Pre-publication version, Published as:

Chapter 19 (pp. 309-320) in Planning Reform in the New Century, edited by Daniel R. Mandelker. Chicago: Planners Press.

A view from the outside
The role of cross-national learning in land-use law reform in the USA

© 2005 **Rachelle Alterman**[1]

In this brief paper, I offer a few observations about American land-use law as viewed from the outside. These thoughts are based on my ongoing comparative research into planning law and practice in various countries. I hope that this comparative view might add an additional perspective to the discussion of directions for reform in American land-use law in the 21st century. I will not comment on substantive policies, but on the legal instruments.

Most of the proposals for reforming American land-use law aired in this symposium did not suggest to "reengineer" the entire framework – and rightly so[2]. Had a similar debate taken place in some other (democratic) country, one would have frequently heard the phrase "a different planning system". The term "planning system" is not part of the professional vocabulary in the USA, and for good reason: The USA does not have "a planning system", where most elements that regulate the use of land are expected to link into a single over-arching concept. In the US, planning law developed through evolution, not revolution. Reforms are therefore likely to be partial, either issue-led or location-led.

The cross-national transfer of planning laws

[1] Professor Rachelle Alterman holds the David Azrieli Chair in Town Planning at the Faculty of Architecture and Town Planning - Technion, Israel Institute of Technology. A planner and lawyer trained in Canada and Israel, Dr. Alterman is internationally known as an authority on comparative land policy, planning law, and planning theory. She has published several books and many academic papers on these topics. Professor Alterman has been a Visiting Professor at the University of North Carolina, Chapel Hill, New York University, University of Wisconsin, Madison, University of Florida, Gainesville, University of Tsukuba, Japan, and University of Michigan, Ann Arbor.

[2] Instead, the speakers raised a variety of issues – some related to the "property rights" debate over the "takings" issue that currently rages in the USA; others focused on housing and social exclusion; still others spoke about the instruments for "growth management" that might reduce the notorious appetite of American towns and cities for consuming land and natural resources.

The vast majority of nations in the world today have legislation that regulates land use and development. Although such laws differ from each other not only in name but in other ways as well, they do have enough in common for the readers of this book to say "we'll know one when they see one". Many nations legislated their planning laws during the first half of the 20th century, often importing or adapting British or German models that emerged in the early years of the 20th century. Formerly Communist countries are the latest to come onboard. Many of them did not have "planning" (or "land use") laws as we know them until the collapse of the communist regimes. But since the early 1990s the new democracies quickly caught up (some, such as Poland, have even gone into the second round of planning-law reform). Even China joined the "haves" of planning law in the late 1990s.

The remarkable spread of planning laws has been aided by cross-national transfer of full or partial models or of particular instruments of planning regulation. This process reflects a growing "export and import trade" across the globe in planning-law concepts. Some countries have largely been on the "export" side of this process. Britain is notable: It pioneered not only a national planning and land-use law, but also the creation of planning education and the establishment of the planning profession. Through its colonial powers, Britain was able to introduce planning law into many countries in various parts of the world (Home 1997, 1993). Germany too initiated land-use and planning law very early and some elements of its format were exported abroad. Most other countries have been on the "import" side. The USA is an exception: its land-use and planning law is largely home grown. Although the "import" and "export" of land-use law ideas did occur in the USA tool, the "traffic" in both directions has been relatively low (but I shall later show why I think that such exchange has increased in recent years).

The challenge of reforming American land-use law in the 21st century might benefit from a look from the outside inwards. Such a perspective would enable legislators, planners, and legal scholars to appreciate the unique attributes of American land-use law and its relative strengths. Some of these strengths have in recent years led to the emergence of an "export trade" in specific US-grown planning-law ideas. A view from the outside might also highlight those aspects of US land-use law that could benefit from cross-national learning.

The "bottom up" evolution of American land-use law

From an international perspective, American land-use law is in a class of its own. It is special both in its manner of evolution and in certain aspects of its structure and content. Whereas in most countries planning law was initiated "top down", through national legislation, in the USA it developed largely "bottom up". While the USA is not the only country where planning law started out in a particular city – for example, such a process occurred in Germany (Frankfurt) in the latter years of the 19th Century - in most other countries this process culminated in national legislation. The federal structure of the USA, the complexity of its laws, as well as its sheer territorial size – all these make the US story special.

