



Policy Study

*Working Paper

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LAND USE REFORM THROUGH PERFORMANCE ZONING

By
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I. INTRODUCTION

Land-use zoning is not likely to disappear anytime in the near future. It has become ingrained on the American consciousness like fast food restaurants, baseball, and apple pie. A majority of Americans have never lived in a community that did not have zoning's myriad land-use restrictions and regulations. However, up until 73 years ago when, in 1916, New York City became the first major city to pass a large-scale zoning ordinance, zoning as an institution did not really exist in the United States. Instead, for the most part, property owners determined how to use their properties.

However, by the 1920s, policymakers, evoking a new-found faith in the benefits of "rational planning," began promoting zoning as an antidote to rising citizen concerns over rapid urbanization. Zoning spread quickly throughout the country as people looked to land-use regulations to preserve or plan their communities. In the 1950s the zoning bug spread beyond major cities, and by 1970 zoning could be found in most of the nation's cities, suburbs, and even rural areas.

Historically, zoning has always had critics among those who perceived it as an erosion of basic property rights. However, one need not even delve into the moral and philosophical objections to zoning from a property-rights perspective in order to argue for

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the scrapping of conventional zoning. From a practical standpoint zoning has simply not worked well. Slowly, policymakers have grudgingly acknowledged that conventional "Euclidean" zoning is not all its cracked up to be. It has distorted land markets by increasing land prices in some zones while depressing prices in others. It has failed to ensure quality development. It has contributed to increased housing prices in some instances. It has sometimes inhibited economic growth which, in turn, has contributed to the economic stagnation and subsequent deterioration of some communities. Further, zoning's voluminous regulations have rarely been fairly or consistently applied. Captured by powerful political interests, since its inception, zoning has been synonymous with abuse.

In short, it is time to discard the tired baggage of conventional zoning and start afresh with a new approach to land-use policy. What is needed are land-use policies that recognize the importance of the market as a flexible institution for meeting the changing needs of a community. At present it is unrealistic to expect communities to revert back to a completely laissez faire land-use system. Yet there are feasible alternatives that might move us in the direction of a more market-oriented and flexible approach to land-use decisions.

Any alternative approach to zoning should strive to: 1) achieve a high degree of flexibility; 2) increase certainty in land-use policy; 3) increase use of market signals to determine land-use; 4) reduce policymaker discretion and arbitrary land-use decisions by policymakers; 5) reduce delays in the application approval process; and finally 6) strengthen protection of property against uncompensated "takings."

An alternative system that accomplishes some but not all of these objectives was first instituted in 1981 in the city of Fort Collins, Colorado. Fort Collins, a city of 90,000 residents and growing, has done the unthinkable. The city has dropped zoning and replaced it with a system based on performance criteria rather than predetermined planners' grids. Fort Collins's experience demonstrates how a community can fend off a no-growth movement by a skillful use of deregulation and market incentives.

coupled with measures to mitigate the adverse effects of development--for example, traffic congestion, pollution, erosion, noise, and so on.

II. THE FAILURE OF TRADITIONAL ZONING

One need not venture far from home to hear a crescendo of cries of intensifying frustration with traditional zoning from planners, developers, home buyers, builders, city officials, and others. When introduced in the early 1900s, zoning was designed to prevent the potential harms that could result from landowners engaging in land uses that conflict with the uses of neighboring properties. In the absence of zoning, "land use decisions would otherwise be made individually by the landowners and purchasers of real estate." (1) By contrast, "a zoning ordinance imposes these decisions upon the market through an agency of the local government....The theoretical objective of zoning ordinances is to eliminate [the] assumed discrepancy between the self-interests of the private individual and the interests of society." (2) To this end, zoning ordinances divide communities into specific "zones" that permit only "compatible" land uses, often resulting in the segregation of agricultural, commercial, industrial, single-family residential, and multi-family uses.

Despite its aims, zoning has not increased certainty among homeowners and developers, nor mitigated land-use controversies, nor ensured a high quality of development. Rigid and static, it is not set up to deal with the complexities of a changing, dynamic world. It is incapable of resolving the competing pressures of complex issues such as environmental concerns, decaying infrastructure, suburban sprawl, and shortages of "affordable" low- and middle-income housing. Problems such as these require levels of subtlety beyond the reach of conventional zoning.

It is also no secret that in many communities the political powerbrokers have captured the zoning process. Administrative discretion plays a weighty role in zoning decisions. Thus, by its very nature, zoning invites abuse. The merit of a development is often only a peripheral factor in determining its acceptance. A zoning change or variance frequently goes to the developer who has most generously endowed the campaign coffer of a local politician. Because it opens the door to administrative discretion, the process has become mired in bribes, corruption, and arbitrary decisions. As one report on zoning summarizes this problem:

"the value of a parcel of land is the value of its potential use. By dictating the usages permitted upon all property subject to the zoning ordinance, the zoning authorities exercise tremendous power over the wealth of the owners of that property. While it is routine to vest great power in governmental bodies, the indictment against zoning is that the procedures regulating the exercise of this power lack established standards essential where property rights are involved."(3)

One of the most widely touted benefits of zoning is that it ensures a high level of certainty in land-use planning. However, this claim loses credibility upon closer scrutiny. In practice, zoning often entails a continual procession of changes and

amendments in the zoning codes. Development-by-variance, which provides relief from zoning ordinances, was the norm rather than the exception in most major metropolitan areas until recently. For example, in one study of Chicago, its zoning board granted exceptions and variances 57.7% of the time between 1923-1937. The same study shows that for several months in 1967 variances were granted for 98% of all requests. Such ready granting of variances has been commonplace in most major U.S. cities. (4) These variance grants were largely a response to the acknowledged need for flexibility to meet urban areas' changing needs as they grew. More recently, pressures against growth and development have sometimes resulted in refusals to grant variances or even to rezoning of entire areas, decreasing density allotments or further restricting uses.

