New Models for Local Land Use Decisions

Carol M. Rose
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers
Part of the Law Commons

Recommended Citation
Rose, Carol M., "New Models for Local Land Use Decisions" (1985). Faculty Scholarship Series. 1829.
https://digitalcommons.law.yale.edu/fss_papers/1829
NEW MODELS FOR LOCAL LAND USE DECISIONS

Carol M. Rose*

I. INTRODUCTION

A few years ago, Professor Earl Johnson of the University of Southern California wrote a useful essay on the now fashionable subject of dispute resolution.1 Extrapolating from the patterns of current practice and commentary, Johnson sketched four possible scenarios for dispute resolution in the world of the future. One scenario was a perfected process of formal adjudication which involved a proliferation of due process safeguards for representation, decisions on a record, and review. A second scenario was maximum decentralization, a variation on the theme of neighborhood mediation. His third scenario was "systems analysis" of whatever problem required solution. Fourth, and last, was a scenario which Johnson labeled "lowered expectations," meaning what some dispute resolution specialists describe (using a highly unspecialized name) as "lumping it."2

In describing current thinking about the major issues in local land use regulation, one quite fruitfully can adopt Johnson's method, envisioning the whole field of local land use processes as a series of variations on a theme of dispute resolution. Since the beginning of modern land use regulation, courts, legislators, administrative bodies, and academic commentators have struggled to define procedures appropriate for controversies that arise over local governmental control of land use. To a very considerable degree, their efforts can be grouped and classified as alternative patterns or models for resolving disputes.

This article will attempt to describe these models for local land use dispute resolution and will concentrate especially on the newer models that have appeared in the last few years, either in the courts, in the legislatures, or in some law professors' heads. These newer models implicitly have criticized quite sharply the more traditional views on local land use procedures and have generated considerable controversy.

* Professor of Law, Northwestern University. A.B., Antioch College (1962); M.A., University of Chicago (1963); Ph.D., Cornell University (1969); J.D., University of Chicago (1977).


At the outset, it should be noted that local land use controversies arise in a variety of contexts. Some clearly concern very large projects, such as the urban renewal clearance projects or the freeway construction of the last generation. These projects entailed large-scale transfers of property and displacement of neighborhoods, and many of them involved a great deal of money.

While such large-scale projects were exceedingly disruptive in the past, the process (as opposed to the substance) of local decisionmaking in these projects has not generated a high degree of controversy, particularly in recent years. In part, as will be discussed below, this is because large-scale projects have certain characteristics that tend to assure a relatively open process of local decisionmaking, and that therefore make them less subject to procedural criticism. In addition, the excessiveness of the older government-sponsored projects has been scaled down in recent years, particularly in the wake of very sharp criticism of urban renewal, although, as will also be discussed below, local governments are still involved in other kinds of large land development schemes. Finally, jurisdiction over a number of particularly sensitive projects, especially those large projects with wide impact, has in some areas been "kicked upstairs" to state or regional boards. In Florida, for example, state and regional boards review "developments of regional impact," and in Maryland, state authorities control the location of power plants.

This assertion of state control has been much discussed as a "Quiet Revolution" in land use regulation. Since the present article focuses on local dealings with land use issues, it will not consider these centralizing trends further, except to note that the Quiet Revolution, like the scaling back of urban renewal, has tended to remove a number of large-scale land projects from the purely local arena.

This is not to say that local governments are altogether out of the business of dealing with large-scale projects. On the contrary, they continue to exercise considerable influence even where state boards make the ultimate decisions over major land development projects.

---

3 For a variety of views on such projects, see URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (J. Wilson ed. 1966).


7 Some leading works on the assertion of state control over land use are R. HEALY & J. ROSENBERG, LAND USE AND THE STATES (2d ed. 1979); F. POPPER, THE POLITICS OF LAND-USE REFORM (1981); U. S. COUNCIL ON ENVTL. QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROL (1971), which popularized the name "quiet revolution."

clearance and redevelopment programs also continue to embroil local governments from time to time, as in Detroit's decision to displace the working class "Poletown" neighborhood in order to accommodate General Motors' new factory location, or in the recent controversies about the location and facilities for a now mooted 1992 World's Fair in Chicago, or in New York City's involvement with the much-troubled "Westway" highway project.

