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### VALUES IN LAND USE CONTROLS: SOME PROBLEMS\*

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CAN we develop a general theory which will give us at least some rational guidance concerning the nature and extent of government planning and controls for land use—a theory which will indicate how we can determine in particular situations whether planning and controls by government are desirable?<sup>1</sup>

Any such theory must be based upon the assumption that planning is

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<sup>1</sup> In addition to the references in succeeding footnotes, I have drawn freely upon the following sources, among others, in writing this paper: Beaglehole, *Property—A Study in Social Psychology* (1931); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 *Law & Contemp. Prob.* 218 (1955); Fuller, *Some Reflections on Legal And Economic Freedoms—A Review of Robert L. Hale's Freedom Through Law*, 54 *Col. L. Rev.* 70 (1954); Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. Legal Ed.* 457 (1954); Fuller, *Freedom—A Suggested Analysis*, 68 *Harv. L. Rev.* 1305 (1955); Hale, *Freedom Through Law; Public Control of Private Governing Power* (1952); Hallowell, *Nature and Function of Property as a Social Institution*, 1 *J. Legal & Pol. Soc.* 115 (1943); Hayek, *The Road to Serfdom* (1944); Hayek, *Individualism and Economic Order* (1948); Jewkes, *Ordeal by Planning* (1948); Kapp, *The Social Costs of Private Enterprise* (1950); Knight, *Freedom and Reform* (1947); Mannheim, *Man and Society in an Age of Reconstruction* (1940); Mannheim, *Freedom, Power, and Democratic Planning* (1950); McDougal and Haber, *Property, Wealth, Land: Allocation, Planning, and Development* (1948); Mumford, *The Culture of Cities*, Chaps. V-VII (1938); Mumford, *City Redevelopment* 154-97 (1945); K. Polanyi, *The Great Transformation* (1944); M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951); Schlatter, *Private Property—The History of an Idea* (1951); Stein, *Toward New Towns for America* 192-207 (1951); Stone, *The Province and Function of Law*, c. XXVII (1950 Reprint); R. J. Williams, *Free and Unequal* (1953); Williams, *Planning Law and Democratic Living*, 20 *Law and Contemp. Prob.* 317 (1955); Wooton, *Freedom Under Planning* (1945); Yale University, *Directive Committee on Regional Planning, The Case for Regional Planning with Special Reference to New England* (1947).

possible as well as desirable. When we say that government planning is possible, we make certain assumptions, including the following:

First, we assume that government action can and will affect human uses of land, and change physical and perhaps even social environment. If government action is powerless, planning and controls will be useless and a waste of time and energy.

Second, we assume that it is possible to predict with a reasonable degree of accuracy in a given situation both what will happen if the government does not act and what will result if the government does plan and impose certain controls. Lacking such predictive ability, planning becomes irrational, if not dangerous—a wild guess about the future.

Third, we assume that suitable legal, political, social and physical techniques either exist or can be devised to carry out the plans and controls whose desirable effects we are able to predict if they are adopted.

Thus, in considering the desirability of land planning by the government we must go beyond descriptive studies and analyses of past and present conditions. We must have available the power to make the required predictions as to what will happen in the future should the controls be adopted or not, and the techniques to carry out such controls.

We must bear in mind that usually land controls are desired to change the social as well as the physical environment; indeed frequently, the social aspects of planning are the ultimate goal rather than the changes of the physical environment. We desire decent housing because we assume that such physically attractive shelter will have important social consequences such as decreases in crime and juvenile delinquency. This assumes, however, that our planning and controls can have predictable social as well as physical consequences—that is, that there is a definite relationship or correlation between bad housing and a high crime rate, and that improvement of housing will decrease crime. Frequently such assumptions of a predictable relationship between physical environment and social goods and evils may be based on guesses rather than demonstrated proof. Eradication of a slum may simply transfer the criminals and delinquents to other areas of the community when their former slum housing is torn down.

Furthermore, strictly speaking, the issue in planning is not whether or not the government will do something or will act. The government will always act, even if its action is to give the ultimate sanctions to the private plans and uses of individual landowners instead of attempting to regulate such individual uses. The real question is not if the government will act but how, and by what methods and procedures, and to what extent will government sanction private uses of land in lieu of attempting to change

them or direct them into other channels than those preferred by the individual users.

