LAw SCoOL DEVELOPMENTS

A FACULTY SEMINAR ON LAND USE CONTROLS

ROBERT KRAMER *

In December 1955, the University of Wisconsin Law School obtained a grant from the Rockefeller Foundation of approximately $8,000 for a proposed faculty seminar on land use controls. Professor Jacob Beuscher, of the Law School, with the advice and assistance of his colleague, Professor Willard Hurst, had initiated the project. Briefly, Professor Beuscher proposed to assemble at the University of Wisconsin Law School at Madison, for six weeks in the summer of 1956, six law teachers, including himself, from as many different schools. The purpose of the project was to take a fresh look, if possible, at the social claims and needs for land use controls, to compare across the board social reality with the stated legal norms of private property law, and to delineate in modern terms the social functions of private property in land. The emphasis was not to be on empirical research, but rather on original thinking on the basic issues involved. His proposal directed attention in particular to the following eight topics, among others:

1. use restraints, such as easements and covenants, imposed on privately owned land by private businessmen (subdividers, insurers, and lenders);
2. indirect governmental restraints, such as those imposed by the FHA through mortgage insurance conditions and the Farm and Home Administration;
3. the administration of land use controls as distinguished from their substance: the problems of pluralistic regulation, and of the procedures and composition of regulating agencies;
4. use of the tax power;
5. public rights in highways and waterways in relation to abutting land owners;
6. the line of demarcation between regulation and the taking of private property;
7. leases, contracts, and land tenure problems; and
8. frontier problems in the land use field.

Four of the six participants were to be property law teachers, one was to be a constitutional and municipal law teacher, and one a jurisprudence teacher. Besides Professor Beuscher, the six participants were: Allison Dunham, University of Chicago; Harry Reese, Northwestern University; Charles Haar, Harvard University; Edward L. Barrett, Jr., University of California; and the writer.

This group spent a weekend in April 1956 at Madison settling various details and discussing the program and procedure for the six week summer

* Professor of Law, Duke University. My five colleagues in the seminar have each read a preliminary draft of this paper. Since each had his own highly individualistic reaction to the seminar experience, none wholly agreed with this interpretation, but all have consented to the publication of this paper.
session. All agreed to attempt to strike out into fresh channels. Individual members submitted proposals. The writer ultimately agreed to and did prepare and send early in June to the other five a short, critical reading list and bibliography, together with a brief discussion outline in very general terms, to be used as the basis for discussion for the first week of the seminar. This week was to center, in an extremely broad fashion, on some of the jurisprudential problems of land use controls.

Professor Beuscher generously acted as official host, mentor, and protector of the group. For the summer meeting at Madison, which lasted from June 25 through August 3, he obtained for each a study in the new general library of the University, as well as a large meeting room there, complete with a tape recorder, for the group sessions. The library set aside on reserve shelves all books on the group’s various reading lists, and the law school made available secretarial services and supplies.

The group’s meetings that summer during the first week were perhaps devoted less to the writer’s reading list and discussion outline than to further general planning for the future of the project. The writer’s brief outline and bibliography was sufficiently broad and suggestive so that it could be used, as it was, to evoke the special interests of the other participants. By the end of this week, each of the six had, at least in the main, definitely picked his particular topic. For the next four weeks, the group met five days a week, usually in the morning, for about four hours. Each of the six participants, in turn, acted as discussion leader for his topic for the three or four meetings devoted to it on consecutive days. Each prepared for the others a short reading list on his topic and was responsible for assembling these books and materials on the group’s reserve shelves in the library. At the conclusion of the group consideration of his topic, the discussion leader usually prepared a short written summary of his interpretations and conclusions as modified by his reactions to the group discussion. Most of the group’s discussions were tape recorded. The final week was spent mainly in consideration by the entire group of the written summaries.

From the very beginning, it was apparent that all six participants were primarily interested in various aspects of the justification today for land use controls. All felt that it was necessary to reconsider, in the light of the experiences of the last few decades, the necessity, desirability, and scope for the future of government planning and controls for land use. The particular topics of each member were the following:

1. Jacob Beuscher: Social science empirical research and its relation to the lawyer’s roles in private and public land use control; the significance of this relationship for law teaching; participation by law trained persons in such research. Professor Richard U. Ratcliff, urban land economist, and Professor Burt Fisher, social psychologist, both of the University of Wisconsin, appeared at several meetings and participated extensively in the discussion of these topics.

2. Allison Dunham: The place of economic analysis in a lawyer’s analysis of land use controls; consideration of the place of uniqueness of land as a factor distinguishing land planning from general economic planning; development of a classification of land use controls in terms of their attempt to
allocate external costs of particular land activity or to obtain the external benefit of a particular land activity; consideration of the relevance of this classification in determining whether the restriction on private property must be compensated for or not.

3. Harry Reese: A comparison of the techniques of land use control employed by governments with the devices of private control through consensual arrangements and rights of property; a comparison of the coercive impact of both forms of control upon the choices of the individual landowner; and a comparison of the legal and functional limitations upon the respective techniques of public and private control.

4. Edward L. Barrett, Jr.: The role of planning in a free society; political and technical limitations on government land planning; constitutional problems relating to the substance of land planning decisions, especially economic and racial classifications; governmental process problems in zoning and subdivision controls—the place of the rule of law; intergovernmental conflicts in land planning; the role of the courts, state and federal, in supervision of land planning decisions.

5. Charles Haar: The role of credit in land use control and planning.

6. The writer: Problems of values in land use planning and controls.

Former Dean Rundell attended several of the group meetings and gave helpful comments.

The ultimate benefits and results of the seminar time alone will disclose. All the group, however, have agreed that, so far as they are concerned, certain conclusions are apparent. The size of the group was about right, and the members, though of different viewpoints, were congenial. The length of the summer session was correct. Originally it was contemplated that the group might assemble teaching materials which each of the four property law teachers would use in the classroom during 1956–57. The group did not prepare any teaching materials as such; whether individual members will do so remains to be seen. Actually, the thought and teaching of all six will be profoundly affected by the six weeks of reading and discussion. Some or all of the six ultimately may publish, in a revised form, some of the materials they prepared for the group.

Perhaps the most valued outcome of the project was the opportunity, on the one hand, to pursue, freed from other duties, some long-deferred but cherished path of reading and research, and on the other hand, to exchange freely and informally with the five others views on topics of mutual interest; to try out novel ideas on them, to obtain their reactions, suggestions and criticisms, and then to reformulate afresh one's views for further discussion and stimulation.

The seminar particularly offered opportunities to the participants to add to their legal training intensive social science study. Throughout the program, there was special emphasis on reading, research, and discussion in the social science disciplines. The fact that the group worked and met in the general library, not in the law school, furthered this approach.

All the participants feel that further seminars in this and other fields of legal study would be desirable. They have learned, at least to some extent,
how to organize and run this type of seminar. They certainly would be willing to share with other law teachers this training and experience by participating individually or otherwise, in future seminars of this type with other teachers. This particular seminar, on the whole, was not highly organized or tightly planned and did not, by and large, tie itself down to a detailed agenda or schedule. Nor did it focus intensely on judicial decisions. Future seminars, however, might well find different approaches necessary and desirable. Such seminars could also be planned at various levels so as to give to beginning teachers or teachers at small schools opportunities for reading, research, and discussion otherwise unavailable to them.

The six participants, the University of Wisconsin, and the Rockefeller Foundation, all viewed the project as an experiment. In fact, the Foundation no doubt treated it as a pilot undertaking to ascertain the feasibility of similar grants to law schools. The participants (each in his own way and for different reasons) regard it as a success.