Most local land use disputes, however, are on a much smaller scale and involve much more prosaic issues. The garden variety land use dispute, the type that fills up state and regional court reporters by the hundreds every year, takes more or less the following classic format: a real estate developer buys a corner lot in a residential area; he wishes to tear out the existing Victorian house and install a gas station or an apartment house, and the horrified neighbors object. The cast of characters thus includes the developer, the neighbors, and some city board or official in the middle.

How, then, should the local board or official make up its mind? The traditional model for the courts' review of local land use decisions was the legislative model, to which I now turn.

II. LAND USE DECISIONS AS LEGISLATION

Let us take the classic case mentioned above: the corner lot developer who wants to build a gas station. Let us further suppose that the property is zoned residential and that, on the developer's request, the city council amends the zoning ordinance to permit his proposed commercial use. The courts in reviewing this decision traditionally have characterized the council's decision as a legislative act, on the theory that the council is a legislative body, and its actions must therefore be legislation. This neat little syllogism implies that the council's rezoning action, as a "legislative" act, is to be tested by the standard of "reasonableness," a standard so permissive as to provide very little relief for any aggrieved parties. In the past, this permissive review spilled over even into local decisions that technically were not undertaken by a city council, such as the so-called "variances" doled out by zoning boards of review in cases of

12 For a critical discussion of this logic, and its extension to referenda and initiatives as "legislative" acts, see Note, Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights, 70 CALIF. L. REV. 1107, 1116-21 (1982).
hardship. These decisions too were treated as the equivalent of legislation, to be tested only for a minimum rationality, perhaps because the variance criteria of "undue hardship" and "not contrary to the public interest" were so loose as to amount to quasi-legislative discretion.

This traditional "legislative" model for local land use decisions, however, has never been a happy choice. Courts always have found it troubling, particularly in the ordinary small-scale land use dispute involving few interested parties and little publicity. Since at least the 1950s, judges and commentators occasionally have warned that the legislative model was inappropriate for review of these decisions; with its deferential "reasonableness" standard, this model might be leaving the door open for thoughtless or arbitrary local decisionmaking. And, of course, the backdrop to this fear was the impression that local land use decisions were all too susceptible to undue influence or outright corruption.

If one thinks of a congressional act as the paradigm "legislative" act, it is easy to see why a local land use decision might seem problematic as "legislation." Congress is a large body, representing exceedingly varied interests and covering a high volume of business. Madison's Federalist No. 10 suggests that all these interests should achieve at least partial satisfaction through the shifting process of congressional coalition-building and logrolling for votes. Because this "logrolling" process acts as an independent guarantor of fairness, courts that review congressional legislation can presume that Congress has acted reasonably towards all interested parties. Moreover, precisely because of the wide variety of interest groups with something at stake in national legislation, congressional acts attract a relatively high level of publicity and public scrutiny, again lessening the need for scrupulous judicial attention, at least under normal circumstances. Thus, it is this wide participation and publicity that entitles Congress' legislation to the loose judicial review entailed in a "reasonableness" standard.

In some instances, local land use decisions may share the traits that justify a "reasonableness" standard of review, even though in many other

---

13 See 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.01 (1977) (permissive standards of review applied to variances and conditional use permits).

14 Indeed, in the 1930s courts in Illinois and Maryland overturned the variance process as an improper delegation of "legislative" powers. Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931); Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 A. 703 (1933).


16 R. BABCOCK, supra note 15, at 104.


18 For non-normal circumstances in which Madisonian pluralism fails to protect isolated minorities, see J. ELY, DEMOCRACY AND DISTRUST 80-88 (1980).
instances they may not. Large-scale local land decisions—urban renewal programs, economic development projects, or major infrastructure developments—are highly publicized and involve many different interest groups; they often are debated for long periods and may become focal points for elections. Local councils’ decisions on these projects, like congressional acts, are legitimated by the surrounding publicity, public scrutiny, and opportunity for wide public participation.

This point is reflected in case law, where courts generally defer to local decisions on large projects. For example, local governments often assist such projects by using their eminent domain powers to assemble land. Eminent domain is supposed to be employed only for a “public use,” and the courts’ broad interpretation of the “public use” test reflects a view of these decisions as “legislative”—that is, subject only to minimal judicial scrutiny.

This was not always the case. Fifty years ago, at least some courts regarded the “public use” requirement as meaning “use by the public,” substantially limiting eminent domain to projects such as official buildings or roads that were open to all. But since the urban renewal projects of the 1950s, courts have interpreted “public use” much more liberally and now permit eminent domain for any purpose that may provide a vague “public benefit,” such as downtown revitalization or economic growth. Even when Detroit condemned the “Poletown” neighborhood to facilitate General Motors’ factory expansion, and a private commercial enterprise became the ultimate owner of the condemned property, Michigan’s Supreme Court declined to second-guess the local government’s finding of a public use for the condemnation.

