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# This land is our land

*Private landownership has always been subject to public control*

by Myron Moskowitz

**W**hen I speak publicly on landlord-tenant law, I am often asked the same question: "Why should cities pick on landlords by controlling rents, when they don't control the prices of hamburgers or T-shirts?"

Other landowners pose the same question. Downtown developers complain of height limits, beachfront owners complain of public access requirements, and residential developers complain of on-site parking space requirements. "Why me? The government doesn't force computer manufacturers, professional baseball teams or hot-dog stands to give things to the public."

The answer is that land is different. Land, unlike other kinds of property, is not truly owned by individuals. It is owned by the sovereign—the public, in our democratic government—and entrusted to property owners to use for themselves and the rest of us.

For landowners who have paid good money for their property, the concept of public control over private land is hard to swallow. But, after all, the nation's land is all that the sovereign has. The land defines the limits of the sovereign's jurisdiction, and to a large extent the quantity and quality of the land

determines the resources of the nation and of each community within it.

A sovereign uses land in a way that furthers its political and economic interests. Nomadic tribes share territory in common, and individual ownership exists only as a temporary right to privacy in a transient hut or tent. In medieval times, a feudal monarch entrusted a large tract of land to a noble in return for rents or taxes. The noble started a chain of "subfeudation" of smaller tracts, with each tenant paying rent or taxes to those above him on the chain.

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**We have allowed private ownership because it provides us with what we have needed: economic development.**

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In a modern democracy, as in the other systems, private ownership of land is not a God-given or guaranteed right like freedom of speech. If it were, every citizen would be entitled to land. Instead, we have allowed private ownership because it has helped provide us with what we have needed: economic development. The federal government



gave land to the railroads and to farmers to encourage development of the West. Our economic system has made it profitable for developers to build housing tracts and centers of commerce, which serve the public's needs. We have civilized greed, making it work for the benefit of the community.

In this sense, we have treated land much like any other commodity. We allow private ownership of iron ore, for example, so its owners can profit by "developing"

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it into steel. We allow private ownership of machinery so owners will make money by "developing" consumer goods. And we allow private ownership of land so that developers can profit by putting land to its "highest and best use." Viewed in this light, it is not surprising that landowners often complain that land-use restrictions "stifle the free enterprise that has made our nation great."

But . . .

But land is unlike other commodities. While few communities impose taxes on *personal* property, taxes on *real* property are almost universal—whether or not the land produces income for the owner. In effect, the sovereign is saying: "For various reasons—such as development and privacy—we are entrusting you with a piece of our territory. But since there is not enough of our usable land for all of us to enjoy equally, it is only fair that you pay us for the privilege we are bestowing upon you."

The governments of England and the United States have seldom hesitated to impose restrictions on the use of land for the public good, even when similar restrictions on business activities were almost unthinkable. Common law judges would enjoin such nuisances as raising pigs in the middle of a village, but would not interfere with the sale of snake oils and other useless or dangerous products. Some one hundred years ago, when manufacturers and merchants were allowed to invoke the doctrine of *caveat emptor* to protect themselves from the injurious or even fatal consequences of their products, *Rylands v Fletcher* ((1868) 3 HL 330) imposed a strict liability on landowners for dangerous conditions on their property.

Even today, our most conservative communities see no inconsistency between the values of free enterprise and those embodied in zoning laws and building codes. Those entrusted with private ownership of land can be prevented from disrupting residential neigh-

borhoods with factories and stores, or endangering the safety of others with poorly designed buildings. The public's needs may clash with the goal of "development," but the public views those needs as legitimate.

Since the beginnings of the environmental movement in the early 1970s, the public has become acutely aware of another crucial difference about land: The supply is limited, both physically and socially. The need for unfettered development and unrestricted land use must now compete with other concerns, such as sunlight, beach access, open space and lower population density. Cities can restrict the building of apartments, even though there may be plenty of space for them. More density, the public may reason, would mean more traffic problems or more pressure on local schools.

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### **The sovereign's need for unfettered development and unrestricted land use must now compete with other concerns.**

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Advocates of development restrictions have been accused of selfishness, of rolling up the gangplank after the life boat is full. This may be true in some cases, but anyone who has spent 30 minutes searching for a parking place in a residential neighborhood can sympathize with the neighborhood's complaints about high density.

The need for development has been with us for so long that we take it for granted. We forget that the private ownership of land was a means by which to further development. But we are entering a new era, when development must compete with other pressing needs. The community has the right to regulate land use in order to promote these other needs, because the land belongs to the community. Land is the community. That's what makes it different. □