

Senator Jackson's Time Has Come: Lessons for the Land¹

A Commentary on Senate Bill S. 3354 (1970)

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The National Land Use System: By Design or Default

This nation's patterns of land consumption are neither economically competitive nor environmentally sound. For seven decades, local governments have helped shape land development patterns by enacting comprehensive plans, zoning ordinances, subdivision and site plan regulations and paying for capital infrastructure. The pattern of land development sketched by municipal ordinance and action has been influenced in turn by state and federal actions such as highway funding, low-cost mortgage finance and environmental regulations.

Together, these local, regional, state and federal actions that direct, influence or react to the use of the land, may be called the national "land use system." If, indeed, we are not growing smart it must be due, in part, to deficiencies in this land use system.

This criticism is not new. A quarter century ago, Senator Henry M. Jackson led a two-pronged assault on the short-sighted, mission-oriented, controversy-ridden system that the nation then employed to use and husband its natural resources. In 1971, he wrote that "It is only in the past few years that the dangers of muddling through events and establishing environmental policy by inaction and default have been very widely perceived."

The Senator was the author of the National Environmental Policy Act, which was adopted in 1968, and the National Land Use Policy Act, which failed to pass in the House of Representatives and did not become law. Together, these laws would have organized the numerous public land use regulatory and finance "components" into a "system" in the ordinary sense of the word.

These two bills were reported out of Senator Jackson's Committee on the Interior and Insular Affairs, a relatively insignificant committee before he assumed its leadership in the

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early 1960's. Gradually, this committee led the movement to protect natural resources through action at the national level. Legislation proposed by the Committee and adopted by Congress established new federal parks for the first time in a generation, and protected trails, wilderness areas, refuges and seashores.

Senator Jackson's committee saw environmental protection as a key component of the responsible use of the land and its resources; it charted an important, although supportive, role of the federal government with respect to land use. In the federal system, property and land use law are regarded as within the domain of the states. Most of the 50 states have delegated responsibility for planning and regulating land use to their localities, many of which regard the stewardship of the land as the centerpiece of their "home rule" authority to govern. The two initiatives proposed by Senator Jackson would have designed a competent system to promote order in a land use process that had been functioning poorly by default.

The National Environmental Policy Act

NEPA planted the intellectual seeds of an organized, systematic approach to land use and conservation with these words: "(I)t is the continuing policy of the Federal Government, in cooperation with State and local governments...to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

That NEPA was a land use statute is evident in the particular objectives the Congress intended it to pursue. They include assuring productive and pleasing surroundings, attaining beneficial use of the environment without degradation, preserving historic and cultural aspects of the environment, and balancing population and resource use. These are closely aligned with land use practices such as community planning, historic preservation, scenic and conservation easements, and cultural inventories, not to mention the adoption of zoning and subdivision ordinances: all, by and large, local practices carried out with state statutory authorization and assistance.

Why NEPA Was Not Enough

Senator Jackson proposed both these bills because he was

frustrated by the conflicts and confusion concerning critical economic and environmental programs at the national, state and local level. One example, of many he cited, involved three agencies of the federal government working at cross purposes in the Florida Everglades. One of them was preserving the area as a park, the other altering the landscape for flood control, the third funding airport construction. One of these was responding to the request of a local government in Florida, the other a county, and the third the state. None knew what the others were planning or doing.

In fact, this Florida illustration was a rather simple example of a profound, and continuing, problem of national priorities that involves huge outlays of federal resources to build highways and public works projects, finance housing in suburbs, clear slums, create open space and conserve energy, to name a few. In the Senator's own words: "Planners have slashed highways through parks where land is invaluable for recreation but cheap for roadbuilding; carved up low income districts with knives of concrete - thus effectively destroying any sense of community; and poured more highway lanes into cities already choking on automobile traffic and fumes."

Senator Jackson realized that NEPA helped to solve this myopia among various levels and agencies of government. At least, under its provisions, all involved federal agencies would be required to move beyond cost-benefit analyses and engineering principles and to consider the impacts of their actions on the physical environment before acting. This provided one common denominator to organize federal activity. However, it would not have altered the fundamental conflicts in the land use objectives pursued by each of the federal agencies and the state and local governments involved.

