

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both men and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

As a rational being, each herdsman seeks to maximise his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?"... The rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another.... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

realizing that it represents a "natural resource", worthy of, and demanding, protection. This represents more than a mere exercise in semantics. Our characterization of the land upon which we live carries with it important legal consequences. It is this changing trend and its legal ramifications which are the subjects of this writing.

If indeed land is a resource then it represents something in which the entire public has an interest. Government regulations of land use then becomes constitutionally permissible, because the protection of exhaustible natural resources is a valid exercise of the police power of the state.¹ More than fifteen years ago a federal judge noted "[W]e cannot close our eyes to the manifold illustrations of experience, where man's over-exploitation has sharply diminished or even extinguished the supply of natural resources, wild game, and fish."²

It has been said that "the need for effective environmental land-use regulation is at least as great as the need for ordinary zoning regulations."⁴ This attitude is so prevalent among students and practitioners in the planning field that it might be called an empirical "truth" rather than a postulate. The logic and arguments for the environmental necessity of land-use planning and the legal

LAND DEVELOPMENT-

A Right Or A Privilege?

— James Murray

Surprisingly, this allegorical archetype is not the futuristic rumination of Buckminster Fuller or Constantine Doxiadis but rather it is one segment of a series of lectures on "The Checks of Population" delivered at Oxford University in 1833 by one W. F. Lloyd. Yet, despite the diligent and prophetic work by the precursors of our modern urban planners, it has only been in very recent history that the general public has become aware of the importance of managing land use.

The trend of contemporary thinking in the study of land use is fairly simple to describe. We are ceasing to view land as a "commodity" and are now

ramifications involved will be partially cataloged here.

Classifying land as a "resource" and thus bringing it within the penumbra of the state's police power is only the first step in attacking a number of legal problems inherent in any state control of land use. A number of these problems have been solved, in part, by the new Virginia Constitution.

Article XI of the revised Constitution of Virginia requires that all state government action be taken with explicit consideration of the environmental consequences. Any effect this article will have on land-use management in the State must be limited to

those land-use activities with environmental consequences. The planners' response to this maxim would be that *every* land use activity has important environmental consequences. However this principle has seen little legal recognition. In fact, only in the case of power plant sitings have courts been generally cognizant of the serious environmental impact of a land-use decision. This does not preclude arguments that other land-use decisions have important environmental ramifications. It does, however, restrict the environmental lawyer to non-legal, but extensive, technical evidence.

The Division of State Planning and Community Affairs, in its report on Critical Environmental Areas,⁵ sees land-use planning as an environmental necessity. They note that by the year 2000 (when the state's population will have doubled) we will need a 300 percent increase in recreational areas. "A single development decision of sufficient magnitude in even a rural area can do extensive harm to an environmentally critical area. If state park land is not acquired or planned for soon it will no longer be

confined realistically to lands in government ownership, but must take into account whatever lands are included in particular ecosystems, regardless of who holds title to them. This broadening of the policy context may be opposed by persons committed to the inviolate right of private land ownership, or who hold specific interests in land use that they believe might be threatened by public action....But if the management of whole ecosystems becomes a matter of public policy, then the formulation of public policy must proceed upon the basis of the proposition that all land is in some degree public. The metes and bounds of ecosystems are determined by physical, biological, and cultural forces. Men may impose their own arrangements on natural systems, but engineers, surveyors, and lawyers neither amend or repeal the so-called laws of nature.⁶

The principal impediment to government control of land use and development is the most basic of American socioeconomic tenets—the free enterprise system. The English companies formed to colonize America were primarily real estate consortiums organized for speculative purposes, and they initiated a uniquely American tradition of treating land as a commodity. Prior to the Revolutionary



Reston, Virginia — A Planned Unit Development

available. The selected critical environmental areas [established by the study] are generally privately owned properties with inadequate protection against adverse development."

