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THE TWILIGHT OF LAND-USE CONTROLS: A PARADIGM SHIFT?

*Charles M. Haar**

The subject chosen for this discussion is both timely and thought-provoking: the status and future of land-use regulations in the United States. In the hope of making the issues subsumed under this title as exciting to the general public as they are to the practitioners, Professor Michael Allan Wolf has taken the monumental *Euclid*¹ decision of the United States Supreme Court in 1926 as the pivot of our deliberations. He has posed the question most dramatically with overtones of a swelling Wagnerian overture: "Is It The Twilight of Environmental and Land-Use Regulation?"

That *Euclid* has arrived at the Biblical three-score-and-ten milestone is truly an occasion for reflection on its achievements, failures, and potentials. At a minimum, it calls for a broad review of history to furnish a context for the current debate over land-use controls, as well as to decipher future trends. Following Professor Wolf's cue, I will, in the hope of stirring lively rejoinders, veer occasionally to post-Wagner—even Mahlerian—extremes in my observations as to how the pendulum of land-use social policy has swung, and where it ought to rest at this particular time.

An Evolutionary Process

Change in land-use practices occurs at an uneven pace. The distance of nearly a century makes it difficult to comprehend today how radical and innovative was the first comprehensive zoning ordinance adopted by New York City in 1916. A culmination of the efforts of diverse, often contending, interest groups over many years, and shaped by the lively interchanges at the

* Chief Reporter, ALI, MODEL LAND DEVELOPMENT CODE, 1963-1966; Brandeis Professor of Law, Harvard University.

1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

annual National Conferences on City Planning, the first zoning ordinances marked a revolutionary leap in the treatment of individual property rights.² Even more startling is an ensuing reflection that all planning of land-uses must pass the test of constitutional scrutiny and that the validation of the extensive cutting into private property rights in *Euclid*³ came during the heart of the *Lochner*⁴ era of jurisprudence.⁵ The ultimate legitimacy of broad-ranging land-use controls, then, fell to the determination of a Supreme Court that thought little of outlawing legislation for protecting the health of women as a violation of their constitutional freedom to contract. How would interfering with market expectations to the extent of a cut in property values fare differently?

Nevertheless, a relative quiescence has prevailed since that stormy period. What has persisted over the long history of land-use controls since the 1920s is a continuation of the equilibrium that the *Euclid* decision evoked. The 1916 New York City ordinance, and its numerous progeny, was the culmination of an extensive state and local gestation and experimentation featuring the division of urban land into districts within a municipality, setting height, use, or bulk controls that differed among districts, although treating similarly the land within each district. The initial, tentative exercise of the police power, finally legitimated by Justice Sutherland's opinion, guided (with but rare modifications) central cities and satellite development through World War II.

Slight variations on those common themes occurred in the ensuing years. There was a pragmatic adjustment to facts—changing or newly discovered—as well as to learning experiences that required modification for legislation. Nevertheless, not until 1961 was there a rewriting of the New York 1916 ordinance. Few major revisions occurred elsewhere in the country.

2. See CHARLES M. HAAR AND MICHAEL ALLAN WOLF, *LAND-USE PLANNING* 163-66 (4th ed. 1989).

3. See *Euclid*, 272 U.S. 365 (reducing the value of plaintiff's land from \$10,000 to \$2500 per acre).

4. See *Lochner v. New York*, 198 U.S. 45 (1905) (ruling that a New York law regulating the hours of bakery workers violated a fundamental right to contract).

5. See RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 22-25 (1961).

Differences in practical policy boiled down to a highly modest minimum.

In addition, the state statutory framework remained frozen. The model state enabling legislation sponsored by the United States Department of Commerce in the 1920s continues dominant in concept, organization, and tone to this date.⁶ Indeed, again, one is struck by planning law's continuity and consistency in the enabling legislation field. Naturally, time would have its way even here (a "quiet revolution" in the state enabling laws occurred in the 1960s, some commentators allege),⁷ with a series of accretions and deletions. This seems unavoidable, for land-use law deals with the dynamics and quickly changing interactions in the modern world of demography, technology, and economic development. But, predominantly, the system remains fixed.

Even national land policies did not shake the smooth course. Urban renewal, FHA insurance policies, model cities, housing voucher programs, empowerment zones—each, in turn, came under the land-use umbrella in the local theater. So, too, with the revolution in metropolitan settlement patterns, that extraordinary change in life styles that made the United States the premier suburban nation; it was absorbed and assimilated into the existing legal structure of land-use controls—service industries, edge cities, mixed uses, environmental impact statements, and large-scale developments. And, in interesting and novel fashions, the recent sprout of managed growth philosophies⁸ and the national environmental legislation reinforce, indeed extend, the reach of the local regulatory power, yet do not burst traditional bounds.

Two leitmotifs (of differing weight, it may be granted) then emerge from this quick glance at history. One is the consistency and gradualist approach in the system of local governmental and administrative control over land-use: the separation of

6. See DANIEL R. MANDELKER, *LAND-USE LAW* 113 (2d ed. 1993).

7. See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Studies*, 18 HARV. ENVTL. L. REV. 489 (1994).

8. See Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992).

land-use and building bulk areas, the zoning envelope, and the districting cookie cutter, all in accordance with a comprehensive plan. The zoning and planning commissions and boards of appeals are all accepted today, as much as in 1916, as valid implementations of the exercise of the sovereign police power over private decision-makers.

