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Land and Prosperity: A Primer on Land Use Law and Policy

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Introduction

An individual's ability to acquire and use land is central to humankind's survival and individual and collective prosperity. Given the importance of land, exerting control over land use is one of the most significant powers exercised by local governments. Government regulation and land use restriction can have far-reaching consequences that can either promote or hinder prosperity. This primer will introduce several prominent land-use controls and briefly discuss their intended value and their potential effects.

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Property and Order

With civilization came both positive and negative externalities. The proximity of people allows laborers access to more employment opportunities and employers access to a larger labor market; Goods and services are more readily available; Transportation costs decrease, and so on. While there are benefits, there are also costs. Societies must also address negative externalities, such as conflicting land uses, noise, odors, and pollution. To maximize the advantages and reduce the costs, each individual must abide by certain behavioral norms. In other words, there must be order.

Order is essential to preserving and protecting the rights and liberties that belong to citizens of the United States. Russel Kirk, a prominent historian and political theorist, identified "order" as the "first need of the commonwealth," the force that binds a

community together, directing and guiding its inhabitants.¹ In his book, *The Roots of American Order*, Kirk defines order as "a systematic and harmonious arrangement" which "signifies the performance of certain duties and the enjoyment of certain rights in a community."² He explains that without order and the laws that proceed therefrom, a civilization cannot have freedom or justice.³ In the absence of order, there is anarchy and violence.

The founders of the United States knew the implications of an established order. In the wake of declaring their independence; proclaiming their natural rights to life, liberty, and the pursuit of happiness; and winning their freedom in revolution, the founding fathers set out to establish a constitutional order that limited the powers of the federal government and protected the fundamental rights of the people.

Among the fundamental natural rights that must be protected, the right to property is paramount. If it is true that order is the first and most critical need of civilization, then the first objective of such an order should be defining, recognizing, and protecting property rights. Properly understood and protected, property rights are the linchpin of individual liberty and economic vitality.

On Private Property Rights

In proclaiming the sacrosanctity of property in the American order, John Adams wrote, "Property must be secured or liberty cannot exist."⁴ John Locke, a 17th-century philosopher whose work was influential among the founding fathers, wrote, "Every man has a *property* in his own person. This nobody has any right to but himself" and that an individual is "master of himself, and proprietor of his own person, and the actions or labor of it."⁵

George Sutherland, who served as an Associate Justice of the Supreme Court of the United States from 1922 to 1938, recognized that the natural, fundamental rights to life, liberty, and property

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are so interconnected as to form one right. He explained:

*To give a man his life but deny him his liberty, is to take from him all that makes his life worth living. To give him liberty but take from him the property which is the fruit and badge of his liberty, is to still leave him a slave.*⁶

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. One's life is one's own, one's actions are one's own, and the products of those actions are one's own.

Inseparably linking to the rights of property and life is the right to possess and own land. Scientists estimate that of the "1.5 million known macroscopic organisms on earth," land supports roughly 80 percent of them.⁷ Earth, and humankind's use of it, is central to existence. "[N]atural reason" explains Locke, "tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature yields for their subsistence."⁸

Since its origins, humanity has always remained dependent on land as a source of its basic needs – food, shelter, and clothing. However, for humankind to make beneficial use of the earth and its resources, there must necessarily be a means of appropriating the earth's scarce resources. A system of private property naturally and necessarily exists as a way for an individual to sustain one's own life.

In a hunter-gatherer analogy, Locke explains that when an individual gathered from what the earth naturally produced, what was gathered became the gatherer's property. Combining that which is the unique property of every individual, one's labor, with that which was granted to humankind in common, the earth, that to which one's labor is combined becomes one's private property. As private property, the good was for the gatherer's exclusive benefit and use. Thus, private property naturally arose as the means to appropriate the earth for the benefit of humanity.

More than a necessary means of survival, property is an instinctual quality of human nature. Researchers have observed this phenomenon among children. In one study, researchers found that children who were informed that a toy was theirs to keep were more likely to maintain possession of a toy, verbally declare the toy as their own, and defend their possession of it. The study concluded that "young children are not only capable of understanding verbal cues regarding ownership, but are aware of some of the norms regarding possession and ownership."⁹ Recognizing and understanding the human nature of private property has significant economic repercussions.

In a market economy, private property rights capitalize on human nature and the innate inclination toward possession and ownership through several natural incentives. The result is the maximization of individual and collective benefit derived from the appropriation of property.

Collectively, the incentives embodied in a system of private property force individuals to "[face] the cost of using scarce resources" and thereby provide "the foundation for cooperative behavior among individuals."¹⁰ First, there is an incentive for an owner to protect and care for the owned property to preserve or even enhance the value of the property. "Private property rights concentrate the owner's interest and attention, providing a strong incentive for good stewardship." Second, the owner with even a modicum of foresight has an incentive to conserve his property to maximize the benefit over time. Third, private property provides an incentive for personal gain through mutually beneficial exchanges of property – for example, selling property to someone who values it more. Finally, private property creates a system of accountability and responsibility in which one must refrain from harming another in the use of their property.¹¹

However, to realize the benefits of private property, there must be a way to protect and enforce individual property rights. As found in the classroom study, toddlers intuitively express what philosophers and economists have spent a great deal of time and effort to articulate. That is, property rights must include: 1) "the right to exclusive use," 2) "legal protection against invaders," and 3) "the right to transfer to (exchange with) another." Herein lies one of a government's essential functions – establishing a legal system within which private property rights can be clearly defined, defended, and transferred.

