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Land use planning is present in virtually every state of the Union in some form or another. Historically planning is said to have been aimed at reducing social ills such as crowded suburbs, unsightly developments, pollution and even poverty. In this article, the authors take a renewed look at the notion that planning is the means to solving society's social problems. The article goes on to suggest that in many cases land use planning may generate more social costs than it reduces. Consequently, the remainder of the article sets forth an approach to evaluate land use planning schemes and then examines the Oregon planning experience using this analytical framework.

TOWARD A THEORY OF LAND USE PLANNING: LESSONS FROM OREGON

*James L. Huffman**

*Reuben C. Plantico***

In 1976, the citizens of Oregon voiced their approval of a newly adopted statewide system of land use regulation.¹ With this political victory, many believed that another chapter of the "Oregon Story" was about to be written. Oregon possesses a reputation of being a leader among states in producing innovative legislation responsive to pressing social concerns. While this characteristic has been displayed in a variety of policy areas,² land use carries special significance in Oregon. It is an essential element of Oregon's image as a progressive, environmentally conscious state.³

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1. On Nov. 2, 1976, Oregon voters rejected ballot measure 10 which called for the repeal of Senate Bill 100: The Land Conservation and Development Act. Senate Bill 100, codified at OR. REV. STAT. 197.005 (1973), as amended, OR. REV. STAT. 664 (1977), is the enabling legislation for statewide land use planning in Oregon.
2. Examples in the environmental field include: mandatory auto emission testing, OR. REV. STAT. 468.360-405 (1977); aerosol spray can regulation, OR. REV. STAT. 468.600-620 (1977).
3. Oregon's "progressive" reputation in the land use field grew considerably under the administration of Governor Tom McCall. McCall's notorious proclamation to out-of-

However, while the gradual implementation of statewide land use planning continues in Oregon, one cannot help but begin to wonder what defines "progressive" in the land use area. What special problems could possibly necessitate legislatively mandated centralized coordination of land use regulation? For that matter, what necessitates any kind of land use planning?

Some Oregonians would be puzzled about posing such questions at this time. We have probably "progressed" beyond the point where it is valuable to ask questions which beg obvious answers. This attitude is reflected in a pair of recent law review articles by former counsel to the Oregon Governor Edward J. Sullivan.⁴ For Sullivan and many Oregonians social planning is an unquestioned given and perhaps, in part, Sullivan is correct. Perhaps without planning we may not be able to reduce the social costs which accrue from crowded suburbs, unsightly developments, disorderly growth, congestion, the elimination of natural amenities, pollution and poverty. But to accept as a given that planning is the means to solving these problems, makes that process an end in itself. To pursue planning as an end in itself is to commit a fundamental analytical error. There are no givens in resource allocation, and centralized land use regulation ought not to be an accepted paradigm of twentieth century life.

It must be emphasized that this article is not a case against land use planning in the abstract. Rather, it is an argument against the unreasoned fascination Oregon and other jurisdictions are currently experiencing with land use planning.⁵ Regardless of the standard of evaluation, land use regulation as a means of solving our social ills must be

stators, "Come visit but don't stay," became a motto for the anti-growth environmental control campaign in Oregon. See, T. McCall, *Come Visit But Don't Stay*, 46 STATE GOVERNMENT: THE JOURNAL OF STATE AFFAIRS, 167, 171 (1973).

4. Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 Will. L.J. 358, 384-88 (1974); *The Taking Issue*, 5 Env. L. 515 (1975).
5. For general discussions of the growth and variety of approaches to land use planning see, BOSSELMAN AND CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); LINOWES AND ALLENSWORTH, *THE STATES AND LAND USE CONTROL* (1975).

It is necessary, at this point, to mention that we recognize technical distinctions between planning and various kinds of implementation devices such as zoning. See generally, HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* (1973). Traditionally planning was a non-binding process which became binding only with the implementation of zoning ordinances. The Oregon Supreme Court decision in *Fasano v. Washington County*, 246 Or. 574, 507 P.2d 23

judged against standards of performance just like any other approach to problem solving. Absent an appropriate statement of goals and standards of performance, it is impossible to determine if we are being progressive; if we are achieving that which our system of land use planning and control is designed to achieve. In this respect, Oregon has not performed well.⁶ At this point statewide land use planning is guided by faith rather than substance and it may result in a system that creates more social costs than it can possibly eliminate. There has got to be a better way. But, before trying to seek it out, it is necessary to first understand what it is we are looking for.

The remainder of this article elaborates an approach to evaluating land use planning and control systems and then examines the brief Oregon statewide planning experience in light of this analytical framework. Part One outlines the nature of land use regulation as a problem of resource allocation. This approach is, by no means, novel,⁷ however, it raises fundamental issues and concepts central to a discussion of land allocation problems. Part Two describes possible justifications for government intervention into a private system of land allocation, and suggests a proper role for (as well as the dangers of) public control of land use. Part Three provides a description and related critique of the enabling legislation for statewide land use planning in Oregon. Part Four analyzes the confusing contributions Oregon courts have made to that planning process. Finally, Part Five concludes with a plea for the articulation of practical; meaningful standards against which the success of our planning efforts can be judged.

I. THE ALLOCATION OF SCARCE LAND RESOURCES: SOME BASIC CONSIDERATIONS

A first and critical step toward understanding the nature of land use planning and control is to address some

(1973), makes it clear that Oregon has abandoned the traditional distinction. Some may be disturbed that we use terms like "planning" and "zoning" interchangeably throughout the article. For our purposes, the technical distinctions are not all that important. In Sections I-III, we are not so concerned with the specifics of how we will plan and how we will apply the law of planning as we are with discussing what planning is all about in the first place.

6. See parts III and IV, *infra*.

7. See, Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUMN. L. REV. 650 (1958); Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293 (1969); Note, *Inverse Condemnation: The Case for Diminution of Property Value as Compensable Damage*, 28 STAN. L. REV. 779 (1976).

rather basic issues about the business of allocating scarce resources. "Resource allocation" refers to the process by which we determine the purposes for and the manner in which resources will be used. Quite simply, it is a process of choice. The market, democracies, and administrative regulation are all, in many circumstances, merely labels for institutionalized forms of resource allocation.⁸ Given the existence of alternative processes of choice, one thing is certain: if we do not employ one system of allocation, we will use another or some mixture of systems. Yet, before making this initial choice or before evaluating whatever system we have, it is necessary to have some idea of the goals we are attempting to achieve. For until the issue of goals is addressed, it will be quite difficult to design any effective process of resource allocation whether we are dealing with land, food, housing, or, for that matter, anything at all.

In addition to clearly defining the relationship between allocative means and ends, there is a fundamental set of factors regarding human behavior which needs to be considered. Without doubt, some will think it a bit foolish for public decision makers to ponder the mysteries of human behavior before making choices about the institutional form of land use regulation. Others might think it to be clearly irrelevant. However, the manner in which individuals utilize resources is very much a function of the kinds of incentives they face. Of course, to a large extent, the kinds of incentives individuals face is determined by the institutional structure within which resource allocation decision making occurs.⁹ Once we understand the interrelations among human behavior, incentives and institutional structures, it will be possible to take a more intelligent approach to designing land use control systems.

The remainder of this section examines some of these very basic questions about resource allocation. Part A

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8. Some may think it analytically irregular to mention these diverse decision making systems all in the same breath. However, to distinguish between "economic" and "political" institutions assumes that they deal with essentially distinct problems. The fact is, however, that they often address a single problem — the allocation of scarce resources. Compare, BLONDEL, AN INTRODUCTION TO COMPARATIVE GOVERNMENT, (1969) with DAHL AND LINDBLOM, *The Isms and Social Technique*, PRIVATE WANTS AND PUBLIC NEEDS 84 (1962).
 9. E.g., Buchanan, "Toward Analysis of Closed Behavior Systems," THEORY OF PUBLIC CHOICE, 11-23 (1972); Randall, *Property Rights and Social Microeconomics*, 15 NAT. RES. J. 729 (1975).

develops a framework for thinking about the use of land as a problem of choice. Part B, on the other hand, takes a position on how to deal with the problem. It offers an approach to land use that draws heavily on utilitarian theory and philosophy. It explicitly rejects the notion that there exists some objective ideal community or pattern of land uses which need only to be discovered through the vigilant efforts of planners (*qua* scientists) and the evolution of planning techniques. Except to the extent that community welfare is critically dependent on the maintenance of a level of environmental quality necessary to sustain basic biological processes, the discovery of the "ideal community" is a subjective matter.¹⁰ Given this assertion, it will be argued that the focus of planners and planning ought to be on matters quite different from those currently receiving attention.

A. *Understanding The Problem: On Making and Evaluating Choices*

In thinking about any human activity, it seems we should ask three fundamental questions. First, why do we do what we do? What motivates human behavior in any particular direction? Second, by what standards can we measure the efficacy of human activity? Thirdly, how can we and should we structure or organize human activity in order to attain that which we perceive as "desirable"?¹¹ No matter what topic we are discussing, these questions are central to every area of human activity — including land use planning. The questions are related in that they all inquire about the nature of human decision making and ways to judge the efficacy of decision making processes as well as specific decisions. Yet, they are indeed separate questions and must be understood as such as they are examined throughout the remainder of this section. For now, in order to relate all of this to land use planning, it seems we must begin by asking why, if planning is merely another word for choosing, do we plan at all? What gives rise to the necessity of choice?

10. Rejection of the "objective ideal" approach to land use decision making carries significant implications for both policy analysis and policy formulation. These implications are succinctly discussed by Professor Buchanan. See, BUCHANAN, *THE LIMITS OF LIBERTY* 1 (1975).

11. It is important to note the obvious — that these questions are, in many respects, interrelated. For example, the organization of human activity would seem to require some understanding of that which motivates human activity as well as that which individual constituents perceive as "efficacious."

Everybody plans. Sometimes one plans only minutes ahead and other times one plans months or years ahead. Whatever the time frame, the subject of human planning is always focused on the allocation of something. It may be land, money, time, effort, or affection. Always, the problem is how to allocate these various things during the course of a day, a week or a lifetime. Every individual makes choices — the scope and importance of which vary significantly and unpredictably. But, virtually every human activity involves the making of choices.

Certainly the reasons for this phenomenon are not difficult to understand. Humans have needs and wants which they attempt to satisfy.¹² This point really requires no elaboration. How needs and wants develop and whether individuals should have their needs and wants satisfied are important, yet essentially separate questions. Second, the resources required to satisfy these needs and wants are available only in varying degrees of scarcity. It is doubtful that one can think of many resources the consumption of which does not reduce the amount available to other parties.¹³ Even those resources once thought to be unlimited — like air and water — are now scarce and land is another classic example. Finally, there are two other constraints on individuals which give rise to the necessity of choice. Assume that resources are, in fact, available in super abundance. The individual, not having the capacity to use all resources or unlimited quantities of them, would still have to choose what to consume or utilize. Also, the ability of the individual to acquire that which he or she desires is limited by the extent of his or her wealth. Individuals cannot acquire everything they need or want because the means by which to acquire these things is limited.

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12. "Needs" refer to those things necessary to sustain life (water, air, food, shelter, clothing, etc.) whereas "wants" refer to other "desires" individuals wish to fulfill. For a traditional discussion of this topic see LEFTWICH, PRICE SYSTEM AND RESOURCE ALLOCATION 2-4 (4th ed., 1974). Recent studies have attempted to expand the economic treatment of consumer tastes and values. See, Stigler and Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).
 13. See e.g., HIRSCH, SOCIAL LIMITS TO GROWTH 19-23 (1977); B. Commoner, *The Closing Circle* (1971). Of course, many resources are renewable. Also, some resources (such as land) may be used for one purpose and then transformed or reclaimed for other uses. On the ability of technology to mitigate certain aspects of resource scarcity see, Ridker, *To Grow or Not To Grow: That's Not the Relevant Question*, 182 SCIENCE 1315 (1973).

Given the propensity of individuals to make competing demands on scarce resources in order to satisfy their needs and wants, what system can be employed to accommodate this activity? What process shall be used to arrive at decisions concerning the purposes for which resources shall be used? How will resources be transformed into those goods and services of value to individuals? Finally, who will make these decisions? Certainly, there are a number of familiar systems which are employed to solve this problem. As was mentioned earlier, the market, democratic vote, centralized administrative planning, or even dictatorship are all mechanisms which have been used to allocate scarce resources. It must be pointed out that these systems of choice can all be characterized and distinguished on the basis of identifying who, in fact, makes the allocative decision within each. If, as we have already asserted, much of land use planning is a subjective matter, this fact will be of central importance to our analysis of land use planning systems.

One approach to the allocative problem is to devise a system in which each individual makes his or her own decisions about such matters. American society has functioned for much of its history on the basis of individuals making choices for themselves. This is due, in part, to the fact that some choices can only reasonably be made by individuals. It also reflects a general philosophical preference for individual autonomy — the liberty of individuals to preserve and pursue their own interests.¹⁴ Today, debate regarding important resource allocation issues at times focuses exclusively on this issue of liberty. In a sense, this is an unfortunate result because it tends to distort the nature of the problems at hand. Advocates of policies promotive of individual liberty are often confronted or opposed by those who support policies allegedly promotive of some collective goal typically referred to as the “public interest.” Perhaps no where is this portrayed as vividly as in the area of land use. Yet, it can and does create a fundamental distortion. Given the proper institutional legal framework, private individual activity can

14. The history of American political philosophy is dominated by a concern for individual liberty. See, Huffman, *INDIVIDUAL LIBERTY AND ENVIRONMENTAL REGULATION: CAN WE PROTECT PEOPLE WHILE PRESERVING THE ENVIRONMENT?* 7 *Env. Law* 431, 432-440 (1977); Diamond, *The Declaration and The Constitution: Liberty, Democracy and The Founders*, *THE AMERICAN COMMONWEALTH*: 1976 39-55 (1976).

generate substantial benefits for society as a whole. As a matter of theory and practice, attainment of the "public interest" need not be exclusive of private conduct. On the other hand, it need not be exclusive of collective decision making either. Decentralized individual decision making and public decision making are merely means of achieving ends. Yet, we seldom reach this critical issue regarding the relationship between means and ends because we are so busy squabbling about ideological issues with ideological rhetoric.¹⁵

Today, an empirical examination of the quantity and substantive content of our laws, if it were possible, would probably reveal a general policy favoring increasing limitations on individual discretion. In the professed attempt to ameliorate social costs of private activity and to secure some level of collective welfare, the total output of regulation from our law continues to grow. Virtually every aspect of our lives from the production of all kinds of basic goods and services to financial markets, our schools, health care facilities, the condition and safety of the workplace, our modes of transportation, availability of and entry into occupations and other innumerable matters are touched in some way by the hand of government regulation. All of these are examples of a policy which argues that the scope of choices left to the individual must be limited.

In essence, there is little to distinguish land use control from these other sorts of regulatory activities. Land use planning is the product of a decision of our public policy making institutions to place limits on personal freedom of choice. It is a statement that although people will be free to make some choices in the allocation of their land and land based resources, there will be certain limits. Consider the following hypothetical case involving an individual landowner. Given what was said earlier, there are a number of practical constraints on his ability to use his land in different ways and to acquire more land for the purposes he intends. Also, he may not use his land in a way that violates the rights that others hold in adjoining land.¹⁶ However, now

15. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION*, Chap. 1 (1975).

16. The common law of property and torts defines the relative rights of neighboring

consider the variety of limitations imposed by law making bodies. Our individual may have the right to build a house on his land but not a factory, or a gas station or some other commercial structure.¹⁷ He may build only if the lot is of a minimum size and the building may not exceed a specified height.¹⁸ He may or may not have the right to drain the swamp at the far end of his lot.¹⁹ He will probably have to dedicate a portion of his land to the jurisdiction in which he lives or pay a tax in lieu of as a condition for building his house.²⁰ Once the house is built, regulations might even specify the number and kinds of persons who may live there.²¹ These represent a mere sample of the kinds of land use regulations which bear either directly or indirectly on the opportunity of individuals to choose that which they desire to do with land.

Another view of the matter will be useful. It might be asked why it is necessary to view land use regulation as a limit on individual choice? Why must we start with individual choice as the relevant level of analysis? Certainly this is not required and by starting elsewhere it will be possible to reach the land use debate.

The problem which humans face at every turn is to choose among alternative courses of action which are available to them. The choice mechanism based upon individual decision making is presented above because it seems central to the American scheme of things. Another mechanism for human choice, and one which is also central to the American scheme of things is democratic choice.²² Society can vote by some means and thereby make choices on just about anything. The complexities of this approach are numerous. There are an abundance of different apportionment schemes for taking the vote.²³ Each will in some

landowners. For a general discussion of this structure of rights and its allocative significance see POSNER, *ECONOMIC ANALYSIS OF LAW*, §§ 3.4-3.7 (2nd ed. 1977).

17. See, ANDERSON, 2 *AMERICAN LAW OF ZONING*, Chapter 9 (1976).

18. See, FREILICH AND LEVI, *MODEL SUBDIVISION REGULATIONS*, § 4.2(2) (1975).

19. See, *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972); *Sibson v. State*, 115 NH 124, 336 A.2d 239 (1975).

20. See, *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606, appeal dismissed 404 U.S. 878 (1971); *Jordon v. Village of Menomonee Falls*, 28 Wis. 2d 608 (1966).

21. *Village of Belle Terre v. Boras*, 416 U.S. 1 (1974).

22. See U.S. Const., ART. I, § 2(1), ART. IV, § 4.

23. See, *Reynolds v. Sims*, 337 U.S. 533 (1964). For relevant discussions of the theories of voting and representation in democratic systems see, Auerbach, *The Reappor-*

way reflect certain basic values of the ruling members of society. Many democratic choices will be very difficult to impose upon individuals, a factor which discourages the democratic regulation of many types of choices and which, perhaps more importantly, suggests something about human nature. Individuals will, if they do not like the democratic choice, and if they can get away with it at a justifiable price or risk, frequently refuse to comply with democratic choices. The explanation for such behavior is central to the theory of human conduct which lies at the heart of the choice theory discussed in the second part of this section.

