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Real Estate Law and Practice Symposium: Foreword, 43 J. Marshall L. Rev. iii (2010)

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REAL ESTATE LAW AND PRACTICE SYMPOSIUM: FOREWORD

This Real Estate Law and Practice symposium issue benefits from two events which the John Marshall Law School and its Center for Real Estate Law presented in academic year 2009-2010 as academic partner of the Burnham Plan Centennial of the *Plan of Chicago*.

Richard J. Roddewig, an attorney and president of Clarion Associates, Inc. a real estate analysis, land use, and zoning consulting firm, spoke about the "Law as Hidden Architecture," analyzing the lengthy legal component of the *Plan of Chicago*. Like architecture itself, the law needs to evolve as society changes. The Burnham Lecture addressed evolving perspectives on how laws support the unique and distinctive social and economic success of modern Chicagoland.

Subsequently, the Center for Real Estate Law presented an extraordinary conference. The Kratovil Conferences on Real Estate Law and Practice regularly bring together both academics and nationally known practitioners to reflect on significant issues that the real estate community faces and will continue to consider. As in past years, the 11th Kratovil Conference responded to the importance of commercial real estate as an industry and to the significance of the law in shaping aspects of it which may have an impact on individuals as well as on business players. "Water as a Resource: Impact on Real Estate Ownership, Development, and Land Use Policy," focused on water needs even East of the Continental Divide. The issues included whether there is water scarcity, how that scarcity affects real estate ownership and development and how land use policy might resolve some of the concerns about adequate water. The goal was to initiate a prolonged discussion of the implications of water shortage in non-arid regions so solutions can be considered before water shortage becomes a crisis. In particular the conference examined the likely challenges for those involved in the real estate industry.

The Conference featured water and water law scholars as keynote speakers. Dr. Praveen Kumar, University of Illinois, presented on "Water Crisis: A Perspective from the Complexity of Coupled Human and Natural Systems," providing the hydrologist perspective on the water scarcity issue. Sarah Gosman, University of Michigan Law School, offered the audience an excellent background history of the new Great Lakes Compact, which

features a horizontal integration of state, federal, and international law in its goal of protecting the Great Lakes from water diversion. Lincoln Davies, University of Utah School of Law, considered whether assured water supply laws, which have developed in the western part of the nation, will be an effective and good fit for the eastern part as well. The final keynote was given by Julian Juergensmeyer of Georgia State University School of Law, who evaluated several unique water conservation approaches creating incentives or directives to use the approaches of recapture.

In addition to providing financial support, conference supporters also provided commentators with business, government, organization, and practitioner perspectives on the water scarcity issue. We are especially grateful to the Alvin Baum Family Fund; to The Environmental Change Institute of the University of Illinois and its executive director Professor Wesley Jarrell, Department of Natural Resources and Environmental Sciences at the University of Illinois at Urbana Champaign, who participated as a commenter; and to the Commercial Center, Chicago Title Insurance Company for their high levels of sponsorship.

Additionally, sponsors Alan Kravets, executive director of Sheldon Good & Company; William Anaya of Arnstein & Lehr LLP and Barbara A. Adams of Holland & Knight LLP offered practitioner comments which are an important aspect of this Conference's tradition. Erin O'Connell, Commissioner of the Illinois Commerce Commission; Ronald R. Pollina, Ph.D., president of Pollina Corporate Real Estate, Inc. and David Ullrich, executive director, the Great Lakes and St. Lawrence Cities Initiative, also participated on the panel. Finally, Virginia Harding of Gould & Ratner LLP served as moderator of the panel of practitioners and business experts and as program consultant extraordinaire.

The four articles included in this symposium issue were solicited from the Kratovil Conference participants and also reflect The John Marshall Law School's participation in the Burnham Centennial Celebration. In the broad view, all of the authors share fresh ideas about how public policy responds to the water needs of society at a particular historic time as well as the importance of an advantageous connection with land use policy.

Lincoln Davies, in "East Going West?: The Promise of Assured Supply Laws in Modern Real Estate Development," answers the initial question about whether there is water scarcity beyond the western part of the United States affirmatively. He provides data supporting the argument that the East has begun to grow rapidly in the past ten years, leading to increasing concerns about an adequate supply of potable water. He then argues that the East is

moving to a comprehensive permit system, anchored in the western water law property rights policy and is letting go of the traditional tort-based “riparianism” so familiar in the eastern part of the country. Riparianism’s presumption of ample water no longer holds. “[T]he East is now the battleground for its own water wars.” Davies also documents a switch in the western water law to embrace aspects of the tort-based scheme.

Equally significant in the long run is Davies’ description and support of the transformation in water law based upon an “increasing interconnection between land use planning and water policy,” so-called Wet Growth. This is an exciting and appropriate development, especially when considered in light of the growth, including sprawl, which is no longer only in the West. Davies links an adequate water supply to the “triple bottom line” of sustainability: “environmental protection, economic development, and equity” in which traditional environmental regulation is woven together with sustainability—including water issues. Thus, Davies reflects the view of Kratovil keynote Praveen Kumar that water has been left out of the puzzle of sustainability for too long.

