

## THE NEW FEUDALISM

BY

JOHN McCLAUGHRY\*

America, so it seems, is caught up in a stampede for "comprehensive state land use planning," which is to say, comprehensive state land use controls. Hawaii, with its uniquely strong state government, led the way with its Land Use Law of 1961.<sup>1</sup> Vermont's pioneering legislation, popularly (and unpopularity) known as Act 250, came in 1970.<sup>2</sup> The same year saw the enactment of the Maine Site Location Law,<sup>3</sup> and the Florida Environmental Land and Water Control Act.<sup>4</sup> In 1972, California voters approved by referendum "Proposition 20," the Coastal Zone Conservation Act.<sup>5</sup> All of these measures impose state environmental controls over at least certain areas of the state. The Hawaii law, and the Vermont law if the process is carried to completion, will put the state in charge of all land use and growth, one way or another.

Parallel to this state activity has been a strong push for federal legislation, led by Senator Henry Jackson (D-Wash.) and Representative Morris K. Udall (D-Ariz.), both, no doubt coincidentally, declared candidates for the Democratic presidential nomination in 1976. Their bill, ultimately known as the "Land Use Planning Act," would have bestowed \$800 million upon the states over an eight year period to enable the states to embark on "comprehensive land use planning processes."<sup>6</sup> The urgency of this legislation

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\*President, Institute for Liberty and Community, a non-profit institute studying private property ownership. A.B. with Honors, Miami University, 1958; M.S., Columbia University, 1960; M.A., University of California, 1963. Formerly Member of the Vermont House of Representatives.

1. HAWAII REV. STAT. ch. 205 (1968).

2. VT. STAT. ANN. tit. 10, ch. 151 (1970).

3. ME. REV. STAT. ANN. tit. 38, §§ 48-488 (Supp. 1970).

4. FLA. STAT. ANN. ch. 380 (1972).

5. CAL. PUB. RES. CODE § 27100 (West 1970). For a description of the act in practice, see Bruce Johnson, *Piracy on the California Coast*, REASON, July 1974, at 18.

6. S. 268, H.R. 10294, 93d Cong., 1st Sess. (1973). Much has been written about this legislation; most of it approving. See LIBRARY OF CONGRESS, 93D CONG., 1ST SESS., NATIONAL LAND USE POLICY LEGISLATION: AN ANALYSIS OF LEGISLATIVE PROPOSALS AND STATE LAND LAWS (Comm. Print 1973); Healy, *National Land Use*

stemmed from the sponsors' realization that the citizens and taxpayers of the several states had little intention of expending such sums on land use controls, thus making a three-to-one federal matching program necessary. With considerable regret, Senator Jackson and Representative Udall abandoned, for the moment, a provision of the bill which would have required the states to take and use federal funds, regardless of their wishes, at the risk of losing substantial amounts of federal highway, airport, and land and water conservation funds.<sup>7</sup> (With even greater regret, they saw the House kill the measure in a dramatic 211-204 vote on June 10, 1974.<sup>8</sup>)

The goal of this movement has been explained through a catechism of slogans. "There is a quiet revolution in land use control." It reflects "the new mood" in America.<sup>10</sup> "Land is a resource, not a commodity."<sup>11</sup> "The public has rights as well as property owners."<sup>12</sup> "Land 'owners' are really land holders, who must exercise stewardship for the benefit of the broader community and unborn generations."<sup>13</sup> Leaving the slogans aside, however, it is clear that the operational goal of this movement is the centralization of all power over land in state—and ultimately federal—regulatory

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*Proposal: Land Use Legislation of Landmark Environmental Significance*, 3 ENV. AFFAIRS 355 (1974). For a less worshipful view, see McClaughry, *The National Land Use Planning Act: An Idea We Can Do Without*, 3 ENV. AFFAIRS 595 (1974). The successor to this ill-fated bill is H.R. 3510, The Land Use and Resource Conservation Act of 1975, introduced by Representative Udall and others on February 20, 1975.

7. The so-called "crossover sanctions" provision. By a vote of 52-44 on June 23, 1973, the Senate rejected an amendment to restore this provision to the bill reported by the Committee. In the House, the sanctions provision, § 112 of H.R. 10294, was deleted in the Interior and Insular Affairs Committee. See HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE PLANNING ACT OF 1974, H.R. REP. NO. 798, 93d Cong., 2d Sess. 33-35 (1974) for discussion of the committee's action.

8. 120 CONG. REC. H. 5041 (daily ed. June 11, 1974).

9. Cf. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

10. Cf. *THE USE OF LAND* ch. I (W. Reilly ed. 1973).

11. Cf. LEOPOLD, *A SAND COUNTY ALMANAC* (New York: Oxford University Press, 1949).

12. Cf. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). "Much of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of what shall be called 'public rights.'" *Id.* at 151.

13. Cf. editorial in the Brattleboro (Vt.) Reformer, Oct. 11, 1974: "If those of us who are alive in 1974 are not 'stewards' of the earth we live on, then we may be destroying the future for our sons and daughters and their sons and daughters."

agencies. The route to this goal is the creation of state-level institutions of government which can achieve the lofty objectives recited in the preambles of environmental acts only by steadily moving toward complete centralization of control over what until now have been known as private rights in land.<sup>14</sup>

The supreme irony of this movement is its determination to move forward by moving backward—backward to feudalism. For the advocates of the new land use control theories are rarely inspired by the glories of socialism and communism, such as the declaration of the Soviet Constitution that “the land \* \* \* is state property, that is, belongs to the whole people.”<sup>15</sup> Instead, their ideal society is one in which all property in land is not held in fee simple, as we now know it, but “of a superior.” That superior is no longer the King, since in a moment of possible irrationality our forefathers scuttled the idea of monarchy in 1776, but the State, a less personal but more permanent institution.<sup>16</sup>

This neo-feudal movement has placed a high premium on the services of lawyers. After all, if the goal is to undo a system of rights developed and solidified over five or six centuries, the only choice is between lawyers and Bolsheviks, and the latter have long since fallen out of favor on this side of the water. Thus some of the most

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14. This institution building strategy is well stated by Reilly, *New Directions in Federal Land Use Legislation*, 1973 URBAN LAW ANNUAL 29, reprinted in *LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM* (D. Listokin, ed. 1974). “The essential objective in the field of land use is institutional reform. Once states have established land use planning and regulatory processes along the lines likely to be required by the Federal law, it may be more appropriate to consider specific substantive directives aimed at preventing irresistible destruction of environmental values.” *Id.* at 355-57.