The National Land Use Planning Act

The National Land Use Planning Act would have controlled this type of inefficient and self-defeating behavior on the part of these governmental agencies. It would have created a framework to coordinate the impact of federal and state actions on land use. It was a fusion proposal focused on both land resource use and conservation. It would have lessened the conflicts Senator Jackson saw emerging in cases like the Florida Everglades by requiring that both development and conservation objectives be considered in advance of specific conflicts and controversies.

The Act provided several powerful incentives to states to encourage them to create strategic land use plans, based on local input and public participation. This was a direct response to the then recent experience of several states that were adopting comprehensive growth management statutes to rationalize their activity with that of their local governments. The incentives in the act included \$100 million annually in direct grants, the provision of a network of data needed to plan efficiently and the promise that federal actions of all types would conform to state land use plans after they were adopted and accepted.

State plans were to designate areas for growth and areas for conservation. Federal resources would then have to be directed to encourage growth and conservation, in accordance with the state plan. The Act would have designated a federal agency to coordinate federal action; states were encouraged to establish coordinating agencies for the same purpose.

Such an approach aims at the cause of much environmental pollution. By asking the states to designate conservation areas, government resources and regulation can abate development pressures in those areas and greatly reduce the air and water pollution, wetlands disappearance and habitat destruction that comes with development.

By focussing on the use of the land, the second Jackson proposal dealt with the causes, rather than the effects, of environmental pollution. By providing incentives to states to prepare state plans and designate development and conservation areas, and promising to use federal resources to promote state plans, the Senator's proposal respected the current understanding of the proper role of the states, and their localities, in land use matters.

Senator Jackson's Vision

The essential vision of Senator Jackson that shaped these two national initiatives was the result of his long experience at consensus building among powerful political adversaries. His own senate committee was constituted principally of conservative western senators who he persuaded to support both a comprehensive national environmental policy statement and national land use management system.

This he did essentially by adopting a collaborative style, an open process of deliberation, and a commitment to seeking and using well and respectfully the best advice and information available. The success of NEPA can be attributed, in part, to the work of a joint House/Senate Colloquium that Jackson organized to consider the need for a federal environmental policy and process. These personal traits are reflected in the approach taken to resource management in both NEPA and the National Land Use Planning Act.

Senator Jackson enjoyed the respect of his colleagues on the Interior and Insular Affairs Committee, but they also shared his understanding of how the federal system could work. Senator Jackson's personal experience had taught him the limits of direct federal intervention in local affairs and respect for local wisdom on matters as critical to individual communities as how the land is used and the environment preserved.

The Committee's method of operating, during the two decades of Jackson's chairmanship, was itself a open and responsive process. Deliberations were not hectic, but proceeded at a reasonable pace. Time was used to gather information and to listen to experts and respond to the political wisdom of colleagues. Jackson's own proposals were offered for discussion and not advanced adversarially. S. 3354 itself was offered as a "working draft."

Staff members of the Committee were chosen based on their qualifications and commitment and, after these characteristics were established, delegated responsibility and relied upon heavily. Experts were chosen to work with the Committee in much the same way. In this fashion, an environment was created that was receptive to innovative and creative ideas.

In short, Senator Jackson and his committee were committed to planning. This was planning based on the best information and expertise available conducted with respect for, and in response to, the input of those affected. Jackson's commitment to planning was not academic; it was action-oriented and driven by respect for efficiency. Jackson's own time, that of his committee and Congress was continually being wasted by dealing with controversies of the moment, the resolution of site specific conflicts in the continuing absence of any long-term objectives or "plan."

The Senator's own description of the Land Use Policy Act

was that it "must contain new procedures and machinery to lessen the conflicts, the wasteful delays, and the inefficient results which land use competition generates. It must shift this competition from the adversary process to the planning process." Further, he promised, "My bill would require effective methods for implementation and make implementation an integral part of the planning process."

Guidelines for National Land Use Policy

The National Land Use Planning Act, S.3354, reflected Senator Jackson's vision and his operating methods in very discrete ways. The quotes in the ensuing material are his:

1. Organizing Principle: It proceeded logically from an organizing principle. "To a very great extent, all environmental management decisions are intimately related to land use decisions. All environmental problems are outgrowths of land use patterns." "By refusing to address the central question - that of land use and residence - this Nation has fostered, and witnessed the failure of, costly, transitory, and unpopular compensatory programs directed at the effects not underlying causes." "Put simply, we need a focal point upon which we can compare alternative proposals to achieve our (environmental) goals. That focal point, I submit, should be the use of the land."