Davies’ evaluation of the benefits and costs of an assured water supply, requiring proof by developers of adequate water for residential development *before* permits are issued, concludes that the benefits far outweigh the costs in the West and that similar results are likely if assured water supply laws are enacted in the East.

Professor Davies provides guidance for the neophyte student of the water scarcity problem as well as for those already familiar with the basics of water law. Throughout the article, he reminds us of the traditional views extant in the West as compared to the East. He explains why those long held perspectives no longer reflect actual real estate development and the current goal of sustainability. He argues persuasively why current water law, creating so-called “paper water,” must evolve in the context of land use policy to assure that water is “actually” available.

Julian Juergensmeyer’s paper, “Rainwater Recapture: Development Regulations Promoting Water Conservation,” echoes the prediction of Lincoln Davies that sustainable development will be required in the future. He focuses on the infrastructure requirements, including ones placed on developers, to guarantee a water supply and energy needs. He explores how the infrastructure will be accomplished. Juergensmeyer sees putting the burden on the developer as a reasonable approach.

Juergensmeyer concerns himself with details of water conservation methods. He is persuasive in arguing that a simple approach of rain barrels catching run off is one of the easiest and least expensive approaches. Besides actual barrels and cisterns, he indicates that the use of green roofs apparently is catching on both

in the United States and the rest of the world.

However, the impact of two distinct water rights systems means that even catching rain must be evaluated under those separate regimes east and west of the Divide. Although there does not appear to be a problem with this approach to water conservation under Riparianism, the western part of the country has been negative toward rain water capture under the Prior Appropriations doctrine. Still, Juergensmeyer notes a new trend in allowing rainwater catchment systems in places like Colorado. He attributes a changing attitude to the green movement.

The article provides a lesson in the United States Green Building Council (USGBC) guidelines and requirements to earn LEED certification. Explaining how water conservation specifically will provide “points” needed for any of the LEED levels of certification links water conservation to the new sustainability movement effectively.

Finally, Juergensmeyer discusses the way in which a rain tax may promote water conservation, although he notes several possible problems with this approach. He points to the Lansing, Michigan, ordinance, which was held to be unconstitutional, as an example of the hurdles a rain tax faces.

Yet, it is his discussion of the need to determine who will pay for the infrastructure—the developer or the homeowners—which is important for those who will deal with the water scarcity problem. Describing Robert Freilich’s pioneering solution through ‘monetization’ of costs associated with water conservation provides those in the real estate industry an additional approach to deal with the new land use policies reflecting water scarcity concerns.

Richard Roddewig describes and demonstrates the continuing concern of the business community to assure Chicago’s growth and development would continue “apace” in his article, “Law as Hidden Architecture: Law, Politics, and Implementation of the Burnham *Plan of Chicago* Since 1909.” This was the motivation that Daniel Burnham tapped into in getting the sponsorship of the Commercial Club of Chicago to produce a *Plan of Chicago*. Like Virginia Harding, Roddewig provides a rich history of the process behind the *Plan* and its goals. Still, his focus is more of a political scientist than historian as he identifies the four “competing interest groups involved in the interplay that would define the future of Chicago and the success or failure of efforts to implement Burnham’s vision” It is this interplay and “political maneuverings between those same four groups so palpable in 1909” that continues today in defining planning in the city and the region.

Roddewig explains a previously untold story of implementation of the *Plan*. In his view it is a story of Illinois laws, Illinois judicial decisions, and of state and local judges who

were the “hidden architects,” sometimes “promoting Burnham’s vision and at other times thwarting it.” The *Legal Aspects of the Plan of Chicago* is an Appendix at the end of the *Plan*. It is the longest component of the text. It had been approved by twelve legal reviewers including the Corporation Council of the City of Chicago, the Cook County Attorney, and various attorneys for neighborhood commissions that Roddewig suggests “provides a clear insight into the legal basis of ‘planning’ in the early years of the 20th Century.” The consensus among the legal community was an important factor in the strategy of getting the political machine and the courts to implement the *Plan*.

One feature of the legal side was that eminent domain and public financing of the infrastructure, rather than government regulation of land, were expected to be the main tools to implement the *Plan*. Roddewig comments that this emphasizes a “very important point about the 1909 *Plan of Chicago*—it was not a modern 21st Century comprehensive land use plan.”

In 1909, “the concept of zoning—‘districting’ as it was commonly called then—was in its infancy.” Demonstrating his own familiarity with land use planning in Chicago and nationally, Roddewig provides a fascinating history of the development of zoning during a fifteen-year period of “legal slogging in the Illinois legislature and the courts,” which he concludes was “not a walk in the park.” A year after the first Chicago Zoning Ordinance the U.S. Supreme Court upheld the constitutionality of comprehensive zoning in *Village of Euclid v. Ambler Realty* making implementation of the *Plan* by government regulation of land use legally possible.

