

The Need for New Models of Rural Zoning

By Joel Russell

It is a familiar scene at planning board meetings around the country. An "out-of-town developer" presents a plan to build 49 houses (or 249 condominiums) on a beautiful farm miles away from any village or town center. The small town's volunteer board doesn't like it. The developer says, "Look, your zoning calls for two-acre lots, and the average lot size in this subdivision is actually 2.8 acres. What more can you want?" Board members look down and think to themselves, "We want you to go away and leave us alone."

The board does not know what to do. Finally, one member rescues the others by saying, "We need more information about the effects on the water table and traffic and the school system." They send the developer away to bring them more paperwork when they would really prefer just to send him away. The process cranks on, with the developer pushing the board and the board stalling. Often litigation results. The only winners are the lawyers and consultants.

Twenty or 30 years ago, developers largely got what they wanted—quickly—from boards that viewed development as progress, adding jobs and tax ratables to their communities. But the developments approved in the 1960s and 1970s have generated traffic congestion, altered community character, and added more costs in municipal services than they brought in through increased tax revenues. Progress has resulted in higher taxes and a deteriorating quality of life in many places.

The new residents are among the most vociferous about controlling any more development. They want to keep what remains of the bucolic character of their communities, and they have begun to sit on the boards that make decisions about development. Would-be developers say these residents want to pull up the drawbridge now that they have their little piece of the country. The residents say they want to protect the rural character of their communities from the depredations of developers who would ruin their idyllic paradise.

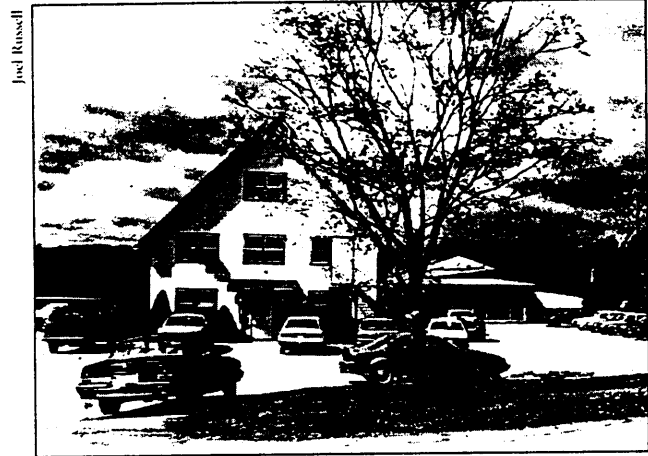
This issue of *Zoning News* explains how current zoning laws are largely responsible for these development wars and looks at how they might be changed to produce results that are more appropriate for rural communities.

Failure in the Rural Context

The standoff between development and preservation is based on a massive failure of local communities to regulate land use effectively. Planning boards are usually helpless against developers when they apply local zoning laws and subdivision regulations because these regulations essentially give the developers the right, if not the mandate, to turn the countryside into a sprawling suburb. Legally, planning boards do not have the prerogative to reject projects simply because they are inappropriate for the community. A developer who complies

with the letter and spirit of the zoning law and other applicable regulations has a right to develop.

Planning boards have, however, become very adept at stalling developers procedurally by constantly demanding more information. They have learned to say "not yet" or "not until you answer 45 more questions," until the developer wishes they had just said no to begin with. A better system would allow planning boards to "just say no" to projects that do not belong in the countryside.



This light industrial building in a barn-like structure is located in a rural area where such uses are usually not allowed.

The problem lies with regulations that prescribe wall-to-wall suburban development. If you follow a recipe for beef stew, you will not end up with chocolate cake. The standard zoning laws and subdivision regulations are a recipe for suburbanization. They produce large-scale, monotonous residential subdivisions that obliterate the rural landscape, punctuated by sterile shopping malls and office parks, all connected by a massive network of pavement with immense parking lots.