The other trend is the continuity of self-criticism throughout the period. While not exactly an orgy of introspection, the examination rises to a perpetual state of identity crises, perhaps most sharply brought to a head in the controversial discussions leading to the American Law Institute's Model Land Development Code in the 1970s. What John Dewey called the social search for certainty, in the land-use case can be translated as a legal search for rationality; it meant argumentation over adaptation of the old systems of control to newly evolving forms of life styles and urban designs, novel financing and mortgage capital formations, new ways of land development and entrepreneurship. True, every once in a while important shifts in emphasis occur. For example, state legislatures occasionally assert themselves to require the inclusion of new elements in the comprehensive plans drawn up by localities, or to enunciate the preeminence of the more general welfare of the state (say, in considering the future of construction abutting the Florida Everglades) over the deployment of police power by localities that concentrated too much on enhancing the local tax base. In addition, at times, local councils amend the governing ordinance to change lot-line and set-back techniques in order to accommodate the large-scale aspirations of corporate developers and shopping center entrepreneurs. New philosophies of the city planning profession contend with (and usually lose out to) rising expectations of private property entitlements; calls for greater flexibility of government controls and the wider exercise of discretion by agencies encounter the stolidity of certainty and predictability.

In short, over an extended period of practice and of criticism, land-use law in the different states and municipalities proceeds on even course, between contending, but certainly not overwhelming, waves of "too far" or "not far enough." Sometimes emotions run high over amendments and variances or the foray of a NIMBY (not in my back yard). Essentially, though, the

stability of land-use controls is the striking factor—the system's ability to adapt to startlingly new transportation technologies, changes in financing and the flow of capital, even transformations of family values. Land-use controls continue to provide the setting in which cities and suburbs exist today.

If in Rip van Winkle fashion, Bassett and Williams, and certainly Bettman, came back to earth, they would soon be able to resume comfortably their legal practice under current statutes and ordinances. This paradox holds because zoning expresses the classical liberal consensus so dominant in American political life. It does not live in a world of absolutes. Zoning avoids the extremes of *laissez-faire* or those of socialization of land ownership, and even, despite Breitel's opinion in the New York Court of Appeals decision in *Penn Central*,⁹ the intermediate position of a municipalization of development values.

The Current Challenge: The Reiterated Need for Periodic Examination and Revision

The questions before the house are: have we reached a point where, despite the accepted doctrine of "*natura non facit saltum*" ("nature makes no leap"), a sharp break in the evolutionary process is imminent; have we reached the end of the land-use control system under which we have grown or endured, perhaps even prevailed, for nearly a century?

The reality of the assault upon land-use laws (alluded to by Professor Wolf) from so many sides is hard to evaluate, often catching truths but pushing them to ideological distortions. Partisans are replete with slogans and cliches, pitting, on the one hand, the essentiality of private property in a democratic community against the despoliation of the landscape by ruthless exploiters. Nevertheless, do recent arguments against the current system have merit? Is there something essential being recognized here? Is the long period of stasis about to be punctuated by a sharp break?

As a prelude, it should be noted that the existing land-use legal system, sadly, does display soft underbellies that pose

9. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

appropriate targets for invasion: questions aroused by sloppy draftsmanship; ordinances that are unclear in definition and ambiguous in defining responsibilities; and troubles deciphering the general intent of the enactor. Without much difficulty, one can point out vague declarations of principles in the city planning documents. Confusion is often encountered in the allocation of powers among zoning commissions, planning boards, landscape and design commissions, and the local legislatures. Even on the federalist level, the proper division among the national, state, regional, and local levels is continuously shifting and unclear.

More than sprucing up language or clarifying ambiguities spurs the current challenges. Strangely, and ironically, the local land-use control instrumentalities are under fire as a result of at least two pressures emanating from the national level.

One pressure is the emerging property entitlement emphasis. A recent series of Supreme Court opinions, *Lucas*,¹⁰ *Nollan*,¹¹ and *Dolan*,¹² have propelled the Fifth Amendment of the Constitution to center stage. The opinions of Justice Antonin Scalia especially seek to employ the compensation knife to cut through government efforts to set a non-market framework for public and private development or, on the expansive side, to upset a community determination of the appropriate physical setting for urban and suburban existence. Issues involving property "takings" are prominent in the conservative agenda. Congress and various state legislatures seem to be following through with property rights bills, with varying diminutions in value requiring the balm of full compensation for property restrictions caused by environmental and land-use controls. The ultimate effect of reification of the bundle of property rights, but for the nuisance exception, is a chilling of planning innovations.

A second pressure arousing unease among adherents of the current system is a looming retreat by courts from the scope of lenient judicial review that has been the accepted standard since *Euclid*.¹³ The benevolent standard of reasonableness—a

10. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

11. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

12. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

13. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

minimum threshold that is easily passed over by most land-use regulations—may be ending. Indeed, footnote three of *Nollan*¹⁴ may someday be noted as the first shot of the counter-revolution.

Even more significant is the message generally read into the 1994 elections. Until the most recent Gingrich shifts, the Republican triumph seemed to herald a return to a golden age of individualism and Darwinian energy, marked, above all, by a revulsion against government intervention in the market. The national priorities were redefined by a shrink-the-Government approach; the cry for deregulation reverberated down to the bureaucratic machinery of local land-use controls. By no means are local administration and taxation—grass roots and close to the people though they may be—immune from the onslaught on the governmental presence. Legitimate targets are many: proliferation of state and local permitting requirements; contradictory overlap of national environmental dictates with the ordinary zoning and subdivision controls; and sharp increases in property taxation. These targets generate resentment and calls for reform.

The significance of what may be added as a third contributing factor to the revisionary attitude is harder to appraise. That is the scribbling—in Keynes's colorful phrase—of academics. Law reviews and planning journals abound with skillfully prepared systems of alternative land-use controls. Composed at a high level of abstraction characteristic of contemporary political theory, the alternative land-use systems present an attractive possibility of bright new worlds of land-use controls against which the current system pales.

Reactions and proposals range across the spectrum. Anecdotal instances of incompetence and corruption abound. Some would revise still within the existing control framework. Occasionally, however, the public uproar swells to advocacy of a paradigm shift.