The environmental importance of land use management is usually viewed as so pervasive in the fight to save our environment that extensive government control over the field is seen as inevitable. One environmental policy commentator has written that:

...[A]n ecosystems approach [to land-use planning] may ultimately become necessary to human well being and even to survival...The discourse can no longer be

War the colonies were under a "socage" system of land tenure which recognized an underlying state interest in all lands within the jurisdiction. However, the United States Constitution eliminated this system in favor of a system of "allodial" tenure in fee simple. This decision has been termed a "most fateful and potentially tragic development" for 20th Century land management problems and has been said to have "conferred on the individual owner a virtually unrestricted right of use and abuse, limited in practice only by the legal doctrine of nuisance, the tenuous application of the police power, and the



power of taxation."⁷ This system is now firmly imbedded in the psyche of every American. No rights are more sacred than "property rights." "Subordination of concern over the environment to private property rights was accentuated by the ideas of such men as John Locke, who were deeply concerned with individual property rights, and reasoned that there would always be enough land and water for future generations."⁸

It is important to understand both this historical background of the American approach to land as a "commodity" and the economic motivation of those who would perpetuate it. In many instances the courts will balance the equities involved when a landowner argues that the use of his land is being unduly restricted. The environmental lawyer would be wise to compare the ecological consequences of particular uses and their broad effects for society with the economic motivation of the landowner.⁹

Local economics is the basis of all regular American zoning decisions. But, even economists recognize the futility of a purely profit-oriented approach to exploitation of resources, including land: "[T]he system is finite. It cannot last because, for one thing, it fails to calculate in its earnings formulas the ultimate capital expenditure: the earth itself. We are rapidly running out of natural resources."¹⁰

Thus, any legal activity involving land-use planning must be undertaken with consideration of this basic conflict between American free enterprise economics and the newly-recognized environmental detriments to the public generally. Social scientists have little difficulty in determining where the balance should be struck: "If our cities are to remain liveable, they will need parks and open space and in most cases in much greater quantity

than at present. Surely the public health rights of hundreds of thousands of city dwellers are at least equal to the speculative money-making rights of individual or, increasingly, corporate landowners."¹¹

The traditional, preeminent American view of land as an economic commodity with salability at the root of all land-use regulation finds support in the Constitution: no citizen of the United States may be deprived of property by his government without just compensation. This right is guaranteed by the Fifth and Fourteenth Amendments, as well as by most state constitutions. It is the primary point of conflict in the vast majority of land-use cases. Deprivation of use or use potential by the government reduces market value and, it is argued, amounts to "taking" of property. "To be effective, environmental law must come to grips with [this] basic tenet of the American way of life:....An individual is free to utilize, change, or destroy his possessions insofar as his actions do not seriously affect some other person; natural resources are meant to be used, i.e. consumed; there is no land form or physiography which is *prima facie* non-developable."¹²

Zoning is recognized as an exercise of the police power of the state for the purpose of promoting "the health, safety, morals, and general welfare of the community" and encouraging "the most appropriate use of the land". Courts will not invalidate a zoning ordinance simply because it diminishes the value of a landowner's property. The problems arise when a zoning or other land-use ordinance seriously restricts the permissible uses an owner may make of his property; for any major restriction which substantially deprives the owner of "all beneficial use and enjoyment" is usually classified as a constitutionally-prohibited "taking". However, this doctrine is limited by an exception which allows virtually unlimited regulation of land use if there is a substantial "public safety" interest involved. For example, flood plain ordinances are often allowed to virtually sterilize a citizen's land, prohibiting any beneficial use on grounds that constructive use of the land would amount to maintenance of a public nuisance.

Another restriction imposed on land-use regulation under the compensation argument is the "public benefit theory". The essence of this restriction is that a zoning regulation which is enacted solely for the benefit of the public, but which severely restricts the uses to which a private landowner may put his land, should give rise to an obligation on the part of the public to pay the landowner for the benefit it receives. This situation arises when the only uses permitted the landowner are of a "public character", in which case "the courts sometimes seem to suspect the government of using the police power to create parks and wildlife sanc-

tuaries without paying for them."¹¹

Whenever a land-use regulation is held confiscatory with respect to a particular parcel of land the state may then determine whether the protection of that property from a particular type of development is important enough to warrant some limited or complete acquisition of the fee. One alternative use of the police power, using eminent domain to control land use, is of limited effectiveness because the cost of any extensive program is prohibitive.