The bottom up process in the USA occurred gradually during the first decades of the 20th century. With New York City pioneering in 1916, scores of other municipalities in many parts of the country began to regulate land use by initiating their own local bylaws. "Zoning" and the "master plan" both emerged in this manner. Zoning made its way through the hierarchy of courts, until it finally obtained clearance from the Supreme Court in 1926 in the *Euclid* decision (Cullingworth and Caves 2003: 64-74).

Americans may view this bottom-up process as natural, but from an international perspective, the evolution of land-use regulation in the USA has been a rather remarkable journey. Only after zoning had taken root in many localities, did states across the country begin to enact "enabling" laws that authorized local governments to apply zoning and related tools. In the absence of federal-level legislation, these laws might have turned out be highly different from each other. Yet, state land-use laws in most US states do share distinctive similarities. Partly, this is due to the gentle "tap on the shoulder" that the Federal level had given to the states by informally drafting two Model Codes in the 1920s. The Model Code for zoning had great influence on the states, the Model Code for planning was less successful (Meck, ed., 2002; Lewyn 2003). But federal encouragement could not have been the only reason why most states adopted similar land use laws. To enable the relatively high degrees of similarity across states, my guess is that an intensive cross-town and cross-state learning process must have occurred with considerable success (long before the advent of the internet). Such internal learning processed that characterizes the evolution of American land-use law to date.

During the last decades of the 20th century, several states initiated new state planning laws. This trend has been tagged "The Quiet Revolution" (Bosselman and Callies 1972). It produced a set of innovative state-level land-use and planning laws – each different from the other. Compared with the traditional state land-use laws, the new state laws bore greater similarity in structure to national planning laws in some other countries. They usually called for additional institutional echelons above the local level, and they usually gave greater legal weight to plans than traditional land-use law had given them. Interestingly (to a foreign observer), the new state laws for the most part left the underlying layer of zoning regulations intact.

The strengths and weaknesses embedded in US land-use law and practice

The process whereby American land-use law emerged has embedded in it both strengths and weaknesses. The strengths have served as the basis for some of the "exports" of US land-use and planning ideas overseas; while the weaknesses should perhaps be candidates for cross-national learning and for legal reform.

Strengths

1) *The absence of a federal law allows room for decentralized innovation*:

When planning laws are fashioned nationally, they often entail a long process of debate and negotiation among national institutions and civic groups before they are and

legislated. The steaks are high because national planning laws in most countries are not just "enabling"; they usually lay down obligations that the lower echelons must carry out. There is only one law at a time at the national level – a single experiment. Once enacted, they are not likely to be revised frequently, and are therefore not adequately responsive to transformations in the economy and society.

Because national laws often entail high political and professional exposure, their designers often seek "elegant" institutional and plan-hierarchy structures, and tend to be more optimistic about the value and validity of formal plans than real-life experience has proven. National laws tend to be high on hierarchies and obligations, and low on "hand on" tools for implementation.

By contrast, the decentralized American planning-law structure, while low on elegance, has permitted many concurrent "experiments" in land-use and planning laws to occur. Over the decades, decentralization has led to a pageant of innovative tools.

2) ***A process of "survival of the fittest":***

The second strength gained from the evolution of American planning law is the built-in *competition* among alternative instruments. The USA has tens of thousands of municipalities, 50 states, and a multi-layered hierarchy of courts. In order for a land-use instrument to last and gain recognition beyond its local birth place, it must survive many political and legal challenges. The combination of decentralized innovation and high competition has probably acted as a mechanism of "natural selection", whereby the most fit instruments have survived. Over the decades, many locally grown innovations may have been lost. But those that survived the policy competition and the court challenges have been imbued with a high degree of *resilience* to challenge and *adaptability* to change.

