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LAND AS A COMMODITY “AFFECTED WITH A PUBLIC INTEREST”

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We abuse land because we regard it
as a commodity belonging to us.¹

Today there is a vigorous challenge to old assumptions concerning the appropriate locus and nature of government control over land use. Some of those in the vanguard of the attack on the old styles of land use policy insist it is essential to cease regarding land as a commodity to be bartered in the marketplace.² The suggestion that land should no longer be treated as a commodity but rather regarded as a resource has a compelling ring which appeals to many people in these days of a heightened concern over environmental degradation.³

One hazard with this approach, however, is that it suggests that if land is treated as a resource—a public trust—the perceived problems in land use policy will be alleviated. The history in the United States of the management of *public* lands, which are legally held in public

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This article is an elaboration of some suggestions made in a speech by one of the authors at the annual meeting of the American Society of Planning Officials in Vancouver, British Columbia, April 1975. That speech is printed in 41 *PLANNING: THE ASPO MAGAZINE* 12 (1975).

1. A. LEOPOLD, *A SAND COUNTY ALMANAC* vii (1949).

2. The report of the Task Force on Land Use and Urban Growth chaired by Laurance S. Rockefeller called for a new “land ethic” that regards land as a resource rather than a commodity, a resource similar to air and water deserving of protection against pollution. The Task Force report asserted that Americans “are rebelling against the traditional processes of government and the marketplace which, they believe, have inadequately guided development in the past.” *TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH* 7, 33 (W. Reilly ed. 1973). The report of the Douglas Commission asserted that Americans are “trustees” of their environment. *NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY* 20 (1968).

3. For an early voice, see A. LEOPOLD, *A SAND COUNTY ALMANAC* (1949).

trust,⁴ does not indicate that pursuit of the public trust analogue as applied to all land will lead to a result which will please the advocates of the concept. Recent controversies such as the mining in Death Valley National Monument,⁵ the Disney development at Mineral King in the Sierras,⁶ the controversies over extensive clear-cutting and over-cutting of national forests,⁷ and innumerable other examples illustrate that the government is carrying out its role as trustee of the public lands with less than due regard for the public beneficiaries. There is little to suggest that the influence of mining, lumber, grazing and other interests seeking to exploit public lands is any less damaging to implementation of beneficent land use policies when exerted at a national level than when exerted at the state or municipal level.

The more serious difficulty with such a pious sentiment as a rallying point in a "revolution" (quiet or otherwise) in public policy is that it may go further than is acceptable to most people or, indeed, than is necessary to achieve the objective of a more rational land use policy. It employs a rhetoric so sweeping as not to be taken seriously. Those who urge such a posture rarely put forward useful methods for transforming such a cry into a program of more than parochial scale.

It is our purpose to suggest that a land use policy which is socially equitable and environmentally sensitive is not resolved simply by labelling land as a "resource" rather than a "commodity." Instead, we propose to examine the special status land has enjoyed for many centuries, and which distinguishes it from other commodities, and to suggest that land transactions and land use should at last be scrutinized in a manner not unlike the treatment extended to a multitude of other commodities no more "affected with a public interest"⁸ than is land.

For centuries government has been more reluctant to regulate

4. See, e.g., *United States v. City & County of San Francisco*, 310 U.S. 16, 28 (1940) (Congress is "in effect trustee of public lands for all the people"); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1916) ("in trust for all the people"); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (the fact that Congress holds Indian lands in trust does not take those lands outside the coverage of the National Environmental Policy Act).

5. The Department of Interior is being sued to halt open-pit and strip-mining of borates and talc within the Death Valley National Monument. *Death Valley Nat'l Monument v. Interior Dep't.* No. 76-401 (N.D. Cal., filed Feb. 26, 1976).

6. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); Commentary, *Mineral King Goes Downhill*, 5 *ECOLOGY L.Q.* 555 (1976).

7. See, e.g., *Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975) (clear cutting). Concerning management practices of the United States Forest Service in general, see G. ROBINSON, *THE FOREST SERVICE* (1975).

8. See Part IV *infra*.

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transactions in land than it has transactions in personal property. Even the modern use of the police power through zoning and subdivision regulations is less a matter of *public* regulation than it is a system for granting *private* benefits or protecting *private* interests. We propose that the doctrines developed in the past century in public utility law may be worth pursuing in the attempt to construct a rational land use policy. There are at least four instances where such an analogy may correct or mitigate current abuses or inequities: (1) scrutiny over cost, profit, price and service, (2) the use of quotas and priorities, (3) the limited protection against competition when it is in the public interest, and (4) the power of condemnation by private developers upon certification by a public agency.

Finally, we acknowledge the high risks in the use of analogy and the difficulties of transferring doctrines applicable to transactions in personal property to dealings in real estate. What follows, then, is more a suggestion for a new way of viewing public regulation of transactions in private land and the use of such land than a precise framework for a new scheme of regulation. If this proposition offends environmentalists and frightens developers, they should consider the record extending over many centuries before they judge such an approach.

I.

Throughout Anglo-American history land, in contrast to other commodities, has occupied a privileged status in society. "Land was wealth, livelihood, family provision, and the principal subject-matter of the law. To begin with, moreover, land was also government and the structure of society."⁹ Land was the key to the power of the feudal lord and ultimately of the sovereign. All land in England belonged to the king who granted the various tenures to lower lords and peasants.¹⁰ The king's absolute power over land, and his authority to levy on land and seize it for non-payment led to the confrontation among peers at Runnymede and the adoption in 1215 of the Magna Carta, which contained protections against the seizure of property without

9. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 88 (1969).

10. See generally *id.* at 88-95; Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 *BOSTON U.L. REV.* 435, 443-47 (1964).

proper legal process.¹¹ Although the English kings varied in the vigor with which they honored the Magna Carta, by the time of the colonization of North America, rights in land had been secured against the royal prerogative of seizure.¹² It takes only a small stretch of the imagination to view the current contest between municipalities and land-owners over land use policy as a similar confrontation.

The feudal, pre-industrial focus on land as a source of wealth might explain the special concern over the protection of that commodity, but this status goes back so far that it transcends a feudal aberration. Throughout history, chattel property has not enjoyed a similar status: "[T]he ownership of land was a much more intense and completely protected right than was the ownership of a chattel."¹³ During the Middle Ages, production of goods was often controlled by the guilds, associations of producing craftsmen who controlled prices.¹⁴ Various elements of trade and commerce, including the wool trade¹⁵ and a variety of commodities such as beer, bread, wine, and timber,¹⁶ were subject to extensive regulation, including price regulation, as early as the thirteenth century in England. But unlike trade in personal property—a business of the rising middle-class merchants—land remained the special prerogative of the sovereign and the nobility. In short, it enjoyed a special class-oriented position.

The American Revolution arose out of a political conflict; it was not a social upheaval. The united colonies did not intend to repeal centuries of common law, including those privileges of land ownership so relished by some leaders of the revolution. Indeed, the records of the Constitutional Convention of 1787 underscore the importance attached to ownership of land: "Probably no member of the Convention believed that a government, republican in form, could be entrusted to men who were not qualified by the possession of real estate.

11. F. BOSSELMAN, D. CALLIES, & J. BANTA, COUNCIL ON ENVIRONMENTAL QUALITY, *THE TAKING ISSUE* 55-57 (1973).

12. *Id.* at 80.

13. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 153 (2d ed. 1898). The United States Court of Appeals for the District of Columbia has stated: "Land always has an owner. . . . In the language of the ancients, land was never regarded as *res nullius*." *Scott v. Powell*, 182 F.2d 75, 81 (D.C. Cir. 1950). The same cannot be said for chattel property.

14. P. GARFIELD & W. LOVEJOY, *PUBLIC UTILITY ECONOMICS* 3 (1964); I J. GREEN, *TOWN LIFE IN THE FIFTEENTH CENTURY* 121-22 (1907).

15. J. GREEN, *supra* note 14, at 45-49.

16. *II id.*, at 25-48.

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Property was considered to be the anchor of government."¹⁷ It is not surprising, then, that from the earliest days of the republic, American law has extended the privileges attached to the ownership of land, leavened by the democratic notion that through acquisition of land a nation of wanderers could be converted to responsible citizens.¹⁸

Although the long established exemption from execution and sale for payment of debts of the homestead (the family home and a limited amount of appurtenant land)¹⁹ has by now been extended to such items as automobiles,²⁰ and some jurisdictions limit the value of exempt real property²¹ as well as personal property, other states that limit the value of exempt personal property place no limitation on the value of exempt real property.²² In addition, some states continue to provide limited property tax exemptions with respect to occupied family resi-

17. I F. THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 464 (1901). James Madison stated during the debates: "Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty." II *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 203 (M. Farrand ed. 1911). The Constitution which finally evolved left the question of qualifications of electors up to each state, some of which at that time did require land ownership as a qualification for voting. *Id.* at 203-04; U.S. CONST. art. I, § 2.

18. In 1796 the federal government sought to encourage the settlement of frontier lands by offering land at auction at not less than \$2.00 per acre in 640-acre tracts with generous credit terms. The Land Act of 1796, ch. 29, 1 Stat. 464 (1796) (current version at 43 U.S.C. §§ 52, 751, 931 (1970)). Because such tracts were too large for the typical debt-ridden migrant from the eastern states, the distribution system became a playground for land speculators. See Shipley, *A Summary History of Federal Land Policy*, in G. LEFCOE, *AN INTRODUCTION TO AMERICAN LAND LAW* 13, 15 (1974). By 1820, legislation reduced the minimum acreage requirement to 80 acres and the minimum price to \$1.25 per acre. Act of Apr. 24, 1820, ch. 51, § 3, 3 Stat. 566 (1820) (current version at 43 U.S.C. § 678 (1970)). In the following two decades, the amount of public land so claimed increased substantially. The Pre-emption Act of 1841 and the Homestead Acts of 1862 and 1891 expanded the availability of public lands by assuring any head of a household interested in cultivating land an opportunity to acquire 160 acres of land at little monetary cost. See Preemption Act of 1841, ch. 16, § 10, 5 Stat. 453 (1841); Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (current version at 43 U.S.C. §§ 161-63, 169, 171, 173, 175 (1970)); Homestead Act of 1891, ch. 561, §§ 4-6, 26 Stat. 1097 (1891) (current version codified in scattered sections of 30, 43 U.S.C.).

19. See, e.g., 43 U.S.C. § 175 (1970) ("No lands acquired under the provisions of the homestead laws and laws supplemental and amendatory thereof shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."); FLA. CONST. art. 10, § 4 (1968, amended 1972). See generally 1A COLLIER ON BANKRUPTCY ¶ 6.15 (14th ed. 1976).

20. E.g., ILL. REV. STAT. ch. 52, § 13 (1975); IOWA CODE § 627.6 (1975); KAN. STAT. ANN. § 60-2304 (Supp. 1975). See generally 1A COLLIER ON BANKRUPTCY ¶¶ 6.14, 6.16.

21. See, e.g., ILL. REV. STAT. ch. 52, § 1 (1975) (exempt real estate limited to \$10,000); IND. STAT. ANN. § 34-2-28-1 (Burns 1973) (\$700); NEB. REV. STAT. § 40-101 (1974) (\$4,000).

22. In FLA. CONST. art. 10, § 4(a)(1) (1968, amended 1972), and KAN. CONST.

dences.²³ Mortgage moratoria were enacted to protect owners of real property²⁴ but no similar deferments were granted to ease the burdens on debtors with respect to obligations on other types of property.²⁵

The Internal Revenue Code provides additional examples of the special status of land ownership. When a homeowner sells a residence at a profit and purchases a more expensive home, he can postpone recognition of any capital gain realized on the sale.²⁶ Land is the only property which commonly benefits from this favorable tax treatment.²⁷

The law governing landlord-tenant relationships contains illustrations of the special treatment accorded by the law to land related matters. "Understanding of landlord-tenant law is best obtained by reflecting on what it is not. It is *not* similar to the law with which most people are familiar. This is contract or sales law."²⁸ Courts in the past have treated covenants in leases as independent. A landlord could continue to collect rent even though he had breached covenants in a lease. Even when a landlord had agreed in a lease to make repairs to

art. 15, § 9 limitations are placed only on the acreage, not the value of exempt real property, whereas in FLA. CONST. art. 10, § 4(a)(2) (1968, amended 1972), and KAN. STAT. ANN. § 60-2304 (Supp. 1975) much more stringent limitations are placed on exempt personal property.

23. See, e.g., ILL. ANN. STAT. ch. 120, § 500.23-1 (1976) (providing a \$1,500 homestead exemption with respect to real property taxes for persons over 65 years old).

24. "The primary object of these statutes is to preserve the properties in favor of the owner in fee." Kaplan v. Rainisch Bros., Inc., 160 Misc. 685, 289 N.Y.S. 1112, 1114 (Sup. Ct. 1936). See also Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Similar protection for farmers is found in the Frazier-Lemke Farm Mortgage Act of 1934, ch. 869, 48 Stat. 1289 (1934), as amended, ch. 792, 49 Stat. 942 (1935), and ch. 39 §§ 1, 2, 54 Stat. 40 (1940), a portion of the Bankruptcy Act that provides special arrangements to permit farmers to get on their feet financially before they lose their farms to creditors.