2. Continuing Process: It established an open-ended process rather than dictating adherence to an end-state vision. "My bill would establish forums and procedures to foster rational, consistent, long-term decision making with the participation of citizens and experts....These decisions would result from the planning process - not the oft-maligned and seldom effective traditional planning process but a new participatory process based upon adequate data and capable of implementation."

3. Input and Information: This process emphasized the importance of input of all affected sectors and agencies and the use of all available and reliable data. "For too long, land use decision-making has been conducted without data adequate to consider fully the decisions' potential impacts." "Planning without citizen participation is neither democratic nor wise...(The) practical wisdom and support (of citizens) make plans capable of implementation, their knowledge of local conditions fills gaps in the planners' data and information, and their varied interests diminish the tendency of planning to

embody a single purpose."

4. Coordination and Integration: The Act established a clear role for each level of government and insured that their activities would be coordinated. "It is essential that we develop a framework within which the myriad proposals to use or consume natural resources can be balanced against one another and measured against the demands they collectively impose upon the environment." "We always seem to be calculating the short-term consequences of environmental mismanagement, but seldom the long-term consequences or the alternatives open to future action." He called for "applying to environmental management the methods of systems analysis that have demonstrated their value in universities, private enterprise, and in some areas of government." "Man's ability to survive on this earth...will turn upon government's ability to develop policies and decision-making models which integrate environmental concerns along with the full range of other important human values."

5. Incentives, Not Mandates: The principal role of the federal government was to provide incentives and guidance to encourage and insure that the states had the capacity to marshall and protect their natural resources. National policy "must lessen the conflicts, the wasteful delays, and the inefficient results which land use competition generates. It must shift this competition from the adversary process to the planning process."

"In every state, the tremendous influence of Federal activities...is largely beyond the control of the State government. For these reasons, a national land use policy is needed."

Consequences of Abandoning this Vision

Within a few years of the defeat of this Act in the House, Congress had established several major development, conservation and pollution abatement programs. In the quarter century since, this federal system, despite some clear successes, has been criticized for imposing unfunded mandates on state and local governments, pursuing conflicting policies, and for being administered inefficiently by dozens of federal agencies whose work is not coordinated. Within the same geographical areas, these agencies often work at cross purposes and, still today, the resources of the federal government are not well coordinated with the expenditure of state and local governments.

Much of the legislation passed in the 1970's, which emerged from other committees of Congress, was aimed at pollution abatement and expressly disclaimed having any impact on the land use authority of state and local governments. Typical is a provision of the Clean Air Act which says nothing contained in it infringes on the existing authority of local governments to plan or control land use. Under both it and the Clean Water Act, however, an extensive national and state permitting process was established which regulates development projects that emit significant pollution directly into the air or water (point source pollution). Indirect air and water pollution of air and water bodies (nonpoint source pollution) is heavily regulated under federal legislation as well. States with appropriate enforcement mechanisms may assume federal responsibility for controlling point and nonpoint pollution to meet federally established air and water standards.

The regulation of nonpoint pollution and the regulation of land use are nearly the same thing. By changing the category of a stream, a state environmental agency, for example, can drastically lower the density at which land development can proceed. Since federal and state laws preempt the application of local laws, such actions can render impotent the carefully-constructed local land use planning and regulatory regime.

Despite the federal disclaimer, these statutes, and others affecting coastal zone management, safe drinking water and resource conservation, deal with the use of the land and its resources. They have established a variety of prescriptive standards regulating discrete slices of the environment that are impacted by the way land is used: the development pace and pattern created by local and state land use regimes. The two are fundamentally the same, though in federal legal fiction, they are distinct enterprises.

At the federal level, there is no framework for achieving cost-effective, competitive and conserving land use patterns. Instead of clarity and cohesion, there is conflict and confusion. What Senator Jackson worried about in 1970 has come to pass.