3) ***A growing "export trade" in land-use regulation instruments***

Instruments that are both resilient to challenge and adaptable to change are obvious candidates for "export" to other countries. In my various research projects – some already published, others in the making - I encountered many American-grown instruments that have crossed the oceans[3]. To do so, they have had to be rather "footloose", so that someone overseas could disconnect them from their home "system", and implant them in a totally different planning system. My list includes:

- Impact fees and "linkage" [4]
- Transfer of Development Rights[5]
- Purchase of Development Rights

[3] Given the scope of this paper I won't provide citations to the many reference or application of each of the tool in the literature and legislation in other countries. I will only cite my own work where I discuss some of these tools

[4] Importing impact fees has been discussed in Britain. In Alterman (1988) I discuss a variety of American exaction tools from a cross-national perspective. Linkage is analyzed in Alterman, 1989.

[5] The innovativeness of TDR and PDR as tools for open-space preservation is discussed in my 6-couuntry research on open-space preservation policies (Alterman 1997). Their transferability to the Israeli context is discussed in Alterman and Hann (2004, Heb.)

- Development contracts[6]
- Incentive Zoning[7]
- Tax Increment Financing[8]
- Design Review instruments[9]
- Many land-use environmental tools[10]

You may notice that this set of instruments tends to be rather "neutral" in terms of policy content and ideological implications. This list of tools deal with problems that challenge planners in most countries where there are private property rights, a dynamic economy, and government financial needs. These tools represent new ways of packaging together property rights, property values, planning, and public finance. More "ideological" tools - such as both inclusionary *and* exclusionary zoning – are not on my list because I assume that they are highly sensitive to each country's particular socio-political context.

The trend to import these types of instrument seems to me to be on the increase in recent years – perhaps thanks to better communication, more international professional organizations in the planning-related field, and of course – "globalization" of the economy and the increasing mobility of developers across national borders. One or more of these American-bred instruments has found its way to the UK, several Western European countries, many of the New Democracies in Central and East Europe, a few Middle East countries, and some Far East nations. Importing these tools may require an amendment to the national land-use and planning law. Thus, ironically, some of the locally-grown US tools may be featured as elements in a new national land-use law in another country.

4) *The role of federal legislation in areas related to land use*

In my cross-national comparative research of 10 democratic countries I classified the USA among the countries with the lowest degree of institutionalization of land-use regulation and planning at the national level (Alterman 2001). But, as Kayden (2001) has so aptly argued, although the US Congress never adopted a general national land-use law, having rejected such a proposal in 1970, it would be incorrect to say that the USA does not have national-level laws that relate to land use. The US does in fact have a wide array of laws at the national level that pertain directly or indirectly to land use (Mandelker *et al* 1986). These deal with several sectorial topics, such as transportation, economic development, and housing. But most significant from an international

---

[6] A comparative analysis of developer contracts is offered in Alterman with Vitek (1992) and Alterman and Margalit (1999, Heb.).

[7] See above.

[8] While I don't have a publication to cite, I can report that the TIF concept has influenced the thinking of the Ministry of Construction and Housing in Israel when it conceived of a new urban regeneration program in recent years.

[9] In a forthcoming paper I analyze design control or review tools in a cross-national comparative perspective. (Alterman and Corren, forthcoming).

[10] Some of these tools are grounded in federal environmental legislation but have found their way to land-use laws in some other countries.

perspective are the set of U.S. federal environmental laws, many of which were innovative at the time they were enacted. Many American environmental policies and regulations have been high on the "export trade" to other countries, including the "environmental impact statement" now so highly integrated into regulative practices in many other countries. One might conjecture that the very absence of general land-use regulation legislation on the federal level may have allowed space for specialized innovative laws to be created at the national level.

Weaknesses – and potential targets for reform

The American style of land-use law also has some weaknesses – in some cases as the "antonyms" of the strengths noted above.

1: The absence of a federal land-use law

While the lack of a nation-wide land-use law has a positive side (as noted above), the fact that the USA is one of only a few countries without such a law should at least raise some questions. The constitutional demarcation of powers between the Federal and the State levels cannot provide the full answer. Germany – also a federal country – does have a federal land-use law which structures the division of planning powers between the *Bund,* the *lander* and the municipalities (Schmidt-Eischteadt 2001) and there are other examples.

