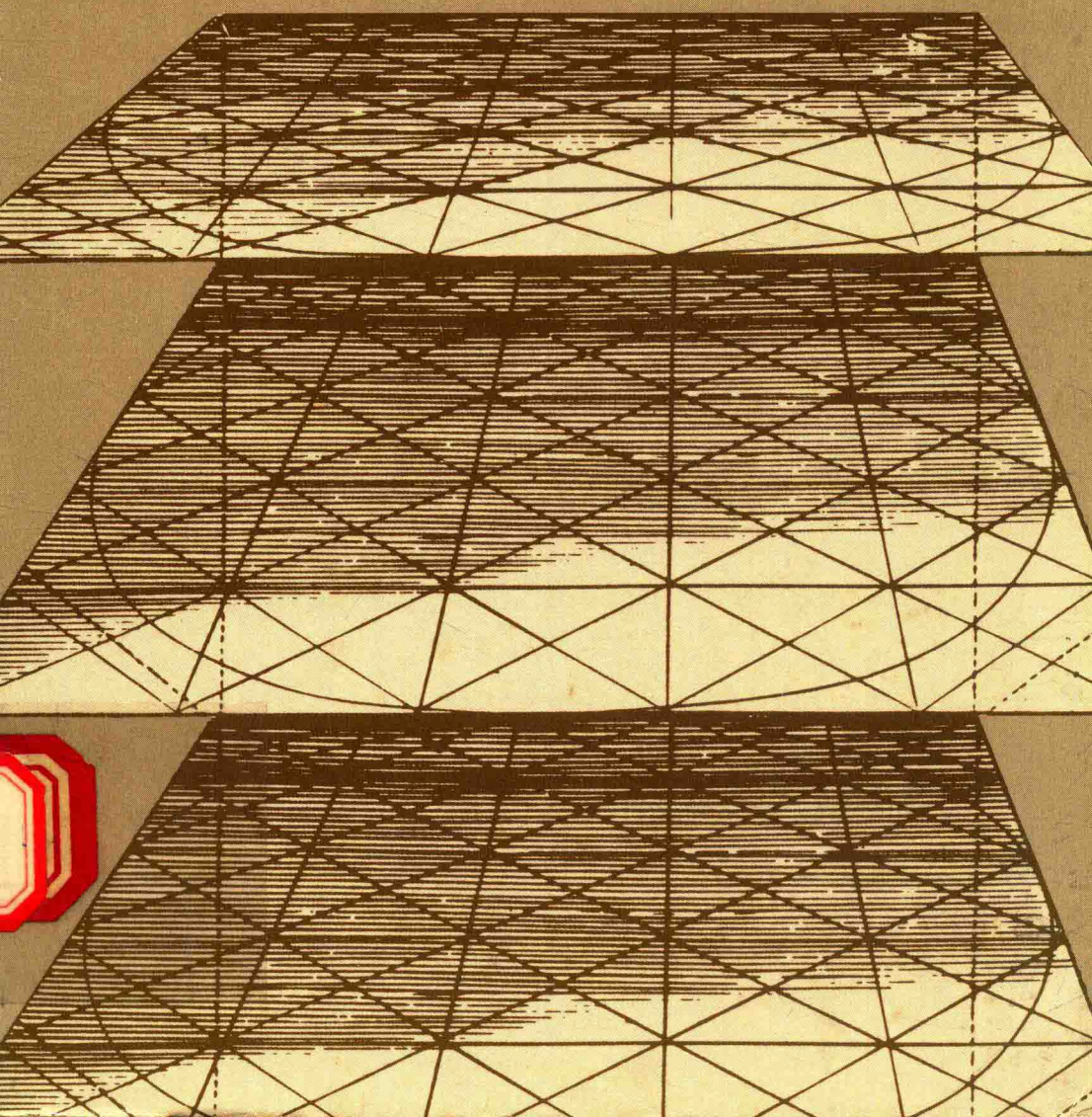


Land Use Regulation

The Impacts of Alternative Land Use Rights

Martin A. Garrett, Jr.