Locke described the "preservation of Property" as "being the end of Government." In preserving property rights, the protection must be from the actions of other private actors and the infringement of property rights by the government itself.¹² Property is not secure if a government reserves the power to arbitrarily take one's property without a legitimate public purpose.

Land, real property, is a limited resource vital to sustaining life. In an effort to secure the health, safety, and welfare of the people, state and local governments have enacted laws, policies, and regulations to order land use.

Introduction to Land Use Laws and Policies

City Planning and land use regulation are certainly not new concepts. Civilizations throughout history and across the globe have attempted to establish order in the use of land. For example, land use regulations existed in Babylon in the 18th Century B.C.,¹³ among the Israelites following the exodus from Egypt,¹⁴ and in Rome with the ratification of the Twelve Tables in 449 B.C.¹⁵ While there are numerous historical, international examples of governmental land-use control, early American settlers often had significant freedom and control over the use of their property.¹⁶ The land use regulation that did exist in colonial America was primarily a private matter accomplished through legal action alleging nuisances and deed restrictions.

Law of Nuisance

As crucial as individual property rights are to preserving liberty and economic prosperity, these rights cannot be, and are not, without limit. "Reason," Locke declared, "teaches all mankind, who would but consult it, that being all equal and independent, no one ought to harm another in his ... possessions."¹⁷ Edmond Burke later wrote, "Whatever each man can separately do, *without*

trespassing upon others, he has a right to do for himself.”¹⁸

The common law provided a mechanism for a property owner to defend his rights from infringement arising out of another’s use of land. Nuisance law is based on the principle that one should not use their property in a manner that injures another’s use of property.¹⁹ Courts would find a nuisance when the land use complained of was deemed to be “unreasonable” from the point of view of an ordinary, reasonable person. Finding a nuisance also involved balancing the various interests and rights of the parties involved.²⁰ Today, a nuisance is defined as an “act or omission” that:

Annoys, injures or endangers the comfort, repose, health, or safety of others; ... Offends decency; ... Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or ... renders other persons insecure in life, or in the use of property.”²¹

Nuisances are classified as either private or public. What distinguishes public or private nuisances was essentially the number of people impacted by the land use. A private party could bring an action against a neighbor if the neighbor’s land use somehow injured the enjoyment or use of the complaining party’s land. For example, a private nuisance could result if the adjoining landowner allows garbage to accumulate in the back yard resulting in foul odors and a rodent infestation that impedes outdoor recreation, discourages open windows, and gives rise to significant health concerns. On the other hand, a public nuisance impacts a larger group of people, such as a neighborhood or an entire community. For example, suppose a chemical manufacturing company begins operations that emit hazardous pollutants into the air so that residents throughout the entire community are impacted. In that case, there likely exists a public nuisance.

As a means for regulating land, nuisance law allowed for significant freedom in using one’s land. Only those uses that were perceived as offensive enough to merit legal action were subject to possible limitation or forced cessation. Absent such a legal challenge, landowners were free to use private property as they pleased. There was no prospective speculation about which uses might be considered offensive. Nuisance evolved only as actual controversy arose, theoretically limiting only those uses that were particularly egregious.

Because of the litigious nature of nuisance actions, developing a body of law indicating impermissible uses evolved slowly, ordering land uses only as quickly as landowners filed nuisance claims. Additionally, relying on nuisance as the sole means of regulating land uses likely inaccurately represented the actual scope of illegally intrusive land uses. Legal action can be time-consuming and expensive. Consequently, developing a comprehensive system of land use regulation would have been extremely unlikely.²² A property owner who lacked the knowledge, time, or resources necessary to bring legal action would have little recourse but to endure the injury or abandon the property.

In addition to developing slowly, a nuisance-centric scheme of land use regulation would have been largely unknown to community members. Educating and informing landowners of all relevant decisions would have required collecting pertinent decisions and indicating which uses were per se nuisances and

which were nuisances only under certain circumstances. This information would then have to be made generally available. Given the cost and the effort, such a generally available anthology did not exist and likely would have been prohibitively expensive.

Furthermore, the reactionary nature of nuisance actions lacked predictability. A landowner could purchase land for a specific purpose, only to discover that others in the community found it offensive, forcing the landowner to defend his use in court. In other words, prospective landowners would have difficulty ascertaining the permissibility of a given use until they had already invested in using or developing their land.