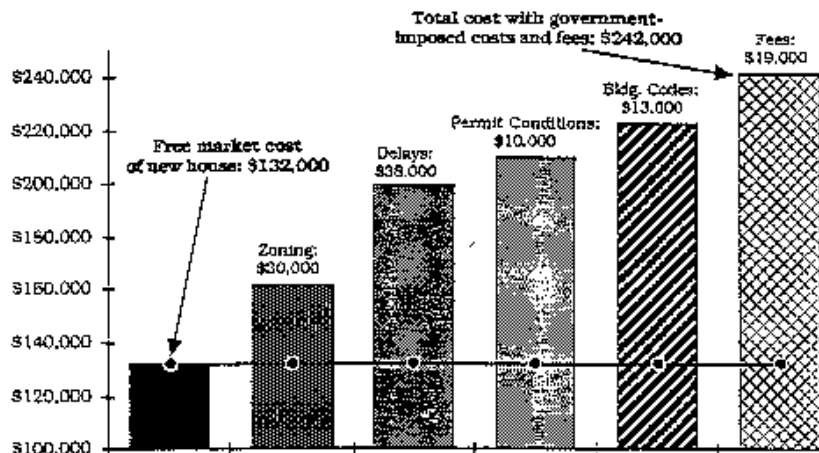
Arbitrary and ever-changing zoning processes have had two key negative consequences. First, since land values are often closely related to zoning designations, the expectations of property owners are constantly undermined by rezonings enacted with each new political breeze. Second, zoning provides no certainty to neighborhood residents who often find their neighborhoods subject to rezoning. Often the process leads to unfairness as exceptions for the rigid regulations of zoning are tossed out in an unsystematic, and at times purely political, fashion.

With no real voice in the political arena, the potential homeowner is another one of zoning's victims. Young middle-class couples are now finding it nearly impossible to realize one of the basic components of the American dream: home ownership. Zoning and the plethora of government regulations that at times mandate everything down to the color of one's roof, substantially increase housing costs (see Figure 1). Protection of single-family neighborhoods from apartment or condominium projects essentially restricts the overall housing supply, putting upward pressures on housing prices. Richard Peiser, in a study on the effects of zoning, compares land costs in unzoned Houston with those of Dallas and concludes that "in Dallas, land development regulation appears to add approximately \$2,000 [16 percent] to the cost of a lot relative to Houston." (5) In a general review of the empirical evidence regarding the impact of growth controls, including zoning, on costs, Dartmouth University economist William Fischel concludes that zoning can result in significant increases in land and housing costs. (6)

In effect, zoning has sometimes been used as a device to restrict entry into a community. The cumulative effect is a dearth of "affordable housing" in some U.S. communities around the country, from Los Angeles to Kennebunkport, Maine. Zoning principally serves the interests of those already established and settled in the community. This is where the political power lies. Potential homeowners are a silent constituency. William Fischel notes that "Measures that provide a small benefit for a large number of voters and impose a large cost on an isolated group of citizens are more likely to pass in a plebiscite than in a legislature." (7)

Figure 1

The Impact of Government Regulations on New Housing Costs*



*based on a standard construction, 1800 square-foot new home, on a 4500 square-foot lot, of the type commonly built in Orange County

Source: The American Nightmare: How Government Regulation and the No Growth Movement are Destroying Homeownership, The Claremont Institute

Depending on the extent to which variances are used, zoning also adds substantially to the time needed to complete a development project, which in turn can increase building costs. Peiser notes that "the actual impact of zoning on land development costs depends largely on the arbitrariness with which the zoning process is administered." However, comparing nonzoned Houston with Dallas, Peiser concludes that "on the average the zoning process adds four to eight months to development time. In a project where land and other rezoning costs are, say, \$1 million, such a

delay represents additional interest cost of \$80,000-\$120,000, in addition to, perhaps, \$20,000-\$40,000 for the zoning process itself." (8)

Over the past several decades, numerous academicians have questioned the rationale upon which zoning is based. The argument, in effect, is that zoning rectifies a market failure that does not in fact exist. In a detailed study of unzoned Houston, Bernard Siegan found that the market does an adept job at separating land uses on its own. (9) Because land prices tend to vary depending on locational factors, there is a natural clustering of land uses. Thus it would be economically infeasible for a steel factory to locate next to an affluent residential neighborhood. At the same time, zoning in Houston has also allowed for more flexibility and mixed-use development, especially of commercial, multi- and single-family residential projects, where these uses have proved compatible.

Martin Gellen, in a study looking at America's housing needs in the 1980s, shows how zoning has contributed to an apparent housing shortage by preventing "the adaptation of existing [underutilized] housing stock to a population of increasingly smaller households through conversions." He notes, "although the secular decline in household density has lowered both gross and net [housing] densities, density standards written into residential zoning ordinances have not changed accordingly. In the absence of zoning laws, or in cases where zoning is poorly enforced, the market would probably generate conversions only when, along with household size, real disposable income per household falls or the relative price of housing increases faster than incomes. The former occurred in the 1930s during the Great Depression and spurred a large wave of conversions; the latter condition characterizes our time." (10) Yet in the face of zoning, this market response to housing needs is unable to take place, contributing to the now oft-lamented "affordable housing" problem.

Another rarely mentioned drawback of zoning concerns the issue of aesthetics. Typically, proponents of zoning are eminently concerned with retaining the beauty or character of their community. In the name of aesthetics, they deem it necessary to infringe on the property rights of their neighbors. Orange County, is one of the the most painstakingly planned areas in the world, yet it is bereft of character. The endless rows of color-coordinated roofs are a study in monotony. In big cities, zoning has had similarly dulling effects. The unique dynamism and vitality that is associated with big cities is often choked off by increasingly restrictive zoning ordinances and accompanying building code regulations.(11)

A predisposition towards regulation and excessive planning in land use, as in most other areas, has yielded perverse effects: increases in land and development costs, politicization of land-use decisions, polarization of communities, and housing shortages. The time has come to move towards a more flexible, market-oriented system for determining land use.

III. PERFORMANCE ZONING

In recent years, thousands of cities throughout the United States as well as dozens throughout other parts of the world have expressed interest in adopting variations of a flexible zoning technique often referred to as performance zoning. The model for the

performance zoning system was first developed by Lane Kendig in 1973 when he was Director of Community Planning for Bucks County, Pennsylvania. With the 1981 publication of his book, *Performance Zoning*, Kendig brought his innovative approach to land-use policy to city planners throughout the world. Since the book's publication, a number of communities, ranging from Lake County, Illinois to Largo, Florida have followed Kendig's model and adopted some version of performance zoning. (12)

Performance zoning typically refers to determining land-use on the basis of performance standards rather than predetermined land-use grids. It is predicated on the belief that market forces are better determinants than planners' maps of where to build shopping centers, office buildings, industrial plants, housing, and so on.(13) Under performance zoning, standards are adopted that mitigate damaging effects of development rather than dictating actual uses for specific parcels of land. The standards are designed to keep administrative discretion and arbitrary political calculations regarding land-use decisions to a minimum.

Performance zoning rests on the rationale that the community/city can set the overall levels/limits in regard to traffic congestion, noise abatement, and densities, but then should step back and allow market forces to determine how these guidelines or limits will be reached. It is useful to draw an analogy to the case now frequently made for market pricing for air pollution. For instance, a district or municipality may mandate that all industries are required to reduce emissions by a certain amount (7% for instance) within a given time period. Rather than regulating how this must be accomplished, it should be left to the individual companies to determine how they want to reach this level. Firms can meet the standards in any way they see fit. If a firm is unable to meet the levels within the designated time period then it has to pay emission charges, or it can purchase credits from firms that have reduced their pollution by more than the prescribed levels.