A less expensive and particularly useful alternative to acquisition of the fee is state purchase of an open-space easement in the property. Another, is state purchase of "development rights" from the landowner. Several states provide for such practices with the usual procedure providing that the owner retain all ownership rights subject to a very restricted right of development in return for a tax advantage, usually a tax freeze at current rates or value. Virginia's Constitution specifically allows for state acquisition of such interests and it provides for tax incentives through tax assessment of property according to its actual use. The chief fault with the easement or development right approach is that in order to be effective such an interest may often have to so restrict the owner's development rights that the property's market value is drastically reduced for the near future. The result is that the fair market

value of the easement may be very close to the cost of purchasing the fee.

Non-legal commentators have gone so far as to argue that development rights are privileges granted by government acquiescence and therefore are freely alienable by government action. They contend that land ownership should be treated like any other investment. Thus it is subject to diminution in value by government action, such as down-zoning, just as investment in the stock market is subject to the vicissitudes of a government controlled economy.¹³

A factor commonly overlooked by those with economic interests opposed to land-use control is that the net long-term effect on the land investor may be beneficial. As space becomes scarce through the continued geometric expansion of population, the value of open space and potential park and recreation lands will grow proportionately. Land which is zoned to insure its character as open space and which carries a low annual property tax rate, as envisioned by many proposals, will be exceptionally valuable. "This recognition of new purposes for regulating land should not and does not mean that the old concerns with land's value and salability should be ignored. On the contrary, the longer-range view expressed in the new land regulatory systems will enhance land values over the long run to a far greater degree than systems motivated

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A basic text . . .

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LAND DEVELOPMENT

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primarily by a desire to increase immediate salability."¹⁴

From a legal standpoint, the situation is in a state of flux. Obviously, there will be some recognition of environmental consequences in future planning decisions. This is precisely what is required by the new Virginia Constitution. However it remains to be seen how far toward the courts will allow the pendulum to swing toward total state control over all land use.

Land-use planning has been called "the base of the pyramid for environmental control." Indeed, a new awareness shared by an increasing number of environmentalists makes increased government control over land-use inevitable. There is little doubt that the consensus of expert opinion favors state-wide planning controls and views such measures as the trend.⁵

In this context Virginia's Land Use Task Force has said: "The existing policies of land use in the Commonwealth are grossly inadequate to fulfill the State's constitutional mandate for assuring a quality environment. The Task Force has concluded that the Commonwealth needs an explicit state-wide land use policy with appropriate instruments to execute that policy."¹⁶

The Council of State Governments lists numerous problems which are factors in generating a need for an increased state role in land resource management. Such problems include rapid, uncoordinated, piecemeal and excessive land development; lack of adequate provision for future land-use needs of agriculture, forestry, and industry; inadequate protection of water supplies, wildlife, and unique or historical areas; the need for "new town" development; and inadequate local planning and zoning.¹⁷

The problem with this approach, besides the opposition of land speculators with vested economic interests, is that the states have traditionally viewed "land-use control as an urban problem". However, it is becoming apparent that "local zoning is inadequate to cope with problems that are state-wide or region-wide in scope, [and this] has fueled the quiet revolution in land-use control."¹⁸

Russell Train, Chairman of the Council on Environmental Quality writes: "[A]s our society has become more complex it has become clear that some land use determinations of one locality often have important consequences for citizens in other areas. It is in these issues of greater than local significance in which state and regional involvement seems appropriate, even necessary, if the broader community affected by such decisions is to have some influence over them."¹⁹

The popular press reflects the same attitude; a

recent article in the Wall Street Journal noted that states are beginning to take back some of the land use regulating authority from local bodies:

Fragmented control simply can't cope with today's problems of protecting the environment, minimizing the chaos of urban sprawl and providing adequate space for housing and industry that increasingly sweep across city and county boundaries. It's clear that states are beginning to rethink their policies for the first time in nearly half a century. And, as a result, a growing number of planners, land use experts, and government officials agree: The era for total local domination in the field is over....The problems of providing enough land for housing, recreation, conservation, and industrial and commercial development can no longer be solved by individual municipalities....[Property taxes are] a major stumbling block to state wide land controls....If they compel communities to share tax burdens, the court decisions would go a long way toward relieving the pressure on municipalities to compete for new development, thus making statewide land-use laws easier. State officials are far more willing to consider environmental values and the impact that a project may have...than are municipal officials.²⁰

A state-wide plan of land-use control would alleviate many complaints about local myopia caused by greed and economic discrimination. Any such plan would necessarily be arbitrary in nature but it would be far less vulnerable to criticism of being discriminatory against particular landowners. In the numerous rural counties of Virginia where land values are more consistent county-wide, and long range development controls would have less immediate drastic economic impact, this is particularly true. A more difficult situation is presented in the highly urbanized areas where undeveloped real estate is a rare "commodity". Here, treating such land as a "resource" worthy of protection by the state would subject the state to claims of "taking without just compensation" and eventual state purchase would probably be necessary.

The Virginia Constitution creates no obligation for the General Assembly to act, in contrast to the Revision Commission's proposal and the environmental provisions of a number of state constitutions.²¹ Thus any such legislation that the Assembly might pass would probably be the result of pressure from environmentalists, The State Division of Planning and Community Affairs, and the federal government. In the latter case the impetus would be considerable if proposed land-use legislation is passed by Congress. Proposed legislation would create economic sanctions for those states which do not have a conforming state-wide land-use plan and regulatory authority. The passage of federal legislation which will require states to implement state-wide land-use planning controls seems virtually inevitable, particularly considering the support the Administration-Jackson Bill received in the 92nd. Congress.²²

The existence of Virginia's Constitution, Article XI, and the establishment of the environmental necessity of planning does not in itself assure Virginians of ecologically sound land-use planning any more than would the creation of a state-wide planning authority. The problem of implementation remains. Justice Musmanno of the Pennsylvania Supreme Court has written: —"[O]ne's bread is more important than landscape or than clear skies. Without smoke, Pittsburgh would have remained a very pretty village."²³ Likewise, many people of similar persuasion, who honestly feel that they harbor a justifiable concern for the economy of their own locale and who candidly harbor a deep concern for their own economic welfare, have managed to neutralize some of the best efforts of environmentally conscious lawyers to see that the spirit of legislation such as the Virginia Wetlands Act and the proposed state-wide planning ordinances is respected, and that the policy enunciated in article XI is observed in the daily operations of government.

"[Land use] law is often politically enunciated and politically enforced. The substance of the statute is enacted in response to political pressures, enforcement is placed in the hands of executive branch officials whose main concern is the political impact of their actions, and it is all too infrequent that political desires coincide with technologically and socially effective solutions."²⁴ One glaring example of how strong, well motivated, environmentally conscious legislation can be rendered toothless and environmentally destructive can be found in the Tahoe Regional Planning Compact, a multi-state planning agreement that was hailed as the savior of the ecologically critical, and only marginally stable, Lake Tahoe Region. The compact is a shambles now that its implementation has begun and this is largely due to the fact that the members of the Regional Planning Agency, who were supposed to take a longer and broader view than the existing local planning entities, are in large majority the same tunnel-visioned local business representatives that had endangered the ecological balance of the region in the first instance. The citizens of the area, led by the League to Save Lake Tahoe, are now desperately seeking a way to halt the planning authority, which they hailed only 14 months before, because it appears destined to perpetuate and guarantee the ruination of a beautiful wilderness area.²⁵