Restrictive Covenants

Deed restrictions, or restrictive covenants, were provisions within a deed that required or proscribed certain land uses. These provisions transferred from one owner to another along with the deed. Most early deed restrictions were used to prohibit some undesirable land use.²³ However, there are examples of more elaborate, affirmative regulatory schemes.²⁴ For instance, in 1749, a member of the Penn family drafted a series of deed restrictions reminiscent of modern, master-planned communities. Among other provisions, the covenants required brick construction, imposed temporal limits on lot vacancy, and demanded conformity to street lines.²⁵

Additionally, there are examples throughout the 19th century of restrictive covenants being used to order land uses in subdivisions. These restrictions ranged from restricting lots to residential uses, reserving open space, requiring homes to be exclusively constructed with expensive materials, and establishing minimum lot sizes. Some restrictions even expired, requiring the residents to renew the covenants if they wished to maintain a covenant-restricted community.²⁶

Deed restrictions became a powerful tool with the rise of planned communities. For example, J.C. Nichols’ Country Club District in Kansas managed land uses in a development that ultimately covered approximately 4,000 acres with about 9,000 homes. Covenants within Nichols’ development restricted not only how the land could be used but to whom it could be sold and how common areas would be managed. He even created a homeowner’s association to enforce the covenants. The use of deed restrictions became more popular as a subdivision tool in the mid-20th century.²⁷

Today, restrictive covenants continue to be a common means of restricting land uses in specific neighborhoods. Today, many individuals live in subdivisions where land uses are prescribed in the neighborhood’s Covenants, Conditions & Restrictions (CC&Rs) and enforced by a Home Owners’ Association.

The potential benefit of deed restrictions lies in allocating the power to control land use in the hands of those who are most interested in benefitting from the land and obtaining value from its development and use – the developers and the subsequent owners. Developers will implement restrictive covenants only to the extent that there is value in doing so. Additionally, the risk of regulation is subject to the same market forces. For example, a developer may find that covenant-restricted communities are more attractive to potential buyers as a means to preserve the appearance of their neighborhood and their home values. As developers sell lots more quickly or at a higher price in a covenant-restricted community, they will continue to build and

develop to meet the demand. However, developers may find that prospective buyers either do not want or cannot afford the increased costs associated with a covenant-restricted community. To maximize their profits, they will have to satisfy the demand for lower home prices and greater freedom in property use. In sum, the private regulation and enforcement of land use through deed restrictions tended to use market forces to limit land use only to the extent that there are actual or more immediately perceived benefits to developers and subsequent landowners.

On the other hand, restrictive covenants carried at least a couple of potential drawbacks. First, it was not uncommon for early deed restrictions to illegally discriminate against subsequent purchasers. For example, racially motivated deed restrictions were used to exclude African Americans from white neighborhoods. Additionally, while such restrictive covenants cannot exist in perpetuity, absent some definite expiration, they could endure for decades, outliving any value they may have added at their creation. In effect, the original landowner could be restricting land use from the grave without regard for future circumstances or subsequent landowners' needs.

A state's authority to regulate land use is founded on what is known as the police power.

Governmental Authority to Regulate Land Use

While private means of limiting land uses through deed restrictions and nuisance actions were valuable, due to their limitations and increasing urbanization, governments perceived a need to assume a more substantial regulatory role in bringing greater collective order in land use. A state's authority to regulate land use is founded on what is known as the police power. The police power is the state's sovereign authority to regulate for the people's health, safety, and welfare. This grant of power is broad in its scope and elusive of a precise definition.²⁸ Despite its breadth and imprecise definition, the police power is not unlimited,²⁹ though such limitations can vary depending on circumstances and historical context.³⁰

In a landmark land-use case, *Village of Euclid v. Ambler Realty Company*, the United States Supreme Court recognized that regulations universally regarded as necessary and valid today would have been considered "arbitrary and oppressive" even 50 years ago.³¹ Judicial opinions have reaffirmed the elastic nature of the police power – that it must expand or contract. Additionally, courts give great deference to a governmental entity's legislative authority to enact and implement public policy.³²

With broad regulatory power, states and local legislative bodies began developing ways to bring order to the varying uses of land. Combined, zoning and comprehensive planning are the primary mechanisms used by local governments to order and control land use within their jurisdictions. Planners use zoning and comprehensive planning to organize the physical uses and development of land and guide the cultural, social, and economic design of a community.

Zoning

While private means of land use control are still available to property owners, zoning was developed to be more proactive. Much of what previously fell under public nuisance, and even some of what would have been a private nuisance, were preempted by modern land use law.

Zoning is the process through which governments divide an area within their jurisdiction into districts to which various agricultural, commercial, industrial, or residential uses are appropriated. Within each designated zone, a governmental entity dictates what can be built, how dense it can be, the materials with which buildings may be constructed, and a host of other limitations that it believes are in the best interest of the community.