In planning, the desirable is always limited by the possible. Perhaps too frequently we assume that if certain planning and controls are desirable, then this conclusion alone should persuade us to proceed, apparently upon the basis that a way must and will be found to make them possible. We ignore or gloss over our inability to predict accurately the results of using or not using the controls, our lack of techniques to carry out the controls and our questionable assumption of a proved relationship between the objectionable social conditions to be eradicated and the physical environment we intend to alter. The fact is, no control or plan is ultimately desirable if it is not possible. To attempt the impossible in the field of planning is to invite disaster in the form of tragic social and physical consequences.

It may well be, as Michael Polanyi has attempted to demonstrate mathematically,<sup>2</sup> that wide scale economic planning by the state is impossible because of the intellectual and physical limitations of human beings. This is especially true if the state tries to take account of what people need and want, instead of simply dictating what shall be done. Perhaps, as Polanyi attempts to prove, individual humans, no matter how powerful and gifted physically and mentally, simply cannot consciously control and plan on a sweeping scale the manifold economic activities of modern society which today are performed by what we call the market mechanism, however imperfect the market may be. I suspect that Polanyi's conclusions may be too sweeping, and that some such modification as that suggested by Fuller is required. Fuller<sup>3</sup> has pointed out that much of our social order comes, not from a planned series of acts, but rather innumerable individual unplanned acts which all together amount to organization by reciprocity, the outstanding examples of which are the market and scientific research. The basis of such reciprocity is exchange and bargaining—A and B each exchange goods or services and thereby obtain a gain from each other. Such individual reciprocal adjustments cannot, on a wide scale, be planned by government. On the other hand, organization by common ends—where A and B combine to achieve what neither alone can do—is a possible subject for state planning and control; for here men can work together and plan. The essential factor here is the need for common goals or ends—absent these, successful planning is impossible.

It seems to me that much land planning may be possible since it falls within Fuller's classification of organization for common ends—schools,

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<sup>2</sup> M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951).

<sup>3</sup> Fuller, *Freedom—A Suggested Analysis*, 68 *Harv. L. Rev.* 1305 (1955).

roads, sewers, and water supplies, for example. More difficult, however, is the question of how far planning is possible because of lack of agreement concerning common ends. It may be argued that there can be no agreement on common goals in planning unless the goals are expressed so vaguely as to be meaningless or highly ambiguous; or unless a dictator or demagogue compels or deceives people into assenting to his goals. However true this may be, certainly I think that even the most ardent advocates of planning are beginning to realize that no plan is really possible of successful operation as hoped for by the planners unless there is widespread public acceptance of the goals of the plan. How to achieve such acceptance—by education, by propaganda, by selling or advertising campaigns, by other means of persuasion—is another question. The extent to which there can be true voluntary agreement upon meaningful common goals in plans is yet to be seen. Quite possibly, planning which tolerates the widest possible scope for individual action may induce more general acceptance than planning which leaves less room for individual choice.

There are other limits on "the possible" in planning, arising out of the political and administrative processes of government itself.<sup>4</sup> We must realize that there is a reaction of the regulated upon the regulator—those subject to controls do not remain passive, but instead strive, often successfully, to convert the planner to a different point of view. Moreover, planners to some degree tend to become biased in favor of more planning; if controls or regulations do not work as predicted, the remedy of the planner is usually not decontrol but instead newer and more widespread controls. In addition, in land use control, as in other forms of government regulation, there frequently is the inherent difficulty that the planners are actually making managerial decisions—decisions concerning pricing and capital outlays and market conditions—without, however, having the ultimate responsibility for the success or failure of such decisions. This difficulty is compounded by the fact that normally land use is not a static condition. Instead, it is a dynamic swiftly changing function in a continuously evolving social structure, which requires constant innovation and invention, with boldness and imagination. Yet, by its very nature, planning must at some point be static, must assume a frozen structure; else all planning becomes impossible—the plans are outmoded before they are finally drafted. Thus, it is often necessary for planners, by zoning or otherwise, to freeze the status quo for a given period while formulating plans, then to remove the freeze, but later to call another halt to attempt to consolidate and appraise new developments. It takes

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<sup>4</sup> Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 *Harv. L. Rev.* 1105 (1954); Jaffe, *Book Review*, 65 *Yale L. J.* 1068 (1956).

time to foresee trends and to evolve plans to cope with them, but by then new factors make obsolete the solutions. Moreover, planning in this country is not possible without certain procedural safeguards—due process and other requirements of fair play. Yet, the inevitable effect of such requirements is to slow up the planning process, to make it slower to act or to adjust to rapid changes. There also may be limits to government planning imposed by personnel problems. On the one hand, the more contented people become, perhaps because of planning, the more reluctant they are apt to be to pay for the planning by taxes to meet agency budgets. On the other hand, private industry often is successful in hiring away from government the more successful planners, leaving for government planning the less bold, less energetic, less competent personnel. Finally, the severe territorial limits imposed on land use planning in this country must also be taken into account.