Changes in Science, Society and the Law

The U.S. Congress is rethinking how it should discharge its

obligations under NEPA and the host of pollution abatement statutes passed in the last quarter century, many of which are awaiting reauthorization. Since their initial adoption, thinking in the political, scientific and business communities has changed drastically. The premises on which our original federal environmental legal system was based have changed. This is evident, particularly, in the scientific community.

In the 1960s and 70s, the popular perception of scientific thinking in the field of ecology was that nature is inherently balanced and is moving toward an ideal end state, that through empirical observation, the behaviors of natural systems can be known and influences on them measured and controlled, and that, given this end-state vision and empirical knowledge, centralized systems of controlling these impacts are the appropriate strategy for protecting the environment from human activity. Under this theoretical approach, the environment and productive use of resources are in opposition to one another.

Since 1970, the seminal moment in the creation of environmental law in the U.S., the views of science have changed. Newer theories see the environment, and its ecosystems, as being in a constant state of change, rather than moving toward an idealized end-state. The infinite complexity of the factors that influence this constant process of change is better understood, while the confidence in our ability to know and predict change has been shaken.

In the 1920's Einstein ("God does not play dice with the universe!") and Neils Bohr ("Uncertainty is an intrinsic part of nature.") debated science's ability to determine natural behavior. Ultimately, the discoveries of quantum mechanics judged Bohr the winner. Bohr and his intellectual heirs place man in nature noting that the observer cannot be independent of the experiment. Slowly, determinism died. The idea that the future state of a system follows inevitably from its present state, according to certain prescribed laws, was a tablecloth that quantum mechanics yanked out from under the careful setting of classical physics.

Today's scientists, through complexity and chaos theories, seem to recognize that efficiency in systems evolves organically as the parts of natural systems interact. We better understand the disproportionate impact that initial errors in the structure can have on ultimate outcomes within those systems, rendering long term predictions, based on current

systems behavior, unreliable. Chaos theorists believe that efficiency in systems evolves through the natural interactions of the components; at some point, the right interaction of elements amplifies through mutual feedback. This process results in a self-organized structure that is relatively efficient and beneficial to the entire system. The emphasis today then is on connections, interactions and process rather than on end-state determinism and mechanistic methods of arriving there.

The movement away from centralized, top-down, end-state planning is evident in the business community as well, which has changed its thinking about the behavior and management of human organizations in the last quarter century. Large corporations are down-sizing, searching for excellence by connecting with their customers and front line employees, seeking wisdom at the grass roots level in the marketplace and learning to be more flexible, open and responsive.

The division of labor and specialization of tasks, as advocated by Adam Smith to serve the industrializing world, is yielding to new systems that organize tasks into coherent business processes. In this way, senior managers, and their long term plans, are integrated with the passionate and intuitive knowledge that arises from the marketplace and the interaction of their employees with each other and with their customers.

This is, as they say, a paradigm shift - as evident today in the halls of Congress as it is in the science lab or business boardroom. Its implications for reforming the land use and environmental laws of this country are profound. Our current environmental pollution abatement system is top-down, standard driven, centralist and not integrated with the local processes that spawn the land use patterns that cause, or can prevent, much of the environmental pollution the federal system is designed to abate.

Senator Jackson's Time Has Come

For its time, S.3354 was a prescient proposal. Senator Jackson's own vision was encoded in that first draft of the National Land Use Policy Act. It aligns very closely with the "recent" advances in business and scientific thinking:

1. The Organizing Principle: The new "wisdom" of the scientific and business communities teaches us about the close

connections that exist in the environment, between economic development and environmental conservation, and between man and nature. Recall the Senator's organizing principle: "That focal point, I submit, should be the use of the land." That point is the intersection of development and conservation, of man and nature.

2. An Open-Ended Process: Senator Jackson called the traditional planning process "maligned and seldom effective" and proposed in its place a "new participatory process," one that is interdisciplinary and continuing. The "paradigm shift" in scientific thinking over the course of this century corroborates this approach. End-state, "traditional" planning relies upon the principles of determinism, mankind's ability to know and predict outcomes. Newer planning and management approaches are more focussed on open-ended processes than on end-state visions, and rely on the inherent intelligence that exists, and arises out of, systems that are functioning organically.