25. An effort to bail out New York City through a three year moratorium on enforcement of outstanding city debts was recently held unconstitutional by the New York Court of Appeals. Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976).

26. I.R.C. § 1034.

27. When stocks, diamonds, or antiques are sold, the government generally will share in any profits in the year realized. See I.R.C. § 1002(c). Compare also the tax benefits which can accrue to the landowner as opposed to the tenant who merely rents a place to live. The landowner can deduct any real estate taxes paid on the property, *id.* § 164, as well as the interest paid on the mortgage to finance the purchase. *id.* § 163. Meanwhile, the tenant of an apartment is without any tax benefit while the landlord gets the tax deductions for the interest and taxes covered by the tenant's rent.

28. See, e.g., Johnson v. Haynes, 330 S.W.2d 109 (Ky. 1959) (owner's failure to make repairs is no defense to a forcible detainer action even though lease contained agreement to repair); Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938) (lessee cannot refuse to pay rent because lessor breached agreement to repair unless the breach constituted constructive eviction).

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leased premises, the failure to make such repairs did not absolve the tenant from the obligation to pay rent.²⁹ In contrast, a purchaser of goods or services which are not delivered in accordance with the terms of a contract can defend an action by the seller to recover the purchase price by asserting a defense of recoupment pursuant to which the purchaser's loss is off-set against the claim of the seller.³⁰ The landlord's obligation to surrender quiet possession of the leased premises to the tenant in return for rent was a different obligation than the one to supply heat or hot water,³¹ and the landlord's failure to provide such necessities did not absolve the tenant occupying the premises of the obligation to pay rent.³²

The law of landlord-tenant relations, however, is one area of real property law where both judicial³³ and statutory³⁴ changes are presently being made to remedy many of the above inequities. Nevertheless, such changes have not been as widely or readily adopted as have comparable remedies in connection with the sale of goods.³⁵

The special status of land appears in the application of the theory of inverse condemnation. Government agencies that impose valid police power regulations on particular land are being challenged by landowners who allege inverse condemnation for the diminution in

29. See, e.g., *Welkner v. DiCarlo*, 181 Md. 15, 27 A.2d 351 (1942) (buyer cannot repudiate sales contract for seller's breach of agreement to service the goods, but may set off the amount paid for repairs).

30. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 225-26 (1969) (emphasis in original).

31. *Id.* at 231-39.

32. *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522, 527 (Tex. Civ. App. 1930).

33. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 *FORDHAM L. REV.* 123 127-30 (1971).

34. The Uniform Residential Landlord and Tenant Act, which has been adopted in ten states to date, provides additional protections to tenants from landlords who fail to live up to covenants in leases. *UNIFORM LANDLORD AND TENANT ACT* §§ 4.101-.107. For comments and an analysis by the Subcommittee on the Model Landlord-Tenant Act of the Committee on Leases of the American Bar Association's Section of Real Property, Probate and Trust Law, see *Proposed Uniform Residential Landlord and Tenant Act*, 8 *REAL PROPERTY, PROBATE & TRUST J.* 104 (1973).

Other states have also enacted legislation giving tenants a limited right to withhold rent or to make repairs and offset the cost against rent. See *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 *VAND. L. REV.* 689, 740-41 (1973).

35. For example, the Uniform Sales Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1906 and adopted in 37 states, authorized a buyer of goods to keep goods which were delivered in breach of a warranty and to diminish or extinguish the price due the seller. *UNIFORM SALES ACT* § 69(1)(a). The Uniform Commercial Code, which has replaced the Uniform Sales Act

the value of their land by virtue of government regulations.³⁶ Courts have found inverse condemnation even where the regulation has not involved physical invasion by the government of the property of the landowner.³⁷ There is no such analogue in government regulation of commercial interests or personal property.³⁸ Although inverse condemnation rationally would seem to be as applicable to personal property as to real property, we have found no instances of government being forced to pay the owner of a business or other personal property because of the exercise of valid government regulation. Government control over real property may be stricken as a deprivation of property without due process or for some other reason, but it appears that government can regulate many businesses or commodities and diminish their value substantially without payment to the owners for that loss in value.³⁹

Nothing demonstrates the chasm between the treatment of trade in land from the trade in personal property more than a comparison of the history of the regulation of the sale and trading in investment se-

and has been enacted in 49 states, provides that a buyer may deduct all or part of the damages resulting from a breach of contract from any part of the price still due under the contract. U.C.C. § 2-717.

The judiciary has also been slower to confront the problems of real property. For example, the courts' assault upon sales of defective goods began as early as 1916 in the landmark case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), whereas *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), holding landlords bound to a warranty of habitability, was not decided until 1970.

36. See Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URB. L. ANN. 1; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

37. See, e.g., *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) (the noise from the airplanes using the county airport deprived a local property owner of the air easement over his property); *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975) (inverse condemnation award where city substituted "Open Space" zoning ordinance for its previous plan to acquire plaintiff's property through eminent domain powers); *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959) (executive order forbidding low-flying airplanes over a national forest deprived resort owners of property, accessible only by airplane, for which they were entitled to compensation); *Charles v. Diamond*, 47 App. Div. 2d 426, 366 N.Y.S.2d 921 (1975) (property owner stated cause of action against village when state agency denied approval of sewer extension to his property because of village's failure to meet minimum state standards); *Eldridge v. City of Palo Alto*, 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1976); *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. Dist. Ct. App. 1964) (inverse condemnation caused by low-flying airplanes).

38. "While inverse condemnation is usually associated with real property, an as yet undeveloped concept may also include using it for personal property damage." Feder & Wieland, *Inverse Condemnation—A Viable Alternative*, 51 DEN. L.J. 529, 549 (1974).

39. See, e.g., *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (upholding the validity of a War Production Board order closing gold mining opera-

curities with the sale of land. Under federal law, as well as securities laws in many states, the sale and trading of investment securities has been subject to extensive regulation for more than forty years.⁴⁰

Although various states had become involved in some securities matters earlier in our history, the first general securities law was adopted in Kansas in 1911.⁴¹ The first comprehensive federal securities legislation was enacted in 1933 after the stock market crash of 1929.⁴² Brokers and dealers of securities are also regulated and must meet specified qualifications.⁴³ Even "investment advisors" are regulated.⁴⁴ The advertising materials used to offer securities to the public must be filed with and approved by the securities regulatory agency.⁴⁵ The federal rules narrowly define the scope of permitted advertising of securities offerings to provide some assurance the securities will not be "puffed" without giving potential investors the necessary data to evaluate securities for themselves. Persons who control organizations that have committed violations of the Securities Act may also be liable to the same extent as the organizations actually committing the violations unless the controlling person can establish a lack of knowledge or reasonable grounds to believe a violation had occurred.⁴⁶ The Securities Act extends to fraudulent interstate transactions in securities even though the securities involved may be exempt from registration requirements of the Act.⁴⁷ Furthermore, the Securities Exchange Act of 1934 specifically authorizes the Securities and Exchange Commis-

tions during World War II). Perhaps the most extreme example of the authority of government to regulate and even close a business without need to compensate owners is in the area of intoxicating liquors, where states are vested with broad regulatory powers under the 21st amendment to the United States Constitution. *See, e.g.*, *California v. LaRue*, 409 U.S. 109 (1972); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Green Mountain Post No. 1 v. Liquor Control Bd.*, 117 Vt. 405, 94 A.2d 230 (1953).

40. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970 & Supp. V 1975); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78j (1970 & Supp. V 1975); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79-6 (1970 & Supp. V 1975); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbb (1970 & Supp. V 1975); UNIFORM SECURITIES ACT. The latter act has been adopted or substantially adopted with modifications in 32 states. 1 BLUE SKY L. REP. (CCH) ¶ 4901.

41. I L. LOSS, SECURITIES REGULATION 23-25, 27 (2d ed. 1961).

42. *See id.* at 120, 129.

43. *See* Securities Exchange Act of 1934 § 15, 15 U.S.C. § 78o (1970 & Supp. V 1975); UNIFORM SECURITIES ACT §§ 201, 204.

44. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80b-18a (1970 & Supp. V 1975); UNIFORM SECURITIES ACT § 201(c).

45. Securities Act of 1933 § 5, 15 U.S.C. § 77e (1970); 17 C.F.R. §§ 230.134-.135a; UNIFORM SECURITIES ACT § 403.

46. Securities Act of 1933 § 15, 15 U.S.C. § 77o (1970).

47. *Id.* § 17, 15 U.S.C. § 77q.

sion to promulgate such rules as it deems necessary to protect the public against the use of manipulative or deceptive devices or contrivances in the sale of securities.⁴⁸

There has been substantial documentation of abuses in the subdivision and sale of land⁴⁹ but efforts to enact legislation to regulate land sales in a manner comparable to the regulation of securities have come up quite short.⁵⁰ To a limited extent, the federal securities laws as well as some state blue sky laws have been extended to cover sales of interests in real estate, such as condominiums and subdivision lots, where the particular objects of sale take on the character of traditional securities.⁵¹ Such interests are often sold to individuals who do not propose to use the property for permanent residences but intend to rent the property for income and often use the seller as an agent to manage and rent the property. Where it is apparent that real estate ventures purposely have been designed for sale primarily as investments rather than as residences, the securities regulation requirements have been held applicable.⁵²

Although securities have been regulated for half a century, it was not until 1968 that Congress enacted the Interstate Land Sales Full Disclosure Act.⁵³ That legislation, however, establishes a regulatory mechanism much less pervasive than the federal securities laws. When Congress finally did act, more than half the states had no legislation regulating the sale of undeveloped land.⁵⁴ Additional states have adopted laws to regulate sale of subdivided land in recent years, but

48. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1970).

49. See, e.g., M. PAULSON, *THE GREAT LAND HUSTLE* (1972); Finkler, *What You See Is What You Get*, 38 *PLANNING: THE ASPO MAGAZINE* 202 (1972).

50. See Case & Jester, *Securities Regulations of Interstate Land Sales and Real Estate Development—A Blue Sky Administrator's Viewpoint: Part I*, 7 *URB. LAW.* 215 (1975).

51. See, e.g., 17 C.F.R. § 231.5347 (1976); MO. REV. STAT. § 409.401(l) (1969); WASH. REV. CODE § 21.20.005(12) (1976); *Release of Colorado Division of Securities*, Nov. 6, 1970, 1 *BLUE SKY L. REP. (CCH)* ¶ 9721; *Ohio Securities Bulletin October 1973*, 2 *id.* ¶ 38,759.

52. See, e.g., *State v. Investors Security Corp.*, 297 Minn. 1, 209 N.W.2d 405 (1973); *Florida Realty, Inc. v. Kirkpatrick*, 509 S.W.2d 114 (Mo. 1974). Similar interpretations have also led to coverage of schemes to sell citrus groves, chinchillas, and a variety of other items in addition to stocks and bonds. See, e.g., *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946); *Hollywood State Bank v. Wilde*, 70 Cal. App. 2d 103, 160 P.2d 846 (1945). For a discussion of the coverage of the securities laws, see I L. Loss, *SECURITIES REGULATION*, 455-75 (1961).

53. 15 U.S.C. §§ 1701-20 (1970).

54. Case & Jester, *Securities Regulation of Interstate Land Sales and Real Estate Development—A Blue Sky Administrator's Viewpoint: Part II*, 7 *URB. LAW.* 385, 417 (1975).

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there is still little uniformity. The Federal Interstate Land Sales Full Disclosure Act, in comparison with the federal securities laws, does not contain any requirement for the registration or licensing of dealers or salesmen, or provisions for the control of advertising materials used in connection with the sale. Although a property report must be delivered to a purchaser,⁵⁵ there is nothing to preclude the use of substantial advertising prior to the registration of a subdivision to generate interest. The Secretary of the Department of Housing and Urban Development has authority to make and issue rules and regulations as necessary to exercise the functions and powers conferred by the Act,⁵⁶ but this grant of authority is by no means the broad grant found in the Securities Act for establishing rules to control the use of manipulative or deceptive devices in the sale of securities. There are civil and criminal penalties for violation of the Act,⁵⁷ but the liability is not extended to "controlling persons" as in the case of the securities laws, nor does the Act extend criminal or civil liability for the fraudulent sales of property sold pursuant to an exemption from the Act's registration requirements. Many states do require licensing or registration of real estate dealers, but it is stretching the imagination to suggest that the regulation of real estate dealers is as extensive as are the regulation and supervision of securities dealers under federal securities laws.

In short, reform in the public surveillance of transactions in land has lagged far behind the public supervision of the markets in personal property.

II.

Although we have suggested that land has occupied a rather special status, enjoying special privileges and exempt from much of the kind of regulation that is imposed on other businesses and personal property, it cannot, of course, be contended that land is not subject to regulation. The host of land use and environmental controls implemented and administered by all levels of government do affect the use to which particular land may be put and how that use may be carried out.

55. 15 U.S.C. § 1703 (1970).

56. *Id.* § 1718.

57. *Id.* §§ 1709, 1717.

