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PUBLIC RIGHTS IN DETERMINING LAND USE

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Concepts of private property in land use can be found in most cultures. Even under Communist rule, where as a matter of theory property in land has been eliminated, departures from the rule are not unheard of. Speaking of property in general, Charles A. Reich wrote in the *Yale Law Journal* in 1964:

> The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.

Western society has sought the origins of property concepts in many places, including Biblical teachings, Greek philosophy, early Teutonic and Anglo-Saxon folk law, Roman law, and feudal relationships. Some, not primarily concerned about origins, have stressed the "natural law" character of property rights as simply inherent in humanity. And for the more pragmatic, the existence of property rights is the starting point for analysis.

A variety of property concepts can indeed be found in many cultures. The specific content of property rights involves important values and beliefs. To what extent concepts, values, and beliefs have moved from one culture to another may be important only to the extent that such historical analogies may provide rationalizations for particular practices and policies.

I have recently spent three months in the Federal Republic of Germany studying its system of land use planning and control, and in this paper I will contrast concepts and practices in that country with those in the United States. Hopefully, this comparative approach may provide new insights into land use planning and control problems.

THE U.S. SITUATION

Property Values

The settlers of the original thirteen colonies undoubtedly drew on their English experience in formulating American property con-

cepts. But historians agree that there were few direct or total transplants of English property institutions. Hence, it is useful to consider some of the special circumstances which contributed to the development of American property concepts and values. Two of these were the tremendous quantity of vacant land and the tremendous amount of energy and effort that went into developing a tract of land for productive, agricultural use. The quantity of land made it of little value. It was the labor that went into making it productive that was significant. And after that labor was expended, a sense of ownership would seem to have been inevitable.

When the colonists first landed at Plymouth, land was assigned to the respective settlers, and the harvested crops went into the common stores. However, no ownership of particular plots was established. Under this system, apparently production was low and after only three years (in 1623) a land ownership system was instituted. On this new system, Governor William Bradford commented in *Of Plymouth Plantation:*

> This had very good success, for it made all hands very industrious, so as much more corn was planted than otherwise would have been. . . . The women now went willingly into the field, and took their little ones with them to set corn; which before would allege weakness and inability; whom to have compelled would have thought great tyranny and oppression.

The attitudes of the early settlers and the contrast with European views are illustrated in *Travels in the Confederation, 1783–84* by J. D. Schoepf, a German traveller who visited the United States just after the Revolution:

> In America . . . whoever holds new land, in whatever way, controls it as his exclusive possession, with everything on it, above it, and under it. It will not easily come about therefore that, as a strict statutory matter, farmers and landowners will be taught how to manage their forests so as to leave for their grandchildren a bit of wood over which to hang a tea kettle. Experience and necessity must here take the place of magisterial provision.

These factors of quantity of land and frontier self-reliance and individualism, coupled with the energy expended in winning the land, might alone have resulted in the development of a uniquely American philosophy of land rights, but other factors also seem to have been important.

Among such additional factors is the fact that many of the early colonists migrated to the New World in protest of the arbitrary excesses of the kings, some of which were evidenced in the

remains of feudal land relationships in England. In this atmosphere of resistance, then, the emphasis of John Locke on the importance of property undoubtedly struck a responsive note. Locke's comments on property were essential to his views on civil government, and he supported his attacks on the Stuart kings by stressing the sanctity of property with which the kings were interfering. Thus he wrote in *Of Civil Government, Second Treatise:*

> The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of property. . . . For the preservation of property . . . [is] the end of government, and that for which men enter into society.

The founding fathers were probably familiar with Locke's arguments, but there is no way of assessing how broadly his views were disseminated. Certainly the colonists were not prepared to accept feudal concepts of property, particularly those concepts which emphasized duty and obligation. Feudal dues do not seem to have played an important role in Colonial development; the issue of "taxation without representation" concerned excise taxes and not land taxes or feudal dues.