This is not surprising. When most zoning laws were adopted, any kind of development was viewed as desirable, and its consequences had not hit home. These laws were copied from those used as blueprints for places like Levittown. Their purpose is to encourage a standardized form of development as quickly and efficiently as possible, treating all land as identical. If there is unusual topography, vegetation, wetlands, or whatever, a bulldozer (or blasting) can solve the problem. Old-fashioned hamlet centers and villages, with their quaint mix of uses and postage stamp lots, give communities a center and a unique sense of place, yet they are illegal under most zoning laws, even though many master plans for these same communities enshrine the village center as the place to concentrate development.

Many towns passed one-acre single-use residential zoning on the theory that one acre is about as much land as anyone needs for a house. That may be so, but one-acre zoning, as conventionally practiced, also means that every acre in town will eventually be developed in the familiar uniform cookie-cutter pattern. In an attempt to preserve rural character, towns have

resorted to two-, three-, four-, and five-acre zoning. As a result, more land gets bulldozed and more road must be built for each house, people have more yard than they know what to do with, and land and house prices go through the roof. Large-lot zoning has done little or nothing to preserve the land because it has occurred in the conventional zoning context: uniform development of the entire landscape.

Zoning became the preeminent land-use technique in the 1920s through the efforts of Commerce Secretary Herbert Hoover; it is probably his most lasting legacy. Designed originally to standardize development in cities, it has had its greatest impact in the development of suburbs and exurban sprawl, resulting in the familiar pattern of extensive, uniform residential subdivisions, and shopping strips. Another hallmark of zoning, strict separation of different uses, may have had some historical relevance to cities and suburbs, where it is important to avoid putting tanneries next to apartment houses. In the rural context, however, it is a stifling restraint on people's traditional freedom to do what they want on their land.

What is important in rural areas is not the use category but the scale and the impact of the use on the surrounding area. Almost any activity that can fit into a garage or barn can be carried on in a way that has little impact on the neighbors, especially if the nearest neighbor is a quarter of a mile away. And it is far better to have these small businesses and industries scattered around the countryside than concentrated in the expensive and ugly commercial strips and office/industrial parks that have degraded formerly scenic roads.

It is slowly dawning on transplanted urbanites and suburbanites that the initial resistance felt by long-time rural residents toward conventional zoning may be well-founded. Zoning is a "big-city" concept that must be turned upside down if it is to serve rural areas. A quiet revolution in zoning is beginning to occur, thanks largely to some original thinking by creative local residents who resist the conventional wisdom propounded by their engineering, legal, and planning consultants.

As conventionally practiced, zoning is inappropriate to the needs of rural and semirural communities. Their master plans, advisory documents that do not have the force of law in most states, usually contradict the zoning blueprint. They typically call for focusing limited growth in existing population centers, keeping commercial growth downtown, and maintaining the rural undeveloped character of the countryside. The zoning laws, which are binding on developers and planning boards, mandate the wholesale conversion of the countryside to residential subdivisions and prescribe strip commercial development along major roadways, outside downtowns.

The contradiction between the master plan and zoning law seems to go almost entirely unnoticed. Maybe this is because people don't read the master plan (usually written in planning jargon) or the zoning ordinance (usually written in indecipherable legalese), or because people view a master plan the way they view ideal human virtue: much to be desired but basically unattainable. Another explanation is that town boards fear litigation from developers if they explicitly limit large-scale development in the countryside, as many master plans recommend.



Joel Russell

Master plans articulate the community's goals. Zoning laws apply these goals to the sometimes conflicting claims of private property rights. This explains why master plans say agricultural land should be preserved while zoning laws prescribe cookie-cutter development. Elected officials do not want to confiscate a farmer's retirement fund but sometimes are unaware that land value can be maintained without prescribing wholesale development of the countryside. As a result, the farmer sells to a developer, and the scene described at the beginning of this article ensues. Are there other ways to regulate and use land so that the countryside's rural, agricultural, and natural character can be maintained without confiscatory regulation? Is costly public land acquisition the only alternative?