The absence of a federal land-use law jeopardizes the ability to weld one of the weakest links in the American "non-system" – the regional level of planning. Those states that have only traditional state enabling legislation usually lack effective regional-level land use regulation and planning. The more innovative state laws do have some form of regional land-use planning, but they differ a lot in degree and manner. They too need federal help in coordinating with neighboring states. Without better regional planning and land use regulation, "growth management" and "smart growth" would remain a local matter and will miss some of their major goals.

Is there a chance that a federal land-use law would pass the House of Representatives? Is there a better chance in the coming years compared with the failed 1970 "Jackson Bill"? My inclination is to say yes; there may be a slightly greater chance. In my study of national-level planning in 10 democracies I identified several "triggers" that may explain why planning emerged at the national level in each of the countries at a particular time. These explanations include external circumstances, such as nation-building, security or natural-disaster threats, the need to reduce inter-regional disparities, the goal of environmental mitigation, and compliance with a supra-national order or incentive (such as from the EU). There may also be political-ideological triggers such as a party change that regards more government intervention as legitimate for achieving its vision.

These types of triggers are unlikely to occur in the USA. However, there are two potential triggers that might provide the necessary boost: One is a looming crisis (perhaps regarding home security or natural disasters); the second is strong public endorsement of the importance of a sustainable environment. The early environmental movement of the

1960s was able to bring about the enactment of several federal environmental laws in the 1970s that were quite daring at the time. Since then, public endorsement of environmental goals has increased much more. Perhaps, at some future political point, harnessing that same momentum to an appropriately repackaged law tagged "environment and land use" or "sustainable land use" might be able to elevate land use legislation to the federal level. (If an outsider might be permitted a linguistic: to me these terms are preferable to the rather euphemistic "growth management or "smart growth").

2. *The ambivalent status of plans*

Legally anchored plans are part of almost every land-use planning law in the world. The legal status and function of such plans may differ from one country to another, but they are always there as a major and essential component of land use regulation (Alterman 2001). Legally grounded plans (known as "statutory" plans) come in many shapes and colors. Their preparation is sometimes obligatory, sometimes discretionary; in some countries they are binding to all private actors as well as government actors, while in other countries they are binding only to government entities; they are sometimes authorized to deal only with "physical" land use goals, at other times (usually more recently) they incorporate social and economic goals; some cover a large geographic scale, others are project-specific; some are general and flexible so as to accommodate change, others are specific and rigid in order to decrease uncertainty.

The shaky legal status of plans in traditional American land use law seems rather odd to a foreign observer. Zoning has become almost universal in American cities, towns and villages. In most countries, the function of assigning different permitted land uses to different zones is carried out by the lower or more detailed level of statutory plans. There are usually no "zoning" bylaws underlying these plans – the hierarchy of plans covers the function of zoning as well. The legal and institutional decoupling between zoning and planning in most US states makes little sense to an observer from the outside (see also Freilach's paper in this book).

The disconnect between zoning and planning may not have been intended by the early designers of US land-use enabling legislation. The Model Code stated that zoning should be enacted "in accordance with a comprehensive plan" and most states incorporated this phrase. In his classical 1976 paper, Mandelker argued that this phrase should have been interpreted to mean that the comprehensive plan should serve as the "constitution" that guides zoning decisions. But over the years the courts in many states endorsed interpretations of this phrase so that the "plan" did not have to actually exist, but could be assumed to be incorporated within the zoning decision (Haar, 1955; Cullingworth and Caves, 2003: 74-78; Mandelker and Payne 2001: 535-537). To a foreign observer, this argument is either tautological or illogical. If one remembers that zoning regulations are amended frequently - a process that Mandelker (1971) has tagged "the tail wags the dog" - the imaginary plan becomes even more questionable.

The picture regarding comprehensive plans in most US states is rather ambivalent. On the one hand, their legal status is weak. But on the other hand, the American "comprehensive

plan" (also called "master" or "general" plan) has a long history. Initiated in the 1920's and 30's, it has become part of expected practice by local authorities. The experience gained in the preparation of comprehensive plans has created innovative formats and functions. Some American planners have been savvy in drawing into plan-making new concepts in planning theory, such public participation, advocacy, conflict mediation, and communicative planning. Americans may not be aware that some of these ideas have crossed the oceans and influenced the conception and format of plans in some other democratic countries. Paradoxically, in some countries these innovative concepts of plans were given the legal status that they lacked in the original, and have become "statutory plans".

