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Private Control of Collective Property Rights: Robert H. Nelson, Zoning and Property Rights

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BOOK REVIEW

PRIVATE CONTROL OF COLLECTIVE PROPERTY RIGHTS

Zoning and Property Rights, By Robert H. Nelson. Cambridge, Mass.: the MIT Press, 1977. Pp. xi, 259.

No other issue in the area of land use control has generated as much controversy as "the taking issue."[1] Legal theorists,[2] lawyer-economists,[3] and would-be lawyer-philosophers[4] have all attempted to elucidate the appropriate limits of police power regulation since Justice Holmes first revealed the presence, but not the extent, of a limit in *Pennsylvania Coal Co. v. Mahon*.[5] No legally satisfactory, efficient, and equitable solution has been forthcoming.

Thus, it came as no surprise when nonlawyer-economist Robert H. Nelson surveyed the literature on zoning and land use and found "[m]ost of the discussions . . . unenlightening."[6] However, what did come as a surprise was the fact that Professor Nelson chose to supply enlightenment not of the bothersome taking problem alone, but of the "broad" objectives of zoning altogether. While the result of Nelson's effort is something less than a complete history of zoning law's "greatest successes and failures,"[7] the book does contain an intriguing proposal for reform and some valuable insights on the underlying purpose of zoning.

For the uninitiated who desire unenlightenment, the taking issue is, to use Professor Nelson's terminology, one of zoning's

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1. *See, e.g.*, F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

2. *See* Sax, *supra* note 1.

3. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

4. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

5. 260 U.S. 393 (1922). Justice Holmes stated: "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." *Id.* at 415.

6. R. NELSON, ZONING AND PROPERTY RIGHTS xi (1977).

7. *Id.*

"greatest failures." The issue originates with the Fifth Amendment's mandate that "private property shall not be taken for public use without just compensation."[8] Regrettably the Fifth Amendment antedated the widespread use of zoning[9] or its sanctioning as constitutional,[10] and hence, the only thing anyone can be absolutely sure of is that if the government decides that your prime residential waterfront property would make an ideal park and community center, and the government physically constructs such thereon, compensation should be forthcoming.[11] The matter becomes complicated, however, if the government merely rezones your property to "open space," a use classification which permits fishing, beachcombing, and cabana-leasing, but unfortunately not the multi-family condominium you were thinking of constructing. In this latter case, compensation will generally not be forthcoming, even though your property has suffered a decline in value from $500,000 to $5,000.[12] After all the rezoning not only permits a reasonable beneficial use (all the fish you can catch), but also leaves your fee simple title undisturbed. Unless the waterfront property is in Missouri,[13] the best you can

8. U.S. CONST. amend V.

9. The first zoning ordinance has been traced to a Napoleonic decree of 1810. *See* J. METZENBAUM, LAW OF ZONING 12 (1955). Zoning in America was patterned after the late nineteenth century experience in Germany, *id.*, and the first comprehensive ordinance was that adopted by New York City in 1916. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.07, 43 (1968).

10. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

11. Professor Berger comments:

> In general, damages have been limited to cases where a *physical act* of the government has caused injury to the property of the owner. . . . In the past it has not been the practice of courts to allow damages in a case where governmental regulation . . . has caused the injury. In such cases the usual remedy has been a holding that the regulation was invalid and unenforceable.

Berger, *supra* note 1, at 165, 170 n.15.

12. The land in the *Euclid* decision was in the path of progressive industrial development. When rezoned to permit only residential uses the market value of the land depreciated 75% – significant, but not enough, to sustain a claim of compensation. The Supreme Court recently upheld a landmark preservation ordinance in New York, holding *inter alia* that "diminution in property value, standing alone, can [not] establish a taking." Penn Central Transportation Co. v. City of New York, 98 S. Ct. 2646, 2663, *reh. den.*, 99 S. Ct. 226 (1978) (citing *Euclid*). *But cf.* Eldridge v. City of Palo Alto, 51 Cal. App. 3d 901, 124 Cal. Rptr. 547 (1975).

