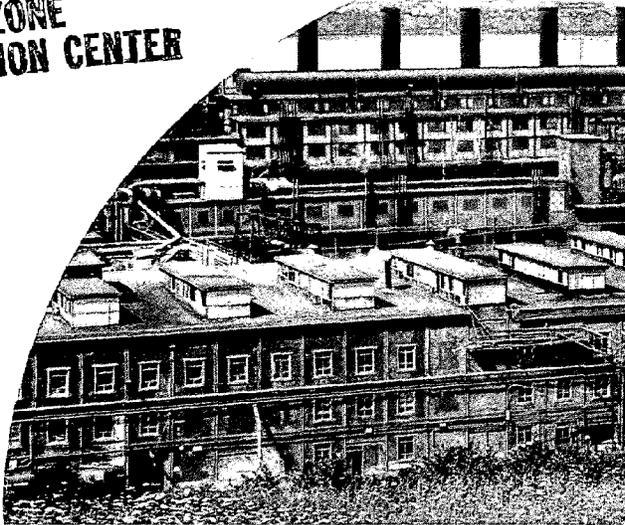


Rural Land Use — Problems & Possibilities

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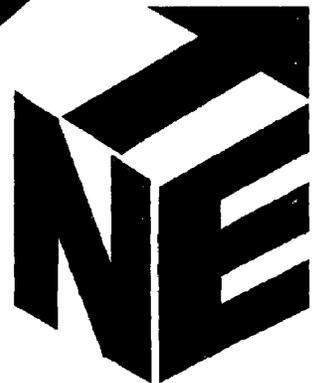
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Northeast Regional Center for Rural Development Publication 12
September 1976
Northeast Regional Center for Rural Development
Cornell University, Ithaca, New York



The information in this packet was adapted from Northeast Regional Center Publication No. 5, **The Proceedings of the Conference on Rural Land Use Policy in the Northeast**. The leaflets were prepared by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.

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Rural Land Use —
Problems & Possibilities

12:1 WHAT ARE THE ISSUES*

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*Adapted from **Problems and Policy Issues in Rural Land Use Control** by Marion Clawson; original paper published in *Northeast Regional Center for Rural Development, Publication No. 5*; adapted by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.

In the United States, and particularly in the Northeast, land use is predominantly *rural*, while the people are predominantly *urban*. This is the root of most problems of rural land use control.

In the belt from Boston to Washington, well over 80 percent of the people live in urban areas, as the U.S. Census defines that term. Yet, in 1961, within this area, only 21 percent of the land was in residential, commercial, or industrial uses, or was in public or semi-public ownership. About a third of it was in farms, some forested, and over 40 percent was what might be called "not" land—not urban, not publicly owned, not farms. Much of this not land was forested, most was owned in relatively small tracts (less than 500 acres, in most cases), and much of this land was used for purposes other than maximizing the annual cash returns.

Comparisons of the entire Northeast, are even more striking: nearly all the people live and work in urban areas, yet the majority of the land is in rural use. A large proportion of the rural land area of the Northeast is *owned* by a few urban residents. Much of the rural land is *used* by people who live in urban areas, for vacations, hunting, sightseeing, or outdoor recreation. There is often a sharp divergence of knowledge, interest, and political power between the *owners* of rural land, be they rural or urban residents and the larger total public of potential or actual *users* of rural lands in the state or region. The owner of the land has a different understanding of the land, of the relationship of people to the land, and of the problems and costs of land ownership than does the city dweller who would like to use some rural land at times and in ways of his choosing.

Public control of private use of rural land is not wholly in the hands of people who live in rural areas. Counties or towns exercise controls over private land use within a legal framework provided by the states. A majority of the electorate is in the cities. Rural land use control is greatly influenced, if not determined, by urban people either as owners or users.

U.S. LAND USE HISTORY

The history of land use in the United States is dominated by the dual thrusts of development and social control. The development thrust has been primarily private initiative working under laws. The development thrust cleared forests and plowed prairies to establish farms, built cities, railroads, and factories. It transformed a vast land, thinly populated and economically backward, into a large, industrialized, economically powerful nation. One need not approve every developmental action, but no informed person can ignore the continued power of the private developmental thrust—the proposal and the action to build homes, shopping centers, office buildings, recreation spots, electric power plants, factories, and all the rest of it.

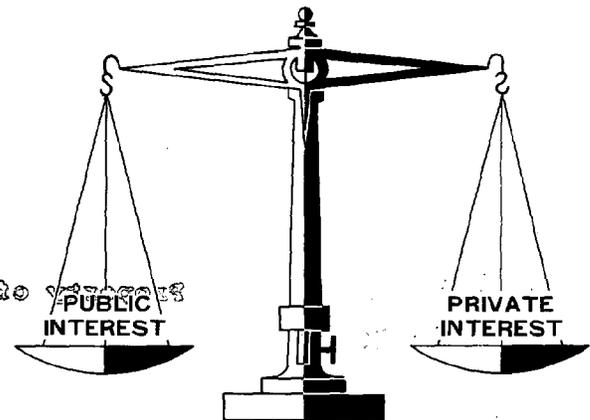
Social controls over private land use often, but not invariably, take the form of laws and regulations. The government may be federal, state, county, city, town, or special district. The laws may be specifically designed as relating to land use, and are generally restrictive, specifying what cannot be done. Some laws, however, provide a subsidy or other direct incentive for the private landowner to do something he would otherwise not choose to do.

EQUITABLE BASIS FOR PUBLIC CONTROL OVER PRIVATE LAND USE

There are four rational, equitable bases for society, operating through a unit of government, restricting a private landowner's land use.

1-Externalities caused by one person and felt by others not party to the decision process. These externalities may be negative: a smokestack belching fumes on nearby landowners, or stream pollution affecting downstream users. Externalities may also be positive: enjoyment of a neighbor's garden, or the value that accrues to a house because every other house in the neighborhood is well kept. Society may take account of such external effects, by prohibiting them, charging the decision maker for them, or bribing him to stop if the externalities are negative; if the externalities are positive, by rewarding the decision maker in some way.

2-Interdependencies where effects flow between each person involved. For instance, a residential neighborhood can be maintained physically and



socially only by all, or nearly all, property owners and residents working together and separately.

3-Indivisibilities may exist. A flood control project protects all land within its service area, not merely some land; or a drainage project drains all land within its borders; a highway serves all residents in an area, not merely those who volunteer to help pay for it.

4-Social controls over private land offers a measure of efficiency. Using all land within one area for one use and all land within another area for another use results in more total satisfactions to landowners and users, and, hence, to more value of the property.

MEANS OF SOCIAL CONTROL OVER PRIVATE LAND USE

If society, or a major sector of it, decides that social control over private land use is desirable, then society has several mechanisms at its command. Most, but not all, are governmental.

In the United States, social control over private land use has rested with the *police power*—the power to compel an individual to do something, or refrain from doing something, for the general public welfare. This extends to public health considerations. If, for example, septic tanks create a health hazard in a particular situation, they may be forbidden.

Taxation is the means whereby society appropriates some of the private income from land use and ownership for social or group purposes. The way in which taxes are levied may affect land use.

Society, operating through government, has the power to own and manage land and to acquire land from private owners without their consent, by the power of *eminent domain*, if the land is to be used for a public purpose. The role of public ownership of land in the United States is often underestimated. Government at all levels owns land, sometimes a lot of it, and may affect the value of private land.

Society or its government has the *power of the purse*, to persuade land owners to do something society is unwilling to compel them to do. This has been the approach in agriculture for well over a generation. It is also the rationale behind many public works and public services. A road into a new area will stimulate development along it; so will extension of a sewer line. For many public services, such as roads, schools, even parks, sometimes sewer lines, and others, there is no direct charge. Users may pay, through their real estate or other taxes, but not at the time or in proportion to use, nor in proportion to costs incurred in providing the public service.

ISSUES IN RURAL LAND USE CONTROL

Increasing population and an increasingly inter-related social and economic structure will increase the externalities and interdependencies in rural land use.

These, in turn, will lead to increased social control over private land use. What social problems or issues does this raise?