Zoning, the traditional American legal mechanism for control of land use, is not a system of *public* regulation in the same sense as securities laws or public utility laws. Zoning policy and practice today reflect a contest between competing *private* interests in real estate: the developer versus the protesting property owners or neighbors. In zoning, the invitation to individuals to seek changes is a major feature of the law. Amendments, variances, conditional uses, planned unit developments all reflect the probability of change at the behest of some individual or group of individuals. Of the more than 10,000 reported decisions on American land use controls since *Euclid v. Ambler Realty Co.*,⁵⁸ substantially all of them arose because a zoning change was denied or because it was granted.⁵⁹ Although one party to the lawsuit is often a municipality, it usually is a surrogate for the real parties of interest—property owners who propose a change or object to a proposed change. Zoning has been constructed through the balancing of private interests, either in the courts or in political forums.⁶⁰ The landowner/developer who protests what he regards as an unconscionable public restraint on his property rights is really protesting the benefits that restraint grants to other owners of private property who resist his proposal. The often outrageous municipal practices that discourage or prevent development are essentially designed and intended to further the interests of one group of landowners, those who are aboard, against another group, those who want to sell their land to others who wish to come aboard. Indeed, the strong and generally successful opposition of local governments to efforts to establish a state-wide land use regulatory policy suggests that a zoning ordinance is frequently viewed more as the bylaws of a private club than it is as a statement of public policy.⁶¹

Beyond this special characteristic of zoning which rebuts its alleged “public” regulatory feature, neither zoning nor any other system of regulation exists which provides a comprehensive oversight of transactions in land similar to that found with respect to securities as well as other commodities and services deemed to be affected with a public

58. 272 U.S. 365 (1926).

59. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 3.01 (1974).

60. In Justice Stevens' dissent in *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976), he distinguishes between those zoning cases concerning matters that affect the general public interest in a municipality's basic zoning plan and those instances where private interests predominate and there is no threat to the general community-wide plan.

61. Babcock, *The Deplorable States*, THE CENTER MAGAZINE, Sept./Oct. 1976, at 23.

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interest. It is, for example, the declared national policy that a goal is "a decent home and a suitable living environment for every American family,"⁶² but most of the regulatory mechanisms applicable to land use do not provide any assurance that people in need of land or structures on land will be able to fulfill those needs at a reasonable cost. Indeed, more often land use and environmental regulations have forced the costs of housing and land to a point where many people are priced out of the market.⁶³

The kind and intensity of land development is, of course, regulated by government through regulatory programs such as building and housing codes and environmental controls, all of which affect the kind and quality of activities or development that may take place on land and, indirectly, the profits that may be obtained. Builders may be required to put in streets, sewers, curbs, sidewalks and a variety of other publicly imposed standards relating to the use and development of land.

Although such controls are ubiquitous, they do not impose on the vendor of land the same measure of oversight as is found, for example, in public utility law. Building or housing codes come into play only when a vendor elects to build a particular structure. Minimum requirements in terms of strength of building materials, use of electrical conduit rather than open wiring, plumbing and other specifications, room size, sanitation, and a variety of other requirements will significantly limit the builders choice of materials and manner of construction. Such codes, however, do not insure a consistency in the design, availability and quality of construction. There may be substantial variation in codes from one local jurisdiction to the next. In addition, they often contain unnecessarily high standards and are unevenly administered and enforced.⁶⁴ Furthermore, these codes provide little assurance that a building constructed in compliance with code requirements will maintain its standards after final inspection.⁶⁵

62. Housing Act of 1949, 42 U.S.C. § 1441 (1970).

63. See, e.g., Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 39-40 (1971).

64. See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 81 (1966).

65. The National Association of Home Builders is concerned with the problem of housing defects not protected by public law, and has endorsed a voluntary Home Owners Warranty Program to give protection to purchasers of new homes over a ten-year period. See Note, *The Home Owners Warranty Program: An Initial Analysis*; 28 STAN. L. REV. 357 (1976); NAHB's Home Warranty Plan—Where and How it Works, THE BUILDING OFFICIAL AND CODE ADMINISTRATOR, May 1975, at 30.

In contrast, public utilities that merchandise a service or personal property are subject to continuous oversight by regulatory agencies to assure a consistently high level of service. Utilities are not permitted to provide only that type of service they elect to provide, because regulatory agencies may require them to provide particular kinds of services deemed to be in the public interest.⁶⁶ These agencies also adopt rules and regulations concerning the quality of service provided by utilities,⁶⁷ and utilities are subject to monitoring and surveillance to assure that service quality standards are met on a continuing basis.⁶⁸

Environmental regulation may significantly affect land use.⁶⁹ When streams and lakes are polluted or sewage treatment capacity is overloaded, new industrial or residential construction may be precluded because there will be no place to dump wastes.⁷⁰ The current controversy in the United States Congress concerning amendments to the Clean Air Act to deal with the deterioration of air quality in areas

66. One example is the order of the Federal Communications Commission requiring telephone companies to permit customers to own certain pieces of telephone equipment and attach them directly to the telephone network without the protective devices previously required by telephone companies. *In re* Proposals for new or revised classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593 (1975).

Mandatory dedication of land or facilities (or payments in lieu thereof) may become more common in land use regulation through the exercise of subdivision and planned unit development controls. *E.g.*, *Associated Home Builders, Inc. v. Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Jerad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). Such exactions, however, do not impose a continuing obligation on the part of the traders in land once the land is developed and sold.

67. *See, e.g.*, Ill. Commerce Comm'n, Rule 10, General Order 24, Revised (1975) (specifying minimum water pressure in customer's water service connections); *id.* § 601-10, General Order 197 (1970) (specifying standards of quality for telephone service).

68. Under the typical system of property taxation, landowners have an incentive to let the quality of housing deteriorate because any improvements may subject the owner to an increase in taxes. G. STERNLIEB, *THE TENEMENT LANDLORD* 220-25 (1969). SENATE COMM. ON GOV'T OPERATIONS, 92D CONG., 1ST SESS., *PROPERTY TAXATION: EFFECTS ON LAND USE AND LOCAL GOVERNMENT REVENUES* 24-27 (Comm. Print 1971). In contrast, public utilities have an incentive to make investments in new land and improvements that will increase the rate base upon which a utility is permitted to earn a return through rates charged to customers. *See* P. GARFIELD & W. LOVEJOY, *PUBLIC UTILITY ECONOMICS* 56 (1964).

69. For an excellent study of the impact of environmental regulation, see F. Bosselman, D. Feurer & D. Callies, *EPA Authority Affecting Land Use* (March 12, 1974) (prepared for Office of Planning and Evaluation of the United States Environmental Protection Agency).

70. *See, e.g.*, Federal Water Pollution Control Act § 402(h), 33 U.S.C. § 1342(h) (Supp. V 1975). That act permits state environmental agencies or the federal EPA to sue a municipality to bar further hookups of new sources of pollution to municipal sewage treatment plants where the plants do not meet appropriate pollution standards.

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where air meets national ambient air quality standards⁷¹ will, if seriously enforced, influence the shape of future development throughout the country. Pollution control programs, however, are not designed for the purpose of controlling the use and development of land. Land use controls may be a means to an end in pollution control programs, but the end is clean air, clean water, or freedom from excessive noise and pesticides. Pollution control programs do not provide oversight concerning the type, quantity, and quality of land use activities unless those activities will interfere with the attainment of pollution control objectives.

Other environmental programs such as wetlands,⁷² shorelands,⁷³ critical areas,⁷⁴ and wild river programs⁷⁵ seek to provide a more pervasive and positive set of land use controls in the name of preserving the special natural features of particular geographic areas. Development along San Francisco Bay is controlled by the San Francisco Bay Conservation and Development Commission;⁷⁶ efforts are being made to preserve the deep blue of Lake Tahoe through a bistate compact agency, the Tahoe Regional Planning Agency;⁷⁷ public and private land alike are subject to controls by the Adirondack Park Agency in overseeing development in a 6,000,000 acre park in upstate New York.⁷⁸ These and other similar programs are all characterized by their limited application to particular geographic areas which have been identified as having a very special significance to citizens of a particular jurisdiction. They are also notable by their focus on everything but housing needs.

71. In *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 ENVIR. REP. (BNA) 1815 (D.C. Cir. 1972), *aff'd*, 412 U.S. 541 (1973), the Environmental Protection Agency was held responsible by the court to assure that state air quality implementation plans required by the Clean Air Act § 110, 42 U.S.C. § 1857c-5 (1970 & Supp. V 1975), do not permit significant deterioration of existing air quality in those places where air is cleaner than specified in national ambient air quality standards.

72. See, e.g., MASS. ANN. LAWS. ch. 131, §§ 40, 40A (Michie/Law. Co-op 1972 & Supp. 1975); VA. CODE § 62.1-13.1 *et seq.* (1973). The Massachusetts Wetland Protection Program is described in F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 205-34 (1971).

73. See, e.g., Shoreline Management Act of 1971, WASH. REV. CODE ch. 90.58 (1976).

74. See, e.g., The Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. ch. 380 (West 1974).

75. See, e.g., VA. CODE § 10-167 *et seq.* (1973).

76. CAL. GOV'T CODE § 66600 *et seq.* (West 1969 & Supp. 1975).

77. Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969).

78. Adirondack Park Agency Act, N.Y. EXEC. LAW § 800 *et seq.* (McKinney Supp. 1975-76).

Although land is subject to regulation that may affect the quality, quantity, and costs of development on particular land, real estate by and large retains its "special status." The principal means of land use regulation are fractured municipal regulations which are imposed as a result of superior persuasion by other landowners. The sale or trading in land is relatively immune from regulation, and unlike regulation of other commodities, land use policy shows little concern for a broad social interest.

A more fruitful approach to public policy on land would begin with an appreciation of the arcane ways in which the ownership of land has been annointed; ways which no longer deserve the protection not extended to ownership of, and transactions in, personal property. If the mystique of ten centuries of the development of real property law could be put aside, land regulation might be dealt with on a more pragmatic basis reflective of and complimentary to existing economic, social, and environmental public policies. The timeliness of such a reappraisal is suggested by the current restlessness about land use policy as we have known it for half a century.

III.

The development of a land use policy is, as Professor Norman Williams has suggested, at a "Y" fork.⁷⁹ Fifty years ago the states delegated direct and overt controls over private land use to municipalities by means of zoning and subdivision regulations. More recently, less obvious but equally influential control has been exercised by state and federal agencies in such areas as the underwriting of mortgage insurance,⁸⁰ highway programs,⁸¹ and environmental regulations.⁸² Which stratum of public control will emerge victorious is unknown.

In the past decade both of these levels of power have been challenged. The municipal dominance of overt controls has been subject to widespread criticism.⁸³ At the other level, the FHA has been ac-

79. 1 N. WILLIAMS, *supra* note 59, § 5.06.

80. See National Housing Act, 12 U.S.C. § 1701 *et seq.* (1970); M. CLAWSON, *SUBURBAN LAND CONVERSION IN THE UNITED STATES* 41-42 (1971).

81. See Federal Highway Act, 23 U.S.C. § 101 *et seq.* (1970). See generally 1 N. WILLIAMS, *supra* note 59, § 1.16.

82. See notes 69-78 and accompanying text *supra*.

83. See, e.g., R. BABCOCK, *THE ZONING GAME* 53-54 (1966); MODEL LAND DEVELOPMENT CODE, art. 7, Comment (American Law Institute); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 *STAN. L. REV.* 767 (1969).

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cused of initiating "redlining" and subsidizing the white ring around our central cities;⁸⁴ the highway lobby has discovered that the little old ladies in tennis shoes are a force to be reckoned with, from Franconia Notch in New Hampshire,⁸⁵ through Overton Park in Memphis,⁸⁶ to the Halawa and Moanalua Valleys in Hawaii,⁸⁷ and the environmentalists have been accused of everything from elitism to racism.⁸⁸

Those concerned with the economics of land transactions are also restless. They suggest it is necessary to find new methods to determine a fair level of expectation from investment in land. Land values often fluctuate substantially because of activities of government in granting favorable zoning, building highways, extending water and sewer mains, or any of a multitude of other factors. The landholder affected by such activities can reap enormous profits simply by having the good fortune to own land in the right place at the right time. Proposals have been made for ways to "recapture" some of the value added to land by public activity.⁸⁹ The chief of the United States Department of Transportation's Urban Mass Transportation Administration⁹⁰ and the administrator of the Federal Environmental Protection Agency⁹¹ have both urged development of programs to permit

84. See, e.g., Duncan, Hood & Neet, *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URB. LAW. 510, 511 (1975). Congress has reacted to charges and findings of redlining by enacting the Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, § 302, 89 Stat. 1125 (1975).

85. *Society for Protection of N.H. Forests v. Brinegar*, 381 F. Supp. 282 (D.N.H. 1975) (construction of freeway enjoined pending completion of impact statement where construction would require enlargement of park road).

86. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (Secretary of Transportation must show what factors he considered and how the decision was made to disburse federal funds for highway through public park where statute required showing that no "feasible and prudent" alternate route existed).

87. *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102 (D. Hawaii 1974), *rev'd*, 533 F.2d 434 (9th Cir. 1976) (construction of highway enjoined until the Secretary of Transportation made determination required by statute of alternate routes, minimizing harm).