3. *The large differences among the "quiet revolution" state laws*

About 10 or a dozen states adopted innovative state planning laws, but each state law has a different institutional structure and decision process. In these statutes, plans usually have a more secure legal status than in the traditional state enabling laws, but the format, scope, and function of plans differs as much among the innovative state laws as among countries outside the USA. I would assume that this great variety also has its "downside". The clients of land-use regulation institutions who would like to receive services from 2 states or more probably feel the burden of having to learn the inevitably complex "rules of the game" of each of the states. The advantage of the traditional state land-use laws, alongside their many "downsides", is their general similarity across state boundaries. The clients of the new state laws may at times feel as if they are moving across international boundaries.

In the European Union there is currently a discussion about whether a uniform land-use planning law should be adopted, but this idea will likely encounter much resistance. In the USA, imposition of a uniform state law is of course legally and politically unfeasible. Perhaps Americans should return to the successful model of the Model Codes drafted in the 1920s. Such an idea is being pursued by the "smart growth" initiative (as reported by Meck in this book). Although the success rate to date is reported to be low, the model-code direction is undoubtedly worth following as a key element in a proposal for legal reform (perhaps repackaged as "environmental land use" as suggested above). A more favorable political situation and public opinion might provide momentum in the future.

4. *The low "import rate" of planning-law concepts from overseas*

Because the newer state land-use and planning laws are more similar in their conception to laws in some other countries (usually a different set of countries is relevant to each state or issue), there are now opportunities for Americans to be on the "import" side of cross-national learning. When designing or interpreting the newer state legislation, American planners, lawyers and the courts could benefit from learning from planning-law concepts that have been developed in some other countries. For example, with the introduction of a hierarchy of plans in Florida came the need to interpret "consistency" (Pelham, in this book). This type of question – in various forms - has engaged legislators and the courts in some other countries. Americans might wish to import alternative conceptions of consistency from other countries.

The role of scholarly exchange in cross-national learning

While doing my doctoral research in the 1970s I came across Dan Mandelker's 1971 book *The Zoning Dilemma*. I had been trying to develop ideas about how to theorize and measure plan implementation. Mandelker's book was about zoning law and practice in the USA, and my research was about planning law and "outline plans" in Israel. Yet the concepts and methods in Mandelker's book were major inputs to my thinking. In my research in subsequent years, I have found that a cross-national prism often provides me with the most lucid view.

All countries face the need to plan and regulate the use of land. As much as their legal, political, economic and social structures may differ, the legal mechanisms for the regulation of land use in countries across the world share basic traits. Setting up mechanisms for land-use regulation that work well seems to be an almost intractable task. There is so much that planners and lawyers could learn from cross-national research about land use and planning law, yet the field is as yet barely charted.

Most fields of scholarship and most professions have an international academic community. Not so scholars in planning and land-use law. For the past 20 years scholars in planning have been working hard to create an international academic community that offers regular academic conferences, journals, and encourages international research. But the field of planning law has yet to benefit from these initiatives. To date, there is no academic organization of researchers in the field. Although the APA "Planning and Law" chapter plays a major role in linking planning and law for the American planning profession, it has not given rise to a format of an academic community. Nor is there such a group under the canopy of ACSP. A "thematic group" about planning and law is in process of being initiated (by me) through the Association of European Schools of Planning, but it is still embryonic.

American scholarship in land-use law is unparalleled in breadth, depth, and quality (this book and the eminent scholar behing it are excellent examples). The number of books and academic papers in this field – small though it may be compared with other areas of law – is many fold larger than in other countries. The discussion of reform of American planning law offered in this book would be of interest to scholars and practitioners in many other countries. Establishment of an international academic group of scholars in land-use and planning law would benefit greatly from the participation of the American scholars in the field. As Americans consider planning-law reform in the new century, the benefit would likely be mutual.

