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# Land and Prosperity: A Primer on Land Use Law and Policy - Summary\*

## Introduction

The ability to acquire and use land is central to humankind's survival and is crucial to individual and collective prosperity. Given its importance, exerting control over land use is one of the most significant powers exercised by local governments. The regulation of land use can have far-reaching consequences that can either promote or hinder prosperity. This primer introduces several prominent laws, policies, and practices used to control land use.

## Property and Order

With civilization, both positive and negative externalities result. To maximize the benefits and reduce the costs of living close to one another, each individual must abide by certain behavioral norms. In other words, there must be an order. Comprised of guiding principles, order can form the foundation upon which liberty and justice can be built. The founding fathers set out to establish a constitutional order that limited governmental powers and protected fundamental rights. Among the fundamental natural rights, the right to property is paramount.

## On Private Property Rights

Subsumed in the natural right to property are the rights to life and liberty. Having possession and ownership of oneself, having the freedom to act in one's own interest, and owning the consequences of those actions is the essence of life and liberty. Inseparably linking life and property is the possession and ownership of land as a means to satisfy humankind's basic needs—food, shelter, and clothing.

Additionally, private property rights capitalize on human nature to maximize the individual and collective benefit derived from property. A system within which private property rights can be clearly defined, defended, and transferred creates natural incentives to:

- protect and care for property to preserve or enhance its value,

- conserve resources to maximize a property's benefit over time,
- provide value to others through mutually beneficial exchanges, and
- refrain from, and accountability for, harming another's property.

## Introduction to Land Use Laws and Policies

Early American settlers often had significant freedom and control over the use of their property, and what controls did exist were primarily a private matter. However, with increased industrialization and urbanization, state and local governments assumed a larger role in ordering land uses under the state's authority to regulate for the people's health, safety, and welfare.

## Private Control of Land Use

### Law of Nuisance

Common law nuisance provided a mechanism for defending property rights from infringement arising out of another's use of land. Nuisance law is based on the principle that one should not use property in a manner that injures others' rights. Courts could find a nuisance where the offending land use was "unreasonable" from the perspective of an ordinary, reasonable person. Finding a nuisance also involved balancing the various interests and rights of the parties involved.

### Restrictive Covenants

Deed restrictions, or restrictive covenants, were provisions within a deed that required or proscribed certain land uses and transferred from one owner to another. Most early deed restrictions prohibited some undesirable land use but could also establish more elaborate regulatory schemes. These covenants ranged from restricting parcels to residential uses and reserving open space to requiring homes to be exclusively constructed with specific materials and establishing minimum lot sizes. Today restrictive covenants are familiar to those in master-planned communities or where homeowners' associations enforce "Covenants, Conditions & Restrictions."

## **Governmental Control of Land Use**

### **Zoning**

Zoning is the process through which governments divide their jurisdiction into districts to which various agricultural, commercial, industrial, or residential uses are assigned. Within each designated zone, a governmental entity dictates permissible uses as well as things like building height, density, lot sizes, open spaces, and yard dimensions.

### **Comprehensive Planning**

The comprehensive plan presents a collective, long-term vision for growth and development. Through comprehensive planning, planners attempt to organize hundreds of thousands of residences and businesses across a municipality. Comprehensive plans must encompass a broad scope of interrelated issues such as critical infrastructure, the economy, emergency services, environmental protection, housing, land uses, and other community components.

### **Subdivision Controls**

Subdivision controls can bear a striking similarity to zoning ordinances but, unlike zoning, are unique to specific subdivisions. The intended purpose of subdivision controls is integration into the community by requiring such things as open spaces, access points for emergency services, street grading and curbing, or specific connection to utilities.

### **Takings**

The government's power to take one's land is considered fundamental to a functioning government. Government activity can result in a taking in a couple of ways. First, in the purest exercise of eminent domain, a government can physically take private property for public use. Additionally, even where there is no physical taking, when an ordinance substantially interferes with a landowner's rights, courts can still find a "regulatory taking" for which just compensation is due.

### **Exactions**

Exactions are the infrastructure, fees, and land set-asides demanded by a governmental entity as a condition for approving a developer's requested land use. They are intended to prevent community members from bearing the costs of new developments by requiring developers to pay those costs proportionate to the increased demand for communal resources. These needs range from improving or adding streets and constructing new schools to expanding infrastructure and growing emergency services.

### **Urban Renewal**

Through urban renewal, cities and towns seek to eliminate and prevent the spread of conditions that threaten health and safety while simultaneously seeking to stabilize the tax base, provide for more equitable distribution of tax burdens, and ensure stronger financial resources. To contain and eradicate blight, municipalities are empowered to take such action as acquiring properties, renovating or demolishing existing buildings and infrastructure, redeveloping the area, requiring mandatory remediation by property owners, and conserving buildings that are salvageable.

## **Conservation and Environmental Protection**

Over the last several decades, land use regulations have continued to evolve from merely dividing and organizing specific land uses to incorporating various environmental considerations. Today, local governments play an increasing role in environmental protection through the police power to regulate land use. These practices can include such things as establishing environmental policy guidance in the comprehensive plan, using zoning to direct new development for minimal impact, or enacting dedicated environmental ordinances to protect vital ecosystems.

## **Aesthetic Regulation and Historic Preservation**

The power to regulate for the people's welfare has expanded over time. Today it encompasses more than financial well-being or some moderately measurable quality of life but includes concepts such as spirituality and aesthetics. With such an expansive interpretation of the power to act for the people's welfare, a list of the ways in which a municipal government could regulate appearance would be lengthy and certainly not exhaustive. However, examples of such regulations could include limiting the display of signs, requiring a particular landscape, or mandating an architectural style for new construction. Additionally, in historic districts, municipalities can require the preservation of aesthetic, cultural, and historical characteristics within a designated area.

## **Conclusion**

Governments created the tools outlined in this paper intending to secure people's health, safety, and welfare. However, for each, there are significant ramifications. Policymakers must consider the administrative, economic, individual, and social ramifications of each tool as well as its usefulness in providing for the people's health, safety, and welfare. In conducting such an analysis, policymakers can ask: What is the burden on a governing authority to implement a given land use policy? Is the policy responsive to economic forces, allowing for the greatest freedom for individual actors to determine the most economically viable use of a parcel? What are the implications to housing affordability? Is the policy necessary to accomplish the health, safety, and welfare of the people?

Given the importance of property rights in preserving liberty, the authority to control land use is one of the most powerful tools wielded by elected officials and planners. Decisions to control or limit land use have substantial consequences to housing affordability, mobility, health, and safety. They have the potential to significantly impact the livelihood of hundreds of thousands of people throughout a state. Elected officials and government planners must wield this power judiciously with great deference to the natural rights to life, liberty, and property. The goal should be to preserve freedom, allow for productive land use, and retain the primacy of private property rights.