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Is The National Flood Insurance Program Really National Land Use in Disguise?

by Robert D. Sokolove*

Over the last decade, this country has experienced an environmental revolution like none before in its history. Landmark legislation such as the Clean Air Act, 42 U.S.C. §§ 1857 *et. seq.*, as amended, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1252, *et seq.*, as amended, and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et. seq.*, as amended, (NEPA) represent the cornerstone of environmental concern and pollution abatement at the Federal level.

Additionally, it should be noted that as an offshoot of the Federal NEPA, twenty states have developed their own "little NEPA's" to address broad environmental concerns at the state or local level.

It is interesting to observe what areas the above legislation addresses. First, there is an emphasis on pollution abatement. The Clean Air Act addresses all types of air pollution ranging from stationary sources (such as factories) to mobile sources (such as automobiles). The Water Pollution Control Act naturally encourages and mandates clean water and goes so far as to address indirect sources of water pollution such as pesticides carried by runoff.

Second, NEPA attempts to advance for the first time, a broad and sometimes vague national goal of "protecting the environment, assuring an aesthetically and culturally pleasing surrounding and enhancing the over-all quality of life."¹ Finally, NEPA mandates that all Federal agencies take a leading role in carrying out the objectives of the Act through policy, regulations and laws.²

What is most interesting about these landmark pieces of legislation is not what they address but rather what they do not address. Significantly, specific controls and objectives dealing with land use are not included in the list above nor are they presently included in any type of Federal legislation.



The absence of national land use legislation continues to frustrate many individuals who feel that the only way problems associated with air, sound, and water pollution, historic preservation, and population growth can be corrected is with some system of land use control at the Federal level. Accordingly, it has been suggested by the Senate Interior Committee that a National land use bill be designed to alleviate or solve the following problems: (1) increasing pressure from conflicting proposed uses of particular valuable land resources; (2) conflicts between environmental values and projected population and technology pressures; (3) inconsistencies in land use aims and consequences of various governmentally initiated, financed, and sanctioned projects; and (4) failure of private enterprise to consider land use consequences as a high priority factor in planning for economic growth.³

Given the premise that these enormous national problems cannot be solved without national land use legislation, it is curious indeed that Congress has not to this date passed such a bill. Admittedly, it is not for lack of an attempt. Since 1970, thirteen bills involving national land use in one form or another have been advanced in the House and Senate but as yet, Congress has chosen not to accept the idea.

The majority of those bills advanced in Congress were introduced by Senator Henry Jackson and Representative Morris Udall. During the tenure of the 93rd Congress, 1973-1974, national land use legislation came closest to passage when the Senate passed S. 268 by a 64-21 vote on June 21, 1973. Subsequently, H.R. 10294, introduced by Morris Udall, was matched against S. 268 but was postponed indefinitely by a Rules Committee vote in February of 1974.

In May of 1974, the Rules Committee finally sent H.R. 10294 to the floor of the House. On June 11, 1974, the Bill was rejected on a procedural vote for consideration by a margin of 211 to 204. No true national land use bill has ever been so close to passage.

Commentators have advanced numerous theories as to why Congress has continually rejected the concept of national land use. The rationale most often suggested is political in nature with a basis in law. This rationale was put forth by M. Bruce Johnson in *A Critique of the Concept of Federal Land Use Regulation*.⁴ Johnson proposed that national land use is "obviously a process of transferring our society from a private to a common basis of property ownership, an insidious corrosion on individual rights."⁵

Another commentator stated that "[the bill] would insure the creation of new institutions of government at the state level, strongly influenced by Washington, whose success could be assured only if they move to seize complete control over the use and exchange of land."⁶

Although such predictions of "socialism by land use" seemed absurd to many, particularly environmentalists who pushed for passage of the various land use bills, they were sufficiently persuasive to make Congress take a closer than usual look at what was before it.

Segments of the most recent bill⁶ included mandatory state

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¹ See: 42 U.S.C. §4331(c)

² 42 U.S.C. §4332(1)

³ In Zisser, *The National Land Use Policy Acts (The Evolution and Analysis of a Reasonable Idea)* in THE ROLE OF THE FEDERAL GOVERNMENT IN LAND DEVELOPMENT, 108 (1977)

⁴ 5 ENVIRONMENTAL LAW 575 (1975)

⁵ McClaghry, *The Land Use Planning Act—An Idea We Can Do Without*, 3 ENVIRONMENTAL AFFAIRS, 597 (1974).

⁶ HR 3510, 94th Cong. 1975

land use programs dealing with “areas of critical state concern,”⁷ “large-scale subdivision and development projects,”⁸ “developments of regional impact”⁹ and a section on “coordination and consistency.”¹⁰ These types of approaches to solving problems of land use on more than a local level have aroused fear of a federal leviathan moving toward federal zoning. In fact, because of the fear of federal “intrusion” into traditional state areas of control, it would take a strong statement of assurance before many would believe that the federal government was not usurping all of the state land use powers with these bills.