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To Sue

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Preface

The purpose of this book is twofold. Since the early 1960s land use issues have become increasingly important in American society. Consequently, I began to incorporate land use issues into a typical economics course in urban analysis. It became immediately apparent, however, that there was no one volume or even a group of selected readings that was appropriate for an undergraduate course. The absence of a work involving a comprehensive analysis of land use is probably attributable to the interdisciplinary nature of the issues. An analysis of land use involves an understanding of economic concepts, while the implementation of land use policies occurs through the political process that is guided by the judiciary. An analysis of land use therefore must incorporate economics, public policy, and court rulings.

There is a large body of literature that has been provided by land use profes-

sionals, whose background may be law, architecture, geography, and perhaps political science or sociology. It became apparent to me, however, that the best analytical studies have been developed by economists and those in the legal profession. Yet lawyers only occasionally incorporate economic analysis and economists rarely include the institutional structures that experts in land use know are important. A major purpose of this work is, therefore, to provide an analytical interdisciplinary approach to land use issues.

There is, however, an additional purpose behind this work. During the past 12 years I have been a member of a planning commission in a community not unlike many of the communities that have been involved in landmark land use court rulings. Primarily these have been suburban communities that have recently been in the path of urban growth or communities that have experienced rapid growth pressure. From the exposure to the problems that rapid growth imposes on a local governing body and the conflicts that arise between local citizens, the governing body, and landlord-developers, I became convinced that optimal land use can be obtained only through a combination of the free market and regulation.

As an economist and a student of land use I immediately encountered a dilemma. The dilemma occurred primarily because land use regulation, especially zoning, has been harshly criticized by eminent economists and lawyers over the past two decades. Actually, it is probably fair to say that recently there has been a clamor among eminent scholars for a free market approach to land use. This work departs from recent contributions to land use policy in two important ways. If we are to develop an optimal land use policy, we must understand how the existing institutional system evolved, recognizing that change will come only from the existing structure. We simply do not have the luxury of starting afresh. More importantly, it is demonstrated that there is a theoretical economic rationale for land use regulation that, when combined with an administrative law approach, leads to a model that approaches optimal land use.

It will become apparent that this book draws heavily on the work of many scholars in land use. It will also become apparent that there are many areas in which the critics of regulation and their alternative approaches are consistent with a combination of regulation and the free market. In effect, this work attempts to provide a balanced approach to land use policy.

Several people have contributed in various ways to my writing this book. Jack Edwards and David Finifter have made immeasurable contributions. Jack's critique of the first three chapters significantly improved the clarity and organization of current land use practices and court rulings. David has commented on several portions of the work, and through hours of conversation has added substantively to the finished product. In addition, I cannot measure my appreciation for his support and encouragement. Karen Dolan's turnaround time of the drafts, including editorial changes, I also consider a major contribution. On various occasions Sam Baker and Bob Barry have provided insightful comments to portions of the work. And I feel sure Sara Parrott, a former student, enjoyed every red mark she made in editing previous versions of the manuscript.

My debts to others include suggestions from Bob Archibald, Cathy Elliott, John Matthews, and Bruce Roberts. In addition, many students who were exposed to rough drafts provided helpful comments.

There is another group of people who have made immeasurable contributions in an indirect way to this work. I thank John Donaldson who, as a member of the James City County Board of Supervisors, first appointed me to the Planning Commission, and Tom Mahone, in the same capacity, for appointing me to two additional terms. Through the years several members of the James City County Planning Commission, lawyers, developers, and citizens within the community have helped focus my views toward land use policy. I also thank the members of the county administration for sharing their views, especially Jim Oliver, the former County Administrator, and Tory Gussman, the current Planning Director.

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Introduction

An analysis of land use in the United States requires a working knowledge of at least two disciplines: economics and law. It is through the theoretical models developed by economists that we attempt to determine the merits of land allocation in a market economy compared with land regulation, and because the institutional structure of land use has evolved through the judiciary, we must understand the legal rationale that has led to the existing structure of implementing land use. The purpose of this work is to provide an analysis of land use in a market economy, including the rationale that has resulted in the existing structure of land use policy. However, because the existing structure of land use in the United States has recently undergone harsh criticism by both economists and the legal profession, a major purpose of this analysis will be an attempt to put into

perspective the existing institutional structure in light of the recent criticisms of land regulation, especially zoning as a form of regulation.