Assuming certain planning and controls for land use are possible, as above indicated, what other factors must be considered to determine their desirability? Obviously to answer this question, we must ask what are the goals of land use; what values or objectives or satisfactions does our society wish to obtain from the use of land? Given these goals or values, we can then attempt to decide in a given case whether planning and controls will aid or hinder their achievement. This question, of course, assumes that we can reach common agreement on meaningful values here—a large assumption as pointed out above. There are many possible values here, which can be grouped in a large number of ways. The arrangement I have set forth below is simply one I find convenient. The order in which I have listed various values in no way reflects their importance or weight—that is another matter I shall return to later.

1. *The promotion of the maximum productivity in the use of land.* There is a social need to obtain the most possible goods out of our raw resources, such as land. In the case of non-urban land this means the obtaining of natural wealth for society from land in the form of crops, livestock, timber, furs, oils and minerals, and other agricultural and natural resource products. For urban land, this would include various industrial and commercial uses; even residential urban property in a sense is being used to shelter those who are engaged in productive work for society. By encouraging the highest productivity in land use we increase society's total material wealth and make possible a higher standard of living. Of course maximum productivity may conflict with other values such as conservation of forests, minerals, coal, oil and other natural resources, or cause farm surpluses, soil erosion, and depletion,

or overcrowding in cities. Generally speaking, however, there is an essential value to society in obtaining the maximum economic productivity from land use.

2. *A just and fair distribution in land use.* The difficulty with this value is in defining what is justice and fairness in the distribution of land. There are several possible approaches. One insists on absolute equality, so far as possible in land ownership and use. This might be achieved by dividing up the land equally among all families or individuals so that each would have the same amount to use; or it might be achieved by abolishing entirely all private rights in land and having it used collectively by large groups. A second approach is to reduce or eliminate large scale inequalities in land use among individuals, either by limiting the maximum amount any one person may have, or guaranteeing to each person a certain minimum amount of land, or some combination of both. Such a system tolerates, within limits, a certain amount of inequality in land distribution and use. A third view applies the principle of equality by guaranteeing to each equal opportunity and equal treatment, so far as possible, in acquiring land, but places no restriction on the amount of land which may be acquired. This approach—to make all equally free—bans social, religious, or other unfair discriminations in the distribution or use of land. Ordinarily, however, it makes no attempt to ban economic discrimination or inequalities imposed by the free market (except for monopolistic trends)—the fact that he who has inherited or acquired capital has an advantage in the land market over those lacking such capital. Frequently, there are conflicts between what we may regard as the fairest distribution of land and its most productive use; the large size farm may be more productive than the family size holding.

3. *Human health, mental and physical, and safety.* This recognizes human needs for light, fresh air, quiet, open spaces, adequate water and sewer systems, traffic controls, smog and pollution protection and insect controls. Here again this value may directly conflict with the most productive use of land; highly productive factories may pollute water and air.

4. *Beauty.* There is a value in land which is pleasant and beautiful, the most attractive uses of land and scenery. Unfortunately, this value is highly subjective, constantly changing both in society and in individuals.

5. *Morality.* We wish to reduce crime and juvenile delinquency; to combat such moral evils as drunkenness, prostitution, and excessive gambling. Unfortunately, we frequently find a vast gap between publicly professed standards and actual human practices—a “small” amount is unofficially tolerated when not too patent in operation.

6. *Security.* There are several aspects or levels of security. One is security of the nation—national defense. Another is family and individual security—giving each family or person an adequate home as “his castle.” This of course involves the even larger issue of economic or social security for each individual.

7. *An adequate family life.* This may, in extreme forms, relate to the size of the family—to foster smaller or larger populations. It may more often involve the fostering of what are believed to be desirable family relationships through emphasis on the home as the place where the family grows, lives, and plays together.

8. *The development of a desirable system of government.* Whatever form of government we may believe most desirable, the use of land may contribute to the growth, stability, and preservation of such government. The existing distribution of land may contribute either to revolution or social unrest or result in peace, order, and stability. If we wish maximum individual participation of individuals in government, land use again may promote this goal.