Similarly, with performance zoning, the city sets certain guidelines based on a set of community goals and aspirations derived from citizen input. These are reflected in the form of a set of performance criteria. A development must satisfy a certain percentage (in Fort Collins it is 65%) of these criteria in order to get the development approved. The developer has the flexibility to meet these criteria whichever way that best meets his project plans and market considerations.

While numerous communities have incorporated performance standards into their zoning ordinances in the last nine years, very few have adopted anything close to a "pure" performance zoning system. Most of these communities have merely overlaid the performance provisions on top of traditional zoning codes. This, in essence, has simply added another complicated layer to already burdensome zoning regulations. Thus, instead of speeding up the application process, encouraging innovation, simplifying the development approval process, letting the market operate more efficiently, and reducing paperwork in most of these communities, the addition of the performance provisions has had converse effects. In these cases, performance zoning has prolonged and complicated the land-use decisionmaking process. (14)

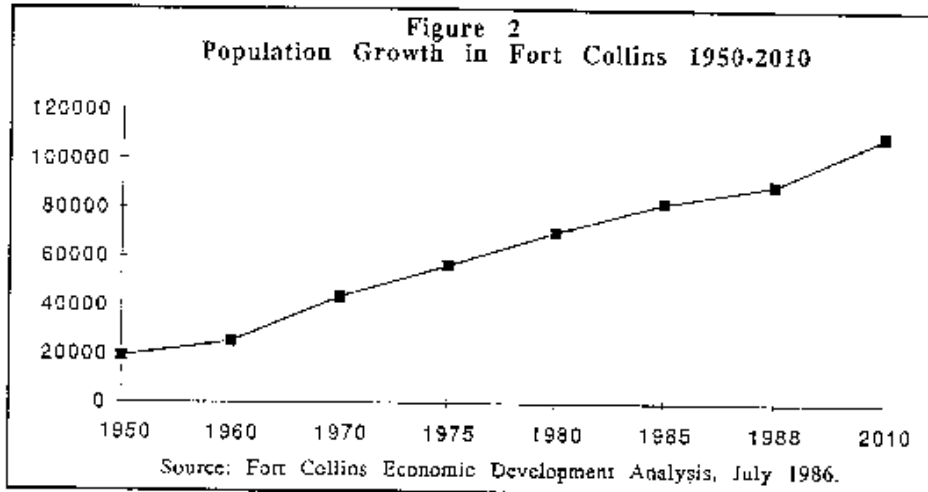
In order to utilize performance zoning as a means of reducing regulation, it should not be grafted onto an incompatible, preexisting zoning system. Rather, the first step that

the city/community should take is to discard its conventional zoning provisions and then implement a performance-based system. Fort Collins, a city outside of Denver, Colorado, effectively took this plunge nine years ago. In 1981 the city adopted an ordinance that permits any and all uses on all land parcels provided certain performance criteria are met. The land use policy, termed the Land Development Guidance System, (LDGS), is the closest to "pure" performance zoning that is currently utilized in a medium-sized city in the United States.

A. FORT COLLINS HISTORICAL BACKGROUND

A city of 90,000 residents, Fort Collins has grown rapidly since the early 1950s (see Figure 2), largely as the result of considerable annexation. With the exception of occasional no-growth movements, the community had a generally pro-growth climate until the late '70s. However, in the midst of a particularly strong, well-organized, no-growth movement in the late '70s, the city planning staff embarked on an extensive study of alternatives to the zoning regulations then employed.

The planning department's surprising response to citizen activists was to scrap traditional zoning altogether. Rather than limiting the quantity of development, they would, they argued, improve the quality of development. The end result was the Land Development Guidance System (LDGS). Lynda Hopkins, now a local developer and at the time a member of the planning board, relates that, "the Land Development Guidance System came as a direct result of the no-growth movement. It was a response, an answer to a no-growth citizen's initiative." Although the initiative ultimately failed, it came close enough to passing and stirred enough passions that the city decided something needed to be done.



IV. THE FORT COLLINS LAND DEVELOPMENT GUIDANCE SYSTEM

The land-use system adopted by Fort Collins is not a completely laissez faire one. The city still has zoning districts in the sense that the developer does have the option to develop a parcel "by right," that is, according to a predesignated use. However, in each district, any use is permitted, as are projects that combine uses. The LDGS is a component of a total growth management system designed to implement the community's long-range plan. Nevertheless, the system provides a great deal of flexibility to allow the markets to respond to land-use needs. Rather than inhibiting the dynamics of the market by imposing arbitrary regulations, as many land-use systems do, the LDGS generally lets market forces determine overall building and land-use decisions.

The LDGS is based on the notion that the market should determine the locales and types of land use in a community. (15) The first section of the LDGS describes the concept behind the system, stating that, "merely designating areas in which land is available for industrial development or those uses of regional impact on a zoning map has done little to attract or control industrial land uses or shopping centers." (16) City officials are concerned about land-use effects--such as impacts on traffic flow, aesthetics, environmental preservation, noise, and so on-- rather than the location of a particular use on a zoning map.

A. REVIEW PROCESS

The developer first submits an application to the city, where it is processed in three stages: the conceptual review, preliminary plan, and final plan. The entire process usually takes anywhere from 7 to 15 weeks.

The review process commences with a conceptual review of the development, which consists of an informal meeting between the developer and various city staff. Here many projects are screened out at an early stage as being entirely incompatible with the city's comprehensive Land Use Policies Plan.(17) Further, in this stage, if the application submitted by the developer is considered promising yet is deemed potentially controversial, the developer is required to meet with the neighbors and get their input before submitting the formal request for approval.

According to the city, citizens share in the community development process at four main levels: 1) they help to determine the goals and objectives for the community; 2) they choose among alternatives; 3) they work with the planners to develop implementation plans for adopted policies; and 4) they provide input at the project planning stage. (18)

After the initial meeting with neighborhood groups, the developer goes through a uniform procedure shown in Table 1.

B. PERFORMANCE CRITERIA

The backbone of the LDGS is the point system, which is set up so that a developer can propose any land use on any parcel of property. No development is automatically eliminated from consideration due to a preconceived zoning blueprint. The point system is designed to mitigate the adverse effects of construction, such as traffic congestion, utility costs, crowding, and so on. The idea is for the community to set the overall standards and then leave the developers to decide how they want to meet these standards. The LDGS includes over 65 performance criteria that must be considered in the development proposal. There are 46 other impact criteria that the development is judged against. The individual criteria carry different weight for different land-use categories. In other words, different multipliers are used depending on whether the development is business, industrial, downtown, residential, a shopping center, and so on.