Every society makes choices about how its land will be allocated, and it is important to be aware that these choices reflect society's fundamental values. The prevailing values in the United States have been primarily individual initiative and market determination of land use. Clearly, in the earlier stages of growth when land was plentiful the vision of private ownership prevailed. For example, the federal government followed a policy of disposing of as much public land as possible to private individuals.¹ Planning for growth was non-existent and what city planning did occur was basically platting streets and blocks in anticipation of urban development. With the open western frontier there was less need to give attention to the adverse impacts of urban growth. When negative impacts of urban development did occur it was thought that the common law of nuisance could provide adequate redress to those who suffered injury.

By the late 1800s the free market approach was beginning to be challenged by urban reformers who asserted that unregulated urban development had detrimental social and economic consequences. Their belief was that public planning and government intervention in the private land use market could remedy these consequences. The early reformers desired a system modeled after those of some European cities that had planned for development, and then zoned or regulated the uses of land to conform to the overall plan.² However, the reformers' boldest ideas were not adopted. Instead, the practice of zoning was adopted. As a consequence, communities zoned land parcels for particular uses without the benefit of a plan for growth and development. Until the end of World War II, zoning involved only rather mild restrictions on the rights of private property owners.

In the 15 years immediately following World War II, zoning restrictions primarily involved ordinances confined to subdivision development, with the major land use decisions being determined through the private market. Beginning in the early 1960s a fundamental change began to emerge in views about land use decisions and policy. The change involved an increasing concern over the environment combined with the notion that, from the perspective of local communities, all forms of growth are not desirable. For the first time, many became aware that some forms of development created a local fiscal deficit. Consequently, many local communities began to exercise increasing control over land use. Although communities rarely adopted a no-growth philosophy, the adoption of a controlled or managed growth philosophy emerged in many communities. As a result, a large body of literature during the 1970s and early 1980s has been highly critical of the increased public intervention in land use decisions primarily because it is argued that the increased public intervention has led to exclusionary practices. A major purpose of this work is to analyze the current criticisms within a framework of economic theory and legal theory.

A chronological history of major land use legislation is presented in chapter 1. If we are to develop an optimal land use policy, we must understand how the

existing institutional system evolved, recognizing that change will come only from the existing structure. We simply do not have the luxury of starting afresh. A brief analysis of the land use reform movement of the 1960s is also presented in this chapter. Here it is argued that either the movement did have a lasting impact, at least at the local level, or that the American attitude toward the right to private property always included an inherent right that owned property has constitutional protection from negative spillover effects from other property owners.

An understanding of land use policy requires not only some knowledge of the institutional structure, but perhaps just as importantly, an understanding of the implementation of policy. The existing administration and implementation of land use regulation is presented in chapter 2. Although federal, state, and local regulations and ordinances are important, the major focus of this chapter concerns the way in which these regulations are implemented. As will become apparent, it is actually through the process of implementation that a viable method for land use regulation can be achieved.

There is widespread agreement among economists that social intervention in private markets is not warranted unless the markets are not functioning efficiently. It is generally believed, however, that the widespread acceptance of public intervention in the market for land is attributable to the existence of negative spillover effects. Chapter 3 begins with the presentation of a model of optimal land use with and without negative spillovers. This discussion is followed by a summary of empirical studies that attempt to measure the impact of negative spillover effects in urban areas. Although a primary criticism of land use regulation has been that the negative externality argument has been overrated, the empirical evidence is not found to be conclusive.