The most striking of the various contenders are those who

14. 483 U.S. 825, 836 n.3 (1987) (stating, in part, "[w]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved.")

would go so far as to repeal all land-use controls. Houston, Texas is their great example of a city devoid of land-use controls. However, one caveat sneaks in: advocates of a total return to the operations of the private market would retain only one curb: the common law of nuisance. But that is all. All we need, according to this proposal, is *sic utere tuo ut alienum non laedas* ("so use your own property in such a manner as not to injure that of another"). The good old common law will get us the most efficient, even the wisest, allocation of land-uses in our metropolitan areas.

To grasp the nature of the calls for change, and to locate and guide future policy, it is helpful to probe a bit into their philosophical underpinnings, as well as to once again set them against the basic tenets of the existing system.

The American Political Culture

Digging below the surface in order to understand the remarkable persistence of zoning, subdivision, and other land-use controls, one conclusion emerges surprisingly and starkly: land-use controls in the United States are truly representative of American culture, and fit tightly into the classical liberal tradition so prevalent in our political thinking at large.

The land-use control system especially encompasses the assumption of individual sovereignty: as possessive beings, people best express themselves through the operation of the unfettered market. The land-use control system in the United States stands on a base of a remarkably unified cultural and political tradition. The Lockean view of inherent rights dominates. Where government does take the step of correcting perceived evils, or to provide some guidance for land development, there is little room for divergence over the extent of appropriate government intervention: as little as possible. Conflict is muted; the area of disagreement occurs only within an accepted middle range of possibilities.

Thus, as stressed in other aspects of United States historical development by Louis Hartz and Richard Hofstadter—with different degrees of certitude—the legal culture draws heavily on the individualistic society of eighteenth-century liberal Enlightenment theory. The predominant philosophy of land-use reflects the overall societal emphasis of the hedonistic pursuit

of material well-being. The aim is not to promote any particular societal ends; rather, the framework of authority entitles citizens to pursue their own ends, albeit consistent with similar liberty for all. Thus, the dominant ideology toward land is that of freedom to act on the land one "owns," a compound of elements of self-help, free enterprise, competition, and beneficent cupidity. Uses, even when it comes to government control under the zoning ordinance, are permitted as of right.

In the instance of land-uses, however, there is a crucial variant on the overall theme that makes matters more complicated. While the right to develop, use, exclude, and dispose of one's land is the dominant view (*pace* Blackstone, own up to Heaven and down to Hell), contrary philosophic strands emerge as the density of populations and activities multiply. The peculiar nature of land in the metropolitan area puts it outside the ordinary workings of the economic market of supply and demand. The resource of metropolitan land is interdependent in its parcels, unique in its locational aspects, and vulnerable in value to the actions of neighbors, even of competing uses further away in space. Private dealings in land cause social externalities. Inescapably, land forms the territorial base for community. Consequently, goals of public interest can be seen to override individual claims. Swathes of suburban society naturally look to the planning and zoning acts for protection and patronage as counterweights to individual dominion. Therefore, when land-use controls become the center of attention, it is easier to argue that while rights attach to the individual, to the ownership of property, and to its development, they are subject, at a minimum, to the equal rights of other owners. The functional law of property always balances protection of private advantage with both the enjoyment of other land owners and with contemporary community goals. Even Hobbes included "place to live in" with the other retained rights of self-defense, water, and air, when the social contract was signed.

Furthermore, there are broader goals of society that are too extensive to be undertaken by individuals or that are embodied in broader contexts of the public welfare. While zoning remains predominantly individualistic, it bears the Aristotelian idea that justice is found in shared undertaking both for the good of individuals and the good of the community. The free-rider prob-

lem and the social paradoxes, sharply manifest in metropolitan land, limit the area for the exercise of unbridled individualism.

Indeed, in the development of metropolitan land, so many unresolved and contradictory aspirations accumulate within the two poles of individualism and community that one can conclude of zoning that it is typically American in the sense that it represents no one coherent theoretical view. The typical zoning ordinance is a quintessential product of a series of pragmatic compromises; it finds working arrangements in situations where people disagree over particular choices; it emerges with a minimal *modus vivendi* for a pluralist undertaking. In sum, there is no overall framework of priorities. Like American society, zoning is profoundly middle-class and liberal in basic orientation toward rights and deeply Lockean in character. On the other hand, it seeks to absorb contending viewpoints of the existence of a public interest without shaking the core belief system. Consequently, land-use controls embody on a local scale, and in a physical sense, the national ambivalence and ambiguity. In addition, by not bringing conflicts out in the open, but seemingly adopting all views at one and the same time, the ordinances are again typically American in the desire not to highlight conflict or probe the darker side.

Hence, the appeal of zoning (as well as the reason for recent attacks upon it from those who resent the lack of dominance of their credo) lies in surface reconciling rather than repressing competing conceptions of the good life and rival notions of society's claims upon the individual property owner. The popularity of zoning lies in its melting pot quality: while it embodies the strand of local *democracy* and political and legal, if not economic, *equality*, its most powerful attachment is to a free market operated on by individual *liberties*. But, at the same time, the public interest of a larger society asserts itself. The constraints that judicial interpretations of equality place on the democratic expression of local wills put the management of the resulting tensions at the heart of post-modern controls. Occasionally, the uneasy and imperfect coexistence of the three goals is out in the open; from time to time, the honeymoon of the three strands turns into a tense cohabitation.

Zoning, with all its ambivalences, is but a special phase of the shared understanding that permeates the society. It is froz-

en at the center of the political and ideological continuum, the unhappy inevitable compromise, and subject to continuous new compromises by the widespread use of variances and special exceptions. Zoning would prefer to conceal the sour notes sporadically emitted from the outburst of conflicts. Liberty, equality, and property can conceivably be worked out as philosophical abstracts *à la* John Rawls. But the implementation, the balancing, of these noble concepts in a specific context, such as the siting of a regional shopping center, is where difficulties bubble to the surface, not to overlook the embarrassment of the papered-over internal incoherences.