These expansive interpretations of the “public use” requirement are one version of the loose “reasonableness” standard for legislation. And again, such interpretations may indeed make sense for large projects. Whether a city is wise or unwise in deciding to condemn property for a large-scale project, the decision is certainly likely to have elicited publicity and participation from a wide range of interests, and thus it shares the qualities that tend to justify deferential judicial review of legislation.

It is much harder to make the “legislative” case, however, for the vastly more numerous small-scale local disputes over the proposed new gas station or apartment building on the corner lot. The decision to permit or deny the gas station is not a general piece of legislation affecting many different interests; it is only a decision about a particular piece of property in a particular neighborhood. The parties have no opportunity

---

to trade off their various goals through the logrolling process because they are interested only in the single issue of what happens to this or that piece of land. The problem with these decisions is precisely that they do not boil over into major controversies, they do not involve many people, they do not interest the press: it is precisely their small scale and uncontroversial character that may open the door to arbitrariness or inside deals. But when a court measures these decisions by the criterion of legislative "reasonableness," there are almost no grounds for reversal, no matter how arbitrary or unfair the particular decision may seem.

Some courts, notably in Illinois, have addressed this problem in effect by ignoring the usual deference to "legislative" decisions and by applying their own views of what is and what is not a "reasonable" land use decision. This solution, to be sure, involves a considerable willingness to second-guess elected officials, something that many courts are reluctant to do. Some other courts, less willing to substitute their own judgment for that of a city council, have borrowed the expertise of the local planning commissions and have tended to scrutinize especially carefully those local land use decisions that run counter to the advice of the professional planners.

These are more or less informal ways courts contend with the seeming unsuitability of the "legislative" designation to the majority of local land use cases. In recent years, however, courts in several states have turned to a solution that has considerably more elaborate theoretical trappings than mere informal tinkering with the "reasonableness" standard: they have abandoned the "legislative" model in favor of an "adjudicative" model.

### III. Land Use Decisions as Adjudication

In the last ten or fifteen years, courts in several states—beginning with Kentucky and Oregon and followed to a degree by California and Colorado—have introduced a different model for small-scale land disputes. Instead of designating these decisions as legis-

---

23 Illinois judges are elected, which may make them more willing to take a critical look at the decisions of other elected officials.
25 City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971).
26 Fasano v. Board of County Comm’rs, 264 Or. 574, 507 P.2d 23 (1973).
27 Topanga Ass’n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); cf. Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980) (reiterating the California rule that zoning ordinances are legislative, while variances and subdivision map approvals are adjudicative).
28 Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975) (city council zoning decision is reviewed as "quasi-judicial" decision); cf. Margolis v. District Court, 638 P.2d 297 (Colo. 1981)
lation, these courts have begun to use *adjudication* as their model for review.\footnote{30}

Administrative law ideas have motivated this shift of models. Administrative law doctrine commonly distinguishes between an agency decision that adopts general standards and one that applies previously adopted general standards to a given set of facts. The former, "rule-making" type of decision is analogous to legislation; the latter type of decision is analogous to adjudication because, in applying rules to specific instances, the agency is really functioning in the way that a court does.\footnote{31} Similarly, when a local council decides a land use matter involving only a single parcel or small area, it is really acting more like a court than like a legislature, because it is not deliberating on general standards, but is making a single decision in a specific case. And because this is the type of decision a court makes, it is argued that the council should model its procedures on those of a court.\footnote{32}

For the reviewing court, this model entails a change in the questions to ask about the legitimacy of a local council’s decision to grant or deny the developer a permit to construct the corner gas station. Instead of a vague query as to the “reasonableness” of the decision, the reviewing court can direct its questions to the correctness of the council’s “adjudicative” processes. Did the council have standards (particularly those of the city’s general plan) when it made the decision to permit the gas station? Was it actually applying those standards? Did it provide notice and an appropriate hearing to interested parties? Could witnesses be cross-examined? Did the council keep an adequate record of the proceedings and make findings and a decision on the record? Were the decisionmakers impartial? In short, the reviewing court can ask whether the decision met the model for a proper adjudication—even though the decisionmaking body is a group of elected politicians.\footnote{33}

The adjudicative model for land use decisions, particularly those involving small-scale projects, has attracted a considerable amount of academic attention and has been adopted at least in part in the American

\footnotesize{(zoning decision is "legislative" for purposes of referendum and initiative provisions of Colorado Constitution).}


\footnote{30} The leading case is generally acknowledged to be Fasano. See Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CALIF. L. REV. 837, 844-46 (1983), and authorities cited therein.