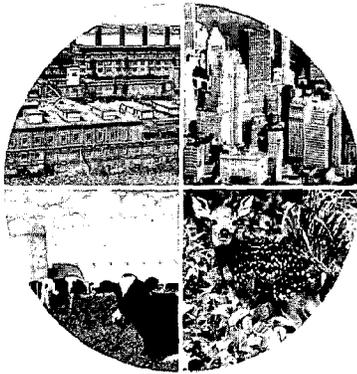
First of all, any significant social control over private land use implies a rejection, at least in part, of the private market. If the market, by itself, produces only desirable results, then there is no need for social controls. It is only when society rejects the actions of the unregulated private market that social controls over private land use are imposed. Unless social controls over private land use restrain some landowners, in some way, they have no rationale. *Effective land use controls must bite someone, but who, how many, and how much?*

If there is to be increasing social control over private land use, who will make the land use plans, by what process, on what basis, and who will frame the controls and enforce them? How far should plans be formulated by experts and how far by the public? Land use controls not based on a land use plan that is solidly based on facts and analysis and that has been adopted by a competent political body under fully acceptable governmental procedures, probably will face increasing challenge, both legal and political.

How far, and in what ways, can social control over private land use respect or defer to the rights or wishes of minority groups within the population? We do not refer particularly to racial or ethnic minorities, or even primarily to economic ones; where and how can the misfit, the oddball, the individualist live, work, and play, if society operates on a majority basis to control private land use? We hear of the tyranny of the majority, but the tyranny of the minority may be equally serious. Most local planning and zoning is the activity of small groups. Much rests on lack of active opposition rather than on consent.

As social control over private land use spreads into more rural areas, and as its terms become stricter, we may see many interesting political and social battles develop. Rural land use planning and control will surely become the "art of the possible"—which is what politics is supposed to be.

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**COASTAL ZONE
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Rural Land Use —
Problems & Possibilities

12:2 A PRIMER ON LAND USE CONTROL LAW: EVOLUTION OF ZONING*

*Adapted from *A Basic Introduction to Land Use Control Law and Doctrine* by E. F. Roberts; original paper published in *Northeast Regional Center for Rural Development, Publication No. 5*; adapted by the *Land Use Subcommittee of the Northeast Extension Public Policy Committee*.

ZONING: A BY-PRODUCT OF URBANIZATION

Early American settlements were planned communities. In the Massachusetts Bay Colony the farmers lived in a village and worked the fields surrounding this cluster of housing. These colonial schemes envisaged a limited population. When the village as planned filled up, the time had arrived to found an entirely new settlement elsewhere.

Though New England began as an agricultural society, economics shortly triumphed, and the neatly planned new towns disappeared. Trade and commerce took over the towns, and farmers began to live on their land. Villages grew into towns, and haphazard construction all but obscured the original design of most American centers of habitation.

COMMON LAW LAND USE CONTROLS

The legal system of our nation is based principally upon English common law. Common law is *court-made law*, that is, it is based not on statutes, legislation, or ordinances, but on court opinions. Under such a system individual decisions by the court set precedents and become the rules of the game for future cases. While tending to look to the past for precedents, common law is flexible, adjusting to a changing society. If an issue has not come before the courts, however, common law will be indecisive if not silent on the point.

Such was the common law stance on potential land use conflicts until about 1930. The cumbersome and ineffective nuisance laws were the only way to deal with conflicting uses of land. Nuisance laws say that if my neighbor's actions *on his property* causes smoke, noise, or odor that annoy me, I can seek relief from the court. But, it is incumbent upon me to establish that I have suffered harm and that the source of the problem can be tied directly to my neighbor.

Private nuisance laws were a primitive zoning tool. Industrial activity was forbidden as unreasonable behavior in suburban residential areas; it was licensed as reasonable in urban centers. It has only recently been recognized that this *de facto* licensing of nuisance activity in urban areas contributes to degradation of the environment in those areas.

Related cases, collected under the caption of "public nuisance," were more directly relevant to zoning. These nuisances were crimes consisting of offenses such as maintaining gunpowder factories or rendering plants in residential areas. This body of law was also a primitive form of land use planning because it exiled uses that threatened the comfort and safety of the public.

PRIVATE PROPERTY AS A RESTRAINT TO LAND USE LEGISLATION

Though nuisances were subject to abatement, the law usually treated land owners as absolute sovereigns over their domain.

Using legislative authority to regulate land use entails exercising the *police power*, that is the state, as sovereign, has authority to make laws to protect the public safety, health, morality, and welfare. Constitutional restraints of the police power function at state and federal levels.

State constitutions tend to differ radically from the federal charter. The U.S. Constitution is largely a list of "do's;" state constitutions tend to be inventories of "do not's." The whole theory of the national charter, after all, was symbolized in the Tenth Amendment notion that all powers not expressly granted to the central government were reserved to the several states.

The Fourteenth Amendment limits the states' authority to "... deprive any person of life, liberty, or property without due process of law." Citizens have recourse, if the state constitutions do not protect them, to the federal courts. The police power has come to be defined for due process purposes in terms of health, safety, morals, and general welfare. It was toward these ends that the reasonable exercise of legislative authority was justified. Even so, the means adopted to achieve these ends had to be reasonable ones.

APPROACHES TO THE CITIES' PROBLEMS

In 1913 there was pressure in New York City to limit the growth of skyscrapers. The city not only limited the height of buildings but also sought to require a system of setting back upper levels, pyramid-style. More significant still, it was concluded that controls had to be imposed upon the uses to which land was put in different parts of the city.

In this second conclusion lay the rub. The height of buildings might be regulated, because such regulations could be justified in terms of safety, but prohibiting a man from building a store in a residential district raised the spectre of unconstitutionality. Such a prohibition was seen as contrary to the Fourteenth Amendment — depriving a person of property "without due process."

In 1915 the Supreme Court decided a precedent setting public-nuisance case, *Hadachek v. Los Angeles*. The Court allowed Los Angeles to impose substantial costs upon a landowner in the name of regulations designed to improve the general welfare. The gist of the controversy was that Los Angeles had annexed territory in order to expedite residential expansion. A rich clay deposit was included in this new territory where Mr. Hadachek manufactured bricks. When Los Angeles outlawed manufacture of bricks within the city limits, Hadachek saw an \$800,000 manufacturing parcel reduced to \$60,000 worth of land suitable only for residential development. The Court sustained the law, remarking that "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."

Bolstered by this opinion, New York reformers divided New York City into districts and regulated the location of trade and industry with zoning resolution enacted in

1916. American land use controls were cast in the regulatory mold; a decision that has influenced the development of those controls to this day.

WIDESPREAD ADOPTION OF ZONING

Once zoning was enacted in New York City, the idea spread like wildfire. In 1920, for the first time, more Americans lived in urban than rural areas, and 35 cities had zoning ordinances. By 1926 that number had mushroomed to 591; in 1932, the figure reached 1,236. Legal cases sustaining the constitutional propriety of zoning began to accumulate.

JUDICIAL OBSTACLES STILL REMAINING

Appearances were deceptive. There were a series of decisions by state courts that were not persuaded that excluding a grocery store from a residential neighborhood had anything to do with the health, safety, morals, and general welfare of a community. The Supreme Court of the United States had not decided whether zoning met the requirements of the Fourteenth Amendment. The attitude of the nation's highest court would be particularly crucial.

The test case, *Village of Euclid v. Ambler Realty Co.*, was decided in 1926. Euclid, Ohio, a satellite community east of Cleveland, had a tree-lined residential avenue stretching across the village from east to west. Expansion of Cleveland and increasing traffic along the avenue was creating strip development of garages and convenience stores on the western end of the avenue. The village wrote a zoning ordinance to restrict the land on either side of Euclid Avenue to residential use. At the same time, it allowed industrial development along the railway tracks that paralleled the avenue farther to the north. The zoning scheme was designed to channel development—allowing for industry, while preserving the residential character of the village. Ambler Realty owned a parcel of land on the north side of Euclid Avenue. Unregulated, the southern portion of the parcel would have continued to be worth \$10,000 an acre; zoned, the same land was worth only \$2,500 an acre.

The Ohio courts sustained zoning, in principle, but Ambler Realty entered the federal court system to test whether the ordinance was unconstitutional because it amounted to a taking of his property without due process. Ambler was successful in the lower court, so the village authorities had to carry the argument to the Supreme Court. A majority of the justices sustained the validity of the ordinance and the constitutional propriety of zoning.