Some Specific Examples

How different visions of the good society are jammed into legislation governing the uses of land, without too much striving at consistency, synthesis, restructuring, or making a deliberate choice, can be seen on the legislative level again and again. It is but a slight exaggeration, when it comes to the run-of-the-mill zoning ordinances, to apply the tag of a collage of contradictory convictions, along with unavoidable reconciliations when contradictions become too blatant. The following are a few prevalent examples of unifying compromise, carrying with them the underlying axiom of a continued dominance of the private sector, but slowed or modified by social restraints.

1. *Height and bulk restrictions* set by the zoning envelope obviously do cut into the private decision-maker's freedom. In the 1990s, one cannot build another Equitable Building in the Wall Street area of New York, concentrating 13,000 people in one block (plus casting a shadow on Trinity Church, a too symbolic dominance, perhaps, of the new money religion over the old). Under the zoning ordinance, skyscrapers will not be allowed to blot out the sky completely, yet corporations can build towering IBM and AT&T headquarters cheek-by-jowl on Madison Avenue. Profitable high rises are not extinct—although they cannot loom too high on the skyline.

2. *Zoning shapes the size and character of the community*, but not too extensively. Property values are to be respected and stabilized as far as possible. Ramapo¹⁵ in the East, and

15. See *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*,

Petaluma¹⁶ on the opposite coast, with their growth plans, can limit the number of building permits they will issue, and force private development along lines of existing public infrastructure. Yet the timing-based restraint must be reasonable, the period limited in years, and self building of infrastructure allowed. Overall, any growth-system control must be slow-paced.

Ratification of the market is even stronger in built-up areas and cities. Indeed, under the 1916 density controls (should one put quotation marks around controls?), New York City could still end up with a population of fifty-five million. One can argue that this is not a bite on property rights of significant magnitude.

3. *Dramatic changes in traditional Euclidean districting* that incorporate the design flexibility advocated by professional city planners occurred in the 1960s and 1970s. Ensnared within them are continued compromises. The arrival of planned unit developments, floating zones, development rights transfer,¹⁷ and cluster zoning can be cited as counterexamples of my thesis of slow-paced and evolutionary change in land-use controls. And they do present important modification of the traditional system. But always the restraining hand: the *Chesterfield Township* court, in invalidating a sweeping flexible ordinance, termed it "the antithesis of zoning."¹⁸

The new techniques widen the range of the operation of individual liberty, with the size of the physical tract making feasible new land development arrangements. Novel as it may be, this changing methodology can be seen as a natural outflow from past permissions for employing performance standards,¹⁹

409 U.S. 1003 (1972); John D. Landis, *Do Growth Controls Work? A New Assessment*, 58 J. AM. PLAN. ASS'N 489 (1992).

16. See *Construction Indus. Ass'n. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

17. See CHARLES M. HAAR ET AL., *TRANSFER OF DEVELOPMENT RIGHTS: A PRIMER* (1980); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). The New York Court identified four major purposes served by TDRs: landmark preservation; open space; economic development; and general land management. See *Penn Central Trans. v. City of New York*, 366 N.E.2d 1271 (1977) (N.Y. 1971), *aff'd*, 438 U.S. 104.

18. *Rockhill v. Chesterfield Township*, 128 A.2d 473, 479 (N.J. 1957).

19. See Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363 (1991).

larger acreage districts, and growing tolerance for compatible, although different, uses. And, above all, as a group, these innovations elaborate the property rights of large-scale developers who internalize the external impacts within the larger land area and punch out an enclave of mixed uses that, meeting publicly enunciated standards, can be free from the design restraints imposed on small parcels. It can be argued that they are an implementation of new social needs for group efficiency, enhanced tax revenue, and evolving social aesthetic preferences.

4. *Localism is rampant*, attachment to grass roots and closeness to neighborhoods is the chosen course in the United States for exercise of the restrictive land-use power.²⁰ Local preeminence flows from the classical notion of limited and decentralized power. Increasingly, however, evolutionary change may increase its hold, as this tenet becomes subject to review by state courts and by state legislative mandates to take local spillovers and externalities into account.

This raises a sharp conflict in the system. Implementation of housing and land policies is clustered at the local level. Over the long-run, however, metropolitan solutions (whether by regional agencies or by state governments) seem to be the only ways to solve pressing environmental, social, and economic problems. The metropolitan economy hinges upon a metropolitan system of land-uses; solutions to local problems often do require a regional approach to population distribution, location of employment, affordable housing, and environmental preservation. While in the past there has been a refusal to give up the local exercise (and local accountability) of power, the needs of interglobal corporations may merge with advocates of efficient government to force a revision of the local boundary curb on land-use controls.

More precisely, as several state courts are gingerly advocating, suburbs need to shoulder low-income housing responsibilities; and, as part of regional land policies and regional economic development, pay for the fair share of the costs derived from the benefits of their siting within the metropolitan area. Most dramatically, the general welfare attack on exclusionary

20. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

zoning by the *Mount Laurel*²¹ cases may foster a new attitude toward class and race relations. Land needs to be made available at prices that are affordable for moderate and low-income housing. Calls for equality will intrude on democracy and individualism.²²

5. *The countervailing force of neighborhood groups and participatory democracy*—forces uniquely at play in the land-use control area—can subvert the purported supremacy of local legislative sovereignty. From the outset, the Standard Zoning Enabling Act provided that no regulation would become effective until after a public hearing, at which parties in interest and citizens should have an opportunity to be heard.²³ Especially with NIMBYs and affordable housing, can subgroups apply pressures for excluding unwanted uses or for expansion of desirable facilities. Citizen associations are quite powerful. The introduction of mandated citizen review boards is a way of controlling bureaucratic power, but it legitimizes conflicting pulls that will shatter temporary equilibria, often to replace them with assertions of private property rights.