The Takings Challenge

In a 1989 law review article, "Law and a New Land Ethic" (74 *Minnesota Law Review* 339), John Humbach traces the evolution in our nation's values from frontier days to the emerging consensus that we are stewards and caretakers of an ecologically fragile planet. He shows how earlier legal doctrines evolved to encourage private exploitation of nature by sanctifying property rights and how they have been modified in recent years to foster protection of the environment.

The emergence of the property rights movement shows that frontier values persist, resulting in a cultural war between defenders of property rights and those who embrace the new land ethic. Many battles have been fought over the takings issue. Until recently, it was difficult to prove a taking without showing either that a land-use regulation does not serve a valid public purpose (preservation of farmland or environmental resources are considered valid public purposes in most states) or that it deprives the owner of any economically viable use of the property.

Recent U.S. Supreme Court decisions have muddied the waters somewhat with regard to takings but do not significantly affect well-designed land-use regulations that protect the rural countryside. However, it is important to note that proposed state takings compensation legislation would be a serious setback for any attempt to write the new land ethic into law.

In general, if a rural landowner can derive a reasonable return from farming a large parcel or from selling it for a single homesite, a zoning law precluding more intensive development will be constitutional. And even if such a law is found to deprive the owner of any economically viable use of the property, the

Joel Russell, planner and attorney, is principal of Woodlea Associates, a zoning consulting firm in Salt Point, Wisconsin. He is also an expert in drafting land-use regulations that are compatible with growth.



Hamlet of Salt Point, New York, showing traditional hamlet layout on left side (now illegal) and modern suburban subdivision pattern required by zoning on the right.

problem may be cured by a minor variance (such as allowing the construction of two or three houses instead of only one), rather than allowing full-scale development of the entire parcel. McHenry County, Illinois, near Chicago, successfully defended a court challenge to a zoning law that put its best farmland into 160-acre zoning because 160 acres was a

rational lot size to protect farming from residential intrusion. [Editor's note: The county later switched to 40-acre zoning ("Illinois County Shrinks Ag-lot Size," December 1994).] The New Hampshire Supreme Court recently upheld 50-acre zoning for the preservation of economically harvestable forest land, and San Luis Obispo County, California, has maintained 640-acre zoning for some of its ranching areas. Sliding-scale zoning, in which larger tracts of land are allowed much lower development density than small tracts, is another technique for keeping rural densities low. Originally devised in rural Pennsylvania, it is gaining wider acceptance.

In most states, very low-density rural zoning is defensible if it is linked to the preservation of economically viable farming, ranching, or forestry resources. When these are located on the urban fringe or in a high-growth area, such zoning is more likely to be vulnerable to constitutional challenge. As long as states do not pass takings legislation, the door remains open to test the fairness and political feasibility of innovative zoning reforms.

In addition to the takings issue, one common objection to low-density zoning in rural areas is that it may be considered exclusionary. Massachusetts courts have struck down rural zoning using lot sizes exceeding three or four acres, not because it is a taking, but because of its allegedly exclusionary effects. This concept usually involves the municipality as a whole, where little or no provision is made to accommodate people of low and moderate income. In most states, as long as appropriate portions of a town are zoned for small lots and multifamily development, the town's zoning will not be considered exclusionary, no matter how little development is permitted in the most rural areas.

Zoning truly adapted to rural regions would solve affordability problems. It would permit inexpensive employee and family housing and some multifamily dwellings on large properties. It would also allow for the creation of small lots and apartments, as long as overall density guidelines are followed. Higher-density multifamily housing could be permitted in areas where such housing would not negatively affect neighbors or the environment. Allowing small-scale businesses to operate in the countryside would make it possible for people to afford to live in these areas because they could earn their living on their home property. By channeling most development to more intensive mixed-use settlements, true rural zoning would reduce the per-unit cost of housing. In addition, if it could allow families to survive with only one car, it would in effect increase their incomes by \$4,000 to \$6,000 per year.