The reasoning of the Court in *Euclid v. Ambler* is important because this decision was the intellectual “open sesame” to land use planning in this country. The idea central to *Euclid v. Ambler*—that nonresidential activities could be excluded from residential neighborhoods—was seen as a natural progression from traditional public nuisance law theory that had always abhorred a right thing in a wrong place, “a pig in the parlor

instead of a barnyard.” These new controls were also justified in terms of health and safety. As a reasonable



tool calculated to protect the public health, safety, and morals, zoning was sustained as a reasonable exercise of the police power but only in response to the need to protect private property from the harm unpoliced development might cause. Thus, the Court rationalized zoning in terms of health, safety, and morals rather than in the broader perspective of the general welfare. Until general-welfare was recognized as a distinct end justifying exercise of the police power and broadening the zoning authority's scope, the law reports were filled with the struggles of judges attempting to fit zoning into the three-part scheme of health, safety, and morals.

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Rural Land Use —
Problems & Possibilities

12:3
PRIMER ON LAND USE
CONTROL LAW:
ZONING AS A SYSTEM*

*Adapted from **A Basic Introduction to Land Use Control Law and Doctrine** by E. F. Roberts; original paper published in *Northeast Regional Center for Rural Development, Publication No. 5*; adapted by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.

Zoning is best understood as a process involving the local governing body that promulgates the ordinance, the *administrative agencies* that oversee the operation of the system, and their interaction with the owners of zoned real estate.

TYPICAL ZONING ORDINANCE

Zoning divides a community into districts so that landowners in each district will use their parcels harmoniously. Zoning is fundamentally a protection against nuisances that is a product of the desire to maintain tranquility in residential neighborhoods. Thus, the most exclusive districts are single-family home districts, typically zoned R-1. Less restrictive residential districts are duplex housing (R-2), multiple dwellings and small apartment houses (R-3) and, finally, large scale apartment blocks (R-4). Traditionally, zoning districts have been cumulative. That is, only single-family homes are permitted in an R-1 district, but an R-4 district allows all the uses in R-1 through R-3 and large-scale apartment developments. Zoning, therefore, allows for increasingly heterogeneous land use as the districts descended from the pinnacle of the single-family homes district.

Commercial and industrial districts were created along with residential districts. And there were apt to be subclasses of each of these districts, envisaging again a descending and accumulating scale of larger and less polite installations.

Some uses are prohibited entirely. Exiled to the hinterlands are brick yards, gunpowder factories, and rendering plants. The difficulty is that the rural areas are being treated as the dumping ground for society's most noxious activities.

In addition to use-districts, two other sets of controls are common. First, a system of area districts establishes minimum lot sizes, and maximum use of lots is fixed. Thus an R-1 use might be the only appropriate use in two areas: in one, a house can be built on only a one-acre parcel and the house and garage can occupy not more than 15 percent of the lot area; in another area, a house can be built on a quarter-acre parcel and 50 percent of the lot area may be covered by a house and garage. Second, a system of height districts sets the maximum number of stories to which buildings can be constructed in various parts of the community. Though there are differences among these districts, within each district the regulations are uniform for each class of building.

The reader should now appreciate Mr. Justice Sutherland's comment in the *Euclid* case when, after verbally describing the ordinance that precipitated that litigation, he observed, "The plan is a complicated one and can be better understood by an inspection of the map..." This observation was particularly perceptive because zoning

ordinances typically are made up of two crucial parts. The ordinance defines concepts, such as "single family," and gives formulas for calculating permissible horizontal and vertical area uses. In order to grasp the plan for the community as a whole, it is essential to look at the map attached to the ordinance, showing the various districts.

OPERATING THE ZONING SYSTEM

It is not enough that the local legislature pass a zoning ordinance; the ordinance must be enforced. The local building inspector should be the zoning enforcement officer.

District zoning lines should make sense only as a whole. A district, after all, is a view of the community in broad terms, not a lot-by-lot analysis. Therefore, a few parcels in any district might not be suitable for development according to the criteria of the whole district. To deny the right to develop in a different way, when economics dictates that compliant development is impracticable, would be to confiscate these odd lots and, hence, to unconstitutionally impose police power. These problems are referred to an agency that can grant exceptions from the local district rules. This agency is known as a Board of Adjustment, Zoning Commission, or Board of Zoning Appeals and is empowered to grant variances to property owners to develop their parcels differently from the strict letter set down for their district. The courts have a complicated process of judicial review to prevent the exception becoming the rule and to prevent the local board from rezoning the community by the variance procedures.

A zoning ordinance, calculating the most practical development of a community, is at best an educated guess as to how development will proceed. Uses that are incompatible today might be compatible tomorrow. Provision was made to amend the zoning scheme. Thus, like any ordinance, the zoning pattern can be amended by the local legislature that had promulgated it.

THE ZONING SYSTEM SEGREGATED FROM THE PLANNING FUNCTION

Zoning evolved within its own enabling legislation, and is distinct from the broader planning function. The planning function evolved through municipalities' imposing controls on subdivision and development. In fact, these controls predated zoning.

A developer typically has to satisfy the local planning commission that internal streets in a subdivision will be in safe alignment with existing thoroughfares and that drainage will be adequate. These restraints, like zoning, are police power mechanisms designed to protect public health and safety. But planning commissions can also require a developer to build the internal streets in a subdivision and then dedicate them. This power, premised as they were based on the notion that subdividing land is a privilege rather than a right, exceeds traditional

police power and rests, in part at least, on the eminent domain power and the power to levy special taxes and assessments.

The planning commission does more than oversee developers. It develops a master plan for the community. A master plan is a projection of when and where new public utilities ought to be built; it is a similar set of projections about street and land use plans. But the master plan is more than a collection of projections. The master plan orders these projections around a core of statements about what kind of community is envisioned. The master plan does not have the force of law that a zoning ordinance has. Rather, governmental decisions should be oriented around the plan. These decisions should not conflict with the goals of the plan: they should tend to implement it.

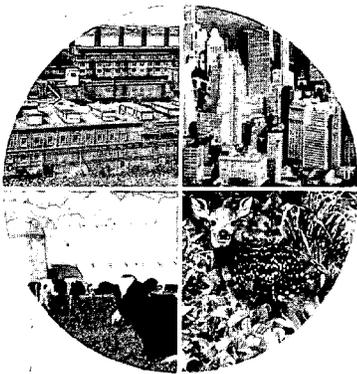
It would seem self-evident that in preparing a zoning ordinance, the master plan should be the basis for the entire scheme. Zoning enabling legislation requires that zoning should reflect a comprehensive plan. If the zoning scheme reflects the goals of the master plan, that is a test of whether the scheme illustrates a comprehensive plan. This has not been done. Instead, most courts examine the zoning plan alone and are satisfied that a comprehensive plan exists so long as the plan,

evaluated alone, is a reasonable proscription for orderly development and is not arbitrary.

Until recently most communities did not have a master plan. To have equated a zoning ordinance promulgated according to a comprehensive plan with the existence of a master plan, would require the court to invalidate zoning ordinances *in toto*, because many communities set about instituting zoning ordinances before a master plan had been prepared or even contemplated. This tended to confirm the wisdom of treating zoning as a self-contained activity.

Laws on this are on the verge of dramatic change. Dissatisfaction with a deteriorating environment has generated dissatisfaction with what is seen to be a fragmented, and ineffective planning system. Inevitably, along with the felt need for more and better planning, zoning will be brought into harness with planning generally. Recent developments in California reveal the direction in which the law is moving. First, local governments will have to develop general plans around which to make decisions about land use and new highways and public utilities. Second, zoning ordinances, whether new ones or substantial revisions of old ones, will have to show conformance with the community's development plan.

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Rural Land Use —
Problems & Possibilities

12:4
PRIMER ON LAND USE
CONTROL LAW:
THE LEGAL BOUNDS
ON ZONING*

*Adapted from *A Basic Introduction to Land Use Control Law and Doctrine* by E. F. Roberts; original paper published in *Northeast Regional Center for Rural Development, Publication No. 5*; adapted by the *Land Use Subcommittee of the Northeast Extension Public Policy Committee*.

ZONING AND THE GENERAL WELFARE

Throughout the 19th century it seemed clear that a state legislature could exercise its police power authority to achieve objectives of health, safety, morals, or general welfare. The first Mr. Justice Harland upheld such a position:

"We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . The foundations upon which the power rests are in every case the same."

This sweeping canon, however, did not last.

Between 1917 and 1934, the Supreme Court took a very narrow view of legislative authority that tinkered with an economy the judges thought best controlled by its own immutable laws. Thus state legislatures were restricted to matters of immediate concern to the public health, safety, and morals while their authority over the general welfare suffered an eclipse.