6. *Segregation of uses*—the essence of zoning—has dark overtones in certain contexts, such as the segregation of users, rather than uses. As early as 1917, overly blatant divisions were outlawed by the courts. But more sophisticated and indirect controls, such as minimum acreages or overzoning industrial land, have escaped the judicial lens. Too often the public power has been deployed to divide communities in ways antithetical to the American Dream. Gated suburbs, surrounded by legal walls of exclusionary zoning, are a blot on the domestic scene. In many suburban areas, the equality norm is slowly arising to combat the democratic view of majoritarianism—especially where the tyranny of localist domination feared by

21. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

22. See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* (1996).

23. See CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* 1099 (2d ed. 1985).

Madison's *Federalist Paper #10* prevents the entry of competing ideas and competing political blocs.

Ironically, the conservative District Court that originally held the Euclid village ordinance invalid, used as its rationale the potential discriminatory impacts of zoning along race and class lines.²⁴ Realization of the inadvertent consequences of many aspects of zoning is now filtering into many liberal views. The fascinating point-counterpoint of court and legislature in the twenty-five-year *Mount Laurel* litigation shows the overwhelming impact of a written constitution and the equal protection norm on other philosophies of controls.²⁵ But it should also be noted that the New Jersey court can be said to be in the mainstream of property rights—this time in enabling the builders and the landowners from whom they obtain options to operate in a market, now freed from the artificial government restraints imposed by local exclusionary regulations.

This difficult and troubling aspect of land-use controls needs a resolution that may prove wrenching to the traditional delegation of land-use powers to the small units of government; avoiding the serious social strains by an agreement to tiptoe around race and class issues is a fantasy—and the movement for environmental justice²⁶ is but the latest push toward greater openness over submerged misuses of land-use powers. Only with the rejection of social fatalism embedded in the notion of unchangeable human nature can the circle of social conflict and reinforced fear be minimized in the environmental and land-use area.

7. The overriding of individual property owners through *the exercise of the compulsory acquisition power* may seem a contradiction of the theme of Lockean prevalence. Yet the justification for the modern extensive broadening of the public use doctrine, and the most difficult arena for repealing contrary precedent, is recycling by another private developer of property taken from a

24. "In the last analysis the result to be accomplished is to classify the population and segregate them according to their income or situation in life." *Village of Euclid v. Ambler Realty Co.*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

25. See generally HAAR, *supra* note 22.

26. See e.g., Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1 (1995).

private owner. Facing the quandary of upholding a taking of land by an authority that would then turn it over not to another public agency, but to a private owner, Justice Douglas, in *Berman v. Parker*,²⁷ had to content us with a legal fiction, one that refused to look beyond the iron curtain of the taking and so could disregard the ultimate disposition and resting place of the land. Again, the various federal and state urban redevelopment legislations, and the ensuing variants of judicial justifications for broad exercises of the eminent domain power, even with the payment of just compensation, can be argued to be indirect ways of extending the individual sovereign powers of selected private sector developers. Only where the private market has failed, or there are insuperable barriers, such as the holdout, will the public use justification for the taking of one property owner's land for disposition to another private person be invoked.

8. The nature of the *local comprehensive plan* that enunciates future land policies and sets out the vision that is to guide the implementing regulations in practice too often turns into an American compromise. From the outset, the draftsmen of the Standard Planning Enabling Act have been divided on the extent and type of private development that should fall within the ambit of the plan. The debate concerns whether public planning should go beyond the spatial. The diametrically opposite versions of Bettman (planning entails social and economic factors) and of Basset (land-use planning relates to physical aspects alone) appear with equal force in the same standard planning statute, coexisting in an incredible contradiction. This ambiguity persists throughout the enactment of state enabling statutes.

Huge investments are required to produce the dwelling units and the infrastructures—another name for the economists' "public goods"—that turn a series of individual homes into a neighborhood. This concentrates attention on the physical aspects of development. Since externalities are more obvious, government intervention also seems safer with respect to accepted tenets than does broad-scale planning. Perhaps, also, competence on the part of administrative agencies is more prevalent in design components. When the need for a powerful

27. 348 U.S. 26 (1954).

emotional impetus to budge any rigidities of a social system is added to these considerations, it becomes clear why emphasizing the physical setting of land-use controls becomes so appealing. Clearance of physical blight, with its call for the eradication of dilapidated housing and slums, arouses a middle-class constituency. This is also more likely to receive the approval of reviewing courts as being indeed a constitutional public use. Furthermore, it means that the subtleties, contradictions, and intractabilities of human nature do not have to be taken into account by blunt government action. How else can one explain the apparent naivete of the belief, held by many of the originators of urban renewal, that by tearing down deteriorating structures, they would transform people's lives; and that somehow, by blotting out the visible physical evil and substituting new forms of concrete structures, urban life would be enhanced? Fortunately, awareness of the economic, social, and even racial consequences of physical siting and location is emerging in public opinion polls; however, ambivalence still persists as to how wide the community may cast its net.²⁸

With the introduction of the Standard Planning Enabling Act, and its later variants in the states, individual ownership of land is defined by the communal attachments and the public policies that form the consensus conclusions of the comprehensive plan. Externalities and the free-rider problem make the land market inefficient, or, rather, inequitable (or both). For example, the private market—by a sheer profit calculus—will not provide inexpensive land for affordable housing, nor will the costs of pollution be borne by the sinning enterprise, whose fiduciary obligation remains predominantly to its shareholders.

Unlike unregenerate classic liberalism, zoning can assert, as a basic principle, that it is in the order of the social arrangement that individual rights are sacrificed for the sake of the general good, so long as there is equality of treatment, and a nexus between the restriction and the goals of a well-considered plan. Like the standard corporate plan, it is necessary to set forth goals, priorities, and the allocation of resources, but un-

28. Contrast the opinion of Chief Justice Wilentz in *Mt. Laurel II* with that of the Virginia Supreme Court in *Board of Supervisors v. DeGroff Enter.*, 198 S.E.2d 600 (Va. 1973) (striking down inclusionary zoning ordinances).

like a Board of Director's business plan, there are many individual voices over and above the broad cleavage between private and public.