The debate about land use like the debate about resource allocation problems generally has failed to join the critical issues. Land use analysis in our policy making forums seems to look exclusively to either the problem of means or to the problem of the ends. The critical relationship between the process of making allocative decisions and ends has not been well perceived or examined. Again, it seems necessary to go back to the very basic questions raised in this part. Much of the remainder of this article argues for a specific approach to the land use problem. Whether the approach is better or worse from a social point of view is not for us to say.²⁴ We hope it is better in the sense that it attempts to establish the relationship between allocative means and ends. Also, the approach to decision making offered here is based on a theory of human behavior. It would seem apparent that understanding something about human behavior is central to the success or failure of any system which attempts to organize human activity.

B. One Approach: The Utilitarian Alternative

Neoclassical economic theory, which has made perhaps the only significant step toward formulating a theory of human welfare based upon our understanding of individual behavior and the relationships among individuals with

tionment Cases: One Person, One Vote — One Vote, One Value, SUP. CT. REV. (1964); Buchanan and Tullock, *supra* Note 1, Part III; and Mueller, *Public Choice: A Survey*, 14 J. ECON. LIT. 395 (1976).

24. Although the remainder of section I and section II argue for an approach that is allegedly more efficient, we cannot conclude that it is "better". For example, an efficient allocation of resources takes as given a corresponding distribution of wealth. If society finds that distribution repugnant to its values, efficiency may be only a necessary and not a sufficient condition of a good society. See also, R. Posner, *Supra* note 17, at §§ 1.2, 2.2.

respect to things we would regard as being "economic",²⁵ provides an analytical framework within which to evaluate land use problems. The power of the theory lies partly in the fact that it is predicated upon several fundamental tenets about the human experience. First, it recognizes that the necessity of human choice — which has been referred to throughout this article — is the product of essentially those factors discussed in Part A of this section, namely the desire to fulfill wants and needs in the face of resource scarcity.

The remaining tenet of the theory is a behavioral one. The utilitarian theory of human behavior underlies the approach to land use planning which is articulated in the remainder of this article. But, a word of caution is necessary here. There is no uniform agreement on the meaning of utilitarianism. The utilitarian theory, which has been frequently maligned and more frequently misunderstood, is a "positive" statement about human behavior.²⁶ It asserts simply that people will act to maximize their pleasures and minimize their pains.²⁷ People, in other words, are motivated by self interest.

It is typically asserted that utilitarian theory is effectively refuted by evidence of people's constant willingness to do things for others. People save lives at great risk, they give gifts at great expense and perform a variety of other altruistic deeds. Why do people do these apparently selfless things? It is because of the values they hold. For example, if one values human life, it will be important to protect it and its protection will bring pleasure to the person holding that value.²⁸

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25. The theory defines rigorously the conditions necessary for *individuals* to maximize personal welfare in a social context. The ability to achieve optimum social welfare through *collective* decision making is severely circumscribed by the impossibility of making interpersonal comparisons of utility. This was formally demonstrated by the classic work of ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2nd ed., 1963).
 26. John Stuart Mill displayed his frustration over misuse of the term "utilitarian" in the following passage: "Yet the common herd, including the herd of writers, not only in newspapers and periodicals, but in books of weight and pretension, are perpetually falling into this shallow mistake. [The assumption that utility is a test of right and wrong as opposed to pleasure.] Having caught up the word 'utilitarian' while knowing nothing whatever about it but its sound, they habitually express by it the rejection or the neglect of pleasure in some of its forms: of beauty, of ornament, or of amusement." MILL, *UTILITARIANISM*, 889 (Modern Library Ed., 1939).
 27. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, Chap. 1 (1789). Utilitarianism has been most frequently employed as a science or theory of ethics rather than behavior. See, LITTLE, *A CRITIQUE OF WELFARE ECONOMICS*, Chap. 1 (2nd ed. 1957). Our focus is primarily behavioral and, therefore, we "sidestep" for now the normative principles alleged to be embodied in utilitarian theory.
 28. The self-interest axiom has been a source of disconcertion for many. The most com-

If we disagree with the choices that others make, it is fruitless to criticize the choice as being wrong or ill-considered. What we are really questioning are the values which led to the particular choice.²⁹ The significance of this point cannot be overemphasized, for invariably in the political arena of land use planning can be heard accusations about selfish considerations by people who act only out of self interest. The truth is that everybody attempts to act in their self interest. What makes people prefer different alternatives are the values which they hold. The point of attack if change is sought should not be a frontal one on the choice made, rather it should be an effort to persuade others to adopt the values which will lead to the preferred result.³⁰

When applied to land use, this theory of human conduct says that people will choose to do with their land based resources that which they believe will bring them the most net benefit (benefits minus costs). The values one holds serve to define what are costs and what are benefits. A cost to one person may be a benefit to someone else.³¹

Recognizing the problem of resource scarcity and the self-interested behavior of individuals, an appropriate goal

mon error has been to confuse self-interest with "selfishness" and therefore condemn self-interest as a form of behavior. For example, see, MONTAGU, ON BEING HUMAN, 20-21 (Rev. ed., 1966). However, there is a subtly different criticism of the utilitarian/self-interest approach. Some attack utilitarianism because of its homocentric perspective; its focus on the fulfillment of human wants. See, Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1324, 1348 (1974).

29. Consider the following example: If I enjoy woodworking or sitting by my fireplace, it will bring me satisfaction to go into my backyard and cut down trees to use as firewood or to make a table. But assume that I also derive satisfaction from making my wife or my neighbor happy. Assume further that they derive pleasure from the trees as they are in my backyard. I may choose to forgo the pleasure derived from the use of my trees for woodworking or for fuel in order to please my wife or my neighbor. But it will not have been anything but a self-interested choice. It will mean simply that I derive more pleasure from making my wife or my neighbor happy. If one does not approve of my cutting down trees, it is useless to disapprove of my self-interested behavior. What one is really objecting to are the values which led me to prefer one course of action over another. In a recent article, Jack Hirschleifer suggests that altruistic behavior in no way contradicts the self-interest axiom. In fact, altruism may well be a behavioral trait that becomes biologically sustained because it ultimately tends to promote survival — a rather fundamental human "interest". See, Hirschleifer, *Economics From A Biological Viewpoint*, 20 J. LAW AND ECON. 1, 17-26 (1977).
30. For example, rather than criticizing a neighbor for cutting down a beautiful tree, an approach which may lead him to cut down another tree, one should attempt to persuade the neighbor of the beauty of trees. There are numerous methods of persuasion — short of coercion — which might achieve this end. Some find this approach unappealing in that the justification for saving trees is only that it satisfies a human want. Why should not trees be preserved for their own sake? See discussion at note 29 *supra*.
31. For an argument that every individual choice has costs for others see Samuels, *An Economic Perspective on the Compensation Problem*, 21 WAYNE L. REV. 113 (1974).

would be to design an institutional structure within which individuals attempt to maximize their personal welfare yet, in so doing, precipitate benefits to society in general.³² Given certain ideal conditions,³³ voluntary exchange among individuals in market settings will lead to an efficient allocation of scarce resources. But, what does it mean to achieve efficiency? Efficiency means simply that consumer demands are being effectively satisfied at the lowest possible cost to society. Markets provide individuals the opportunity to exercise direct choice over a variety of goods and services. Individuals, through their dollar votes, provide the relevant information about what should be supplied and in what amounts.³⁴ Efficiency means also that resources are gravitating to their most highly valued uses (measured by consumer willingness to pay) through the exchange medium. When no further exchanges could be made which leave at least one person better off without making anyone else worse off, then we have attained optimum efficiency — known also as Pareto Optimality.³⁵

Standard optimization models describe in detail the conditions necessary for efficient resource allocation through voluntary market exchange.³⁶ Central to this entire process is the critical role of the price system in reflecting the costs of using specific resources for specific purposes.³⁷ These

32. This, of course, was the basic purpose of ADAM SMITHS' AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

33. These conditions include: (i) absence of monopoly in product and factor markets, (ii) perfect information, (iii) a general absence of market failure of which externalities and public goods are symptomatic. For succinct discussions see, HAVEMAN, THE ECONOMICS OF THE PUBLIC SECTOR, 23-27 (1970); HIRSHLEIFER, PRICE THEORY AND APPLICATIONS, 446-458 (1976).

34. Haveman describes the ideal result: "With a smoothly functioning market system, the complete pattern of consumer preferences is captured in the demands which are expressed in the market. Likewise, the costs to society of satisfying these preferences are embodied in the supply curves. Consequently, when the market reconciles demands and supplies, it enables everything which is produced to yield benefits to buyers (as reflected in their willingness to pay) which exceed the costs of getting it produced." Haveman, *supra* note 34, at p. 28. A useful discussion of the relationship between resource allocation and wealth distribution is contained in Weisbrod, *Collective Action and the Distribution of Income: A Conceptual Approach*, PUBLIC EXPENDITURES AND POLICY ANALYSIS 117, 120 (1970).

35. For an excellent discussion of the Pareto Criterion and its essential relationship to the elements of economic efficiency [i.e., Consumer sovereignty, efficiency in production, and efficiency in the distribution of the product] see, DORFMAN, PRICES AND MARKETS, 174-195 (2nd ed., 1972).

36. See, e.g., Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22 (1957).

37. Prices play two related yet separate roles in the economy. First, assuming competitive conditions where price equals the actual cost to society of producing one additional unit of output (marginal cost), prices provide critical incentives which encourage efficient behavior by consumers and producers. Second, prices provide an extensive information network regarding the relative scarcities of resources, the

models have been developed in detail elsewhere and there is no need to engage in a technical description here. However, it is important to examine briefly the control function played by the legal system in promoting efficient resource allocation through market decision making.

Advocates of land use regulation submit that such controls are a necessary response to the costs generated by private activity. They tend to ignore the fact that there exists a basic legal structure (imperfect in some respects yet subject to improvement) which developed in an earlier time for any of the same reasons which are advanced to justify contemporary public regulation.³⁸ The common law of property, torts (which in itself is merely a species of property law) and contract evolved as the rules of the marketplace. They comprise a structure of privately enforced rights which have the effect of promoting efficient economic use in market settings.³⁹ For example, market transactions actually involve the exchange or transfer of ownership rights. Land transactions, therefore, involve the exchange of specific property rights which attach to the use of that land. Contract law promotes efficiency by facilitating the exchange of such ownership rights and by protecting the parties involved in exchange agreements.⁴⁰ The law of nuisance and trespass (normally subjects of tort law) illustrate the point that ownership rights are never exclusive. Such rules can ensure in many cases that one landowner cannot use his land in a way that systematically imposes costs on others. Quite simply, nuisance and trespass rules can provide mechanisms to internalize the costs of private activity.⁴¹

supplies of outputs, the availability and costs of substitutes, and the relative value of outputs to consumers. For an argument that no other known mechanism provides such information so extensively and efficiently see, Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); and HAYEK, *THE ROAD TO SERFDOM* 49-50 (1944).

38. See, e.g., Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. ASSOC. PAPERS AND PROCEEDINGS 347 (1967); Anderson and Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. LAW AND ECON. 163 (1975) arguing that property rights evolved to internalize costs of private economy.
39. Posner, *supra* note 16, at 27-191; Furubotn and Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137; Cheung, *The Structure of Contract and the Theory of a Non-Exclusive Resource*, 13 J. LAW AND ECON. 49 (1970).
40. Posner, *supra* note 16, at § 4.1.
41. Many assert, as an automatic justification for government regulation, that constitutional protections of private rights have never recognized that individuals may do anything with their land. See, BOSSELMAN, *THE TAKING ISSUE* 1 (1973). This fact, however true, provides no analytical basis for public regulation of land as property. Private rights in land are mutual. The common law of nuisance and trespass repre-

In the context of land use, it has been demonstrated that this self regulatory mechanism of the marketplace is by no means beyond practical implementation.⁴² Careful consideration of those factors which contribute to an efficient system of private rights, something which has been discussed at length by property rights scholars in many contexts, presents a viable yet largely unaccepted approach to land use policy problems.⁴³ In those situations where decentralized decision making through markets can operate with tolerable efficiency, it is very difficult to justify substituting public for private allocation systems. The role of government ought to be restricted to the task of enforcing private rights.

The above discussion does not deny a necessary and proper role for government in the land use area. Our position merely suggests that intervention ought to occur only when markets are unable to allocate resources efficiently.⁴⁴ However, an additional word of caution is necessary at this point. Providing a justification for government intervention and specifying the precise form of intervention are two separate tasks. The latter is far more difficult to describe at a conceptual level and equally difficult to implement on a practical level.⁴⁵ The little empirical work that has been performed in this area indicates that the results of intervention have been mixed.⁴⁶ However, the first step to successful intervention is the matter of establishing goals and standards of performance.

In a society such as ours, where private resource allocation has played a vital role and public allocation, through methods like land use planning, operates as a limit on private choice, there are two basic issues which arise in

sent privately enforced limitations or regulations on uses of land. The only relevant question is when are private limitations inadequate so as to justify public ones.

42. See, Ellickson, *Alternatives To Zoning*, *supra* note 7; Siegan, *Non-Zoning in Houston*, 13 J. LAW AND ECON. 71 (1970); Roberts, *Alternatives To Zoning*, 28 LAND USE AND ZONING DIGEST 5 (1976).
43. See *e.g.*, Symposium, *Natural Resource Property Rights*, 15 NAT. RES. J. 639-797 (1975).
44. See discussion in Section II, *infra*.
45. See, Tullock, *The Social Costs of Reducing Social Costs*, MANAGING THE COMMONS, 147-156 (1977); McKean, *Divergences Between Individual and Total Costs Within Government*, 58 AM. ECON. REV. 243 (1964).
46. See, *e.g.*, Maser, *et. al.*, *The Effects of Zoning and Externalities on the Price of Land: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J. LAW ECON. 79 (1967); Reuter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J. LAW AND ECON. 313 (1973); Ervin *et. al.* *supra* note 7, at 61-102. For a non-empirical study see, SIEGAN, *OTHER PEOPLE'S PROPERTY* (1976).

assessing a land use regulation system. First, it is necessary to settle upon an allocative standard. Second, it is necessary to identify the allocative mechanism which best satisfies that standard. The utilitarian allocative model articulated above provides the basis of a workable standard. Any allocative system can be judged against the utilitarian allocative standard. Private allocation through a market place is one possible system. Another is democracy. A third might be some form of central administrative planning. Of these and other alternative allocative mechanisms the market provides the most effective means of integrating private wants and assuring that each individual is able to optimize his welfare, given the scarcity of resources and the existing distribution of wealth. It is also the most efficient system because it accurately reflects the costs of resource utilization. The defenses of free market allocation of resources are numerous, and most challenges to that alternative are based upon identified failures of the market to achieve its theoretical goals. This market failure appears to be the motivating factor for the imposition of land use planning in Oregon. If this is true, land use planning ought to be designed to correct or compensate for the failure of the market to allocate resources efficiently.

II. THE COST INTERNALIZATION: CASE FOR LAND USE REGULATION

It has been argued that several virtues can be associated with the process of allocating scarce resources by private exchange in market settings. Assuming the legal system efficiently provides an appropriate degree of certainty and security both in personal safety and the ownership and exchange of resources, the market takes advantage of important incentives which tend to encourage individuals to pursue socially beneficial activities. Basically, it provides the means for individuals or groups of individuals to make themselves better off while providing goods and services for others.⁴⁷

47. Now it may seem that we are being untrue to our earlier proposition that processes should not become ends in themselves. Just as land use planning should not become an end in itself, neither should the market. Therefore, it must be emphasized that we are not advocates of the market as such. Rather, we are looking for the best means to maximize welfare. To the extent the market achieves that end, then it is the appropriate means. To the extent planning achieves it, then planning is appropriate.

Regulation reflects a conclusion that this private system does not result in a socially optimum allocation of resources. This conclusion is typically based on the notion that the summation of costs and benefits which accrue to specific individuals who participate in market transactions diverge from those which accrue to society as a whole. Because there are social costs which result from private decisions, it is necessary to correct for such socially injurious private choice by placing limits on the freedom of the individuals to choose. Therefore, in order to attain efficient resource allocation, we must turn to our public decision making institutions to plan and organize economic activity in various markets.

The purpose of this section is to discuss those issues relevant to a determination of a proper role for the state in securing a level of welfare through land allocation that is not obtainable in the market-place. Because the issues are diverse and complex, they will be examined in three parts. Part A engages in a brief digression on the business of choosing goals which guide our resource allocation efforts. Part B presents an analytical framework for identifying causes of market failure, which, in turn, provide a necessary (although not sufficient) justification for government intervention in the form of public land use control. Finally, Part C discusses a variety of obstacles to attaining efficient resource allocation through public land use planning. It also addresses the far more serious problem of how public agencies themselves generate social costs.

A. Choosing Among Worthy Goals: A Digression

To this point, our concern has been almost exclusively with the matter of allocative efficiency. However, this is not to deny that there exist other goals upon which public land use control might be predicated. Certainly, if no one cared about efficiency, there might be little reason to discuss it. So implicitly our position assumes that efficiency is very important indeed.⁴⁸ Yet there is evidence both within the academic community and the content of "public opinion" that several other goals are, or at least should be, on our minds. The truth

48. Yet, even if no one admitted the importance of efficiency, our utilitarian theory of behavior — if accurate — would compel us to deal with efficiency at some point.

of this assertion does not in any way limit the validity of a major thesis of this article — that the means of allocation must be designed with the relevant goals in mind. The very critical problem at every turn is to know something about one's destination before setting out on the journey.