In a 1965 *Iowa Law Review* John E. Cribbet has quoted Francis G. Philbrick as saying that "in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public." And Professor Cribbet has added, "It may be that the wrong concepts of feudalism survived—that we threw out the baby and kept the bath." But these issues, to be considered again later in this paper, were probably not in the minds of the colonists. It is not clear that any extensive body of theory developed to support the practice described by the German visitor, namely that of regarding property as solely and exclusively belonging to him who lived on it and worked it. There is convincing evidence that legal concepts of property law as well as the views of the political philosophers were introduced later.

Even though the ideas of the political philosophers had little influence on the average settler, they were important to the development of the ideas of the Revolutionary leaders and after the Revolution became part of American concepts of land rights. In the view of Adam Smith, property was an individual right to be protected, not regulated by the state. His emphasis, as Locke's, was on rights, not duties. And with Jeremy Bentham, Locke assumed a congruence between individual and social interests. Thus when the individual pursued his own interest, he promoted the welfare of all (society).

While few Americans were familiar with Locke, Smith, and Bentham, relatively more came to know Sir William Blackstone, for many nineteenth century American lawyers relied extensively on his *Commentaries on the Laws of England* to qualify for admission to the bar. And it was Blackstone who declared:

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the rights of any other individual in the universe.

Even Blackstone recognized that the free use, enjoyment, and disposal of property could be controlled and diminished "by the laws of the land." John Locke emphasized that "nothing was made by God for men to spoil or destroy." But such qualifications were lost in the strong thrust for "sole and despotic dominion."

Property and Liberty

The ideological importance of property is suggest by the references to it in various American Bills of Rights. The Virginia Bill of Rights of 1776 stated that among the inherent rights of men were the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing happiness and safety. And the Massachusetts Bill of Rights of 1780 declared that all men have certain natural, essential, and unalienable rights among which may be reckoned the right of enjoying and defending their life and liberty; and of acquiring, possessing, and protecting property.

For reasons that have never been satisfactorily explained, Jefferson substituted "pursuit of happiness" for "property" in the customary trilogy "life, liberty, and property" when drafting the Declaration of Independence. But Jefferson did not thereby indicate a lessening in his regard for the important relationship between property and liberty. In 1774 he dismissed the idea that feudal relationships carried over into the colonies and was one of the leaders in abolishing primogeniture in Virginia. He felt that ownership should rest on occupation and that a wide ownership base would support democratic freedoms. Thus he proposed the distribution of Virginia lands to each settler, an idea that ultimately was incorporated in the Homestead Act (1862) and for somewhat similar reasons.

Not all the Revolutionary leaders felt so strongly on the issue. Thomas Paine, criticizing the "natural law" theory of property, commented that in his opinion the Creator of the earth did not open a land office from which the first title deeds were issued. But the dominant view was one which cherished property rights

as indispensable to liberty. Liberty was conceived of as being against government. Thus in 1792 when the Bill of Rights to the U.S. Constitution was adopted, the Fifth Amendment was aimed at the national government, stating "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." It is important to emphasize this "antigovernmental" bias of the Fifth Amendment when considering the complexities in defining public rights in land.

To sum up this period of American property concepts, property was regarded as a positive and necessary factor in the protection and development of liberty, and hostility to government interference with property was a positive and necessary policy. A third aspect of property rights began to show up as settlement moved westward and it became necessary to draw boundaries between what was thine and mine. This was an important aspect of the Land Ordinance of 1785 and of the Northwest Ordinance of 1787, both of which reflected the concept that governments were instituted to protect property rights. Perhaps the most dramatic example of these attitudes, uniquely reflecting the problem of drawing boundaries in a frontier situation, is the manner in which Western mining and water law developed.

As a result of the Mexican War through the Treaty of Guadalupe Hidalgo of 1848, the United States acquired a tremendous quantity of land, but Congress was slow to enact statutes governing this new territory. The discovery of gold in California in the same year of the treaty, brought in a host of Americans. But since there was no law governing the situation, mining and the use of water for mining and for irrigation went forward without any governing law. Pillage, piracy, theft, and violence might have resulted. Instead, consistent with the "compact theory of government" developed by John Locke, the miners worked out an arrangement whereby those making a discovery formed an association, agreed on the claim size each miner was entitled to, determined the amount of work that must be done each year on the claim, and placed in a record book the regulations of the association and a description of each claim. Thus the miners devised an arrangement whereby mineral bearing lands in the public domain could be acquired by individuals simply by taking possession. Congress and territorial and state legislatures subsequently approved the method of establishing private rights to mineral lands.