So, at best, only the most generalized objectives and priorities are enunciated in the commonly adopted master plan. At the same time, one should note that the "in accordance with a comprehensive plan" requirement of the Standard Zoning Enabling Act may be used by individual property owners to combat restrictions on their land.

9. The efficiency of the Adam Smith market has yielded on other occasions in consideration of land-use problems. Urban land's monopolistic nature makes *the need for a safety net* more obvious. The admission is widespread that the ruthless market needs to be tempered by the needs of disadvantaged groups. This can be achieved through techniques such as inclusionary zoning, development exaction fees, linkages, and low-income housing density bonuses. The general belief in economic growth is modified in these cases to protect those who otherwise suffer from change. Contempt for the economically disadvantaged and politically disenfranchised characteristic of a social Darwinism in other areas of economic activity is tempered in the land-use area. Consequently, the controls are often shaped, and even initiated, by this realization, and they further justify extending actions by governments.

Part and Parcel of the System

All of these examples illustrate that zoning, as an outcrop and interpretation of American political thought and culture, is nowhere near a substitution of a collectivist ethos for individual decision-making over land. Nor is it Friedrich A. von Hayek unleashed. The ambiguities and ambivalences involved make zoning as American as apple pie. By denying, or simply assuming, it buries epic conflicts. It is as if no conflicts exist between tenants and owners, between old residents and newcomers, or between welcomers of change and keepers of the familiar. Above all, zoning fails to recognize that heavy issues divide the have-nots and the haves.

So the system of land-use controls—blown-up targets of the current attacks against the presence of governments—turns out to be a shifting stew. It is a mix of conflicting elements strug-

gling for philosophic dominance, embodying forms of compromise, and, above all, a concoction lacking the spice of direct, self-confident assurances. Zoning is an effort to mediate opposing conceptions of the good. Within this typical American approach, zoning neither clearly establishes liberal values, nor espouses communitarian values.

Nor have land-use controls come to a final resting point concerning the deference to be paid to popular democracy. Zoning is the Mozart of adjustment. No institution does it better. It establishes a shifting balance that is temporary in nature, but at the same time a fixed balance. The theory of the untrammelled market seems dominant, but having let the genie of public interest out of the bottle, it cannot be shoved back in no matter how impassioned the later efforts. The difficulty of defining the very terms of individual applications themselves ("ownership" and "community" are overwhelmingly barnacled with layers of meaning), coupled with the complexity of line-drawing, is the drafting lesson of zoning. These difficulties are also the reason for the frustrations accompanying zoning, sometimes to the point of advocating its expungement and repeal.²⁹

But this very source of anxiety is also the reason for zoning's popularity and acceptance. Despite the criticism by certain academics, lawyers for property owners, and sectors of public opinion, existing land-use controls do not buck market trends too severely, nor do they impose a collectivist view on land development. Above all, they are not tools for redistribution of resources from the rich to the poor.

Indeed, the inconsistencies and ambivalences related to zoning and other land-use ordinances can be attributed to contradictions in American society itself. And the magnet for attack, most especially the barbs from the dominant class of the legal profession (for example, the failure of regulations to be unified, consistent, or logical), arises from the strange juxtaposition that zoning is a mirror image of society.³⁰ And the response of

29. In his regulatory-taking project, Justice Scalia seems on the verge of being the major advocate for this course. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

30. One could argue that an important aspect of American public life today—a deep and growing cynicism about the political system—also explains why the zoning

practitioners within the current system involves attempts to impose a semblance of order on top of the disorder of land development reality. The lack of predictability makes this an onerous task. The interdependence of land, even though parcels and tracts are individually owned, makes a return to the state of nature a frightening Hobbesian prospect. The system may not be coherent, but plausibility suffices. And the delicate balance of the landowner's rights with the perceived needs of the society-at-large moves only within slight degrees. A new paradigm would not be welcomed by any of the parties.

The Positive Side: Enter the Joint Venture

One evolutionary trend may ultimately bring about sharp changes. This trend is widening the scope of controls by emphasizing the "welfare" term of the police power quartet. In the marketplace of ideas, zoning can be justified as expunging imperfections in the market, rather than replacing it wholesale or interfering with its operations. The real estate market is traditionally an inefficient one—primarily local, characterized by imperfect knowledge of supply and pricing, and dominated by lack of data or awareness of national trends. Hence there is a need for legislative enactment to rectify these shortcomings, but one that still owes allegiance to the untrammelled theory of the market. My guess is that, though far short of a revolutionary break such as repeal, society is ready to move the equilibrium further than in the past, most particularly against the prevailing legal constraint of a separation between the public and private worlds.

Recognition of affirmative potentials may provide the more likely impetus for rewriting the current agenda. It is the positive side, the potential of land-use planning and ordinances operating in conjunction with the Lockean owner, by way of enhancement and of synergies, that may differentiate newly emerging land-use controls from the compromises of the past. Consequently, the chosen stopping places of the present system of land-use controls may be dislodged. The future may witness the retreat of the liberal constitutional rights of the Lockean

order, while still extolling self-interest, revised to satisfy the exigencies of the joint-venture society.

By appropriating a theme that worked in pushing zoning through the conservative barrier of the 1926 Supreme Court, the joint venture of public and private may be depicted as a mean between the extremes of total and no control. While the mental image of development held by the new control pattern is no longer the unencumbered self, the community aspects of the joint venture are also shaded down.

The new combination does not, by any means, represent a subordination of private interest to public interest, as Benthamite utilitarianism might require. Rights remain trumps, but in accordance with the terms of a partnership agreement in whose drafting both sides are deeply involved. Power does shift away from democratic institutions such as local legislatures, and towards a combine of individual (and group, as in *Mount Laurel*) entitlements established by the plan. That this new form of land organization may represent the dominance of large-scale developers and corporations (as seems to be the case of the General Motors-City of Detroit combine in the *Poletown*³¹ case) simply brings out into the open what has always been latent in past planning compromises. But visibility can summon controls.