New Generation of Rural Zoning Laws

Many towns have realized that their current zoning laws are not working, but most proposed solutions do not get to the heart of the problem. Instead of drastically reducing rural densities, these revisions merely increase minimum lot sizes to two to five acres. Sometimes they become more restrictive than ever with respect to nonresidential uses, leaving rural landowners with no economic use besides residential subdivision. They also tend to prevent new development in hamlets and villages, where mixed-use growth should be encouraged, by restricting commercial use and requiring lots much larger than those that give the village its distinctive character.

Other changes offer more hope. These include much lower overall densities in rural areas, smaller minimum lot sizes, increased use of clustering, designation of preservation overlay zones where protective regulations apply, and hamlet or village zoning that allows higher density and mixed uses in a traditional configuration, regulated by design standards.

Local lawmakers often assume that the U.S. Constitution safeguards all of a landowner's development rights. Because the constitution actually protects only the right to an economically viable use, zoning can also take away most of the valuable development rights it confers. Limiting environmentally sensitive rural land to one house per 100 acres or allowing residential construction only by special permit or variance may be legal in some very rural areas. Such restrictions may still seem unfair, but the outer limits on land-use regulation then become ethical and political issues, not legal ones. Moreover, restrictive zoning sometimes increases property values. In the fox-hunting country around Millbrook, New York, many landowners have used voluntary conservation easements to restrict their land to 50 acres per residence. Their property values have risen to the highest levels in rural Dutchess County.

If the scope of nonresidential uses in the countryside is expanded, with limitations on size and impact, then landowners can have economically attractive alternatives to large-scale residential development. Fair solutions can be crafted, involving more flexibility, carefully sited low-density development, cluster development, and the construction of mixed-use traditional villages. These will not occur, however, if the developer's path of least resistance and highest profit remains conventional suburban subdivision and strip commercial development. The place to start is with zoning ordinances that practice what rural master plans preach: preservation of the countryside and development of villages. Unless the new generation of rural zoning laws abandons the suburban models that have been used previously, we will only get large-lot exurban supersprawl, not a settlement pattern that meets the needs of rural communities. It is important, however, to differentiate between communities on the urban fringe that view themselves as rural but face intense development pressure and those that truly are nonmetropolitan.

Rural zoning solutions should be tailored to the market dynamics of each municipality. The types of solutions that are appropriate will differ significantly based on development pressure and other market conditions. It is far more difficult to maintain rural character where development pressure is intense. Keeping a place a sleepy small town surrounded by undeveloped countryside may not be an option. The more realistic choice may be between suburban development in a sprawl pattern or in compact settlements that maintain significant amounts of open country.

Applying the New Urbanism

One of the most hopeful changes in planning practice for rural areas is the increasing acceptance of what has been called

neotraditional planning or the new urbanism. The word urbanism may seem misleading in connection with rural planning, but new urbanist planners are really designing traditional compact towns, villages, and city neighborhoods that can work in either setting. These places are friendly to pedestrians and make it possible to walk to shops, schools, jobs, parks, and entertainment. They reduce dependency on the automobile and allow some families to have only one car. They may be dense enough to make public transportation viable. This type of development is needed if rural landscapes are to be preserved and the classic rural settlement pattern maintained. People will want to live in such villages only if they are attractive and convenient and offer a sense of community.

Until recently, this notion seemed out of the question to most planners, developers, and real estate financiers. The dominant belief has been that suburban sprawl and commercial strip development are inevitable because people want to be able to live on large lots in residential subdivisions and drive their cars everywhere. An increasingly influential group of planners, architects, and political leaders is challenging these assumptions. Evidence of the acceptance of neotraditional development is mounting with its endorsement by *Consumer Reports* and favorable articles in *Newsweek* and other popular publications.