\footnote{31} See, e.g., Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958).

\footnote{32} Fasano, 264 Or. at 579-85, 507 P.2d at 26-27.

\footnote{33} For some of the procedural ramifications of the adjudicative model, see id. at 588, 507 P.2d at 30.
Law Institute's Model Land Development Code. The model seems to rationalize the ad hoc character of the garden variety one-lot rezoning or variance; it gives the reviewing courts some genuine inquiries to make, and it satisfies possible due process objections to the designation of small-scale decisions as "legislation."

But with all these features to recommend the adjudicative model, it is a bit startling to find that the reaction of a number of jurisdictions has been somewhat cool. Michigan, for example, flirted with the model but then retreated; California and Colorado, while adopting the model for certain types of small land control decisions, have rejected it for others, and other jurisdictions have simply not bothered with the model at all. This reaction suggests that there are some problems with the adjudicative model, despite its glamor in land use academic circles.

One problem with the adjudicative model concerns the standards that are to be "adjudicatively" applied. The courts' usual answer is that the standards should be those of the municipality's own general plan. But these documents are notoriously vague. The plan may simply be a cardboard box full of uncoordinated memos and reports, or, if more coherent, the plan may be full of large, loose platitudes about "high levels of community development" and maps consisting of uncertain blobs of color—all of which are designed to leave maximum flexibility with the local board deciding the individual case. Even plans for historic districts, which tend to be relatively specific as plans go, frequently require only that new structures be "in harmony with" or not "obviously incongruous" with the old.

If plans are vague, however, they provide no genuine standards for individual decisions. And if that is so, then it is very difficult to charac-

---

34 For commentary, see authorities cited in Rose, supra note 30, at 844 n.17; MODEL LAND DEV. CODE §§ 2-201(3), 2-304 & note, 2-312(2), (3), 3-101 & note (1976).
36 See authorities cited supra notes 27-28; see also Rose, supra note 30, at 845 n.18.
38 Fasano, 264 Or. at 582-83, 507 P.2d at 27.
40 See, e.g., Sierra Club v. County of Alameda, 73 Cal. App. 3d 572, 140 Cal. Rptr. 864 (1977) (zoning changes to be based on "general welfare").
41 See, e.g., the much emulated Nantucket historic district legislation, ch. 601, 1955 Mass. Acts 494 (current version at ch. 395, 1970 Mass. Acts 237). The Nantucket ordinance requires the historic district commission to "keep in mind" such matters as "general design," materials, colors, etc. Some historic districts spell out the elements that are to "harmonize" in greater detail, as in Savannah, where new structures get points based on "relatedness" to design features of older structures, such as roof pitch, color, materials, placement of windows and doors, etc. See Tondro, An Historic Preservation Approach to Municipal Rehabilitation of Older Neighborhoods, 8 CONN. L. REV. 248, 267-74 (1976).
terize the individual decision as an "adjudicative" act that applies preex-
isting standards to a specific instance.

It may be, too, that local governments have a good reason for keep-
ing their land use plans rather fuzzy: they may not want a fixed plan
because they cannot realistically see very far into the future. Neither can
anyone else. Consider, for a moment, how dramatically our attitudes
have changed in the last few decades about the appropriate placement of
various land uses. In the past it was common to place tanneries and glue
factories in a separate "industrial" zone, but the new high-tech plants,
though they may be "industries," require no such separation. The local
"home for the feeble-minded" was also once placed in zones with heavy
industry and other undesirable uses.42 But this is entirely contrary to
modern theories of community placement for mental health patients and
retarded persons; these newer theories would place the homes in residen-
tial areas and would require some flexibility in the once-sacrosanct single
family zone.43 More generally, we have a far greater appreciation of
mixed uses in single areas than was once the case and a vastly greater
appreciation for historic structures.44 Indeed, whole constituencies
spring up to preserve old structures and neighborhoods that were deemed
eyesores and "blight" twenty years ago.45

In view of the way we all change our opinions of what is and is not
desirable in land use, it is no wonder that local governments shy away
from general plans that genuinely will structure their day-to-day deci-
sions. But this in turn means that the "adjudicative" model of land use
decisions becomes exceedingly problematic: if there are no fixed stan-
dards, no law to apply, then local boards are not really acting as adjudi-
cative bodies.