13. Missouri statutes authorize ordinances providing for zoning with compensation. *See* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969). In America zoning compensation statutes are rare. However, Professor Hagman has devised an elaborate windfall recapture/wipeout mitigation proposal which would recoup the increases in value to some property precipitated by land use controls and apply such recaptured value to properties adversely affected by land use decisions. *See* D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978).

hope for is to have the rezoning invalidated as an unreasonable or confiscatory exercise of the police power not furthering the public health, safety and welfare, although this hope is very often a slim one.[14]

At this juncture most legal scholars have been taken in by the complexity of the taking issue, and have sought to identify the legal theory which reconciles the apparent inequity in the above example and countless real-life tragedies like it. Mr. Bosselman argues that the Constitution should be strictly construed in accordance with the intent of the founding fathers as not including a requirement of compensation for land use control measures.[15] Professor Berger would award compensation, but only if the landowner did not know and should not have expected the detrimental regulation;[16] Professor Sax *may* suggest that whether the government is acting in its enterpriser or arbitrator capacity would determine compensation;[17] and Professor Ackerman will inquire as to the credentials of the judge as either an ordinary observer or scientific policymaker, for only if the judge is of the latter stripe will he be able to evaluate the claim of compensation in terms of the applicable comprehensive view.[18] Some serious scholars have surveyed the morass, and have told us that it can be resolved only with an "alternative to zoning"[19] or by eliminating zoning altogether.[20]

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14. *See, e.g.*, Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973).

15. F. BOSSELMAN, D. CALLIES, & J. BANTA, *supra* note 1, at 318-22 (1973).

16. Berger, *supra* note 1, at 223-26.

17. In one article Professor Sax suggested that if the government enterprise is enhanced by a land use regulation, a taking has occurred; but when the government merely resolves a land use conflict by regulation, a taking has not occurred and no compensation need be paid. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). In a later article, Professor Sax took a more restrictive position indicating that the need to protect public rights precludes compensation except where the land use being regulated has no conflict-creating spillover effects. Since virtually every land use creates spillover, little compensation is required under the second Sax theory. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

18. B. ACKERMAN, *supra* note 4. "Policymaking" and "observing" are alternative approaches to legal problems. The policymaker believes that the legal system is organized around the principles of a comprehensive view; the observer believes the legal system should vindicate the practices and expectations of dominant social institutions. "Scientific" and "ordinary" refer to the legal language: the scientist believes that legal language consists of technical concepts set in relation to one another; the ordinary analyst requires that legal language be perceived in relation to the talk of nonlawyers. Ackerman argues that only the scientific policymaker can hope to resolve the internal confusion present in modern land use decisions.

19. Ellickson, *supra* note 3.

20. B. SIEGAN, LAND USE WITHOUT ZONING (1972); B. SIEGAN, OTHER PEOPLES

Initially, Nelson is unfettered by the taking thicket, such that his first efforts are devoted to uncovering the real basis of zoning. In Chapter One, Nelson surveys zoning law's nuisance prevention justification and finds it wanting. To Nelson, justifying zoning with a nuisance rationale is merely a prerequisite to zoning's constitutionality. Property rights in America have always been subject to "limits . . . authorized as being appropriate police powers of the state."[21] The problem, as Nelson correctly points out, is that from the very beginning many land uses subject to zoning regulation were not in fact nuisances.[22] Most importantly viewing zoning as merely nuisance prevention obscures what Nelson considers to be zoning's primary purpose: the protection of neighborhood quality.[23]

Even with the constitutionality of zoning ensured, however, the nuisance rationale lingers. The portrayal of zoning as a reasonable means of preventing or controlling nuisances obscures not only zoning's unarticulated purpose, but also the taking issue. A judicial finding that a particular ordinance is a police power function related to the protection of the health, safety and welfare has generally meant *ipso facto* that compensation need not be paid. However, the failure of the courts to require and sometimes even consider compensation claims, even in cases of highly restrictive zoning,[24] does not concern Nelson as it has concerned so many others.[25] It becomes increasingly apparent that Nelson is in pursuit of a land use control mechanism that promotes allocational efficiency, not necessarily allocational fairness.