88. For a collection of the criticisms, see R. BABCOCK & D. CALLIES, *ECOLOGY AND HOUSING: VIRTUES IN CONFLICT, IN MODERNIZING URBAN LAND POLICY, RESOURCES FOR THE FUTURE* 205 (M. Clawson ed. 1973).

89. Callies & Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 URB. L. ANN. 73 (1974); Rice Center for Community Design & Research (Nov. 1974) (prepared for U.S. Dep't Transportation, Office of University Related Research).

90. Remarks of R. E. Patricelli, 3 LAND AND THE ENVIRONMENT 172 (bi-weekly ed. 1975) (published by Business Publishers, Inc.).

91. Remarks of R. E. Train, *id.* at 180.

public agencies to realize more fully the incremental values created by public expenditures. Of course, the effect of public activity on land value is not always to produce a windfall to the landowner. The opposite may also happen.⁹²

Most of the criticism of current land use policy is directed at the American system that delegates land use control to the myriad of municipal governments which jealously seek to protect their sovereign power to control what happens to land within their own haphazard boundaries. The character of many American suburbs has been attributed, in large part, to the use of local land use controls to exclude "undesirable" types of development. Through such devices as large lot zoning, density controls, minimum floor area requirements, and other substantive controls, not to mention a Byzantine system of administrative procedures, the cost and type of housing in many suburban areas has been controlled in such a manner that only the expensive single family or multiple dwellings are feasible. Thus, many persons with low incomes, particularly racial minorities, are prevented from "polluting" the suburbs.⁹³ A look at some of the cases that crowd state and federal courts provides evidence of the continuing concern, at least in the state courts, for exclusionary zoning.⁹⁴ Some state legislatures in

92. Hagman, *Windfalls for Wipeouts: A Preliminary Report*, in 1 MANAGEMENT AND CONTROL OF GROWTH 275 (R. Scott ed. 1975).

93. R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING—LAND USE REGULATION AND HOUSING IN THE 1970'S 5-17 (1973); NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 2 at 211-17.

94. Contrast the responses of federal courts that have rebuffed efforts to break down apparent exclusionary land use policies with the responses from state courts that have been more forceful in overturning local efforts thought to be exclusionary. The federal cases are: *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976) (authorizing use of voter referendum before land use changes are authorized); *Warth v. Seldin*, 422 U.S. 490 (1975) (challenge to zoning ordinance as discriminatory toward low and moderate income groups dismissed for lack of standing); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding an ordinance restricting land use to single family residences and defining "family" to exclude more than two unrelated persons in a single residential unit); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970) (denial of injunction directing implementation of a zoning change permitting federally financed housing project, which had been nullified by a voter referendum). *See also* *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 97 S. Ct. 555 (1977) (upholding refusal to grant zoning change to permit multi-family units for low and moderate income persons).

The state court cases are: *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (restrictions requiring single family residences and large lots were violations of the New Jersey constitution's equal protection and due process clauses); *National Land and Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597, 612 (1965) ("A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon

the early years of this decade directed the establishment of programs pursuant to which state agencies are exercising an increasing influence and even direct control over important aspects of land use planning and control.⁹⁵

The paradox is that while some state legislatures and some state courts are questioning municipal domination, imaginative municipal governments are implementing initiatives to control more firmly the development of land within their jurisdictions. Such plans are receiving favorable acceptance by the courts, although scrutinized to prevent racial and economic discrimination.⁹⁶ Timed development ordinances,⁹⁷ moratoria on building permits,⁹⁸ controls to limit second home development,⁹⁹ historic preservation designations,¹⁰⁰ charter amendments to put a cap on total permissible dwelling units within a municipality,¹⁰¹ and other municipal control efforts going

the administration of public services and facilities can not be held valid"); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) ("... in enacting a zoning ordinance, consideration must be given to regional needs and requirements"); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (the constitutionality of restrictions significantly affecting residents of surrounding communities must be measured by the impact upon the welfare of the surrounding region, not merely the impact on the welfare of the enacting community). *See also* Babcock, *On the Choice of Forum*, 27 LAND USE LAW & ZONING DIGEST 7 (No. 6, 1975); Urban Land Institute Research Report 23, Fair Housing and Exclusionary Land Use (1974) (a summary of cases challenging exclusionary land use practices).

95. Fred Bosselman and David Callies documented this "quiet revolution" in their report prepared for the Council on Environmental Quality in 1971. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971). The "revolution," today more quiescent than quiet, was set back by the failure of Congress to pass national land use legislation. *See, e.g.*, Florida Environmental Land and Water Management Act of 1972, 14 FLA. STAT. ANN. § 308 *et seq.* (West 1973); Florida Local Government Comprehensive Planning Act, *id.* §§ 163.3161-3211 (requiring local government to adopt comprehensive plans after review of proposed plans by state); Oregon Land Use Law, ORE. REV. STAT. ch. 80 (1973).

96. *See, e.g.*, cases cited in note 94 *supra*.

97. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). *But see* *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236 (1975). In *Board of Supervisors v. Williams*, 216 Va. 49, 216 S.E.2d 33 (1975), the Virginia Supreme Court refused to uphold county efforts to influence the timing of development where it found public facilities were or would be available to serve the land in question.

98. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

99. *See* *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972).

100. *See, e.g.*, *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Maher v. City of New Orleans*, 256 La. 131, 235 So.2d 402 (1970); *Penn Central Transp. Co. v. New York*, 50 App. Div. 2d 265, 377 N.Y.S.2d 20 (1975). *See also* Gerstell, *Needed: A Landmark Decision*, 8 URB. LAW. 213 (1976).

101. The Boca Raton "housing cap" was declared unconstitutional in a decision of the trial court in *Boca-Villas Corp. v. E. E. Pence*, No. 73-106 CA (L) 01 F, Cir. Ct. of the 15th Jud. Dist., Fla. (Sept. 30, 1976). Although overturning the cap, and finding

beyond traditional zoning and subdivision programs have received judicial approval.

The disquiet over the present system does not only result from the struggle between those who seek to substitute regional control for municipal power and those who would invent ingenious techniques to maintain local control. The unrest is also apparent in the increasing demands that, in the larger cities at least, community organizations be given a greater voice in land use policies which affect their neighborhoods.¹⁰² The call for greater citizen participation in land use policy has been implemented by the increasing use of the initiative and referendum to check local legislative decisions on land development policy.

Perhaps the most renowned uprising was the passage of Proposition 20—the creation of the California Coastal Zone Conservation Commission—by a voter referendum in California in 1972.¹⁰³ Voters in San Antonio, Texas, recently forced a referendum on a regional shopping center approved by the San Antonio City Council and voted to reverse the Council's approval.¹⁰⁴ Other examples of voter referenda limiting action of local governing bodies are to be found.¹⁰⁵ Many of these programs and actions have been responses to the conviction that

there was no "rational relationship to a permissible municipal objective," the court stated: "If a reduction in Boca Raton's overall residential densities to 40,000 units would rationally promote public welfare without unnecessary and unreasonable consequences to private property rights, the city could legally utilize a variety of techniques, including a form of Cap." *Id.* at 4–5. For a description of the "housing cap" see Einsweiler, Gleeson, Ball, Morris & Sprague, *Comparative Descriptions of Selected Municipal Growth Guidance Systems: A Preliminary Report*, in 2 *MANAGEMENT & CONTROL OF GROWTH* 283, 299 (R. Scott ed. 1975).

Not all municipal initiatives have received judicial approval. *See, e.g.*, *Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976) (overturning a municipality's refusal to extend water and sewer service into a new area); *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (rejecting New York City's effort to grant transferable development rights to a landowner whose property was rezoned as "Special Park District" open to the public).

102. *See* OFFICE OF POLICY DEVELOPMENT AND RESEARCH, U.S. DEP'T OF HOUSING & URBAN DEV., *NEIGHBORHOOD PRESERVATION: A CATALOGUE OF LOCAL PROGRAMS* (1975).

103. CAL. PUB. RES. CODE § 27001 *et seq.* (West Supp. 1976).

104. *San Antonio Express News*, January 18, 1976, at 1, col. 1–A.

105. *See, e.g.*, *San Diego Bldg. Contractors Ass'n v. City Council of San Diego*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974) (initiative to pass ordinance limiting height of buildings in coastal zone); *Builders Ass'n of Santa Clara/Santa Cruz Counties v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974) (moratorium on residential zoning passed by voters). For a brief summary of constitutional amendments, initiatives, and referenda submitted to voters across the country in November 1974, many of which concerned land use or environmental issues, see *New Legislation*, 27 *LAND USE LAW AND ZONING DIGEST* 20–27 (No. 2, 1975).

municipal governments have lacked a resolve to resist the blandishments and political pressure from interests seeking to use land for their personal gain.¹⁰⁶ One can only speculate as to what effect the United States Supreme Court decision in *City of Eastlake v. Forest City Enterprises, Inc.*,¹⁰⁷ which upheld a charter provision requiring a referendum before final approval of land use changes, is going to have in encouraging even greater resort to the polls to preclude new development.

So this is an era when the old verities on land use policy are up for grabs. The environmentalists, after five years of persistent victories, sense a backlash and protest that the rape goes on unabated; the developers are incredulous that municipalities can lawfully take away what they regard as their inalienable rights in property; and the civil libertarians curse both their houses, confident that the ecologists too often serve as a respectable if unwitting cover for less legitimate purposes, yet nervous of making an entente with the builders against a perceived common enemy. Finally, those associated with municipal agencies are coming to realize that they are at the end of an era of tranquility, at the close of a half century during which all powers to regulate land use affairs were unquestionably municipal.

There may be a common ground upon which an acceptable accommodation among those divergent interests may be reached. What is necessary is this: that a theoretical base for a land use policy be constructed that has some prospect for achieving reform, will be acceptable to most interested parties, and is based on some established parallels in Anglo-American law and politics.

IV.

The flaw in the current debate on land policy is that the choices offered by the antagonists often are too extreme. Either the landowner should be compelled by uncompensated regulation to make no economic use of his land or, indeed, to dedicate it to the public, or he should be free to do as he pleases, subject to whatever accommoda-

106. See generally M. MOGULOF, *SAVING THE COAST* 1-2 (1975).

107. 96 S. Ct. 2358 (1976). The United States Supreme Court held that the referendum did not violate the federal constitution. Within a few months of this decision, eighteen Cleveland suburbs had adopted charter amendments requiring a referendum on every zoning change. *Cleveland Plain Dealer*, July 18, 1976, § 1, at 1, pt. 2.

tion he can make with other landowners (neighbors) in any one of the multitude of jurisdictions that may have some voice on a development proposal.¹⁰⁸ As long as the issues remain so polarized, a land use policy acceptable to most people is unlikely. We believe the current debate on land use policy may benefit from an examination of the long-established treatment of businesses "affected with a public interest" including, but not limited to, public utilities.

A century ago, in *Munn v. Illinois*,¹⁰⁹ the United States Supreme Court held that Illinois could regulate the prices charged by warehousemen. The plaintiff alleged a "taking." The Court said government can regulate "the conduct of its citizens one towards another and the manner in which each shall own his own property, *when such regulation becomes necessary for the public good.*"¹¹⁰ The Court added:

In their exercise [of these public powers] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.¹¹¹

The Court repeated the wisdom of Lord Chief Justice Hale: "[W]hen private property is 'affected with a public interest, it ceases to be *juris privati* only.'"¹¹²

There is no magical formula in the Anglo-American precedents to determine when a private interest is affected with a public interest and ceases to be *juris privati*. Statutes and cases throughout the United States suggest the breadth of regulation which has been applied to a variety of businesses, commodities, or services. For example, among the various items that have been subject to extensive regulation, including in many instances the regulation of price, the quality of ser-

108. Consider, for example, the plight of the owners of wetlands who were denied authority to fill their land by the Wisconsin and New Hampshire Supreme Courts in *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) and *Sibson v. State*, 336 A.2d 239 (N.H. 1975). Their lands in the natural state were not suitable for the owners' purposes yet they were not permitted to fill the land and they were awarded no compensation. *But see MacGibbon v. Board of Appeals*, 340 N.E.2d 487 (Mass. 1976) in which the Massachusetts Supreme Court overturned for the third time a municipality's denial of a permit to fill portions of a coastal marshland.

109. 94 U.S. 113 (1876).

110. *Id.* at 125 (emphasis added).

111. *Id.*

112. *Id.* at 126.

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vice and, indeed, the prudence of investment and rate of return, are milk,¹¹³ theatre tickets,¹¹⁴ alcoholic beverages,¹¹⁵ bread,¹¹⁶ used cars,¹¹⁷ agricultural commodities,¹¹⁸ water,¹¹⁹ sewer services,¹²⁰ natural gas,¹²¹ electricity,¹²² telephone and telegraph services,¹²³ transportation services of all kinds,¹²⁴ warehouses,¹²⁵ docks,¹²⁶ toll bridges,¹²⁷ stockyards,¹²⁸ ice,¹²⁹ steamheating,¹³⁰ and cotton ginning,¹³¹ as well as other enterprises.