In addition to the problem of standards, the adjudicative model for

42 The ordinance upheld in the classic zoning case, Village of Euclid v. Ambler Realty Co., 272
U.S. 365 (1926), placed "insane and feeble minded institutions" in the lowest use zone along with
prisons, crematories, garbage and refuse incineration, scrap iron and junk storage, petroleum works,
and any other manufacturing or industrial uses.

ordinance excluding mentally retarded group home without rational justification is violation of equal
protection clause); Region 10 Client Management, Inc., v. Town of Hampstead, 120 N.H. 885, 424
A.2d 207 (1980) (town zoning ordinance for single family dwellings subordinate to state policy for
placing retarded persons in communities).

44 One of the first major authors to direct attention to the value of mixed uses was Jane Jacobs. J.
Jacobs, The Death and Life of Great American Cities 152 (1961). In recent years, develop-
ers such as James Rouse have capitalized on the current appreciation for mixed uses as well as
historic rehabilitation. See He Digs Downtown, Time, Aug. 24, 1981, at 42. On the current interest
in historic preservation, see Rose, Preservation and Community: New Directions in the Law of His-

45 Some of these constituencies are represented in the quite colorful names of historic preserva-
tion litigation. E.g., Don't Tear It Down v. Washington, 399 F. Supp. 153 (D.D.C. 1975); Save Our
land use decisions has encountered a number of procedural snares and has not succeeded in clarifying the processes that local governments actually should use in land use decisions. One major problem has been ex parte contacts. Local council members talk to their constituents—indeed they are expected to do so—about land use matters as well as other governmental issues. Does this mean that they cannot make an adjudicative decision on an issue that they have discussed with constituents "out of court"? They may also campaign on the very issues that they have to decide. But if a council member has run on a pro-development or anti-development position, or takes such a position on general principles, does this mean that the council member cannot make an impartial decision? The courts tend to say that none of this matters, but it is hard to see why not, if the process is supposed to emulate a courtroom proceeding with disinterested judges.

As for that "adjudicative" proceeding itself, do witnesses have to be sworn? Should they be open to cross-examination? What are the standards of relevance? The Kentucky courts have had these matters before them and, sensibly recognizing that land use hearings tend to be a bit of an emotional free-for-all, have decided that these formal trappings of courtroom process are unnecessary. But what happens then to the adjudicative model for land use decisions? It seems to fall apart, or at least fails to generate clear criteria about which court-like processes are required and which are not.

Thus the adjudicative model is hardly a trouble-free paradigm for local land use decisions. This model is in large part a creation of the courts, and the courts may be expected to spell out the model's ramifications and attempt to deal with its shortcomings in the future. But not all the new models come from the courts. Another new model for land use decisions is the special darling of legal academics, though local governments also seem especially interested in its practical applications. This is the market model, to which the next section is addressed.

IV. LAND USE DECISIONS AS MARKET TRANSACTIONS

The market model for local land use decisions would be unthinkable without the law and economics scholarship of the last generation. Underlying this model is the idea that land use decisions can be made more efficient if they are analogized to private market transactions in which resources travel to their most valued uses through a series of trades.

The market model for land use decisions tells us that we can forget

\[46 \text{ See, e.g., City of Fairfield v. Superior Court, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975); Turf Valley Assoc. v. Zoning Bd., 262 Md. 632, 278 A.2d 574 (1971); Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980).} \]

\[47 \text{ See, e.g., Fiscal Court v. Ogden, 556 S.W.2d 899 (Ky. Ct. App. 1977); Bellemeade Co. v. Priddle, 503 S.W.2d 734 (Ky. Ct. App. 1973).} \]
about plans and substantive standards and complex adjudicative processes for land use decisions because we do not really need them. A local legislature can figure out what to do by looking to the willingness of interested parties to pay for what they want. If the neighbors want to keep the Victorian mansion from being razed and replaced with a gas station, they can do so, and the city need not issue the demolition permit; the neighbors or the city, however, will have to pay the owner to keep the structure as it is.48

Under this economic analysis, it would seem clear that if the neighbors and the city try to get something for nothing, they are bound to fail; their schemes may even backfire. Economic analysts indeed could point to historic preservation for a dramatic example of the point: there is a strikingly high incidence of arson among buildings designated as protected landmarks.49 The answer, according to economic thinking, is not to regulate without paying, but to compensate owners sufficiently, so that they will not be tempted to thwart the community’s goals in such a devastating manner.50