An almost identical process took place with respect to water rights in the semiarid West where water often was scarce. Thus

the doctrine known as "prior appropriation" was formulated which gave the first user (miner or irrigator) the right to use the quantity of water he had initially taken, so long as he continued to use it constructively. And because of variations in flow, the doctrine was often stated as "first in time, first in right."

Duty or Obligation and the Public Interest

The way American concepts of land rights developed has been reviewed to stress the emphasis on individual rights and freedom in prevailing doctrines and pragmatic practices. By the end of the nineteenth century and well into the twentieth sole and absolute dominion was a virtual reality. The sanctity of property rights and their protection from government interference were fundamental to American political and economic thought. The more firmly the doctrines became established, the more the essential relationship of property to liberty was obscured. No longer was the struggle one of resisting royal encroachments. And as a result, the idea that property rights brought with them responsibilities and obligations toward the community was also largely forgotten. Once property taxes had been paid, most landowners probably felt that all social obligations had been met. Even when public interests were involved, the orientation was toward rights and not obligations. It was assumed that individual rights and interests were automatically congruent with those of the community.

Only occasionally did overt dissent, such as the Populist Movement and later the Progressive Movement, suggest that the public interest in land might be different from the private rights. Henry George's attack was not primarily in terms of the social obligation of property, but rather against excessive profits and unearned increments. which were to be limited by the single tax system.

In explanation of the mood of the times, it might be noted that from about 1870 to 1920 the major effort of the national government was to dispose of the public domain. Over 700 million acres of public lands were privatized in that fifty-year period, with each decade except the first seeing from 100 to 200 million acres transferred to private or state ownership, with almost 200 million being occupied under the Homestead Act of 1862. It is a popular misconception that, because the frontier disappeared by 1890, disposal of the public domain also ended at that time. In fact, more of the public domain was disposed of and more homestead entries were made after 1890 than before! Thus, with the disposal to private ownership of vast acreages of so-called vacant land, it could have been understandably difficult to articulate a specific policy which stressed the social obligations of private land and

the social duties and responsibilities of private landowners. As a matter of fact, this same time period saw the beginning of both the National Park system and the National Forest system, which even then involved vast acreages.

Bentham, Adam Smith, and others who struggled with the concept of property rights recognized, as Bentham wrote, that "Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases." Professor Cribbet summarized this view in stating that ". . . property is shaped and controlled by law but law is shaped and controlled by society. Our search for changing concepts in the law of land use must involve an understanding of the changing nature of modern life, especially of those phases normally subsumed under the rubric, 'population explosion.' "

A search in the literature, judicial opinion, and elsewhere, gives an impression that is not so simple and stark as presented above. Scattered through many judicial opinions, for example, are statements of the public interest in private land, or even a recognition of the social obligations of the private landowner. Much of this language, however, stems from the private nuisance concept (so use your property as not to injure your neighbor), and this concept was narrowly defined compared with today's concern for externalities and spill-over effects. Moreover, in many of the opinions the expressions concerning the public interest had minimal impact on the way the law developed. It is generally agreed, for example, that the U.S. Supreme Court decision sustaining urban zoning in 1926 did so more on narrow nuisance grounds than on any conception of a public interest in how land should be used over against one's neighbors and the community.

THE GERMAN SITUATION

The Context of Land Use Control and Planning

While the German and the American cultures are similar in many ways, there are a number of significant differences which set the stage for German land use planning and control.