1. *Distributive Justice*

Nearly every major discourse on public sector decision making suggests that furthering the end of economic justice is a proper function of the state.⁴⁹ In fact there is probably no greater force at work today in our policy making forums than the demand that government either (a) effectuate a more even distribution of wealth; or (b) eliminate causes of unequal access to the means of satisfying individual wants and needs.⁵⁰ There are some fundamental problems in evaluating the efficacy of policies designed to promote these distributive ends. While for matters of resource allocation, economists can base policy prescriptions on a technical theory of value and efficiency, no equivalent policy guidance exists for issues of wealth distribution. As one commentator in the land use field explains,

Because they have found no theoretically sound basis for making interpersonal comparisons of utility, many economists believe they can at best only describe the wealth transfer effects of a policy, but they cannot assess the fairness of those transfers . . . the degree of unfairness of a system cannot be quantified and persuasive arguments about fairness are hard to construct.⁵¹

It is, for all practical purposes, a question of values or philosophical preference as to what constitutes a "just" distribution of wealth and opportunity among members of society. Recently, a few seminal works have provided valuable perspectives from which to view this problem.⁵² It seems, however, none have yet received the acceptance necessary to qualify them as paradigms for policy analysis on questions of distributive justice.⁵³

49. See, for example, MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* (1959); Herber, *MODERN PUBLIC FINANCE: THE STUDY OF PUBLIC SECTOR ECONOMICS* (Rev. ed., 1971).

50. NISBET, *THE TWILIGHT OF AUTHORITY* 198-223 (1975).

51. Ellickson, *Alternatives to Zoning*, *supra* note 7 at 690.

52. RAWLS, *A THEORY OF JUSTICE* (1971); Wolff, *UNDERSTANDING RAWLS* (1977).

53. However, for the proposition that a Rawlsian policy of "minimum needs" (i.e., "That

This analytical dilemma may pose difficulties in the land use area. Land has been such a constant source of wealth that it is only natural for it to be the focus of intense distributional conflict. Regardless, there is no sound justification for confusing land use policy means and ends.⁵⁴ Redistributive goals ought to be realized through policies designed to promote redistribution. Unfortunately much land use regulation is replete with conflicting means and ends. If the purpose of government intervention is the elimination or mitigation of the costs which some uses of land impose on neighboring land owners, then it seems likely that efficiency is our goal. Several policies designed to address *that* problem might be implemented. However, there are numerous land use controls which purport to achieve efficiency, yet have primarily a redistributive impact. The result can be only costly confusion.

Consider a local zoning plan which, in the eyes of its designers, reflects the ideal pattern of land uses in that community. The plan will most likely consist of regulations which preclude uses of land once recognized as valid in certain locations. This is the point at which a very difficult issue arises. If, in fact, the zoning plan has little to do with separating incompatible land uses, but actually redefines rights merely because the altered pattern satisfies the planning commission's vision of a more perfect community, then the real impact is redistribution. Rights to use land have been effectively transferred from one party to the state or, perhaps, to neighboring land owners. Yet, it is the former holders of those rights who bear the full cost of the transfer.⁵⁵

Compare the above situation with another case of intervention where the relationship between distributive means and ends is both perceived and realized. Two major

basic material needs be guaranteed by the government to those who cannot satisfy them through their own efforts") is becoming solidly entrenched in our political life see, Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976).

54. Although there are certainly strong motives — perhaps surreptitious ones — for individuals to seek redistribution through government. See North, *Political Economy and Environmental Policies*, 7 ENV. L. 449, 456-458 (1977).
55. Unless, of course, compensation is required under the "Taking Clause": U.S. Const., Amend. V. To obtain "just compensation," an actual physical seizure of property is not required. Regulation affecting property may require the payment of just compensation. See generally, STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* (1977).

problems faced by planners are the preservation of and accessibility to natural amenity resources. Oregon provides a classic example. The Oregon Coast is one of the natural wonders in the United States offering both scenic and recreational benefits. In 1967, the Oregon legislature, taking notice of the increasing demands being placed on coastal resources, the scarcity of ocean front property and the naturally increasing interest of private entities in gaining ownership of that property, enacted ORS 390.610:

(1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the State heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line of the South so that public may have the free and uninterrupted use thereof.

This statute, in effect, secured for every person the right of access to the Oregon Ocean Beaches. No doubt, as an alternative, these beaches could be held in private ownership as beaches in other parts of the country are. This would have effectively excluded individuals unable to buy access to beach land.⁵⁶ The end furthered is, obviously, the even distribution of access to an amenity resource.

Evaluating the efficacy of policies designed to achieve distributive ends or of policies with incidental yet significant redistributive impacts is beyond the scope of this article. However, some basic observations are in order. Policies having redistributive impacts are not costless. The costs may take a variety of forms, but we are primarily concerned with those costs accruing to individuals as a result of regulations affecting their land. As in the first example presented above, owners of rights in the use of land who are suddenly regulated in an adverse way by land use planning laws may incur substantial losses. Land investments are costly and usually, such investments are made with the expectation of reaping some benefit. If in this process, one landowner imposes costs on neighboring landowners, a policy promoting efficiency would, in many cases, force those costs to be in-

56. See, e.g., Wolff, *War On The Beaches*, 4 REAL EST. REV. No. 2, 82-84 (1974).

ternalized. However, if a right to use land in a certain way is suddenly wiped out or transferred by regulation, there are strong arguments for compensating the landowners. First, a matter of fairness, it seems difficult to justify having the landowner bear the full cost of a right transfer that benefits the state or neighboring landowners.⁵⁷ Second, uncompensated redistributions via regulation can have inefficient effects. They create a very uncertain climate for private activity. If there exists a substantial risk of loss due to non-compensatory regulation, individuals will be faced with disincentives to engage in more highly valued uses of land.⁵⁸ In addition, those who actually gain or stand to gain from noncompensatory regulation (i.e. those who receive benefits without bearing any costs) are faced with incentives to direct resources into influencing the regulatory process.⁵⁹ Although this use of resources may result in benefits to those influencing the process, it is likely that significant opportunity costs arise from the use of resources in this fashion as well as generating more misallocation due to uncertainty in the land market.⁶⁰

2. Environmental Goals: Maintaining the Delicate Balance

Environmental science, though still in a nascent stage of development, has produced much information regarding the nature and maintenance of relationships within natural systems. Central to our scientific understanding of ecology is the notion that there exists some equilibrium or steady state in all natural systems. To upset this equilibrium may

57. See, Michelman, *Property, Utility and Fairness: Comments On The Ethical Foundations of Just Compensation*, 80 HARV. L. REV. 1165, 1218-24, 1250-51 (1967); arguing against blatantly capricious "takings" or those which bring about "nearly total destruction of some previously crystallized value"; and Berger, *A Policy Analysis of The Taking Problem*, 49 N.Y.U. L. REV. 165, 195-97, 210-213 (1974); arguing for a compensation principle that protects "reasonable expectations" of private parties as a matter of fairness.

58. The behavioral effects of noncompensatory regulation are, of course, empirical questions. However, economic theory would suggest that fear of uncompensated regulation might create insecurity and, therefore, prevent individuals from putting their land to more highly valued uses. For a related discussion see, Michelman, *Id.* at 1208-1218; and Williamson, *Administrative Decision Making and Pricing: Externality and Compensation Analysis Applied*, THE ANALYSIS OF PUBLIC OUTPUT 115, 119-129 (1970). The results of such redistributive policies may in fact be less wealth for everyone. By deterring productive activity, the amount of wealth available for actual redistributive purposes would not increase. Cf., Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis The Abortions of Public Whimsy*, 7 ENV. L. 519, 520, 527 (1977).

59. Cf., Ervin et al., *supra* note 7, at 21.

60. Seldom recognized is the fact that resources diverted from other activities for the purpose of obtaining inefficient regulation represents a distinct kind of opportunity cost. Cf., Posner, *The Social Costs of Monopoly and Its Regulation*, 83 J. POL. ECON. 807, 809 (1975).

endanger the perpetuation of vital life cycles. In a recent paper, Professor Barry Commoner suggested several ways in which the delicate balance of natural processes might be upset.⁶¹ First, constituents of the ecosystem which have economic value can be withdrawn from the exosphere. Excessive exploitation of any given constituent may have deleterious effects.⁶² Second, a component of the ecosystem may be added above its proper level by external sources.⁶³ Finally, an ecosystem might be damaged by the introduction of substances wholly foreign to it and the resulting stress may lead to the destruction of the system.⁶⁴ The critical problem in each instance is to monitor these natural systems in order to detect imbalances which could have serious environmental impacts.

Several approaches to the problem of detecting ecological imbalances have been developed at least at the conceptual level. Theories of environmental "carrying capacity"⁶⁵ and "materials balance"⁶⁶ have become familiar to many in the field. Another approach which has significant potential is energetic analysis.⁶⁷ Energetics is predicated on the idea that the maintenance of life support systems relies on the availability of usable energy. Therefore, our ability to understand the relationship between human activities and their impacts on energy flows could provide critical information about the preservation of ecological systems.⁶⁸

What has this to do with land use planning? If one accepts the idea that energy is the key to understanding the capacity of natural systems to support human activities, an energy valuation system might provide the proper tool for analyzing and formulating land use policies. Energy accoun-

61. Commoner, *The Environmental Costs of Economic Growth*, ECONOMICS OF THE ENVIRONMENT 331, 335-36 (2nd ed., 1977).

62. *I.e.*, over exploitation of agricultural or timber lands, and fisheries, *Id.* at 335.

63. *I.e.*, intrusion of sewage into surface water or the intensive use of fertilizer, *Id.* at 335.

64. *I.e.*, infusion of DDT upsetting the balance among insect pests, plants and insect prey, *Id.* at 335.

65. *See, e.g.*, WATT, PRINCIPLES OF ENVIRONMENTAL SCIENCE 25 (1973); Pope, *Communities and Environments: Carrying Capacity*, EQUILIBRIUM 12 (Jan. 1973).

66. Kneese *et. al.*, ECONOMICS AND THE ENVIRONMENT: A MATERIALS BALANCE APPROACH (1970).

67. *See, e.g.*, ODUM & ODUM, ENERGY BASIS FOR MAN AND NATURE (1976); ODUM, ENVIRONMENT POWER AND SOCIETY (1971).

68. *Id.* at 1.

ting systems employing such analysis are being developed as practical instruments of land use allocation.⁶⁹

There are likely to be goals in addition to the two discussed here that society is interested in achieving.⁷⁰ No matter which goals we choose to guide our land use system, they need to be operationally defined so that the appropriate means of satisfying those goals might be developed. It is not unreasonable to suggest, however, that the utilitarian theory of resource allocation might also accommodate some of these other goals as well. For example, it is quite possible that individuals, when faced with complete information about the effects of land use decisions on environmental processes and the costs of those decisions, would make allocatively as well as energetically efficient decisions. Of course, the critical problems are to generate sufficient information and to ensure that individuals are faced with true cost of any given land use decision.⁷¹

To conclude this inquiry about goals, some comments concerning the Oregon approach to defining goals are relevant here. Section IV of this article analyzes in some detail the goals and guidelines promulgated by the Oregon Land Conservation and Development Commission. There are nineteen goals in all and their successful implementation would seem to require more than the work of mere mortals as they are indeed noble goals. The problem is that they are too numerous and too broad to be meaningful standards for land use planning. For example, blanket statements are made about preserving agricultural lands,⁷² coastal resources,⁷³ forest lands,⁷⁴ and open spaces;⁷⁵ providing for housing and

69. See, e.g., Nilsson, *Energy Analysis — A More Sensitive Instrument for Determining Costs of Goods and Services*, 3 *AMBIO* 222 (1974); Hannon, *An Energy Standard of Value*, 410 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 139 (1973); Klystra, *Carrying Capacity Project for Florida and Its Major Regions Involving Natural Systems Inventory and Comprehensive Planning* (Carrying Capacity Comm. Fla. Legis., 1974); and Office of Energy Research and Planning, Office of the Governor, State of Oregon, *Energy Study: Interim Report* (July 26, 1974).

70. For example, preserving options for future generations or advancing a goal based on some notion of ecological justice. See, e.g., Tribe, *supra* note 27; STONE, *SHOULD TREES HAVE STANDING?* (1974); Sagoff, *supra* note 27.

71. Huffman and Fleming, *Allocative and Energetic Implications of Land Use Planning*, 5 *ENV. L.* 477, 510-512 (1975); cf., Gordon *Economics and The Conservation Question*, 1 *J. LAW AND ECON.* 110 (1958).

72. LCDC Goals and Guidelines, No. 3.

73. *Id.* at No. 5 17-19.

74. *Id.* at No. 4.

75. *Id.* at No. 5.

transportation needs;⁷⁶ and insuring orderly transition from urban to rural lands.⁷⁷ Decisions about land use are seldom, if ever, all or nothing propositions. To the extent the Oregon goals appear to be just that, they provide no direction for decision making whatsoever. Land use decisions, like all allocative decisions are made "at the margin".⁷⁸ Is it too obvious to ask for standards as to how much agricultural land we should preserve at the cost of foregoing other benefits? Or what standards guide our decisions about the quality and quantity of transition from urban to rural lands?

The benefit of looking to the utilitarian allocative theory is that it leads us to ask fundamental questions about the specific substantive ends individuals want to pursue. It assumes nothing about that which individuals view as desirable. Rather, its implicit focus is on process problems of aggregating individual preferences and translating them into social policy. The Oregon goals, on the other hand, do make some absolute assumptions about "good" land use. Yet, even those assumptions are stated in a way that affords little decision making guidance.

B. Market Failure and Allocative Inefficiency: A Basis for Government Action

Although one can identify numerous markets through which a variety of resources are allocated, there are times when markets are prevented from forming. In an ideal setting where markets arise spontaneously to allocate all resources, the costs and benefits which accrue to the parties of any specific exchange are no more nor less than the costs and benefits which accrue to society as a whole. The total social cost of the transaction or activity is reflected in the prices of the resources exchanged and the goods and services produced from those resources.⁷⁹ The allocative significance

76. *Id.* at No. 10 and No. 12.

77. *Id.* at No. 14.

78. It would do well for land use policy makers to consider the following statement about the concept of marginality: . . . "intelligent men often ignore it in the discussion of public issues. Educators, for example, often suggest that if it is better to be literate than illiterate, there is no logical stopping point in supporting education . . . The correct comparison of course, is between *additional benefits* created by the proposed activity and the *additional costs* incurred." Ruff, *The Economic Common Sense of Pollution*, THE PUBLIC INTEREST, No. 19, 69 at 70-71 (Spring, 1970).

79. Social cost is the entire cost to society of any particular transaction. See generally, Coase, *The Problem of Social Cost*, 3 J. LAW AND ECON. 1 (1960). In reality, "social cost" is a misnomer because costs are relevant only insofar as they are experienced

of this alignment of private and social cost is that individuals are faced with appropriate incentives which affect behavior. When faced with the total cost of their actions, individuals will be able to make efficient decisions both from their own point of view and society's.

Where the price of land reflects the true marginal cost of the use of land, and that price is known or knowable by private parties, it provides information about the feasibility of various activities on that piece of land and about the appropriate level of intensity at which the land may be used.⁸⁰ However, where markets are unable to form, price signals become distorted if not altogether eliminated. This, in turn, may cause a misallocation of resources and thus inefficiency. Impediments to the formation of markets through which individuals can bargain are significant deterrents to efficient resource allocation. Identification of market failure and its causes is central to the justification for and guidance of government intervention.

Assume there exists a pleasant residential area on the edge of a city. A farmer living adjacent to this neighborhood decides to sell a portion of his land. The highest bidder turns out to be an individual who plans to build a cement factory on the site.⁸¹ Assuming the factory is built, the cement company will have to pay the costs of the raw materials, labor, and any capital investments necessary to produce cement. However, it is possible that there will be costs of operation which the cement company will not have to bear. Rather it might impose those costs on other parties. Adjacent residents may bear the cost of the factory's use of the air as a place to emit dust and smoke. The factory might be a source of noise pollution. Also, the scenic value of the countryside might be reduced by the presence of the factory. These effects may have health and aesthetic costs and they may also reduce the value of property in the residential neighborhood. A failure to confront the cement plant with the true costs of its activities would simply result in the overproduction of cement.⁸²

by individuals. The adjective "social" is used to indicate that the costs accrue to members of society other than those participating in transactions intended to be "private".

80. For a brief and readable discussion of this point see, Note, Inverse Condemnation, *supra* note 7 at 788-792; and Gordon, *supra* note 71.

81. Assume, for now, no limits on land uses are created by zoning ordinances.

82. All costs would not be accounted for in the price of cement. Assuming the good is

Traditional welfare economic analysis would indicate that this might clearly be a case for land use regulation. Regardless of how obvious the case for regulation may seem, some difficult analytical questions must be addressed before implementing policies. In his definitive article, "The Problem of Social Cost",⁸³ Professor Coase reminded both academics and policy makers that the first hint of externality problems should not lead to automatic conclusions about the necessity of government intervention.

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.⁸⁴

Disregarding for now other important issues discussed in his article, Coase pointed out that the market could, under certain conditions, work to internalize most external effects through negotiation. Assuming that, at any moment in time there is a legally sanctioned structure of property rights in existence and the cost of exchanging and enforcing those rights (i.e. transaction costs)⁸⁵ were zero, all externalities can be internalized and all misallocations remedied through market transactions.⁸⁶ As one property rights scholar summarizes this position:

All that is needed is the establishment of a non-attenuated structure of property rights in all relevant resources and the problems will disappear in

price elastic, less would be consumed had the price reflected the actual costs of cement production. One other point must be made regarding the importance of the price mechanism. If a firm tries to minimize its costs of production, it is doubtful that a cement company would locate adjacent to a residential area where the price of land tends to be high. Therefore, price itself can be a powerful force in segregating land uses. *Accord, Siegan, Non-Zoning In Houston*, 13 J. LAW AND ECON. 71 (1970).

83. Coase, *The Problem of Social Cost*, *supra* note 79.

84. *Id.* at 2.

85. Transactions costs include the costs of (i) gathering information about the persons with whom one must bargain (ii) determining one's position and strategy, (iii) negotiating an agreement, and (iv) enforcing the agreement. *See, Coase, Id.* at 15; and Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. LAW AND ECON. 11 (1964).