The Supreme Court's 1954 decision, in *Berman v. Parker*, is central to recent state court decisions that the general welfare caption justifies the exercise of the police power over real property. In *Bergman v. Parker* the owner of a sound building in a blighted area of Washington, D.C. contested the authority of a local public agency to condemn the building as part of an urban renewal plan. The controversy came to be phrased in terms of police power, condemnation being treated as a tool, selected in lieu of a regulatory approach, to attack the problem of urban blight.

Since *Berman v. Parker* it has been axiomatic that:

... conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the value of taxpayers' properties.

Thus, to preserve their overall character, communities can fix reasonable minimum lot areas, minimum floor areas for residential dwellings, and segregate trailer parks into special zones.

Increasingly, criticism has been heard that some suburban communities have exploited their zoning authority to exclude newcomers. Some communities have in fact preserved their "character" to the extent of requiring four- and five-acre minimum lots in single family residence districts and entirely excluding apartment house developments.

Pennsylvania's highest court has been the most active in striking down overly restrictive zoning ordinances "whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic

or otherwise, upon the administration of public services and facilities." Actually, *Berman v. Parker* licensed the broad view of zoning to achieve well-balanced communities, not suburban exclusivity. Thus, while growth can be channeled, it cannot be aborted by zoning.

THE FIFTH AMENDMENT

"... nor shall private property be taken for public use, without just compensation."

Because legislatures can enact measures to protect the general welfare, the scope of this authority seems circumscribed only by the capacity to concoct a general welfare justification for any enactment. A state legislature, for example, might conclude that media violence contributes to increased crime and so might set up a system of censorship. But the enactment would be void because the due process standard in the Fourteenth Amendment, which applies to the states, includes the basic civil liberties enumerated in the Bill of Rights, among them guarantees of free speech and press.

The Fifth Amendment provides that governments cannot take private property for public use without payment of just compensation. It is precisely this constitutional check on the scope of legislative authority justified in terms of the general welfare, that must concern us.

Life would be simple if a state legislature possessed two distinct powers: authority to regulate use of land to protect the general welfare and authority to condemn land upon payment of market value. In simpler times, it appeared that these two powers were quite distinct.

The courts held that nuisance had no rights. This was illustrated when the court sustained the Los Angeles ordinance prohibiting the manufacture of bricks within the city limits. A zoning ordinance often reduces land value, but what if, in a non-public nuisance situation, land use controls were to totally destroy the value of a parcel?

Pennsylvania law once was unique in dividing fee simple ownership into three "estates": surface rights, mineral rights, and support. What this meant was that a coal company that owned the last two estates could mine without regard to the harm any sinking or settling of the surface could cause the surface owner. Concerned over the safety of the surface dweller, the state legislature exercised its police power to forbid mining under dwellings. Here then was a regulation that rendered certain property, in this case mineral rights, worthless. But in this case Mr. Justice Holmes condemned the enactment.

... The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pushed too far, regulations imposed upon land use became void because they were tantamount to *uncompensated taking* of real estate.

Diminution in the value of land caused by imposition of regulations is not the test signalling an *unconstitu-*

tional taking. There is no set formula to determine where regulation ends and taking begins. The test is one of reasonableness. As a rule of thumb, a regulation becomes confiscatory when the owner of land cannot realize a reasonable return on his parcel as zoned.

Early efforts to create flood zones generated considerable litigation. The New Jersey decision in *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, is a classic. A township amended its zoning to create meadowlands to preserve its swamplands for water-holding areas. The only uses permitted in the new zone were greenhouses, agriculture, wildlife sanctuaries, and the like. Other consistent uses were allowed by special permit. When not permitted to fill a parcel in order to use it for intensive commercial development, a landowner went to court and prevailed.

Communities have learned that certain restraints, however laudable, imposed on land use will fail as regulations. The alternative strategy is to achieve the same purpose by condemnation. Lack of monies, however, often renders the alternative academic, and thus, intermediate strategies have evolved. Government may acquire partial interest in land, such as easements, to achieve their purpose at reduced expense. Taxes may be manipulated as incentives for the desired use. Land use controls have become a continuum of controls running a gamut from pure takings to pure regulations with many a variant between the poles.

New Jersey court recently suggested that the *Morris County Land* case might have to be reexamined.

... The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restrictions in furtherance of a policy designed to protect important public interests...

It has been suggested that there is a key to the taking cases that runs as follows. The police power can be exerted, like nuisance laws, to stop A from exploiting his land when it entails harming his neighbor, B. Thus, in a residential area, A can be restricted to a residential use. A's lot could not, however, be zoned for exclusive use as a park. In this situation, the public would be trying to make A confer a public benefit at his private expense. Thus, in *Morris County Land*, the public was trying to get water catchment areas for their benefit at A's expense, a "taking" according to this thesis. But, what if public harm were expected when waterways were polluted? Would analysis indicate that A could be prevented from filling swamp land if such an action caused ecological harm to the public?

The Wisconsin decision, *Just v. Marinette County*, is significant in this regard. A county ordinance divided shorelands into general purpose, general recreation, and conservancy districts. Use permitted in the conservancy districts was limited to harvesting of wild

crops, forestry, and fishing. Any use that involved filling or dredging required special permission. The owner of a parcel within a conservancy district commenced a fill operation, precipitating both a fine and an injunction. On appeal, the property owner sought to have the ordinance categorized as a taking.

The court took the position that taking only occurred when government, through restricting land use, *sought to obtain a public benefit*. Police power could quite properly be used to prevent a landowner from causing harm to the public. The public, in this case, had rights in the state's unpolluted waters.

While diminution in value of land caused by imposition of regulations is not controlling, the amount of this figure always looms large in making decisions. Traditionally, the figure is calculated in terms of what the land would be worth if it could be developed minus its value subjected to the regulations. The Wisconsin court, however, did not allow *Just* to use this potential. Rather, the "true" or unregulated value of the parcel was calculated in terms of value in its natural state.

The reasoning involved in removing speculative gain from the equation is even more significant in the long run. Land has a cash value that includes potential development value. Taking cases have tended to protect these speculative values as part of the notion of property rights. In *Just*, the Wisconsin court called into question this property concept. At face value, *Just* removed the taking constraint when the general welfare basis of using police power pertains to the public's right to a decent environment. The decision is so potentially revolutionary that one is forced to wait upon developments before assessing its full impact.

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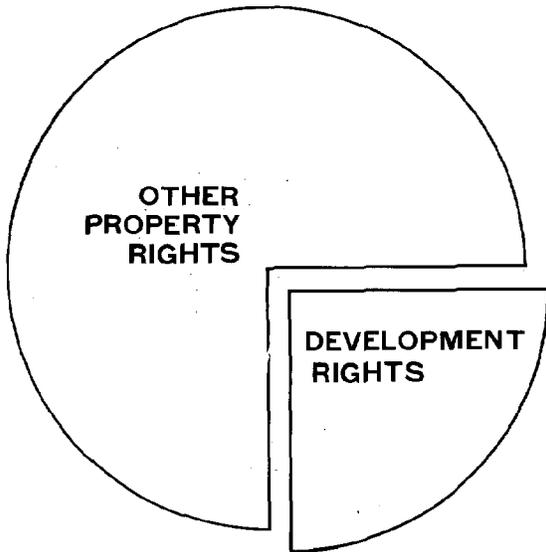
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Rural Land Use —
Problems & Possibilities

12:5
ALTERNATIVE METHODS
OF LAND USE CONTROL:
TRANSFER OF
DEVELOPMENT RIGHTS
AND PUBLIC PURCHASE
OF EASEMENTS*

*Adapted from *Transfer of Development Rights: A New Concept in Land Use Management* by B. Budd Chavooshian and *Public Purchase of Development Easements* by William L. Park; original papers published in *Publication No. 5, Northeast Regional Center for Rural Development*; adapted by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.

How can we protect critical natural areas, preserve open space, insure a high quality of life, and, at the same time, accommodate the legitimate development demands of a growing society? There are several approaches to this concept of land use control; two examples follow. Both approaches use the concept of the *development right*. One uses the market mechanism to transfer development right. One uses the market mechanism to transfer development rights from one individual to another; the other uses the resources of the state to purchase development rights from the individual.