Table 1

Review Process for both the Preliminary and Final Phases:

1. The application for development approval, with all supporting documentation, is submitted before the fifth of the month.
2. Plans and written materials are routed to city departments and agencies for review.
3. Approximately two weeks after submission of the application, a staff review meeting is held to discuss these comments.
4. Approximately one week after the staff review meeting, review comments are sent to the applicant. Usually the applicant and staff meet to review the comments.
5. The applicant has approximately two weeks from receipt of the written review comments to submit revised plans or documents.
6. The planning staff prepares a written report for the Planning and Zoning Board, which is presented to the board at its work session held the Friday before the public hearing.
7. The Planning and Zoning Board conducts a public hearing on each application the fourth Monday of the following month and takes action on each application, either approving it, approving it with conditions, denying it, or tabling the application to another hearing date.

Source: Urban Land Institute, *Flexible Zoning: How It Works*, p.164

Points are broken down into base criteria and bonus criteria. Points can be earned from the base criteria for such things as proximity to a community park, public transportation, employment centers, and/or a community facility. Base criteria points are first calculated. For approval, a development must meet 65% of the performance criteria for its land-use category. If the development does not achieve the minimum score needed to meet the point system requirements (for its density and location), then it can try to garner bonus points. The density chart allows bonus points to be awarded for attributes such as environmental conservation (this is the largest multiplier), housing for the handicapped, preservation of historic buildings, recreational facilities, parks, and so on (see Table 2 for a list of 44 of the 65 criteria which apply to all development). The only criterion where the LDGS appears to be highly subjective and not amenable to measurable standards concerns the category of neighborhood compatibility.

The point system allows the developer to be more creative and meet his needs and the community's through a more flexible framework. The strength of this approach is that certain objectives, deemed to benefit the community, are strongly encouraged by economic incentives and disincentives built into the system rather than by rigid, regulatory means. It is up to the developer to evaluate the degree to which he wants to emphasize each of these criteria in the development. The LDGS reaffirms the notion of private property rights. According to City Planning Director Tom Peterson, "As long as you can mitigate your land-use, the city is not going to hinder you."

Bufferyards are an essential ingredient for the success of any performance zoning system. One of the central assumptions of the LDGS is that "any land use likely to occur in Fort Collins can in most cases be made compatible with any neighboring land use through careful design and buffering." (19) As will be demonstrated later, with appropriate buffering, a company plant can be located adjacent to an affluent residential neighborhood with little controversy.

V. HOW PERFORMANCE ZONING HAS PERFORMED

As one of the first systems of its kind, Fort Collins's Land Development Guidance System has proved both effective and popular. With the exception of radical no-growth proponents, no one interviewed wished to go back to conventional zoning and even Ward Luthi, a vocal and radical antigrowth activist admits that "in terms of the quality of development there has been some positive impact." One local developer noted that because of the LDGS, the "development projects are much better thought out."

Table 2

NEIGHBORHOOD COMPATIBILITY

1. Social Compatibility
2. Neighborhood Character
3. Land Use Conflicts
4. Adverse Traffic Impact

PLANS AND POLICIES

5. Comprehensive Plan

PUBLIC FACILITIES & SAFETY

6. Street Capacity
7. Utility Capacity
8. Design Standards
9. Emergency Access
10. Security Lighting
11. Water Hazards

RESOURCE PROTECTION

12. Soils & Slope Hazard
13. Significant Vegetation
14. Wildlife Habitat
15. Historical Landmark
16. Mineral Deposit
17. Eco-Sensitive Areas
18. Agricultural Lands

ENVIRONMENTAL STANDARDS

19. Air Quality
20. Water Quality
21. Noise
22. Glare & Heat
23. Vibrations
24. Exterior Lighting
25. Sewages & Wastes

SITE DESIGN

26. Community Organization
27. Site Organization
28. Natural Features
29. Energy Conservation
30. Shadows
31. Solar Access
32. Privacy
33. Ocean Space Arrangement
34. Building Height
35. Vehicular Movement
36. Vehicular Design
37. Parking
38. Active Recreational Areas
39. Private Outdoor Areas
40. Pedestrian Convenience
41. Pedestrian Conflicts
42. Landscaping/Open Areas
43. Landscaping/Buildings
44. Landscaping/Screening

Source: *Land Development Guidance System*, p.12

However, the LDGS is not without its flaws. Over time, the application/review process has, to some extent, become politicized. Further, by 1989, after eight years under the system, the planning staff began exhibiting a growing willingness to address certain community concerns through regulatory means rather than market incentives. The increasing ability and willingness of citizen activists to micro-manage the designs of certain developments and to delay projects constitutes a weakening of property rights. Often, when heated controversy develops over a project, the city "feels the only answer is regulation," according to developer Lynda Hopkins. Assistan Mayor, Chuck Mabry, a former city planner, believes the land use process has become, "more intrusive, more regulatory, and less predictable." For instance, with regard to new development on Harmony road--the new entrance to the city from the highway--the planning department is requiring 80-foot abatements. Such requirements can essentially undercut the original concept of the Land Development Guidance System. However, all in all, the LDGS has stood up pretty well to increasing pressure from citizen and neighborhood groups. In practice, only a small percentage of developments have suffered undue delays, and only a handful of developments have been blocked by citizen opposition.

A. APPLICATION/REVIEW PROCESS

Goals:

If the LDGS is to overcome the problems and politicization generated by traditional zoning it must meet several objectives. These include: 1) Making the approval criteria explicit and subject to measurable standards; 2) Making the decisions by the planning board more predictable, less arbitrary, and less subjective; 3) Replacing negotiations with administrative decision making; 4) Decreasing the time involved in the application process; 5) Protecting private property rights, while reducing externalities or adverse effects of projects on other landowners or residents.

Performance:

The time involved in the application process has decreased from 7 to 9 months to anywhere between 7 to 14 weeks, according to Fort Collins's planning staff statistics. This large time savings can be largely attributed to the fact that 2 to 3 months are saved by not having to go through rezonings to obtain project approvals. Projects with no discernable controversy or opposition now just "fly through," according to Assistant City Planner Joe Frank. Since the adoption of the LDGS in 1981, only 29 projects (out of a possible 1700) have been appealed to the City Council.(20) This averages only 3.5 appeals per year.

Because projects no longer have to go through the process of getting variances and rezonings, costly delays that would have ensued under traditional zoning have been averted. In areas previously not zoned for commercial or industrial--where the developer would have had to receive a variance to build--time delays have decreased considerably.