Under Nelson's analysis, "zoning divides control of the use of land, and thus the property rights to that land, between the personal owner and the local government. . . . [Z]oning in effect creates collective property rights that are held by local government."[26] In this regard Nelson's analysis can be compared with the theory of entitlements suggested by Calabresi and Melamed.[27] While the entitle-

PROPERTY (1976); THE INTERACTION OF ECONOMICS AND THE LAW (B. Siegan ed. 1977).

21. R. NELSON, *supra* note 6, at 7.

22. *Id.* at 10-11. For example, in *Euclid*, Justice Sutherland characterized an apartment house—which is generally not a noxious, dangerous or immoral use in the nuisance sense—as "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others. . . ." Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

23. R. NELSON, *supra* note 6, at 11.

24. *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

25. *See generally* the articles cited in note 1, *supra*.

26. R. NELSON, *supra* note 6, at 1.

27. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Under the Calabresi and

ment (a certain parcel of land) is protected by a "property rule," the entitlement itself is shared between the local government and the individual owner, and thereby has two dimensions: one personal and one collective. Nelson chooses to describe zoning as a collective property right to facilitate his subsequent proposal for zoning reform. At present, however, it is enough to note that this description too avoids but does not answer the taking question.

Assuming zoning is a collective property right, and not merely a manifestation of the police power, how is this collective right exercised? "[I]n all except a very few instances, local legislatures can be counted on to follow the residents' wishes in administering the zoning of a neighborhood,"[28] says Nelson. The wish of most residents, of course, is to maintain a neighborhood of high quality, a wish that would remain unfulfilled, according to Nelson, without zoning.

A growing number of land use students would quarrel with the proposition that zoning is a prerequsitie to the maintenance of neighborhood quality.[29] Many counties in Florida, Texas, Missouri, Illinois, Iowa, and Indiana have never adopted zoning ordinances,[30] and available evidence suggests that nonzoned areas are not only indistinguishable in many respects from their zoned counterparts, but also, because of their greater flexibility, better able to accommodate development, transition, and redevelopment pressure.[31] How do these nonzoned areas maintain neighborhood quality? Primarily by allowing land to be allocated in accordance with the normal economic forces of the market place. Neighborhood quality is maintained since industry finds land prices too costly adjacent to residen-

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Melamed analysis, the legal system is called upon to make a first order decision: whom to entitle to a certain right or interest when the rights of two or more people conflict; and a second order decision: how to protect the entitlement once it is conferred. An entitlement can be protected by: a property rule, such that "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction," *id.* at 1092; a liability rule, when someone may remove or destroy the entitlement by paying an objectively determined value for it, *id.*, or an inalienability rule, where the entitlement cannot be transferred. *Id.* Nelson suggests that by means of the zoning ordinance, the legal system has split the entitlement to private property between the owner and local government. Nelson's proposal for reform discussed *infra* advocates that the local government entitlement, which is presently protected by an inalienability rule, be redistributed to a neighborhood association and protected by a property rule.

28. R. NELSON, *supra* note 6, at 16. However, for a number of reasons public regulators may misperceive resident wishes, *see* note 41 *infra* and accompanying text.

29. *See generally* the articles cited in notes 3 & 20 *supra.*

30. THE INTERACTION OF ECONOMICS AND THE LAW 159 (B. Siegan ed. 1977).

31. *Id.*

tial subdivisions, and commercial enterprises such as gas stations and shopping centers, find locating on interior streets away from major thoroughfares less than ideal from the standpoint of profit maximization. Secondarily, and to a much smaller extent, nonzoned areas employ private land use controls such as restrictive covenants to assure neighborhood quality.[32]

In response to those who argued for private land use control, Nelson asserts that private covenants are feasible only where an entire neighborhood is assembled under single ownership prior to its development. Obtaining agreement on the content of such covenants in an existing neighborhood "would be very difficult—if not impossible."[33] Thus, in order to deal with the "unwilling"—those who refuse to accept neighborhood quality, or who have a different conception of it—Nelson would impose zoning, "a form of coercion that would not be possible using private methods."[34]

