In its beginnings about fifty years ago zoning meant dividing the territory of a city or other urban area into districts having different use and development regulations. When a landowner claimed that the regulation was an unconstitutional restraint on his freedom of choice as to use of his land (denial of due process), the local government defended the regulation in terms of what it prevented the owner from doing. A substantial relation existed, the local government claimed, between the health and welfare of the community and the exclusion from the district of incompatible uses that the owner might choose. In addition to this due process problem there was an equal protection requirement: land similarly situated had to have similar restrictions. These requirements were so simple and self-evident that there was no “dilemma”;¹ the choice of preventing bad neighboring uses was clearly more satisfactory than the choice of allowing an owner to exercise his freedom by introducing harmful uses.

But city planners do not like to be merely policemen promoting a policy of “good neighborliness.” And it was not very exciting to design plans that forever divided the city into firmly bounded districts with permanent height, bulk, and use characteristics. So planners began to claim that planning and zoning were not really “end states” but a process to manage and guide the future uses of urban land resources. Just as the manager of a business firm is able to reallocate his firm’s resources from time to time, they argued, so should the planner have the flexibility that is inherent in “management.” The citizens on the

¹ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). This case and Nectow v. City of Cambridge, 277 U.S. 183 (1928), so firmly established the “nuisance” principle in zoning that a zoning problem did not reach the United States Supreme Court again for over twenty-five years. See Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
city planning commission or on the city or county council, who tended to be business managers in their private lives, quickly understood and approved these demands for flexibility. But the lawyers and judges guarding the Constitution had a little more difficulty with the idea of granting broad discretion to the planner. The planners first proposed what was in effect a simple, one-sentence zoning law: "No development may take place in this community without the consent of the city planner." The courts decided, however, that this did not comport with the Constitution; there had to be some standards established in advance of actual decision to guide the planner in deciding whether to grant or withhold permission for a material change in the use or development of a parcel of private land, and there had to be some definite procedure for making a decision.

The planner, after some half-hearted efforts to identify criteria to write into law as a guide to his managerial tendencies, ran back to his legislative bosses on the city planning commission or county council for protection. Although many planners had argued that they should be part of the executive branch, the Standard City Planning Enabling Act made them advisors to the city council. Significantly, constitutional standards constraining a legislature are far weaker than those constraining an executive: a possibility of promoting general welfare without overt discrimination was all that was required and little or no hearing process was necessary. Thus, the zoning ordinance returned to the form originally envisioned by the founders of zoning but with a different reality. Almost all land, or at least all land for which a material change in use was to be expected in the foreseeable future, was districted but assigned to a "too restrictive" district. Under these restrictions a landowner who wanted to build could not do anything economically viable without applying to the legislative body for an amendment to the zoning ordinance which would cover only his particular land.

Initially this "spot-zoning" procedure appeared to be incompatible with constitutional concepts of fair play, but the courts eventually concluded that if the process required presentation of the matter to expert planners, who recommended approval of the spot change on

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2 See the difficulty the court had with a law authorizing granting a variance "for special reasons" in Ward v. Scott, 11 N.J. 117, 98 A.2d 885 (1952).
the basis of some preconceived plan, the constitutional defect was removed. Yet the master plans, which like the old zoning ordinances tended to have prestated physical location, were also thought to be too restrictive of managerial skills. Consequently, locational plans were abandoned in favor of "policy plans," which were merely commonplace rules of thumb such as: "Since multi-family residential areas are complementary to shopping areas and other primary service facilities, they may logically be developed adjacent to such uses."

Such a plan is "implemented" by putting all undeveloped land in the urban area into zones classified as "agriculture," "single family residence," or "low density multiple family dwellings." The expectation is that any person owning land in these categories that he thinks is or will be adjacent to a shopping or other urbanized area will, if he decides to build high-density, multifamily dwellings, apply to the city council for an amendment to the zoning ordinance to reclassify his land. The new zoning ordinance based on the "policy" plan usually provides for application directly to the planning agency, which prior to action by the city council must make a recommendation stating whether the proposed amendment conforms to the policy plan. Some communities streamline the amendment process even further by providing that the legislative body be regarded as having approved the amendment if it does not formally disapprove it within a specified time after receiving the favorable recommendation of the planner.

It is this policy planning process that Professor Mandelker analyzed and studied. His model is that of a local government guiding future development by utilizing the amendment process in the zoning ordinance to allocate land resources in accordance with a prestated comprehensive plan. The King County plan recommends that apartments be permitted in some portions of the county, primarily near major highways and major shopping and cultural centers. Professor Mandelker studied 170 apartment rezoning amendment applications that were processed between September, 1967 and September, 1968. One purpose of the study was to determine which of the criteria in the policy-type plan appeared to have a substantial influence on the resulting zoning pattern.

As to this aspect of the study, Professor Mandelker concludes that "nothing in the comprehensive plan firmly told the zoning agencies which were the preferred locations for apartment development." Since none of the variables isolated in the study and in the plan "had an

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5 Almost all modern plans of cities are in this form. For a partial illustration, see the King County plan, which Professor Mandelker quotes at pages 121-22.
appreciably high explanatory value," there is doubt that the administrators avoided "arbitrary decision-making."6

In recent years lawyers have begun to express concern about the system of zoning described by Professor Mandelker. One theme, expressed by Norman Williams, is that this system is a perversion of the purpose of zoning, especially where prejudices against low- and moderate-income apartment housing are involved, and that local governments should be required to establish in advance districts where all kinds of apartments may be located "as of right."7 Another approach, suggested by Richard Babcock, is that the irrationality of the existing process should be controlled by subjecting zoning administration to the rigorous requirements of administrative law (and therefore the adversary process) even if an amendment is involved.8 A third argument, that of Bernard Siegan, is based on a comparison of an area zoned under the system described by Professor Mandelker with an area that is not zoned at all.9 It concludes that the zoning and amendment process tends to do what the market would do if unrestricted by zoning and that therefore the process only introduces a costly bureaucratic delay. Since the administrators allow the developer to do what the market would suggest that he should do, there is no real management of the allocation of land resources.