Over one hundred years ago Frederick Law Olmstead, who was America's first landscape architect and city planner, as well as the designer of New York's Central Park, foresaw the urban blight indigenous to unrestricted metropolitan sprawl and fought to have the city not only reflect the needs of commerce but of "humanity, religion, art, science

and scholarship. Long before the end of the Nineteenth Century he foresaw the choked, crowded Manhattan we now see, the need for green, grassy suburbs, the interdependence of adjoining urban regions, and the threat to the air itself. When asked to build Prospect Park in Brooklyn—his finest park—he tried to lift the eyes of the politicians to a regional system of parks and roads running from the Atlantic Ocean to the Hudson Valley. But they kept their eyes to the ground; 'Practicality' triumphed, and we are left today with the debris of that practicality.²⁶

It is Olmstead's sort of approach to land use that has now been universally accepted by scientists, scholars, and even lawyers as not only environmentally attractive but as critical to the future of the world. It remains, however, for the legislature and the courts to adapt the legal system to reflect this same recognition. §

FOOTNOTES

1. *Potomac Sand & Gravel Co. v. Mandel*, no. 20, 430 Circuit Court, Anne Arundel County, Md. (1972), at 19.
2. *Corsa v. Tawes*, 149 F. Supp. 771, 774 (1957).
3. **Report of the National Conservation Commission**, S. Doc. No. 676 60th Cong., 2d Sess. 109 (1909).
4. R. F. Kingham, *Wetlands Protection Laws and Flood Plain Regulation: The Question of Taking Without Just Compensation*, (1972)(Unpublished paper, University of Virginia).
5. **Division of State Planning and Community Affairs, Preliminary Report on Critical Environmental Areas**, (Sept. 1972).
6. Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 *Natural Resources Journal* 203, 205-206 (1970).
7. *The Council of State Governments, The State's Role in Land Resource Management* (1972), at 2-3.
8. Cohen, *The Constitution, The Public Trust Doctrine, and The Environment*, Vol. 1970 (No. 3) *Utah L. Rev.* 388, 389 (1970).
9. Rockwell, *The Expanding City, Environmental Geology Notes* No. 46, at 28-29 (May 1971) (Illinois State Geologic Survey).
10. A. Smith, *Supermoney* (1972), reviewed, W. Schott, *Life*, Oct. 20, 1972, at 24, (Vol. 73, No. 16).
11. Pryde, *New Strategies For Open Space*, 57 (2) *Sierra Club Bulletin* 9, 18 (Feb. 1972).
12. Adams, *Environmental Law Tackles 3 American Institutions*, 8 (4) *Industrial Water Engineering* 24, 25 (April, 1971).
13. Pryde, note 11 *supra*, at 10-11.
14. E. Bosselman, *The Quiet Revolution in Land Use Control* at 25, (Council on Environmental quality, U.S. Government Printing Office, 1971).
15. C. O. S. G., note 7 *supra*.
16. *Virginia Governor's Council on The Environment, Land Use Task Force Report*, 57 (1971).
17. Note 7 *supra*, at 6-7.

18. *Bosselman*, note 14 *supra*, at 3.
19. *Bosselman*, note 14 *supra*, at ii.
20. "State Land Use Control", *Wall Street Journal*, June 28, 1972, at 1, col. 6.
21. A. E. Howard, *State Constitutions and The Environment*, 58 *Va. L. Rev.* 193, 207 (1972).
22. The Land and Water Resources Planning Act, S. 632. This bill proposes that federal aid be given to state governments in order to assist them in developing comprehensive land use programs.
23. *Waschak v. Moffatt*, 379 Pa. 411, 109 A. 2d 310, 316 (1954).
24. D. J. Brion, A Short Study of The Common & Statutory Water Law of Maryland and Virginia, 18, (Working Document No. 32, Planning and Evaluation Office, Federal Water Pollution Control Administration, Middle Atlantic Region, 1969).
25. S. Brandt, *What's Going Wrong at Tahoe*, 56 (10) *Sierra Club Bulletin* 8 (Dec. 1971).
26. *Newsweek*, Nov. 6, 1972, at 77 (Vol. 80, No. 19).