86. Calabresi, *Transaction Costs, Resource Allocation and Liability Rules — A Comment*, J. LAW AND ECON. 67, 68 (1968).

the market as the process of exchange continues until all gains from trade are exhausted. That solution, by definition, is efficient.⁸⁷

The foregoing discussion points out two major causes of market failure, namely, an imperfect or incomplete specification of legal rights and the presence of significant transactions costs which prevent parties from getting together and negotiating in market transactions.⁸⁸ Regardless of the extent to which property rights are defined and assigned, if the transferability of those rights is prohibited by law or by the presence of high transactions costs, it will be very difficult to achieve efficiency through the market.

Given these problems, it is useful to return to the cement plant hypothetical. If the residents have a clearly defined legal right to be free from air and noise pollution, or to a scenic easement, they may assert their rights in court and get appropriate relief.⁸⁹ However, if they do not have such legal rights, the only recourse is to attempt to bargain with the cement plant. As a result of negotiation, the plant could be bribed to cut down on its pollution or perhaps locate elsewhere.⁹⁰ But such negotiation is not always possible. The costs of numerous residents getting together to bargain with the cement plant are likely to be too high.⁹¹ It may turn out

87. Randall *supra* note 2, at 735.

88. Professor Posner has identified the requirements for an efficient system of property rights: 1) *universality*, all resources must be owned or ownable by someone; 2) *exclusivity*, an individual holder of property rights must have sufficiently exclusive control over the relevant resources to assure that he will both reap the benefits and bear the full costs of his utilization of those resources; and 3) *transferability*, property rights must be transferable so that resources can gravitate to their highest valued uses through the process of exchange. Posner, *supra* note 16, at 29-31.

89. The following alternatives should be considered when allocating rights and remedies in incompatible land use cases: (i) where the transactions costs are low enough so as not to prevent bargaining between the cement firm and the neighboring landowners, then injunctive relief would be appropriate. Given clearly defined rights and low transactions costs, negotiation would determine whether cement production is feasible in that area and at what level. (ii) However, where transactions costs are high or the costs of closing down the plant altogether exceed the benefits to be derived from injunctive relief, then damages should be awarded to the neighboring landowners as compensation for the violation or acquisition of their rights. See, Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972); and Posner, *supra* note 16, at §§ 3.4-3-7, 4.12.

90. Alternatively, it is quite possible that the landowners could not "bribe" the cement plant to alter its level of production. This fact reveals the force of the Coase theorem. In this kind of case, many believe that is the initial assignment of a right that will determine the prevailing use of land. However, if transaction costs are low, negotiation (and market forces) will determine the prevailing land use independent of the assignment of legal rights. Coase, *supra* note 79. *But see*, Mishan, *Pareto Optimality and the Law*, 19 *OXFORD ECON. PAPERS* 255 (1967).

91. A major problem is that of free riders. Of course, the point at which transactions costs become prohibitive is largely an empirical question about which we know very little. *E.g.*, Crocker, *Externalities, Property Rights and Transactions Costs: An Empirical Study*, 14 *J. LAW AND ECON.* 451 (1971).

that the residents continue to bear the costs of pollution and the consumers of cement purchase an underpriced product to the extent that the costs of using the air as a factor of production have not been paid by the cement company; the costs of discomfort from noise is still borne by the neighbors; and an area of scenic value has been spoiled by the presence of the plant.⁹²

While the presence of high transaction costs renders the market incapable of resolving efficiently the problem of incompatible land uses and, therefore, provides a justification for government intervention in the form of land use planning, major problems remain. What use of land should ultimately prevail or who should be compensated for their loss of welfare or change in position are questions which must be resolved. The nature of the problem immediately suggests a role for the government decision maker in mediating conflicting uses of land such as residential neighborhoods and cement factories.⁹³ Perhaps the prescriptive separation of incompatible land uses through public regulation could be justified on efficiency grounds.⁹⁴ But the problem is not always as easy as it is in the case of such grossly incompatible land uses as cement factories and residential neighborhoods. What if our hypothetical involved more subtle incompatibilities such as residential neighborhoods versus small grocery stores, medical clinics, apartment houses or gas stations? Is it clear that the costs of incompatibility in such cases justify intervention? This problem will be further developed in Part C of this Section where we contend that the answer to such questions depends upon a comparison of the costs of incompatibility with the costs of government regulation.

In addition to the problems of imperfect specification of property rights and prohibitive transaction costs, there exist two other possible justifications for government to act in the

92. These costs will be reflected in the reduction of property values and increased medical bills. General psychic and aesthetic costs are very real yet difficult to quantify.

93. Collector of whatever information is necessary to arrive at a result that would have occurred in an efficient market.

94. For example, in those cases when we can state with relative certainty that there is a correlation among (i) particular uses of land, (ii) the presence of costly external effects; and (iii) a likelihood of high transactions costs in private negotiation, separation of uses through zoning is only one method. A permit system might achieve a tolerable result. Some externality-producing uses of land might be taxed.

interest of achieving efficient resource allocation. First, realization of the actual costs of using land in various ways is, in part, a function of the availability of information concerning the short and long run effects of different land uses.⁹⁵ Information, like many other things, is scarce and often costly to obtain. While the production of information can benefit from the incentives of private control, there are significant theoretical reasons to believe that information will not be produced in sufficient amounts in the market place.⁹⁶ This may justify a role for government in subsidizing the generation of information about the impact of land uses.⁹⁷ In addition, there is another kind of information which contributes to efficient private decision making. Individuals must know what land is actually available and, perhaps more importantly, what legal rights attach to any particular parcel of land.⁹⁸ Certainly, a critical role of the state would be to make more definite and certain those property rights in land which do exist.⁹⁹

A second impediment to efficient land allocation concerns the problem of "public goods". Reconsider for a moment our hypothetical case. Assume that the neighboring residential landowners wish to purchase that portion of land the farmer is willing to sell because they want to turn it into a park. However, this land use preference for a park might not be realized in the market. A park provides benefits which can be consumed by some without reducing the amount available to others. It is quite difficult to exclude individuals from sharing in at least some of the scenic aesthetic and recreational benefits of a park.¹⁰⁰ When the time comes to ac-

95. See, Haveman, *supra* note 33.

96. It has been argued that because the benefits to be derived from information generation cannot be captured completely by the producer, information will be underproduced in the marketplace. For a summary of relevant arguments see, Hirshleifer, "Where Are We in the Theory of Information?" 63 AM. ECON. ASSOC. PAPERS AND PROCEEDINGS 31 (1973).

97. For justification of a government role in mitigating informational problems see, e.g., BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE 199-201 (2nd ed., 1965); ARROW, THE LIMITS OF ORGANIZATION, (1974).

98. For the proposition that uncertainty about the law (i.e. legal rights) leads to inefficiency see, Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 U.C.L.A. L. REV. 1233 (1974).

99. Certainly, a central role of the courts is to determine or make clear the rights of parties which appear before them. A recent and novel commitment to making clear and definite existing rights in property is exemplified by MONTANA'S WATER USE ACT OF 1973 § 89-865. This legislation asserts a policy of protecting and preserving existing property rights in water and establishes an elaborate process for determining what property rights actually exist.

100. Such goods lack the critical feature of exclusivity. However, it is not suggested that parks are examples of pure Samuelsonian public goods. See, Samuelson, *The Pure*

tually negotiate the sale of the farmer's land and subsequently transform it into a park, it will clearly be in the interests of some to take a "free ride" on the efforts of others. The allocative effects of "free riders" who attempt to internalize the benefits and externalize the costs of the provision of a public good are to either not have the good supplied at all; or have the good supplied in inadequate quantities.¹⁰¹ Government can play a vital role in purchasing the land for conversion into a park and in taxing those individuals who are likely to derive the greatest benefits from the existence of the park.¹⁰²

If the goal of land use planning and control is to eliminate the inefficiency that results from market failure, then the foregoing discussion provides a theoretical framework for addressing that problem. Imperfect property rights specification, prohibitive transaction costs, public goods and free riders are all causes of market failure which regulation must be designed to overcome. In their efforts to eliminate the external costs of private activity, planners must generate information about individual preferences so that land use regulatory decisions might approach that result which an efficient market would have accomplished. This task is, by no means, simple. Because government has problems of its own in bringing about efficient results, market failure does not provide an automatic justification for intervention.

C. Government Failure: Obstacles To Effective Intervention

In making the choice between market and non-market allocation,¹⁰³ it is important to remember that the presence of market failure provides only a necessary and not a suffi-

Theory of Public Expenditure, 36 REV. ECON. AND STATS. 350 (1955). One can imagine ways of excluding others from some of the benefits of parks (i.e. user fees). Yet allocating efficiently goods which exhibit only varying degrees of "publicness" can prove to be difficult in the marketplace. Herber, *supra* note 49, at 26, 44-61.

101. Classic treatment of the problem is in OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See also, BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968).
102. *But see*, Coase, *The Lighthouse In Economics*, 17 J. LAW AND ECON. 357 (1974) for the proposition that actual cases receptive to the classic justification for government provided public goods seem to be rare and that a careful factual examination of each case must be conducted before deciding the issue of government provision.
103. Professor Posner, *supra* note 16, at 271 correctly points out that choices between market and nonmarket forms of allocation also involve choices between private (the common law) and public forms of regulation.

cient justification for government intervention. There are two major reasons for this. First, government also fails in its attempt to achieve efficient resource allocation. There is no guarantee that public control of allocation can or will be more efficient than private allocation. Second, there are times when the cost of government intervention will exceed the benefits to be derived from such intervention. The most that can be offered in the way of an approach to evaluating these problems is to suggest a careful weighing of the advantages of public versus private control of allocation in each particular situation.

The purpose of this Section is to review some problems which can prevent government from achieving efficient results when it intervenes to correct failures of the market. The following three topics will be addressed: 1) The ability of traditional public land use planning methods to eliminate the costs of external effects; 2) The question of whether public decision makers face real incentives to make efficient allocative decisions regarding the use of land; and 3) The matter of discovering the optimal jurisdiction for land use controls.¹⁰⁴ What follows is not an elaborate discourse on each of these topics. Rather, issues will be raised merely as a means of elucidating potential hazards to effective planning.

1. Planning Our Way To Efficiency?

There are two essential steps to be taken when considering the effectiveness of land use planning in attempting to deal with the external effects which result from actual market failure.¹⁰⁵ First, there must be some method for identifying externalities as well as the cause for their existence. This is not an easy task and while there is not a great abundance of empirical work in the area of land use, attempts have been made to deal with the technical problem of identifying and measuring external effects.¹⁰⁶ The second step involves a determination of whether land use planning actually mitigates the external effects it anticipates. This is just another way of saying that we need to be able to evaluate the

104. This issue involves determining the basis for "statewide" as opposed to more decentralized or more centralized forms of land use planning.

105. Ervin *et. al supra* note 7, at 74-75.

106. *See, cites contained at note 47 supra. See also, Crecine et. al, Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J. LAW AND ECON. 79 (1967).

effectiveness of land use planning methods. Unless we can say that things have improved as a result of regulatory efforts, it would seem difficult indeed to justify the cost of regulating.

There is no scientifically objective method available for detecting the existence of externalities. The problem is not only an empirical one, but a conceptual one as well. What is an externality? Even if we were able to identify some external effects which the market place could not address because of transaction costs, there is no guarantee that the market would internalize those costs if it could. The willingness to put up with certain things in life is a subjective matter.¹⁰⁷ This fact merely reinforces the importance of having planners gather data regarding the preferences of their constituents before actually engaging in regulatory policy making.¹⁰⁸

Planning proceeds on the basis that incompatible uses of land can be separated. Implementation of this policy usually begins with the development of a land use plan or map which specifies where certain uses of land may occur. Given what has been said about the subjective nature of the problem, drawing up the plan can be a difficult job. Of course, there are probably some incompatibilities which are so significant that we can assume some rough empirical correlation between the presence of a particular land use and the magnitude of the costs it would impose on neighboring landowners. However, when planners get down to the business of dealing with more subtle incompatibilities in land uses, it is unclear whether locations should be specified for such uses or not. Some questions which are central to this problem must be asked. First, what costs would be imposed on existing owners of property by having a more detailed and restrictive specification of permissible land uses? Certainly the expectancy value of some land would decrease if the range of permissible uses were more specifically detailed. If the courts are unsympathetic to the claims of property owners for just compensation, real welfare losses might

107. This perspective is implicit in Buchanan and Stubblebine's essay, *supra* note 79 where they attempt to distinguish between Pareto-relevant and Pareto-irrelevant externalities.

108. To the extent that public allocation attempts to enhance efficiency, it would be critical to aggregate and be responsive to the preferences of individual constituents.

result.¹⁰⁹ Second, would the costs of a more detailed specification of land uses exceed the benefits which could be derived from that specification? One commentator provides a succinct response to this question:

Land use controls essentially take an "all or nothing" approach in that certain uses are either allowed or prohibited. Such an approach produces misallocations because the proper economic goal is not to prohibit all uses which generate externalities, but only to facilitate an accurate determination of whether a particular use is feasible when all the costs are considered.¹¹⁰

Although flexibility devices such as permits and variances could act as safety valves in allowing for "feasible" uses which are prohibited by land use regulations, it is unlikely that this administrative approach to allocation would be less costly than the market itself.¹¹¹ Also, even if market failure prevented the market from operating well in this capacity, there are likely to exist entirely more effective means of public control than the segregation of land uses.¹¹²

Some studies have been conducted in an attempt to ascertain the actual effectiveness of land use regulation. There is evidence which suggests that the externalities anticipated by land use plans do not even exist.¹¹³ Perhaps the most controversial work has been performed by Bernard Siegan who suggests, in part as a result of his study of Houston, Texas, that zoning has not proven to be an effective means of attaining efficient land use and, in fact, generates significant costs by placing inordinate burdens on the poor.¹¹⁴ As the evidence begins to accumulate on land use

109. The courts have generally recognized as constitutionally valid regulations which do not prohibit *all* reasonable and feasible uses of land. *Averne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 NE2d 587 (1938). See discussion in Stoebeck, *supra* note 55 at 172-175. Government, therefore, has the potential of using a large amount of discretion in deciding how restrictively it may define land uses without payment of compensation.

110. Note, *Inverse Condemnation*, *supra* note 7, at 791.

111. The relevant comparison would be between the costs of administering a system of public land use controls with the costs of transacting in the land market and/or implementing voluntary land use agreements such as those anticipated by Ellickson, *Alternatives to Zoning*, *supra* note 7.

112. Methods might be borrowed from the area of pollution control. See, Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 UCLA L. REV. 429, (1971).

113. See, *supra* note 46.

114. Siegan, *Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation*, 5 ENV. L. 385 (1975).

planning and regulation, it becomes apparent that we may do well to look to alternative methods of dealing with social costs generated by private land use decisions.¹¹⁵

2. Planning and The Incentives of Public Servants

Land use control is frequently characterized as a means of placing limitations on the rights of individuals to make choices regarding the disposition of their land. Regulation is perceived only as a means of limiting private action but this view of the matter is incomplete. As more and more substantive resource allocation problems are affected by government regulation, there is not only an increasing limitation on private rights, but an attendant expansion of the rights of government to control various economic activities.¹¹⁶ This right of state and local government to affect social processes derives from its police power.¹¹⁷ Today, the scope of activities which can be affected by the police power has increased dramatically.

Two significant consequences flow from the expansion of police power activity. First, government has increasing power to define those rights which will exist.¹¹⁸ This is exemplified by the process of land use planning through which the state defines permissible uses of land. Legislative bodies define rights, but those rights may be defined so vaguely that either administrative agencies or the courts are effectively left with the task of defining them more precisely.¹¹⁹ As Section IV and V of this article argue, vagueness

115. *Supra* note 42.

116. Central to this discussion is the distinction between government's role pursuant to the rights it possesses (which right it may acquire from or transfer to private individuals subject to any constitutional limits) and government's role as the definor of rights. This distinction is developed and related to a general theory of rights in a forthcoming paper — Huffman and Plantico, *Property Rights and Social Welfare in a Constitutional Democracy: A Case for the Taking Clause of the Fifth Amendment*.

117. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See, discussion in Stoebeuck, *supra* note 55, Chap. 6.

118. The purposes for which government may regulate land (i.e. define rights in land) are both broad and diverse. See, ANDERSON, 2 AMERICAN LAW OF ZONING, Chap. 9 (1976).

119. The standard which guides much rights definition by public decision making bodies is "public interest" or "public welfare". The inherent vagueness in this standard is obvious. The words of Justice Douglas suggest that this vague standard affords government great latitude in defining rights. "The concept of public welfare is broad and inclusive . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954). To the extent that legislative bodies adopt vague legislation, the specific content of rights will be determined by other government bodies which either implement legislation (agencies) or adjudicate specific claims arising under the legislation (courts).

characterizes the enabling legislation for the Oregon statewide system of land use planning and therefore creates opportunities for more precise rights definition by non-legislative bodies.

A second major consequence involves the effect of allocating rights through public agencies. When decisions are made in the private sector, they are shaped and constrained by significant incentives. Assuming the efficient operation of markets, individuals are directly faced with the private and social costs of their decisions. However, when allocative problems are taken out of the market and put in the hands of public servants, decision making is influenced by qualitatively different incentives. Price, for example, is no longer a direct constraint on decision making. New factors come into play such as the "power" of those private groups who seek to influence public decisions. There are incentives to make politically rather than allocatively efficient decisions.¹²⁰ Although many agencies purport to insulate themselves from the political forces surrounding their "public" position, the fact is that they are frequently faced with incentives to respond to precisely those political influences.¹²¹

Recently, discussions of the regulatory process by Professors Stigler, Posner, and Peltzman¹²² have advanced the general thesis that agencies, as arms of the state, are in a position to essentially "produce" regulation. As a result, private groups make demands for regulations which have the ultimate effect of transferring wealth.¹²³ This general thesis can provide analytical insight to the process of land use regulation. Where land use regulators are in a position to

120. Assuming the utility maximizing behavior of public servants, the question of what is, in fact, "politically efficient" requires an examination of that which public officials value (it has been suggested that increasing agency budgets, vote maximization, accumulating power and prestige, perpetuating and extending agency programs and even maximizing personal income are common goals of legislators and/or bureaucrats). See generally, Symposium: *Economic Analysis of Political Behavior*, 18 J. LAW AND ECON. 587-918 (1975); North, *supra* note 23 and DOWNS, *INSIDE BUREAUCRACY* (1967).

