NEW FRONTIERS FOR LAND DEVELOPMENT CONTROLS

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Three statutory programs initiated within recent years are reversing the historical process by which decisions about transportation systems are made. Formerly, the decisions were made by agencies having no responsibility for land use and environmental programs. One of these programs is the Clean Air Amendments of 1970, which has provisions bearing on the implementation of land use and transportation controls that are being made increasingly effective by the Environmental Protection Agency. The other two programs are on the state level and include the model code of the American Law Institute and the Oregon state planning law. This paper reviews each of these programs and points out how each has recognized that decisions about transportation facilities must be made in the context of other program objectives, whether they be the abatement of air pollution or the implementation of a statewide planning process.

•HISTORICALLY, decisions about transportation systems were made by conventional highway and transportation agencies having no responsibility in land use control. This conventional legal framework is undergoing substantial change. New state and federal legislation has gradually shifted the legal authority over transportation systems to general-function national and state agencies that have a primary responsibility for land use and environmental programs. In the process, the conventional transportation agencies are gradually losing their power to make the critical decisions about the planning and construction of transportation networks.

This paper reviews 3 new statutory programs affecting both land use and transportation that have rearranged the legal authority to make decisions about transportation systems. Attention will be paid to the land use and transportation controls that have been adopted under the national Clean Air Amendments of 1970. New state land development control powers proposed by the American Law Institute's Model Land Development Code and adopted legislatively in Oregon also will be examined.

LAND USE AND TRANSPORTATION IMPLICATIONS OF THE CLEAN AIR AMENDMENTS OF 1970

When Congress moved in 1970 to amend and strengthen the national Clean Air Act of 1963 [42 U.S.C. §§1857-58a (1970)], the provisions of the statute authorizing land use and transportation controls received minimal attention. The reduction in air pollution that the statute mandated was to be achieved primarily through source controls on pollution emissions. Increasing awareness of the land use and transportation implications of a clean air strategy has gradually led the Environmental Protection Agency (EPA) to emphasize land use and transportation controls as an additional necessary major component in air quality improvement. This section will review the provisions of the Clean Air Amendments of 1970 that bear on the implementation of land use and transportation controls and the administrative steps that EPA has taken to make these controls effective.

The Clean Air Amendments of 1970 contemplated a coordinated federal-state attack on air pollution. Primary enforcement authority is delegated to the states, which must comply with federal standards and program requirements, subject to the reserved power of EPA both to determine the content of state programs and to take over their enforce-

ment when the state effort is unsatisfactory. We will concentrate in this paper on the federal statutory provisions applicable to stationary sources of pollution. The key to the statutory program for the control of these sources lies in the state implementation plans for the control of air pollution that are required by the federal act. These plans are to include a variety of techniques for pollution control, among them such measures "as may be necessary" to the achievement of national pollution-abatement objectives, and these additional necessary measures may include "land use and transportation controls" [42 U.S.C. §1857c-f(a)(2)(B) (1970)]. Mandelker and Rothschild discuss the legislative history of this provision elsewhere (1). No definition of the scope of these controls is provided by the act, and legislative history as well provides little guidance on the precise form in which these controls should be applied in state air pollution control programs.

State implementation plans also must contain another and more specific control over stationary sources that also may be construed as a land use control measure. Plans must contain a procedure for the review, before construction or modification, of a new or modified stationary source of pollution. Review procedures must be used to prevent the construction or modification of a stationary source at any "location" at which the state determines that construction or modification will prevent the "attainment or maintenance" of a national primary or secondary air quality standard [42 U.S.C. §1857c-5(a)(4) (1970)]. Because there is a specific reference in this provision to controls over the "location" of sources, the review procedure authorized by the statute can be considered as a land use control.

One other provision of the Clean Air Amendments of 1970 that has a bearing on land use and transportation controls also needs to be mentioned. States may obtain from EPA an extension of the statutory time limit for meeting the federal primary standard, but to obtain such an extension they must demonstrate to EPA that they have "considered and applied... reasonably available alternative means" of achieving this standard other than controls over emission sources [42 U.S.C. §1857c-5(e)(1)(B) (1970)]. These alternative means presumably include land use and transportation controls. Because several states now have and will continue to seek extensions in the time required to meet primary standards, a state's failure to include land use and transportation controls in its implementation plan will be considered by EPA when deciding whether to grant a statutory extension.

What is lacking from the Clean Air Amendments of 1970, unfortunately, is any provision that can guide the states in providing statewide the necessary intergovernmental arrangements through which these land use and transportation control measures can be implemented. Land use control and transportation powers ordinarily are exercised within the states by units of local government. State air pollution control agencies do not ordinarily possess comparable authority and, indeed, may not be the proper agencies at the state level to exercise this authority. With no directive from the national statute indicating how these powers are to be distributed within the states, EPA has been left with no statutory guidance on this essential component of a land use and transportation strategy.