It is interesting to note that the same problem that Professor Mandelker perceived was seen by each of these authors without the benefit of an elaborately constructed statistical study. Unlike Professor Mandelker, however, each suggests a possible solution to the problem. As the title of Professor Mandelker's book indicates, he sees no solution but only a "dilemma."

What is his "dilemma"? I think it is his conclusion that whether government attempts to manage the allocation of land resources by administrative and "spot" amendments, as it does now, or attempts to allocate land resources by public ownership and disposition on specified conditions, an alternative considered by Professor Mandelker, a serious question of "equity" or discrimination among individuals remains: some will be "given" apartment house value by the government action and others, indistinguishable from them, will be denied this benefit. He regrettably does not attempt to explain why these

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6 Pp. 164, 167-68.
two methods of allocation are the only possible alternatives and con-
sequently fails to demonstrate that there is a "dilemma."

It is unfortunate that Professor Mandelker did not consider in
greater depth the economic history of the parcels studied and the
neighborhoods in which they are located. He examined a system in
which there was an apparent restriction on the supply of land avail-
able for apartment construction—a restriction arising from the fact
that not all land was legally available for apartments. His study
indicates, however, that approximately fifty-five percent of the re-
quested amendments were approved. He states that almost no apart-
ment construction resulted on the land rezoned and that at the time
of rezoning there was other land, already zoned to apartments, that
was vacant; but this finding is not drawn from his statistical survey.
His statement that the landowners who applied for rezoning were
trying to capture for their land a "floating apartment house value"
caused by the zoning process and that they did capture such value is
not supported by his factual study.

Professor Mandelker's conclusion that this assumed "floating apart-
ment house value" is an inequitable "externality" caused by the
zoning process is a questionable one. In an area without any zoning
some land would have apartment house value and some would not,
depending on the market's assessment of the highest and best use of
each parcel. Under a system in which a landowner must apply to the
government for an apartment house classification for land before it
can be called "apartment house land," the same result might well
follow. The zoning system requires in the first instance that some
owner do market research leading to a conclusion that there is a
demand for his land for apartment purposes. Depending on how the
zoning process is perceived in the commercial market, an owner of
"apartment house land" may be competing with all other land in the
area. For if the zoning administrators are likely to grant a zoning
amendment whenever a demand for apartment houses exists, then a
person seeking land for apartment uses really has a choice of all avail-
able land. True, the owner whose land is already zoned to apartments
may be able to get a higher price for his land, but only to the extent
of the value placed by the market on the elimination of one of the
transaction costs in using land for apartments—the cost of successfully
obtaining an amendment.

Indeed, the author seems to reach this conclusion himself in another
context. He states:

[Public agencies probably do not control enough of the inputs
into the land development process to make the public control of
land use and land development fully effective. Planning and zoning agencies may make land use and development allocations, but as the initiative for development remains in the private sector they have no control over the pace and location of development that occurs in response to planning and zoning proposals.\(^{10}\)

This statement would seem to suggest that a restrictive zoning policy does not increase the value of the land beyond that which the market would assign to it in a nonzoning situation, except as to the effect of a "prepaid" transaction cost on the value of a parcel already zoned to apartments.

The quoted statement of Professor Mandelker, however, is of profound importance for policy makers and planners, including the embryonic variety—the law and planning students—for whom in part the author states he has written the book. Government policy constituting an action program designed to achieve a particular societal goal must be constructed with full knowledge of which matters are controllable by government and which matters are not. The policy maker or planner could, of course, attempt to produce the state or condition that a study of the uncontrolled private decisions would indicate is the trend, Thus, if the uncontrolled private decisions of land owners, developers, and consumers appear to be producing apartment development in suburbs and "clusters," the planning agency could recommend in a policy-type plan that the suburbs make land available as needed for apartment construction but only clustered around urban centers. That is not, however, a government plan in the true sense of the word since it is not calculated to produce a result different from that which the sum total of relatively free private decisions would otherwise produce.

The uncontrollable elements referred to by Professor Mandelker are even more significant in a real attempt at government planning. A policy maker must determine which elements he can control, which he can merely influence, and which he cannot affect at all. If uncontrolled decisions in housing tend to produce development of "high-rent" apartments and apartments for one- or two-person families in suburbs, elimination by the suburban community of its requirements for single-family housing or large acreage per dwelling unit will not produce low-rent apartment housing; the trend of uncontrolled decisions indicates either that low-income families do not wish to compete for apartment shelter in the suburbs or that the intense unsatisfied demand of the affluent for suburban housing excludes them

\(^{10}\) Pp. 176-77.
from the market. If it is government policy to encourage economic and social integration of high-rent areas, efforts must be directed to either controlling or influencing the decisions of low-income and high-income households in order to induce the poor to live in suburbs and the wealthy to live elsewhere.

Given our existing values about liberty, it is hard to imagine a program of controlling private decision by prohibiting the rich from living in the suburbs and compelling the poor to live there. The alternative seems to be that of "purchasing" uncontrollable decisions. Many existing programs and proposals seem to ignore the large number of uncontrolled elements in any problem. Certainly existing programs for government intervention in the housing market do not seem to achieve their assumed goals.

The skepticism that Professor Mandelker expresses about the possibility of achieving certain goals by planning is a welcomed antidote to the claim that planning can solve problems. It is too bad, however, that Professor Mandelker found himself on dead center—the horns of a dilemma. Government policy makers cannot resign so easily.