121. See generally, REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 1969.

122. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. AND MGMT. SCI. 3 (1971); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. AND MGMT. SCI. 335 (1974); Peltzman, *Toward A More General Theory of Regulation*, 19 J. LAW AND ECON. 211 (1976).

123. Examples are too numerous to mention here (i.e. price controls, restrictions on entry to the market, etc.). For a discussion of the panoply of restrictions to the land market see Hagman, *supra* note 58.

define rights and thereby supply regulation, various interest groups may attempt to secure and increase wealth by demanding favorable regulation. This, of course, suggests that agencies will be faced with demands to make decisions with primarily distributional impacts.¹²⁴ Studies in the land use area suggest that the nature of much regulation supports this thesis.¹²⁵ If this is true, it raises serious doubts about the actual propensities of agencies to base their regulatory policies on an efficiency rationale.

3. The Optimal Jurisdiction

A final issue concerning the ability of government to deal effectively with market failure goes directly to the heart of statewide land use planning. This issue involves the problem of determining the appropriate jurisdictional level at which land use policies should be formulated and from which the implementation of these policies should be directed. A decision on this issue requires consideration of a few analytical questions which will be discussed briefly here.

The familiar and persistent rhetoric of "local autonomy" suggests that communities are still very much interested in being masters of their own destinies. However, it is necessary to have some analytical framework in order to determine whether a jurisdiction beyond the local level is required to handle certain land use problems. The concepts of "externality" and "market failure" need only be extended somewhat to provide such a framework.

It was argued earlier that the failure of markets to internalize costs provided a justification for government intervention. If, for example, only individuals within a particular municipality were affected by the externality in question (ugly billboards on main street or soot from a local factory) then the municipality's collective decision making body is best suited for the task of aggregating local

124. An unexplored corollary to the theory of economic regulation is the extent to which similar incentives of interest groups result in demands for vague legislation. Well organized interests at the agency level may attempt to influence the writing of vague laws because they are confident of their ability to influence the specific decisions of regulatory bodies. To the best of our knowledge, this hypothesis is unexplored in the land use area.

125. See, e.g., Ellickson, *Suburban Growth Controls*, *supra* note 7, at 432; Ervin *et. al*, *supra* note 7, at 92-94; Siegan, *supra* note 122.

preferences on local land use matters.¹²⁶ If and when local uses of land have negative impacts on neighboring communities and the transaction costs of communities resolving these matters themselves are prohibitive, there may be a basis for having a more encompassing jurisdiction assist in the problem.¹²⁷ Of course, certain factors would have to be weighed before opting for this approach. In addition to the fact that the costs of intervention should never exceed its benefits, there is always the possibility that local interests will be subordinated in state decision making processes. If the problem at hand affects only a small percentage of the state, there are dangers that irrelevant interests will influence the outcome.¹²⁸

Unless it can be demonstrated that the actions of private parties within communities, or that communities themselves impose costs of statewide significance, it is very difficult to justify statewide intervention in the land use process. Certainly, communities can impose costs on each other by adopting specific kinds of policies. For example, "no growth" ordinances which restrict the supply of housing and basic services may have the effect of forcing neighboring communities to deal with the costs of growing populations.¹²⁹ However, absent a well-supported finding of these intra-state costs, there seems to be no justification on efficiency grounds for state mandated land use planning or the imposition of substantive goals by state government or local communities.

One final example should be raised here. Frequently, many citizens of a state will share in the benefits of a particular amenity resource which is, in effect, common property. Absent some regulatory control, the use of a common

126. See, e.g., Oates, *FISCAL FEDERALISM* 11-13 (1972); Stigler, *Tenable Range of Functions of Local Government, in Joint Econ. Comm., FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH* 213 (Jt. Comm. Print 1967); Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1954).

127. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L. J.* 1196, 1215-1216 (1977). However, as always, the costs of utilizing an agency with more extensive control should never exceed the benefits to be derived from that control. Zerbe, *Optimal Environmental Jurisdictions*, 4 *ECOLOGY L. QTR.* 193, 223 (1974).

128. Ideally, those represented within any collective decision making body attempting to resolve problems of resource misallocation would also be the ones who are actually affected by the externality in question. The present division of government jurisdictions into "local" - "state" - "federal" does not always lend itself to such specific correlation.

129. See, Ellickson, *Suburban Growth Controls, supra* note 7, at 403, 450.

property resource can result in a misallocation of resources. The problem arises because access to common property is often unrestricted and unless some form of regulation restricts entry, the resource will be over-exploited.¹³⁰ Since the benefits of such resources frequently accrue to a large percentage of the state polity, the relevant jurisdiction to control the commons would appear to be state government.¹³¹

The cost internalization case for land use regulation developed in this Section provides both an approach to the problem of land use planning as well as an analytical framework for evaluating existing regulatory mechanisms. The purpose this approach serves, above all others, is to point to the necessity of establishing clearly the relationship between regulatory means and ends as well as to clarify what information is needed to proceed intelligently with land use problems. With this in mind, we now turn to a critique of the Oregon statewide planning system.

III. THE OREGON SYSTEM OF LAND USE PLANNING

Land use planning in Oregon evidences very little analytical foundation in the terms discussed above. Articulated objectives of planning tend to be specific preferences for resource use, and are therefore little more than subjective value statements. There has been no effort to identify broader social objectives nor to relate those objectives to the planning system provided for their realization. That the Oregon planning system seems to be so widely supported speaks not to the quality of the Oregon system, but to the remarkable faith of the Oregonians who endorse it. It is essentially a foundationless system. Its goals are inadequately articulated and its processes are unrelated to what vague goals have been articulated. There is, it would appear, a presumption in favor of the correctness of land use planning. The fact that many Oregonians are happy with their planning system is admittedly proof that it has delivered results to their liking. But in the design of social institu-

130. The classic discussions are Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Hardin *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

131. See generally, Zerbe, *supra* note 127; HAEFELE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT (1973).

tions, the proof of the pudding is not in the eating. The proof must be in the recipe, the constitutional and statutory design, for although the pudding tastes good today, it may be a function of the good taste of the cook and not the prescription of the recipe. The analysis in the preceding sections suggests that a system which delivers good and bad results depending upon who is making the decisions is a system which can be improved. That is the case with the Oregon land use planning system.

The problem which Senate Bill 100 purports to address is that of "uncoordinated use of lands" which "threatens the orderly development, the environment . . . the health, safety, order, convenience, prosperity and welfare of the people of this state."¹³² However, Senate Bill 100 does a poor job of articulating the particular purposes for which land use is to be coordinated. The only language in the quoted section which gives even vague guidance is that which designates the purposes of health and safety. "Orderly development," "order," and "convenience" are all terms which, like coordinated, have meaning only in relation to particular objectives. What is order for one purpose may be chaos for another. Prosperity and welfare are terms without objective meaning except to the extent that individual judgements can be meaningfully combined into an integrated whole. Whether a society is prosperous which has vast areas of wilderness as compared to a society having enormous stocks of lumber for housing is entirely a question of the values of the individual members of society. There are no abstract definitions of prosperity and welfare.

Section 2 of the legislation, which is labeled a policy statement, adds nothing to the search for a direction for statewide land use planning. "In order to assure the highest possible level of liveability . . .," the Legislative Assembly determines that "properly prepared and coordinated comprehensive plans" are needed.¹³³ Ask a hundred people what "the highest possible level of liveability" is and you will get one hundred different answers. It is probably a paradigm of Oregon Land Use Regulation that very dense concentration of human residences results in a low level of liveability.

132. OR. REV. STAT. § 197.005(1) (1977).

133. OR. REV. STAT. § 197.010 (1977).

Perhaps that is an accurate reflection of the opinions of many Oregonians, which one would expect since they have chosen to live in Oregon where human settlement is not very dense. But how is it explained that thousands of people choose to live in housing which often has over a thousand people on a single city block and the nearest park several miles away? It is not uncommon in many American cities, nor are all of those people wishing they lived in Oregon. As with the terms employed in Section 1, liveability is meaningless except in relation to particular purposes and particular individuals.¹³⁴

Although the Act goes on for another fifty-six sections, there is nothing which comes any closer to giving some direction to its application. Section 3 defines a comprehensive plan as a "generalized, coordinated land use map and policy statement . . . that interrelates all functional and natural systems and activities relating to the use of lands."¹³⁵ As the decisions in the case law indicate, this definition has left everybody in the dark as to what a comprehensive plan really is, or what, under the state law, a comprehensive plan is supposed to be.

Section 43 of the Act, an amendment of ORS 215.055, provided that comprehensive plans "shall be designed to promote the public health, safety, and general welfare . . ."¹³⁶ They are objectives with which surely no one will disagree in the abstract, but with which few will agree on specifics. Section 43 went on to indicate what factors are relevant in the formulation of the plan, but nothing was added in terms of defining goals. The effect was merely to require that comprehensive plans be based upon an inventory of the human and natural resources of the area for which the plan is being designed, a seemingly obvious requirement.

But even the vague guidance offered by Section 43 of Senate Bill 100 is no longer part of Oregon's law, having been repealed by the legislature in 1977.¹³⁷ The repealing legislation provides substitute direction only to the extent

134. Not only do values vary among individuals, but an individual's values will vary over time.

135. OR. REV. STAT. § 197.015(4) (1977).

136. OR. REV. STAT. § 215.055(1) (1975).

137. OREGON LAWS, Chapt. 766, § 16 (1977).

that it requires comprehensive plans to be "in conformity with the statewide planning goals and any subsequent revisions or amendments thereof."¹³⁸ The effect of this amendment is to further amplify the powers of the appointed Land Conservation and Development Commission, which is discussed below.

Whether or not one agrees with the wisdom or need for statewide land use regulation, there should be general agreement in a system of representative government that once it is decided to have state-wide planning the legislature is the body which ought to establish the goals for that planning.¹³⁹ Perhaps the most remarkable aspect of Senate Bill 100 is that it gives to the state the power to regulate land use in the state and then abdicates that power to a Commission of seven appointed members.¹⁴⁰ The finality of the abdication is emphasized by Section 48 of the Act which restates the provisions of ORS 215.515, a legislative statement of general planning goals, and then makes it clear that they will continue to apply only for an interim period before complete abdication.¹⁴¹ Although vague,¹⁴² the standards stated in ORS 215.515 were at least evidence of a legislative interest in retaining control over the land regulation process.

Having pointed out the total lack of standards for implementation of the Act, it should be said that there is really no surprise in finding such a directionless piece of legislation. It merely reflects the fact that the problem with which the legislation deals is one of resource allocation, and as indicated in the first sections of this article, that is a problem which can only be resolved in a society of individuals, by

138. OR. REV. STAT. § 215.050(3) (1977).

139. It is fundamental to any representative system that the representatives make the decisions delegated to them. The extent to which the legislature may delegate decision-making to administrators is a continuing issue. The total lack of legislative guidelines in Senate Bill 100, and the attenuated control retained by the legislature over LCDC both suggest that the representative principle is being violated in Oregon land use planning. For consideration of the delegation issue in the Federal context see *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *Schechter Poultry v. United States*, 295 U.S. 495 (1935), and *National Cable Television Association v. United States*, 415 U.S. 336 (1974).

140. OR. REV. STAT. § 197.030 to § 197.060 (1977).

141. OR. REV. STAT. § 215.515(2) (1977).

142. Vague legislative language may be the result of poor drafting, a lack of information necessary for greater specificity, or intentional introduction or uncertainty for reasons of political compromise or with the hope of using uncertainty to particular advantage at some future time. See, Curtis, *A Better Theory of Legal Interpretation*, 3 VANDERBILT LAW REV. 407 (1950).

relying on people's needs and wants as they perceive them.¹⁴³ Any body which truly represents the people of Oregon would be unable to establish anything but the most general of standards. By shifting the standard writing task to a commission of seven members, it is possible to write increasingly specific standards only as the commission is able to increasingly isolate itself from the people of the state.

The Land Conservation and Development Commission is a body of seven individuals appointed by the Governor.¹⁴⁴ The Governor is restricted to having at least one member from each congressional district, one member who is an elected city or county official at the time of his appointment,¹⁴⁵ and one but not more than two members from Multnomah County.¹⁴⁶ In addition, Commission members are staggered and their appointment is subject to Senate confirmation.¹⁴⁷ All of these provisions are presumably to assure that the Commission will be objective and not subject to partisan pressures. Other restrictions might have been imposed. For example, bipartisanship in terms of political party membership might have been required. It is doubtful, however, whether more or fewer restrictions on membership would have made any difference in terms of the actions of the Commission. The fact is that the Commission is required under the statute to make a vast range of political decisions.

There is no way to make a political decision anything but political and there are no degrees of politicalness. Politics is the business of trying to influence decision makers to decide in a way which benefits the politician. Anybody having the power to make allocative decisions for others is in the business of politics and everyone having a sufficient interest in the outcome of the decision to seek to influence it is a

143. Certainly these are alternative allocative principles. For example it would be theoretically possible to allocate all resources on the basis of energy efficiency. For the application of energy efficiency theory to human affairs, see, ODUM, ENVIRONMENT, POWER, AND SOCIETY (1971).

144. Until July 1, 1979, the Commission may have eight members as a result of a 1977 law OREGON LAWS, Chap. 664, § 4(a) which provides for immediate appointment of an elected city or county official. This adjustment was necessary since the terms of existing Commission Members, none of whom is an elected city or county official, did not expire until July 1, 1979.

145. This provision was added in 1977 in response to widespread belief among local governments that their interests had often been ignored by the LCDC.

146. OR. REV. STAT. § 197.030 (1977).

147. Or. Rev. Stat. § 197.030(1) (1977).

politician. As in the market place, who gets what depends upon what they can afford. The distribution of political power is at least as disproportionate as the distribution of financial wealth.¹⁴⁸

The preceding point requires re-emphasis. Those who insist that planning in the "public interest" will result from an apolitical decision-making process are at least fooling themselves, but are more likely trying to fool those who are disgruntled about the outcome of planning decisions. A casual ear to the rhetoric of any political campaign will hear nothing but talk of who in society can expect to get what if the speaking candidate is elected. Not all promises are kept nor could they be, for many of them conflict, but what is important is that the subject matter of politics is resource allocation. Every person in society wants a lot of things and there simply are not enough resources to satisfy everyone's desires. How those resources which are allocated publicly are in fact allocated is a function of the workings of the political system. Planning is government resource allocation, and we should not be so naive as to believe that there are apolitical solutions or that we can design an apolitical process to reach allocative solutions. What we must do is recognize that public resource allocation is the business of politics and to concentrate on the task of designing a political process which will bring the allocative result we desire. This will never be done until we have articulated our goals for public resource allocation.

Under Senate Bill 100 the LCDC is assigned numerous functions. The Commission is to "establish state-wide planning goals consistent with regional, county and city concerns."¹⁴⁹ Although these goals are subject to review by a Joint Legislative Committee on Land Use,¹⁵⁰ they go into ef-

148. The goal of legislative apportionment (an element of political power distribution) is to "accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority." Associate Justice Stewart dissenting in *Lucas v. Colorado*, 377 U.S. 713 at 748-749 (1964). See also, SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* at 229-230 (1964). "[T]he electoral process is not the only political process. Indeed a major share of our politics consists of negotiations, both public and private, among various interest groups and segments of government. In this sphere of negotiations, political equality is difficult to attain. In fact, it is extremely difficult to assess what degree of inequality actually exists."

149. OR. REV. STAT. § 197.040(2)(a) (1977).

150. OR. REV. STAT. § 197.135(3) (1977).

fect without legislative approval and remain in effect apparently until the Legislature takes affirmative steps to alter the stated goals. Hence, seven appointed individuals will somehow arrive at a set of goals which will govern land use planning for the entire state, from metropolitan Portland to the deserts of eastern Oregon. The Commission's announced goals evidence the enormous difficulty if not impossibility of this task.¹⁵¹

As of February, 1978, the LCDC has promulgated nineteen goals and guidelines for Oregon land use planning.¹⁵² Exemplary of the problem faced by the LCDC in satisfying the whole spectrum of Oregon political interests are repeated provisions which allow particular goals not to be met if other objectives are more important. For example, goal number

151. *Oregon Land Conservation and Development Commission, OREGON LAND USE HANDBOOK*, Chapter 2 (1978).

152. 1. To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.
 2. To establish a land use planning process and policy framework or a basis for all decisions actions related to use of land and to assure adequate factual basis for such decisions and actions.
 3. To preserve and maintain agricultural lands.
 4. To conserve forest lands for forest uses.
 5. To conserve open space and protect natural and scenic resources.
 6. To maintain and improve the quality of the air, water and land resources of the state.
 7. To protect life and property from natural disasters and hazards.
 8. To satisfy the recreational needs of the citizens of the state and visitors.
 9. To diversify and improve the economy of the state.
 10. To provide for the housing needs of the citizens of the state.
 11. To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.
 12. To provide and encourage a safe, convenient and economic transportation system.
 13. To conserve energy.
 14. To provide for an orderly and efficient transition from rural to urban land use.
 15. To protect, conserve, enhance, and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.
 16. To recognize and protect the unique environmental, economic and social values of each estuary and associated wetlands; and to protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic and social values, diversity and benefits of Oregon's estuaries.
 17. To conserve, protect, where appropriate develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of those shore land areas shall be compatible with the characteristics of the adjacent coastal waters; and to reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands.
 18. To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas.
 19. To conserve the long-term values, benefits and natural resources of the near-shore ocean, and the continental shelf.

three is "To preserve and maintain agricultural lands."¹⁵³ In pursuing this goal planners are instructed that the:

Conversion of rural agricultural land to urbanizable land shall be based upon consideration of the following factors: (1) environmental, energy, social and economic consequences; (2) demonstrated need consistent with LCDC goals; (3) unavailability of an alternative suitable location for the requested use; (4) compatibility of the proposed use with related agricultural land; and (5) the retention of Class I, II, III and IV to convert rural agricultural land to urbanizable land shall follow the procedures and requirements set forth in the Land Use Planning goal (Goal 2) for goal exceptions.¹⁵⁴

Consideration number one is the biggest hedge of all since it essentially requires that the planner reconsider the fundamental land allocation issue which brought the goals into existence in the first place. If the decision to convert rural land to urban land is to depend upon the "environmental, energy, social and economic consequences," we know precisely what we should have known all along — the land use decision should be socially optimal. The goal in no way helps us to know what is optimal, nor has the focus of the particular goal on agricultural use given us any basis on which to assess agricultural uses in relation to alternative uses.