This kind of economic thinking has had a substantial impact on local land use practice in the last few years. Localities have been developing all kinds of schemes to “pay” for what they want, or for what they think their citizens want. One valuable asset that localities have traded is zoning relief. A form of zoning relief somewhat in vogue is the transfer of development rights (TDRs): an owner may be prohibited from replacing his one-story historic landmark with an office highrise, but the city will “compensate” him by allowing him to transfer his unused airspace to another building. This scheme is perhaps best known in the area of historic preservation but has been used in a number of other areas as well.51 For instance, San Francisco has used air rights bonuses for all kinds of desired “amenities,” so that the developer who provides a nice park, with benches, shrubs, a fountain and sunlight, can build higher on the building’s location or elsewhere. He might get a bonus if he voluntarily builds residential housing into his office structure, or he might be required to do so, but be compensated for his effort with the right to build

These transfer and bonus schemes bear a striking resemblance to the "bubble" concept in environmental law. According to this concept, the air above an entire plant is considered a "bubble" of pollution, and an owner of a polluting plant need not control every separate source of pollution so long as a highly polluting source is offset by a low pollution rate at another. Transfer schemes treat a city (or portion thereof) as a "density bubble" and allow transfers of density so long as the city's overall density or "carrying capacity" is not exceeded.

As in bubble schemes, there are certain technical problems with transfer and bonus schemes in land use, the most dramatic concerning the locations to which unused or bonus air rights may be transferred. For a time, New York City permitted TDRs only to nearby lots, with the effect that low-lying historic landmarks or "bonusable" parks acquired enormous highrises as neighbors, creating a "Mutt and Jeff" look. Even more problematic are height and bulk bonuses for seemingly unrelated "amenities" such as subway entrances or artwork. As with the "bubble" concept, the major difficulty here is to know what offsets what: is density the same commodity in different places? Is a fountain or a piece of artwork an offset for a building's greater height or bulk?

Quite aside from these technical problems, the market model raises another difficulty: assuming that desired land uses should be paid for, either with dollars or with in-kind bonuses, how much should be paid? The neighbors may very well be able to figure out how much it is worth to them to keep out the gas station. But how are we to deal with land use cases in which the development affects a wider public? Take the destruction of an old theater or the construction of a building that disrupts a vista of the mountains: how much is the older structure or the view worth to the neighbors, or to the larger public? What is the appropriate mode and amount of payment?

Similar problems affect all the so-called incentive schemes that are so popular now. Whether one is thinking of a transfer of development rights for an urban park or of regulatory relief in an "enterprise zone" to keep businesses in depressed areas, one has the same questions. How much is it worth, and who is interested? Is it really worth the tax losses

52 See Rose, supra note 30, at 905 and authorities cited therein.

53 See, e.g., Yao, Plain Dust is the Key to Pollution "Bubble" at Armco Steelworks, Wall St. J., Oct. 11, 1980, at 1, col. 6. For the Supreme Court's recent approval of the Environmental Protection Agency's "bubble" regulations, see Chevron, U.S.A. v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984).


or visual blight to attract commercial development? Is it worth the overbulk in some places to create open spaces elsewhere? In short, while a market model may tell us that something has to be paid for desired uses, it does not tell us how much, especially when the costs and benefits revolve around those amorphous and wide-ranging items that we call "environmental."

Moreover, a market model doesn't tell us who has to pay whom in any given instance. In the classic gas station case, is the gas station a nuisance-like use, so that the developer has to pay the neighbors if he wants to build? Or does the developer have the right to tear down the Victorian mansion and build the station, so that the neighbors have to buy him out if they want to preserve the status quo? According to some of the law and economics scholars most interested in market models, an efficient solution may not depend on the underlying distribution of property rights (at least where trading is easy). But insofar as a market model is indifferent to the underlying property rights, it doesn't tell us who should pay whom or, to put it another way, which local land use decisions are compensable events and which are merely regulatory.

To their credit, however, market model advocates have stimulated further thought about the ways to define the underlying property rights. Robert Ellickson, one of the leading proponents of market solutions for land use problems, has tried to come to grips with the problem of defining the underlying property entitlements and has suggested that such rights can be determined by ordinary language or ordinary practice. He has suggested, for example, a whole apparatus of "nuisance boards" to decide whether a proposed use is considered a "nuisance" by the standards of the community (if so, the proposed use will have to pay off the neighbors; if not, the neighbors will have to pay to keep out the use). While we may not need the elaborate administrative apparatus that Ellickson suggests, his proposed standard of ordinary practice or usage is a very enlightening one.