While Nelson's argument pertaining to the creation of private covenants is generally accurate, insofar as hold-outs and transaction costs may be significant obstacles to establishing private controls in an existing neighborhood, the statement does not inexorably establish either the need or desirability for zoning. Nelson fails to address the assurance of neighborhood quality provided by the marketplace itself or to acknowledge the fact that covenants, as he admits zoning to be, are merely reflective of market demand. Most disturbingly, Nelson tacitly accepts the infringement on individual liberty that is involved in coercing the unwilling property owner. Without acknowledging the coercive element present in zoning, Nelson compares collective property rights to the undivided ownership and management of common elements in a condominium. However, insofar as condominium ownership is undertaken voluntarily, with full knowledge of the terms contained in the condominium declaration, the analogy is simply false.

Is Nelson aware of zoning's infringement on individual rights? Apparently. In his own words, "The collective rights created by zoning are inconsistent with basic American beliefs. Americans have traditionally placed a very high value on individual freedom . . . ."[35] Moreover, Nelson admits that it is primarily because zoning so drastically infringes upon personal independence that courts require

32. In Houston the most notable example of nonzoning, only 10 to 15 percent of vacant land is subject to restrictive covenants. *Id.* at 162.

33. R. NELSON, *supra* note 6, at 17.

34. *Id.*

35. *Id.* at 119-20.

zoning to be strictly limited to police power purposes.[36] Yet according to Nelson, Americans also treasure highly homogeneous neighborhoods, and the desire for homogeneity and economic segregation has been well served by zoning. For this reason the infringement of liberty entailed by zoning is seldom legally acknowledged, and "[z]oning [is] supported by fictions, evasions, contrived arguments, and other dodging of the fundamental issues . . . ."[37] As before, with reference to the compensation question, Nelson appears unphased by this decline of individual rights. Indeed, Nelson peers into his crystal ball and finds that "in future social systems personal rights may be increasingly superseded by collective rights."[38]

The core problem in Nelson's view is not that the individual is trampled by collective society (the classic taking fact situation), but that small segments of collective society—neighborhoods—do not have the right to sell the collective rights created by zoning. In this regard Nelson finds zoning to be the modern-day equivalent of feudalism: as the lord of the manor could only manage, but not sell the manor, so too local governments can only administer, but not sell zoning rights.[39] Unlike private covenants which can be sold in response to an attractive development offer, zoning rights are not a salable commodity, and hence beneficial neighborhood transition is forestalled. Thus, Nelson indicates that while he is quite willing to give priority to collective rights, he is not at all satisfied with the existing public control of those rights. Zoning's success is the protection of neighborhood quality through a collective right; zoning's failure is the public administration of those rights.

Public control of zoning results in land use inefficiencies because such control is frequently out of line with private demand. For example, large-lot zoning is utilized as a growth or income barrier, even though the practice often results in urban sprawl with extended municipal boundaries and attendant fiscal burdens for road and utility extension.[40] These aberrational land use decisions are

36. *Id.*

37. *Id.* at 121.

38. *Id.* at 119.

39. Some public land use decisions are sold illicitly, however. In this regard, Nelson comments: "Public control of land use has worked so poorly that it has had to be regularly subverted by developer political intrigues, corruption, and other unsavory practices." *Id.* at 190.

40. Nelson suggests that these allocational inefficiencies are likely to become more glaring as "[e]conomically, it will not make sense to locate moderate- and high-density housing far out in suburban fringes that are removed from existing centers of activity." *Id.* at 176.

made because public officials fail to adequately perceive the private demands existing in individual neighborhoods, and respond instead to the political pressure of organized, rather than diffused, interests or constituent concerns that fail to adequately weigh the costs and benefits of development proposals made by outsiders.[41] Nelson also suggests that "regulators have shown a frequent willingness to sacrifice greater long-term benefits to avoid short-term pains."[42] Since public regulators misperceive the wants of the regulated, "there is little reason for not giving administrative control over neighborhood protections [zoning] to the group in whose interest these protections are exercised."[43]

