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Environmental Decision-Making and the Siting of Facilities

By Michael S. Baram*

Remarks made at the Annual Meeting of the Special Committee on Environmental Law of the American Bar Association, April 1974.

One of the more urgent problems of environmental law concerns the siting of industrial and other major constructed facilities required to meet societal needs. Although the siting problem may be diminished as a result of the use of energy conservation measures and other techniques affecting the need for certain facilities, the problem will remain a significant one for environmental decision-making.

Facility-siting is today a highly complex process, involving developers, interest groups and numerous authorities at all levels of government. Measured in terms of costs and time, the process is inefficient. Measured in terms of environmental quality indicators, the process is largely ineffective in ensuring appropriate siting and design decisions.

In the process, developers of the private sector, as well as the developer agencies of the public sector, employ siting methods which are essentially opportunistic, in that the methods are designed primarily to identify paths of least resistance from interest groups, irrespective of the environmental consequences associated with the sites under consideration.

Each of the numerous federal, state and local authorities involved in the process in turn applies its narrowly-drawn criteria to its permit and other review procedures, in order to accomplish its limited objectives. Local zoning and health boards, state wetland and wildlife commissions, state siting and public works boards, the Army Corps of Engineers, the Environmental Protection Agency, and various other authorities with pollution control and other objectives are encountered by developers and interest groups in multiple review contexts.

Each authority employs its own calculus or method of decision-making, designed to ensure that its own mandate and objectives will be satisfied. In the aggregate, the numerous separate and uncoordinated decisions of these authorities constitute a negative approach to siting on the part of government; while the constraints are indicated for each proposed site, no effort is made to harmonize the separate review procedures, and no "lead agency" emerges to designate an optimal site or range of preferred alternatives. With few exceptions, no coherent framework or forum is provided for the

review of siting alternatives, and for bringing together the various authorities into an efficient and coherent review process.

Judicial review of the decisions of these authorities merely reinforces this fragmented, agency-by-agency, approach to siting. The courts employ essentially a single instrument — the remand authority — to "fine-tune" each agency's decision-process, and to ensure that the agency under review properly employs its calculus. This review is generally limited to a judicial assessment of whether the agency acted within its authority, collected the relevant data, and drew rational inferences from the data, in light of existing limitations on agency manpower and fiscal resources.

If the agency under review is a "lead agency" with environmental impact assessment responsibilities under the federal National Environmental Policy Act (NEPA)¹ or similar state law, judicial review should include agency consideration of "alternatives" to the proposed project.² This agency role should include consideration of alternative projects and sites, and judicial review could suffice to impose a more coherent and "positive" siting responsibility on the "lead agency" in siting cases subject to NEPA or analogous state statutes.

But the courts have not exploited this opportunity to force lead agencies into a "positive" and coherent role on facility-siting, possibly because of several factors. For example, most agencies lack the manpower and funds to conduct extensive siting studies on facility proposals offered by private developers. Agencies with the resources to carry out extensive siting studies on their own proposed developments are believed to lack objectivity because of their role as developer. Legislation is needed to clarify the responsibilities of the lead agency and to provide lead agencies with the authority to pull other review agencies at the various levels of government into a coherent forum or framework, such as a "one-stop" siting process, with subsequent limitation of judicial review opportunities. Finally, the intrusion of an agency into a private developer's siting process, *before* the developer's plans, facility design and land acquisition or option have been brought together into a facility-siting proposal to the agency, presents significant legal issues which state and federal legislators have been reluctant to confront.

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1. 42 U.S.C. §4321 *et seq.*, ELR 41009.

2. 42 U.S.C. §4332.

At the state level, several recent developments demonstrate alternative approaches to the problem of developing more coordinated and effective site review procedures. The primary development has been the attempt to create a "one-stop" administrative review procedure for specific types of facilities. Although Connecticut,³ and Maine⁴ and other states claim to have "one-stop" processes, it appears that only New York at present has substantially achieved this objective. The New York Siting of Major Steam Electric Generating Facilities Act⁵ provides for a single forum and single permit process, sufficient to the needs of all state and local agencies and interests, with a single level of judicial review, for steam electric generating plant proposals. Negotiations with federal agencies such as the Corps of Engineers and the Environmental Protection Agency may lead to the integration of their review and permit tasks in the state process. It is simply too early to determine the consequences of this approach to necessary administrative reform on the siting problem.

Another type of state-level approach to the siting problem does not provide for administrative reform, but focuses on the reviving of land use authority at the state level. This approach, which can directly or indirectly provide for state authority to override the decisions of local zoning and other boards, has been adopted in Massachusetts for the siting of subsidized housing for low and moderate-income families. The controversial Massachusetts Anti-Snob Zoning Law⁶ authorizes qualified developers to sidestep most local authorities by acquiring a single comprehensive permit for siting a housing facility. If such a permit is denied by the appropriate local board of zoning appeals (as most have been, to date), the developer can appeal to the state Housing Appeals Committee, created by the Act, for a reversal of the board's decision. The Act further provides the Committee with criteria for evaluation of the proposed facility and site; these criteria relate to regional housing needs and available housing in the site community. On the basis of applying such specific criteria as well as considering general environmental and other factors, the Committee can override the local decision and approve the proposed site. The constitutionality of this law has been upheld in the state's highest court,⁷ and it is expected that state intervention in the siting of housing will now become effective. A similar approach to the siting of certain energy facilities has

been enacted and will become effective in 1975 in Massachusetts.⁸

A third approach to the siting problem, a state role in the acquisition and use of sites for certain facilities, has been adopted by the state of Maryland.⁹ The state's Secretary of Natural Resources has been provided with the authority to select and acquire up to eight sites for future power plants, on the basis of needs analyses and environmental studies by the state's Planning Department. The sites may be acquired by contract or condemnation, and, following acquisition, are exempt from local zoning. Electric companies may thereafter purchase the sites or lease them on a long-term basis. This direct or "positive" state siting role constitutes a form of "land-banking" for future energy facilities, and is now being initiated. It is one of the bolder approaches to the siting problem, and should provide important results for consideration in other states.