Market models, then, are not entirely self-executing. A market model does not say how much to pay or what the appropriate mode of payment might be; it does not say even who should pay whom. But by

56 For a discussion of "enterprise zones," and a comparison to other incentive schemes such as tax abatement and bonus zoning, see Note, Enterprise Zones: New Life for the Inner City, 4 HARV. J. L. & PUB. POL'Y 243, 258-59 (1981).

57 Coase, of course, provided the classic analysis in The Problem of Social Cost, 3 J. L. & ECON. 1, 2-8 (1960) over which an extraordinary amount of academic ink has been spilled. For two recent critiques, see Cooter, The Cost of Coase, 11 J. LEGAL STUD. 1, 14-24 (1982) (bargaining strategy may prevent efficient transactions); Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. CAL. L. REV. 669, 689-91 (1979) (income effects may influence ultimate allocation of resources).

58 Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 762-72 (1973); for a discussion of community standards on the meaning of nuisance or harm, see id. at 728-33.
its very indifference to these issues, a market model brings them into focus and encourages the rest of us to think about them. What do we want in land uses, and how much? What is a fair trade for what we want? How do we define the underlying property rights that tell us who should pay whom for what?

A market model, then, highlights some important facets of land use practice; it gets people to ask questions about what they really want, and how badly, and about the proper distribution of rights and responsibilities in using property. A final "negotiation" model for land use decisions attempts to identify a process for answering some of those questions.

V. LAND USE DECISIONS AS NEGOTIATIONS

Like the market model for land use decisions, this fourth and final model has two major sources, one academic and one practical. It stems in part from the legal academic discussion of "alternative dispute resolution," a discussion that rejects (at least for some matters) the formal style of adjudication. The other major source of the negotiation model is the set of practices loosely associated with environmental review.

In searching for alternatives to adjudication—partly because it is too expensive and partly because it does not always seem to lead to stable or lasting conflict resolution—academics from the "alternative dispute resolution" school have turned to the social sciences and particularly to anthropology. Anthropologists have often mentioned negotiation and mediation as processes for resolving conflicts, and have discussed the conditions that are most likely to bring about a conclusion satisfactory to the parties involved. Generally speaking, their work suggests that the decision making process should be opened up rather than narrowed; that the process should be fairly loose about such matters as who can talk, what sorts of issues they can raise, and what sorts of solutions they can suggest; and that it should include a whole range of possible tradeoffs instead of a flat "yes or no" decision. The idea here is to come to a resolution that satisfies or at least mollifies everyone, and not to arrive at the win-or-lose solutions typical of judicial decisions. The goal is to assure the interested parties' future ability to get along, and not their present victory or defeat.

In land use, and particularly in those dizzying numbers of small-scale land use conflicts over gas stations and apartment buildings and the like, one can fairly easily envision the local governmental board's role as that of a mediator in a negotiated dispute resolution. Under this model,


60 For a discussion of this literature, see THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 1-40 (L. Nader & H. Todd eds. 1978). For perhaps the most extensive treatment, see P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE (1979).
we could stop pretending that local boards are applying general, neutral, pre-existing standards to individual decisions and instead see them as attempting (though not always successfully) to intermediate a "deal" between the neighbors and the developer.\footnote{For this author's efforts to describe land use decisions as mediations, see Rose, \textit{supra} note 30, at 887-93.}

One land-use related area in which the mediation model can already be seen is environmental law, where some commentators explicitly have proposed mediation as a model for resolving environmental disputes.\footnote{\textit{See}, e.g., Susskind \& Weinstein, \textit{Towards a Theory of Environmental Dispute Resolution}, 9 B.C. \textit{ENVTL. AFF. L. REV.} 311 (1980-81). \textit{But cf.} Schoenbrod, \textit{Limits and Dangers of Environmental Mediation}, 58 N.Y.U. \textit{L. REV.} 1453 (1983).} But even when mediation is not explicit, environmental review often has a mediative flavor, particularly on the local level. In some states, environmental review statutes have been interpreted to require local governments to go through an environmental impact review of their land use decisions,\footnote{A major case is \textit{Friends of Mammoth} v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). \textit{See also} Cook v. Clallam County, 27 Wash. App. 410, 618 P.2d 1030 (1980); Pearlman, \textit{State Environmental Policy Acts: Local Decision Making and Land Use Planning}, 43 J. \textit{INST. AM. PLANNERS} 42 (1977).} and this review has some distinctly mediative characteristics. The statutes' review processes require the local board to collect the views of more or less anyone who is interested in, say, an historic structure or ocean vista, and then to explore why and to whom the structure or vista might be valuable before issuing (with explanation) a demolition or construction permit. As in mediation, the review opens up the decision process. Moreover, by way of mollifying parties and seeking acceptable solutions, the board not only must explain why it grants or denies a permit, but also must attempt to "mitigate" damage. Thus, the parties might be reconciled to the destruction of an old building so long as the developer "mitigates" the damage by retaining the old facade in the new structure.