9. *Justice and fairness.* Land use and distribution may or may not be in accord with community ideas as to what is just and fair, either as to the procedures followed in, or the actual results of, the distribution and use.

10. *Development of character.* The difficulty with this value is its vagueness: what are desirable traits of character in individuals; to what extent are certain human traits natural born instincts which must be accepted whether we like them or not? We wish to foster generosity, tolerance, altruism and respect for points of view of others. We desire individuals to be independent, self-reliant, able to act, think, plan and take care of themselves and their families. We want men able to get along with others, and yet capable of independent thought and action. We desire men with both self-respect and self-control—responsible human beings, aware of the dignity of all men.

11. *Freedom and Liberty.* To most of us these are among the very fundamental values of society. We want both freedom from restraints and freedom to do things—freedom to act, to think, to speak, to write, to vote—all of our civil and political liberties. In addition, there is the value of the creative, purposive, choosing side of human nature, responsible for so many of man’s great achievements, the result of freedom to try, to experiment, to fail or succeed, to diverge from the ways of the community, to challenge its most basic assumptions and beliefs. There is value in the human need for self-expression, for each to develop his personality in his own way to the fullest extent possible. This value often

conflicts with others. Humans may prefer only to associate with others of their own race, culture, or social or economic class, and so may make social and other discriminations contrary to equality of treatment and a fair and just distribution of land use. Divergence may result in ugliness rather than beauty or in non-productivity of land.

12. *Happiness and well being.* Perhaps this is only the sum total of all or some of the preceding values. It is so intensely subjective that it is hard to describe or give definite content.

These dozen or so general values recognize that land and its use are both an integral part of society's economic organization and a vital coordinating factor in the functioning of our entire social order.

More important, and certainly more difficult than a mere catalogue of desirable values, is the question of how do we determine in a given situation whether planning and controls will aid or hinder the achievement of these values? In part, this is a function of specialized social sciences. The economist must give us guidance as to whether controls will increase productivity; the political scientist must assess their effect upon government; the criminologist their effect upon crime and morality. There are, however, several essential general issues here which merit further discussion.

First, to what extent should results be reached by a mere counting of noses—a determination of whether more people will suffer from controls than from the lack of them or a decision based upon how many people favor or oppose the controls? Should we give greater weight to the wishes or values of any particular group of people—the rich, the poor, tenants, landlords, the aged, the workers? Would not any such preferential treatment amount to unequal treatment and unfair discrimination? Should only those directly affected by controls have any voice? Under our form of government it would seem that equal weight must be given to the values and wishes of at least all people in any way involved.

What about these various values, however? Should all be given equal weight, or should some be preferred or subordinated? Should we attempt to discover a hierarchy of values? Is there any way we can determine the amount of satisfaction each value gives each person, or is this far too subjective a matter? Apart from some mechanism such as a free market, I believe it impossible to attempt any such scaling of values—all must be given equal weight.

Are we then reduced simply to the greatest good for the greatest number—majority rule here? Yet, many of our values depend upon protection of or tolerance for minorities—freedom, character, fairness and

justice, proper distribution. Certainly we must always permit the minority a fair chance to state its case and be heard—we should take every precaution to be certain that its wishes are not overlooked. Furthermore, in many instances it may well be that if the minority is willing to pay the full cost of what it wishes, there will be no social harms or costs if its wishes are granted, assuming they are not criminal or immoral.

Another issue of importance here is whether we should approach the valuation of controls impartially or with a bias for or against their use. Should we take the position that controls are the exception in the kind of society we prefer, and should not be imposed except where there is a convincing case made out for their use because of serious infringement of desirable social values? Or should we proceed upon the assumption that uncontrolled land use is the exception and only justified upon a clear showing that it will not seriously jeopardize desirable social values? Or, should we approach the issue with no presuppositions one way or the other? I confess my own preference for the approach which places the burden of proof, so to speak, upon those who would impose controls. I base this choice upon my feeling that as a general rule more of the basic values are promoted by a free market than by widespread controls. Thus, a free market encourages the most productive use of land by stimulating the maximum development of it in order to obtain the profits given by the market. It promotes growth of character by letting individuals decide for themselves how to use their land and holding them responsible for the results. This is not to deny that controls may not be needed to secure certain values at certain times. In fact, controls may be essential to preserve the proper functioning of the market if private groups such as bankers, credit or insurance agencies, real estate brokers, begin to exercise monopoly powers. The demands of health, safety, security, fairness in distribution, all may require some controls on land use. But, I believe in the principle of strategic controls: the least possible we can get along with which will do the job of meeting our really urgent needs. In general, it means to me that the free market is the best way to allocate our use of land resources and the price of such resources—the allocation of such resources both as to what is produced and who shall use it. Generally, market price is a better assessment of these various values than any other mechanism we have.