References

Alterman, Rachelle (Ed.). 1988 (1990). Private supply of public services: evaluation of real estate exactions, linkage and alternative land policies. New York University Press, 1988.

Alterman, Rachelle, 1988. "Evaluating linkage and beyond: Letting the windfall recapture genie out of the exactions bottle". Washington University Journal of Urban and Contemporary Law, Vol. 32, 1988: 3-49.

Alterman, Rachelle. *2001*. National-level planning in democratic countries: A cross-national perspective. Chapter 1, pp. 1-42 in National-Level Planning in Democratic Countries: An International Comparison of City and Regional Policy-Making, edited by Rachelle Alterman. Liverpool University Press - Town Planning Review book series.

Alterman, Rachelle, 1990. "Developer obligations for public services in Israel: Law and Social policy in a comparative perspective." Journal of Land Use and Environmental Law, Vol. 5, No. 3, 1990, pp. 649-684. This is an expanded versions of the item on exactions in Israel under Chapters in Books,

Alterman, Rachelle, 1992. "A transatlantic view of planning education and professional organization". Journal of Planning Education and Research, 12 (Oct. 1992): 102-117.

Alterman, Rachelle. "The challenge of farmland preservation: lessons from a six-country comparison", Journal of the American Planning Association, Vol. 63 (2) Spring: 220-243, 1997. [*Awarded the JAPA Best Paper Award for 1998*

Alterman, Rachelle, "Developer obligations for public services, American style: Lessons for British planners." pp. 162-174 in Land and property development processes in a changing context, ed. by Patsy Healey and Rupert Nebarro, Gower Publishing co., 1990.

Alterman, Rachelle and Munther Haddadin *in preparation, 2005*. "Transfer and Adaptation of Planning Laws: How British-Based Planning Legislation Has Persevered in Israel and Jordan".

Bosselman, Fred and David Callies (1972). *The Quiet Revolution in Land Use Control*. Washington: Council on Environmental Quality.

Callies, David L. (1994) *The Quiet Revolution Revisited: A Quarter Century of Progress,* The Urban Lawyer Vol.26: 197.

Cullingworth, Barry and Roger W. Caves (2003). *Planning in the USA Policies, issues and processes.* Routledge (2nd Edition).

Haar, In Accordance With A Comprehensive Plan, 68 Harv. L. Rev. 1154, 1174 (1955). Haar, The Master Plan: An Impermanent Constitution, 20 Law & Contemporary Problems. 353.

Home, R. K. (1993). "Transferring British planning law to the colonies: The Case of the 1938 Trinidad Town and Regional Planning law." Third World Planning Review **15**(4): 397-410.

Home, R. K. (1997). Of Planting and Planning: The making of British colonial cities. London, Spon.

Kayden, Jerold S. (2001). National land-use planning and regulation in the United States. Chapter 2 pp. 44-64 in: National-Level Planning in Democratic Countries: An International Comparison of City and Regional Policy-Making, edited by Rachelle Alterman. Liverpool University Press - Town Planning Review book series.

Lewyn, Michael (2003). *Twenty-First Century Planning and the Constitution.* 74 *University of Colorado Law Review:* 651.

Mandelker, Daniel (1971). *The Zoning Dilemma: A Legal Strategy for Urban Change*. Bobbs-Merrill.

Mandelker, Daniel (1976). The Role of the Local Comprehensive Plan in Land Use Regulation, 74 *Michigan Law Review* 899.

Mandelker, Daniel and John M. Payne (2001). *Planning and Control of Land Development* (5th edition), Michie.

Mandelker, Daniel, Jules Gerard and JE. Thomas Sullivan (1986), *Federal Land Use Law* New York: C. Boardman.

MECK, STUART (GEN. EDITOR, 2002), GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (American Planning Association).

Schmidt-Eichstaedt, Gerd (2001). National-level planning institutions and decisions in the Federal Republic of Germany. Chapter 6 pp. 127-147 in: National-Level Planning in Democratic Countries: An International Comparison of City and Regional Policy-Making, edited by Rachelle Alterman. Liverpool University Press - Town Planning Review book series.