However, the cost of preparing a development application has increased, since development proposals need to be much better thought out in the earlier stages of preparation. Nonetheless, comparing performance zoning to conventional zoning in

this regard can be misleading. Unlike conventional zoning systems, the LDGS incorporates zoning and the subdivision processes into the same application. Thus, while a greater amount of information is required from the developer in the initial application, the developers do not have to repeat the process for subsequent subdivision applications. This cuts down considerably on costs and time for the remainder of the process. Further, housing prices have stayed low and stable. Thus it appears that the extra costs incurred for preparing the initial application are counterbalanced elsewhere--for example, from the large decrease in time delays.

Table 3

Abstract of Performance of Land Development Guidance System

1. Application/Review Process	Decreased application time on average from 7-9 months to 7-14 weeks. Some projects have been delayed by neighborhood opposition. Developers complain of decreased certainty in the process.
2. Citizen Participation	Neighborhood input is increased, more sophisticated and at an earlier stage. Between 40-45 neighborhood meetings each year. May be too much micro-level citizen participation. Process has become somewhat politicized due to increased citizen participation.
3. Infrastructure Costs	Some positive effect in tying development to existing infrastructure. Effect not as great as anticipated due to problems with contracts and tax laws.
4. Mixed Use	Increased substantially. Scotch Pines neighborhood and Oak Ridge Business Park are illustrative.
5. Jobs/Housing Balance	Ratio of 1.16 jobs to 1 household. This corresponds to a very balanced jobs to housing ratio.
6. Quality of Development	"Developments are much better thought out." Improvement in quality & aesthetics of project design.

Predictability. The complaint voiced most often by developers is that the approval process needs to be more predictable. While the developers are allowed a great deal of flexibility in determining the appropriate use for the land, at times they find the process unpredictable, and not guided by clear and specific rules and procedures. In some respects, this is not surprising because there is a certain tradeoff between predictability and flexibility. However, the city is currently working on making the system more self-administering, rapid, and predictable by allowing for more projects to bypass the formal application review process and instead to go through what they term "administrative review." This is an even quicker route to get a development plan approved. It applies to projects which have already previously gained approval for a related master plan and is structured so that the current project can be approved within a time span of three weeks.

According to City Planning Director Peterson, "it (administrative review) shortens the review time further because basic guidelines that affect development are agreed upon ahead of time (by the developer and the city staff)." Generally, in this process the two parties have agreed upon the guidelines in a previous development or master plan, and these guidelines are applied to the present development. The process offers more predictability, which is important for the success of any flexible land-use system in order to reduce the prospects that the system will become politicized.

B. CITIZEN CONCERNS

Goals:

- 1) To reduce citizen influence at the microlevel of individual projects, while preserving a strong citizen role in developing the overall community plan and guidance criteria.
- 2) To quell citizen concerns about the environment by preserving open space and conserving natural resources through more market-oriented means.

Performance:

Citizen Input. Regarding the level of citizen input, there is considerable difference of opinion. Citizen activists such as Tom McKenna claim that "neighborhood participation is a farce. Citizens are given short shrift in the meetings. Developers, (who try to come across like the little sisters of the poor), always win and the homeowners always lose."

On the other hand, one developer related that the Fort Collins system "allows too many people to try to feather their own bed." He claims that a small vocal minority can wreak havoc on the application process and that citizen input can be so demanding that the developer's break-even point is threatened." Frank Vaught, a building designer, believes that developers sometimes have to deal with "vigilante-type neighborhood opposition." However, developer Lynda Hopkins, asserts that, "One of the best features of the system is very early neighborhood participation." She adds that "these neighborhood meetings are taken very seriously in design." Her reasoning is that it is better to have the citizen input up front, at the beginning of the process, rather than having a vocal group of neighbors sabotage a development at a later point in the process.

The LDGS is clearly a very participatory land-use system. With between 40 to 50 neighborhood meetings each year, clearly the application review process allows ample forums for citizens to have input into the process, despite the claims of the no-growthers. Indeed, the process actually mandates a role for citizen input. However, the claim that citizen groups have too much influence on site design decisions has a great deal of validity. The virtue of the LDGS is that land-use decisions are intended to focus on mitigating specific, measurable adverse effects of development rather than on preventing development altogether. Instead, due to the, at times, undue influence that neighborhood groups can exert on the nature and design of the developments, the objectivity of the process is being undermined. Citizen groups are even beginning to hire their own consultants.

As noted earlier, in response to community concerns in a number of cases in the last year, the planning staff has resorted to the quick fix by imposing regulation. Tom Peterson, Director of Planning, acknowledges that "the planning board is moving more in the direction of policy...and there is a tendency to look at regulations." He adds, however that "before thinking of regulations, the city commissions a market analysis" to determine the appropriate policy and whether any guidelines are even needed.

Environment. It is difficult to judge the performance of the Guidance system in this regard because preserving open space and environmental resources is not a stated goal of the LDGS. Nevertheless, 14 of the performance criteria for evaluating all development in the LDGS pertain to preserving natural resources, conservation and open space. In general, performance zoning can do a far better job in preserving the environment than conventional zoning. This is because conventional zoning ordinances typically only provide for preserving resources and open space in special agricultural or conservation districts. In all other districts, conservation is widely ignored.

Most performance systems strongly incorporate environmental provisions. In fact, according to the Urban Land Institute, "(Flexible zoning systems) build on the groundswell of performance standards developed by environmentalists to protect natural resources. They provide a more unified approach to environmental protection than most zoning and subdivision regulations have achieved." (21)

Political Reality. In Fort Collins and to a much greater extent in hundreds of other communities throughout the United States, neighbors have become heavily involved in the zoning process and have used it to advance their own agenda rather than some more general public interest. The result has been a serious undermining of basic property rights. Increasingly, citizens are demanding to have a voice in decisions on development proposals. Most of these people understandably care about preserving the character/beauty of their neighborhoods and protecting the property value of their land. However, their conception of property rights stretches the concept considerably beyond traditional legal recognition of abutment rights and nuisance laws.

No-growth activist Tom McKenna is typical of those who have somehow fashioned a whole new theory of property rights. He explains that "the only right he (the property owner) has is to continue the use as a vacant lot or to put in a home similar to mine." If the property owner proposes any other use, such as a different style house than that of

McKenna, he'll have Tom McKenna to deal with. Frank Vaught notes that in Fort Collins "we (developers) have a set of rules that we have to follow, but the neighborhood groups have no rules to follow." With the growth/no growth debate becoming more contentious and divisive, it is clear that citizen concerns with, and involvement in, land-use decisions will only increase. Faced with this political reality, there are a number of options that can be pursued by policymakers.