In chapter 3 a theoretical rationale for land use regulation is also developed. From economic theory two conclusions are derived. First, it has been known for some time that we do not have a theory for the supply of urban land that includes infrastructure implementation and that there are nonpecuniary factors that influence the supply of urban land. Yet this alone cannot wholly justify land regulation in a free market economy. Economic theory does suggest, however, that for optimal land use to obtain in a dynamic setting, a contract must be formed between households and the landlord-developer during two time periods. Land uses must remain flexible through time if optimal land use is to occur, yet contracts must be binding. This inconsistency can be resolved through a jurisprudence system that likes piecemeal changes that are justified through a tradition in American political thinking that legitimizes local decision making by reference to the smallness of local communities, in contradistinction to the largeness of the extended public (the nation). It is through this complementarity of economic theory and judicial theory that optimal land use must include a combination of regulation with the free market.

Although the analysis presented in chapter 3 suggests that land use regulation combined with the free market is optimal from an economic perspective and can

be implemented through the existing institutional structure, this is not to imply that the present system is free of imperfections. Within the past decade several alternatives to the existing institutional structure of land use have accompanied the criticisms of the present system. Several of these alternatives are discussed in chapter 4 in order to determine if they may be superior to the conclusions of chapter 3. While it is not argued that any are superior, it is demonstrated that there are several advantages to incorporating some or parts of alternative systems into the existing institutional structure. The alternatives include: Frank Popper's land consumerism movement; Robert Ellickson's covenants, nuisance rules, and fines; Robert Nelson's private neighborhoods; the transfer of development rights; Douglas Kmiec's land use intensity system; inclusionary zoning; and William Fischel's property rights approach.

Chapter 5 incorporates a discussion of several land use issues. The chapter begins with a discussion of land rent followed by a discussion of an issue that only recently have we begun to include in the study of land use, namely, that land use regulation may be a means of social control. The merits of land use regulation combined with the free market are then presented. This section is followed by a discussion of incorporating the merits of suggested alternatives that were presented in chapter 4 into the existing institutional structure in order to enhance land allocation. The discussion then moves to an analysis of one of the most difficult issues to resolve in contemporary land use regulation—the exclusionary argument: a difficulty that stems from the controversy concerning private property rights and collective property rights. A discussion of resource allocation and land use is presented next, followed by a conclusion.

The concluding chapter begins with a discussion of the supply of urban land in order to establish how the characteristics of urban land differ from the characteristics of supply for a commodity. In effect, there is no theoretical supply for urban land. The lack of a supply for urban land combined with the model and the implications of the model for land use in chapter 3 leads to the conclusion that planning is a prerequisite to optimal land use. It is further demonstrated how the conclusions of this work are consistent with those of other commentators, although we reach the same conclusion for very different reasons.

NOTES

1. The following briefly summarizes Jonathan Hughes' (1983: 95–97) analysis of early American public land disposition. By 1853, the land area of the United States was 1.9 billion acres, and as late as the Civil War fully two-thirds was empty and in the public domain. In the actual process of disposal of public land almost nothing went according to plan. The government apparatus was too slow in setting up the system, too cumbersome, and when sufficient land offices were finally established, they were too slow in recording and granting titles. Events moved too quickly. Studies of the General Land Office and its procedures agree that the administration was deficient throughout. Although the sale of public lands was to raise revenues for the government, the federal government actually spent more money disposing of the lands than was received in sales revenues. Considering

what was going on—the wholesale privatization of communal property—the system had one overriding virtue: it was fast.

2. Seymour Toll (1969) provides an excellent historical account of the work, personalities, and philosophies behind the land reform movement that led to the initial adoption of the New York City zoning ordinance in 1916.

Land Use Regulation

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1

An Overview of Land Use Regulation and Land Use Reform

An analysis of the extent to which land use is regulated and the impact of regulation on the allocation of land must incorporate an understanding of the evolution of land use controls. If we are to develop policies leading to optimal land use, we must begin with the existing institutional structure, including an understanding of its evolution. Controls on land use are not an innovation of the twentieth century. They existed in various forms in England long before we were a nation. Even the earliest Code of Roman Law, the Twelve Tables, provided for setback lines from boundaries and for distances between trees and boundaries.

Modern fiction has it that property rights have a certain absolutism about them stemming largely from Blackstone's statement that property rights cannot be violated "even for the general good of the whole community" (1966: 139). However, he was speaking of the inherent right of Englishmen to own property—