Finally, a comprehensive approach to the siting problem, one which grapples with the two critical issues of administrative reform: The need for a "one-stop" process and state authority to override local decisions, has been recommended by the Special Committee on Environmental Law of the American Bar Association. The Special Committee's report, *Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection*¹⁰ recommends the establishment of a single state agency with jurisdiction over all applications to site major industrial facilities, and the exercise of siting authority by the agency which pre-empts local and other state agency decision-making. This state "super-siting agency" concept is accompanied by recommendations for the creation of a federal siting review agency with a single adjudicatory hearing in lieu of the separate hearings now conducted by individual agencies, and with judicial review in the United States Court of Appeals.

Other siting reforms have been suggested, for example: changes in local zoning authority and decision-making which would promote regional interests;¹¹ judicial notice of regional, state and local national interests and plans in reviewing the land use decisions of local authorities.¹² These are some of the alternatives now

3. Conn. General Statutes §16-50g to 16-50w, §16-235.

4. Maine Site Location and Development Act, 38 M.R.S.A. §481 *et seq.*, ELR 43027.

5. New York Public Service Law, §140 *et seq.*

6. Mass. G.L. ch. 40B, §20-23, (Supp. 1973).

7. Hanover Bd. Appeals v. Mass. Hsg. Appeals Committee, 294 N.E. 2d 393.

8. Electric Power Facilities Site Evaluation Act, M.G.L. 164, s. 69G, st. 1973, c. 1232 (effective 31 Dec. 1974).

9. Article 66c, Anno. Code Md. §763-768, ch. 31 (1971).

10. See the Summary Report, published in 1973 by the American Bar Assoc.

11. See *Model Land Development Codes* (1970-1974), American Law Institute.

12. See M. Baram, *Environmental Law and the Siting of Subsidized Housing: Conflicts and Opportunities*, MIT-Harvard Joint Center for Urban Studies, Paper N. 24, Feb. 1974. (to be published in *Columbia Law Review*).

available to state legislators for resolving the siting problem.

Obviously, siting must be dealt with in the larger context of land use and economic planning, now being discussed and dealt with in several states. The effective use of any new siting program, incorporating administrative reforms and state authority to override local decision-making, will be highly dependent on the formulation of state-wide environmental and economic plans, and their adoption by state legislatures. Although a site review and permit process can be carried out without state plans or land-use designations for the regions of a state,¹³ the site permit process will remain arbitrary and suspect until the individual state provides a comprehensive land use framework, identifying the state's goals and the criteria to be employed by site review boards in reaching those goals.

Agreement on state goals which incorporate both environmental and economic concerns is the most critical and politically difficult task for state legislators seeking a harmonized environmental-economic siting program. Unless state legislators successfully carry out this task, the future economic growth and environmental quality of the states will remain in the hands of numerous, understaffed, non-professional site review boards, operating without the benefit of long-term objectives and criteria or means to achieve those objectives, and therefore functioning on an ad hoc subjective basis.

This thesis has been demonstrated in Vermont, where the 1971 land use control program, involving three phases, is being implemented.¹⁴ The first phase, creating regional site permit boards, and the second phase, establishing an interim state-wide land use plan, have been carried out. The third phase, however, involving adoption of a final land use plan on a state-wide basis, has faced serious opposition and has not been realized. Therefore, the site permit boards are now carrying out their review processes without any real guidance as to what sites, types and designs of proposed facilities are appropriate to the state's long-term interests. It has been aptly noted that the Vermont "Act

250" boards are merely allowing a continuation of existing patterns of development, albeit with some success at controlling the grosser environmental effects of certain types of facilities, and that the boards will become effective only when they have been furnished with a final state land use plan.

It is noteworthy that the coastal states are now moving in the direction of comprehensive management of the lands and waters of their coastal zones. This movement has been initiated and is being funded by the federal Office of Coastal Zone Management in the United States Department of Commerce under a program outlined by the Coastal Zone Management Act of 1972.¹⁵ States can qualify for development and, subsequently, management grants from the federal office, if they are taking steps towards management of their coastal zones which will enable multiple uses and economic growth concurrently with the maintenance of environmental quality.

This program may offer the prototypes for planning and site selection which will be useful for the larger issue of state land use management, since many of the issues are similar. Coastal zone management will inevitably involve state-level planning and coastal zone use designations, site permit boards and processes. Industrial and energy facilities also figure largely in most coastal issues. The experience acquired in the limited but complex region of the coast will undoubtedly be useful in grappling with planning for other state lands and facility-siting, and may prepare the public for the necessary legislative reforms.

To conclude, siting is a complex problem which calls for administrative reforms and the revival of state authority over land use. It must also be related integrally to the development and adoption of state-wide land and economic planning. Federal funds, environmental assessment techniques, pollution control programs and judicial decisions will be significant contributions to the development of siting programs. But values and politics are at the heart of the problem, and these can only be dealt with by our state legislators, who must be held accountable on the siting problem.

13. *In re Spring Valley Development*, 300 A.2d 736 (1973).

14. 10 V.S.A. 6001 (n. 250, 1970).

15. 16 U.S.C.A. §1451 *et seq.* (Supp. 1973) and subsequent CZM regulations.