3. The Inherent Intelligence of Systems/The Importance of Information and Input: Systems theories today emphasize the importance of gathering and respecting the intelligence available from within components of a system. Senator Jackson proposed the efficient use of all reliable and objective data and the use of citizen participation at the grass roots level to fill the inevitable gaps in the data network and to benefit from this "practical wisdom" and its tendency to balance the influence of particular interests within the system.

4. The Importance of Coordination and Integration: New scientific thinking advances the notion that efficient systems are self-regulating, that efficiency arises out of the chaos that exists within "complex adaptive systems" because of the inherent connections among their components. Biologists refer to the "nested hierarchies" that exist in nature, noting the mutually beneficial results that emerges from the natural interplay among species in ecological niches and among the hierarchies of ecosystems.

It was not by accident that the Senator referenced favorably the "methods of systems analysis" employed in universities and private enterprise. His National Land Use Planning Act would have integrated local, state and federal systems. Planning would have emerged from the local level to be memorialized in a state plan, which was under constant review. The federal role was to provide incentives, data, assistance and

training to encourage and help the states in their coordinative role. The states would have provided a common forum for localities to organize their regulatory regimes and capital budgets so that all three levels of government could cooperate to encourage development in designated growth areas and to encourage land and resource preservation in conservation areas. In other words, Jackson advocated a process that was competent to integrate resource allocation and regulation into a coherent process.

5. Incentives to Cooperate, Not Mandates to Achieve Particular Objectives: Senator Jackson believed strongly that the role of the federal government was to provide effective incentives to encourage this integrated system to come into being and function efficiently. When one provision of his bill was called a sanction, he quickly replied that it was instead the withdrawal of one of the incentives. He defended his bill against detractors who wanted more federal guidelines and sanctions. Emphasizing planning, he felt, by providing incentives to encourage it, would "lessen the conflicts, the wasteful delays, and the inefficient results which land use competition generates." The bill, he said, would "shift this competition from the adversary process to the planning process.

Incentives were his technique for building a healthy and organic land use system, one that gathered intelligence from all its components, one that was integrated and within which efficiency resulted from the interplay among all decision makers and affected parties.

A Challenge to Legal Institutions

Twice in this century, U.S. resource regulators have been encouraged to operate within integrated systems. Both times, they balked. The model zoning and planning acts of the 1920s envisioned a constant conversation among affected parties that was to precede and shape the issuance of specific regulations. Experience shows that most local land regulations are not closely tied to comprehensive planning; further, the local planning that is conducted is usually done in isolation of the plans of adjacent communities and in ignorance of regional needs.

Senator Jackson proposed a broad national resource planning system that was narrowly rejected. Interestingly, changes made to S. 3354 moved the National Land Use Planning Act away from

Jackson's central vision. These modifications added more federal requirements, made state plans less comprehensive, lessened the incentives and added new sanctions. Although the modified bill passed the Senate handily, it did not pass in the House where charges of "federal zoning" and "regulatory taking" were levelled against this altered version of the statute.

Shortly after the failure of the act to pass in the House of Representatives, the federal Congress adopted dozens of statutes regulating segments of the environment in a variety of ways. Environmental regulation proceeded in relative ignorance of economic policy. This system is notable for its lack of coherence and integration.

The new paradigm, emerging from the scientific and business communities, requires a constant feedback process within an integrated system. Integration, today, refers not simply to intergovernmental coordination, but a profound fusing of public and private sector planning and processes. Despite the great competitive clashes that characterize individual relationships in nature, scientists have observed that natural systems are essentially cooperative. It is through pervasive interaction within entire systems that mutually efficient behavior - order and efficiency - evolve. These concepts of efficiency and integration should be reflected in modern processes of resource allocation and regulation.

For lawyers, the critical challenge is to define and advocate a new jurisprudence of resource use and regulation.

The relatively new term "sustainable development" provides, conceptually, this type of integration and a basis for the reform of our legal systems. The U.S. has a historical legacy, provided by Senator Jackson, that can be revisited and revised as we seek mutually beneficial ways to develop more efficient systems for resource use and conservation. As Senator Jackson wrote in 1971, "Resolving these problems for human ends - to improve the quality of our life - is, in major respects, the most challenging task facing the legal profession in the last one-third of the century." With 25 years of that time elapsed, his challenge rings more loudly and, hopefully, is more audible today.