As this approach gains political and market acceptance, it may hold one of the keys to protecting rural areas. It faces formidable political obstacles, however, because it normally requires both downzoning of areas that are to remain rural and upzoning of designated settlement centers (both typically opposed by residents). The first large-scale successes of this model have been on large tracts of land held in single ownership, where the development rights on the open space land can be efficiently transferred to the village center. Almost all new urbanist developments have been approved through a planned unit development provision or other special district, rather than by following an existing zoning code. I have begun incorporating new urbanist principles as an integral element of the zoning codes I write so that neotraditional development does not need to go through a long and arduous special approval process. The next issue of *Zoning News* will discuss examples of the new generation of rural zoning ordinances.

Housing Policies Scrutinized

The Twin Cities' Metropolitan Council has adopted housing goals for half the 187 communities in its region. The February

Zoning News is a monthly newsletter published by the American Planning Association. Subscriptions are available for \$50 (U.S.) and \$65 (foreign). Frank S. So, Executive Director; William R. Klein, Director of Research.

Zoning News is produced at APA. Jim Schwab, Editor; Fay Dolnick, Scott Dvorak, Michelle Gregory, Sanjay Jeer, Megan Lewis, Doug Martin, Marya Morris, Marty Roupe, Aaron Sheffey, Laura Thompson, Reporters; Cynthia Cheski, Assistant Editor; Lisa Barton, Design and Production.

Copyright ©1996 by American Planning Association, 122 S. Michigan Ave., Suite 1600, Chicago, IL 60603. The American Planning Association has headquarters offices at 1776 Massachusetts Ave., N.W., Washington, DC 20036.

All rights reserved. No part of this publication may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the American Planning Association.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.



action stems from findings that affordable housing has not kept pace with job growth and that many suburban communities have exclusionary housing policies. In a 1994 study, Barbara Lukermann of the Hubert H. Humphrey Institute of Public Affairs and Michael P. Kane of the Center for Urban and Regional Affairs, both in Minneapolis, examined the land-use planning practices and regulatory requirements in 10 area suburbs to assess the extent to which these practices limit housing choices for low- and moderate-income households. (See *Land Use Practices: Exclusionary Zoning, de Facto or de Jure?*, "Zoning Reports," April.)

The study found that many of the communities had stated policies in their comprehensive plans to achieve a certain percentage of affordable housing but in practice continued to facilitate market-rate housing. Although their policies did not completely exclude low- and moderate-income housing, they have not created realistic opportunities for developing it. Lukermann and Kane offered seven strategies for further consideration:

- Property tax reform to treat rental housing on a par with owner-occupied housing.
- Refocus local zoning regulations toward urban design performance standards in lieu of current density requirements.
- Adopt local policies that will prevent future concentrations of poverty in any neighborhood.
- Create a regional funding pool that would reward communities that are strongly motivated to diversify their housing stock.
- Elevate the *Metropolitan Development Guide's* Housing Policy Plan chapter to system status, thus increasing the Metropolitan Council's authority to link the achievement of affordable housing goals with access to regionally funded infrastructure improvements.
- Reestablish a fair share housing program at the regional level where achievement is linked to both incentives and penalties that can be effectively enforced.
- Tighten monitoring over the criteria for use of local resources in subsidizing the local housing market.

Last year, influenced by this study and by prodding from State Rep. Myron Orfield, the Minnesota legislature passed the Metropolitan Livable Communities Act to address housing affordability, polluted property cleanup, and urban sprawl issues.

The Metropolitan Council has long held the authority under its review powers to influence local policies to adhere to regional goals. The 1985 *Guide* indicated that the Metropolitan Council would recommend priority in funding from various state and federal programs based on a community's present provision of housing for low- and moderate-income persons and its commitments to provide such housing in the future. Last spring, the council entered into negotiations with several suburbs to establish land-use planning practices that would encourage or protect housing options for low-income families. Maple Grove and Plymouth agreed to increase housing density and reassess local controls while Brooklyn Park agreed to preserve and improve existing low-income housing. The impetus was that these communities will be the major beneficiaries of the Elm Creek Interceptor, a \$71 million, 20-mile sewer line. In order to justify that expense, the council asked that they submit housing agreements to assure their progress towards participating in metropolitanwide goals.

Scott Dvorak