Policy Options:

1) Expressly forbid neighborhood control. One option is artfully expounded by Douglass Kmiec, a law professor at Notre Dame University. He argues that if the community has any rights at all concerning land-use, they are confined to the community having "a right to articulate how they want to grow in the future," that is through specifying the community's overall growth and infrastructure goals. (22) However, when neighbors get involved in individual land-use decisions, the process loses its procedural fairness. His studies have found that the process inevitably becomes politicized, and the approvals don't match any coherent statement of community policy. Therefore, he proposes expressly forbidding neighborhood control except at the overview/ comprehensive plan stage of policy making. The public would have input and influence at the general/abstract level of policymaking--such as determining guidelines for land-use intensities--but not at the highly specific level of individual cases of land use and site design. (23)

His system shares many attributes with "pure" performance zoning, and the goal is the same: to depoliticize the process and restore private property rights by allowing the community to set overall standards and then letting the property owners determine how they will reach those standards. The only drawback to Kmiec's system lies in practical, political considerations. How do you convince citizens to give up their voice in the application approval stage of the process, especially since they keep demanding an even greater voice? If the Supreme Court continues to rule, as it did in several recent cases, that some land-use restrictions constitute "takings" of private property and therefore require compensation of the landowner, this might set the stage for restricting citizen participation along the lines that Kmiec proposes. Such "takings" decisions would force communities in effect to pay for onerous land-use restrictions imposed on landowners, thereby potentially having a dampening effect on efforts of citizens to block development. This, in turn, might make Kmiec's proposal for participation at only the general plan level more politically feasible.

2) Use restrictive covenants to protect property values. A second alternative is through the use of restrictive covenants written into property deeds. Covenants are legally enforceable rules about land use. They are usually written into deeds by developers when building new properties as a means of enticing people to buy the homes. The residents are then legally bound to abide by the deed restrictions on the uses of their property. This protects property values and ensures stability in one's neighborhood through a private, legal, voluntary approach, rather than by government coercion. Restrictive covenants have been widely used for many years in cities such as St. Louis and Houston and (24) in Fort Collins, a significant percentage of homeowners are protected by private covenants.

Restrictive covenants are not more widely used across the country because, according to Kmiec, "the law of covenants is hopelessly anachronistic." It reflects certain provisions of old English law. Most lawyers don't want to tinker with the standard covenants. However, to make covenants more applicable to different situations, they should be tailored to the particular development and circumstances. Covenants are also not easy to establish in already developed neighborhoods because it is very difficult to get all the people in the neighborhood to agree to restrict potential uses of their property or to agree on what these restrictions will be. (25) Thus, at present, covenants are likely only a realistic policy option in newly developed and undeveloped areas.

3) **Expressly authorize neighborhood control.** For developed areas, Professor R. Nelson advocates expressly authorizing neighborhood control. Nelson believes that zoning is "supported by fictions, evasions, contrived arguments, and other dodging of the fundamental issues." (26) Masquerading zoning as a policy tool is sham. Nelson's system would transfer property rights to a neighborhood association. Each property owner in the neighborhood would have "shares." (27) In order to develop on undeveloped land within the association boundaries, the owner could purchase the necessary collective property rights from the association. What this amounts to is paying the other property owners for the increase in traffic congestion, or the externalities resulting from the new development.

4) **Purchase or Transfer of Development Rights** A fourth alternative is for communities to develop programs for purchasing development rights. Under such a plan, the local government or private neighborhood association purchases the "right to build" from the landowner. This approach has been utilized in various communities to preserve agricultural and other open-space land. Economist Richard Stroup, summarizing several such programs, notes that:

King County, Washington, allocated \$15 million to purchase development rights in 1982, and since then has been involved in the purchase of rights on 1,886 acres. The states of Maryland, New Hampshire, and New Jersey have such programs, as do counties in New Hampshire and Maryland. In California, the Coastal Conservancy works with counties and private land trusts to purchase development rights. This approach is market-based on the supply side, since it is a voluntary exchange. Taxpayers, of course, have no such choice except perhaps at election time. But the cost is spread among all taxpayers, who might all benefit if, for example, amenity production is the value sought by the government and the amenity sites are enjoyed by all. (28)

Programs that allow for purchase of development rights offer one mechanism of allowing local citizens to preserve some areas against development, while compensating affected landowners. Such programs may help to reduce overall conflicts regarding land-use by forcing concerned citizens or their representatives into taking the full cost of their land preservation desires into account. This restricts citizen involvement to overall decisions regarding whether or not to purchase, and thereby preserve, specific properties. If citizens choose not to purchase the development

rights to a specific property, then development would be allowed to proceed according to the prevailing land-use guidance criteria.

Programs that allow for purchase of development rights offer a key means of preserving open spaces, agricultural lands, and other resources. Increasingly, some citizens in a number of communities are pushing to prohibit development on certain lands, including privately owned parcels. Yet prohibiting development on such lands runs headlong into the property rights of the landowner. Recent Supreme Court decisions, though ambiguous, have begun to require compensation of landowners if land-use regulations essentially deprive the landowners of all use of their property. Purchase of development rights offers a means of securing certain lands as open spaces or agricultural preserves while compensating the landowner.

C. INFRASTRUCTURE COSTS

Goal:

One of the objectives of any performance zoning system should be to decrease the cost consequences specific to each development that the city's taxpayers have to bear. One of the important features of the LDGS is the stated belief that development should pay its own way (this is distinctly different from current trends to in effect "extort" fees from developers to pay for community benefits--parks, museums, schools, and so on--not directly related to the actual development project itself.) The goal is to sharply reduce the financial burden of development to the public sector. Thus, the goal is to tie new development very closely with existing infrastructure. This, in turn, encourages infill development and discourages suburban sprawl. In theory, developments of outlying areas with little public infrastructure cannot take place without significant infrastructure and related expenses accruing to the developer.

Encouraging infill development is important in a broader context, because it cuts down on the leap-frogging effect. Conventional zoning often actually creates incentives for growth to "leap frog" past urban areas to outlying, less regulated areas. Restrictive urban and suburban ordinances cause developers to choose alternative sites in exurban and rural communities because the political climate is more auspicious to development. Reviewing the urban sprawl effects of zoning, William Fischel notes that "restrictive controls applied to a large fraction of suburban land can have significant effects on urban structure, pushing development to remote locations as close-in development is precluded." (29) This, in turn, can cause increases in commuting, adding to traffic congestion and pollution.

Performance:

In practice, in recent years, the LDGS has had an impact on tying development to existing infrastructure and encouraging infill development, though not to the degree anticipated. The planning department freely admits that they have made a number of mistakes in this regard. In several cases, the taxpayers have been forced to foot the bill when developments went bankrupt. This resulted from poor contracts drawn by the city. Further, the one tax increment finance district has caused overbuilding in some areas.