15. U.S.S.R. CONST. art. 6.

16. This restoration of feudal land law has been suggested on several occasions. Cf. Professor Francis S. Philbrick, in his classic article *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 710 (1938): “The disappearance of any long established social system must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public.” See also Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 247 (1965):

“[Feudal] duties became onerous, then unnecessary, and ultimately ridiculous so that the system itself dissolved, but the concept behind them was sound. Ownership of land does involve participation in the affairs of society, and the use of land is of more than private concern \*\*\*. It may be that the wrong concepts of feudalism survived—that we threw out the baby and kept the bath.”

eminent and capable lawyers in the land have devoted their talents to the new feudalism. Many more have busied themselves interpreting the new ideas and theories to yet others, who have clients of one sort or another whose interests are affected. Indeed, if the movement is truly successful, there may be a revival of practicing law courses in such currently neglected subjects as enfeoffment, allodium, saerstock and daerstock tenancy, and possibly the question of repealing *Quia Emptores* after 700 years.<sup>17</sup>

The purpose of the present exercise is to describe the genesis of the comprehensive land use control movement in the state of Vermont since 1969.<sup>18</sup> Since Vermont has by now just about run through the full cycle of environmental hysteria, state development controls, a statewide zoning battle, a catastrophic defeat, a sober reappraisal, and the slow beginning of a serious search for alternatives, the experience may well prove instructive for lawyers and citizens in other states. It might, in addition, shed some light on the direction of federal legislation, since the Vermont "process" was frequently lauded as a model of that envisioned under the Jackson-Udall Land Use Planning Act.<sup>19</sup>

### THE PROCESS IN ACTION—THE VERMONT EXPERIENCE

In 1968 the nation's economy was in high gear. People had money to spend, and many of those living in the larger cities of the Eastern seaboard began to consider buying second homes in some relatively accessible, yet unspoiled rural area. The urban disorders of 1967 and 1968 accelerated this desire for many upper-income whites.

Vermont had long been a beautiful but relatively distant

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17. Those wishing a head start in this area should consult A. SIMPSON, *INTRODUCTION TO THE HISTORY OF LAND LAW* (1961), and E. MAINE, *EARLY HISTORY OF INSTITUTIONS* (J. Murray, 7th ed. 1914).

18. In fairness, it should be pointed out that other views abound. For a good account by an environmentalist, see P. MYERS, *SO GOES VERMONT* . . . (The Conservation Foundation, Wash., D.C., 1974); see also F. BOSSELMANN & D. CALLIES, *supra* note 9, at 54-107 E. HASKELL & V. PRICE, *STATE ENVIRONMENTAL MANAGEMENT: CASE STUDIES OF NINE STATES* (1972); and Salmon, *Vermont: Public Support for Land Use Controls*, 46 *STATE GOV'T* 196 (1973).

19. Cf. remarks of Gov. Thomas P. Salmon on "The Advocates" television program, April 30, 1974: "We are already, in the State of Vermont, four years along in the process that is set up in the Jackson bill [S.268]." (From program transcript, WGBH, Boston.)

backwater, known mainly for laconic farmers and a devotion to the Republican ticket. But in the mid-60's, something new came to Vermont—the Interstate Highway System. By 1968 southern Vermont was a mere two hours drive from Boston, four hours from New York City. With its scenery, its skiing, its summer sports, and its relatively cheap land, Vermont suddenly became a mecca for urban expatriates and vacation home buyers. This did not escape the attention of second-home developers.

By summer of 1968 second-home developers were gobbling up southern Vermont's countryside at an unheard of pace. The International Paper Company, for example, proposed a huge second home village on 20,000 acres in Vermont's southeasternmost county. This trend led Governor Deane C. Davis to name a Governor's Commission on Environmental Control in May 1969. This commission, chaired by Representative (now Senator) Arthur Gibb of Weybridge, issued its report in the fall of 1969.<sup>20</sup> The report formed the basis for enactment of Act 250 by the 1970 legislature.<sup>21</sup>

The Gibb Commission could have relied upon the traditional Vermont practice of local government control of development. Indeed, as of mid-1968 Vermont towns had sweeping powers to control development. The newly enacted Municipal Planning and Development Act had authorized towns to impose stringent zoning and subdivision regulations, including such features as site plan approval, design control districts, performance standards, and planned unit development regulations.<sup>22</sup> In addition, local powers included requiring performance bonds before accepting private roads as town roads;<sup>23</sup> power to reject private roads altogether;<sup>24</sup> power to seek injunctive relief for nuisance;<sup>25</sup> and sweeping powers in sewage disposal and health-related matters.<sup>26</sup>

With some additional provisions and technical assistance from state experts and lawyers, these powers could have dealt with any conceivable development. But that would have required a

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20. Report, Governor's Commission on Environmental Control (Montpelier, Vermont, 1970.)

21. No. 250, [1969] Vt. Acts Adjourned Sess. 237, codified at VT. STAT. ANN. tit. 10, ch. 151 (1973).

22. VT. STAT. ANN. tit. 24, ch. 91 (Supp. 1974).

23. *Id.* § 4416.

24. *Id.* tit. 19, § 292 (1968).

25. *Id.* tit. 24, § 2121 (1967).

26. *Id.* tit. 18, ch. 11 (1968).

local will to act, and the Gibb Commission did not believe that local people would act to implement sufficiently stringent local rules to guide large developments.

Rather than providing expert assistance to local governments, the Gibb Commission embarked on another route—state control over development. In a gesture to local control, the commission recommended the creation of district environmental commissions, staffed by laymen, to pass on permits. The criteria for the issuance of permits would be written into state law. A State Environmental Board would prepare guidelines for the permit process and act as an appeals board. Finally, two important plans were to be prepared for subsequent legislative approval—the “capability and development plan” and the “land use plan.”

Initially, it was intended that the “capability and development plan” be sort of a master plan for the state, indicating which kinds of development were best suited to which areas, in light of numerous policy decisions. The plan made public by the Environmental Board in November 1972 made only a feeble attempt in this direction. The sweeping statements in the plan alarmed opponents of centralized planning, while the lack of detail and general vagueness dismayed the environmentalists. The result was something of a legislative debacle. The capability and development plan submitted by the board was promptly scrapped, as was an equally inchoate land use plan. In its place came a bewildering series of legislative drafts. Finally, on the last day of the 1973 legislative session, a bill bearing the name of a “capability and development plan” squeaked through to final passage.<sup>27</sup>

As the state planning director later admitted, however, the bill had little of a “capability and development plan” in it.<sup>28</sup> Instead, it added numerous refinements to the permit criteria section of Act 250, and stated 19 policies for future land use planning. These policies, however, had no regulatory force and effect and were not codified into the state statutes.

The final plan, the “land use plan,” was to be state zoning, pure and simple. Under the law, it was to “consist of a map and statements of present and prospective land uses based on the capa-

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27. No. 85, [1973] Vt. Acts 246.

28. According to Arthur Ristau, State Planning Director, “the Land Capability and Development Plan is not a plan at all. All it does is tighten up the holes in the sieve.” Rutland (Vt.) Herald, June 6, 1973.

bility and development plan, which determine in broad categories the proper use of the lands in the state \* \* \* to be further implemented at the local level by authorized land use controls such as subdivision regulations and zoning."<sup>29</sup> The appointed State Environmental Board would supervise the process.

The first attempt at a land use plan, unveiled in late 1972, was so inept a document that neither outgoing Governor Davis nor incoming Governor Thomas P. Salmon was willing to sign it. But it underscored an important fact: it revealed that the ultimate end of the "Act 250 process" was not merely the requiring of environmental permits from "large developers", but the complete centralization of power over the use and exchange of land in Montpelier.

For the first two-and-a-half years after enactment of Act 250 there had been no organized opposition, although there was some unhappiness among developers subject to the permit requirement. Ironically, it was not Act 250 at all but a related measure, the Health Department Subdivision Regulations, which provoked the organization of opposition culminating in the smashing defeat of the Act 250 land use plan.

