

January 1978

Review of Environmental and Land Controls Legislation by Daniel R. Mandelker

George D. Brown

Boston College Law School, browngd@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Environmental Law Commons](#), [Land Use Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

George D. Brown. "Review of Environmental and Land Controls Legislation by Daniel R. Mandelker." *Environmental Affairs* 6, (1978): 449-453.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

BOOK REVIEW

ENVIRONMENTAL AND LAND CONTROLS LEGISLATION. By Daniel R. Mandelker. Indianapolis: Bobbs-Merrill Co., 1976. Pp. xi, 417. \$15.50.

*Reviewed by George D. Brown**

Daniel Mandelker's book, *Environmental and Land Controls Legislation*, is a timely illustration of a general point: public policy discussions in the United States involved as much debate over *who* is to carry out a program as over *what* its content is to be. The existence of a federal system, especially one which is continually given new content and meaning by the Supreme Court,¹ requires a thorough understanding of the inter-governmental dimensions of a problem such as land use prior to choosing among particular regulatory approaches.

Debate over which level of government is the "best" decision-maker has arisen frequently in the context of spending programs involving direct transfer payments and the delivery of services to individuals. This debate pits those who invoke the superiority of the national government against those who favor decisionmaking at sub-national levels (usually without distinguishing sharply between state and local governments).² Casting the debate in economic terms, "centralists" argue that only the national government can perceive accurately the level of demand for public goods and services and, therefore, national intervention is required to ensure that state and local markets (governments) provide the correct supply.³ "Decentralists," however, argue that the existence of different serv-

* Professor of Law, Boston College Law School.

¹ See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976).

² See generally M. REAGAN, *THE NEW FEDERALISM* (1972).

³ E.g., G. BREAK, *INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES* (1967).

ice and expenditure levels in sub-national units is essentially a reflection of the differing preferences of their citizens and should therefore be encouraged.⁴ A similar debate has gone on among political scientists. Centralists favor the national government as more responsive to the "national public interest" and less captive of narrow-minded, middle class, local political elites.⁵ Decentralists, on the other hand, argue that state and local governments are closer to the people and can make "better" decisions than the Washington bureaucracy.⁶

This debate is easily transferable to a regulatory program such as land use. After all, regulation involves resource allocation just as does taxing or spending. For example, the practice of exclusionary zoning by suburban jurisdictions pits the decentralist goal of advancing local values against the need for intervention by a higher level of government to achieve equity as defined by national values. Similarly, states and localities may encourage development along their coast lines, while a national perspective would suggest that this resource needs protection in the "national interest."

Recognizing these competing perspectives, Mandelker's book is an excellent portrayal of the "state of the art" of American land use systems as of 1976. He presents the book as "neither polemic nor propaganda," but as a guide for "lawyers, administrators, policy-makers and others who are concerned with the enactment and implementation of land use legislation."⁷ In this sense, the book recognizes one of the primary roles of the lawyer in contemporary society: that of a designer of institutions.⁸

Mandelker begins by placing land use in context. He states that land use issues present four dimensions: an environmental dimension; a social dimension (exclusionary zoning); a growth control dimension; and an inter-governmental dimension.⁹ Focusing first on state land development planning, he conducts an intensive examination of the American Law Institute's Model Land Code. He analyzes the Model Code as a proposed system and examines legislation in those states which, at least partially, have adopted it. The

⁴ E.g., R. WAGNER, *THE FISCAL ORGANIZATION OF AMERICAN FEDERALISM* (1971).

⁵ E.g., Susskind, *Revenue Sharing and the Lessons of the New Federalism*, 8 *URB. L. ANN.* 33, 51 (1975).

⁶ See *id.* at 42-43 (summarizing and criticizing decentralist theory).

⁷ D. MANDELKER, *ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 1* (1976).

⁸ See MICHELMAN & SANDALOW, *GOVERNMENT IN URBAN AREAS XI* (1970).

⁹ D. MANDELKER, *supra* note 7, at 2-14.

author then considers the federal role in land development, focusing on the National Environmental Policy Act, the land use dimensions of federal air and water quality programs, and the operation of the Coastal Zone Management Act of 1972. The book next turns to two extensive case studies at the state level: the Hawaii Land Use Law and the Vermont Land Use and Development Law. A closing chapter, "Some Final Perspectives on National and State Land Development Control Systems," attempts to put the previous material in perspective and suggests future dimensions which land use systems, especially state systems, might take.