The record is encouraging yet mixed on tying development to existing infrastructure for a number of reasons. First, city policies were not clear, and the rules for the special improvement districts were not well thought out. Second, some projects were delayed or simply abandoned due to intense, active resistance of neighborhood residents to questions of appearance and "compatibility" of some infill development. A number of controversies have made some developers uneasy about development in infill sites. Another culprit was tax law (prior to the 1986 reform) that encouraged a great deal of development designed primarily to take advantage of tax benefits. The loans developers received from savings and loan institutions were not predicated upon the development's future economic viability. They were driven purely by the tax structure. The result was that the construction of numerous commercial buildings outstripped the market demand for office space. However, the empty office space is now gradually being absorbed.

Policy Recommendations:

- 1) **Make certain taxpayers are not forced to bail out insufficiently thought-out development.**
- 2) **Avoid allocating taxpayer's money towards preferential business subsidies.** Tax breaks for businesses have considerable merit. However, subsidies distort the market process by creating artificial demand and arbitrarily favoring some businesses over others.
- 3) **Increase the multiplier for infill development.** The LDGS could have encouraged an even greater amount of infill development vis-a-vis periphery development if the incentives were greater and regulations and restrictions concerning infill development were decreased. Moreover, reducing citizen involvement in the specific project approval process could help mitigate the disincentives developers face in trying to build in dense urban environments.

D. MIXED USES

Goal:

Encouraging a greater blending of uses in a community is a desired aim of most performance zoning ordinances. Extensive separation of uses can contribute to lifeless and sterile downtown areas when an intermix of commercial and residential uses are prohibited. Moreover, separation of uses in traditional zoning schemes has contributed to suburban gridlock in some metropolitan areas as people are forced to drive great distances to get to work, or the store, and so on. A greater mixing of uses can decrease gridlock by opening up more opportunities for people to live and work in the same vicinity. This, in turn, decreases vehicle emissions, which are a primary source of air pollution in many urban areas. Further, by decreasing workers' commute times, greater mixed use can diminish lost productivity caused by lengthy commutes.

One of the major urban problems in outlying areas of many cities is the so-called jobs/housing imbalance. This refers to the number of jobs per household in a city/community. Areas that are housing poor and job rich such as Silicon Valley in Northern California and Orange County in Southern California have high ratios with

job/household ratios over 1.2. Bedroom-type communities that are job poor will have low ratios. This imbalance is alleged to be a major cause of traffic congestion and air pollution.

Urban Villages. Removing restrictive government land-use regulations, including especially those zoning ordinances that have prohibited mixed-use and infill development, can mitigate traffic congestion and air pollution. In European cities "urban villages"--where commerce and housing are intermixed--are the norm rather than the exception. Housing is located above shops, and there is a wide diversity of land-uses within individual neighborhoods. On this side of the Atlantic, throughout the 20th century, planners in American cities have consistently tried to separate uses. By doing so they have forced housing artificially apart from business. This contributes to traffic congestion as people have to drive great distances to work. Moreover, the dispersed residential patterns that have resulted in part from zoning practices make it difficult to develop cost-effective urban mass transit systems. By removing barriers to natural integration of uses, performance zoning can help to rectify these problems.

Performance:

in Fort Collins, performance zoning has had very positive effects on increasing mixed use in a tasteful fashion. Unquestionably, it has been a success in this regard. It is known as a city where people can "live, work, and play" in the same area and in an attractive setting. (30) In some areas, children can walk to the neighborhood store as their parents did many years before.

The most telling illustration of mixed use is Fort Collins's Scotch Pine neighborhood. Directly across the street from this community with a lake, attractive houses, and ten acres of open space, lies the Woodward-Governor factory. The factory, which employs 1,000 workers who make governors for motors, has such effective landscaping and buffers that one has to look very closely to see the factory.

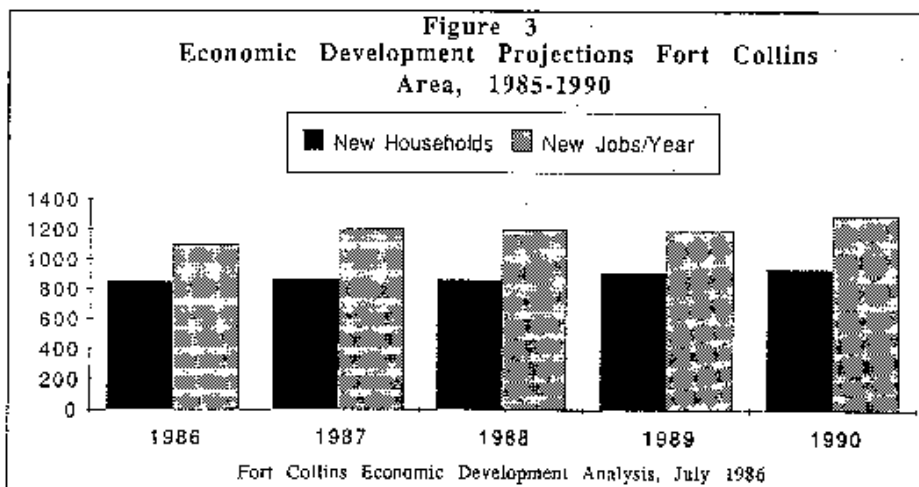
The Oak Ridge Village and Business Park provides another fitting model of the ability of the performance system to blend uses in a quality fashion. The development is designed to inspire people to dwell and work in the same neighborhood. The business park has five office buildings in which around 500 people are employed. The adjacent 120-acre residential area will eventually have 400 homes that could accommodate many workers from the business park.

Already businesspeople who previously had endured hour-long commutes to work now can see their office buildings from their homes. According to City Planning Director Peterson, mixed uses like the Oak Ridge development, "add life to the community." He notes, "if they can walk to work, they don't drive." This, in turn, cuts down on traffic congestion and car pollutants going into the atmosphere.

The important ingredient for making this mixture of uses work well is the bufferyard. For instance, the Oak Ridge development has a greenbelt area, abutting nearly half of all the development's lots, which runs through both the business and residential sections. When the business and residential areas eventually converge, the greenbelt area will serve as an effective buffer to separate the areas. Regarding a different section of the city, Neal Pierce, a columnist for the *National Journal*, notes that the

"landscaping makes what could be an ugly commercial strip into a visually pleasing thoroughfare." (31)

Jobs/Housing Balance. In Fort Collins, most of the residents work in the city or at least in the county (Larimer County). Figure 2 shows a relatively good balance of jobs and housing in the city. The projection for new households per year is very close to that for the number of new jobs. The ratio is around 1.16 jobs to household. It is not possible to determine how this ratio would have been affected had Fort Collins not implemented its Land Development Guidance System. However, the LDGS may have helped the city to maintain this balance with its encouragement of mixed-use development projects.