Zoning began in 1909 with the nation's first city-wide zoning ordinance enacted in Los Angeles. L.A.'s ordinance was a response to the rapid growth of the city. As the city expanded outward, residential neighborhoods began to complain of smells and sights produced by nearby agricultural or manufacturing operations. In response, California passed a city-wide ordinance that divided the city into industrial and residential areas.³³

A few years later, New York City enacted what has become known as the country's first comprehensive zoning ordinance in 1916. In part, the ordinance was a response to the construction of the 41-story Equitable Building. The fledgling skyscraper, built to the edges of its lot, blocked the views from and cast shadows on surrounding properties. Anticipating similar issues, the government officials divided the city into three districts (residential, business, and unrestricted). The ordinance delineated permissible and impermissible uses within each zone. For example, there were eight permitted uses within the residential district, while in the business district, there were 44 prohibited uses. The ordinance also set various height districts regulating how tall a building could be within each one. Finally, the ordinance codified regulations for lot-area requirements (determining things like courtyards, open spaces, and yard areas).³⁴

Around the same time, other state legislatures began formally enacting laws that delegated state police powers to cities for land-use regulation. The acts were generally known as zoning enabling acts. Within the first two decades of the century, several states had enabled some or all of their municipalities to regulate land use.³⁵ Then, in 1922, under Secretary of Commerce Herbert Hoover, the Department of Commerce issued "A Standard State Zoning Enabling Act" (SZE).³⁶ This publication proved influential. Introducing the publication of the SZE, Secretary Herbert Hoover wrote that the SZE was to ensure "that proper zoning can be undertaken ... without violating property rights."

The SZE ushered in a wave of states delegating these powers through enabling acts. Oklahoma was one of the early adopters of a state zoning enabling act following the release of Hoover's model legislation. In 1923, the state statutorily authorized municipalities to enact zoning ordinances. Municipal governing bodies were granted the authority to "enact ordinances, rules and regulations ... not inconsistent with the constitution and laws of the state of Oklahoma"³⁷ to promote the "health, safety, morals, or the general welfare of the community."³⁸

While this delegation of the police power is a broad grant of authority, state law provides some insight into the purposes of zoning, planning, and land use regulation, including:

- Reducing traffic congestion;
- Protection from dangerous conditions or circumstances (such as fires);
- Promoting “health and the general welfare, including ... peace and quality of life”;
- Providing “adequate light and air”;
- Preventing “overcrowding of land”;
- “[H]istorical preservation”;
- Avoiding “undue concentration of population”; and
- Facilitating “transportation, water, sewerage, schools, parks and other public requirements.”³⁹

The law further directs that ordinances must consider “the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land.”⁴⁰ Specifically, regulations concerning buildings and land uses within a city and its defined zones can include:

- “the height, number of stories, and size of buildings and other structures,
- “the percentage of lot that may be occupied,
- “the size of yards, courts and other open spaces,
- “the density of population, and
- “the location and use of buildings, structures and land for trade, industry, residence or other purposes.”⁴¹

Zoning has been implemented in counties and municipalities throughout the state to organize compatible land uses. In some ways, zoning was a solution to the shortcomings of nuisance actions – though it created problems of its own. In the ways that nuisance law was weak—the ad hoc, reactionary, unpredictable nature of nuisance—zoning is strong. It is a regulatory scheme that is comprehensive, proactive, and, once established, has some degree of predictability. Rather than a piecemeal ordering of permissible and impermissible land uses, zoning aligns with a comprehensive plan and looks at the city as a whole to determine what uses are permitted and compatible within each use district. In this way, zoning ordinances preempt much of what formerly would have been challenged under nuisance law. Additionally, as zoning laws replaced some legal actions with regulations, individuals and the judiciary avoided the high cost of litigation.

While it has its benefits, zoning can be discriminatory, exclusionary, and highly limiting. In designing a scheme of land uses, planners must determine which uses are acceptable in a given location, often to the exclusion of others. The decisions to include or exclude certain land uses can be inefficient and costly for residential and commercial land uses. Rather than allowing individual actors to signal the mixture of uses through market engagement, zoning (in conjunction with planning) often seeks to create order by design. Lacking individual actors’ expertise and knowledge to locate themselves or their businesses to maximize their mutual benefit, individuals within a governmental entity are unlikely to design the most economically viable options. Furthermore, like deed restrictions, governmentally delineated use districts were historically implemented in racially discriminatory ways, such as prohibiting African-Americans or Chinese nationals from residing or operating a business in certain areas.

Additionally, zoning can place significant power to control private property into the hands of politicians, their appointees, and other governmental employees whose interest in specific

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parcels is more detached and superficial than the landowners themselves. Since control of land is a primary condition of ownership, the government’s power to control and determine the best and highest use of every parcel of land not only diminishes private property rights it also creates a superior right of ownership in the government.

Comprehensive Planning

Planning goes hand-in-hand with zoning. Modern planners have an arsenal of tools at their disposal to help chart the course toward orderly physical development. The purposes of these plans can range from renovating a specific neighborhood to more broadly ensuring housing or transportation needs are met.⁴² There are urban design plans, regional plans, neighborhood plans, downtown plans, corridor plans, redevelopment area plans, transportation plans, housing plans, economic development plans, parks and open space plans, and many more.⁴³ However, chief among these plans in effecting land use control is the comprehensive plan.

The comprehensive plan is considered one of the key elements of governmental land control. It presents a collective, long-term vision for the growth and development of a county or municipality and is intended to guide planners in organizing a community and serving its residents. The complexity of the task of “comprehensive” planning is monumental and technically difficult.