In *Nebbia v. New York*,¹³² the Supreme Court upheld against a due process challenge a New York statute establishing a milk control board with authority to fix minimum and maximum retail prices. The Court stated: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."¹³³

113. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934). *Contra*, *Gwynette v. Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960).

114. *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964).

115. See, e.g., *Dave's Market, Inc. v. Department of Alcoholic Beverage Control*, 222 Cal. App. 2d 671, 35 Cal. Rptr. 348 (1963); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 45 Misc. 2d 956, 258 N.Y.S.2d 442 (Sup. Ct. 1965), *aff'd*, 23 App. Div. 2d 933, 259 N.Y.S.2d 644 (1965); *Pompei Winery v. Board of Liquor Control*, 167 Ohio St. 61, 146 N.E.2d 430 (1957).

116. See, e.g., *State v. Hudson House, Inc.*, 231 Or. 164, 371 P.2d 675 (1962).

117. See, e.g., *State v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1966); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360 (1960).

118. See, e.g., *Dighton v. Coffman*, 178 F. Supp. 114, *rehearing on additional facts*, 179 F. Supp. 682 (E.D. Ill. 1959); *Luke v. Review Comm.*, 155 F. Supp. 719 (W.D. La. 1957).

119. See, e.g., *Lamb v. California Water & Tel. Co.*, 21 Cal. 2d 33, 129 P.2d 371 (1942).

120. See, e.g., *In re Central Jersey Sewerage Co.*, 66 P.U.R.3d 387 (N.J. 1966).

121. See, e.g., *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

122. See, e.g., *Metropolitan Dist. Comm'n v. Department of Pub. Util.*, 352 Mass. 18, 224 N.E.2d 502 (1967).

123. See, e.g., *Granite State Alarm, Inc. v. New England Tel. & Tel. Co.*, 111 N.H. 235, 279 A.2d 595 (1971).

124. See, e.g., *Summerfield v. Civil Aeronautics Bd.*, 207 F.2d 207 (D.C. Cir. 1953) (airlines); *River Lines, Inc. v. Public Util. Comm'n*, 62 Cal. 2d 244, 398 P.2d 144, 42 Cal. Rptr. 104 (1965) (water carriers); *Market St. Ry. v. Railroad Comm'n*, 24 Cal. 2d 378, 150 P.2d 196 (1944) (street railway); *City of Chicago v. Illinois Commerce Comm'n*, 34 Ill. 2d 49, 213 N.E.2d 550 (1966) (railroad rates).

125. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1876).

126. See, e.g., *United States v. Berger*, 66 F. Supp. 950 (D. Alas. 1946).

127. See, e.g., *Clarksburg—Columbus Short Route Bridge Co. v. Woodring*, 89 F.2d 788 (D.C. Cir. 1937).

128. See, e.g., *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

129. See, e.g., *Garner v. Tulsa Ice Co.*, 1976C P.U.R. 613 (Okla. 1916).

130. See, e.g., *In re Montana-Dakota Utilities Co.*, 89 P.U.R. 471 (N.D. 1950).

131. *Oklahoma Cotton Ginners' Ass'n v. Walker*, 168 Okla. 459, 33 P.2d 766 (1934).

132. 291 U.S. 502 (1934).

133. *Id.* at 527-28.

The Court also recognized that the selling of milk was not a public utility, but nevertheless concluded that the sale of milk could be subject to state regulation:

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.¹³⁴

Due process required only that the law “not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”¹³⁵

Millers and wharfingers, theatre tickets, and used cars can hardly be said to be more affected with a public interest than dealings in and the use of land. Land is a limited if not depleting commodity which is intimately bound up with our public health and welfare. It is a commodity the use and misuse of which can impose enormous public and external costs. Yet land has been treated with a forbearance by the public that is not extended, for example, to the ownership and sale of natural gas or electricity, or the sale of liquor, or the use of the air waves. The ownership of land is often identified with outrageous profits and catastrophic losses, each such consequence more often than not attributable to a spillover from some public act or expenditure. When public surveillance of dealings in and use of scores of other commodities is the accepted responsibility of the states or the national government, the regulation of the use of land should not be left to the caprice and parochial intents of multitudes of local governments, each defining the public welfare in its own image, or in the image of a clutch of neighboring property owners.

Land, and as such its ownership, continues to benefit or suffer, in a variety of quixotic ways, from an ancient inheritance that seems anachronistic in the last years of the Twentieth Century. We propose to

134. *Id.* at 531–32.

135. *Id.* at 525.

examine a few of the current issues in land use policy that might benefit from an extension of the old constitutional doctrine that permits public regulation of a "commodity affected with a public interest," whether or not that commodity or service is labelled a "public utility."¹³⁶

V.

A. *Public Scrutiny of Profits and Performance*

Alleged windfalls in land development—speculative profits—are a common charge in many sections of the country. The protest is notably strident when the windfalls to landowners are a result of the decisions of public agencies to exercise land use or environmental controls in a particular manner or to make investments of public funds in public facilities which benefit particular land.¹³⁷ A number of devices have been suggested to extract from landowners some portion of the public expenditures that increase the value of private land.¹³⁸ Among the more common techniques are special assessments,¹³⁹ and requirements that the developer dedicate land, improve public facilities, or make payments to public agencies in lieu of dedication or improvement.¹⁴⁰ Vermont has adopted a Land Gains Tax in an effort to dis-

136. It should be emphasized that in most instances the analogues in public utility and licensing laws assume that the entrepreneur will be a private profit-seeking agency, not a public body. The licensed or regulated enterprise receives some protective benefits, often in the form of a more orderly or predictable market not extended to its counterpart in the so-called free market, in return for the greater scrutiny to which it is subjected. Because the entrepreneurial function remains in private hands, the decision to enter the market rests with the private sector. Only after private enterprise alone has made that decision does public scrutiny take place. The suggestion that our experience with public utility or licensing laws be extended to dealings in land carries with it the assumption that private enterprise will continue to make the basic decisions of when and how to develop what land. The contrary notion that government knows best when and under what conditions to develop land flies in the face of our bleak history the last twenty years of urban clearance, public housing, and highway construction, not to mention the recent unhappy course of the New York Urban Development Corporation. This should not, however, be regarded as a dissent from proposals that government should undertake land banking; only that the initial decision to undertake development should be by the private sector.

137. Professor Donald Hagman has spent two years researching this question. See Hagman, *supra* note 92.

138. *Id.* at 281-83.

139. See, e.g., 14 E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 38.38 (3d ed. 1970).

140. See, e.g., *Mid-Continent Builders, Inc. v. Midwest City*, 539 P.2d 1377 (Okla. 1975) (requirement that builder install water mains and dedicate them to city held

courage land speculation and, not so incidentally, out-of-state developers.¹⁴¹ The Vermont Supreme Court upheld the tax law and acknowledged that deterrence of land speculation may have been one of the legislative purposes behind the taxes:

[W]e may take judicial notice of an increasing concern within the State over the use and development of land as a natural resource Speculation falls within the ambit of such concern as a land use; indeed it has a bearing on many other uses to which the land might be put.¹⁴²

“Recapture of value” recently has concerned those urban planners and transit authorities who note the consequence to market values of land abutting fixed rail transit stops.¹⁴³ Although it is not our purpose to choose between specific techniques to recover a share of the profit from these coups, we do suggest that advocates of “recapture” should not have to apologize—let them look to traditional public utility regulation.

The concept of a limitation to “fair rate of return” is not alien to our legal system. The entrepreneur who enjoys a special status because of benefits conferred by the public has been subject to public control over his rate of return for at least a century. In 1923, the United States Supreme Court in *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*¹⁴⁴ dealt specifically with the issue of the return on investment to which a utility is entitled and concluded that there is no constitutional right to such profits as might be anticipated in other highly profitable or speculative ventures:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience

not an unconstitutional taking). Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

141. VT. STAT. ANN. tit. 32 § 10001–10010 (Supp. 1974). See Baker, *Controlling Land Uses and Prices by Using Special Gain Taxation to Intervene in the Land Market: The Vermont Experiment*, 4 ENVIRONMENTAL AFFAIRS 427 (1975). The province of Ontario, Canada, in an effort to restrain land speculation and the consequent increase in land and housing prices, has enacted a Land Speculation Tax to tax gain on the disposition of certain real estate. See Smith, *The Ontario Land Speculation Tax: An Analysis of an Unearned Increment Land Tax*, 52 LAND ECONOMICS 1 (1976).

142. *Andrews v. Lathrop*, 132 Vt. 256, 315 A.2d 860, 863 (1974).

143. See notes 89–91 and accompanying text *supra*.

144. 262 U.S. 679 (1923).

of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties¹⁴⁵

In a subsequent case the Court held that the return can properly be measured on the actual cost of the investment rather than any market or reproduction cost or value.¹⁴⁶ Despite whatever increase in value may accrue to the property of a public utility after an investment has been made, there is no right on the part of the owners to realize that increase at the expense of the ratepayers. Furthermore, it is clear that a fair return is not to be mistaken for a publicly guaranteed rate of return—witness the repeated wipeout of shareholders in railroad reorganizations.¹⁴⁷

The only examples we have uncovered of direct government regulation of prices affecting private land are rent controls imposed in various parts of the country. Such controls have been upheld as constitutional exercises of governmental authority.¹⁴⁸ The supreme court of New Jersey recently upheld rent controls adopted by the Township of Parsippany-Troy Hills.¹⁴⁹ The court reviewed a number of tests for determining the fair value of rental property and indicated that utility precedents are of value in determining whether rent controls permit a reasonable return to the apartment owner.¹⁵⁰ In discussing the question of what is a “just and reasonable return,” the New Jersey court

145. *Id.* at 692.

146. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

147. *See, e.g., Public Serv. Co. of N.H. v. State*, 113 N.H. 497, 311 A.2d 513, 516 (1973) (“The right of a utility to receive just and reasonable rates is not a guarantee of net revenues regardless of circumstances”).

148. *See, e.g., Bucho Holding Co. v. Temporary State Housing Rent Comm'n*, 11 N.Y.2d 469, 184 N.E.2d 569, 230 N.Y.S.2d 977 (1962). *But cf. City of Miami Beach v. Fleetwood Hotel Inc.*, 261 So.2d 801 (Fla. 1972) (city has no power to enact a rent control ordinance without legislative authorization from the state).

149. *Troy Hills Village v. Township Council*, 68 N.J. 604, 350 A.2d 34 (1975).

150. 350 A.2d at 43–46. The New Jersey court went on to discuss allowances for expenses of apartment operators.

Finally, it should be noted that the constitution does not require that inefficient operators be permitted the same return as efficient managers. . . . When an unreasonable expense has been incurred, the court should reject it and substitute a more reasonable alternative in its place. Plaintiff's books are, at best, merely *prima facie* evidence of expenses. They are always open to question for lack of reasonableness.

Id. at 46. The court also held that each apartment complex must be treated separately and one cannot subsidize another.

echoed the opinions of other courts that upheld the validity of public regulation of private activity involving personal property or services:

[T]o be "just and reasonable" a rate of return must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit. A just and reasonable return is one which is generally commensurate with returns on investments in other enterprises having corresponding risks. On the other hand it is also one which is not so high as to defeat the purposes of rent control nor permit landlords to demand of tenants more than the fair value of the property and services which are provided. The rate need not be as high as existed prior to regulation nor as high as an investor might obtain by placing his capital elsewhere.¹⁵¹

Rent controls, however, have had a rather limited application¹⁵² and do not directly control the often speculative and profitable transactions involving the sale of land. More often than not they have been inconsistent with a public rhetoric directed toward more and better housing.

Decisions by the management of public utilities on capital expenditures are scrutinized for inflated or imprudent investments to assure that customers are not required to pay for facilities or to provide a return on investment in facilities which are not reasonably required to provide adequate service.¹⁵³ As one court stated:

If . . . construction undertaken by the Company is "wasteful," or its expense is unwarranted by the demand probable at the necessary price for service produced by it, or if "proper economies in management are lacking" so that operating expenditures are shown to be excessive or overestimated, unwarranted investments may be excluded from rate base, and unjustified expenditures from the determination of a reasonable return.¹⁵⁴

151. *Id.* at 47 (citations omitted).

152. For example, some courts have held such ordinances can be justified only in emergency situations. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Block v. Hirsh*, 256 U.S. 135 (1921); *Baar & Keating, The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447 (1975).

153. See, e.g., *Latourneau v. Citizens Util. Co.*, 125 Vt. 38, 209 A.2d 307, 311 (1965) (expenditures for water rights unwarranted, therefore cannot be included in the rate base).

154. *New England Tel. & Tel. Co. v. State*, 95 N.H. 353, 64 A.2d 9, 15 (1949).

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In determining the base on which a return is allowed for utility rates, no allowance is permitted in the rate base for the monopoly value of the franchise.¹⁵⁵ A leading text on public utility economics states the general rule: "Although there is no dispute that the monopoly franchise is valuable, it is recognized as having originated in a grant by the public."¹⁵⁶ In land development, to the contrary, the monopoly incident to location near a *public* investment can be a major factor in a windfall return.