To stall development until a comprehensive law could be passed, Governor Davis in September 1969 approved the adoption by his Health Commissioner of "subdivision regulations." These strict regulations had the ostensible purpose of preventing the subdivision of land into lots which lacked adequate sewage disposal capability. The regulations did not come into effect until the third lot was subdivided, so many farmers and rural land owners did not feel its strictures. (The subdivision regulations so far exceeded the powers of the Health Commissioner in 1969 that the 1970 legislature had to be asked to ratify them *ex post facto* by reference.)<sup>30</sup>

In November 1972, Human Services Secretary William Cowles (under whom reorganization had placed the Health Department) issued horrendous new subdivision regulations requiring, for example, a costly percolation test on *every acre* of a thousand-acre parcel divided into three parcels for sale. Bearing only marginal relations to sewage disposal, the new regulations were clearly designed to prevent subdivision of land.

At Lyndonville, in the state's relatively undeveloped Northeast Kingdom, 75 citizens came together in a spontaneous protest

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29. VT. STAT. ANN. tit. 10, § 6043 (Supp. 1974).

30. No. 249, [1969] Vt. Acts Adjourned Sess. \_\_\_\_.

meeting. About a third of those present were associated with the real estate business. Others were just land owners, large and small. Many were notably conservation minded, although that was more than the environmentally oriented daily press was willing to concede. The meeting resulted in the formation of the Landowners Steering Committee to fight back against the bureaucrats. As a means of getting public attention, the group pledged to post some 100,000 acres of Vermont land against hunting, fishing, or snowmobiling.

While the cause of the protest meeting was subdivision regulations, the Steering Committee quickly recognized that far more of the same kind of thing was on the horizon. Under the leadership of Lyndonville realtor Gerald Farrington, the Steering Committee adopted a reasonable and balanced five-point program to:<sup>31</sup>

- (1) reject the Act 250 statewide zoning plan;
- (2) put the responsibility for preserving the environment on the developer, not the mere seller of land;
- (3) prevent bureaucrats from imposing impossible regulations on the citizens without legislative approval;
- (4) enforce the laws against polluters; and
- (5) allow multiple use of state-owned lands.

Despite this very moderate program, the Landowners Steering Committee was continually roasted in the daily press. Its members were castigated as irresponsible hucksters and polluters hell-bent for personal profit at the expense of present and future generations.<sup>32</sup>

Governor Salmon, who had previously distinguished himself by leading a "mini-filibuster" against Act 250 as a member of the Vermont House, scored with the environmental organizations by inveighing against "land rapists and fast buck artists"<sup>33</sup> and ridiculed the "committee with the long name."<sup>34</sup>

The Steering Committee quickly broadened its board to include representatives from 10 of Vermont's 14 counties, and launched a series of public meetings and radio spots to alert Ver-

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31. Condensed slightly from *The Landowners Steering Committee Fights for Your Rights* Vermont Watchman, Apr. 1973, at 7.

32. Cf. Editorials in the *Caledonian Record* (St. Johnsbury, Vt.), Nov. 18 and Dec. 20, 1972; *Herald* (Rutland Vt.), Dec. 11, 1972.

33. *Free Press* (Burlington, Vt.), Feb. 16, 1973.

34. Following several occurrences of this gambit, the Landowners Steering Committee began to refer to Gov. Salmon as "the governor with the name of a fish."



monsters to the issues. The environmental organizations responded with meetings of their own, plus attempts to suppress the opponents.

Due in part to the vigorous efforts of the Landowners Steering Committee, and circulation of some 10,000 copies of its tabloid newspaper, the *Vermont Watchman*, the 1973 "capability and development plan" emerged from the legislature minus most of its teeth.<sup>35</sup> Much of that "plan" was either advisory in nature or non-controversial. Its main significance was that it was admittedly the legal foundation for the land use plan to be presented in 1974.

Following the 1973 legislative session, Governor Salmon called a press conference to announce that he intended to take personal direction of the program to develop a land use plan for 1974.<sup>36</sup> From the beginning, however, the State Planning Office and the State Environmental Board engaged in a running battle over the form of the plan to be produced. To the delight of the opposition, Governor Salmon seemed either unwilling or unable to insist on a resolution of these differences.

In September 1973 the State Planning Office, in conjunction with the various regional planning commissions, conducted a series of hearings on its proposal for a state land use plan. Scarcely had these hearings concluded when the Environmental Board took the field for its own set of hearings. Expressly disavowing the Planning Office draft, the Environmental Board offered no draft whatsoever. The purpose of the hearings was merely to gather opinion, said the board; then it would retire to its chambers and bring forth the plan for submission to the governor and legislature. This rather cavalier approach by the board produced prompt criticism, and the board was ultimately forced to produce a draft plan and conduct several additional field hearings on it.<sup>37</sup> Now, with the board's intentions revealed, public reaction arose quickly.

The board's proposed plan was simply a state zoning scheme.<sup>38</sup> The state was to be subdivided into seven zones. Each zone had its own set of purposes, allowed uses, prohibited uses, and density

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35. No. 85, [1973] Vt. Acts \_\_\_\_.

36. Herald (Rutland, Vt.), June 16, 1973.

37. Altogether, twenty-three hearings were held by the State Planning Office and Environmental Board without the all important map. The seven additional hearings held in December 1973 did much to stimulate the opposition forces by making the charge of statewide zoning credible.

38. Office of the Governor, State Land Use Plan (Jan. 1974).

limitations. Local towns were given a year to prepare a zoning map "furthering the purposes of the State Land Use Plan." If they failed to do so, the State Environmental Board would supervise the zoning of the town. To satisfy the State Environmental Board, a town plan would have to comply with 16 detailed criteria. Any mention of compensating landowners for confiscated property rights was scrupulously avoided.

A howl of protest went up at the unveiling of this plan—not only from landowners, but also from local government officials. The plan's emphasis on keeping rural areas undeveloped clearly meant that growth in taxable development would be directed to regional centers. The plan promised tax chaos as the restrictions changed the value of land drastically and unpredictably. The plan virtually ordered the towns to provide adequate housing for such people as the state thought ought to be living there—an idea already enunciated by the chairman of the Environmental Board, who claimed that towns should take over the responsibility for housing just as they had taken over schools and roads.<sup>39</sup> This same gentleman's uncautious declaration that "local control is out of the Dark Ages" did much to inspire and enlarge the opposition.<sup>40</sup> So did the deliberate refusal of the Environmental Board to produce the map clearly called for by the statute. In open session, the board members, recalling the poor reception given to the abortive 1972 land use map, debated the "practicability" of complying with the law.<sup>41</sup> Finally, they decided to ignore it and hope no one would notice. In this they made an egregious blunder.

Key legislators gave prompt notice to the board that if it intended to zone everyone's property, it would have to present the required map to the legislature. Two lawsuits to force the board to produce the map were filed, and although both were dismissed on technical grounds, they further dramatized the issue.<sup>42</sup> Throughout this furor Governor Salmon sided with the Environmental Board. Before a sportmen's gathering in January, he said that publication of the zoning maps would kill the whole plan—and that since his

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39. Free Press (Burlington, Vt.), May 23, 1973.

40. The statement was made in a debate with the author on Vermont educational television, Burlington, on January 19, 1973.

