role as they do in matters of speech, press, and religion. They do not presently serve that role in property matters.

It is not only a question of a court abusing its authority. The result in New Jersey will be, in my view, highly adverse to housing. I can say that without too much theory. The New Jersey decision requires municipalities to engage in inclusionary zoning.

Much has been said and written about inclusionary zoning. Part of our Housing Commission hearings concerned inclusionary zoning. What is inclusionary zoning? It requires builders to allocate a certain percentage of their units—say, 15 to 30 out of every 100 that are built—to the development of low and moderate income housing. That may sound reasonable to some, but the problem is that a builder frequently says, "I don't want to do it, and if you make me do it, I won't build." Sometimes you can give the builder lots of inducement, and provide him with sufficient rewards, so he will build the 100 units. But many times you cannot induce the builder to construct low-income housing. My conclusion, based in part on the Housing Commission's hearings, is that inclusionary zoning will reduce the total production of housing, and that is very bad. That is the kind of thing that courts should never be responsible for. Courts should remove restraints upon production and competition. They should not cause a decrease in the people's supply of housing.

Inclusionary zoning sounds good but presents serious risks to the production of housing. I was told privately by one official that the best way to stop all housing construction in a town was to mandate inclusionary zoning across the board—require the builders to include 15%, 20%, or 30% of their units for inclusionary zoning on the theory that poor people were being helped. The result would be no building in town. Sometimes when you look at cities that require inclusionary zoning, you wonder whether the purpose is to aid the poor or stop development.

As a result of the experience to date, it would be most desirable for the judiciary to return to its original role in land use. The courts should be watchdogs protecting us from the evils and abuses of the legislature. This would limit the restrictive policies of Oregon and other states. The courts would be fulfilling their proper function in the society.