One of the first of these differences is the population-land ratio. The area of the German Federal Republic is somewhat less than that of Colorado. Its population is about 60 million, about three times that of New York state which has about half the area. The German population is probably distributed somewhat more generally than that of New York, since there is no German city anywhere near as large as New York City. However, the area north from Bonn to the Ruhr, including the Ruhr Valley and west to

Holland, Belgium, and France, is the most densely populated area in the Western, industrialized world. Unquestionably, the density of population provides a stimulus for planning and for accepting state intervention in the form of planning. The widespread recognition in official and unofficial circles of the need for recreation facilities is but one example of how population densities affect land use planning and control. Perhaps because land use is managed relatively well, one is just not aware of these densities.

Another set of factors which are a part of the background for German land use control is historical. Germany has not been a vacant land comparable to the United States in 1800. But Germany was until the end of World War I a kingdom, with a complex structure of royalty, princes, and barons, many of whom owned or controlled substantial areas of land. In contrast to France, for example, Germany did not experience expropriation of the nobility. Although it is easy to place too much emphasis on this, it probably can be said that in Germany the effects of the feudal era are still quite apparent, perhaps more so than in Britain. Agricultural lands appear to be farmed under a complex structure of agreements and relationships, including individual ownership as well as a variety of other tenure forms.

A number of other historical sociological factors should be noted. One of these is that the government is a federation. While this suited the victorious allies after World War II, it also reflects the historical relationships of the various principalities that were first brought together under Bismarck's leadership in 1870. One result is that a major role in land use control is played by the state governments. Another factor, at least in many parts of the German Federal Republic, is the aggregation of farmers in villages, rather than on their farm lands as in the United States. Finally, Germans have been fond of the outdoors and have cherished nature. Greenbelts do not have to be "sold" to the German public!

Some might attribute the acceptance of land use controls in Germany to the supposed willingness of Germans generally to submit to authority. But it seems difficult to separate this sociological factor from an acceptance of planning decisions for the simple reason that without such acceptance the situation would soon become intolerable. Germans appear to be less litigious than Americans and are less likely to challenge governmental decisions. Partly, this reflects the rather different philosophy of the Roman law from the common law with respect to the role and authority of the judge. Substantial reinforcement for the acceptance of bureaucratic planning decisions arose from the need to rebuild the

country after World War II. Rebuilding the shattered cities, the shattered society, and the shattered government required firm and forceful action. And authoritative action-oriented planning was a necessity.

In the United States the debate over socialization of land and other means of production have taken place more often than not in academic halls rather than at the barricades or in constituent assemblies. In contrast, in Europe generally, and in Germany particularly, the tensions among differing theories and perceptions of property were part of day-to-day political life through most of the nineteenth century and even to today. The philosophies of classical liberalism with its stress on private property and individualism, concepts of state capitalism, beliefs in democratic socialism and the values of social responsibility of the Christian community, nationalization proposals of communism—these and many variants were in day-to-day conflict. Each had its adherents; each looked to the day when it might shape governmental and social institutions in accordance with its world view. Nothing comparable ever existed in the United States. One result, as might be expected, the German Constitution or Basic Law reflects the compromises that such varying philosophies, theories, and values would require, so long as no one group or coalition could sweep away all opposition and carry forward its plan for a new society.

The Basic Law

The "Bill of Rights" of the Basic Law declares in Article 14, Section 1, that "private property and the right of inheritance are guaranteed." This statement is simple and clear-cut. But the section continues to state that the "content and limits on private property are to be specified by statute." This language places a substantial responsibility on the German Parliament. In comparison with the American Constitution, the Basic Law does not suggest or imply limits on the ordinary legislative power.

Section 2 of Article 14 further complicates the clarity of the mandate by declaring, "The duties of property. Its use shall redound to the common good or general welfare." Thus is stated the social obligation of property. Rather than a bulwark of individualism to be protected from government encroachment, property and its uses are regarded in the context of societal needs. This emphasizes the idea that property and property rights in fact are products of, to use Locke's phrase, the social contract.

Section 3 of Article 14 indicates that expropriation or condemnation (what the Fifth Amendment of the U.S. Constitution calls

"taking") may occur only when its purpose is to serve the common good or general welfare. And then it states that expropriation or condemnation can occur only when provided for by a specific statute which specifies the means and measure of compensation or damages. Thus far the provision is very similar to the language and practice under the U.S. Constitution. But then the section suggests that the amount of damages is to be determined by an equitable balancing of the interests of the community and those of the affected party.

