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Evolutionary Trends in Land Use Control in the United States

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The Fifth Amendment to the Constitution of the United States of America concludes with these words: "... nor shall private property be taken for public use, without just compensation." This has been the basis for all policies and debates concerning the control or regulation of land use throughout the history of the Republic.

Its full force was made binding upon member states by the Fourteenth Amendment, incorporated into the Constitution in 1868 in the aftermath of the American Civil War, which states in Section 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This paper will sketch the evolution of land use policy under these guiding principles, with emphasis on the changes that have occurred since the 1920's. The path of change can be divided into two parts: The first concerns the policies implemented in the outright taking of private property "for public use," through the exercise of powers of eminent domain. The second path involves use of the police power in the regulation of private land use that falls short of an actual "taking." This discussion will focus on the use of the power of eminent domain.

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The distinguishing difference between these two paths is that a "taking" clearly requires compensation. A regulation or restriction of land use judged to fall short of a "taking" does not necessarily require that compensation be paid. The boundaries that permit and define a "taking" identify the modern debate over land use policy in the United States.

A taking of land is an exercise of the power of eminent domain. It is important to note that the Fifth Amendment, does not say that private land shall not be taken. The emphasis is on "just compensation," leaving it to legislatures and courts to determine whether or not the exercise of eminent domain was achieved through "due process of law," and had provided citizens "the equal protection of the laws."

A regulation of land use that falls short of a taking is an exercise of the "police power." In the United States this has been interpreted as an exercise of state sovereignty in the interest of public "health, safety, morals, and general welfare." It is not constrained by any constitutional restriction, and the Supreme Court has been reluctant to substitute its judgement for that of state legislatures or the Congress in determining how far use of the police power can be extended (Callies, p. 254; Paul, p. 841).

Throughout the 19th and first half of the 20th centuries the taking of private land was judged legal if the land was to be devoted to a "public use." Early court cases involved the acquisition of land as sites for public buildings, canals, roads, or military installations. The ground transport revolution that began with the railroad era, expanded with electric street railways, and culminated with the automobile and motor truck enormously enlarged the need for land for rights of way. These needs led to widespread

use of eminent domain, as did the needs for partial takings or easements over land for electric power transmission lines, pipelines, and hydro-power dams.

These uses of eminent domain all fell clearly within the traditional interpretation of "public use." Beginning in the 1930's and accelerating after the war years of 1939-45, there has been a profound shift in the basis on which the exercise of eminent domain rests. In place of a narrow definition of "public use," the basis has shifted to a much broader specification of a "public purpose." The legal literature recording this shift is voluminous, and a detailed citation of court cases is inappropriate in this paper. Instead, an attempt will be made to sit back and reflect on how these changes came about.

This will involve the tracing of several major streams in the recent history of what can be loosely defined as projects of public works in the United States. The first is the era of big dam building. Promoted as programs to "get America working" in the depression years of the 1930's, the leading symbols were the Hoover Dam on the Colorado river, the Fort Peck Dam on the Missouri river, and the Tennessee Valley Authority. These required large areas for lake impoundment and flowage rights, giving rise to many cases in which land was needed to achieve the purposes of the dams but its taking strained the definition of "public use." The most frequent cases involved loss of access by private land owners, suggesting the wisdom of acquiring ownership units or parcels through a "taking," although water behind the dam or flowage below it might not actually occupy all of the parcels.

A second expansion of public works utilizing eminent domain was the acceleration of programs of slum clearance and urban renewal after 1945. Derelict areas in central

cities became painfully visible with the rapid suburbanization that began as soon as wartime shortages of building materials ended. It was apparent that entire areas or districts were involved, and not simply isolated buildings.

In the 1950's the practice quickly spread of creating, urban redevelopment authorities with power to use eminent domain procedures to acquire all of the land and buildings in designated areas. Typically, they would raze the buildings, realign streets or public utilities if necessary, and resell the land to private developers. Eminent domain power was being used to take land from one group of private owners and resell it to a different group of private owners.

It was obvious that this was necessary if the goals of urban renewal were to be achieved while maintaining a system of predominantly private ownership of urban housing. It was also obvious that the land thus taken by eminent domain was not being devoted to a "public use," in the conventional meaning of that phrase. While legal challenges were raised, the courts usually concluded that serving a public use could be interpreted to mean serving a public purpose.

This interpretation should not be surprising, for it continued a land tenure practice that is as old as the nation. Lands taken from Indian occupants, by treaty or force, were declared a part of the public domain and offered for resale to developers, i.e. to new settlers. The power of the state was used to take land from one owner and make it available to another. As repugnant as this power is, its toleration has clearly been a function of the goal being pursued. When settlement of the West or removal of urban

blight has been involved, the government of the United States has not hesitated to interpose itself between private land owners to effect changes in land use.