EPA has moved on several fronts to implement land use and transportation policies and has taken 3 major actions. Regulations have been promulgated requiring the preparation of air quality maintenance plans for air quality regions in which maintenance problems are serious. Regulations also have been promulgated providing for the review of indirect sources; regulations also have been proposed that deal with the problem of nondegradation. In addition, EPA has proposed parking management regulations for those cities that have serious motor vehicle pollution problems.

State implementation plan regulations now require the states to identify and the administrator of EPA to confirm those areas within the state that "due to current air quality and/or major projected growth rate" may have the potential for exceeding any national air quality standard within the succeeding 10-year period [40 C.F.R. §51.18(a) (1974)]. States are then to submit a plan, including any necessary revisions in control strategies or other measures, that will ensure that "projected growth and development" will be compatible with the maintenance of air quality standards throughout the 10-year period. Because of the explicit reference in the regulations to control strategies af-

fecting growth and development, air quality maintenance plans can be expected to contain land use control measures as one of the primary tools for the implementation of air quality maintenance plans. This possibility is explicitly recognized by the EPA air quality maintenance planning guidelines.

The EPA indirect source regulations apply to major public and private developments that contain associated parking facilities large enough to qualify for regulation under the act as well as to major highway and airport proposals [40 C. F. R. §52.22 (1974)]. An indirect source, including highways and airports, may not be approved if it will violate an applicable control strategy or if it will cause or exacerbate a violation of the national carbon monoxide standard in any region. Other pollutants associated with these developments are not tested because there presently are no modeling techniques that can measure their impact. An applicant for an indirect source permit may use one of several methods to show compliance with this standard. As one possibility, the regulations suggest modifications in the site design for submitted projects that will allow the applicant to modify traffic flows within his or her development so that the carbon monoxide standard is not violated.

EPA has adopted regulations to prevent the nondegradation of the air in those areas in which the air is currently better than what the national standards require [40 C. F. R. §52.21 (1974)]. These regulations would confer authority on the states to classify these areas into 1 of 3 classes. Within these classifications the nondegradation requirement is to be implemented through the review of applications to construct or modify a group of designated stationary pollution sources. Initially, this review is to be conducted by EPA, but it may be delegated by EPA to state or local agencies subject to EPA approval.

The 3 area classifications provide different tolerance levels for additional pollution increments. Class 1 areas are those in which almost no change in current air quality levels is desired. Class 2 areas are those in which a moderate change in pollution levels would be tolerated, but pollution controls more stringent than the national standards would be imposed. Class 3 areas are those in which major industrial or other growth is desired. Air quality in these areas would be allowed to deteriorate to the national standards.

Congress may yet act to eliminate entirely the nondegradation requirement, and some may yet challenge the proposed regulations for failing to meet the requirements laid down by the court decisions. By allowing the air to deteriorate to the national standards in class 3 regions, EPA may have adopted an interpretation of the act that was implicitly rejected by the federal courts. Considerable leeway also is afforded the states both in designating and in redesignating the classes into which areas are to be placed. Manipulation of class boundaries to allow additional growth in those areas in which the state wants growth to occur is a distinct possibility, and through this method the states may avoid the intended impact of the nondegradation requirements.

Parking Management Plan guidelines, newly proposed by EPA for cities with serious motor vehicle pollution problems, indicate some current thinking of the EPA on transportation strategies [39 Fed. Reg. 30429 (1974)]. These guidelines impose stringent requirements on the location and operation of parking facilities and supplant the indirect source regulations in those cities to which they are applicable. The guidelines may be implemented at the local level through a review of individual applications for parking facility construction. Approval may not be given unless it is demonstrated that the new facility is consistent with the need to minimize vehicle miles (kilometers) of travel in the area affected and that the new facility will not cause or exacerbate a violation of the national carbon monoxide standards. Alternatively, localities may adopt a local parking management plan providing for controls over the development of new parking facilities in relationship to existing parking resources and the current and projected transportation system.

STATE LAND USE CONTROL LAWS AFFECTING TRANSPORTATION SYSTEMS

Recent years have seen the adoption and consideration by state legislatures of a variety of state land use control statutes that provide for a wide range of planning and land development control powers to be exercised at the state level. These statutes include regulatory powers over transportation systems as well as over those areas adjacent to these systems in which substantial development can be expected. Foremost among the legislative proposals currently receiving attention is the Model Land Development Code prepared by the American Law Institute, which, when this paper was written, was expected to be adopted in final form in the spring of 1975. This code is intended to replace existing legislation for local planning and land development control, and provides as well for a new set of land development control powers to be exercised at the state level.

State-level powers proposed by the American Law Institute provide for state control of significant areas of concern to the state and developments of more than local impact. Of greatest interest here are the provisions for the control of areas of state concern, called areas of critical state concern by the code. These areas are to be designated for control by the state planning agency and may include areas adjacent to existing and proposed major public facilities including highway interchanges and transit interchange points. Article 9 of the code contains these provisions. The reason for state designation of critical areas adjacent to key facilities is to provide an opportunity at the state level to monitor development occurring near these facilities so that any new development that occurs is compatible with these facilities and does not interfere with their use.