This language reminds me of the Calvert Cliffs case in which Judge Skelly Wright talked about the National Environmental Policy Act requiring a balancing of social gains against environmental degradation. Some American courts have talked about balancing with respect to condemnation or taking, but their concern was not with balancing to determine the value or amount of compensation, but rather with balancing to determine whether the taking was justified.

Finally, Section 3 of Article 14 permits appeal to the regular courts if there is a dispute over the amount of compensation. German courts have been explicit in denying "market price" or "market expectation" as the measure of value. In one decision, the court explicitly stated that to pay market price was contrary to the Basic Law, one of the reasons for this view being that market price tends to include the value added by the public or societal decision to use the land. The person affected by an expropriation may appeal to the Administrative Courts, and if the issue is one of constitutional power or authority, the Constitutional Court is available to the aggrieved party.

The ideological tensions which lay behind the Basic Law are perhaps best illustrated in Article 15, which authorizes the socialization of land, means of production, and natural treasures. It sets up the procedural requirement, however, that socialization must be for the general welfare and must be based on a specific statute which spells out the means and measure of compensation as a part of the process of socialization. Valuation is to follow the provisions of Article 14, Section 3. If a thoroughly committed socialist party gained power, one wonders how the balancing process would work where socialization of land or of the means of production were involved.

There are other provisions in the Basic Law (the guarantee of the full and free development of one's personality; the right to life and to remain physically undisturbed; the right to travel, to live where one chooses, and to follow the occupation or calling

one chooses) which could be important for interpreting the meaning and limits of property rights, but they will have to be treated elsewhere.

Several statutes have been enacted to implement the provisions of the Basic Law with respect to planning and land use control. As is typical in a federal state, powers are shared between the central government and the states. In addition, by tradition and under the Basic Law, substantial power and authority resides in the communities or local governments. Probably the most important federal statute is a statute for "the ordering of space," enacted in 1965. In addition there are statutes dealing with settlement policy, with transportation networks, with agricultural land use and consolidation of holdings, with water, with nature protection, and a number of other topics that have significant bearing upon land use planning. But in most respects the statute for the ordering of space is the most comprehensive, providing for the coordination of most of the other planning activities.

Each of the states has enacted four or five relevant statutes implemented by appropriate administrative policies and regulations. But most of the actual planning is carried on at the local level—in the communities, through federations of communities, through counties, through administrative regions, or through larger regions, the oldest of which is the Ruhr Region. At the state and federal levels major responsibility is for coordination, establishing guidelines, assuring that problems which transcend local boundaries are taken into account, and providing various kinds of financial assistance.

At the same time, the power of government reorganization and consolidation is retained at the higher levels. Thus a considerable number of local governments have been consolidated into larger and presumably more rational units. And this has contributed to more effective planning. The Basic Law even anticipates redrawing of the boundaries of the several states. There is an acute awareness of unevenness in development and prosperity among the several geographic portions of the nation, and deliberate policies have been formulated to equalize economic well-being geographically. These policies, as well as many others of national scope, must be considered by local planning authorities, so that what is decided at the local level must be consistent with state and national objectives. To achieve this, local plans are subject to review by higher authorities, primarily the state agencies.

Let us turn now to some of the basic policies and techniques which rest upon the concept of the social responsibility of prop-

erty—the idea that property values are a function of societal action and conditions, and that land use controls, therefore, seek the general welfare in a positive sense (in contrast to the essentially negative view of general welfare in the American police power enactments).

First, the local planning units are required to plan virtually for the entire country under the guidelines of superior and supervising governments. The planning process involves inputs from professional planners, but opportunities for citizen inputs are also provided by means of hearings and by provisions for legal challenges. The basic technique is land classification under which land is designated as building land, agricultural land, forest land, industrial land, etc. Once a plan is adopted it has the force of law. Variances in classification are rare occurrences.