41. Free Press (Burlington, Vt.), May 24, 1973; Herald (Rutland, Vt.), April 19, June 14 and Oct. 18, 1973.

42. *Appleton v. Environmental Bd.*, No. C 9-74 OEC (Orange County Ct., filed Jan. 21, 1974); *Town of Kirby Planning Comm. v. Environmental Bd.*, No. C19-74CAC (Caledonia County Ct. filed Feb. 15, 1974).

plan was too important to suffer this fate at the hands of an outraged citizenry, no maps would be published!<sup>43</sup>

But pressure built up rapidly, until the Environmental Board reluctantly asked the Planning Office to bring forth the maps. The maps were released in mid-February. Due to the necessary imprecision in zoning a whole state from the capitol, and to the extreme haste in which the maps were completed and rushed to publication, the maps carried countless errors which were immediately detected by local government officials and landowners. But more importantly, the maps dramatized the land use plan as statewide zoning, a charge frequently made, but until that point not clearly proven.

And the board did another thing in its draft plan which produced a new wave of opposition. Since 1971 the board had been concerned about the inapplicability of the land use plan to developments too small to be required to obtain a permit, i.e., less than 10 units of housing.<sup>44</sup> So in October 1972 the board adopted a resolution asking the legislature to amend the law to make it applicable to even the surveying of lot lines on a single lot!<sup>45</sup> Not only did the legislature not honor this request, it responded by inserting in the land use plan section of the law a sentence affirming that the land use plan would explicitly *not* apply to anything but "developments" as defined in the act—meaning 10 or more housing units and industrial and commercial development on 10 or more acres (one acre in unzoned towns).<sup>46</sup>

When the board began to prepare a land use plan for 1974, this provision caused great perplexity. How could a meaningful statewide zoning plan be put forth, argued the planners, when anyone might build nine houses in any open field without being governed by the restrictions in the plan? The board decided to ignore this provision of law by presenting a plan which covered every single acre, every single lot, in the state of Vermont.

Within 60 days of its approval by Governor Salmon, and

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43. This is the eyewitness report of two separate observers present at the meeting at Randolph, Vt., January 20, 1974.

44. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1974).

45. Unnumbered resolution, approved October 1972. The text is reprinted in the April, 1973 Vermont Watchman under the headline, "The Environmental Board Wants All You Got."

46. No. 85, § 4, [1973] Vt. Acts —, amending VT. STAT. ANN. tit. 10, § 6043 (Supp. 1974).

within 40 days of the publication of the maps, the 1974 Land Use Plan was stone-cold dead. The end came at a tumultuous public hearing before the House Natural Resources Committee on February 26, 1974. Farmers, landowners and just plain citizens flocked to Montpelier 800 strong to berate the plan for over four hours, while only a handful of special interest representatives, principally architects, rose to defend it. The committee, which had voted in favor of a watered-down version of the plan by a 7-to-4 margin the previous day, voted 9-to-2 the following day to shelve the whole project for 1974.

Recognizing that the map was a major cause of the public uproar, Governor Salmon quietly caused to be introduced into the House a modest measure eliminating the requirement that any state land use plan "shall consist of a map."<sup>47</sup> This measure was dutifully brought to the floor by the Natural Resources Committee, where, in the words of the ardently pro-environment *Rutland Herald*, it was "belted out of sight."<sup>48</sup> As a desperate effort to salvage something from the legislature, the Governor finally pried from it a bill to require Act 250 development permits whenever more than five lots were to be sold at public auction.<sup>49</sup> This wholly illogical piece of legislation was based on the idea that public auctions were highly visible, and thus imposing regulations on them would satisfy the more distraught environmentalists favoring an embargo on the sale of land by other people, while not causing additional inhibition to the private, covert sale of land by the same people.

Finally, the legislature established by resolution a Land Use Study Committee, charging it to meet during the eight month recess period "to review all laws, rules and regulations relating to land use planning."<sup>50</sup> This 13 member group met almost weekly for four months. Despite its mandate to review the entire subject, the majority of the committee voted to allow discussion only of zoning and capital investment controls. Its final report was little more than a watered down version of the defeated land use plan.<sup>51</sup> This produced three different reactions.

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47. H. 529, Vermont House of Representatives, 1974. The measure acted upon was a committee-sponsored amendment which replaced the original text of the bill. See Vt. H.J. 632 (Mar. 27, 1974).

48. *Herald* (Rutland, Vt.), Mar. 28, 1974.

49. No. 256, [1973] Vt. Acts Adjourned Sess. 436.

50. R-78, [1973] Vt. Acts Adjourned Sess. 636.

51. Final Report, Special Committee on Land Use (Montpelier 1974).

First, the chairman of the committee, Representative Robert Kinsey of Craftsbury, a farmer concerned about saving the environment, but increasingly resistant to the centralization of power at the state capitol, issued a stinging "minority report."<sup>52</sup> Kinsey charged that the report proposed a "unique medieval system" where citizen action was made subservient to the decisions of the "King and his Court." The Environmental Board's activities, he went on, "lend credibility to the charges of 'Kangaroo Courts.'" Second, Governor Salmon called the committee into his ceremonial office to receive their report and there, with as much grace and charm as he could muster, told them that it did not go far enough and would have to be improved upon by his staff.<sup>53</sup> And finally, the author, frequently referred to as a spokesman for various groups opposing state land use controls, presented a critique focusing sharply on the committee's refusal to even listen to any technique for dealing with land use and growth problems other than zoning and public investment controls.<sup>54</sup>

The Governor promptly began work on his own version for 1975, placing the responsibility not on the Environmental Board, which had already exhausted its opportunities for bungling the matter, but on the State Planning Office. This had the incidental effect of permitting the circumvention of the requirements of Act 250 that any land use plan should be aired at public hearings in each of the nine environmental control districts,<sup>55</sup> and that it should be submitted to the more than 200 town and regional planning commissions for a thirty day review period before being sent to the legislature.<sup>56</sup>

On January 17, 1975, Governor Salmon unveiled his new model to the public. A year previous, he had said in signing the ill-fated 1974 plan that it was a "local control document" that

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52. Minority Report, Special Committee on Land Use (Montpelier 1974).

53. Reported in the *Herald* (Rutland, Vt.), Sept. 25, 1974.

54. *Vermont Watchman*, Nov. 1974, at 11.

55. This had been required in the original Act 250, VT. STAT. ANN. tit. 10 § 6044 (1973). The action of Governor Salmon in circumventing the public hearing process in 1974 seems curious in light of his recurring oratory about the vital importance of citizen involvement: "If the times demonstrate anything, they demonstrate that where we can go wrong is to fail to seek the counsel of the people, to search out their views and ask them for guidance." (Inaugural Address, January 10, 1975.) See also Salmon, *Vermont: Public Support for Land Use Controls*, 46 STATE GOV'T 196 (1973). Perhaps Governor Salmon came to dislike the counsel offered by the people.

56. VT. STAT. ANN. tit. 10, § 6045 (1973).

would "encourage local communities to put their house [sic] in order."<sup>57</sup> In 1975, however, he took a slightly different tack, saying that the new plan was "a local control plan" allowing the local communities to "get their house [sic] in order."<sup>58</sup> The new plan preserved the basic state-supervised zoning scheme intact, relaxing various requirements as to designation of zones, deadlines for compliance, burden of proof, and the imposition of state controls in the case of towns whose citizens were so backward and reactionary as to fail to zone themselves to state satisfaction on schedule.<sup>59</sup>

The Salmon Plan was introduced in the general assembly,<sup>60</sup> along with the plan favored by a majority of the summer Land Use Study Committee.<sup>61</sup> Despite the election of a sharply increased number of legislators of the Governor's Democratic party, including a Democratic Lieutenant Governor and Speaker of the House, the wave of enthusiasm so evident in 1972 was strikingly absent. Indeed, no less a personage than Benjamin W. Partridge Jr., the Windham lawyer who had been the first chairman of the Environmental Board, came before the legislature to state in no uncertain terms that no regulatory land use plan of any kind should be adopted.<sup>62</sup> Instead, he said, the state should devote its resources to preparation of a sound technical data base as to the environmental impact of development, and the creation of controls over public investments by public bodies at all levels in furtherance of a rational state plan. He continued to support the present permit system for the so-called "larger developments."