Through comprehensive planning, planners attempt to organize hundreds or thousands of residences and businesses across a municipality or county. A comprehensive plan encompasses a broad scope of interrelated issues and requires a profound knowledge of the complex, intricate workings of a city and its residents. Such a plan must contemplate “the important relationships among the economy, transportation, community facilities and services, housing, the environment, land use, human services, and other community components.”⁴⁴

While planning is legally subordinate to duly enacted zoning ordinances, as a policy, it carries immense power and legal significance in directing and justifying land uses within a municipality.⁴⁵ For example, in one of the most infamous land-use cases, *Kelo v. City of New London*, the United States Supreme Court, in determining that there was a “public purpose” for taking several families’ private properties and giving them to a private development corporation, relied on the fact that the taking “would be executed pursuant to a ‘carefully considered’ development plan” that the city believed would “provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”⁴⁶ Additionally, in many laws, including

Oklahoma's, zoning ordinances must be made in accordance with a comprehensive plan.⁴⁷

Zoning and planning often go hand in hand as the primary method of ordering a community. Planning attempts to provide a vision and establish guiding policies for creating an orderly place. Planning can be a useful tool for ensuring that adequate infrastructure is provided, particularly as continued development and growth increase demand for necessary infrastructure and services. Planning would also be advisable for a municipality that has undertaken to establish zoning. Attempting to develop use districts in the absence of a plan would be arbitrary guesswork. There would likely be no guiding policy in the process of ordering land uses. Decisions on zoning each parcel of land would have to be made on an ad hoc basis without adequate interest in or information about each piece of land. Without this guidance, zoning might be more chaotic, irrational, and subjective than when made in conjunction with a comprehensive plan.

As idealistic as city planning sounds, there are several technical difficulties inherent in the nature of comprehensive planning that can impede its effectiveness. One of the primary deficiencies of central planning is a lack of knowledge sufficient to build an efficient and productive economy. Each day, innumerable transactions are conducted by almost as many individual actors. Each of these transactions are critical to the design of an economy. An efficiently planned economy must reflect the demands signaled by these transactions in an open market. It is simply impossible for a central planner to accomplish this without supernatural omniscience.

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As with the attempt to plan an economy, in urban planning, the utopia sought by central, comprehensive planners is ultimately unachievable. First, cities are incredibly complex systems in which people engage with each other in innumerable ways. They are places of intellectual, economic, and social exchanges. Formulating a comprehensive plan, planning commissions and professional planners must contemplate the numerous ways people interact with each other as well as with the built and natural environments to organize the use of every parcel of land across potentially hundreds of square miles. For each tract, there several economic, environmental, topographical, and geographical considerations. Each parcel of land has context within a broader collection of proximate land uses, which raises questions of the compatibility, efficiency, and functionality of each prescribed use. Accounting for the number of variables inherent in such a complicated endeavor as comprehensive planning is undoubtedly more than humans could adequately comprehend. Even computers require an overly simplified model to gather and analyze the requisite data and produce understandable and usable information. The amount of data needed to plan every aspect of every parcel adequately is overwhelming.⁴⁸

Additionally, while more prospective than regulation of land uses through nuisance law, comprehensive plans still cannot predict the future. Planners can do their best to study and project trends, but the future is ultimately unforeseeable. People, their needs, their preferences, and their behaviors change. Depressions and recessions arise, housing bubbles burst, pandemics happen, and natural disasters occur. Furthermore, new, innovative technologies arise that necessitate changes in the way cities are planned. For example, a couple of decades ago, most city planners were not likely to give significant consideration to infrastructure for electric vehicles, robotic delivery services, self-driving cars, or other smart-city innovations. Given the constancy of change and the rapid rate at which it occurs in 21st Century cities, the time it takes to create a multi-year comprehensive plan dooms it to obsolescence from its infancy.⁴⁹

Subdivision Controls

While zoning and planning take center stage in regulating land use, subdivision controls are another powerful means for ordering land use. A quick drive around growing metropolitan areas will demonstrate that much of the new development and growth, particularly residential neighborhoods, are built as subdivisions. Subdivision controls often bear a striking similarity to zoning ordinances with set-back lines, minimum lot sizes, floor area ratios, etc. However, where zoning applies to entire zones throughout the jurisdiction, subdivision controls are unique to specific subdivisions.

The purpose of subdivision controls is to ensure that new neighborhoods are designed and built to provide for smooth integration into the community. This can mean ensuring that the design conforms to the comprehensive plan; that adequate infrastructure will be installed; that any requisite improvements are made to the land or existing infrastructure; or that any public access, easements, or land dedication are secured.⁵⁰

For example, municipal planning commissions can require subdivisions to:

- Arrange streets in a way that is consistent with current or planned streets;
- Create open spaces for a multitude of purposes such as parking, access apparatuses for emergency services, or recreation;
- Limit population congestion through things like minimum lot dimensions;
- Meet specifications concerning the grade of streets; or
- Connect to or install certain "water, sewer, and other utility mains, piping, or other facilities."⁵¹

The apparent benefit of subdivision control is integration. It helps maintain street alignment and connect neighborhoods to adequate services such as electricity, sewers, and water. However, like zoning, subdivision regulation can increase costs and may not be responsive to the demands of the real estate market. For example, requiring a subdivision to have a minimum residential lot size larger than what is demanded by prospective landowners increases the developer's cost as well as the price for homebuyers.