To replace public control, Nelson proposes a private land tenure instrument, the neighborhood association.[44] Ideally, the jurisdiction of a neighborhood association would be determined by private agreement or less ideally, by local government fiat, but in either case, the association should be "several blocks" of similar uses or social character.[45] The collective rights established by zoning would be transferred to the association and individual owners within the neighborhood would be assigned "shares" of equal value or based upon property value, floor space or a combination thereof.[46] The primary function of the neighborhood association would be to evaluate and respond to development proposals for the neighborhood. A reasonably high majority vote would be necessary to sell collective rights,[47] the sale proceeds being divided among the members in accordance with a formula based on share value. Development proposals for individual neighborhood sites, or entire neighborhoods, would be possible.[48] In either case the developer

41. *Id.* at 191-92.
42. *Id.*
43. *Id.* at 174.
44. *Id.* at 207.
45. *Id.* at 209.
46. *Id.* at 213.
47. Nelson suggests a vote of 75% or higher. *Id.* at 179.
48. Nelson prefers the entire neighborhood approach since this will avoid piecemeal redevelopment or transition which could hinder other neighborhoods, comprehensive private restructuring of the neighborhood, and the public planning of schools, roads, and sewage facilities. While Nelson's preference for entire neighborhood, rather than site-by-site, transition has theoretical merit, it may not be practical in terms of the structure of most land development firms. Historically, land development firms, while numerous, have been small-scale site operations, without the managerial size, capital, and production capacity necessary to carry out the redevelopment of an area approximating the size of a neighborhood in Nelson's terms. *See* E. RACHLIS & J. MARQUSEE, THE LANDLORDS 37-40 (1963). In this regard the National Association of Home Builders currently boasts of a membership in excess of 110,000 builder organizations.

would still have to purchase the non-collective, existing use, or what Nelson calls "personal rights," from the affected individual owners. However, where an entire neighborhood scheme was accepted by the majority, "the minority that voted against acceptance of an offer would still be required to abide by the majority decision."[49] In essence, like local government, neighborhood associations would not only control collective rights but also have the power of eminent domain over the "personal rights" of the minority; unlike local government, neighborhood associations would exercise collective rights and compel the sale of personal rights in response to private incentives, rather than on the basis of the police power.

Prima facie, Nelson's land tenure instrument exceeds the scope of any existing land use control device. First, as mentioned previously, Nelson compares his proposal to homeowner associations and condominiums. However, because of the involuntary establishment of collective (zoning) rights upon which Nelson's system is premised, the comparison to voluntary collectivities is somewhat misleading. The comparison is further weakened by the fact that the principal concern of homeowner associations and condominium management boards is the governance and maintenance of common elements, and not the personal rights of individual owners.[50] Second, by removing the veil of the police power and recharacterizing zoning as a private collective right, one suspects that Nelson's proposal will be assailed as a restraint on alienation.[51] However, the policy against restraints on alienation is wedded to the common belief that all development rights are controlled by the individual owner, subject only to police power limitations. If one assumes that zoning is a collective right which is not within the control of individual owners, as Nelson does, the restraint on alienation argument becomes inapposite by definition. The individual has his personal rights[52] which he is free to sell at any time, subject possibly to a right of first refusal in the neighborhood association.[53]

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49. R. NELSON, *supra* note 6, at 179.

50. G. LEFCOE, LAND DEVELOPMENT LAW 726 (1974).

51. Provisions in condominium and homeowner association by-laws restricting the ability of members to convey their interest in property have been denied enforcement. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 304 (1971).

52. To use the original waterfront property example, the personal rights include fishing, beachcombing, and cabana leasing, and the collective rights include everything else.

53. R. NELSON, *supra* note 6, at 214. While Nelson does not state it clearly, he presumably would allow an individual to sell at any time not only his personal rights, but also the inchoate value of his share interest in any collective rights held by the

At last it is apparent why Nelson did not set out to specifically resolve the taking problem: under his proposal, property is no longer taken for *public* use, the event allegedly requiring compensation under the Fifth Amendment; property is taken for *private* use. Unfortunately the sleight of hand is not a resolution of the problem. Private collective takings could potentially infringe individual liberty as much as public takings.[54] Is Nelson troubled by this? Hardly. The taking problem relates merely to equity which, in Nelson's view, is "a transitional concern."[55] The Fifth Amendment "goes beyond equity . . . to the fundamental question of who should hold development rights."[56] Those who argue for private control of development rights demand compensation; those who would place control in the public sector do not. It is as simple as that.