Meanwhile, the chief draftsman of the original Act 250 and its various amendments, attorney Jonathan Brownell of Montpelier, said in a public statement that the 1975 legislature should not attempt to adopt any kind of land use plan.<sup>63</sup> Skeptics initially interpreted Brownell's remarks as reflecting his judgment that it would be better for environmentalists to lay low until the 1974

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57. As reported in the Free Press, (Burlington, Vt.), Jan. 9, 1974.

58. From actual transcript of the Governor's news conference, January 17, 1975.

59. Proposed State Land Use Plan (State Planning Office, Montpelier, 1975). Printed in full in the Vermont Watchman, Feb. 1975, at 3, col. 1.

60. H.R. 201 (Vt. 1975).

61. S. 70 (Vt. 1975).

62. Herald (Rutland, Vt.) Feb. 6, 1975. His testimony repeated his views expressed in a memorandum of December 19, 1974, printed in the Vermont Watchman, Feb. 1975, at 6, col. 1.

63. Remarks made on cable television on an interview show in Rutland, Vt., Jan. 13, 1975; reported in Herald (Rutland, Vt.), Jan. 14, 1975.

backlash had exhausted itself. An article written by him in a fairly obscure legal periodical then came to light, however, which put a different face on the matter.<sup>64</sup>

In the article, which had passed unnoticed in Vermont for several months, Brownell cast serious doubts upon the entire Act 250 regulatory process. At the same time he admitted many of the charges made by opponents to state land use control, which had hitherto been dismissed by the news media as the feverish ravings of John Birchers and other irresponsible types. Brownell first admitted that "it is the purpose of the land use map to control the settlement pattern and distribution of all growth within the state in order to conserve the open and productive lands which may now surround our communities but which would otherwise be lost to development, whether or not environmentally pure."<sup>65</sup> This admission confirmed the charges of opponents that the ultimate and of the Act 250 process was complete state control over all growth in Vermont.

Brownell then went on to list four "unresolved issues" which "must be resolved before we get too far down the road of adopting comprehensive statewide land use laws."<sup>66</sup> The first of these is jurisdiction. Act 250, for example, does not apply to less than ten units of housing, or to commercial and industrial developments on less than ten acres of land (one acre in unzoned towns).<sup>67</sup> Wrote Brownell:

There is an unwanted and unforeseen result to such a jurisdictional line being drawn: the aggregate of the small haphazard and unplanned developments not falling within state jurisdiction, which may be ignored or granted blanket variances by the local jurisdiction, can cause as great or greater pollution of our water and air, cause as severe an impact on our existing roads and schools, and result in as great a loss of our farm and forest productivity as those developments our statutes define as large enough to be of "critical state concern."<sup>68</sup>

In other words, because of the Act 250 jurisdictional line, the state can control the big developers, but hundreds of small developers

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64. *State Land Use Regulation: Where Are We Going?* 9 REAL PROP., PRO. & TRUST J. 29 (Spring 1974).

65. *Id.* at 30.

66. *Id.*

67. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1974).

68. Brownell, *supra* note 62, at 30.

and individual landowners can nickel-and-dime the environment to death without coming under Act 250. Brownell continued:

Unless we can resolve the jurisdictional question, we may force a paradoxical result, that of stopping the large developments which may be the very ones the community should encourage because of their substantial capital investments in pollution control equipment, road and school construction and open space planning, while allowing the smaller developments to slip under the net of regulation, even though they are the ones too small to afford either the protection of natural resources or the prevention of fiscal impact on the community.<sup>69</sup>

What Brownell points out here is precisely what Act 250 opponents have charged all along. The regulations will have to try to extend Act 250 to take in every single acre and every single home; indeed, the Environmental Board has already tried twice to do this. And the target of the regulators is not really the big developers, who have the expertise and political muscle to satisfy the Environmental Board, but the small developer who has neither.<sup>70</sup>

The second unresolved issue is that of determining "undue adverse effect" on the ability of a community to pay for services required by new developments. Here, Brownell says, Vermont finds itself in the position of "having adopted criteria which as a theoretical matter cannot be proved to have been met, at least with the administrative tools with which review boards and executive agencies have at hand."<sup>71</sup>

The third unresolved issue has to do with the review process. Brownell points out that the criteria of "net benefit" to the community cannot be determined objectively; it must be a political decision. Yet Act 250 treats this determination as if it could be settled by reference to facts. "[W]e have found," says Brownell, "that the statutory allocation of burden of proof for the various

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69. *Id.* at 31.

70. Interestingly, this point was noted by the Liberty Union, Vermont's left-wing third party.

"I am opposed to such plans precisely because I believe that the large developers will benefit, while the average person will suffer. The big developers can afford to hire the legal and technical expertise that is necessary to meet the many restrictions and requirements of land use planning while the average person who just wants to build a house cannot."

Statement of Martha Abbott, Liberty Union candidate for Governor, Vermont Watchman, Nov. 1974.

71. *Id.*



criteria between the applicant for a development permit and any opponent determined the result of the case."<sup>72</sup> That is to say, it all depends on the locus of the burden of proof whether a permit is granted. This admission undercuts the whole idea of determining this "net benefit" as a quasi-judicial proceeding. It admits that however the legislature places the burden of proof, that side will almost always lose when the issue is later pressed in specific cases.

Finally, Brownell grapples<sup>6</sup> with the thorny issue of constitutionality. With respect to what Brownell calls "radical land use legislation" one major question is how far communities can go to limit future growth. This question, he says, appears to make a decision as to whether a community has some kind of "need" to pass an exclusionary ordinance.

A second constitutional issue is the taking of private property through regulation. Here the law is in a state of flux and uncertainty, with no clear standard emerging to govern the point at which the regulatory body must compensate landowners for property rights taken. This whole question of "taking" is one that has been carefully avoided by Vermont environmentalists as far as possible, for, as Brownell notes, it is of the "highest political sensitivity." Which is to say, when the average landowner realizes what land use plans will do to his land values, he will march on the statehouse. In conclusion, Brownell states:

I am deeply concerned with the dissolution of clear judicial standards for valid legislative action under the Constitution, which provided clear guidelines to legislatures and the public for the limits of government's power, guidelines which took longer to change and alter than a simple legislative session. I suspect that, in our zeal, we may well have taxed beyond their capabilities the present structures of governmental decision making for the resolution of issues such as those discussed above.<sup>73</sup>

The defection of Partridge and Brownell, two of the leading lights of the land use control movement, from the 1975 campaign to pass a land use plan left Governor Salmon a noticeably isolated advocate.