In particular, it seems to me, the values of freedom and liberty may be imperiled by land use controls. For one thing, such controls create restraints almost inevitably on individual action; true, such restraints may produce other values or enlarge the freedom of others, but of necessity they do limit the freedom of some in the use of their land. Second,

such controls are apt to create a social and political organism hostile to freedom and liberty. Most of us, even if we acknowledge the need for powerful government, view with some misgivings such a development, fearing the impact of such power upon individual freedoms, minority rights, individual divergencies and eccentricities. This is not to argue that freedom can exist without government—it cannot. We need a social and political structure in order to permit us to make meaningful choices which are the true basis of freedom. But, it does seem to me that the essence of freedom is the meaningful choice—the choice the individual makes directly for himself in a concrete situation: such choices, I believe, are typically the ones each of us makes in a free market; they are not the type we are apt to make when government planning and controls dominate our lives.

Actually, I believe that freedom and productivity and the other values I have listed are perhaps far more consistent with planning and controls in the case of land use than in the case of other factors in society such as labor. The explanation, I suspect, is perhaps partly because some of the controls may be ones which mainly perfect the workings of the free market by curbing monopolistic trends, and partly and more importantly, because of a second factor. This factor is the presence in the land use field of so many values on which we usually do not attempt to put a market price—character, morality, security and beauty. Because we have here so many noneconomic and nonmonetary values we may have more controls without harmful effect on a free market. This is not to say that such values as beauty, health or security are not priced on the market (they are when necessity requires) for we assume almost every piece of land has its price regardless of its subjective value to the user. What we do recognize, however, is that the translation of many of these values into monetary terms by the market is at best crude and often inadequate. Another approach to this thesis is to stress that in land use we frequently have a problem of large social costs to others of land uses which the users customarily, in a free market, will not bear or include in their market prices. Controls are then simply a method to redistribute the burden of such social costs as pollution, smog, noise, soil erosion and depletion, to the user or the purchasers of his products. Also, frequently land use may involve social benefits so widely diffused that no private user can obtain sufficient return in the market to warrant undertaking them. Such things as public works or parks or schools may fall into this class.

Another factor influencing a more favorable attitude toward land use controls may be the fact that eminent domain often is present. It would

seem to me that the use of eminent domain in land planning and controls is a vital factor, for at the very least it softens the impact of the controls to a considerable degree, and often entirely or largely removes the damaging effect of controls on certain of our values. If the exercise of controls damages certain values which are desirable to me and society, at least, eminent domain gives me a sum of money which in a free market may enable me to purchase an equivalent value or satisfaction for what I have lost because of controls. Of course, this is true only if the values I have lost can be purchased in a free market. The market may not offer the equivalent of such values to me. Or, if planning and controls have gone far enough, there may be no free market left for me to buy in.

Land use, in this country, is usually subject to quite definite territorial limitation—the city, county, or state. This may, of course, put definite limits on the scope of planning; but such limits may actually permit, subject to their limitation, more effective planning than if attempts were to be made on a larger scale. It may well be easier to plan land use for a small area than for a whole country, even granting that the smallness of the area subject to planning may seriously limit the possibilities of the planning.

May land use planning be more effective or at least easier to control because land uses are less dynamic than other elements of our economy, such as automobiles? We can trade in our old car for a new model each year, but few of us change our housing so quickly. In a relatively short period of time—a decade or two—it is possible to scrap all old or obsolete cars and start afresh; but the problem of how to replace obsolete housing, to remodel cities, is not so easy of solution. On balance, it seems to me that this factor in land use does not make planning here any simpler or more acceptable. For one thing, the rate of change in land use planning actually may be as rapid as in other areas; after all, the changes in automobile design and use are a big factor in urban and even rural land use. For another thing, while the more permanent and stable nature of land use may give planners more time for thought and make land even more tolerant of controls, this very stability and permanence creates other more serious problems for planners, not the least of which, perhaps, is that a mistake in land planning often cannot be corrected—a misplaced subdivision is there to stay for a good many years. Moreover, the users of land may be more, rather than less, opposed to controls for the very reason that land is often a long-term investment for them.