The code procedure for the designation and control of areas of critical state concern is simple and straightforward. These areas may be designated by the state planning agency under its rule-making power following a public hearing at which time the agency may specify land use policies for these areas. Selection of critical areas for designation may be based on planning studies conducted by the state planning agency, but adoption of a statewide plan is not required. After designation, the local government in whose jurisdiction the area is located has a specified period of time to adopt land development control regulations if they are not already adopted or to revise any existing regulations to conform them to the policies adopted by the state planning agency for the critical area. If no controls are adopted by the local government, then the state planning agency may adopt its own controls for the critical area, and these controls are to be enforced by the local government having jurisdiction (2).

As applied to highway and transportation systems, the critical area regulatory technique provides for the first time a method for regulating and controlling development in the vicinity of highway interchanges and transit points and allows the state to determine the development policies to be applied to these all-important areas. Too often, local governments have seized on the opportunities provided by highway interchanges to allow new commercial and industrial development that may augment the local tax base but that leads to a traffic buildup near the interchange that generates more traffic than the facility can hold. These shortsighted local practices often have led to severe traffic congestion. In addition, opportunistic local land use decisions near interchanges often spoil or detract from overall regional planning objectives. Although land uses near highways are substantially committed in many areas of the country, the critical area approach provides a method for improved control in those areas where development patterns near highways have not been fixed. It is also a regulatory tool that may have extensive application in the control of land uses attracted by the construction of new transit systems.

Although critical area controls can deal with land uses near highways and transit lines, they do not apply directly to siting decisions for these facilities. Some recent state legislation has moved to bring siting decisions for major highways and other key facilities directly under the control of general purpose state planning agencies and commissions. Foremost among this legislation is the comprehensive state planning act passed by the Oregon legislature in 1973 (S. B. 100). This act establishes a Land

Conservation and Development Commission of 7 members that has 3 principal functions. It is to adopt statewide planning goals and guidelines, review local plans and land development controls for conformance with these planning goals, and exercise a review and permit authority over major activities of statewide significance, including all transportation facilities.

The Oregon legislation is highly innovative in its insistence that all government units in the state engage in a planning process and that this planning process be made consistent with statewide planning. Moreover, because the statewide planning goals to be adopted by the commission cover the entire range of planning elements, they include a transportation component. Statewide goals adopted by the commission, including the transportation goals, will form the basis for reviewing all local plans and ordinances. An opportunity will thus be provided for the first time at the state level to adopt a transportation planning policy that is coordinated with other planning goals. As the state delegates the plan and ordinance review function in the Portland metropolitan area to the Portland area regional planning commission, that commission will be in a position further to coordinate the statewide planning goals with the regional transportation planning that has been carried out in the Portland area.

In comparison with the legislative approach authorized by the American Law Institute model code, which adopts a selective method of statewide regulation based on the critical area concept and which is not based on an adopted state plan, the Oregon legislation adopts a mandatory planning process for the state and its local government units. In this process, a comprehensive review of local planning, including transportation planning, can be conducted by the state commission. As soon as statewide planning goals have been adopted, the statute also requires that all activities of statewide significance, including siting decisions for transportation facilities, must be approved by and receive a permit from the Land Conservation and Development Commission. In this manner, the state retains jurisdiction over the siting of major facilities whose location has a substantial impact on the implementation of state planning policy. Major public developments, including transportation facilities, also are subject to a system of state review under the American Law Institute model code, but this review is carried out independent from the designation of critical areas. In addition, state review does not occur unless an appeal is taken from a local decision on the siting of the facility.

CONCLUSIONS

This paper has observed that federal and state legislation increasingly recognizes the important linkage between the development of transportation systems and state and local land use regulation. The Clean Air Amendments of 1970 and state legislation, such as the American Law Institute model code and the Oregon state planning law, have recognized that decisions about transportation facilities must be made in the context of other program objectives, whether they be the abatement of air pollution or the implementation of a statewide planning process. As part of this legal framework, this legislation may locate the approval authority over transportation projects in agencies other than transportation agencies and may provide newly enacted controls over land uses adjacent to these facilities.

The degree of integration that is provided by this legislation varies. Controls adopted under the Clean Air Amendments of 1970 are limited to air pollution objectives. State legislation may provide varying degrees of integration depending on whether the regulatory controls are part of a comprehensive planning process, as in Oregon, or are administered selectively, as contemplated by the American Law Institute model code. Just what form the legal framework provided by this legislation will finally take is not yet clear and will depend on the success of the clean air program in asserting jurisdiction over major traffic-generating developments, and on the extent to which the states follow enacted state planning and land use regulation systems. What is encouraging is that legislative policymakers increasingly are seeking new ways of coordinating the administration of transportation systems with regulatory programs affecting the future form and shape of land use and development.

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REFERENCES

1. D. R. Mandelker and Rothschild. The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970. Ecology Law Quarterly, Vol. 3, 1973, p. 235.
2. D. R. Mandelker. Critical Area Controls: A New Dimension in American Land Development Regulation. Journal of American Institute of Planners, 1975.