Since Nelson finesses the compensation question, the only remaining issue becomes private versus public control of the use of land. Public control means public planning, a concept that represents another one of zoning's "greatest failures." Nelson discusses some of the problems associated with public planning in Chapter 3, and finds as others have, that "[t]he history of comprehensive public land-use planning in this country is in fact one of an almost total lack of influence."[57] As Professor Robert Ellickson has commented:

> In a world of perfect information and infallible civil servants, [state master planning] would be as good an approach as any. But in the real world—where people hold sharply conflicting values, where technological change outstrips the imagination of science fiction writers, and where civil servants may be uninformed or subject to corruption—the centralized master planning of the use of widely scattered resources is likely to impair rather than augment human welfare.[58]

Nelson correctly observes that whether development rights are purchased by the government (the English practice)[59] or rezoned out of

neighborhood association. Collective rights, themselves, can be transferred only by the association.

54. *See generally* Kristol, *On Corporate Capitalism in America*, 41 PUB. INT. 124, 131 (1973).

55. R. NELSON, *supra* note 6, at 217.

56. *Id.* at 218.

57. *Id.* at 65.

58. Ellickson, *Ticket to Thermidor: Commentary on the Proposed California Coastal Plan*, 49 S. CAL. L. REV. 715, 735 (1976).

59. The English system is described in D. HAGMAN, *supra* note 51, at 590-649; *see also* D. HAGMAN & D. MISCZYNSKI, *supra* note 13, at 285-89.

existence without compensation (the American practice), public planning is essentially a "no growth" or "negative" approach. Public control or ownership of development rights can prevent development, but cannot assure that publicly desired development will occur.[60] Unfortunately, despite the failure of public planning, only right-thinking people acknowledge that the allocation of development rights in accordance with private competition in the land market is superior to allocations made pursuant to public decision-making. As a result, Nelson's reform proposal is not likely to be the first piece of legislation introduced into the state legislature next session.

The fact that individual liberty and equity are effectively ignored[61] depreciates Nelson's analysis, especially in view of the considerable legal scholarship dedicated to the difficult task of reconciling those interests with current land use practice.[62] Nevertheless, Nelson's analysis does provide a fresh perspective, and indeed, wide-ranging examination of zoning.[63] Most impressively, Nelson is able to look beyond the legal fictions employed in the exercise of the police power and the debate surrounding the taking issue, to suggest a system of private land use control that contains the promise of less allocational inefficiency than the public control mechanism upon which the proposal is founded.

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60. R. NELSON, *supra* note 6, at 219.

61. Nelson's proposal allows zoning controls to be redefined after the collective rights are transferred to the neighborhood association by a vote of 70 to 90 percent of the association membership. *Id.* at 210. Fairness and individual liberty could be accommodated with compensation or by requiring unanimous approval of the collective rights to be administered by the association, whether the substance of those rights are to be continued as they existed when administered by local government or in modified form. In some cases Nelson suggests that compensation might be paid to owners of properties adversely affected by a decision of a neighborhood association, although this suggestion does not appear to include nonconsenting members of the association in general. Furthermore, Nelson does not tell us how the compensation would be measured or determined. Nelson also rejects unanimity as a "practical impossibility." *Id.* Nelson's concession to fairness is to provide an "upper limit beyond which collective authority could not go under any circumstances. This would involve matters relating solely to the interior of individual properties." *Id.*

62. *See* B. ACHERMAN, *supra* note 4; Michelman, *supra* note 1; Berger, *supra* note 1.

63. While this review has concentrated upon the aspects of the book dealing with the reform proposal, Nelson also examines emerging state and federal land use control pursuant to environmental legislation (Chapter 6) and growth controls (Chapter 7).

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