PACKAGE OF PROPERTY RIGHTS

Development right is one of the rights included in ownership of real estate. It permits the owner to build upon or otherwise develop his land. All rights of land ownership are subject to reasonable regulation under the police power and are also subject to governmental power of eminent domain. Rights of ownership in land, such as the right to develop, the right to mine, or the right to the air space, may be separated from other rights and be regulated by government or sold and transferred separately.

TRANSFER OF DEVELOPMENT RIGHTS

Almost any newspaper can provide a chronicle of battles waged over land use. In many cases, one property owner may wish to maximize the value of his investment, but neighbors feel that development threatens the desirability of their property.

Besides the constitutional question of individual property rights and due process, development offers increased taxes to hard pressed municipalities balanced against possibly making the community a less desirable place to live.

Transfer of development rights (TDR) is a new technique to help solve this dilemma without violating basic rights and due process guaranteed in the Constitution. It combines planning with aspects of property law.

The process is begun when a municipality prohibits development in a designated area of open space, and the residential development potential in that area is transferred to another district or districts.

Landowners in the preserved areas may sell their rights to further develop to other landowners or builders who wish to develop those areas in which development is agreed on. Transferable development rights help a community plan its growth, conserving environmentally important areas with equitable compensation, and at the same time, meeting the housing needs of a growing population.

CREATING A TDR ZONING ORDINANCE

The first step in creating TDR zoning is to identify the area to be preserved. It should be substantially unimproved land consisting mainly of farmlands, woodlands, aquifer recharge areas, floodplains, steep slopes, or marshes, etc. The preserved area must correspond to the community's master plan so that the area is the product of a rational plan for orderly growth and development.

After the preserved district is designated, its development potential, under current zoning, must be calculated, converted into development rights, and distributed to property owners in the preserved district. In residential zoning, this is done on the assumption that a development right is equal to each dwelling unit eliminated so that the total number of development rights distributed in the preserved district must equal the total number of eliminated dwelling units for the entire preserved district. This total represents the residential development potential of the preserved area; a similar scheme would be used for commercial and industrial zoning.

Each owner then has development rights based on the value of his tract, less improvements, in relation to the value of all the land, less improvements, in the preserved district. In this way, the unique location and characteristics of each tract are considered.

Next, a situation is created to give value to development rights; that is, a market is created for them. The municipality designates other suitable and highly developable districts where a new and higher density development will be permitted if accompanied by development rights. The total increased density in the designated district will depend on the number of outstanding development rights issued in the preserved district.

The increase in density above the formerly zoned maximum is the incentive that should attract a willing buyer of development rights. Specific increases for any one acre can only be established in light of the facts and

conditions in each municipality. For example, in some cases medium density, multiple family zones may be designated for residential transfers. But, in certain instances, single family residential dwellings on small parcels will be zoned especially in areas where it is desirable from a marketing and planning perspective. To avoid incompatible land use patterns and undue strains on the natural environment, planning and zoning for the higher permitted densities must be the result of sound planning principles.

Whatever and wherever new density requirements are established, the new zoning district must be more desirable for development because it is more profitable for the builder; the new density permitted must in fact create the incentive.

Finally, the proposal must ensure a continued marketability of development rights. Incentive to purchase development rights must be perpetuated until all outstanding rights are used. If the building proposals conform to the old zoning, they can be approved without the purchase of additional development rights. Thus a surplus of development rights is possible. If this should occur and more development rights were to exist than land upon which they can be used, it then becomes the responsibility of the designated governmental body to rezone another district in which development rights can be used. That is, they must re-establish the market for development rights and incentive zoning. Again, rezoning must be in accordance with the master plan and reflect sound planning principles.

At each critical step in the process, public hearings must be held with proper notice to landowners in the preserved areas as well as notice to all other affected parties. Due process of law must be observed throughout implementation of the program, and appeals of all decisions will be provided for.

Development rights are taxed in a manner similar to real property. For assessment purposes, the initial value of the development right would equal the difference between the assessed value of the land for agricultural or lesser purposes and the assessed value of the land for development. This way, there is no change in the payment of taxes by taxpayers in the governmental jurisdiction.

The major advantage of TDR's, at least from society's point of view, is that they provide a mechanism for preserving designated areas and guiding development into more appropriate areas without large expenditures of public funds. The major disadvantage of the approach lies in the complex, costly and uncertain process of maintaining a market for development rights.

PUBLIC PURCHASE OF DEVELOPMENT EASEMENTS

Development easement purchase plans as a means of establishing agricultural open space preserves have been suggested in some states such as New Jersey. An easement is an acquired privilege (in this case, the right

to develop) that one "person" (in this case, the state) has on the land of another.

The proposal for preserving agricultural open space in New Jersey provides that: (1) local municipalities are directed to designate the prime farmland to be preserved; (2) land in the preserved areas is limited to agriculture and related open space uses only; (3) landowners in preserved areas may sell the development rights of their land to the state for the difference between the market value and the farm value of such land; (4) the program would be financed by a real estate transfer tax on all real estate property in the state; (5) the program would be administered by semi-autonomous agency attached to the department of agriculture.

The advantages to the easement purchase approach are:

1. The public condemnation of development rights and the subsequent purchase of an easement. It modifies the deed and thereby imposes a restricted use of land to agriculture and related open space uses for any future purchaser; a sense of permanence in land use is established.

2. It potentially can provide a critical mass of land of sufficient size to maintain critical service industries. It is believed that 750,000 to 1,000,000 acres could not be preserved without some form of mandatory participation. It is also believed that the sense of permanence will spill over into nonpreserved areas where agriculture can exist for several years.

3. It provides for just compensation for the fair market value of property rights taken from the landowner.

4. It provides a balance between state and local authority wherein each can contribute to the program in a manner to which it is best suited. Home rule still has a role.

5. It protects the concept of private property as provided in the fifth amendment to the Constitution; it retains privately owned and operated farms.

6. It distributes the cost of the program to all citizens of the state.

7. It provides a mechanism for protecting agricultural activities.

The suggested program is a major departure from past policies and is not without disadvantages. The principle problems are:

1. Rigidities will be introduced into the land use system that are in conflict with longstanding agricultural traditions of independence and noninterference.

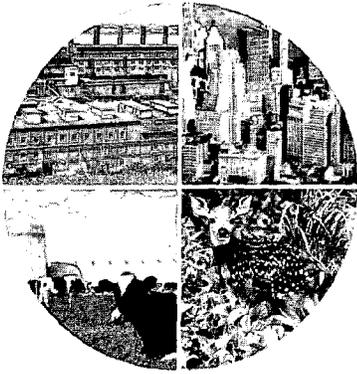
2. Determination of fair market value of condemned rights is complex and may not be readily understood by affected parties.

3. Many landowners value their land above the fair market level, leading to legal entanglements.

4. Lack of confidence in government could bring

about opposition to the proposal even though the plan itself might be acceptable.

5. The tax burden of financing the preservation of land may delay the decision until the problem is acute and much of the land to be preserved is already developed.



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Rural Land Use —
Problems & Possibilities

12:6
**ALTERNATIVES FOR
LAND-USE MANAGEMENT:
TAX POLICIES AND OTHER
SPECIAL INCENTIVES***

**Adapted from Alternatives for Land Use Management: Tax Policies and Other Special Incentives by Lawrence W. Libby and A Basic Introduction to Land Use Control Law and Doctrine by E. F. Roberts; original papers published in Publication No. 5, Northeast Regional Center for Rural Development; adapted by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.*

Designing land control programs requires attention to the *performance* of available alternatives. Impacts must be compared with costs. Distribution of costs and benefits from a land control device or set of devices is critical, especially in building political support and achieving some reasonable standard of equity. Choosing among land control devices is sometimes discussed as if the options were unlimited. In fact, political response to estimates of performance and impact distribution cut the options to one or two that "might sell". Standards of performance must relate to realistic expectations for the technique under study. A major problem with recent land use policy at the state and local levels has been the tendency to expect too much from a certain planning effort or set of implementing tools. The elements of land policy are interrelated. Desired changes in land use behavior by owners and users of land are being accomplished with an impressive variety of promises, threats, bribes, pleas and doses of education and research. Performance must be gauged with respect to the role each device can be expected to play in the total control package.

TAX MANIPULATIONS

Adjustments in tax burden are a popular technique for retaining a politically favorable comparative advantage for certain open-land uses. As with other incentive programs, tax manipulations affect the economic consequences of certain land use changes.