Goal number fourteen is exemplary of the same lack of direction. That goal is "To provide for an orderly and efficient transition from rural to urban land use."¹⁵⁵ Factors to be considered in making that decision include:

- (1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
- (2) Need for housing, employment opportunities, and livability;
- (3) Orderly and economic provision for public facilities and services;
- (4) Maximum efficiency of land uses within and on the fringe of the existing urban area;

153. *Id.* at 13.

154. *Id.*

155. *Id.* at 38.

- (5) Environmental, energy, economic and social consequences;
- (6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,
- (7) Compatibility of the proposed urban uses with nearby agricultural activities.¹⁵⁶

Consideration number four is, like the factors to be considered in conjunction with the agricultural land goal, a simple restatement of the basic land allocation issues. Efficiency as used here can only mean the optimum social use of urban-fringe lands — that is the lands should be urbanized or not depending upon whether society will benefit more from their urbanization or retention as agricultural lands. Consideration number six refines the issue a bit by reminding the planner that Class I land should have a higher priority for agricultural use than Class VI land. In other words fertile bottom lands are better for agriculture than rocky hill tops. Surely any individual involved in the sale or acquisition of land would not have to be reminded of a fact so obvious. That some Class I lands have been urbanized only evidences that even the best farming lands have been deemed at various times to be more valuable for urban uses.

A recent decision of the Oregon Court of Appeals illustrated the difficulty of requiring compliance with both goal three (agricultural lands) and goal fourteen (urban lands). In *1000 Friends of Oregon v. Benton County*,¹⁵⁷ the petitioners appealed the approval of subdivision plans for land located in an “Agricultural/Forestry” district under the county zoning ordinance and on “agriculture, forestry and/or flood plain” area under the county comprehensive plan. The petitioners contended that the approval of the subdivision plans was contrary to LCDC goal number three because the lands in question were “agricultural lands” under Oregon law.¹⁵⁸ The Court of Appeals rejected the petitioners absolutist approach pointing out that goal three requires the designation of agricultural lands “consistent with existing needs for agricultural production, forestry and open

156. *Id.*

157. 32 Or. App. 413 (1978).

158. Ors 215.203.

space.”¹⁵⁹ Quoting from their earlier opinion in *Sunnyside Neighborhood v. Clackamas County*,¹⁶⁰ the Court said that “local governments are required to address and accommodate as much as possible all applicable planning goals.” That requires, observes the Court, the application of goal three in view of the objective of goal fourteen. There is no basis for a judicial determination of compliance.

But the objective of this article is not to defend or justify existing land use patterns. The analysis of Section II recognizes that many current land uses are likely not to be optimal. Rather the objective of this article is to assess the alternative institutional arrangements under Oregon law for land allocation. An examination of the goals and guidelines which have been promulgated by the LCDC to date indicate that there has been little if any progress made beyond the statement in various ways of the broad land allocation issue.

The only goal which appears to take a positive stance in favor of a particular use of lands is number fifteen which relates to the Willamette River Greenway.¹⁶¹ That goal says that the Greenway will exist and that comprehensive plans must be in compliance with the Greenway program. However, the decision to prefer particular uses over others along the Willamette River was in fact made by the Oregon Legislature when it set up the Greenway program.¹⁶² LCDC goal number fifteen thus simply requires local planners to comply with existing state law.

A goal by goal critique would lead to similar conclusions in every case, but a final comment on goal number two will suffice to confirm the conclusion that the LCDC's goals and guidelines have done little or nothing to aid in the making of land use choices. Goal number two sets out the process for land use planning.¹⁶³ Part II of that goal allows for exemptions to the statewide goals and sets forth the following considerations in granting exceptions:

159. 32 Or. Adv. 426-427.

160. 27 Or. App. 647, 654, 557 P.2d 1375 (1976).

161. *Id.* at 41.

162. *Ore. Rev. Stat.* 390 (1977).

163. *Oregon Land Use Handbook*, *supra* note 164 at 7.

- (a) Why those other uses should be provided for;
- (b) What alternative locations within the area could be used for the proposed uses;
- (c) What are the long term environmental, economical, social and energy consequences to the locality, the region or the state from not applying the goal or permitting the alternative use;
- (d) A finding that the proposed uses will be compatible with other adjacent uses.¹⁶⁴

Again the factors which are to be considered in granting exceptions simply restate the basic problem of choosing among alternative land uses.

In the face of all of this criticism of the LCDC's formulated goals and guidelines, there is a basic point to be made on the affirmative side. Taken individually, the goals and their stated considerations for implementation have little substantive direction. Taken as a whole, however, the goals do articulate the multitude of considerations which are relevant to any land use choice. In this way the goals and guidelines require that planners perform an impact study prior to making any planning decisions. It is a requirement similar in form, although broader in substance, to the well known environmental impact statement process.

Although it may appear obvious that a land use decision should involve the consideration of all land use alternatives and the external consequences of those alternatives, which are the considerations required by the LCDC goals and guidelines, it is clear that public decision makers do not always take into account all of the relevant considerations. Thus, there is surely something to be gained by requiring public planners to demonstrate that they have considered the alternatives and their consequences. Such a demonstration by the public planner will be sufficient,¹⁶⁵ whatever the actual allocative choices, but assuming that public planners

164. *Id.* at 8.

165. This statement is true only if judges perceive their role as being limited to the interpretation and enforcement of existing law. When judges view their role, as many do, to be the resolution of social problems, planners will have to demonstrate that they have made the "best" choice in addition to demonstrating that they have considered the alternatives. Arguments against the latter approach to judging are implied in Part IV.

are motivated to improve the public condition, these essentially procedural requirements of the goals and guidelines should have some benefits.

The LCDC is authorized to issue permits for activities of state-wide significance,¹⁶⁶ and to recommend designation of areas of critical state concern.¹⁶⁷ These are the only subjects of Commission authority over which the Legislature has retained direct control. Section 25 gives the Commission discretion to designate certain specified activities as being of state-wide significance.¹⁶⁸ Other activities may be recommended to the Legislature as being of state-wide significance,¹⁶⁹ but planning goals for those activities are not effective until the Legislative Assembly approves their inclusion as activities of state-wide significance.¹⁷⁰ The same legislative approval is required for the designation of areas of critical state concern.¹⁷¹ The Commission has the authority to articulate and implement statewide planning goals and guidelines with which those pursuing activities of state-wide significance must comply.¹⁷² Non-compliance will result in the denial of a permit to proceed with the activity.¹⁷³ The planning goals and guidelines for activities of state-wide significance and for areas of critical state concern are effective upon their approval by the Commission as are the goals and guidelines for local and regional planning.¹⁷⁴

The importance of planning goals and guidelines is immense for local planning agencies. Section 18 of the Act makes it mandatory that each city and county adopt a comprehensive plan.¹⁷⁵ Failure to comply with the goals and guidelines will result in the refusal by the Commission to approve the local plan. Prior to 1977, if the local planning agency failed to come up with a complying plan, the Commission was authorized to prescribe, amend and administer a plan for the local areas.¹⁷⁶ Although the Section authorizing the

166. OR. REV. STAT. § 197.040(2)(b) (1977).

167. OR. REV. STAT. § 197.405(2) (1977).

168. OR. REV. STAT. § 197.400(1) (1977).

169. OR. REV. STAT. § 197.405(1) (1977).

170. OR. REV. STAT. § 197.405(1) (1977).

171. OR. REV. STAT. § 197.405(1) (1977).

172. OR. REV. STAT. § 197.415 (1977).

173. OR. REV. STAT. § 197.415(1) (1977).

174. OR. REV. STAT. § 197.255 (1977). OR. REV. STAT. § 197.230(2)(a) appears to require issuance of goals and guidelines for areas of state-wide significance.

175. OR. REV. STAT. § 197.255 (1977).

176. OR. REV. STAT. § 197.325 (1977).

LCDC to plan for non-complying cities and counties was repealed in 1977,¹⁷⁷ the substituted grant of LCDC enforcement powers may give the Commission effectively the same degree of control.¹⁷⁸ Specifically the LCDC may issue compliance orders¹⁷⁹ and may seek judicial enforcement of those orders.¹⁸⁰ More significantly, the LCDC is authorized to prohibit local land use actions determined by the Commission to be contrary to the public interest during the interim period of local non-compliance with comprehensive planning requirements.¹⁸¹ Thus, although the LCDC can no longer propose local plans, it can regulate local land use activity during the period of local non-compliance. The effect of these provisions is that everybody has to plan, they have to do it in accordance with the LCDC's goals and guidelines, and if they fail to do it or do it incorrectly, LCDC will do it for them.

The LCDC is required to "prepare, collect, provide or cause to be prepared, collected or provided land use inventories,¹⁸² a task which would seem to be preliminary to the formulation of any planning goals or the review of any comprehensive plans. No such state-wide inventory of land uses exists, and that would seem to be only a part of what is needed if the LCDC is to intelligently allocate the state's land resources. An inventory of all of the state's land based resources and related activities is essential to comprehensive planning. An inventory of what the people of Oregon want and how much they are willing to pay for what they want is necessary. How is it possible to establish planning goals without some knowledge of what people want and what is possible? How is it possible to review the adequacy of a local comprehensive plan without knowing what the local resources are and what the local land uses are? It is an obvious principle of decision-making that the quality of a decision can be no better than the quality of the information available to the decision maker. Information about available resources and human values are essential to resource planning decisions which are designed to optimize the public interest.

177. OREGON LAWS, Chapt. 664, § 42 (1977).

178. OR. REV. STAT. § 197.320 (1977).

179. OR. REV. STAT. § 197.320(1) (1977).

180. OR. REV. STAT. § 197.320(5) (1977).

181. OR. REV. STAT. § 197.320(4) (1977).

182. OR. REV. STAT. § 197.040(2)(c) (1977).

The review of local comprehensive plans is the principle source of LCDC controls over local planning efforts.¹⁸³ The extent of this power cannot be fully comprehended without first recognizing the nature of the processes of legal rule interpretation. Any decision-maker, or interpreter of legal language, will have increasing discretion in direct relation to the increasing vagueness of the language being interpreted.¹⁸⁴ A specific provision using precise language leaves little room for varying interpretations. A vague provision leaves considerable doubt as to intended meaning and hence much discretion in the authorized interpreter of the provision. In the case of the application of the state-wide planning goals and guidelines to local comprehensive plans, the goals are necessarily vague, as demonstrated above, since they must accommodate the interests of the entire state, and the LCDC will, therefore, have vast discretion in determining compliance. The matter is further removed from any external control by the fact that the LCDC is both articulator of the vague goals and guidelines and interpreter of their meaning. The LCDC is both legislator and adjudicator. The LCDC is required to coordinate planning efforts of state agencies and all state avenues are required to conform their actions to the statewide goals and guidelines.¹⁸⁵ In addition, all state agencies must get approval from the LCDC prior to taking action affecting an activity of state-wide significance.¹⁸⁶ The effect of LCDC review of mission agency actions will likely turn on the bias of the membership of the Commission as well as the ability of the agency to bring influence to bear on the Commission. In addition, most mission agencies are structured in a way intended to bring particular social influences to bear on agency actions, and the effect of a superimposed review by the LCDC on the agency's mission is probably unknown, and certainly unanticipated.¹⁸⁷

The Commission is required to "insure widespread citizen involvement and input in all phases of the process."¹⁸⁸ Pursuant to this authority the Commission is required to ap-

183. OR. REV. STAT. § 197.300 to 197.315 (1977).

184. See, Curtis, *supra* note 12.

185. OR. REV. STAT. § 197.040(2)(f) (1977).

186. OR. REV. STAT. § 197.410(1) (1977).

187. At least it is clear that the act does not anticipate the problem of LCDC review causing redirection of mission agency procedures and goals.

188. OR. REV. STAT. § 197.040(2)(g) (1977).

point a State Citizen Involvement Advisory Committee.¹⁸⁹ The Committee is to represent the geographic areas of the state and the interests relating to land uses and land use decisions. The function of this advisory committee appears to be to advise the LCDC on procedural systems for the involvement of citizens in LCDC decisions. If that is the Committee's function, its membership is unrelated. Given this function, its membership should be composed of individuals having expertise in effective citizen involvement. Even if such a membership could be appointed, they would still be at a loss to offer advice since the purpose of the desired citizen involvement is never stated in the Act.

Goal number one promulgated by the LCDC is "to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process."¹⁹⁰ The implementation of this goal is to be achieved by allowing citizens to be involved in every stage of the process from data collection to final plan adoption. In addition to opportunities for active citizen involvement, the guidelines require agencies and public officials to provide feedback in various ways. The system suspiciously appears to have the effect of involving citizens, for the sake of involvement, rather than for the purpose of benefiting the planning process. The citizen involvement provisions of both the statute and the goals and guidelines evidence no theory about how citizens can contribute to the planning process. There is no indication that anyone has considered such basic questions as to what kind of information citizens of various backgrounds have the capacity to provide or what kind of citizen supplied information will be relevant to the land use planning process. Finally, the LCDC goals and guidelines repeat the theoretical error of the statute by providing for the citizen involvement advisory committees without any requirement that those serving on the committees have any expertise in citizen involvement.¹⁹¹

189. OR. REV. STAT. § 197.160 (1977).

190. Oregon Land Use Handbook, *supra* note 151 at 3.

191. In fact there are very few individuals with expertise in the process of citizen involvement. It is likely that those appointed to the committees will be individuals who have been actively involved in other citizen participation activities. Such people will probably understand how to gain access to existing public decision-making systems and what aspects of existing systems make access difficult. But that knowledge will contribute little to the design of citizen involvement procedures which will optimize citizen contribution to public decision-making. It must be remembered that optimum citizen involvement is not the same thing as maximum citizen involvement.

If the purpose of citizen involvement is to assist the state and local planners in identifying people's desires, a different procedure is probably required then for citizen involvement which has the purpose of placating negative responses to planning decisions, or for citizen involvement which has the purpose of providing information about existing land uses and resources. Because nobody knows very much about the processes or effects of citizen involvement,¹⁹² and because even the allocation of access to government decision makers is a political issue,¹⁹³ the effect of the State Citizen Involvement Advisory Committee will probably depend upon the constituency of that Committee and the interests that the members represent.¹⁹⁴

Finally, the LCDC is required to prepare "model zoning, subdivision and other ordinances and regulations" for state agencies, cities, counties and special districts.¹⁹⁵ The influence of this power on the substance of local planning is likely to be very great. Because of the inherent vagaries of the state-wide planning goals and guidelines, local planning units and state agencies will find it difficult to draft rules and regulations which they can be relatively sure will be found to comply. The only way in which they can be absolutely certain that their planning efforts and the implementation of their plans will be found to be in compliance is to adopt the Commission's recommended ordinances and regulations. Because the costs of ordinance and regulation adoption are high, particularly in view of the required citizen involvement, the incentives for local and state agencies to adopt the Commission's model rules will be high. The Commission will thereby have a tremendous influence on the content and implementation of what are supposed to be local and mission agency programs.

192. Very little study has been done to empirically measure the effect of various citizen involvement procedures on government decision making. An example of what has been done is EBBIN, *CITIZEN GROUPS AND THE NUCLEAR POWER CONTROVERSY* (1974).

193. "Asymmetrical access to government — to lawyers and lobbyists and therefore to courts, legislatures and executives — tends to produce asymmetrical definitions and distributions of rights, of economic security, and of opportunity sets. In short, asymmetrical access to law leads to unequal economic performance." Samuels, *supra* note 31, at 128. A legal system which tolerates this asymmetry invites competition for a bigger piece of the legal access pie.

194. OR. REV. STAT. § 197.160(1) (1977) recognizes the political nature of citizen involvement procedure allocation by requiring committee membership to be diverse with respect to geography and land use interests.

195. OR. REV. STAT. § 197.040(5) (1977).

As indicated in the preceding discussion of the powers of the LCDC, the possibility for a significant loss of local control over the planning process is great. Whether or not local control is to be preferred to state control is a question which can only be answered in the context of the goals which the planning process is intended to achieve. If energy efficiency is the goal of planning, it may well be that a state-wide energy accounting system will be more effective than a multitude of local accounting systems.¹⁹⁶ However, if the goal of planning is to optimize social welfare as measured by individual welfare, planning is increasingly less likely to achieve its goals the further it is removed from the individuals whose costs and benefits are the critical measure of success.

Senate Bill 100 allows for even further removal of planning control from the individuals affected by authorizing the Commission to perform the functions of the State in any interstate planning compacts which may be formed in the future.¹⁹⁷ It further allows the LCDC to negotiate with the interstate agency in defining the respective areas of responsibility for the Commission and the interstate planning agency.¹⁹⁸ The effect of this provision would seem to be that LCDC could abdicate its planning responsibilities to the interstate agency, thus further removing control from the people of Oregon who will be affected.

Section 19 of the Act also makes it possible to remove planning decisions from cities under specified conditions.¹⁹⁹ If cities and counties representing 51% of the population in any area of the state petition the LCDC for an election, a regional planning agency will be formed upon a majority vote of the population of the area.²⁰⁰ Henceforth, resolutions adopted by the regional planning agency, pursuant to the exercise of county responsibilities to coordinate all planning activities, will be binding upon every city within the region so long as the county in which the city is located supports the

196. The preliminaries of any energy accounting capability were developed during the administration of former Oregon Governor Tom McCall. See, *Office of Energy Research and Planning, Office of the Governor, State of Oregon, ENERGY STUDY, INTERIM REPORT* (July 26, 1974).