Takings

The government's power to take one's land is considered a fundamental power of a functioning government. The

foundation for takings is established by the due process and the takings clauses of the Fifth Amendment to the United States Constitution. It reads, “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.” The Fourteenth Amendment extends the protections of due process and just compensation to the states. Similarly, the Oklahoma Constitution prohibits taking or damaging private property for private use absent the landowner’s consent.⁵² In line with the United States Constitution, if a governmental entity acts to take a landowner’s property for public use, Oklahoma property owners are entitled to just compensation.

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 from the property owner for public use or some public purpose. Additionally, even where no physical property has been taken, when an ordinance substantially interferes with a landowner’s rights, courts can still find a “regulatory taking” for which just compensation is due.⁵³ Supreme Court Justice Oliver Wendell Holmes explained that “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁵⁴

Takings are a two-edged sword. On the one hand, the power to take private land for public use can facilitate the creation of necessary infrastructure – such as roads that efficiently carry commuters to their destinations daily. On the other hand, in providing a significant benefit to the community, individuals are physically deprived of their land or their beneficial use is impaired in some way. There is some consolation provided to those whose land is the object of a taking action or regulation – the property owner must be compensated for the “value of the property taken” as well as the damages to the parts of the property that weren’t taken.⁵⁵

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.⁵⁶ With new development and growth come particular needs. These needs range from improving or adding streets and constructing new schools to expanding infrastructure for utilities and increasing emergency services. Exactions are designed to prevent community members from bearing the costs of new development by requiring the new-comers to bear those costs proportionately. Exactions can either offset the expenses by demanding a fee or eliminate the cost by requiring new developments to provide for any resulting need.

Traditionally, exactions ranged from requiring a developer to install, provide land for, or pay a fee for anything ranging from parks to utilities or streets. Beyond the traditional exactions, governmental entities can charge fees related to infrastructure outside of the subdivision but still serve subdivision residents’ needs. In addition to exactions imposed on subdivisions, developments can also be charged impact fees to generate revenue for things like parks, streets, and water infrastructure.⁵⁷

While exactions look like a pay-your-own-way model, it can raise various legal and practical questions. For example, at what point does an exaction rise to the level of a taking? Is levying a fee on the developer an exaction, or is it an illegally imposed tax?

What is the impact on affordable housing? The answers to these questions are circumstantial, depending on the relevant laws and the language of the exaction. Exactions can rise to the level of taking. Exactions can be a mere substitute for lost tax revenue. Where the costs exceed any benefit to the landowner, these costs are likely to be passed along to subsequent purchasers, thus increasing housing costs. Furthermore, exactions can raise questions about whether developers should bear the costs of growth or if the government is neglecting its obligation to provide the infrastructure or service exacted of the developer.

Urban Renewal

Urban renewal may be familiar to those in metropolitan areas of the state, especially those who lived through the 1960s and 70s in Oklahoma City. With the creation of the city’s Urban Renewal Authority and the Urban Action Foundation’s help, the city began an ambitious crusade to revitalize the city’s downtown core during that era. This started with the hiring of the internationally renowned architect, I.M. Pei. The Pei Plan initially covered 528 acres in downtown Oklahoma City and called for the demolition of much of the city’s core and its complete redevelopment in the hope of realizing a thriving downtown and a windfall of economic impact.⁵⁸

With urban renewal, “blight” is the word of the day. For example, the narrator of a 1964 promotional video for the Pei Plan describes Oklahoma City’s downtown as plagued with “a disease called blight which, like a deadly mold, has settled on our downtown and is killing it.” What led to such a diagnosis? The city is depicted as being consumed with “obsolete structures, congested traffic, too little parking, worn-out hotels, and low-grade businesses.”⁵⁹ Urban renewal was created as an antidote to the spread of blight.

Blighted areas “constitute a serious and growing menace, injurious and inimical to public health, safety, morals, and welfare of [a municipality’s] residents.”⁶⁰ These areas exist where attendant conditions impede “sound growth,” result in “substantial liability,” jeopardize life or property, or are “conducive to ill health, transmission of disease, mortality, juvenile delinquency, or crime.”⁶¹ According to the legislature, blight is the cause of significant economic and social liabilities, such as decreased tax base, reduced tax revenues, stagnation of economic growth, traffic congestion, and are a strain on a municipality’s coffers resulting from a greater need for services like police, fire, paramedics, and hospitals.⁶²

Through urban renewal, cities and towns seek to eliminate and prevent the spread of blight and ameliorate the perceived evils contemplated above. They hope to stabilize the tax base, provide for more equitable distribution of tax burdens, and ensure stronger financial resources.⁶³ 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 salvable.⁶⁴ Using urban renewal to salvage existing infrastructure and eliminate blight can result in cost savings for a municipality. New development often requires new infrastructure. Urban renewal can utilize existing infrastructure as the foundation for further development where blight might otherwise consume resources and diminish the utility of existing

infrastructure. However, while urban renewal may have some advantages, it also has the potential to run up against the same problems inherent in central planning.