This extension of the concept of public use to include public purpose was given a powerful acceleration by the National Interstate and Defense Highway Act of 1956. This involved the design and lay-out of over 40,000 miles (more than 65,000 kilometers) of dual-lane, divided-center highways, for which the typical right-of-way was at least 330 feet or over one hundred meters wide. These new superhighways were to provide by-passes around cities and (as nearly as possible) straight-line connections between major urban and industrial centers. Acquiring the necessary land triggered the largest exercise of the power of eminent domain in the nation's history.

Major problems quickly arose. To understand the set of problems that helped shape the transition from public use to public purpose in justifying the taking of private land, it is necessary to outline the configuration of land ownership patterns in the United States. In the 13 original colonies, clustered along the Atlantic seaboard, survey descriptions of land ownership rights followed a European pattern, characterized as "metes and bounds." Property lines depended primarily on identification with elements in the physical landscape. In the states carved out of lands outside the original colonies, a different system of rectangular survey was used. In these "public land" states the patterns of land ownership take on a Cartesian character, with property boundaries running at right angles in East-West and North-South directions, forming a gigantic grid. The operating lay-out of farms and the street pattern of many cities in the mid-West and

West of the United States reflect these grid-like configurations. The road system that emerged with settlement also followed these chess-board property lines.

Many segments of the newly authorized Interstate system of superhighways crossed these East-West and North-South property lines at an angle as they curved around cities and headed for neighboring cities "as the crow flies." The result was the truncation of many land ownership parcels, leaving triangular or irregular shaped remnants of land on either side of the newly-located highway. Original land owners often had no access to these severed tracts, or found it uneconomic to continue using them. The tracts thus severed were clearly not being "used" in a direct sense for the new highways, but were also rendered almost useless to their previous owners.

From this dilemma emerged the principle of "excess condemnation." Even though the whole of an ownership unit was not needed for highway right of way, it was cheaper to take the entire unit and sell any remnant tracts. Property owners in many states have been given the option to demand that the condemning authority take their entire ownership units rather than the parts actually "needed."

In this way highway authorities found themselves engaged in using the power of eminent domain to take land from one private owner and later sell it to another private owner. As was the case with urban renewal and slum-clearance programs, powerful reasons emerged for a transition from "public use" to "public purpose" as a justification for exercise of the power of eminent domain.

Two points merit emphasis in tracing this experience with the highway program. The first is that it affected every state, and concerned a widely (if not universally)

approved exercise of public authority. The second is that many of the most uneconomic consequences of a narrow insistence on "public use" as a justification for taking private land concerned farm land. Farm land owners, as a group, are typically stout defenders of the rights of private land owners. The fact that they could experience first-hand the logic and economy of taking land in excess of that actually "needed" undoubtedly played an important role in developing general support for the courts in reinterpreting public use to include public purpose. As a vehicle for public education in constitutional law, the Interstate Highway program has been outstanding.

This background makes understandable the decision of the U.S. Supreme Court in 1984 upholding the right of the Hawaii Housing Authority, under the Hawaii Land Reform Act of 1967, to use eminent domain powers to compel large landowners to sell leased land to their tenants. (Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 1984). The goal was to reduce the concentrated power of some 72 large land holding families in Hawaii, holding 47 percent of the state's lands, whose holdings traced back to a semi-feudal era and included most of the value represented by residential land in the state's principal cities. The goal of the Hawaii Housing Authority was virtually no different in principle from that validated by the Supreme Court thirty years earlier in a 1954 case involving urban renewal (Berman v. Parker, 348 U.S. 26, 1954).

Justice Sandra Day O'Connor, in the concluding paragraph of the Supreme Court's opinion in the Hawaii case, pointed out that "The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii--a legitimate public

purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirement of the Fifth, and Fourteenth Amendments have been satisfied." (467 U.S. 245, 1984).

Earlier in its decision the Court had said: "... the Court has made clear that it will not substitute its judgement for a legislature's judgement as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' ... where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.... On this basis we have no trouble concluding that the Hawaii Act is constitutional" (467 US 241). The decision of the Court was unanimous.

This is where the matter seems to rest. If a taking of private land is reasonably related to a public purpose as determined by a state's legislature, the Supreme Court will not interfere as long as just compensation is paid. This throws the principal burden of decisions as to the proper exercise of eminent domain power on the method and standards by which compensation is determined.

This has worked reasonably well in the United States due to the existence of an active land and real estate market. It is not unreasonable to argue in the United States that monetary compensation can stand as a proxy for land ownership. It is an open society, with a high degree of physical mobility. The U.S. Postal Service reported for 1990 that 18 percent of all postal addresses were changed in that year. Loss of land or

homesite is not the catastrophic event that it would be in a more rigid social or economic system.

The anomalous result is that the very existence of a functioning private market for land makes it possible to tolerate in the United States a level of public taking of private land that would be regarded as intolerable in most other countries. The greater the efficiency of the market process the less frightening is the exercise of public power over private land.

There remains of course the second path of evolution of public control over private land, through use of the police power. Since this has typically involved regulation without compensation, it has been an even more contentious exercise of public policy than has the use of eminent domain. But that is another paper.

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