197. OR. REV. STAT. § 197.050 (1977).

198. OR. REV. STAT. § 197.050 (1977).

199. OR. REV. STAT. § 197.190 (1977).

200. OR. REV. STAT. § 197.190(3) (1977).

resolution.²⁰¹ The result of this arrangement is that a city having the minority population of a county may be forced against its will to cooperate with the coordination efforts of the regional agency. Although this may not be a bad result in the abstract, the test of the law's effect must be in relation to the law's purpose. If that purpose is optimum public welfare, the discussion in the first two sections of this article suggest that loss of local control may diminish the chances of achieving the good.

The provisions relating to citizen involvement further demonstrate that the law is ill-adapted to the achievement of its stated and apparent purposes. As indicated above, state and local citizen's advisory committees are supposed to counsel the LCDC and local planners as to the adequacy of their citizen involvement procedures. The Act gives these advisory committees no hint as to what the standards of adequacy should be. Perhaps the real purpose of requiring citizen involvement is revealed by Section 37 which requires that public hearings be held prior to approval of the state-wide goals and guidelines by the LCDC. The Commission is to "Consider the recommendations and comments received from the public hearings . . . [and] make any revisions in the proposed state-wide planning goals and guidelines *that it considers necessary* . . ." ²⁰² Is it the citizen or the Commission which is to determine what is best for the citizen?

IV. Judicial Application of the New Rules of the Land Use Game

Three decisions of the Oregon Supreme Court are particularly pertinent to an understanding of how statewide land use planning is actually working in Oregon.²⁰³ *Fasano*, although it predates the implementation of Senate Bill 100, is the central case in most litigation subsequent to the adoption of Senate Bill 100 because of its procedural requirements for effecting zone changes and the implications those requirements have in terms of the significance and

201. OR. REV. STAT. § 197.190(4) (1977).

202. OR. REV. STAT. § 197.240(2) (1977).

203. *Fasano v. Washington County*, 246 Ore. 574, 507 P.2d 23 (1973); *Peterson v. Mayor and Council of The City of Klamath Falls*, 279 Ore. 249, 566 P.2d 1193 (1977); *South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County*, 280 Ore. 3, ___ P.2d ___ (1977). The *Fasano* holding was extended to cities in *Baker v. City of Milwaukee*, 271 Ore. 500, 533 P.2d 772 (1975).

nature of comprehensive plans. *Peterson*²⁰⁴ and *Sunnyside*²⁰⁵ are the important cases in terms of the actual interpretation of LCDC authority under Senate Bill 100.

Having read the text of Senate Bill 100 and the statutes which it amended, one would anticipate that an early issue which the courts would have to face is that of defining what constitutes a comprehensive plan.²⁰⁶ Indeed, *Fasano* involved that very issue. The court's solution was a simple one, it ignored the issue entirely.

Fasano involved a challenge by a resident of a single-family neighborhood to a county decision to grant a zone change which would allow the location of a trailer park in the single family neighborhood.²⁰⁷ The Court upheld the challenge and overturned the zone change.²⁰⁸ It was assumed, apparently, that a comprehensive plan is one of those things you know when you see. There is no indication in post-*Fasano* decisions that the provisions of Senate Bill 100 relative to the definition of a comprehensive plan do anything to change the legal significance of the term.²⁰⁹ It was undefined before adoption of Senate Bill 100 and its definition in Section 3 of the 1973 Act is apparently taken to be the same as it was before the Act. In *Fasano* the Washington County Plan was a comprehensive plan because the county called it a comprehensive plan.²¹⁰

From the point of view of the individual, and therefore from the point of view of an efficient private allocative system, the definition of comprehensive plan is certainly important given the role which *Fasano* assigns to the comprehensive plan. The plan has the effect of being a source of the definition of private property rights and this point cannot be overemphasized.

204. *Peterson*, *supra* note 203.

205. *Sunnyside*, *supra* note 203.

206. The Supreme Court decision in *Green v. Hayward*, 275 Ore. 693, 552 P.2d 815 (1976) failed to decide whether *Fasano* and *Baker* always apply to "framework" plans which divide large land areas into relatively few land use designations. The court did say, however, that although the statute (Senate Bill 100) "calls for both a map and a policy statement, the statute addresses primarily questions of context, leaving the problem of form to those responsible for the creation and adoption of the plan."

207. *Fasano*, *supra* note 215, at 577.

208. *Id.* at 588.

209. See Coon, "The Initial Characterization of Land Use Decisions," 6 ENV. LAW 121 (1975) for a good discussion and summary of the post-*Fasano* cases.

210. *Fasano*, *supra* note 215, at 578.

Fasano holds that a zone change cannot be granted unless it is shown to comply with the comprehensive plan,²¹¹ or alternatively after the plan is amended so that the zone change will comply.²¹² Rights of use in a particular piece of property are thus defined by the comprehensive plan. It may be argued that private rights are defined by the zoning regulations rather than the plan, and it is unclear what private rights are in the absence of any zoning. However, because all zoning, whether initial or amended, must conform to the comprehensive plans, and because zoning is mandatory, the plan has the effect of being the definer of private rights in the use of property.²¹³

Now this situation is a real puzzle, because Senate Bill 100 specifically provides that the comprehensive plan shall be of a "general nature" which means that it does not "necessarily indicate specific locations of any area, activity or use."²¹⁴ What the private rights holder faces is this: Under state law his land must be zoned in conformance with the plan and the zoning cannot be changed unless it complies with the comprehensive plan. It is a puzzle how a specific change will be found to be consistent or inconsistent with a comprehensive plan which says nothing about specific parcels. The comprehensive plan need not say anything about a property owner's land, and yet it is the definitive statement with respect to his rights of use in his land. What activities can the private rights holder undertake with any degree of confidence that he is acting within his rights? It seems very difficult to know.²¹⁵

The comprehensive plan, then, defines private rights, but by law it does so in as vague language as possible.

211. *Id.* at 583.

212. *Id.* at 582-583.

213. *See, Fifth Avenue Corporation v. Washington County*, 282 Or. 591 (1978), the petitioners owned 20 acres of land purchased in 1965 when the county zoning for the parcel allowed construction of a "district shopping center." In 1973, the county adopted a new zoning ordinance and a comprehensive plan, both of which prohibited the construction of the proposed shopping center. The plaintiffs challenged the validity of the ordinance and plan on several grounds, but the Court's holding made it clear that independent of the zoning ordinance, the plaintiff's right of use in the land was strictly limited by the comprehensive plan.

214. OR. REV. STAT. § 197.015(4) (1977).

215. A letter to the editor illustrates the problem.

To the Editor: In the people's own corner of *The Oregonian* of Sept. 7, Susan Clark relates her difficulties in trying to erect a house on her own land adjacent to the proposed Greenway. The most revealing and interesting information is in the editor's note at the end of her letter, which shows that the legislation spawned by the Oregon lawmakers allows the 150-foot reference in the bill to be expanded. In other words, Susan Clark does not know how much land, if any, she actually owns. *Oregonian*, Sept. 13, 1976, at B6, Col. 4.

Because a private allocative system relies upon precise and exclusive rights definition for its efficient operation, Oregon's comprehensive plan requirements are likely to result in an extremely inefficient allocative system. The terms of the plan are general, yet they function as limitations on subsequent adjudications of rights. The rights adjudicator, in *Fasano* the county commissioners, thus has tremendous discretion in determining what legal rights an individual holds.

This may be precisely the situation which some individuals prefer, and is no doubt motivation for some of the support for Senate Bill 100. Because the only substantive requirements for the content of the comprehensive plan are very general statements about it being promotive of the public interest, the effect is that private rights are defined as being whatever does not conflict with the public interest, as the public interest is defined by the local planning authority and as the local authority is limited by the LCDC's judgment about public interest. Under such a system private rights lose all constancy, and those in positions of political influence relative to the planning process acquire significant control over the use of land to which they have no legal title. Presumably the public has title to that portion of rights in a parcel of land which the official declaration of public interest finds to be best not left in private hands. Nobody knows who has what rights, and everybody knows that to achieve their allocative objectives they must gain influence over the definers of public interest — the definers of changing private property rights.

A detour into *Fasano* land will perhaps clarify what must certainly be very confusing. The single issue which *Fasano* specifically addresses is whether local government zoning decisions are legislative or judicial acts.²¹⁶ If legislative, they must be granted a presumption of validity. If judicial, the courts can jump in and scrutinize what the local government has done in granting or denying the zoning change.

The *Fasano* court articulates well the traditional distinction between legislative and judicial functions.

216. *Fasano*, *supra* note 203 at 579.

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination of whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.²¹⁷

What the Court fails to consider is where the initial definition of rights falls into this dichotomy. That, it turns out, is of critical importance given the significance of the comprehensive plan, the result of legislative action.

A different formulation of the distinction might be useful. Legislative action is of two broad categories. One category of legislative action, which is of little concern here, is that which is done pursuant to implementing publicly held rights. Such things as the building of roads on publicly owned rights-of-way are of this category. A second category of legislative action is that which defines or alters private rights. Initial rights definition, as distinguished from changes in existing rights definition, are a subject of unrestrained legislative discretion. Most legislative action with respect to rights definition has as its purpose the alteration of existing definitions of rights — the redistribution of rights — and that legislative authority is severely limited by several constitutional provisions.²¹⁸ Alterations of property rights can be accomplished by the legislature only upon compliance with the taking clause of the Fifth Amendment.²¹⁹ The allocative efficiency of private rights in property is thus assured by a requirement that the value of all rights held will not be taken as a result of governmental shifting of property rights.

Judicial action is that which relates to the adjudication of rights. By adjudication is meant the determination of the extent of pre-existing legislatively recognized rights. Courts

217. *Id.* at 580-581.

218. U.S. CONST. amend. v, XIV; OR. CONST. art. 1, §§ 18 and 20.

219. The limits imposed by the taking clause are something short of absolute. For discussions of taking see Michelman, *supra* note 63 and Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

do not alter rights. They merely inquire into the question of who holds what rights, a question which frequently arises due to the vagaries of language and the inability of humans to anticipate all possible future circumstances.²²⁰ Again private rights are protected in the American system from judicial abuse, principally through the operation of the due process clauses of the Fifth and Fourteenth Amendments.

In the context of *Fasano*, the Court accurately describes the adoption of the comprehensive plan as legislative action, one which serves to define rights. Most rights defined by the comprehensive plan are the result of a redistribution of pre-existing rights, a redistribution which has seldom received the protection of the taking clause and thus one which probably leads to significant allocative inefficiencies.²²¹

The *Fasano* Court also accurately describes the local zone change process as a judicial process, if one assumes that the comprehensive plan defines the extent of private rights and that any zone change consistent with the plan will not alter any existing property rights.²²² The zoning board, under this view of things, is merely determining the extent of existing rights, a determination which turns on defining the public interest. The fact that the private rights holder has no idea of what his specific rights are, and therefore cannot rely on reaping the benefits of his development of land based resources, is the result not of a misdefinition of the types of process involved. It is the result of allowing private rights to be defined by so vague an instrument as a comprehensive plan.

What the courts and legislature have jointly given us is a system of rights definition and rights adjudication which has bodies designed to perform the legislative function performing the adjudicatory function which other bodies were designed to perform. The local governing body is supposed

220. See Curtis, *supra* note 142.

221. Since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) zoning has been considered a valid exercise of the police power and therefore not subject to the compensation requirement of the 5th Amendment. It is allocatively inefficient because it results in an uncompensated redistribution of property rights and because it results in property rights being ill-defined which reduces incentives to develop land resources. The Oregon Supreme Court specifically addresses the taking issue in *Fifth Avenue Corporation v. Washington County*, 282 Or. 591, 608-614 (1978), and holds that the enactment of a comprehensive plan does not result in a taking.

222. This theoretical consistency of the *Fasano* case is threatened by the Court's recognition of a "STCPA" ("single tract comprehensive plan amendment") in *Fifth Avenue*

to be somewhat accomplished at determining the public interest. Because the public interest is critical to rights adjudication under the Oregon planning system, it only makes sense to have bodies expert in that determination performing the task. The difficulty, as demonstrated above, is that private rights holders have extremely ill-defined rights, and the allocative advantages of a private rights system are thereby diminished or lost.

Land regulation theorists continue to assert that land use planning is merely a system of limitations on private rights, limitations necessary to minimize or eliminate the external costs of private actions. It seems that many continue to believe that we still operate in an allocative system based largely on private definition of private welfare. The Oregon system of planning and its associated effects of rights definition should cause us to wonder if in fact we are not opting for an entirely new allocative alternative — one which substitutes governmental definition of optimum resource allocation for one based on private definition of a socially optimum allocation of resources.²²³ When private rights become so uncertain that an individual is unable to distinguish between consequences of rights and consequences of public action, it is doubtful whether a private rights system exists at all.

How have the Oregon Legislature and the Oregon Supreme Court gotten us into this situation of probable allocational inefficiency? Why do the people of Oregon and their leaders seem so anxious to endorse existing land use regulation schemes?²²⁴ Perhaps it is because we face numerous allocational problems which demand an immediate solution. Planning on its face is an obvious solution. But we do not eliminate our problems by simply turning them green or blue on our comprehensive plan map. Planning is not a panacea. In fact, it is nothing but arbitrary in

Corporation v. Washington County, 282 Or. 591, 616 (1978). These STCPA's are quasi-judicial like zone changes, not legislative like comprehensive plan changes. The Court appears to have recognized that, in fact, the comprehensive plan is the rights definer, and an amendment to that plan fits the definition of a quasi-judicial act. The next step for the Court will be the recognition that the initial adoption of the plan similarly affects the existing rights of individuals.

223. This article is really an argument against acquiescing in this apparent trend.

224. "So far, Oregon has been more foresighted in developing land use planning legislation and in zoning its coastal areas than has California. But the risk Oregon now runs is from the efforts of those who want to unwind the clock by repealing SB 100. *Two States, One Issue*, Oregonian, Aug. 8, 1976, at F2, Col. 2.

the absence of standards against which we may judge the quality of our plan. Once we have articulated those standards, once we have determined what our resource allocation objectives are, we may well realize that planning is not the final and perfect system for all resource allocation. Some perhaps, but probably not all, and our task is to know which problems can be resolved by which mechanisms. We will never know that until we define our standards so that we will know when we have in fact solved some of the problems.

Exemplary of this unthinking commitment to planning is the writing of Edward J. Sullivan.²²⁵ Sullivan believes that there are certain allocational givens which can be safely carved in a comprehensive plan of stone.²²⁶ This Sullivan argues despite his own recognition of the vague nature of standards like public need.²²⁷ He expresses the fear that the public need standard might invite subjective judgment at the local planning level. Somehow it seems, similar subjectivity does not influence the application of state public need standards. Sullivan further supports his case of general public allocation of resources by restating a very common misperception of the historical development of local government. Sullivan suggests that we might consider reorganizing local government so that it will facilitate planning on a regional basis.²²⁸ He implies that existing county boundaries reflect the appropriate units for governmental action during a time long past. If local government boundaries were in fact promotive of governmental efficiency in 19th century America, it is largely coincidental. The history of local governments is a history of unmatched political and economic struggle.²²⁹ If efficiency had anything to do with the result, it was merely political efficiency. Granted that local units often do not suit the needs of planners, it should not be assumed that regionalism is to be preferred to altered localism. In all probability, the institutional solution will vary with the nature of the particular land use problem.

225. *The Taking Issue*, *supra* note 4.

226. *The Taking Issue*, *supra* note 4, at 384-88.

227. *Id.* at 368.

228. *Id.* at 386.

229. This conclusion is based on extensive research by the author into the development of local government in territorial Wisconsin. To date the conclusions of that research have not been reported.

The Oregon Supreme Court seems guilty of the same unthinking commitment to planning as a panacea. The purpose of the *Fasano* holding is not entirely clear, but a seemingly sensible explanation is that offered by Jim Coon in his recent article.²³⁰ The Court, Coon suggests, sought to protect the comprehensive plan against "improperly exerted private interests."²³¹ Another article in the same symposium concludes that the purpose of *Fasano* was to eliminate the influence of "financial impropriety and favoritism of a few."²³²

The rationale, which is strongly supported by the Court's own language,²³³ is that the planning and zoning process is subject to strong influence by private economic interests, and that rather than suffer that danger it is preferable to complicate the process a little by calling it quasi-judicial. By doing that the courts will be able to keep the "judicial eye"²³⁴ on the local decision makers and thus assure that the public interest will not be sacrificed. That the Court should even suggest such a rationale is both presumptuous and obnoxious to a democratic society.

One might first ask what type of private influence is improper. Certainly the paying of bribes to planning officials is improper, because it is illegal, but the criminal process, not judicial review of the planning process, is the appropriate remedy for such improper private influence. What other kind of private influence does the court consider improper? The discussion of planning as a political process in Section III of this article should point up the fallacy of crying wolf when one private interest prevails over another in a land use decision. The victory and defeat of private interests is what politics, including planning, is all about.

Those who cry wolf when a "private economic interest" prevails in the planning process should not expect to get relief from the courts. They should seek to redesign the planning process so that political power is redistributed in a way which gives them more power and others less, or they should

230. Coon, *supra* note 209.

231. *Id.* at 125.

232. Triplett and Fasano, *Zone Changes in Oregon: Fasano in Practice*, 6 ENV. LAW 177, 190 (1975).

233. *Fasano*, *supra* note 215.

234. Coon, *supra* note 222, at 136.

seek to acquire more political power in the existing system. To seek victory in the courts is to appeal to a forum which has neither the capacity nor the legitimacy to overturn the political decisions of the planner. Unfortunately, the *Fasano* Court saw a wolf and decided to defang it, regardless of the effect of their decision upon private rights and upon the allocational problems which got Oregon into land use planning in the first place. Coon is right when he suggests that this may be judicial legislation,²³⁵ but as with all public actions, only those whose "ox is gored" will complain.