No such statement was strong enough to convince the doubters. This situation led Michael Zisser to conclude, “The lack of guidelines was enough to keep environmentalists uncertain of their support, but it was also enough to keep the major resource industries certain of their opposition to any implementation of guidelines.”¹¹

Zisser quoted John McClaughry as stating, “this (system) would inevitably lead to a new federalism where the freehold theory of property ownership would be transferred into a ‘social property’ theory. The State—in the last analysis the Federal Government—would accede to the rights of the medieval king. Land would no longer be ‘owned’ by private citizens but merely ‘held for a superior’.”¹²

Apparently, views such as those of Johnson and McClaughry were sufficient to convince Congress that national land use was too risky a business to legislate. Because of the emotionalism evidenced by the issue, it is clear that the will of Congress was, at least in part, politically motivated. How much of its decision was political and how much was truly a desire to maintain traditional states’ rights in the land use area is open to speculation.

But a funny thing happened on the way to the land use bill defeats. Congress debated, passed and eventually strengthened the National Flood Insurance Program (NFIP).¹³ An understanding of the history of this program is crucial to a thorough grasp of the ongoing land use controversy.

During the late 1960’s, Congress became increasingly concerned with the tremendous loss of life, property and federal money as a result of flood disasters. Therefore, in August 1968, the National Flood Insurance Act of 1968 was enacted as Title XIII of the Housing and Urban Development Act of 1968, Public Law 90-448 (“1968 Act”). The 1968 Act provides flood insurance at actuarial rates for new construction and substantial improvements made to existing structures. The Act also provides flood insurance to properties that were already in existence at the time the area they were located in was identified as having special flood hazards. As a condition precedent, the Act required that flood-prone communities adopt local flood plain management measures to reduce or avoid flood damage in connection with all new construction if those communities wanted to benefit from the program.

The 1968 Act was amended by Title IV of the Housing Act of 1969, Public Law 91-152, to create the Emergency Flood Insurance Program. Under this Program, insurance is immediately provided at subsidized rates for all property,

including new construction and substantial improvements.¹⁴

By 1973 Congress realized that the benefit of flood insurance under the NFIP did not itself offer sufficient incentive to reasonably assure local community participation in the Program. By the Flood Disaster Protection Act of 1973, Public Law 93-234, (the 1973 Act), Congress opted to make participation in the NFIP a mandatory precondition in flood prone areas for the financing of numerous federal benefit programs and obtaining loans from federally supervised lending institutions.¹⁵

It should be noted that by Section 703 of the Housing and Community Development Act of 1977, P.L. 95-128, Congress removed the prohibition against the extension of financing by federally supervised institutions in flood hazard areas of non-participating communities. However, Congress did not alter the flood plain management measures connected with the program.

It is the flood plain management criteria that must be examined in light of the earlier discussion of “national land use” to determine the answer to a key question. Namely, do the “criteria for land management and use”¹⁶ as promulgated in the *Code of Federal Regulations* pursuant to the National Flood Insurance Program and authorizing Acts constitute “national land use?”

On the surface, these provisions appear to fit that description. If a community wants to accept the benefit of Federal Flood Insurance, it must first become a “participant” in the program. A condition precedent to such participation includes *inter alia* that the community must apply land use control measures to all areas within the identified special flood hazard boundaries. The community must require that special land use measures to effectuate flood control take precedence over conflicting law or codes presently in operation.¹⁷

These measures include such requirements as mandating that all new construction and substantial improvements (as defined by regulation) of residential structures have the lowest floor (including basement) elevated to or above the base flood level. The same regulations apply to non-residential structures or in the alternative they must be flood proofed.¹⁸

The measures also include a provision that until a floodway (for riverine overflow) is designated, no use of land or even the use of land fill will be permitted if it will increase the water surface elevation of the 100 year flood (defined as the “base” or statutory flood for these purposes) by more than one foot at any level.¹⁹

In addition, the land criteria regulations state that once a regulatory floodway has been designated, the community must prohibit all encroachments including fill that would impair its ability to discharge flood waters resulting from a 100 year flood.²⁰

Admittedly, these land use measures and controls are very strict in nature. They leave little discretion on the part of the community which chooses to participate in the program.

Here, however, two important points must be made. First, it should be emphasized that as strict as the minimum land use criteria of the NFIP may be, the program is voluntary. No com-

⁷ HR 3510, Title III, Sec. 302.

⁸ *Id.* at Sec. 304.

⁹ *Id.* at Sec. 306.

¹⁰ *Id.* at Sec. 308.

¹¹ *Supra*, footnote 3, at 187.

¹² *Supra*, footnote 5, at 598.

¹³ Codified at 42 U.S.C. §§4001 *et seq.*

¹⁴ 42 U.S.C. §4056

¹⁵ 42 U.S.C. §4106

¹⁶ 24 C.F.R. part 1910

¹⁷ 24 C.F.R. part 1910.3(b)

¹⁸ 24 C.F.R. 1910.3(b)(4)

¹⁹ 24 C.F.R. 1910.3(c)(10)

²⁰ 24 C.F.R. 1910.3(d)(3)

munity must adopt the land use provisions as outlined above unless it chooses to accept the federal benefit of Federal Flood Insurance.