Urban renewal authorities are unlikely to possess adequate information to redevelop entire urban areas. For example, as part of an urban renewal plan, authorities may be forced to relocate displaced businesses without the business's unique expertise and

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knowledge. In the Pei Plan, the John A. Brown department store was forced to leave its downtown location. Even though planners had determined a new location for John A. Brown, lacking sufficient knowledge and expertise possessed by the owners and advisers to the store, the designated site was deemed unsuitable for their business.⁶⁵

Urban renewal plans are unlikely to adequately represent the aesthetic preferences and economic needs of the renewal area's residents. While most residents would probably agree that real blight should be dealt with appropriately, the term is highly subjective. What some call "blight" others might affectionately call "home." Again, Oklahoma City's experience demonstrates the high cost to those displaced from their homes and their places of business in the name of beautification and renewal. Some buildings, valued by the designers and planners, were initially preserved, while others were slated for demolition. For example, representatives of the Hales Building, one of the buildings slated for demolition under the Pei Plan, argued that it had been well maintained, undergone periodic interior and exterior renovations, was not aesthetically a blight, and did not pose a health risk.⁶⁶

Conservation and Environmental Protection

Typically, a study of conservation and environmental protection emphasizes the evolution of federal laws and policies beginning in the 1960s and the 1970s with legislation such as the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act and the formation of the Environmental Protection Agency. Today, local governments play an increasing role in environmental protection through the police power to regulate land use.

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. 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. For example, Tulsa recognizes a need for special consideration when developing environmentally sensitive areas with conditions like eroding soil or where "unique environmental or aesthetic qualities" exist.⁶⁷ Oklahoma City has developed several initiatives as part of its comprehensive plan intended to positively impact the environment – such as improving air and water quality, reducing environmental hazards, augmenting the supply of locally-grown food, and increasing green building practices.⁶⁸

Conserving natural resources and mitigating pollutants and environmental hazards are connected to health, safety, and welfare. However, environmental protection must be balanced with ensuring that it does not come at the expense of human vitality. With continued and growing concern for housing affordability and a well-founded desire to make homeownership possible for more people, limitations on development due to environmental concerns can increase housing costs. In some cases, land use controls intended to protect the environment may have the opposite effect. For example, urban designs that restrict traffic flow to promote walkable cities or mass transit and reduce reliance on the automobile can result in substantial traffic congestion, longer commutes, and increased emissions.

Aesthetic Regulation and Historic Preservation

Among the objectives of the police power, regulating "for the welfare of the people" has evolved to be the broadest and most nebulous. Something as measurable as present financial well-being, which is challenging to predict accurately, or as indefinite as happiness, might improve a person's welfare. To complicate matters, in 1954, the United States Supreme Court included spirituality and aesthetics within the realm of the police powers. The court held that "the concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy."⁶⁹ With judicial precedent establishing such a broad interpretation of "welfare," cities have some security in regulating municipal aesthetics.

With such an expansive interpretation of the power to act for the people's welfare, attempting to list the ways in which a municipal government could regulate appearance would be lengthy and certainly not exhaustive. Such regulations could include limiting the display of signs, requiring certain landscaping, or the appearance of new construction.

For example, in the Bricktown Core Development District in Oklahoma City, the code requires "architectural continuity" of new buildings. This means that any new construction in the district must be compatible with adjacent structures. However, the city makes it clear that continuity does not mean architectural monotony. The city encourages each design to have its "own distinctive character and appearance while maintaining a strong degree of compatibility."⁷⁰ And, of course, in a place named Bricktown, the "predominant use of red brick as the primary exterior building material is critical" to this continuity.⁷¹

In addition to such aesthetic concerns, places like Bricktown also seek to preserve an area's historical significance. Historical districts are intended to protect the historical significance and character of a designated area and are defined as "groupings of buildings and structures, noteworthy for their age, architectural integrity, or aesthetic unity."⁷²

While the benefits to aesthetic regulation and historical preservation may seem readily apparent – creating a beautiful place rich in historical significance – aesthetics are inherently subjective. What may have been considered blighted, ugly, or obsolete to a group of power brokers in the 1970's, were residences and businesses with value to their owners. Like many land use controls, determining what may be considered beautiful or historic is often limited to those in positions of authority,

influence, and power. Additionally, requiring homeowners and businesses to bear the burden of aesthetic compliance and historical preservation can be costly and bears little relevance to adequate housing or business success. The result is that bureaucrats, who have little accountability and who face virtually no risk, in a position of de facto ownership.

Conclusion

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. The decisions they make have significant consequences. They impact housing affordability, mobility, health, and safety. They have the potential to significantly impact the livelihood of hundreds of thousands of people throughout a state. Leaders of state and local governments must carefully consider the consequences of any action that tends to limit land use. Developing a basic understanding of these land use controls and their impact on the

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people of the state is essential to maximizing individual liberty and economic prosperity. Elected officials and government planners must wield this power judiciously with great deference to the natural rights to life, liberty, and property.

