The More Things Change...

The impacts of the 1970 Clean Air Act on land development and infrastructure improvement, if thought of at all, would likely be profound. It was predicted, for example, that EPA's 'indirect sources' rules would cost a billion dollars to the federal public and private development that would have to be paid for by higher costs of federal and state development programs. It was also predicted that the Clean Air Act was going to be a boon to infrastructure improvement.

The 1970 Clean Air Act again attempts to achieve meaningfully coordinated land use, transportation, and air quality planning at all levels of government. The transportation-related provisions could significantly affect the development industry and the American's ability to improve road networks and discourage the use of cars.

The 1970 Clean Air Act will result in major changes in travel and travel patterns only if these impediments are overcome. In addition, the process of change will be slowed by legal challenges to decisions intended to ease the flow of traffic into the future. The Ohio State University is an example of a state that is seriously examining the traffic quality of land use and transportation policies.

Implications for Urban Growth and Development

Ironically, Section 805 of the CAA added the following provisions to the clean air act: If the statute.

Nothing in this Act shall authorize the filing of citizen suits, and provides for the award of up to $10,000 to persons furnishing information leading to criminal convictions or civil penalties for certain violations.

Michael J. Korman, a partner in the Washington, D.C.-based law firm of Arent Fox Kimm, pleased with the Clean Air Act, but not altered much by it.

In urbanizing areas, where should development not go? What environmental features should be protected and how? Sorting out these issues is a Herculean task accomplished by collaborative, area-wide planning, a flawed but promising process in its current guise.

Environment

Douglas R. Porter

Planning Gaps and Glitches

Developers are discovering that the notion of environmental and the existence of certain creatures, some quite divisive, can disrupt and even bring to a halt the most splendid proposals. Conflicts with environmental goals appear to be on the increase as urban development pushes into sensitive environments, and as governmental requirements for the preservation of endangered species, wetlands, and other environmental features have both broadened and intensified.

All of this means that developers are encountering more circumstances in which they must somehow come to terms with restrictions on development to save important environmental features. Often they are required to make major contributions of land, time, and cash.

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mental agencies, each with its own rules and its own ways of reaching decisions. The second problem—probably the more serious one—is the general absence of any public decision-making structure allowing environmental/development conflicts to be considered and reconciled in a rational, creative manner.

If a wetland or habitat of an endangered species lies wholly within a single property in a single jurisdiction, the local planning and zoning apparatus, if coordinated with state and federal requirements, may offer a suitable venue for reaching agreements about preservation and development. Too often, however, one or more of the following conditions exists:

- The community's comprehensive plan and zoning ordinance have not identified specific environmental features worth preserving and have not defined ways in which competing development and environmental goals might be reconciled, thereby providing little guidance to property owners.
- The features in question cross property lines or jurisdictional boundaries. Attempts to coordinate development decisions among multiple property owners and communities, however, usually are frustrated by the case-by-case procedures established by permitting agencies.
- The regional agencies that might provide guidance for multiple property owners or interjurisdictional agreements lack plans with sufficient force and definition to assist in such decisions.

In short, public planning mechanisms in most communities and regions fail to link satisfactorily with the environmental regulatory machinery set up by federal, state, and local governments.

Federal agencies have taken some cautious steps to bridge this procedural gap. The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA), charged with issuance of wetlands permits, have encouraged advance identification programs for wetlands that serve to notify property owners of potential development problems and to establish some wetlands preservation priorities.

The Coastal Zone Management Act of 1972 approaches the problem by encouraging coastal states to designate critical areas and prepare areawide plans for them. The Endangered Species Act of 1973, as amended, represents a third approach. The law authorizes limited invasions of endangered species habitats if a regional conservation plan is in place and other conditions are met. (See Timothy Bealcy, "Regional Approaches to Wildlife Habitat Conservation," Urban Land, August 1991.)

A number of states have established special procedures for dealing with areas of critical concern. New York's Hackensack Meadowlands Development Commission focuses planning and regulatory activities across a number of jurisdictions on the goal of achieving a proper balance between environmental preservation and development. Florida's 1982 Coastal Zone Act establishes comprehensive planning procedures for designated critical areas, and has been applied in several areas, including the Everglades. Maryland's Chesapeake Bay Critical Area Commission devises and implements criteria to guide development and preservation in 61 jurisdictions on the bay and its tributaries.

Experience with these approaches has been studied by an informal working group whose meetings were cosponsored by ULU and the Environmental Law Institute. The meetings were initiated by Lindell Marsh, a member of ULU's Federal Policy Council, and chaired by John M. DeGroff, director of the FAU/RIU Joint Center for Environmental and Urban Problems at Florida Atlantic University in Fort Lauderdale. The group also sponsored case studies describing specific experiences with resolving environment/development conflicts (see "A Quaret of Wetlands Plans," Urban Land, April 1990). Some lessons and conclusions drawn from this wealth of information may help others resolve similar conflicts.