It is too early to say whether the joint-venture approach is for better or worse. The marriage of market and regulatory strategies rests on different but complementary conceptions: business as the motor force in our capitalist economy and the developer of metropolitan land; and government as public conscience, minor market manipulator, and, in areas where the profit motive cannot work, the purveyor of funds or the initiator of programs. The traditional attachment to private enterprise—and the force of its constituent lobbies—leads not to complete substitution of public goals for those of the private decision-maker, but rather to the stimulation of joint participations.

Through the accretion of experience of the past thirty years, the joint-venture form is becoming a familiar phenomenon. In

31. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

one sense, it is the distillation and condensation of much that has gone on before. One may argue that we have already arrived at a half-way house to the joint venture in many land-use ordinances. Increased use of performance standards, rather than preordained prescribed regulations, leads to the private sector choosing the means by which it will arrive at goals set by community participation. Casting of local land-use controls in the form of incentives and subsidies, rather than command-and-control exhortations, also moves to a sharing of responsibilities.

At its most complex, the joint-venture format has come to mean cooperation among three significant groups: private developers and lenders, local municipal and state governments, and relevant federal agencies. Ideally, bargains struck among them can result in coexistence of private profits and public benefits. It should be noted that gains would be made in each sector that could not be obtainable through individual efforts alone. As experience has introduced the reality principle, the approach explicitly encourages participants to pursue their own ends as they best envision them—a reinterpretation of self-interested maximization that is the settled norm in the society—redeemed by the belief that a framework of properly designed programs, through a coordination process, will produce benefits for everyone.

At the optimum operation of the system, each sector is assigned to do what it does best. Ultimate success will depend on the ability to reach across ideological differences in order to have a rational dialogue about hugely important issues. In theory (and sometimes in practice), the government applies its broad perspective of public needs to the design of responsive policies. In many ways, often unrecognized, the government is uniquely situated, especially in the exercise of its sovereign powers of regulation, eminent domain, tax abatements, and awareness of local conditions. The private sector meets its joint-venture partner with different but equally important strengths. Driven by entrepreneurial instincts, business combines knowledge of investment opportunities and capital markets, and assessment of consumer wants with its drive for cost reduction and efficiency. Micro-awareness of the private sector complements the macro policies of the public sector.

Cultural change would have to accompany, indeed precede, legal change. A prerequisite for success of a joint venture program is overcoming business disdain of government and government distrust of business. Moreover, the time has come for modifying the corrosive pessimism over local government will and capacities.

A principal task for government is to win over the average developer by eliminating genuine fear of administrative bureaucracy, red tape, delays, and perceived inefficiency—especially when actions of several levels of government are required. The public sector can take two major steps to encourage the joint-venture approach: (1) streamlining local land-use controls and federal regulatory procedures, and (2) developing a cohesive institutional strategy in its comprehensive plan formulation. Realignment and coordination among city and federal departments that influence land development, coupled with a simplified application and approval procedure, could increase private support, understanding, and participation.

At the same time, the private sector must work to gain the trust of a government wary of its continuous pushing of the zoning envelope, overexploitation of infrastructure, red-lining practices, poor management, and undertones of ethnic or racial discrimination. Developers need to understand, and work to achieve, the social goals of a project while keeping their eye on the bottom line. This may require prodding. Voluntary, cooperative solutions are difficult to maintain. While some corporations may be considering environmental values in making pollution decisions, they do so, at least in part, because of laws and sanctions regulating pollution.

The role of organized power concentrations (who can thrive under either a system of land-use regulation or one of non-regulation) will determine the success of the joint venture. Stressing joint ventures may be too outright an acknowledgment that “the business of America is business.” Joint ventures may prove to be too cozy an alignment, and when the music stops the protected groups keep the chairs. But this recognition provides greater negotiation power for the public share of total return.

Finally, the need at strategic moments for direct government intervention and decision-making for human settlements grows

more clearly recognized, even by a Lockean private-property oriented society. The imperfections of the private land market, set forth glaringly by the absence of affordable housing, are all too obvious in the metropolitan area. Thus, one should keep in mind the use of urban development corporations, or metropolitan land-bank associations equipped with eminent domain powers to compulsorily acquire land, and authority to either (1) package large-scale, mixed-use land developments for private investments, or (2) actually carry entire projects themselves. They may be the next evolutionary phase of controls. Ultimately, the joint-venture organization of metropolitan land development challenges the capacity and willingness of a society to engage in deliberate social change.

Where public tax funds or exercises of sovereign powers enhance land value, recapture by society of some proportion of values generated by its efforts should be acknowledged. This will also be the test of the new forms of joint-venture controls. If planning and land-use controls cannot prove that they pay for themselves either by compensating those property owners who have to undergo the costs of use restrictions, or by making an economic return on infrastructure investments or joint ventures, then there is little reason for them to put forth claims in a world of limited resources. Hence, public efficiency has to be added to distributive goals if communitarian values are to play a stronger role in the post-Lockean society of the joint venture.

Conclusion

Another version of the question posed by this seminar is to study the goals put forth for the passage of land-use controls and the extent of their actualization. What are the purposes of planning and zoning law? Is repeal warranted today? And for the future, drawing on the historic trends, is a sharp break in the offing or will zoning undertake yet another pragmatic adaptation of the liberal tradition?

Zoning in the United States, while remaining surprisingly stable, has displayed considerable flexibility, adapting to changing conditions of urban expansion and development innovations. Throughout its history, it has remained within the admittedly loose confines of the framework spelled out by the two Standard Enabling Acts. And it is most likely to continue in this

fashion by way of occasional incremental modifications, representing a limited renewing of the vitality of the original conceptions. For the repeal of zoning³² and other land-use controls, advocated by some groups,³³ does not posit a coherent, intellectually serious alternative.³⁴ Such a revolutionary change is not in the cards; its lure is but an abstract will-o-the-wisp; perhaps, like the Holmes characterization of the nuisance doctrine as a "benevolent yearning," the same can be said of the support for revolution as a substitute vision for current controls.³⁵ Urban life is no longer "comparatively simple."³⁶ Common needs and interests of users and enjoyers of land enlist a wide recognition of vulnerability, interdependency, and the need for a generalized coordination. A complex, mobile, and pluralistic society demands various forms of guidance and, at times, explicit direction over the purposes for which metropolitan land is used.