The *Fasano* court tried to cover its tracks by throwing in some procedural requirements to make it look like they were somehow really out to protect private rights,²³⁶ or at least that is what Justice Schwab of the Court of Appeals concludes.²³⁷ But the procedural requirements do not comport with the reason for the *Fasano* decision. There is no constitutional requirement that a comprehensive plan, or any other product of public decision making, be granted the protection of due process. Due process is exclusively a protection of individuals against the government. The idea that it somehow protects the government from individuals is preposterous.

In truth, it would seem that the *Fasano* procedural requirements reflect the Court's felt need to maintain the unity of the legal process. Once it is decided to call a process judicial or quasi-judicial, it is simply mandatory to throw in some procedural requirements. Losing sight of the purpose of those procedural requirements is of little concern so long as the proper legal structure exists. What the *Fasano* court has done is not only to create a system of rights definition which makes private rights depend upon the vague standard of "public good", but also a system which requires that the private individual, seeking to determine the extent of his rights, prove that what he believes to be his rights is in fact consistent with the public interest.²³⁸ There is perhaps no greater disincentive to productive private action than this.

In July of 1977, the Oregon Supreme Court, in *Peterson v. Klamath Falls*, decided that a city annexation was a decision within the planning and zoning responsibilities of the

235. Coon, *supra* note 209, at 123.

236. Fasano, *supra* note 203 at 588.

237. West v. City of Astoria, 524 P.2d 1216, 1222 (Or. App. 1974).

238. Fasano, *supra* note 203 at 586. See, Triplett and Fasano, *supra* note 232 at 182-185.

city and therefore subject to LCDC review for compliance with statewide planning goals and guidelines.²³⁹ Although the statute was amended in 1977 to specifically include LCDC review of the annexation of unincorporated territory, the Court's reasoning in *Peterson* is important because of its potentially broad implications.

The Supreme Court rejected the Court of Appeals argument that under Oregon law an annexation has no impact on the permissible land uses in the annexed territory.²⁴⁰ As a technical matter the Court of Appeals was clearly correct, but as a practical matter there can be little doubt that annexation generally is the result of or the prelude to changed land use patterns in the annexed territory. Given the broad objective of Senate Bill 100, the 1977 amendment of the LCDC review provision is a logical legislative decision and may well have been required by an oversight when the legislation was originally drafted. However, that cannot justify the Court's decision which effectively amended the statute, the legislature's acquiescence in that amendment notwithstanding.

Directly stated, the significance of the *Peterson* decision is that it characterized the exercise of "planning and zoning responsibilities" by cities and counties as including any action which impacts on future land use.

The phrase actually employed in ORS 197.175(1) — "planning and zoning responsibilities" — seems to encompass not only local planning decisions which relate to immediate land use objectives but also planning objectives which relate to the uses to which that land will be put in the future.²⁴¹

The Court's use of the language "planning decision" is clearly included as a broad generic description of actions affecting future land uses rather than a statutory definition of planning activities. Thus, the Court appears to have opened the door for lower courts to require that any city or county action having a prospective impact on land use, which will include a vast range of local actions never before thought to be

239. *Peterson*, *supra* note 203 at 255.

240. 27 Or. App. 225, 227-228, 555 P.2d 801 (1976).

241. *Peterson*, *supra* note 203, at 252-253.

planning activities, be demonstrated to be consistent with the statewide goals and guidelines and therefore subject to LCDC review.

As the *Peterson* Court points out, Senate Bill 100 gives LCDC the authority to review "any . . . ordinance or regulation alleged to be in violation of state-wide planning goals."²⁴² But this is an after the fact review which places the burden on the LCDC to prove non-compliance by the local ordinance or regulation. The effect of the *Peterson* decision is to shift the burden to the local government to demonstrate prior to the taking of any action which falls within the broad category of "planning and zoning responsibilities," that the contemplated action complies with statewide goals and guidelines.

Because annexation ordinances relate directly to the Urbanization Goal, they clearly appear to be subject to LCDC review under [ORS 197.300(d)] . . . Therefore, since LCDC has the authority to review annexation ordinances for compliance with the urbanization goal, as well as any other applicable goals, it is only logical to conclude that such ordinances must be enacted in accordance with the applicable planning goals in the first place.²⁴³

The reason that the Court places this burden of proof on the local government relates directly to the *Fasano* decision. As indicated above, *Fasano* held that local decisions to change zoning regulations are quasi-judicial and therefore subject to review by the courts. One effect of this judicial review power is to require the local government to issue a statement of findings and reasons with respect to an anticipated decision's compliance with, in this case, the statewide goals and guidelines. Although *Fasano* specifically required only that zoning decisions be shown to be consistent with the comprehensive plan, later decisions and logic support the Court's extension of the *Fasano* holding to the much broader requirements of *Peterson*. Because comprehensive plans must comply with statewide goals and guidelines, and zoning changes must comply with com-

242. *Id.* at 254.

243. *Id.* at 254-255.

prehensive plans, it follows that zoning changes and the exercise of all other "planning and zoning responsibilities," must comply with statewide goals and guidelines.

In summary, the effect of the *Peterson* decision may be to require cities and counties to prepare statements of findings and reasons prior to the enactment of any local ordinance or regulation which may impact on future land use. Failure to do so may result in a suit for injunctive relief which the courts will have to grant because "[a] *fortiori*, there are no findings and no statement of reasons . . . [and therefore] no way to adequately review the decision."²⁴⁴ Even if such findings and statements of reasons are prepared by the local government, the decision will be subject to judicial review. As the discussion in Part IV of Senate Bill 100 and the goals and guidelines promulgated by LCDC indicates, the standards for judicial review are extremely vague. Thus, local governments will suffer from the same uncertainties that hinder private decision makers.

The Oregon Court defends its *Peterson* decision with a concluding statement that "this process will not only facilitate an orderly review of the city's decision on this issue, . . . but it should also benefit decision-making process at the local level."²⁴⁵ Although it is admirable that the Oregon Supreme Court is concerned about the quality of local decision-making, it is hardly their role to assure its realization. The costs to local government resulting from this judicially imposed improvement in local decision making may well exceed the actual value of the benefits. In any event, that weighing of costs and benefits should be made by the local government itself.²⁴⁶

The other major Oregon decision interpreting Senate Bill 100 is *Sunnyside Neighborhood v. Clackamas County*.²⁴⁷

244. *Id.* at 256.

245. *Id.* at 257.

246. For the reasons discussed at various points in this article, a decision making process cannot be evaluated unless there is an articulated standard against which its performance is to be judged. In this case, it seems more likely that local governments will be more institutionally competent to identify the optimum decision making processes for their particular needs. Centralized constraints, like those implicit in the Due Process Clause of the 5th and 14th Amendments, are acceptable only because of the widely recognized presumption that the resultant benefits to individuals will almost always out-weigh the costs to society. That it is not a 100% presumption is reflected in Supreme Court balancing tests.

247. *Sunnyside*, *supra* note 203.

In the Court's words, the central problem of the case was the determination of "the substantive standards or criteria by which an amendment to the comprehensive plan is to be tested."²⁴⁸ The Court answers that question in the abstract, but avoids the difficult problem of specific standard articulation by remanding to the county board for more adequate findings. Apparently it does not occur to the Court that the difficulty which local governments have in formulating adequate findings and reasons may be a function of the vagueness of the standards with which they are supposed to comply.

As in *Peterson* the Court's decision turns on the *Fasano* holding that zoning change actions are quasi-judicial. Of major importance is that *Sunnyside* did not involve a zoning change, rather it involved a change to the comprehensive plan. It is possible to read the *Sunnyside* opinion as holding that only those comprehensive plan changes which are single parcel specific will be deemed quasi-judicial. The Court's holding in *Fifth Avenue Corp. v. Washington County*, specifically holds that a single tract comprehensive plan amendment is quasi-judicial.²⁴⁹ This reading seems particularly appropriate since the County Commission action in *Sunnyside* was an apparent attempt to avoid the requirements of *Fasano*.²⁵⁰ The Court's language supports this interpretation by appealing to the *Fasano* rationale about the need to have the public interest and not private interests control land use decisions.

However, there are difficulties with this interpretation. Senate Bill 100 specifically provides that the comprehensive plan "does not necessarily indicate specific locations of any area, activity or use."²⁵¹ Given that the plan need not inform a rights holder of the permissible use on his specific property, and therefore use changes on specific parcels are possible without conflicting with the plan, it is difficult to understand

248. *Id.* at 10.

249. 282 Or. 591, 618 (1978).

250. *Fasano* requires: It must be proved that the change is in conformance with the comprehensive plan.

"In proving that the change is in conformance with the comprehensive plan in this case, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property."

251. OR. REV. STAT. 197.015(4) (1977).

what is different about a use change which, by the accident of lines drawn by the planner, requires a formal change in the plan.

It must be admitted, however, that the *Sunnyside* holding is probably logically consistent with the *Fasano* line of cases. Thus, *Sunnyside*, which has the effect of significantly widening the judicial intervention into a clearly legislative area, serves to magnify the problems created by the initial holding in *Fasano*. The next logical step will be to hold that any comprehensive plan change proceeding is a quasi-judicial process; all of this because the Court in *Fasano* held that zone changes which serve to define private rights are quasi-judicial and therefore subject to judicial review. That fundamental holding was as it should have been, but the important line between judicial and legislative authority was obliterated by the *Fasano* interpretation of Senate Bill 100. That interpretation had the effect of making those private rights a function of the vague language of Senate Bill 100 and of the LCDC goals. By this process of reasoning the Oregon Court is set to invade the legislative domain whenever the standards set forth by the legislature have the effect of helping to define a private right. Most legislative enactments will fall into that category.

It is not clear whether the court or the legislature have created this problem. The legislature wrote the vague standards and set up a process for judicial review. The courts have had difficulty reviewing the local decisions in view of the vague standards and have thus remanded for better findings and reasons. It is unlikely that an honest court will often declare the finding to be adequate given these vague standards, causing most cases to end in a remand. With the burden on the local government to justify the zone or plan change against these vague standards, changes will be infrequent, thus perpetuating the political choices of the original drafters of the plan. The Court has complicated the situation, however, by its willingness to mount a white horse and charge forward in defense of the public interest against the evil foes of private interests. It is a noble but blind pursuit absent a clearer understanding of the complex relationship between public and private interests.

The Court's willingness to offer itself as the ultimate decider of the public interest is re-emphasized in *Peterson*. The Court of Appeals had held that the *Fasano* standards of review had no application independent of the context of the *Fasano* decision. But the Supreme Court held that it had the power to review the proposed plan change to assure that

(1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.²⁵²

The only available standards for the Court to use in answering these questions are those set forth in Senate Bill 100 and the LCDC goals. As the discussion of those standards indicates, they essentially require that the public interest be optimized. Thus, the Court must appeal to its own determination of the public interest.

A November, 1978 decision of the Oregon Supreme Court opens the door wide for judicial intervention while leaving local and state planners with almost unlimited discretion to alter the expectations of private property owners. In *Anderson v. Peden*,^{252a} the Court upheld the denial of a conditional use permit. The permit was denied, among other reasons, because the petitioner failed to prove that the requested use was "an encouragement of the most appropriate use of land" and would "promote orderly and efficient transition from rural to urban use."^{252b} The Court itself recognized that the former standard is "undeniably vague," but held that the petitioner could still be held to that standard of proof. Ignoring the constitutional issues raised by the case, it is at least clear that any efficiency benefits of a private right system will be lost when rights are based on a standard so uncertain.

Although the case came to the courts as a result of the *Fasano* standard, the Court has totally lost sight of the only reasonable foundations for judicial review. In *Fasano* the Court described the planning process as quasi-judicial

252. *Fasano*, *supra* note 203, at 584.

252a. 78 OR. ADV. SHEETS 313 (1978).

252b. *Id.* at 319.

because private rights are at stake. In *Anderson*, while carrying out the very judicial review justified by *Fasano*, the Court finds that the petitioner has no constitutional claim unless it be based upon unequal treatment as compared to other property holders similarly situated. There are no longer any rights in private property which are protected by the taking clause or the due process clause. The only constitutional protection for the property holder, whose interests justified judicial review in the first place, is that if the state takes or alters private property rights, it must do so to all in an equal manner.

The judicial rules of the land use game in Oregon are not complicated in practice. Advocates should be able to understand how they must proceed. The problems with the Oregon Supreme Court's land use holdings are much more basic. They relate to the underlying principles of public decision making in any form, and to that extent the problems created by the courts are no different than those created by the legislature.

V. CONCLUSION

It is incumbent on those who criticize existing laws and institutions to at least suggest alternatives. Although we are unable to offer any specific formula for the immediate, practical implementation of an improved land use planning system, the concluding paragraphs of this article will outline some of the things which must be understood before meaningful alternatives can be developed. But first a brief review of what has been discussed above.

Land allocation decisions in the United States have traditionally been made by private individuals and through private transactions. As the theoretical discussion of Part II points out, the basic justification for land use regulation or government intervention in any form, is based upon the alleged failure of the market place to internalize many of the costs associated with private transactions. It has been assumed throughout this article that significant external costs in fact result from private decision making with respect to land use. Therefore, the appropriateness of some

form of public intervention has been generally assumed. The problem, of course, is to identify the optimal form of intervention.

The criticism in Parts III and VI of the form of intervention adopted by Oregon's statewide land use planning system is based largely on theoretical considerations. The critique might best be viewed as a set of hypotheses which awaits empirical evaluation. The accuracy of the hypotheses can only be determined by empirical studies which have not been done or by theoretical challenges to the arguments which are the foundation for the criticism of the Oregon system. The authors are not aware of any theoretically sound justification for the Oregon system, nor is there any evidence that Oregonians as a whole are any better off as a result of statewide land use planning under Senate Bill 100.

Accepting that significant external costs result from private land use decision making does not, of course, inevitably lead to the conclusion that government intervention in some form is warranted.²⁵³ It may well be the case that the costs of a particular government intervention exceed the benefits which derive from the intervention in the form of lessened external costs. It may also be the case that government intervention will result in new social costs due to the fact that individuals may no longer be faced with important incentives to undertake private actions which minimize external costs. But this article is based upon an assumption that there are circumstances where government intervention in land use decision making will improve the welfare of society as a whole. Therefore, the problem is to design a land use regulation system which will improve the efficiency of land allocation.

The Oregon system is found wanting because it merely shifts many land use decisions from private rights holders to public officials without any means of assuring that the public choices will in fact result in internalized costs and more efficient land use. Although no fail-safe system is pro-

253. The subject of external costs is discussed in Part II. It should be added, however, the identification of external costs is a very difficult problem. Hence, the broad assumption that these costs exist is underlain by an assumption that we can or will be able to identify existing external costs.

posed here, there are a few general guidelines which should be followed in the development of alternative land use planning systems.

First, it is important to bear in mind that social welfare is not something which can be defined in the abstract, nor can good land use planning be defined objectively. Social welfare is a direct function of individual welfare and can therefore only be defined in terms of combined subjective value choices. This nature of social welfare leads to some fundamental conclusions about the role of the public officials involved in land use planning.

At a minimum it is clear that land use planners cannot be, as many of them claim to be, experts at good land use. Good land use for some communities, may be poor land use for others. Those planners who claim to know how land can best be used are either fooling themselves or covering for imposing their own values by appealing to abstract principles of good land use. The risks of granting such power to any individuals are potentially serious.²⁵⁴

The role of the land use planner must be that of a collector of information about individual values and impacts on values of land use alternatives. The land use planning system must be designed to insure that planners will fill this dual informational role. Because social welfare is a function of combined individual welfares, it is impossible to decide in the public's interest without a measure of what satisfies those individuals. Citizen involvement schemes are an apparent recognition of this need to measure individual values. As a view of the Oregon citizen participation systems reveals, however, there is little in the system which indicates an understanding of how citizen involvement is supposed to inform public decisions or what information citizens have the capacity to provide.²⁵⁵ Obviously, research is needed which will lead to a better understanding of how the re-

254. In fairness to many land use planners who view their role as that of information generator, it should be said that the seriousness of this grant of power rests as much in the potential for abuse as in any evidence of past abuse. Although we may, in fact presume our public servants to be honest, much in the design of American political institutions reflects a hesitancy to let temptation influence those in power.

255. It is clear that all citizens will not have the same interests, values, needs, or capacities. Hence their ability and willingness to provide information will vary as will the information to which they have access.

quisite information can be efficiently collected from the people in whose behalf the public decision maker purports to act.

In addition to collecting information on human values, planners should also be in the business of generating information about the impacts of alternative land uses. This information is only relevant in that it will provide the opportunity for subjective value choices to be made as intelligently as possible.²⁵⁶ It is also, therefore, essential that people who will be impacted by alternative land uses have the best information available before expressing their value choices. To the extent that this information is not privately generated, the land use planner can serve as an information generator and disseminator. It is imperative of course, that this publicly produced information be objectively disseminated and that it not be produced when the costs of generation and dissemination exceed the benefits from more informed value choices.

To state the central point succinctly, the land use planner should have two distinct functions. First, he should supply data about the costs and benefits of alternative land uses. Second, he should poll by some means the impacted members of society to determine what alternative will be socially optimal. The latter function is strictly empirical, although methodologically complex. The design of the methodology will depend initially upon a decision about how the values of the various members of society should be weighted to result in a socially optimum allocation of land. This article has urged the adoption of a weighting system which approximates that which would result in an ideal private market. Such a system may have to be adjusted to accommodate certain distributional objectives. Whatever theory of social optimization is adopted, it must precede the formulation of a methodology for subjective value measurement. A planning system, like that employed in Oregon, which totally lacks a theoretical foundation can at best lead to random results. Random public decision making is unlikely to improve on a private decision making process which has a well developed theory to support its results.

256. There may be, as Barry Commoner has often argued, an ecological minimum. It is certainly persuasive to argue that at least that minimum should be imposed. It is also arguable that, given total information, everyone would choose to do nothing which exceeded that minimum and therefore public imposition of the minimum would be consistent with private choice.