How Areawide Planning Should Work

Rarely are areawide planning exercises undertaken unless a long history of clashes among developers, public officials, and environmental groups or agencies has convinced all parties that some extraordinary means of accommodating the various interests will be required. Initiated either by developers, special interest groups, or public agencies, a planning group is formed to represent the variety of stakeholder interests. The group may have official status, as in the state-appointed Chesapeake Bay Commission or the Resource Planning and Management Committee for the East Everglades, or it may be convened as an ad hoc group such as the committees typically organized to formulate habitat conservation plans.

Funding for staffing and research comes from developers and public agency contributions, from federal and state grants, and sometimes from foundations or corporate donations. Normally, little money is available to pay for the expenses of individuals to attend meetings.

Like its counterparts everywhere, a planning group obtains and discusses information, appoints subcommittees to follow up specific issues, holds public hearings or workshops, adapts to constant member turnover, and reports to one or more official agencies. The findings and conclusions of some groups flow directly into official acts, such as adoption of court conservation plans by the U.S. Fish and Wildlife Service (FWS), or multijurisdictional agreements among local governments. In other cases, results of group efforts serve simply to advise an array of agencies and interests.

This approach for preserving important environmental features in developing areas is useful in at least three important ways. First, it views environmental concerns broadly over a large area containing numerous property holdings, a way of looking at issues that heartens environmentalists who decry the cumulative effects of incremental permit approvals and the ecological discontinuities that often result from narrowly defined plans. Developers avoid the "death by a thousand cuts" that individuals permitting efforts seem to entail. Public officials find useful the consensus-building forum that such discord.

Second, discussions and negotiations often lead to creative solutions that satisfy the objectives of all interests. Planning group participants tend to focus on reconciling differences and finding solutions. They avoid stonewalling. Traditions and biases become possible that otherwise might be difficult with single parcels or with unilateral decisions. The costs of preservation can be equitably distributed among the various interests.

Third, the involvement of many interests in public discussions builds community confidence and trust in the outcomes, encouraging long-term adherence to agreements and plans. This provides greater predictability and certainty for advocates of both environmental and development values.

For all these reasons, special areawide planning may prove an invaluable aid to developers seeking approvals and environmentalists seeking preservation of important resources.

The Ways It Doesn't Work

For all its promise, collaborative planning is time-consuming and resource-intensive, if only because of the diversity of participants and the range of is-
sues. Yet these investments would be eminently worthwhile if the consensus reached were equitable, implementable, and enforceable. Unfortunately, such is often not the case. The process can go wrong for many reasons, among them:

**Constraints on Federal Agencies.** Especially when federal agencies are not lead agencies in the process, getting their representatives to the table is difficult. Regional offices of agencies such as EPA and the Corps plead a lack of staff and travel budgets. In the planning for the East Everglades, federal agencies were only sporadically represented. As a result, EPA basically disagreed with the committee's final consensus on tradeoffs among agricultural and preservation uses.

Another problem is that federal agencies find it difficult to respond to the classification of some otherwise protected areas as expendable. The EPA/Corps advance wetlands identification process, for example, can easily identify wetland areas that are unsuit- able for development but finds it hard to acknowledge that some wetlands may be fillable. David Davis, EPA's deputy director of wetlands, oceans, and watersheds, says that the agencies are working on overcoming that psychological barrier. "We find ourselves needing to be able to make that kind of judgment," he says, especially when wetlands identification occurs within an overall planning framework.

The wholehearted participation of federal agencies in group planning endeavors may be stymied by their wariness about regulatory takings. The Bush Administration's recent insistence on enforcing Executive Order 12630—which directs federal agencies to identify actions that might stir takings claims and make those agencies potentially liable for compensation to landowners—may be keeping EPA and other agencies from joining these planning efforts.

**Lack of Funding for Planning and Implementation.** With their less than official status, areawide planning efforts must contend with funding uncertainties and shortages that limit staffing, research, and follow-up measures. A lead local or state agency may provide basic staff resources, and federal and state agencies sometimes provide special grant funds. Most often, however, it falls to developers to foot much of the bill. The lack of any central funding source leads to limitations on the comprehensiveness of planning and dampens the entire effort.

And planning costs are negligible compared to the costs of implementing plans, which often call for the acquisition of hundreds or thousands of acres to preserve usable, expensive wetlands. Compensation for landowners forced to re- serve large acreages is often critical to obtaining their support for preservation plans and to avoiding takings claims.