To make his plight more serious, the national recession had produced a serious impact on Vermont. By early 1975 the state employment security fund was \$4 million in debt to the Federal

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72. *Id.*

73. *Id.* at 33.

government due to high unemployment claims. Declining state revenues had produced an \$11.6 million deficit for Fiscal Year 1975, enormous by Vermont standards. Housing and construction industries were dormant, as was mortgage lending. A major corporation, the Parsons-Whittemore Company, announced it would locate a new \$200 million wood products plant in New Hampshire instead of Vermont, due in large part to Vermont's environmental laws and restrictions and negative business climate.<sup>74</sup> Finally, the Vermont Natural Resources Council, a prestigious tax exempt organization which had been extremely active in promoting environmental controls, lost its tax exemption for engaging in propaganda in support of specific legislation, contrary to Internal Revenue Service regulations.<sup>75</sup> All these factors taken together made enactment of a land use plan highly unlikely.<sup>76</sup>

Governor Salmon did, however, take a related step by executive order.<sup>77</sup> This was the creation of a process for coordinating state-aided capital investment in public facilities and infrastructure. This new policy for the first time recognized that the growth of Vermont depended in large measure on the availability of services provided by government funds, and sought to bring those investments in line with a rational overall plan. Ironically, just such a policy had been urged on Governor Salmon in the *Vermont Watchman* almost two years before. Commenting rather wryly on Governor Salmon's action, the February 1975 *Watchman* expressed its hope that the Governor would "promptly put into practice many of the other valuable suggestions that have appeared in the *Watchman's* pages."<sup>78</sup>

Thus, as of mid-1975, the land use control movement that had erupted with such force in 1969 had largely ground to a halt. After three years of gathering momentum, the tide began to turn in early

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74. News report, WCAX-TV (Burlington, Vt.) Jan. 17, 1975. Reprinted in the *Vermont Watchman*, Feb. 1975, at 2, col. 1.

75. *Herald* (Rutland, Vt.), Oct. 12, 1974.

76. The House Natural Resources Committee discarded Governor Salmon's proposed plan (H.R. 201) promptly upon its arrival. On March 19 the committee voted out a clean bill, H.R. 383, which was promptly criticized by all sides as vague, confused, and totally meaningless. This bill was then referred to the House Agriculture Committee, which on April 1 gave it a 6-2 adverse report, and to the House Ways and Means Committee, where it continued to repose upon adjournment of the 1975 legislative session.

77. Executive Order No. 2, Jan 14, 1975.

78. *Vermont Watchman*, Feb. 1975, at 16, col. 3.

1973, and by 1975 it was flowing strongly in the opposite direction. This may, indeed, be a typical cycle to be experienced by other states as well; there is nothing unduly peculiar about Vermont that would suggest the contrary. Having recounted the five year episode in Vermont, it is now time to examine that episode for characteristic features that might well be replicated in other states.

## CHARACTERISTIC FEATURES OF THE LAND USE CONTROL MOVEMENT

### *The Idea of Social Property*

Underlying the movement for the New Feudalism is the concept of "social property." It is the polar opposite to the "sole and despotic dominion" claimed for the freeholder by Blackstone.<sup>79</sup> Under the "social property" concept, common both to feudalism and socialism, land is always held at the suffrance of a superior.<sup>80</sup> In olden times, there was a long chain of superiors starting at the top with the King and extending downward through duke, baron and lord to serf. Under the New Feudalism, the ultimate superior is the State—or possibly the Federal—government (although it is not entirely clear what constitutional power Congress might seize upon to effect the direct regulation of the use of land). The once free and independent landowner becomes the modern counterpart of the serf.

The ideas of freehold and social property necessarily tend to approach each other. No freeholder may, Blackstone notwithstanding, use his property so as to injure the property rights of another.<sup>81</sup> Nor may he waste and destroy his land, or claim access to facilities provided by the public on his, rather than the public's, terms. But under freehold land ownership, the presumption favors the use, enjoyment, power to convey, and power to exclude of the landowner of record, and the various qualifications, though not unimportant, are incidental.

Under social property, by contrast, land is presumed to belong to society; so-called land "owners" are merely land "holders" with

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79. 2 W. BLACKSTONE, COMMENTARIES \*1-2.

80. For a description of feudal land law, see A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF LAND LAW (1961), and HARGREAVES, INTRODUCTION TO THE PRINCIPLES OF LAND LAW (4th ed. 1963).

81. The familiar "sic utere tuo, ut alienum non laedas."

a temporary usufruct, subject to termination upon society's demand. But since continuous governmental management of every square foot and every use is not administratively feasible, the social property school concedes to the "holder" the privilege (though not the right) of engaging in various small-scale and relatively innocuous uses without obtaining governmental permission. But such "freedom" derives only from administrative limitations, and there is no right of the "holder" to act independently.

In Vermont, with a relatively conservative political history, the "social property" theory was rarely enunciated with any great precision. Rather, the case for centralization of land controls was continually made in terms of "minor modifications" of the existing freehold system enshrined in the Vermont Constitution.<sup>82</sup> It is even possible that some of the advocates of land controls sincerely failed to recognize that their proposals were based on a social property doctrine. Those who were willing to bite this bullet, however, spoke in these terms:

I advocate nothing less than doing away with private ownership as it concerns real estate. We will have to change our legal philosophy to do that. We will have to stop thinking of land ownership and start thinking of land holdership.<sup>83</sup>

The property you possess in the form of real estate does not belong to you. It belongs to the government and the government is the people.<sup>84</sup>

When it comes to ownership of land, we are nothing more, and never should be anything more, than very temporary trustees with a direct responsibility for its protection and use.<sup>85</sup>

These public statements illustrate the basic social property approach of the New Feudalism.

### ***The Lofty Goals***

The preamble of every environmental bill sets forth a series of

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82. VT. CONST. arts. 1, 2. Jonathan Brownell, the chief architect of Act 250, now, however, refers to the Vt. act as "radical land use legislation." *Supra* note 59, at 32.

83. Former House Appropriations Chairman R. Marshall Witten of Bennington, quoted in the *Boston Globe*, Apr. 16, 1973.

84. Letter to the *Herald* (Rutland, Vt.) from Francis P. Rudnicki, Poultney, Vermont, July 24, 1974.

85. Letter to the *Free Press* (Burlington, Vt.) from W. Douglas Burden, a leading environmentalist of Charlotte, Vt., Aug. 9, 1974.

lofty goals which it is said that society must achieve, or else. It is significant that individual liberty and a republican form of government never appear in such a list, although at least a few Orwellian attempts have been made from time to time to equate "planning" with "freedom."<sup>86</sup>

Section 6042 of Vermont's Act 250 is a classic example of the recitation of lofty goals:

The board shall adopt a capability and development plan consistent with the interim land capability plan which shall be made with the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the state, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development, including but not limited to, such distribution of population and of the uses of the land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other uses as will tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population and tend toward an efficient and economic utilization of drainage, sanitary and other facilities and resources and the conservation and production of the supply of food, water and minerals.<sup>87</sup>

The remaining sentence of this section incorporates the purposes stated in the "purpose" section of the state's local planning and zoning enabling act.<sup>88</sup> And if that were not enough, the 1973 legislature added a series of nineteen generalized instructions to society covering everything from utility corridors to archeological sites to transportation systems (which, for example, must be "mutually supportive, balanced, and integrated").<sup>89</sup>

Here, then, are sweeping and lofty goals. There is to be a bureaucracy charged with achieving those goals. That bureaucracy will never be able to achieve those goals so long as free citizens go about their business in ignorance of the Grand Design revealed to,

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86. See, e.g., Vermont Environmental Conservation Secretary Martin Johnson: "I see [the capability and development plan] as about our last chance to maintain our freedom, our freedom of choice in particular," *Herald* (Rutland, Vt.), Dec. 19, 1972.