Operations of utilities are also scrutinized to assure that some reasonable degree of service is being rendered to the public.¹⁵⁷ When a utility fails to provide adequate service, regulatory agencies may require a utility to make such improvements as are deemed necessary.¹⁵⁸ The obligation to provide adequate service does not mean that a utility must provide the highest possible quality of service, but, rather, that service be reasonable in terms of public demands, costs, and the condition of the utility.¹⁵⁹ In addition, the quality of the service a utility renders the public has been held to be relevant to the question of the allowable return on investment.¹⁶⁰ Where a utility provides poor or inefficient service, it can expect regulatory agencies to be less generous in setting an allowable return on investment. Conversely,

155. See, e.g., *Clark's Ferry Bridge Co. v. Public Serv. Comm'n*, 291 U.S. 227, 237-38 (1934) (valuation above fair market value not allowed for the value of the location of the bridge); *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972). The North Carolina court said rates are determined with certain objectives:

(1) To produce a fair profit for its stockholders, in view of current economic conditions, (2) maintain its facilities and service, and (3) compete in the market for capital. . . . The fixing of rates for service which will enable the utility to do these things, and no more, is the ultimate objective of rate making.

189 S.E.2d at 738.

156. P. GARFIELD, *supra* note 68, at 85.

157. See, e.g., *Elk Run Tel. Co. v. General Tel. Co.*, 160 N.W.2d 311 (Iowa 1968); *Southwest Gas Corp. v. Public Serv. Comm'n*, 86 Nev. 662, 474 P.2d 379 (1970); *Northwestern Tel. Serv. Co. v. Public Util. Comm'n*, 175 Ohio St. 300, 194 N.E.2d 434 (1963); N.C. GEN. STAT. § 62-131(b) (1975); VA. CODE § 56-234 (1974).

158. I A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 276 (1969).

159. F. WELCH, *CASES AND TEXT ON PUBLIC UTILITY REGULATION* 127 (1968).

160. See, e.g., *In re General Tel. Co.*, 89 P.U.R.3d 92 (Ark. 1971); *In re New England Tel. & Tel. Co.*, 84 P.U.R.3d 130 (Mass. 1970); *State ex rel. Utilities Comm'n v. General Tel. Co.*, 285 N.C. 671, 208 S.E.2d 681 (1974); *In re United Tel. Co.*, 2 P.U.R.4th 299, 311 (N.J. 1973); *In re Newport Elec. Corp.*, 96 P.U.R.3d 306 (R.I. 1972).

The Illinois Supreme Court has stated that one of the functions of the Illinois Commerce Commission is to maintain "a balance between the rates charged by utilities and the services performed." *Village of Apple River v. Illinois Commerce Comm'n*, 18 Ill. 2d 518, 523, 165 N.E.2d 329, 332 (1960).

“[t]he reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more.”¹⁶¹

The law is clear that parties making the decision to conduct business vitally affecting the public interest, such as utilities, can be subject to extensive regulation with respect to the quality of the service they provide, the return they will be permitted to earn at the expense of the public, and the reasonableness of the investments they make in conducting the business. It seems reasonable that when public expenditures or the exercise of public authority enhance the value, and consequently the profits, of that vital but limited public resource, land, it is proper that the public exercise some overview of the profit the owner of land will realize from that property. Such oversight should assure that the public not be forced to pay a price which gives the land speculator unreasonable profits attributable to public favors.

The only reason such a suggestion may be shocking is because it is land, not traditional utility or common carrier services, being considered. It is an inadequate rejoinder to assert that utility regulation is based on the need to control an essential natural monopoly such as gas or electricity. That begs the question. Gas and electricity are in competition, both between themselves and with unregulated forms of energy. The finite land which is available clearly is no less essential to society. Why then should transactions in land not be subject to greater and less parochial public scrutiny than is the case today?

The apparent difficulties in transplanting similar public controls to profit, price, and service in land development may be real or they may only appear perplexing because of our historical block concerning transactions in land. Surely, the development of a regulatory system would involve no more obtuse jargon and sanctified formulae than have accompanied the evolution of the regulation of pricing, profit, and quality of service by regulated utilities. Today the developer who proposes a large scale land development under a planned development ordinance must negotiate every aspect of his proposal from allowable densities to contributions of cash or land. There is no reason why he should not also be subject to scrutiny over the prudence of his investment and the rate of his return. The developer should be bound as

161. *Missouri ex rel. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n.* 262 U.S. 276, 291 (1923) (Brandeis, J., concurring).

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well to his representations on quality of service.¹⁶² One thing seems sure—such a reform would underscore the need to shift decisions over major land development from the municipality to the state with the former playing the role of advocate, either for or against the proposal, in a state forum.¹⁶³

B. *Quotas and Priorities: Quantitative Controls and Permissible Discrimination*

A second and substantially different land use issue might benefit from an examination of the precedents in not only utility but also licensing law. The traditional zoning rationale tells municipalities to take into account “the character of the district.”¹⁶⁴ Under traditional land use dogma “more is better.” The first intrusion is the excuse, le-

162. For example, in allocating station licenses, the Federal Communications Commission (FCC) must take into account the adequacy of the service provided by radio and television licensees to the communities they serve. Those licensees that fail to provide sufficient community oriented programs and a fair treatment of issues of public concern may find themselves without a new license as did a television station in Jackson, Mississippi, which lost its license because of its racially biased programming. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). In its supervision of station licenses, the FCC must also consider the program format of existing licensees to determine whether a change in the format that may result from FCC action is in the public interest. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). The Court of Appeals for the District of Columbia held that if the transfer of a license would result in the loss of a classical music format that would be suffered by a special audience, the FCC had to consider whether the transfer would serve the public interest. *Id.* at 262.

163. Regulatory agencies at the state level have been responsible for utility regulation in most states for most of the twentieth century. See FEDERAL POWER COMM'N, FEDERAL AND STATE COMMISSION JURISDICTION AND REGULATION OF ELECTRIC, GAS AND TELEPHONE UTILITIES, TABLE 5, REGULATION OF RATES—MISCELLANEOUS 14 (1973). What movement there has been to shift the locus of utility regulation authority in recent years has been in the direction of removing what authority existed in municipalities to state agencies. For example, Minnesota has expanded the role of its Public Service Commission to include regulation of electric and natural gas utilities, MINN. STAT. ANN. § 216B.01–.67 (Supp. 1976), while South Dakota and Texas have created new state regulatory agencies superseding municipal authorities. S.D. COMPILED LAWS ANN. ch. 49–34A (Supp. 1976); TEX. CIV. CODE ANN. art. 1446c (Vernon Supp. 1975–76). The pitfalls of scattered municipal regulation of utilities was illustrated in Texas where the Southwestern Bell Telephone Company was discovered keeping two sets of books—one for its own internal purposes and one to show municipal officials when seeking rate hikes. *Bell Explains Two Sets of Books*, San Antonio Express-News, Nov. 28, 1974, § A, at 1, col. 3; *Bell's Rate Computations Allow Extra Profits*, San Antonio Express-News, Dec. 12, 1974, § A, at 2, col. 1. It is unlikely that utility regulation will be shifted back to municipalities.

164. THE ADVISORY COMMITTEE ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1924); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.25 (1968); 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.24 (3d ed. 1965).

gally, for the next. The presence of one gas station at an intersection is the justification for a second. The first highrise to enter the three-story brownstone neighborhood is the camel's nose under the tent for a wall of highrises. The first half-way house in a neighborhood is often the precursor of another and another. And the rub with the "fair share" low-income housing schemes—even if they do prove to be more than noble proclamations—is that they do not protect the participating communities from the developer who is not a party to an intermunicipal agreement and sees a financial opportunity in exceeding the quota in a particular community. If a developer selects his neighborhood with care, the traditional zoning doctrine which looks to the "character of the neighborhood" will facilitate his effort to break the "fair share" plan. In short, in land use law today there is little law to justify quantitative controls, a concept that may be essential to brake the tendency of the real estate market to congregate.

The concept of quotas is nothing new to licensing law. The first statute in England to provide for a limit on the number of ale houses was Henry VII's law of 1495.¹⁶⁵ Five centuries later, state and municipal governments in the United States have similar authority over dispensers of intoxicating beverages and the presence of five taverns may be a legal basis for a public decision to exclude a sixth.¹⁶⁶ The concept of priorities and quotas—discrimination if you will—when authorized by the public agency, is also well established in public utility law. For example, the number of available radio frequencies is limited. To avoid confusion and interference that could result from attempts by radio broadcasters to utilize frequencies without adequate consideration to the use of the same frequency by others, the United States Congress enacted provisions of the Communications Act of 1934¹⁶⁷ requiring the licensing of radio broadcasting.¹⁶⁸ The Federal Communications Commission controls the number of radio and tele-

165. *The Evolution of the 'Pub'—A Sketch of the Earlier History of the Licensing Laws*, 20 THE L. REV. 316 (1904).

166. *See, e.g.*, *Miller v. Zoning Comm'n*, 135 Conn. 405, 65 A.2d 577 (1949) (upholding zoning ordinance that prohibited permits if another establishment selling alcohol was within 1500 feet); *Paron v. City of Shakopee*, 226 Minn. 222, 32 N.W.2d 603 (1948) (upholding limitation to five licensed premises within the city).

167. 47 U.S.C. §§ 151-609 (1970).

168. *Id.* §§ 301-99. *See also* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

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vision licenses permitted to operate in a given area and the conditions under which the licensees operate.¹⁶⁹

Perhaps the most graphic and recent examples authorizing public regulatory agencies to establish priorities or quotas regarding the provision of goods and services are the various programs used by natural gas distribution companies to deal with gas shortages by means of a freeze on new attachments to protect existing customers or by a limit on deliveries to existing customers. Among applicants for new gas service, utilities are permitted, even directed to give priority to residential consumers over commercial and industrial users.¹⁷⁰ Such actions are designed to preserve a limited amount of fuel which may be declining in relation to the demand to assure a supply for those residential consumers least able to secure an alternative.¹⁷¹

In land use regulation a quota system will, of course, raise difficult problems of equity. Quantitative control over half-way houses or gas stations is relatively easy. If, however, my neighbor obtains permission to build the only high-rise in the block, this undoubtedly confers special privileges on him, but in addition, and unlike the radio license, it may have an adverse impact on the marketability of my neighboring property for a single family home or a duplex. The answer may require a payment to me by the high-rise "licensee" as consideration for my covenant not to develop. In effect, I would share in his development profits.

Existing land use controls do discriminate and establish priorities to the extent they define what uses may be carried out on what land. It is instructive, however, to contrast the experience in land use control

169. 47 U.S.C. § 303 (1970).

170. *E.g., In re Columbia Gas of W. Va., Inc.*, 10 P.U.R.4th 146 (W. Va. 1975). For example, utilities have been directed to refuse to provide gas to heat new swimming pools and to discontinue service to restaurants that continue to use certain types of decorative gas lamps. *See National Swimming Pool Inst. v. Kahn*, 48 App. Div. 2d 736, 367 N.Y.S.2d 869 (1975); *Leroy Fantasies, Inc. v. Swidler*, 44 App. Div. 2d 266, 354 N.Y.S.2d 182 (1974); Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 1 ENERGY MANAGEMENT (CCH) ¶¶ 1021-34 (1977), which authorizes the President, for a limited period of time, to allocate natural gas supplies among interstate pipelines if severe natural gas shortages in any region endanger supplies to "high-priority uses."

171. The same social policy that seeks to protect the utility services to individual residential customers vis-à-vis large industrial or commercial users can be seen in utility rate structures that may impose a higher rate on industrial or commercial customers than on residential customers because service has a higher "value" to such users. *See J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES* 83-84 (1961); P. GARFIELD *supra* note 68, at 142-45.

systems with public utility regulatory agencies that have authority to establish priorities and to order the regulated utilities to meet the priorities so that the over-all public interest is served. Land use control systems have little muscle in today's world to assure that whatever priorities are set will in fact find expression in actual land use and development beyond precluding non-priority uses or developments. Some recent efforts to require a specified percentage of low and moderate income housing as a condition to approval of a subdivision have not met with success.¹⁷²

We question whether there is a constitutional principle which compels a distinction between the establishment and implementation of priorities and quotas in the sale of electricity or natural gas but not in the sale and development of land.

Occasionally there will be a measure such as the Massachusetts "anti-snob" zoning legislation that permits a qualified developer of low-income housing, with the approval of a state agency, to override local zoning that prevents such housing.¹⁷³ Some recent court opinions have suggested that community development controls will not be upheld if they do not accept a "fair share" of housing demand,¹⁷⁴ do not give "the opportunity for the location of appropriate housing for all classes of our citizenry,"¹⁷⁵ or do not balance the local desire to maintain the status quo within the community with regional housing needs.¹⁷⁶ However laudable such judicial responses may be, courts recognize they are unable to effectively cure problems of lack of housing in absence of direct government action.¹⁷⁷ Significant con-

172. See, e.g., *Board of Supervisors v. De Groff*, 214 Va. 235, 198 S.E.2d 600 (1973). See also *Mahaley v. Cuyahoga Metropolitan Hous. Auth.*, 500 F.2d 1087 (6th Cir. 1974). But see *Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976), which upheld a plan of the City of Petaluma, California to limit the number of new dwelling units to be permitted during a five-year period. The plan required that approximately eight to twelve percent of the units be constructed specifically for low and moderate income persons. 522 F.2d at 908, n.16.

173. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West Supp. 1976-77).

174. *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466, 468 (1975).

175. *NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, 731 (1975).

176. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672 (1975).

177. E.g., *NAACP v. Township of Mount Laurel*, 67 N.J. 151, 170 n.8, 336 A.2d 713, 722 n.8; *id.* at 208, 211, 336 A.2d at 741, 743-44 (Pashman, J., concurring).

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struction of housing for people in all income ranges is unlikely without appropriate carrots or sticks provided by public agencies.¹⁷⁸

If "fair share" is to become a standard for judging the validity of land use regulations that affect housing, it will be necessary to abandon the "more is better" philosophy and introduce quantitative controls and discrimination. A community which has accepted its "fair share" should not be required to accept more simply because a developer sees an opportunity to make money.

It is possible that selectivity, legitimate discrimination, and quantitative controls, all common to public utility and licensing law, may inject themselves into land use policy by way of environmental law. A developer's right to build homes may depend less upon the zoning he can get than where he stands in line on hookups to the public sewer. The United States Environmental Protection Agency has authority to prohibit local sewage treatment plants from accepting any new connections if the plant does not have adequate capacity to treat additional sewage.¹⁷⁹ Sewer connection moratoria are not uncommon.¹⁸⁰ Indeed, some municipalities have attempted with mixed success to use sewers as one element in a growth control plan.¹⁸¹ Availability of pot-

178. See Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L. FORUM 1, 71 (1976). The authors have been told that one reason Indianapolis has so much good subsidized housing well scattered throughout Marion County is that the Planning Commission follows a policy of granting permission to build market housing to those developers who have had a good record of building subsidized housing.

179. Federal Water Pollution Control Act § 402(h), 33 U.S.C. § 1342(h) (Supp. 1976). Limitations may also be placed on industrial or other development which contributes to air pollution through effectuation of the air quality maintenance and "significant deterioration" requirements under the federal Clean Air Act. 42 U.S.C. § 1857 (1970); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 ENVIR. REP. (BNA) 1815 (D.C. Cir. 1972), *aff'd*, 412 U.S. 541 (1973). Under regulations adopted by the EPA, the quantity of new air-polluting development will be limited and quotas are set depending on the area and the condition of its air. 40 C.F.R. §§ 51.18, 52.21 (1976). Some flexibility in the administration of the significant deterioration quotas is being proposed by EPA in its "tradeoff" policy pursuant to which new industry would be permitted to locate in areas where air quality standards are not being met provided other existing sources agree to reduce their pollution so there is no net increase in pollution when the new industry is in operation. *Environmental Protection Agency Draft Preamble to Interpretative Ruling on New Source Review Requirements*, [1976] 7 ENVIR. REP. (BNA) 1091.

180. *E.g.*, *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975). See Ackerman, *supra* note 178, at 60.

181. See *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) which upheld a timed development ordinance which looked, among other things, to the availability of sewers as a condition to granting building authorizations. *But see Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976) in which the Colorado Supreme Court held that the City of Boulder could not base its refusal to extend water and sewer service into an area outside its corporate boundaries

able water may also result in severe limitations on growth and development.¹⁸²

Some of the state land use and environmental initiatives designed to protect particularly sensitive ecological areas may provide a justification for selecting and limiting, if not mandating, the quantity as well as the type of development which may take place in designated areas. The New Jersey Coastal Area Facility Review Act,¹⁸³ the California Coastal Zone Conservation Act of 1972,¹⁸⁴ the New York Adirondack Park Agency Act,¹⁸⁵ and the Washington Shoreline Management Act¹⁸⁶ are examples of legislation that require the balancing of the need for development with a public interest in preserving areas deemed of some particular significance to the public. For example, the New Jersey law requires development of a comprehensive plan selected from identified alternative "environmental management strategies which take into account the paramount need for preserving environmental values and the legitimate need for economic and residential growth within the coastal area."¹⁸⁷ Such environmental controls could compel a choice between alternative proposals for development that might in turn introduce a social purpose by extending a priority to those builders who include some low-income housing in their developments.

Introduction of a social purpose into land use regulation would bring regulation into line with public utility law, which has seen regulatory agencies begin to take more and more interest in protecting the right of disadvantaged classes to utility services at reasonable rates.

in which it was the sole provider of such services on the ground that growth in the particular area was not consistent with its comprehensive plan.

182. See *Swanson v. Marin Mun. Water Dist.* 56 Cal. App. 3d 512, 128 Cal. Rptr. 485 (1976) where the court of appeals upheld a moratorium on new water service imposed by a municipal water district where there was a proven shortage of water. In upholding the district, the court said:

[W]e are not unmindful of the somewhat dire consequences which flow from our decision in this matter. Politically, the power to "cut off one's water" by the simple expedient of imposing a moratorium such as the one here involved is a potent weapon in effecting a no-growth policy within a community. Since District has neither the power nor the authority to initiate or implement such a policy, the imposition of any restriction on the use of its water supply for that purpose would be invalid.

Id. at 524, 128 Cal. Rptr. at 492-93.

183. N.J. STAT. ANN. ch. 13:19 (West Supp. 1976-77).

184. CAL. PUB. RES. CODE §§ 27000 *et seq.* (West Supp. 1976).

185. N.Y. EXEC. LAW §§ 800 *et seq.* (McKinney 1972 & Supp. 1975-76).

186. WASH. REV. CODE ch. 90.58 (Supp. 1976).

187. N.J. STAT. ANN. § 13:19-16 (West Supp. 1976-77).

Utility regulatory agency requirements that "lifeline" services be made available at lower than normal monthly rates reflect special consideration for the elderly, the poor, and the infirm. Such services permit customers to receive a bare minimum amount of electric or telephone service to meet emergencies and basic needs without having to pay the normal rates which permit middle class suburbanites to satisfy their desires for a variety of conveniences.¹⁸⁸ Concern for protection of customers against arbitrary denial or termination of utility service by utilities over-zealous to protect revenues against nonpayment of bills has led courts and regulatory agencies to take a more active role in policing utility credit and service termination practices and in requiring utilities to adopt more explicit procedural guidelines and safeguards to deal with credit and bill payment matters.¹⁸⁹

The usefulness of quotas and priorities in land use controls is not limited to housing needs. The San Francisco Bay Conservation and Development Commission (BCDC) recognized the danger of running out of industrial waterfront sites which do not require additional filling of the Bay. In order to assure utilization of waterfront sites in a manner consistent with the over-all objectives of the BCDC plan, the BCDC has established priorities by designating certain areas exclusively for the use of "water-related industries."¹⁹⁰

C. *Protection of Existing Development from Economic Competition*

There is a third area where the experience in public utility regulation may offer some lessons in the formulation of land use policy.

188. See *In re Michigan Bell Tel. Co.*, 94 P.U.R.3d 321, 346 (Mich. 1972); *In re New England Tel. & Tel. Co.*, 90 P.U.R.3d 476, 496 (R.I. 1972); Pace, *The Poor, the Elderly, and the Rising Cost of Energy*, PUB. UTIL. FORT., June 5, 1975, at 26. But see *Rhode Island Consumers' Council v. Smith*, 111 R.I. 271, 302 A.2d 757 (1973); *In re Rate Concessions to Poor Persons and Senior Citizens*, 14 P.U.R.4th 87 (Ore. 1976).

189. See, e.g., *Palmer v. Columbia Gas, Inc.*, 479 F.2d 153 (6th Cir. 1973); *Stanford v. Gas Serv. Co.*, 346 F. Supp. 717 (D. Kans. 1972). Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477 (1973); Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers*, 78 YALE L.J. 448 (1969).

190. Claude Gruen & Associates, engaged by BCDC to review the industrial portion of the BCDC plan, recommended that BCDC revise its definition of "water-related industries" so that the test for determining whether an industry should be permitted would turn on "whether or not an industry would produce less benefit to the region if it were excluded from the bayfront." Gruen, Gruen & Associates, *Waterfront Industry Study, A Report to: San Francisco Bay Conservation & Development Commission IV-A* (July 8, 1976).

Public utility plants and facilities are expensive private undertakings and it is generally believed that the public interest is best served if utilities are granted monopolies to serve specified areas. The reasoning is that the monopoly permits utility service to be provided economically and efficiently because the public does not have to pay for the construction and operation of duplicative and costly utility systems.¹⁹¹ The utility also receives some benefit because it is assured a defined market relatively free of competition with respect to the particular service it provides.¹⁹² In return for its limited monopoly, the utility is subject to regulation with respect to its rates, return on investment and the quality and manner of service it provides. The utility is protected, however, only so long as it provides adequate service; it may be compelled by law to improve service or give up its franchise.¹⁹³

The monopolies granted do not in all instances relieve utilities from competition. Particularly in the energy field, competition is still significant. Electricity may replace gas or oil for heating purposes. For the individual homeowner, however, this freedom to substitute different fuels does not come without expensive alterations to heating equipment that substantially reduces any real competition.

In land use law, the suggestion that regulation may have as a legitimate purpose the protection of existing uses from competition is greeted by the charge that such is improper. Some cases maintain that the use of zoning regulations to control competition is ultra vires or unconstitutional,¹⁹⁴ while others suggest that control of competition cannot be the dominant purpose in zoning.¹⁹⁵ These responses are bemusing in light of the monopolistic consequences of the traditional zoning treatment of nonconforming uses,¹⁹⁶ and the common and accepted litany in zoning cases that apartments may be excluded from single-family districts because, among other consequences, apartments will damage existing single-family property values.¹⁹⁷

191. J. BONBRIGHT, *supra* note 171, at 11.

192. See *Dickinson v. Maine Pub. Serv. Comm'n*, 223 A.2d 435, 438 (Me. 1966).

193. E.g., *Preston County Light & Power Co. v. Renick*, 45 W. Va. 115, 113 S.E.2d 378 (1960).

194. E.g., *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961); *Circle Lounge & Grille, Inc. v. Board of Appeal*, 324 Mass. 427, 86 N.E.2d 920 (1949).

195. E.g., *Pearce v. Village of Edina*, 118 N.W.2d 659 (Minn. 1962); *In re Lieb*, 179 Pa. Super. 318, 116 A.2d 860 (1955). See Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33 (1962).

196. See *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 782 (1925).

197. R. BABCOCK, *THE ZONING GAME* 170-79 (1966); 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* ch. 50 (1974).

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If it is a desirable public policy in the provision of utility services to grant at least limited monopolies in order to avoid wasteful duplication of facilities and resources,¹⁹⁸ there also may be a public interest in a land use policy which seeks to provide more protection than is allowed by traditional zoning dogma against the exploitation for private gain of limited land resources in a manner unnecessarily duplicative of and potentially destructive of existing land uses serving the same community of interest. Suppose, for example, a city with a population of 100,000, an urban center in a rural setting, has seen its central business district deteriorate and decides to remedy the situation. With substantial federal aid and considerable local effort, private and public, it starts to revitalize its central business district. It persuades a major retail chain to rebuild in the run-down central business district. It creates the usual mall, gets a national chain to operate a new hotel and, generally, decides to fight downtown blight. Should the municipality be permitted to use its zoning power to deny a building permit to a developer who wants to construct a regional shopping center on the fringe of the city on the candid basis that the regional shopping center is a threat to the revitalization of its central business district which, in turn, is regarded as essential to the health of the entire city?

It is absurd to deny that zoning regulations have an impact on economic competition whether among commercial or residential developments.¹⁹⁹ Courts that subscribe to the doctrine that zoning may not have as its sole or primary purpose the regulation of business competition are left with the thorny problem of trying to decipher when a zoning ordinance is intended solely or primarily to effect competition. In 1969 a superior court of New Jersey upheld a zoning ordinance which was designed to restrict retail sales to the central business district.²⁰⁰ The court rejected the claim by the owners of a tract of land located in an outlying area, who wished to construct a supermarket, that the zoning ordinance was unconstitutional. The court held that the municipality had a right to enact measures designed to revitalize the central business area. Although the zoning ordinance might give the central area a virtual monopoly over new retail business, the court did not invalidate the ordinance. It was willing, however, to suggest that the municipality had a right to restrict competition and suggested

198. See P. GARFIELD, *supra* note 68, at 15.

199. 1 N. ANDERSON, *supra* note 164, § 7.28; R. BABCOCK, *supra* note 197, at 70-79.

200. *Forte v. Borough of Tenafly*, 106 N.J. Super. 346, 255 A.2d 804 (1969).

that the exclusion of competition was simply "an incident or effect of otherwise valid zoning."²⁰¹ A California court of appeal upheld a city's denial of a permit to construct an automobile service station.²⁰² The court accepted the traditional litany that zoning regulation cannot be used to control economic competition, but it stated that "so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition."²⁰³

These and other cases²⁰⁴ demonstrate that zoning regulation affects competition, but that is not acceptable advocacy to say so. Other courts have recognized that the absence of a public need for a particular use is a valid factor to be considered in judging the reasonableness of a zoning ordinance.²⁰⁵ But despite such opinions, courts are generally inclined to the proposition that where the declared purpose of land use regulation is to protect specific economic interests the regulation is invalid, but if another "valid" purpose is stated with the incidental effect being to restrict economic competition, the regulation is proper. We suggest there is no legitimate public interest served, beyond the possible encouragement of creative ordinance drafting, in forcing courts to probe the minds of local officials to determine whether a zoning or-

201. 255 A.2d at 806.