Acquisition and compensation costs can be enorm- ous. In Riverside County, California, for example, protection of the Stephens' kangaroo rat will require land acquisitions costing from $50 million to $250 million. The proposed Austin, Texas, preserve for 15 species will cost over $80 million. Beyond acquisi- tion costs, management of preserves and other elements of plans require continuing funding.

Local public officials are inclined to turn to de- velopers and landowners for funds. Many of the plans to date have been spurred by developers and developer fees. Riverside County, for example, has raised almost $25 million from a $1,950-per-acre development fee for its kangaroo rat preserve.

But state and federal funds should also be part of the funding packages, since preservation efforts are state and national priorities and their benefits spread well beyond the boundaries of the immediately affected properties. In addition, developers may understandably not agree to plans that depend solely on private funding.

The current laws may require preservation of wet- lands and wildlife habitats have not been accompa- nied by suitable funding to compensate landowners. The federal Land and Water Conservation Fund has provided some acquisition funds. In some cases, such as Florida's East Everglades, the state has stepped in to raise the necessary funds. The Nature Conservancy has funded some planning and acquisition in several habitat conservation plans. But these essentially ad hoc financing efforts do not provide a predictable mechanism for implementing plans. There is a need for federal programs to assist in funding areawide planning efforts.

**Lack of Enforceable Assurances.** Since many spe- cial collaborative planning efforts depend on ad hoc, voluntary planning funds, it is not surprising to find problems in follow-up implementation and management.

For example, with FWS official commitments to habitat conservation plans, federal agencies by and large are bound only by the moral force of adopted areawide plans as they review individual permit applications.

This is a frail foundation, as was proved by the fate of an elaborately negotiated plan for Grays Harbor, Washington, an early prototype of special area management plans. When a local lumber company came to naught when new personnel in the Corps, a key player, reneged on its staff's previous consent to plan implementation. State and local governments, as well, are subject to the vagaries of political trends that may cause them to withdraw support from adopted plans. In addition, areawide plans usually depend heavily on actions by assorted agencies and departments, ac- tions that are easily unhinged by budget and staff changes.

Experience demonstrates the critical necessity of assigning follow-up responsibilities to specific or- ganizations or agencies. Follow-up problems on plans forged by critical area committees in Florida, which are disbanded when plans are adopted, are instructive. The critical need to involve several property owners may go adrift if one or more of them run into economic or other problems. Areawide plans, then, are as good as the long-term viability and consistency of outlook of the public and private interests with a stake in the outcome. The legislation and regulations governing areawide plans should be augmented to provide assurances to all interests that the plans, once formulated, will be honored.

The **Complexity of Environmental Values.** It should come as no surprise that areawide planning often runs afoul of disagreements over the defini- tion of critical environmental features, the determina- tion of viable preservation areas, and other techni- cal matters. Many environmental interests find it difficult to accept any diminution of resource lands, much less the alteration of wetlands or habitats in new locations to replace lost ones.

Questions of adequate biodiversity and the long- term viability of preserved habitats are difficult to resolve. Many of these questions stem from insuf- ficient understanding of the particular wetlands and species involved, but research to provide an ade- quate understanding would take years to carry out.

These uncertainties will make for continuing controversy during and after the planning process. To have any hope of long-term implementation, plans must build in ongoing research activities and latitude for revisions based on research findings. To do so, of course, will add more uncertainty to the implementation process.

**Future Prospects**

With all these drawbacks, is there any hope for the concept of collaborative planning? The answer has to be yes, if only because environmental and develop- ment conflicts undoubtedly will continue to in- crease, and the collaborative planning approach rep- resents one of the few means of reconciling the host of issues raised by such conflicts. As it now works, it is a necessary but costly and complex procedure, and certainly less than satisfactory in its long-term reliability.

Two lines of action would significantly help to improve the process. First, federal and state agen- cies should construct a regulatory home for such ef- forts, including incentives for undertaking them and mechanisms for recognizing their results in later agency actions. The incentives should include a funding element and the recognition should include a form of binding agreement that developers can "take to the bank" and that environmental interests can bank on as well.

Second, efforts should be made at all levels to weave a more consistent and coherent relationship among planning and regulatory entities involved in development and conservation. Local governing bodies, for example, should identify wetlands areas and habitats of endangered species, and should reflect the development restrictions on those lands in their comprehensive plans, zoning, and subdivision require- ments and procedures. Those plans and ordi- nances could also make room for the multi-party agreements resulting from areawide planning.

State and regional agencies concerned with growth management and environmental preserva- tion should establish guidelines for meshing environ- mental permitting requirements with state, re- gional, and local planning processes. State agencies, in particular, could assist in smoothing relationships between federal regional offices and local govern- ments, including authorization, for example, of multi- party development and conservation agreements.

In short, collaborative, areawide planning needs help and support throughout the various levels of government if the concept's advantages are to be truly realized.