Each of the tools outlined in this paper was created with the intent of securing people's health, safety, and welfare. However, for each there are significant ramifications. Policymakers must consider its administrative, economic, individual, and social ramifications 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 useful and necessary to accomplish the health, safety, and welfare of the people?

Under nuisance law, there was little administrative burden on municipal executive and legislative bodies. However, due to the litigious nature of nuisance actions, the administrative burden for the judiciary could have been significant. Because of the limited nature of nuisance actions, land use regulations may have been more responsive to economic forces, allowing considerable freedom in determining the highest and best use of the land. Landowners were free to use their land as they pleased so long as it did not infringe on others' ability to enjoy and use their land. The broader utility of nuisance actions was limited. Regulation founded on nuisance actions lacked knowability, predictability, and security. Furthermore, nuisance actions could also be prohibitively expensive and time consuming.

Deed restrictions placed virtually no burden on the administrative body and minimal burden on developers. Market forces determined the extent to which land uses could be limited—what burdens existed on residents would be only as heavy or as light as buyers were willing to assume. Like nuisance law, restrictive covenants allowed neighborhoods to regulate themselves. On the other hand, deed restrictions can have significant social implications, such as historical examples of racially motivated covenants. Additionally, long-standing deed restrictions can decrease the utility of restrictive covenants that outlive their perceived value.

While zoning and planning preempted much of the legal action required by nuisance law, saving individuals and the judiciary time and money, zoning placed a greater administrative burden on governments' executive and legislative branches. Additionally, zoning and planning significantly impact the economy while relying on often limited knowledge. Lacking the unique knowledge possessed by individuals and business firms, it is doubtful that planners can effectively and efficiently design a city that maximizes its economic potential. Zoning and planning can also dramatically limit individual property rights. Through zoning, governmental actors assert greater control over, and, by extension, a superior ownership interest in, private property. Like deed restrictions, zoning and planning have significant social implications. There are historical examples of racially motivated zoning ordinances. Zoning can also result in decreased affordability and increased disparity between economic classes. However, compared to nuisance actions and deed restrictions, zoning and planning present a more comprehensive, predictable approach to land use regulation. Landowners could more easily discover permissible and impermissible uses within a use district, resulting in greater confidence and security in purchasing land and putting it to some specific use.

Subdivision controls and exactions were intended to integrate new developments into the community by balancing governments' administrative burden through reallocation of some costs associated with new development onto the developer. Depending on the nature of the conditions imposed or exactions demanded by the government, the demands could either beneficially or detrimentally impact the developer. The increased cost that results from subdivision controls is often passed on to homebuyers, which can have social ramifications. There is value in ensuring that new developments can connect to necessary infrastructure properly. However, other subdivision controls may have little relevance to ensuring residents' health, safety, and welfare.

Takings are considered a fundamental power of a government. Utilizing private land for public uses alleviates some of the government's burden when providing necessary infrastructure and can result in greater efficiency. However, taking private land has serious repercussions to individual property rights. Any exercise of eminent domain must be judicious and be narrowly tailored to achieve legitimate public uses. Takings can provide significant social and economic benefits when necessitated by actual demand. However, they can be utilized in ways that negatively impact individual property rights with substantial social and economic detriment when governments condemn property for some intangible public purpose.

With urban renewal, there is a significant administrative

burden on the governing authority to identify blight and design a scheme that eliminates and prevents its spread. Like zoning and comprehensive planning, this process can be complicated and requires significant knowledge. Urban renewal can have both negative and positive economic consequences. However, like comprehensive planning, it is unlikely that planners have the expertise and knowledge necessary to maximize economic efficiency and vitality through redevelopment. While it can alleviate the burden on government services and preserve under-utilized infrastructure, it can also have significant economic and social impacts on displaced individuals and businesses.

Local legislatures have assumed a more significant administrative role in environmental protection over the last several decades. While environmental protection can be driven by market forces, using land-use regulation to accomplish conservation and environmental protection is more often driven by planners and governmental authorities. This can result in increased costs to developers and landowners and limit the owners' use of the land. While there is a connection between conservation and environmental protection with human health, safety, and welfare, the result can have consequences to other health and welfare indicators, such as housing affordability. It can also sometimes conflict with other regulations, such as zoning or

aesthetic regulation.

Finally, aesthetic regulation and historic preservation are two additional top-heavy approaches to land use regulation. While there is an administrative burden associated with regulating appearances and defining historical value, such requirements and designations can provide a greater burden on landowners. Aesthetic and historic preservation often bear little relevance to free markets and a thriving economy. While there is certainly value in preserving and knowing history, those needs should not trump the needs of homeowners and businesses. There can be notable increases in the costs of aesthetic compliance and historic preservation. Careful consideration should be given to what classifies as historical and to what extent aesthetic regulation provides for the people's health, safety, and welfare.

To find the right balance in land-use regulation, governmental leaders can begin by asking whether current or proposed regulations are indispensable to health and safety and then consider their impact on property rights. It is human nature to act in one's best interest. This motive extends to land use. The vast majority of people will seek to improve their situation and pursue that which augments their health, safety, and welfare. The goal should be to preserve freedom, allow for productive use of land, and retain the primacy of private property rights.

End Notes



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