87. VT. STAT. ANN. tit. 10, § 6042 (1973).

88. *Id.* tit. 24, § 4302 (Supp. 1974).

89. No. 85, § 7, [1973] Vt. Acts 248.

or at the least prepared by, the planners.<sup>90</sup> Thus the combination of lofty, unattainable goals and a bureaucracy charged with their achievement must necessarily lead to steadily advancing controls over individual freedom of action. There can be no logical end to this process. No sooner is one outrage brought under control, for example, the unconscionable sale of land parcels at public auction,<sup>91</sup> than another regulatory step must be taken, i.e., requiring a small town government to obtain a permit for improving one third of a mile of existing gravel road.<sup>92</sup>

### ***The Affirmation of "Broader Interests"***

The bane of Grand Designers is local control over land use and development. What was perfectly agreeable to planners in 1925, when the Grand Design was envisioned only at the local level, is now anathema. The process so hopefully started in 1924 by the Standard State Zoning Enabling Act<sup>93</sup> to regulate land use has been captured by local interests oblivious to the needs of the "broader community". This "broader community" is most commonly the region or the state, but occasionally includes the whole of North America and even all of "Spaceship Earth."

The argument has thus arisen that local land use control actions fail to recognize the interests of the "broader community." Local governments have abused or misused the grant of police power. Hence the time has come for the government representing the "broader community" to at least supervise the local land use control process, and perhaps to recover the police power delegated decades ago and exercise it from some more elevated vantage point.<sup>94</sup>

There can be little doubt that, nationally speaking, local governments have in many cases used the police power unwisely and even corruptly.<sup>95</sup> It should be pointed out, however, that removing

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90. For an example from history, see Pettengill, *The Old Regime*, THE FREEMAN, Sept. 1962.

91.. *Supra* note 49.

92. The town of Peru, Vermont's (pop. 243) ordeal is described in the February 1975 Vermont Watchman, at 11, col.1; also described in the Herald, (Rutland, Vt.), Jan. 9, 1975.

93. Reprinted in LIBRARY OF CONGRESS, 93 Cong. 1st Sess., National Land Use Policy Legislation: An Analysis of Legislative Proposals and State Laws 480 (Comm. Print 1973).

94. Cf. remarks of Jonathan Brownell in debate with the author, reported in the Herald (Rutland, Vt.), Dec. 4, 1974.

95. An extensive case is presented in R. LINOWES & D. ALLENSWORTH, THE

the relevant aspects of the police power to a higher level of government may only remove the foolishness and corruption to a higher level. This has, indeed, been ably argued by Dr. Frank Popper, a Harvard trained planner.<sup>96</sup> The thought that perhaps the defect lies not in the level of government, but in the exercise of the police power itself, rarely seems to occur to the New Feudalists.

### ***The Rejection of Alternative Remedies***

There are a host of techniques for guiding responsible growth that do not require adherence to the doctrine of the New Feudalism. Among them, for example, are public investment controls; transferable development rights; graduated taxation; public acquisition and land banking; a reformulation of nuisance law; guaranteed value and compensated regulation plans; and an institutionalized private covenant system.<sup>97</sup>

The rejection of these alternatives by Vermont environmentalists was significant. For it revealed that their goal was not so much protecting the environment, guiding responsible growth, etc., but the concentration of power over the use and exchange of privately-owned land in the State, which they presumed they would be able to control. For example, the 1974 summer land use study committee of the legislature actually voted to rule out any discussion of any of the aforementioned techniques (except public investment controls), despite its mandate to examine "all laws, rules and regulations relating to land use planning."<sup>98</sup> Indeed, throughout the whole five year struggle, proponents of alternative techniques steadfastly refused to even discuss anything other than uncompensated police power controls. For almost all of those techniques would have obviated any need for an all-powerful board or bureaucracy passing on the desirability of actions by citizens.

### ***The Marketing Strategy***

The first round in any environmental control battle will almost necessarily be an impassioned appeal to "stop pollution" and "save the environment" for "our children's children" against the

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POLITICS OF LAND USE (1973).

96. *Land Use Reform: Illusion or Reality*, PLANNING, Sept. 14, 1974, at 14.

97. References to many of these techniques are given in the author's article, *The Land Use Planning Act: An Idea We Can Do Without*, 3 ENV. AFFAIRS 595 (1975).

98. R-78, [1973] Vt. Acts Adjourned Sess. 636.

"ravages of uncontrolled development." Examples of this rhetoric are so numerous as to make citation unnecessary. Suffice it only to say that the goal of this emotional appeal is to put any voices of balanced judgment into the same category as unscrupulous developers and land speculators. There is something reminiscent of the campaigning of the Red Guards in China's Cultural Revolution in all this, although no one has yet attacked the opposition as "running dogs of the imperialist capitalistic land developers."

A second ingredient of the marketing strategy is the importation of experts to dispense wisdom to the ignorant citizens of the state. Governor Salmon, for example, named as his Environmental Board chairman Mr. Schuyler Jackson, formerly Director of Housing and Urban Renewal for New Jersey, a state whose successes in land use planning are widely celebrated. Serving on Jackson's Environmental Board were eight other citizens, of whom only one was Vermont-born. One had come to Vermont in 1919 as a child, another as a college professor in 1942. The remaining six, including Jackson, had arrived after 1960.<sup>99</sup> To further edify Vermonters, a wealthy environmentalist imported University of Michigan Law School Professor Joseph Sax to speak at a public meeting, hosted by the Governor himself, on the subject of how public rights could be made to overcome private rights in land.<sup>100</sup>

The third ingredient might be called "clamor generating." This is an attempt not only to persuade the average citizen that he is deeply concerned about growth and development—which many citizens are—but also that increasing public controls over private property is the sole solution to the problem. The Vermont Natural Resources Council obtained a grant of \$120,000 in 1971 from the Ford Foundation to underwrite an Environmental Planning Information Center.<sup>101</sup> Part of the program of the Center was to "employ a variety of educational techniques to stimulate broadly-based citizen participation in the formulation of the Vermont Capability and Development Plan."<sup>102</sup>

According to the Ford Foundation newsletter announcing the grant, a "prime function of the council is to ensure the widest communication and understanding of facts and maximum public

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99. The biographies are taken from the VERMONT LEGISLATIVE DIRECTORY AND STATE MANUAL, 1971-72, at 583-86, and from state files. They are printed in the Vermont Watchman, Jan. 1974.