This is not so different from what local land-use boards have always done in "variance" or "rezoning" decisions, at least when they have done their job adequately: they notify interested parties, they hear all kinds of information (and this includes allowing the parties to let off steam), and they try to explain their decisions and arrive at tradeoffs that will satisfy everyone—approving the gas station, for example, on condition that it be surrounded by shrubs.\footnote{An example of this free-form process, involving "emotional responses to technical issues," appears in \textit{Fiscal Court v. Ogden}, 556 S.W.2d 899, 901 (Ky. Ct. App. 1977). For a discussion of the "venting" or "catharsis" function of local land use hearings, see Goldston \& Scheuer, \textit{Zoning of Planned Residential Developments}, 73 HARV. \textit{L. REV.} 241, 255 (1959); \textit{see also} C. \textit{PERSHING}, \textit{EVERYTHING IN ITS PLACE} 183-84 (1977). For a discussion of the mediative aspects of older land use practice, particularly the variance procedure, see Rose, \textit{supra} note 30, at 860.} The issue under this model is the adequacy of the mediating process: did the local board really do all it reasonably could to mediate a successful negotiated solution between the interested...
The literature from the "alternative dispute resolution" scholars suggests that the proper questions are whether a local board gave wide notice, allowed a free-ranging hearing, considered alternatives and trade-offs, and explained its ultimate decisions according to community norms.

The negotiation or mediation model of land use decisions has some problems too, as do all the other models. First, in a field that seems so rife with "deals" as land use, one might well resist a model that seems to accept dealmaking as the basic format. The answer, of course, is that we are very likely to have local land use deals anyway, and we might as well make this explicit and perhaps refine the process. The negotiation model does at least stress that there are conditions for successful deals and that those conditions require openness, flexibility, and a certain appeal to the moral sensibilities of the community and the interested parties.

A second problem with the negotiation model is its mushiness on property rights. The owner of the corner lot may think that he damned well has a right to tear down the Victorian house and build the gas station, while the neighbors insist that he has no such right at all and that his proposed acts are a violation of their property rights. Can any settlement be negotiated or mediated so long as this issue of underlying rights goes unresolved? Or is the negotiation model, like the market model, simply silent about the underlying property rights of interested parties, taking those as a given without really helping to define them?

At least some market model proponents do suggest ordinary practice or ordinary language as a way to define property rights. The mediation or negotiation model suggests a way to figure out what this ordinary practice or ordinary usage is: the standards of the community emerge from what we might call "jawboning"; that is, standards are defined in a discourse of the community about things that matter to its members. The mediation model should supply a forum for discovering what the interested community thinks and what the ordinary practices are. Beyond that, the model should define some conditions that will make the forum work properly.

VI. CONCLUSION

The new models for land use decisions—adjudicative, market, and mediative—emerged because courts and commentators were dissatisfied with the legislative model as a means of resolving the most common form of local land decision, one involving a small area and a few interested parties. No one seriously quarrels with the "legislative" designation of major decisions concerning controversial, large-scale projects, even when

---

65 See supra note 58 and accompanying text.
such decisions are made by local boards. But the one-lot decisions are simply a different kind of beast. They bring out all the chumminess, informality, and dealmaking qualities of local government. Local government need not be bad government, but, as small-scale land decisions show, local government simply does not operate the way a big legislature does. Local government requires its own models for small-scale land use decisions. The new models for local land use, more than anything else, represent an effort to come to grips not only with land use but also with local decisionmaking generally. They are cause for cheer in that they illustrate how other lines of thought—administrative law, economics, alternative dispute resolution—can enrich the way we think about local government and local decisionmaking processes.

67 See supra notes 19-21 and accompanying text.