The final part of Roddewig’s article considers Burnham’s plan in the context of Grant Park and the continuing conflict between two visions for it: the Burnham vision of a cultural center and the Ward vision of an open space preserved for the people of Chicago. He brings back the four groups which continue to matter in determining “what will be our new vision for Chicago?”—basically the same question that Burnham considered in the *Plan of Chicago*.

Virginia Harding draws together the themes of viewing water as a scarce natural resource and the need to consider adequate supply in the context of land use planning. “Burnham: Water and the *Plan of Chicago*: A Historical Explanation of Why Water was Ignored and the Consequences of Ignoring Water,” reflects Harding’s careful analysis of the *Plan*. To the extent there was any attention to water in it, it was only about safe, unpolluted water. “When you look in the *Plan* index under the word ‘water’ you find nothing.” Her thorough research reviewed the *Plan* itself, of course, but also materials she found in the Chicago History Museum Library, especially on the World’s Columbian Exposition

held in Chicago in 1893, which Harding considers responsible for a new concept: “a city plan with relationships between buildings, water, and open space which were not only aesthetic but also practical and convenient.” Daniel Burnham was involved with both events—the first giving him the incentive to consider what a real city like Chicago might be in the future. Burnham started as the successful architect and builder of the Columbian Exposition, known as the “White City,” and subsequently turned his attention to city planning.

Yet, the *Plan* does not mention water, “surprising given Chicago’s long struggle to provide residents with safe water.” Harding attributes this lack of attention to the fact that the city’s location along Lake Michigan seemed to assure the water supply and that the reversal of the Chicago River in 1900 and other engineering achievements seemed to solve the water quality problems.

Even as members of the Commercial Club, which sponsored the *Plan*, expected huge growth, to as many as 13,250,000 by 1952, the omission of attention to water in the *Plan* is “striking” and is puzzling to Harding because so many of those members were aware of the water safety concerns in preparation for the Columbian Exposition. Although the Chicago metropolitan region has not yet met the population predicted in 1952, Lincoln Davies reports in his article a 1998 study by the Sierra Club characterizing Chicago as one of the “more sprawling” cities in the United States—more so than its western counterparts. Growth alone is a fact which justifies a concern about adequate water supplies even outside the arid regions. Moreover, Roddewig pointed out that the *Plan* is not a modern 21st Century comprehensive land use plan. This too may explain the failure to include water as a part.

The Columbian Exposition forced its promoters to consider how to supply safe water to the millions of visitors. Harding’s history here is fascinating, especially as she notes that early plans to pump water out of Lake Michigan were scrapped because of safety concerns.

Of even greater concern to Harding is the failure of several recent plans for Chicago and the region to omit planning for water. *Chicago Metropolis 2020: The Chicago Plan for the Twenty-first Century* (“*Metropolis 2020*”) is built on the legacy of Burnham’s *Plan of Chicago*. Like its predecessor, *Metropolis 2020* took a regional approach and identified issues for the region: “unlimited, low density sprawl; concentration of poor minorities; the spatial mismatch between jobs, affordable housing and transportation; and disparate degrees of access to quality education.” Still, *Metropolis 2020* does not address adequacy of the region’s water supply even though most of the region does not get its water

supply from Lake Michigan but must look to other sources.

Harding describes and applauds two civic organizations which have begun to address whether the region has adequate quantities of water to meet future needs. Openlands Land Preservation, founded in 1963 to protect “natural and open spaces in northeastern Illinois and the surrounding region,” includes water as a significant part of its planning mission. It focuses attention on watershed planning because individual communities are not able to prevent flooding and guarantee adequate water supplies. Collaboration with other organizations and among local governments is critical to accomplishing the goal.

Harding identifies the Metropolitan Planning Council (MPC) as another civic organization that responded to the Illinois State Water Survey produced in 2000, which showed depletion in the aquifers that supply water to the western parts of the Chicago region that do not use water from Lake Michigan. Both organizations collaborated in publications that have identified water scarcity as a public planning concern and have set forth a series of recommendations that amount to regional planning. In contrast with the Burnham *Plan of Chicago* and *Metropolis 2020*, Harding concludes, “[T]hese publications are putting the question of does the region have a sufficient supply of water onto the planning table and making the determination that the region has an adequate supply of water as a critical item for every planner to make. For without an adequate supply of water there is nothing to plan.” This resonates with Lincoln Davies’ assured water supply approach which requires water to be considered in the context of land use planning.

These articles, indeed, have triggered the prolonged discussion we hoped for. The real estate industry is informed about the significance of water scarcity in ownership and development of real property. An integrated approach to that problem in the context of land use policy has started.