For example, there is a case where a farmer (who in typical fashion lived in the village and went daily to his land to farm) was housed in an attic apartment where, because of the size of his family, he was very crowded. Since his land was classified as "farm land," he asked that the plan be changed to permit him to build an adequate house on his land. He exhausted all appeals, including a petition to the state legislature, but no variance was granted. Instead, the mayor of the village was instructed to find land classified as "building land" and to work out a trade with the farmer.

Another technique involves the authority of the planning unit to freeze all land uses for periods not exceeding four years. Beyond that time, landowners may be entitled to compensation. Once such a freeze is imposed, land rights may be transferred but the land must remain in the same use.

Related to this authority to freeze land uses is the authority to prevent building for a specific period of time, or where it is inconsistent with the approved plan. As the example cited above suggests, the planning authorities usually are empowered to purchase land to implement a plan. This is a broad power, permitting purchase of land to be traded for another parcel in order to recombine parcels for more sensible urban development or to consolidate holdings for better farm management. An important value underlying plan development is landscape protection—a concern for visual amenities. Plans are multipurpose in scope, seeking to take into consideration the whole range of development factors that will influence land use. This is the ideal, yet coordination with the specialized planning activities for highways, water, etc., is not always easy, the specialist's view of the world in Germany being not unlike that of his American counterpart.

Finally, an important factor in effective planning concerns the valuation of land required for public purposes in accordance with particular plans. As indicated above, the German courts have dismissed "market value" as a viable standard. Moreoever, value is measured in terms of the present use of the land and not in terms of the owner's expectations with respect to it. Thus, farm land is valued as farm land in terms of its productivity, even though it is right on the edge of a city or town. And its character as farm land is in turn a function of the approved plan. Obviously, this removes much of the speculative element. At the same time, if farm land is reclassified as building or housing land in a new or revised plan, the owner will be entitled to the unearned increment that may result. One other aspect of valuation in German practice is further evidence of the extent to which value is recognized as a function of societal action. If you own 100 acres, and 20 are taken for public purposes in accordance with the approved plan, and the value of the remaining 80 acres is as high as or higher than was the value of the 100 under the existing uses, you are not entitled to compensation. Your condition has not been worsened by the change.

SUMMARY

To summarize this difference, then, in U.S. Constitutional law "taking" of private property is interpreted as a general term to cover almost anything that diminishes or negatively affects the area or the value expectations of the owner. Similarly, "just price" means market price and is applied to every taking. And the market used to measure the price is the market of expectations as superficially implied from the location of the property, and not from the needs of the community. In the German Basic Law, expropriation does not apply to all actions which negatively affect a tract. There must be a "balancing" of social and individual equities, and value is based on present use, not on expectations. And the courts have specifically disavowed "market price," in part because that price is socially determined.

In the United States it is still prevailing law that the property owner has a right to do with his property what he chooses; he can use it in any way he sees fit, so long as no direct nuisance damage occurs to his neighbor. While zoning, subdivision controls, and a number of other regulations have begun to alter this situation, the American courts still tend strongly to regard any public action which diminishes the landowner's rights as a "taking" of property requiring "just compensation," interpreted as market value based on expectations. Thus William Whyte and others have proposed,

somewhat in desperation, that our only course is to buy land in fee or to buy a variety of scenic and other easements to protect the public interest.

In our theories we have overlooked the fact that the value of a tract to a large extent is determined by society and by its laws. The transportation system which takes farm production to market, the economic system which results in urban growth and establishes the pressure for urban housing, these and many other kinds of social actions in fact determine value and perhaps should be considered in determining a "just price."

In both American and German law there is little question about the responsibility for nuisance damages to property. Nor is there any argument about compensation for public actions which diminish the potential for existing uses. The significant difference lies in the way the questions of changes in land use are handled. It would be useful to analyze the question of whether the constitutional requirement for "just compensation" should include expectations (which may not be realistic) and unearned increments. In short, we need to develop some concepts of the public interest in private land, drawing on bits and pieces of public interest law scattered through the total body of our law. Until we develop modernized theories of property, we will not be able to do an effective job of land use planning and control.