Real estate taxes have been seen as a key factor in land use equations. Land is assessed at value, then taxes begin to creep upward as farmland acquires added value, reflecting its potential for residential development. This increase in costs may accelerate the decision to convert land from agricultural use to some more lucrative one. Efforts have been made to continue to assess farm land at its agricultural value, without regard to its increasing potential for something else, in order to keep land on the urban fringe open and undeveloped.

Assuming a constitutional scene in which it is possible to treat agricultural land separately, tax abatement for farms may actually subsidize developers in making advance acquisitions of land. They need simply keep the land in agricultural use until the time is ripe to develop it and all the time they pay less taxes than if they had bought non-farm land. Too, many farmers are also part speculator. Any tax advantage, then, has to be keyed to some additional system of controls if the advantage is going to achieve the purpose of maintaining prime land in agricultural use.

William H. Whyte suggested that three factors had to be worked into any tax preferment mechanism:

... First, the open space assessment would apply not only to farmland, but to any land the

openness of which would benefit the public... Second, open-space assessment was to be geared to the land use plan of the local government... The third provision was for a partial recapture of taxes when open space was converted to another use.

This is what Pennsylvania set out to do in 1966.

The Pennsylvania system applied to farmland, forest land, water supply land, and open space land generally. These lands were eligible only if they were appropriately designated on a municipal land use plan. This being the case, the owner could enter into a covenant with the county government. (A covenant is a contract that binds subsequent owners as well as the immediate promisor.) This covenant runs for ten years and is automatically extended year by year unless appropriate notice to terminate it is given by one of the parties. The county promises to assess the subject land at its market value for the use to which it is restricted by the covenant; the land owner promises not to alter the style of use during the covenant. If the landowner alters the use, he is liable to the county for the difference in taxes between the amount actually paid and what would have been due without the restrictive covenant. While these damages are calculated from the time the agreement commenced, in no event is the landowner liable for more than five years of back taxes.

Forested land may qualify for use-value incentives. Approximately 35 states have special yield tax provisions for commercial forest land. The concept is: taxes are based on income productivity in current use, not on market value influenced by the possibility of land use change.

The time dimension of timber production is a primary rationale; annual revenue is not available to pay *ad valorem* taxes. Yield taxes are paid at time of timber harvest.

To the extent that yield taxes avoid increments of land value reflecting the possibility of second home development or other "higher value" uses, they are a tax subsidy on behalf of a use deemed to have special importance. As with other incentives, final judgment should depend on performance—its effect on the objective of keeping private land in timber production, and equity or resulting tax redistribution.

Along with the conventional mechanism, new techniques are coming into prominence. In lieu of property taxes, for example, taxes imposed on the profits obtained from land sales may have an even more direct impact on the pattern of land use decision making. To affect rapid transfers of land, Vermont imposes a tax on capital gains derived from real estate transactions. Assuming that speculation in land entails quick turnover, this system encourages the opposite behavior.

Most of these tax incentives are like block grants. The economic incentive is offered to achieve desirable land use. There is no direct earmarking of subsidies for a specific action. The analytical problem is the with-with-

out/before-after issue in any benefit cost analysis. What behavior would have occurred in the absence of the incentive?

OTHER INCENTIVES

This category of land use institutions involves creating sets of circumstances conducive to preferred land development patterns. Incentive range from direct payments to support certain activities, to research and education aimed at influencing preferences about land use alternatives.

The New York Agricultural Districts approach is to *maintain economic conditions* that encourage continuation of viable agriculture. Its intention is to supplement, not replace, the management judgment of the farm operator. It does alter forces of land change in those areas where physical resources and management expectations are that agriculture *can* survive. Care is taken to assure sensitivity to state and local planning preferences, which helps build the political support needed to make the program work. In addition to use-tax provisions, farms in a designated agricultural district are immune from local restrictive ordinances deemed inconsistent with agriculture, state administrative regulations, or eminent domain actions that can be avoided, and special assessments.

The program will not meet the long-run open space demands of New Yorkers. But it has fostered viable agriculture, encouraged a land use change pattern more sensitive to land characteristics, and within its acknowledged limitations has demonstrated a level of performance unmatched by other programs for open land.

Cost sharing to encourage specific activities is a familiar approach to land policy in agriculture and forestry. The last thirty years of experience includes Agricultural Conservation Program, Rural Environmental Assistance Program, Soil Bank, low interest forestry loans through Farmer's Home Administration, timber development organizations set up under the Appalachian program, and others. Success of any such incentive is dependent on the degree of departure from current practice that is required, and the level of subsidy necessary to encourage private action benefiting the public.

Much of the effort to guide rather than control private behavior in use of open land is in research and education aimed at demonstrating land-human relationships. The purpose is to build useful behavior incentives into the values of those whose actions affect the land. Human preference is the moving force in any area of policy. Various institutions are needed to gauge those preferences, and others to help form them.

Achieving land use objectives through the controlled application of taxes and other incentives leaves significant discretion to the land owner. This approach will not work for all land qualities but seems essential for others. Strengths and weaknesses of this set of land-management alternatives may be summarized as follows:

Strengths

1. Incentive programs accommodate rather than confront the economizing impulse of persons acting singly, in groups, or as some formal decision unit. Positive incentives are there, to be taken or ignored. They become part of the management judgment of the actor, not a contradiction of that judgment. In fact, they acknowledge the role of management in certain of the land qualities sought.

2. Because they cause relatively minor changes in ownership rights, incentive programs generally are not too disruptive.

3. Because they attempt to adjust the terms of *current decision institutions rather than replace them* with new ones, incentive programs are likely to entail less direct administrative cost than is true with more authoritarian approaches. The most expensive is usually outright purchase. An elaborate police power alternative often requires establishing new decision criteria to replace market signals. Incentives simply push the market around a little.

4. Cost of achieving social objectives from private land is more clearly assessed on those who realize the benefit. Other institutions may restrict the owner on the assumption that any cost he bears is more than offset by benefits to others. This is not a comforting rationale to the owner who feels he is asked to bear exorbitant costs for small increments of benefit spread throughout the population. None of the incentive programs matches dollar for dollar in benefit/cost distribution, though they come closer than other techniques.

Weaknesses

1. Because incentive programs depend on self-interest, their performance beyond the specific actions of interest will be modest. They are not massive redistribution of rights in land; thus spectacular results should not be expected.

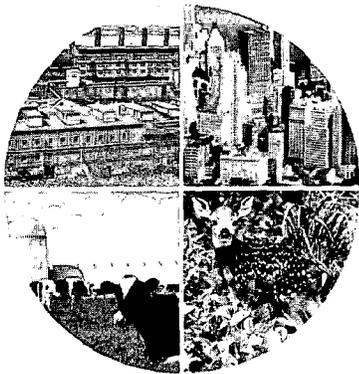
2. Incentive programs appear to be special-interest legislation. A category of tax payers or citizens is "encouraged" to do things, and those who are not "encouraged" may feel left out. The challenge is to assure some return for "encouragement," and to publicize the social benefits involved. Many state use-tax proposals have died in committee because they were perceived as one-way transfers. Of course, *all* land management institutions redistribute costs and benefits of decisions, and thus are special interest for somebody. Incentives for open land owners are particularly vulnerable in battles among special interests, because there are relatively few recipients.

3. The critical aspect of incentive programs is the link between altered circumstances and desired action. Incentive programs do not *force* action, and attention to outcomes of a program is essential.

4. The key question is "How much is enough?" The incentive must encourage action without becoming

a windfall. The actual cost to the land owner from failing to take the incentive must be greater than the cost of changing or continuing his land-related behavior. We must also acknowledge that it probably costs more for a change in behavior than a continuation of behavior.

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Rural Land Use —
Problems & Possibilities

12:7
ALTERNATIVE METHODS
OF LAND USE CONTROL:
INFLUENCING LAND USE
THROUGH PUBLIC
ADMINISTRATIVE
ACTIVITIES*

*Adapted from *Influencing Land Use Through Public Administrative Activities* by Ronald W. Pedersen; original paper published in *Publication No. 5, Northeast Regional Center for Rural Development*; adapted by the *Land Use Subcommittee of the Northeast Extension Public Policy Committee*.

Influencing land use through public administrative activities is a subject that can bring to mind a dictatorial bureaucrat or an army of citizens with eager attorneys determined to do battle with the administrator of some program of development. Or, one may picture citizens seeking in other ways to influence the real or imaginary administrative discretion thought to be in the hands of a government official. If you are in government, the responsibility for making public decisions may cause reconsideration of the impact of your actions as you work in the public interest and somehow account for all aspects of some law or policy.