Policy Recommendations:

- 1) **Do not distort natural land market forces.** Experience has demonstrated that without government intervention, jobs follow housing. As areas get built up with residences, light commercial and later larger commercial development get established.
- 2) **Remove mixed-use zoning restrictions and increase density allotments.** Downzoning, along with mixed-use zoning restrictions, can contribute to jobs/housing imbalances.

E. QUALITY OF DEVELOPMENT

Goal:

Improving the quality of development is one of the principal goals of all the communities that have adopted performance-based land-use systems. People understandably want to ensure that their communities are "livable." From a political and policy standpoint, ensuring quality development is usually a necessary carrot in order to quell people's inherent opposition to change. The hostility of many citizens to the pressures of growth can be tempered if the growth process is orderly and results in aesthetically pleasing projects. It is important that this is encouraged by setting performance standards, however, and not by specifying detailed building requirements.

Performance:

Among over a dozen residents of Fort Collins interviewed, there was almost unanimous agreement that the quality of development increased dramatically after the city discarded zoning and adopted the LDGS. Because the system focuses on quality site design, "the development has become more thought out," according to Lynda Hopkins.

The factories and buildings now being built were uniformly considered to be visually attractive by those interviewed, because of incentives that are built into the point system. However, the city planning department is moving in the direction of imposing an increasing amount of "aesthetics" guidelines in certain city "corridors," such as 80-foot setbacks. The system has become very site-specific. Some even call the LDGS a very sophisticated conditional use process. Further, the planning staff is increasingly becoming involved in nifty-gritty design details. However, according to attorney Lucia Lilley, who is counsel for a number of developers, "amenities, and requirements for quality control are not a problem for developers." Buffering and visual amenities are usually only a very small fraction of development costs and it is good business to design quality structures.

Policy Recommendations

1) **Offer the increase in quality of design as a carrot.** It appears that some level of architectural site review is a necessary trade-off in order to retain public support for deregulating land use by eliminating zoning and replacing it with a guidance system that allows for development. Residents need to see some tangible gain in order to support a radically different, innovative system. However, one advantage of the LDGS in Fort Collins was that it actually encouraged high-quality projects without dictating architectural design. After the LDGS was in place for awhile, the planning staff noted that the developers began coming in with much better designs (structurally and visually) on their own initiative. The developers saw the high quality of design in other developments and tried to outdo their competitors. The designs have become much more creative. This "market competition" in design standards could over time remove the need for close architectural review by the city planning staff.

VI. CONCLUSION

Conventional zoning has contributed to traffic congestion, air pollution, long commutes, and increased housing and land costs. Moreover, conventional zoning has directly led to the politicization of land-use decisions and an erosion of property rights. Unless communities begin to seriously explore alternatives to conventional zoning, present problems will worsen. The dearth of "affordable housing" will not be solved by more government money. Exclusionary zoning, downzoning, growth caps, and an abundance of costly government regulations that specify housing size and other amenities are key culprits in the housing "crisis."

Performance zoning, as implemented in Fort Collins, Colorado, offers one alternative that has attempted to give market forces wider play in determining land use. However, when faced with demands from very vocal neighborhood groups, the city planning staff is increasingly resorting to the quick fix of regulation. This tendency may undermine the initial successes of performance zoning in Fort Collins. Yet there are better ways to address the concerns of vigilant citizens. It is important to keep in mind certain basic goals that a performance zoning system should strive to achieve.

1) The system should be flexible. Land-use policy has to be able to respond to the changing dynamics of the marketplace. Barriers to mixed land-use should be eliminated.

2) It should seek to reduce administrative discretion by establishing measurable or quantifiable performance criteria. These criteria should focus on mitigating externalities and adverse consequences of development rather than specifying detailed technologies or design regulations that must be used by the developer. Focusing on setting basic performance standards rather than delineating how to achieve those standards promotes diversity and innovation by developers seeking to meet performance standards.

3) It should ensure the protection of personal property rights, including requiring compensation to landowners in exchange for establishing permanent open spaces.

4) It should encourage quality development.

5) It should decrease the financial burden to the public sector by encouraging tying development to existing infrastructure.

The no-growth movement is not likely to get any less fervent in the years to come. Tensions will continue to increase as pressures build. The experience in Fort Collins demonstrates how a slow-growth or no-growth movement can be moderated by encouraging quality development to take place. The Fort Collins example also shows how this can be accomplished by allowing market forces, not more regulation, to determine land-use.

Mr. Eggers is a Research Fellow at the Reason Foundation.

APPENDIX

Where to go for more information about Performance/Flexible Zoning:

Fort Collins Planning Department:
Urban Land Institute, Washington DC:
Lane Kendig, Kendig Inc, Mundelein, Illinois:
Reason Foundation, Santa Monica, CA:

Selected Communities with forms of Flexible Zoning:

Auburn, Alabama
Bath Charter Township, Michigan
Bucks County, Pennsylvania
Duxbury, Massachusetts
Hardin County, Kentucky
Lake County, Illinois
Largo, Florida
Queen Anne's County, Maryland
Williamson County, Tennessee

Interviews:

Citizen Planners, neighborhood group
Shelby Dill, former President, Fort Collins Inc.
Bob Everitt, President, Everitt Enterprises
Joe Frank, City Assistant Planning Director
Cindy Gilbert, Senior Planner, Auburn Planning Department.
Lynda Hopkins, The Group Inc.
Hal Judson, homeowner
Lane Kendig, author of *Performance Zoning*
Douglas Kmiec, Notre Dame Law School
Lucia Lilley, Attorney and former City Attorney
Ward Luthi, citizen activist
Chuck Mabry, Assistant Mayor
Tim McCune, 2MS Inc
Tom McKenna, citizen activist
Stuart McMillan, Vice President, Project Development, Everitt Enterprises
Bill Neal, Chairman of Fort Collins Inc.
Tom Peterson, Fort Collins City Planner
Jim Rhodes, Chairman, Fort Collins Board of Realtors
Ed Stoner, Fort Collins Inc.
Frank Vaught, Architectural Planner
Ken Waido, Senior City Planner

Notes

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18. *Summary of the Performance of the Land Development Guidance System 1981-1984*, City of Fort Collins, p.15.
19. *The Land Development Guidance System for Planned Unit Developments*, p.v.
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23. Kmiec, Douglas W., *Deregulating Land Use: An Alternative Free Enterprise Development System*, University of Pennsylvania Law Review, vol. 130, number 28, (1981), pgs. 76-87.
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25. Fischel, p.12.
26. Kmiec, pgs. 82-84.
27. Ibid, p.83
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29. Fischel, p.51
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