100. At the Pavilion Office Building, Montpelier, Vt., July 19, 1973.

101. Ford Foundation Letter, July 15, 1971, at 8.

102. Vt. Nat'l Resources Council news release, June 21, 1971.



participation before a final plan is prepared for Vermont's legislature next year."<sup>103</sup> For openers, the program produced a slide show entitled "So Goes Vermont . . .", which was shown extensively at public meetings and on television. "The sound track's only voices were those of Vermonters who watched brutal subdivision builders chop away at their land and expressed their hope that Act 250 could put a stop to haphazard growth."<sup>104</sup> This was followed by a professionally supervised poll to discover the extent to which the slide show and other propaganda had incensed Vermonters about "brutal developers", etc. "This poll became the basis for future citizen education strategy as well as the source of statistics frequently recited to legislators to prod them along," according to a report by the Conservation Foundation.<sup>105</sup>

Fourth, following the generation of sufficient clamor for stopping pollution, comes the bait and switch so beloved by discount merchandisers. For it turns out that it is not just control over pollution that Vermont environmentalists wanted. They wanted total control over growth, which is a completely different matter. Once Vermonters were foaming at the mouth about the iniquity of pollution, Governor Salmon pulled the switch. Instead of antipollution laws, he explained, the real need is a law to put the State in charge of growth. The state must have the power to veto growth, he stated, even where the proposed development meets ecological standards.<sup>106</sup> It is ironic that this well-known though somewhat reprehensible technique of "free enterprise" was employed by the critics of free enterprise to advance a contrary doctrine.

Fifth, the marketing strategy calls for outspoken vilification of opponents. It is necessary to portray opponents of state land use controls as, to use Governor Salmon's terms, "land rapists and fast buck artists," whose every argument is unworthy of a public hearing.<sup>107</sup> Perhaps the nadir of this technique was reached on February 15, 1973 at a meeting of state bureaucrats who had been brought together for a briefing before being sent out to persuade the citizenry that state land use controls were good for them and their families. Environmental Conservation Secretary Martin Johnson, a state cabinet officer, launched this missile at the Landowners Steering Committee:

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103. *Supra* note 99.

104. P. MYERS, SO GOES VERMONT \* \* \* 26 (1974).

105. *Id.*

106. Free Press (Burlington, Vt.), Sept. 5, 1973.

107. *Supra* note 33.

This group is using tactics we have seen throughout the nation—techniques of fear, distrust, distortion, hysteria, misstatement, and innuendo. All these far out types, regardless of what they are pushing—crime, drugs, prostitution, communism, fascism, or land speculation—use these same techniques and then try to hide behind our Constitution.<sup>108</sup>

Strangely, none of Vermont's liberal editorialists, environmentalists, or public figures took any exception to his outburst. And later, when the Landowners Steering Committee proposed a "truth panel" to pass judgment on statements, claims, attacks, etc., not one environmental group or state official was willing to endorse the proposal.<sup>109</sup>

Sixth, the legislative component of the strategy calls for the progressive expansion of the controls to every single lot in the state. The attempt of the Environmental Board to eliminate the exemption for small landowners, as well as the response of the 1973 legislature, has been treated.<sup>110</sup> Yet, despite the legislative rejection of the scheme, the 1974 land use plan sent to the legislature by Governor Salmon attempted once more to apply the plan to every single lot in the state, no doubt one strong reason for its rejection.

Seventh, the map is to be avoided at all costs. Again, the Environmental Board's attempt to circumvent this Act 250 requirement is instructive.<sup>111</sup> Production of a map has a strong impact on the public. It dramatizes the fact that a state land use plan is state zoning, something the backers were at pains to deny until the appearance of the map made further protest pointless. The last ditch attempt of Governor Salmon to eliminate the map requirement in the 1974 Legislature underscored the truth of this observation.

Eighth is the technique of draft switching. A bill to implement a state land use control program is necessarily fairly complicated. Vermont environmental advocates had a clever technique of switching drafts just as soon as the citizens began to catch on to what was being proposed. They were then able to say that the question referred to an earlier, discarded draft, and hence was no longer relevant. This leaves inquiring citizens always at the mercy of officialdom.

These techniques have been described in the hope of making clear to citizen groups and their counsels in other states what tactics are likely to be employed in the selling of state land controls. It is even possible that there are additional tricks of the trade that Vermont proponents overlooked.

All of this elaborate campaign to sell the New Feudalism is, in the author's view, based upon a certain contempt for the intelligence of the ordinary citizen and the principles of democratic decision making. This is not to claim that opponents of state land use controls may not also launch equally unprincipled campaigns. But in Vermont, at least, the proponents set the style and level of the debate at the beginning, and must accept most of the responsibility for the subsequent campaigns on both sides.

A dispassionate, reasonable and principled statement advocating the imperative of forsaking freehold property for the New Feudalism would at least have been worthy of respect. In Vermont no such presentation was ever made. It is likely that such a presentation would be doomed to immediate failure, at least the first time around. Unhappily, public figures today seem to place exorbitant emphasis on winning by any means available, all rhetoric notwithstanding. And the news media, at least in Vermont, were perfectly willing to encourage hysteria and environmental extremism, not only by editorials, but also by selectivity, bias, and outright fabrication in the news columns. That the people of Vermont largely came to resist this campaign is a tribute to their common sense.

### CONCLUSION: THE NEW FEUDALISM

This lengthy examination of the Vermont experience in land use controls is intended to serve as a case history in the genesis of the New Feudalism. It is not the only interpretation that might be placed on the events of the five year period, of course.<sup>112</sup> But it documents the central thrust of the Vermont experience: the effort to replace freehold property by social property, which is the basic tenet of the New Feudalism.

The Old Feudalism was not without virtue.<sup>113</sup> It meant military security in an age of brigandage and invasion. It curbed eco-

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112. Cf. references in note 17 *supra*.

113. For a sympathetic and perceptive discussion of the virtues of feudalism as a remedy to modern ills, see Johnson, *Paths out of the Corner*, EQUILIBRIUM, Oct. 1972, at 4.

conomic fluctuations by preventing alienability of land. It was a strong force for social stability, and well defined relationships between classes. It imposed a system of mutual rights and responsibilities, tied to the use of land, some of which might profitably be restored in our own day.

The problem of the Old Feudalism was that it stifled individual liberty, productivity, and self-government. And that will also be the problem of the New Feudalism. When fully implemented, it will mean the concentration of all power to use, exchange, and perhaps even to enclose land in the hands of a governmental bureaucracy. Any economic enterprise, other than that carried out solely by the mind (lawyer, accountant, author, travelling minstrel), will be allowed to occur only with the consent of the government, which will have power over the location of the enterprise and hence over its very existence.

With the government in control of all land-related economic activity, in addition to all the functions already under governmental control, clearly property will cease to be the basis not only of economic activity, but also of individual liberty. Could John Adams, James Madison, Thomas Jefferson, or even Alexander Hamilton have conceived of a republic of free citizens, in which the state held full control over land?<sup>114</sup> Merely to ask such a question is to answer in the negative.

The choice, happily, is not between the New Feudalism and destruction of our environment and natural resources. As noted before in this article,<sup>115</sup> a host of techniques exist for guiding responsible land use and growth—techniques which do not require a foundation in the doctrine of social property. After five years of near-hysterical thrashing about in pursuit of a restored feudal society, the tide in Vermont now seems to have slowly turned in the direction of alternative techniques. It is not unreasonable to suspect that the same result will occur in other states—provided the New Feudalism can be held off long enough for wiser heads to prevail.

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114. For the views of these gentlemen on the subject see J. McCLAUGHRY, *EXPANDED OWNERSHIP* (1972); H. AGAR, *LAND OF THE FREE* (1935); Coker, *American Traditions Concerning Property and Liberty*, 30 *AMER. POL. SCI. REV.* 1 (1936); W. Scott, *Every Man Under His Own Vine and Fig Tree* (unpub. PhD diss., U. Wis. 1973).

115. See text accompanying note 94 *supra*.