BACKGROUND

There seems to be a view that administrative actions can be neatly separated from legal and legislative aspects of land use policy. A brief example will dispel any ideas about its neatness.

For years New York has had a state aid program to help towns upgrade rural roads. Administrators proposed the program and later proposed its expansion. It requires legislative action, however, to pass the proposed program and an administrative decision to sign it into law. Annually, legislative and administrative action provides the needed funds. State-level administrative decisions allocate available monies. At several points in the process, administrative decisions are guided by rules that are legislative, yet that were administratively proposed.

But, how far can administrative decisions really shape policies? What are their impacts?

Administrative decisions, and their impacts usually take place within a complex web of private and governmental decisions, making it difficult to locate the key link or act. Key decisions influencing land use are often difficult to identify. Some of the administrative decisions that come to mind when considering land use are global in scope and impact. Others may have an impact on only one small area, or at most one small area at a time.

When the Federal Reserve Bank changes the interest rate, the impact is profound, with direct and indirect effects on every industry, family, land developer, farm operator, and level of government. At the other end of the spectrum, there are any number of narrow policy determinations and administrative decisions, authorized because of some special concern, often single-purpose and regulatory in nature. After April 1975, in New York, a permit has been required to excavate more than 1,000 tons of sand, gravel, or minerals.

Administrative decisions may have impacts far beyond those expected by the framers of the original law. For example, administrative approval for a new or expanded municipal water supply in New York requires a number of findings, including the public necessity for the new supply. This element of necessity has not been

considered nearly as diligently as a literal reading might anticipate. Suppose it were? It would be difficult to list the aspects of the communities public, and private, past, present, and future that would not be subject to administrative analysis. The consequences of many laws and decisions often are not fully anticipated though clearly great. Highway laws and the administrative processes they create provide examples. When Route 17 in New York was modernized from a winding two-lane route from New York City to the Catskills a few years ago, it was only a short time before the curve of increasing land values in many rural communities jumped off the chart. Vast areas of beautifully rugged topography suddenly were an hour or more closer to the New York City metropolitan area.

Another entirely different sphere of administration affecting land use is the area of public professional guidance to private decision making, an important activity of land-grant colleges, though often participated in by state government agencies. Guides to private land use decisions have been issued in many subject matter areas including crop varieties, rates of fertilization, animal practices, silviculture, and marketing advice.

TYPES OF DECISION MAKING

There are two principle types of administrative decision making: rule-making and adjudication.

A newly enacted land use statute may include in detail standards to be applied and procedures to be followed, or it may have very little detail. One of the first actions of the agency charged with administering a law is the formulation of rules and regulations. This rule-making procedure is a critical point of input for influencing administrative decision-making. It is often the rules more than the statute itself that determine how narrowly or how broadly the law is applied.

The adjudicatory proceeding, on the other hand, is carried out under the mandate of the statute and agency rules, and considers a request from an individual applicant for approval to undertake some specific program. This is a quasijudicial process in which any concerned parties-in-interest can participate to influence the decision.

Finally, an aggrieved individual or group may resort to judicial proceedings to appeal actions of an agency's rulemaking or adjudication to the courts. The usual grounds are that the action was arbitrary and capricious, because the court will seldom consider substituting its own judgment for the agency on the substantive issues.

INFLUENCING THE DECISION MAKERS

Here are some ways in which administrative actions can be influenced by individual citizens and special interest groups.

1. *Know clearly what is being sought.* Define the objective in terms of steps that relate to the end results desired. Get your ideas to the right place or person.

Never underestimate the impact of a well-written let-

ter. Government officials, legislators, and corporation presidents read and consider points of view logically expressed. Their motives may vary, but they do read their mail.

2. *Prevail upon decision makers to get the facts and consider all aspects before making a decision.*

In general, the earlier one intervenes in the series of many small decisions that are usually involved, the better the chances of success.

3. *Recognize the practical need for making some laws quite general.*

The Private Land Use and Development Plan for the Adirondacks as passed by the New York Legislature, for example, sets forth density guidelines and use limitations by broad land classes. An administrative agency, the Adirondacks Park Agency, was created to make the vast number of specific decisions needed to carry out the broad policies in the law and to collect information for making these decisions.

4. *Seek public involvement.* The interest, concern, and support of the public are essential in developing and implementing worthwhile land use programs. Despite many recent steps to encourage public participation, the role of the public has been minimal.

SOME CONSTRAINTS

It is not easy to influence policies or decisions affecting land use; a few constraints should be pointed out. In some instances, they can be worked around; in other cases, years of education or radical changes in basic precepts about land use may be needed. Some examples:

1. A project or activity may have severe physically limiting factors, thereby reducing the alternatives. A pumped storage power plant needs a certain topographical position, a nuclear plant needs cooling water. Neither is appropriate for an urban area. Hence, in certain areas, power plants and associated transmission lines will continue to be rural land use considerations.

2. Conflicting or inconsistent public policies may thwart first-stage efforts. In New York, for example, highways are usually located to minimize the taking of prime agricultural land. Yet, nothing is then done to assure that the land saved is not sold for a shopping center.

3. Political considerations may be major limiting factors. For example, local, state, and federal levels of government often have inadequate liaison, resulting in confusion and overlapping. Many local government officials stress home rule, while state officials chaff at the limited perspective of local officials. Officials at one level of government often try to control a program but seek to have the next higher level pay for it.

4. Many individual citizens and citizen groups have conflicting goals that are not easy to reconcile. For example, many farmers view favorably any steps to save agricultural land and keep urban sprawl at bay, but

at the same time do not want any options closed for future use of their land. Reconciliation of personal goals and public good, where they may differ, is difficult to achieve to everyone's satisfaction.

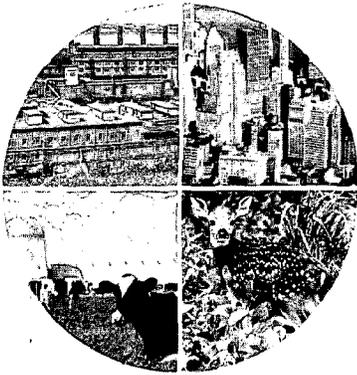
5. Another constraint is the opposing views held by different groups. The views of people and interest groups affect public decision making, but they can be so conflicting that they provide no useful guidance to a decision maker.

6. The reluctance to change established patterns of thinking and ways of doing things can be a significant constraint.

SUMMARY

There are major land use issues pending at the national level that can have widespread impact, ranging from transportation policies to inheritance taxes on the sizes of agricultural units that can be passed to the next generation. Neither the problems nor the proposed solutions are static. They are identified and carried forward within a hodgepodge of decision making and policy determination.

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Rural Land Use —
Problems & Possibilities

12:8

**RURAL LAND USE POLICY
IN THE NORTHEAST:
CONSENSUS, DIRECTIONS,
AND ISSUES***

*Adapted from **Rural Land Use Policy in the Northeast: Consensus, Directions and Issues** by W. Neill Schaller; original paper published in Publication No. 5, Northeast Regional Center for Rural Development; adapted by the Land Use Subcommittee of the Northeast Extension Public Policy Committee.

WHAT IS THE PROBLEM?

A wise choice of policy tools requires a correct diagnosis of the land use problem. Land use problems occur because current or prospective use differs from desired use. Desired use implies certain goals. Land use policies and other tools are for achieving those goals. Thus, to diagnose the problem, the goals, as well as reasons why they have not been achieved, must be identified.

A major concern in the northeastern U. S. is that prime agricultural land is shifting out of farming uses. Are the alternative remedies being discussed in the Northeast based on an understanding of why this shift is occurring? How much of the bidding of land out of farming is due to population pressures, to lower relative economic returns to land used for farming, to the tax structure, or to previous policies, including those never perceived as likely to affect land use? Have we identified the problem or the symptoms? Will the corrective measures chosen simply pile new policies on old ones? Should we review past policies to get at the basic reasons for the disappearance of farmland?

We can only partly answer the question of what the problem is until the companion question, whose problem it is is faced. The land owners and those affected by its use may have divergent goals. Much non-urban land in the Northeast—farmland and “not-land”—is owned by urban people who not only see land use differently but will have much to say about land use policy.