Second, although the U.S. Department of Housing and Urban Development, through its Federal Insurance Administration, publishes and monitors the land use criteria as well as provides technical assistance to the various communities which request such, it is the communities themselves, not the Federal Government, which ultimately adopt the land use criteria for their area.

These two points were the subject of recent litigation in the Federal District Court for the District of Columbia.²¹ The case, *Texas Landowners Rights Association v. Secretary of HUD*, was brought as a class action challenging the constitutionality of the NFIP, particularly as it may conflict with the states' rights of sovereignty under the Tenth Amendment. Plaintiffs in the case claimed, in essence, that the "burden" to the communities (not receiving federal financial assistance) is so great if they do not participate in the NFIP, that the program is no longer "voluntary" but "mandatory" in nature. Further, the plaintiffs in *Texas Landowners* contended that the land use management is "federal" and therefore conflicts with the Tenth Amendment.

Relying on the decision in *National League of Cities v. Usury*, 426 U.S. 833 (1976) where the Court held that amendments to the Fair Labor Standards Act conflicted with the state's Tenth Amendment Rights, plaintiffs were not as successful in challenging the NFIP. The Court distinguished *National League of Cities* by stating that there, the provisions of the Fair Labor Standards Act were mandatory while here, the land use management provisions were voluntary in that a community could choose whether or not it wanted to participate. The rationale for this distinction was based upon the Court's opinion that unlike the FLSA, there was a benefit to be derived by participation in the NFIP.

Further, Judge Waddy, relying on the decision in *County of Los Angeles v. Marshall*²² by Judge Richey just a few months earlier, found that the NFIP, as a benefit program, had "reasonable" conditions attached.

Although *Texas Landowners* has been noticed for appeal to the United States Circuit Court for the District of Columbia in July of 1978, it is significant that Judge Waddy, in his decision, acknowledged for the first time that Congress intended the NFIP to be a benefit program and voluntary in nature. By suggesting that the minimum land use requirements of the NFIP are appropriate as conditions to a federal benefit, the Court has determined that the proper emphasis of the program should be the federal benefit to be derived by the communities and not the "burden" of land management criteria as suggested by the *Texas Landowners* plaintiffs.

Congress apparently has not been inconsistent by rejecting national land use but accepting it *de facto* through the auspices of the NFIP. The courts have remained consistent by concluding that the land use provisions of the NFIP are reasonable conditions to a federal benefit. Thus, the question of whether the NFIP is really national land use in disguise, must be answered: "no."

Behavioral Study of Justice Goldberg and the Supreme Court

For the period of 1962 to 1969, the United States Supreme Court has been accused of "judicial activism" and of lacking "judicial self-restraint." Supporters of self-restraint have accused the Justices of overstepping their authority, of making themselves into super-legislators, and of revealing to the public that the decisions which judges pass down are based on personal prejudices and not some higher dictates, such as those of natural law. The "Warren Court" of 1962-1969 is recognized as having been in the vanguard of social progress for it was well ahead of the popularly elected branches of government - the legislative and executive - and even public opinion in such areas as equality of all citizens and the rights of individuals.

Chief Justice Earl Warren and his colleagues led a new revolution in judicial review. They followed almost precisely the guidelines which Chief Justice Harlan Stone set out for future Court action in the famous *Caroline Products* "Footnote." Stone listed the areas in which the Court should intervene to be: (1) the First Amendment freedoms because these were preferred freedoms important to democracy, (2) cases dealing with minorities because their rights are most likely to be overlooked in a government by majority rule, and (3) where the political process is corrupt, for then there is no other recourse available. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

This was the Court on which Justice Arthur Goldberg served. In the three years he was an Associate Justice, Goldberg participated in some of the Court's most important decisions involving judicial activism. Consistently, these were egalitarian in nature and reflected an acceptance by the intellectual elite of the need for human dignity and equality.

Immediately upon his arrival, Goldberg associated himself with the activist position on civil liberties cases, often expressing his views on what he felt should be the proper role of the Court. He asserted that the Courts should take a harder look at the facts of the case before it and measure these facts against the commitment of the Constitution to equality and justice under the law. *Stare decisis*, he felt, placed an undue burden on the Court. In a speech given to the Hastings College of Law, Justice Goldberg illustrated these convictions when he said "And if, as future advocates, you want a tip from me, spend more time on your facts than on your law in arguing before our Court. What you can bring to bear is that infinite detailed knowledge of your case and your conviction as an advocate of having a case that your client is entitled to win."¹

THE EFFECTS OF THE POLITICAL PROCESS ON THE JUDICIARY

While an activist Warren Court operated as a separate force in government, the complexion of its membership was greatly influenced by political and personal dynamics within both the judicial and, most formidably, the executive branches.

²¹ See: *Texas Landowners Rights Association, et al. v. Harris*, Civ. Action No. 77-1962 (D.C.Cir.)

²² 442 F.Supp. 1186 (D.D.C. 1977)

¹Daniel P. Moynihan, ed., *The Defenses of Freedom* (New York: Harper & Row, Publishers, 1966), pp. 134-5.