Environmental and Land Controls Legislation is an excellent introduction to a complex subject. Only an author such as Mandelker, with extensive knowledge of legislation and court decisions at federal, state and local levels, could have written it. Several strong points stand out. His analysis and critique of the A.L.I. Code is an excellent treatment of that system's strengths and weaknesses—it is also a clear illustration of Mandelker's broad understanding of state-local institutional issues. He questions whether the Code's reliance on local government administration of state imposed norms will, in fact, work.¹⁰ He also questions whether state legislatures can or should play an active role in the development of state land use plans.¹¹ His treatment of the federal materials is also enlightening. Mandelker does not hesitate to criticize NEPA as incremental. Nor does he avoid suggesting that a federal program such as air pollution control can present significant problems of coordination *within one area* (the concept of air quality maintenance versus the nondeterioration principle), problems of coordination among *functional areas* (air versus water), and problems of coordination *between levels of government* (federal controls versus state and local land development plans).¹² In his treatment of the Coastal Zone Management program, Mandelker underscores the fact that the federal government may have substantially less leverage when it institutes land use control through a grant program enacted under the spending power than when it engages in direct regulation under the commerce power.

This said, some reservations about the book must also be noted. Although the two case studies are excellent (especially David Hee-

¹⁰ *Id.* at 123-26.

¹¹ *Id.* at 36.

¹² *Id.* at 169-205.

ter's chapter "Almost Getting it Together in Vermont"), one may question whether these were the best examples to treat at such length. Mandelker chose these state experiences because they represent "the most comprehensive state land planning and development control programs in the country"¹³ and because they have been operational for some time. He indicates that since attitudes toward land use and government regulation "are not likely to vary with differences in location, governmental structure, and the distribution of governmental responsibilities,"¹⁴ the Hawaii and Vermont experiences may be replicable. This premise is certainly open to question. On the other hand, to the extent that the Hawaii and Vermont experiences teach "sobering"¹⁵ lessons, the case studies suggest that the development of new land use systems may be even more difficult in those states less likely to take an innovative approach. This observation leads inevitably to the spectre of a greater national role.

A second drawback is that significant events have happened since the book's publication, and no method appears to have been provided to update the book's contents. For example, the emergence of the Tenth Amendment as a potential limitation on the national government's ability to "coerce" state and local administration of federal programs is a development which needs to be reckoned with in considering potential federal and state roles.¹⁶ Another recent development is the commencement of federal approvals of state Coastal Zone Management programs; the extent to which the grantor agency is strict or lenient in accepting state programs will tell a good deal about the potential for national leverage under the Coastal Zone Management program. Neither of these developments is necessarily inconsistent with the points made in Mandelker's book, but those who are interested in the subject matter need to consider such crucial events.¹⁷

Finally, one must question Mandelker's decision to omit any substantial discussion of the proposals, so dominant in the early 1970's, for a National Land Use Planning Act.¹⁸ Of course, such legislation was never passed; nor is it likely to be passed in the foreseeable

¹³ *Id.* at 269.

¹⁴ *Id.* at 270.

¹⁵ *Id.*

¹⁶ See, e.g., *EPA v. Brown*, ___ U.S. ___, 97 S. Ct. 1635 (1977).

¹⁷ The possible emergence of a National Urban Policy with land use implications, and some emphasis on a state role, is another recent event which would be useful to consider in the book's overall context.

¹⁸ S. 268, 93d Cong., 1st Sess. (1973).

future. But the enactment of such a national program might answer many of Mandelker's valid criticisms of the federal role as it has evolved to date, especially the multiple problems of policy coordination.

Mandelker's failure to deal with the possibility of national land use legislation leads to two broader questions about the book: whether the author ever resolves the fundamental question of which level of government ought to perform what land use functions, and whether such issues can be avoided in this area. A major item on any future national agenda will certainly be the proper land use role for the federal government. Mandelker's book suggests that land use control may call for, or at least permit, greater diversity than, say, air and water pollution control. This, of course, intimates a decentralist approach with substantial authority remaining in state and local hands. However, as the author points out so well, the national government already reaches quite deeply into land use control through its regulatory programs concerning air and water pollution.

Mandelker takes as given the desirability of transferring a substantial amount of land use responsibility from *local* governments to higher levels,¹⁹ but he does not always distinguish sharply between an enhanced federal role as opposed to an enhanced state role. On balance, Mandelker seems to favor the latter. The early emphasis on state planning, as well as the emphasis on alternative state roles in the closing chapter, point in this direction. The evidence contained in the book's chapters, however, raises doubts about the likelihood of state assumption of extensive responsibility. As the Vermont chapter notes, "[s]tate land use plans and controls are an idea whose time has only partly come."²⁰

The author seems to have aimed his book primarily at state decisionmakers as an aid in the design of new state institutions. Perhaps ironically, in view of the evidence that the states cannot or will not do the job, Mandelker also implicitly presents arguments for a greater national role. Whatever the outcome of future national policy debates over land use control, Mandelker's book will be essential reading for any and all participants in those debates.

¹⁹ D. MANDELKER, *supra* note 7, at 393-94.

²⁰ *Id.* at 391.