The vast majority of land use problems are problems not merely because desired goals are unmet, but because different goals are involved and available means cannot satisfy all of them. This helps to explain why there are different names for land use problems. Some refer to a particular problem as an environmental quality problem; others may label it a physical or economic problem. Whether you label as a serious problem the building of high-rise apartments on farmland depends on whether you are (or think like) the farmer, developer, renter, public official, or interested neighbor. If you are a public official in Washington, you will probably think about it quite differently than someone who lives and works elsewhere. Similarly, what the federal official describes as a land use problem may appear to the local citizen as an issue too remote to add to his already-long list of worries. There is no one correct perspective.

WHAT CAN BE DONE ABOUT IT?

The question has two parts: what are the alternative policies and control techniques, and what is the process of deciding which tools to use?

LAND USE POLICY TOOLS

Many of the tools for solving land use problems fall

into a continuum between reliance on the marketplace and reliance on regulations and controls. Economists usually favor letting the market work. When the market fails to solve land use problems, such as those caused by external effects, they turn reluctantly to controls. Planners, in contrast, tend to favor regulation, flirting now and then with the market approach.

Between the two extremes are incentives and other techniques to guide the changes in individual behavior that will solve land use problems. The distinction between guiding and controlling is important. Guiding policies reward desired behavior. If a person chooses not to change his behavior, he loses only the reward. Controls penalize anyone who behaves undesirably. A person can decide to disobey a law, but the resulting fine or jail sentence tends to remove that option as a viable choice.

The effectiveness of a policy depends not only on correct diagnosis of the problem, but also on a favorable setting in which the policy can operate. The agricultural districts approach in New York can encourage retention of prime farmland when development is relatively scattered, but may be less effective when urbanizing pressures mount. A policy that is effective in one place may have limited effect in the same place five years later. It might never work in another location.

The combination of policies on the books is an important part of the setting. Different policies can offset as well as complement each other. Land use patterns may be influenced as much by policies having no perceived relation to land use as by those specifically concerned with land use. The unintended effects of land use policies are of continuing concern. In solving a particular land use problem, we worry about creating or aggravating another problem. Some have pointed out the unintended benefits to higher income people of certain tax policies. Others have said that use-value assessment may provide a haven for speculators. It has also been suggested that if the property of farmers is taxed less, the tax burden will be shifted to non-farmers, which might ultimately increase the cost of housing for low-income people.

The possible impact of a given land use policy on concentration of land ownership could be added to this endless list of unintended effects. If the public is seriously concerned about bigness, the question to be asked of each proposed policy is, will it encourage or discourage concentration? If everything is indeed related to everything else, where does the assessment of intended and unintended policy effects end? There is no answer.

The “taking” issue is becoming of more concern and it is broader than the taking of property rights. We are struggling with the more complex problem of who is going to take what from whom. Land use policies and control techniques may well involve the taking not only of property rights, but of other critical rights, such as access to choice, opportunity, prestige, or income.

THE PROCESS OF SELECTING POLICY TOOLS

Often we talk more about tools than about the process of selecting tools. Yet, to many people the question of who decides, and how, is as important as which tool is chosen. The issue is not whether the public should participate, but how much, when, and how. Still, those who want to find solutions quickly are apt to view public involvement as time consuming and costly. They may encourage it, not for its own sake, but rather to legitimize a particular decision. Do we think of public involvement as a means to acceptance of a policy decision when the public sees it as an end? Perhaps we should begin to think of anything that restricts public participation as the potential taking of a right.

Related to the matter of who decides is the important question, at what geographic or governmental level will what decisions be made? Some see a shift upward in the locus of control. What would be the consequences of this shift? Is it what the public wants? A possible way to resolve it is suggested in the public choice approach to public administration. New institutional arrangements, or rules of the game, may be devised to encourage governmental units at different levels to negotiate with each other or otherwise participate in decision making, much as private firms participate in markets. The public choice approach then poses the challenging question, who decides on the rule changes and how?

THE NEED FOR INFORMATION AND UNDERSTANDING

Different kinds of information are required at different stages in what can be called the policy issue cycle. As a land use problem emerges, we need to know why it is a problem and for whom. We need to know what people really want. As alternative policy tools and control techniques are identified, we need to be able to make informed judgments about the effects of those alternatives. More often than not, we must rely as much on informed judgment as on hard data.

Still another kind of information is needed at the point in the policy issue cycle where decisions are made. We need to know about alternative decision making rules and their consequences. For instance, are there ways to increase the extent and effectiveness of public involvement, such as compensating citizens for the costs of participating. If the important decisions are made by those who administer legislation, and if public involvement ends when legislation is enacted, does that mean that more decisions should be legislated? Or, should ways be found to expand post-legislative involvement of citizens?

The outcome should be monitored and evaluated, if only to determine whether the corrective measure solved the problem it was supposed to solve. If the problem persists, we need to know why.

Just as information needs differ at various stages in the policy issue cycle, so do needs for education. In the initial stages of the land use issues cycle, the need is for

education to increase public awareness of the problem and then to help identify the alternatives and consequences of problem-solving tools. Extension can play an important role in broadening citizen participation in decision-making and ultimately monitoring the results of actions taken. It is difficult to work successfully in extension education when the issues are as complex and controversial as most land use issues. But, if extension educators merely raise the quality of the policy debate, they will have made a significant contribution.

WHAT IS THE ROLE OF THE EDUCATOR?

First, it is people, not land, with land use problems. The solution to land use problem may be a trade-off to the analysts, but to the people affected it may be a blessing or a tragedy. Whatever role you play in land use problem solving — planner, researcher, administrator, educator, or legislator—you are not an objective technician, but part of the process.

Second, lack of public confidence in professionals, as well as in government, adds particular importance to how you think about and carry out your role. The climate is hardly improved by the professional's occasional lack of confidence in other professionals. Never underestimate what you can do to help restore confidence.

How you respond to four professional pitfalls could have a significant impact on the well-being of people and their confidence in you.

Role confusion is one pitfall. How do you see your role? Do local leaders, citizens, and other professionals see it as you do? If you are in extension education, for example, what must you do, or be, in order to teach? Do you have to mediate before you can teach? Do others recognize and accept that role? The payoff from trying to clarify your role and to win acceptance of it can be substantial.

A second pitfall is succumbing to *grand designitis*—looking for that one grand design or one best solution to a complex land use problem. Unfortunately, progress is often made in small steps that are seldom neat and usually indirect.

The third pitfall is the *favored client tendency*. If you serve different involved publics who see a land use problem differently, how do you proceed? To simplify matters, you may be tempted to look for policy means that will maximize the goals of one person or group without hurting others too much. There is a subtle difference between winning and not losing; your publics will see it. Giving in to this temptation could also block understanding of the other ends involved and, as a result, reduce the chances of finding those rare, but not impossible, means that will satisfy all parties. A way out of this dilemma is to know how much of the problem-solving process is in your proper domain and how much belongs in the political arena.

Finally, the *reality of self-interest* suggests a related pitfall. We are frustrated at times by the self-interest of parties involved in land use debates. How often have

you silently muttered, "People are no damned good?" How do you manage these situations? Most educators probably feel that helping to develop a new land use ethic is either an unrealistic educational role or one best left to men of the cloth. Regardless, you have the opportunity, if not the obligation, to help people develop enlightened self-interest. While some conflicts will surely remain even if self-interest is enlightened, the resolution of conflicts will be better informed. And that is no small accomplishment.

CONTENTS

- 12:1.** What Are the Issues?
- 12:2.** Primer on Land Use Control Law: Evolution of Zoning
- 12:3.** Primer on Land Use Control Law: Zoning as a System
- 12:4.** Primer on Land Use Control Law: The Legal Bounds of Zoning
- 12:5.** Alternative Methods of Land Use Control: Development Rights and Easements
- 12:6.** Alternatives for Land Use Management: Tax Policies and Other Special Incentives
- 12:7.** Alternative Methods of Land Use Control: Influencing Land Use Through Public Administrative Activities
- 12:8.** Rural Land Use Policy in Northeastern U.S.: Consensus, Directions and Issues.
These materials may be useful in workshops, study groups and conferences where land use is the focus.

**COASTAL ZONE
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*Audiences may be local and regional government officials, civic clubs, high school and college students, and county and local organizations.
Information in the leaflets might be supplemented with slides and maps to highlight key points.
The Leaders Guide, Pamphlet #8, provides an overview for the leaflet series.*