202. *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971).

203. *Id.* at 128, 92 Cal. Rptr. at 790. The "primary purpose" dogma is not unknown in zoning law. The early cases involving attempts to regulate aesthetics held that such was not invalid so long as aesthetic considerations were not the primary purpose. *E.g.*, *Neef v. City of Springfield*, 380 Ill. 275, 43 N.E.2d 947 (1942); *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932). More recently some courts have upheld restrictive land use regulations solely on aesthetic grounds. *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963); *McCormick v. Lawrence*, 83 Misc. 2d 64, 372 N.Y.S.2d 156 (Sup. Ct. 1975). *See generally* 1 N. WILLIAMS, *supra* note 59, ch. 11. The same cautious trend may be expected in the case of economic zoning.

204. *See, e.g.*, *American Oil Company v. Board of Appeals*, 270 Md. App. 301, 310 A.2d 796 (1973); *In re Lieb*, 179 Pa. Super. Ct. 318, 116 A.2d 860, 865 (1955).

205. In *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973), the Oregon Supreme Court held invalid a rezoning of property from single-family residential to planned residential to allow a trailer park in part because the party seeking the change had not established the public need for the change. The Illinois Supreme Court has also recognized, as have courts in other jurisdictions, that the need or lack of need of a community for a proposed use is relevant in evaluating zoning decisions. *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406, 411 (1960). *See, e.g.*, *Lucky Stores, Inc. v. Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973); *Rigby v. Crate*, 15 App. Div. 2d 605, 222 N.Y.S.2d 406 (1961); *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975); *Duddles v. City Council*, 535 P.2d 583 (Ore. 1975).

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dinance in fact has as its primary purpose the regulation of economic competition or is intended to achieve other public purposes. Regulation that confers economic benefits is an accepted concept in other areas of law and should be similarly accepted in dealings with land. It seems strange that the character of a single-family neighborhood can be "protected" from a multiple family dwelling, but a central business district cannot be protected from an outlying shopping center. In public utility law the issue would be whether the central business district is providing adequate service. If it is, it will be protected; if it is not, it will be required to shape up or a competitor will be franchised.²⁰⁶

A rule of law that flatly rejects the employment of land use regulation to protect existing development from adverse economic competition on the ground that land use policy cannot protect one enterprise from another is not only hypocritical, but also blind to important public concerns as well as to long accepted public policy doctrines. Before the turn of this century, public utility and licensing laws had sanctioned the protection of existing enterprises from uncontrolled competition in appropriate circumstances, not for the purpose of conferring a benefit on the protected enterprises, but because it is believed that some public interest is thereby advanced. The same considerations could be usefully employed in land use law if the mystique surrounding the ownership of land were shed.

D. Land Assembly

A final illustration of an area in land use policy where experience in public utility law may be instructive is the assembly of land, a trying experience for the private entrepreneur. A variety of techniques have been proposed or utilized by public agencies to amass sufficient land to permit development of a single large parcel. Land banking by public agencies has been employed in a number of European countries, particularly Sweden and the Netherlands, and has been widely acclaimed as a mechanism for encouraging orderly urban growth. Advocates of land banking suggest it is a viable means to control urban land sprawl and to assure that land development is soundly

206. The record of municipal parochialism that has led to much of the current "revolution" in land use policy requires that such a major decision should ultimately be settled in a forum more detached than the city council, probably in a state agency.

planned.²⁰⁷ The Model Land Development Code approved by the American Law Institute in 1975 contains an article on Land Banking which provides for the creation of a State Land Reserve Agency with authority to acquire land "for the public purpose of achieving the land policy and land planning objectives of this State"²⁰⁸ Although still an untried technique in the United States,²⁰⁹ legislation authorizing land banking in Puerto Rico has been upheld by the Puerto Rico Supreme Court and an appeal to the United States Supreme Court was dismissed.²¹⁰

We surmise, however, that most land development in the United States will continue to be undertaken by private enterprise. Unlike public agencies, private land developers today do not have the power to condemn, nor should they be so endowed, given our present fractured system of control over land development. If, however, some of the old precepts applicable to businesses "affected with a public interest," such as the concept of a limitation to a fair rate of return based on prudent capital investment, a duty to provide adequate facilities and services, and, above all, a consistency of land development with publicly articulated development policies, were introduced into land development, then those *public* standards would be consistent with a

207. Repts. *The Future of American Planning, Requiem or Renaissance*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1967; SELECTED PAPERS FROM THE ASPO NATIONAL PLANNING CONFERENCE 47 (1967); M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 355, 363 (1971); Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897 (1972). See also K. PARSONS, H. BUDKE, S. CLEMHOUT, P. FARRELL, J. PROST, & E. ROBERTS, PUBLIC LAND ACQUISITION FOR NEW COMMUNITIES AND THE CONTROL OF URBAN GROWTH: ALTERNATIVE STRATEGIES 209 (1973), a report prepared for the New York State Urban Development Corporation proposing initiation and funding of a land banking operation.

208. MODEL LAND DEVELOPMENT CODE § 6-101 (1975).

209. Under various existing state and federal laws, public agencies are authorized to exercise the power of eminent domain to acquire tracts of land for the construction of public housing or for other urban redevelopment projects, and proposals have been made for extensive use of such power. The National Commission on Urban Problems advocated that government assert its concern for rational urban development by obtaining land through purchase or eminent domain. NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 2, at 251-53. The Task Force of the Rockefeller Brothers' Fund recommended establishment of public entities comparable to New York's Urban Development Corporation to undertake large scale development projects with the power of eminent domain. TASK FORCE ON LAND USE AND URBAN GROWTH, *supra* note 2, at 261.

210. Commonwealth of Puerto Rico v. Rosso, 95 P.R.R. 488 (1967), *appeal dismissed per curiam*, 393 U.S. 14 (1968). Translated excerpts of the opinion of the Supreme Court of Puerto Rico appear in Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use*, 2 PROSPECTUS 199 (1968).

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system that authorized a state agency to issue a certificate of authority to private enterprise to condemn for the purpose of land assembly, at least in large-scale undertakings. An electric or gas utility may obtain the right to condemn, provided its proposal for development, for example, to construct a new pipeline, is found by an appropriate regulatory authority to be required for the public convenience and necessity.²¹¹ When such a finding is made after an adversary proceeding, the public interest is served by permitting private enterprise to exercise this sovereign power. The sad record of flirtation with new towns is attributable to a multitude of public and private sins,²¹² but at least the delays and costs in getting such projects under way would have been substantially reduced had the developers had the certified authority—essential in negotiating—to condemn.

It is ironic that in a tentative draft of the American Law Institute's Model Land Development Code,²¹³ the Reporters and the Advisory Committee proposed just such a power for developers of large-scale projects provided, first, that the developers assemble a substantial percentage of the land by purchase²¹⁴ and second, that their development receive approval from the state planning agency.²¹⁵ Because many ALI members were lawyers with utility clients, it was assumed this suggestion would receive a sympathetic response. The idea was squashed decisively by the members of the ALI who reacted not as utility lawyers but as residents of suburban communities. The attitude seemed to be that no land developer should have such authority.

CONCLUSION

We have suggested that models of regulation of businesses affected with the public interest, including public utilities, may be instructive in dealing with transactions in land. We do not propose that any such regulatory mechanisms could or should be applied wholesale to all land development or transactions in land. There are many practical and conceptual difficulties in the application of licensing and public

211. See, e.g., ILL. REV. STAT. ch. 111-2/3, § 63 (1973); 2 A. NICHOLS, EMINENT DOMAIN § 7.52 *et seq.* (3d rev. ed. 1976).

212. E.g., Stuart, *Government and Private Backers Face Huge Losses in Housing Plans*, New York Times, Dec. 12, 1976, § A, at 1, col. 3.

213. MODEL LAND DEVELOPMENT CODE (Ten. Draft No. 5, 1973).

214. *Id.* § 4-302.

215. *Id.* § 4-304.

utility concepts to the development of land or to transactions in land. The variety of interests in land are more subtle and complex than are the interests in the goods and services that are now extensively regulated for prudence of investment, price and quality of service. There is an understandable public interest in assuring a substantial uniformity in the availability of natural gas, electricity, telephone service, or milk. Individuals who trade and invest in land, however, look for various locations, differing amenities, and other characteristics which will make their demands and needs difficult to fit into a uniform public policy. People have different tastes with respect to whether they live on a corner, along a lakeshore, in the middle of a city, in a rural setting, with a south or a north view, near or far away from a school, or any variety of other factors.

The factors that affect the value individuals will place on particular real property may also be of a different nature than those encountered in some of the more traditional systems regulating personal property. Regulatory mechanisms that deal with other commercial enterprises do, however, recognize the need to accommodate varying needs and interests. The rate tariffs of a typical gas, telephone, or electric utility illustrate the wide variation in types of services available and the multitude of price levels which may be charged. Various grades of party line service, private line service, service with unlimited calling privileges in a specified geographic area, extended area service, and a variety of options give the subscriber a wide choice of services depending on how much the individual wants to pay and how many of the services he wants to use.

All transactions in land cannot be subjected to detailed utility-type regulatory oversight; such a system would be intolerable. Nevertheless, the application of such mechanisms to those developments or transactions which exceed a specified dollar amount or acreage would be feasible. The exemption of small transactions from regulation is a familiar concept in American law. Securities laws, both federal and state, contain exemptions with respect to registration requirements for small offerings of securities.²¹⁶ Experience under such exemptions suggests they must be carefully designed to assure that the overall public purpose behind regulation is not defeated by activities which

216. See, e.g., Securities Act of 1933 § 3(b), 15 U.S.C. § 77(c)(b) (1970); Regulation A, 17 C.F.R. §§ 230.251-63; UNIFORM SECURITIES ACT § 402(b)(9).

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are conducted on a small enough scale to escape regulation but which on an incremental basis could undermine the public goals.

The problem of a remedy against a land developer who does not live up to his or her representations or carry out the conditions of his or her license may, as a conceptual matter, seem awkward to put right. Once a building or other improvement is constructed, courts are reluctant to require its removal. Indeed, once land development activity has commenced, it may be impossible to restore natural features of the environment destroyed in the development process. Part of this problem can be dealt with by requiring developers and land speculators to demonstrate their financial and other capabilities as a condition of permission to undertake their activities. Bonding is a common means of protection against default. Licensing of various trades, businesses, and professions, conditioned upon standards concerning the character and responsibility—financial or otherwise—of the licensee, is common.²¹⁷ Utilities generally are not permitted to begin their operations and vend their services until a certificate of public convenience and necessity is obtained.²¹⁸ In this way the public is able to exercise some oversight to assure that an activity is conducted by someone with the expertise, resources and capability necessary to carry it through.

Analogy to other fields of public interest regulation suggests several other potential remedial devices. For example, licensees under the FCC are subject to periodic review and renewal and their licenses to operate are, at least as a matter of law, revocable. The concept of a forced divestiture of ownership is not unknown to the antitrust laws.²¹⁹ The availability of such remedies as non-renewal of a license or divestiture would generate a greater concern by the entrepreneur for compliance with the dictates of the public interest than has been the case under the present system of land use regulation.

As counsel for public utilities, the authors know, and from time to time have shouted, all the usual complaints about utility regulation:

217. For example, the Securities and Exchange Commission has substantial authority to establish qualifications of brokers and dealers in securities. *See* Securities Exchange Act of 1934 § 15(b)(7), 15 U.S.C. § 78o (1970). Among other things, the SEC has adopted the so-called "Net Capital Requirements for Brokers and Dealers" rule relating to the financial responsibility of brokers and dealers engaging in securities trading. 17 C.F.R. § 240.15(c)3-1.

218. I A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 347 (1969).

219. *See, e.g.,* FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

the over-regulation, the political pressures and the potential for venality. We believe each of these evils is substantially greater in our disordered system of land use regulation. What our present land use regulation system does not provide, however, is public scrutiny over speculative profits derived from monopoly benefits arising from public expenditures; nor does our system have an effective method for permitting socially desirable discrimination; nor any way to protect what is regarded as a socially desirable investment; nor a method to compel a sharing of the costs of subsidized but socially desirable growth.

We hardly need document the failure of the American system of land use planning and controls to assure that all people have the opportunity to obtain a decent place to live according to their needs and capabilities. That goal requires that a limited supply of land, little of which remains within a reasonable distance from existing jobs, be developed in a manner which takes into account not only the profit motive of the developer, but overall social needs as well. By any measure, land is a commodity that justifies as much if not a greater degree of public scrutiny and accountability by those private interests profiting from public favors, as does telephone service, the sale of liquor, or wharfing. The courts and legislatures have not hesitated to extend public regulation to these latter items and many others. If we are serious about reform in land use policy, the time has come to replace old rhetoric and exotic proposals with some ideas that have been around for centuries in respect to public regulation of transactions in other commodities far less affected with the public interest than is the case with land.