Public action, in the form of land-use controls, is unavoidable in the provision of infrastructure generated by existing and proposed transportation and utilities systems,³⁷ the availability and affordability of housing, the revitalization of central cities,³⁸ and the coping with emerging regional environmental needs. Again, large-scale undertakings are too intimidating to the private sector without subsidies, incentives, or guarantees. This also means prevention of potential conflicts in land-uses (when the nuisance equitable anticipatory injunction is not available). Only through the action of the community can the

32. For instance, President Reagan's Commission on Housing recommended reconsideration of *Euclid*. See PRESIDENT'S COMM'N ON HOUS., THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 202 (1982).

33. That one-man army, Richard Epstein, has even argued that zoning is unconstitutional. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 131-34 (1985).

34. There are exceptions, of course. See the argument for an alternative free-enterprise system in Douglas W. Kmiec, *Deregulating Land-use*, 130 U. OF PA. L. REV. 30 (1981).

35. Cf. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (1962).

36. See CHARLES M. HAAR AND LANCE LIEBMAN, PROPERTY AND LAW 1093 (2d ed. 1985) (citing *Euclid*).

37. The Boston Harbor litigation and its outcome exemplify consequences beyond the reach of traditional nuisance law or of private initiatives. See generally Charles M. Haar, *Boston Harbor: A Case Study*, 19 B.C. ENVTL. AFF. L. REV. 641 (1992).

38. See e.g., Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795 (1991).

demands for a better life, and the need for a vision in the physical setting of the metropolitan area, be met. The police power enables society to uniformly regulate a wide variety of land-use activities in order to protect the health, safety and general welfare of the citizenry. The empirical experience denies drastic revision or repeal of the land-use regulatory system as a realistic option. *Gotterdammerung* on the operatic stage, yes; in real life developments, no.

* * *

Going back to the same source of inspiration as has Justice Antonin Scalia—the common law—I would like to emphasize yet another aspect of this historic system: the continuous process of working itself pure through experience, and the testing of experience by logic and wisdom. “Changed circumstances or new knowledge,” as Justice Scalia himself explained, make previous conclusions no longer applicable.³⁹

So three major expectations therefore exist to observe whether land-use developments flourish or founder:

1. Pragmatic adjustments of land-use controls, but within the overwhelming Lockean tradition of the rights of property and a tilt toward individual energy of development, even within an expanding community action under the *general* welfare clause. Inevitably, changes will continue in an evolutionary form, not by a sharp turn in one direction or the other. The sanctity of private property, and the right of the individual to deal as she wills with the bundle of rights represented by “ownership,” will remain the staple tenet, tempered by a slightly more frequent reference to a state or regional framework for common action. State growth management plans may bring about more ambitious overview of local government controls to attain balanced growth and economic development objectives. The role of courts, especially as they explore their own capacities and techniques for implementation, in insisting on rationality, democratic political processes, and instrumental nexii of ends and means, will be both a check, through requiring due process of law on overly arbitrary dispositions and regulations, and a spur to achieving

39. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992).

constitutional mandates that may speed up the pace of evolution toward the equality pole.

2. The joint-venture society, with its more explicit recognition of the roles of public and private sectors in land development, may hasten the adaptation of traditional land-use controls dramatically, even to the point of changing the culture of land-use planning, and being noted by later historians as a sharp break in the evolutionary pattern. But this hinges on how popular they become. One interesting variant: the prominence given by the joint venture to costs and benefits means, in a world of tightened budgets, the return of the struggle to mastering the ancient puzzle of recapturing planning values. Demanding a portion of the rewards from new synergies will be revisited in many forms; even as there is no clearly articulated break with the inherited ideology, the land-use system's more activist response may provide a vivid example of Gould's punctuated equilibria.

3. Finally, I turn to one steady state: the H. G. Wells view of societal future depending on the outcome of the race between catastrophe and education. The wisdom necessary for attaining the good society may continue to elude us. But instilling greater sophistication and awareness by the general public of the forces that shape the physical (and related) patterns of existence is a key task; the environmental programs, in many ways, as the mirrors of growth management programs under the zoning power, have been the major organizers of public awareness of land interdependencies.⁴⁰

Returning to the seminar's theme of the termination of land-use controls, a possible twilight of the Gods, I recall one of Mark Twain's acute observations. Asked how he liked the newly arrived music of the revolutionary Richard Wagner (it might have been *Gotterdammerung*), he replied only, "I hope it's better than it sounds." Whatever the final judgment on the *Ring*, this assessment should be applied to the calls for drastic revisions in our land-use system and for the adoption of extreme deregulatory postures.

40. See, e.g., H. JEFFREY LEONARD, *MANAGING OREGON'S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING* (1983).

The joint-venture theme sheds a new perspective on the community plan, already so central to environmental and land-use controls. It represents a move away from the world of isolated individuals; its stress is on an organic and integrated whole. In this sense, it undermines implanted liberal thought and the traditional market approach, for it expresses the idea that a free society, given all its divergent pulls, can enjoy periods of commonality, and that by local democratic participation and forethought (aided by technical experts), collective power can be exerted to promote the well-being of the collectivity.

To return to Professor Wolf's question, the twilight is not yet here. And the long period of stasis in land-use controls is not about to be interrupted by abrupt change. The call for expanded private property rights is especially simplistic. The task of the next decades is not that of total recasting of the land-use and environmental systems with an earlier halcyon form of market ordering, but to improve and enhance the present structure so that it continues the evolutionary pattern of meeting the needs of continually evolving economic and social arrangements.