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SOIL CONSERVATION SOCIETY OF AMERICA
7515 N. E. Ankeny Road
ANKENY, IOWA

LAND USE--PERSUASION OR REGULATION? THE BEST OF BOTH WORLDS

I welcomed the invitation to appear on this panel and to try and take the middle ground; but I spent some uneasy summer hours thinking about what to say and how to say it.

Basically, as a free American and as one who has worked for thirty years in a successful voluntary conservation program, I thought I was opposed to regulation of any kind. But on closer reflection of my life I find I have long accepted many limitations on my personal freedom of action.

As I commute about 70 miles each day to and from USDA, I do stop at red lights (and I expect others to obey when I have the green signal). I belong, as you do, to a community of people. We have a responsibility to act in ways that do not create a nuisance or threaten the safety of other members of the community.

An individual's legal relationship to the community long ago dictated use of the Nation's police powers...passed for the most part to the sovereign states...delegated from there in lesser degree to local units of government through enabling legislation.

Material presented by Norman A. Berg, Associate Administrator, USDA, Soil Conservation Service, at the annual meeting of the Soil Conservation Society of America, Syracuse, New York, August 14, 1974.

These powers are applied most visibly to the use of motor vehicles or to crimes against property and persons.

People who are seeking equitable solutions to land use problems are concerned that individual rights will be unnecessarily eroded by increased community action in this arena. Yet in the final analysis, the application of public police powers to land use problems may well be no different than their application to traffic or respecting our neighbors' safety and welfare rights. But the search for solutions in this complex area is likely to be frustrating and take time.

Land is a finite resource. How it is used is increasingly important to the quality of life of present and future Americans. Most, if not all, citizens are affected by its use. Development pressures, coupled with some deficiencies in how land is now converted from rural to urban uses, has led to growing concern for more responsible public policies. The intent and form of such policies will depend on what the public will accept and support.

The major responsibility for land-use policy--planning, persuasion, and/or regulation--rests with local and state governments. Within this framework, the rights and responsibilities of landowners and users must be recognized and protected to the maximum extent possible

But the frontier days of land-use decision making are about gone. The public will not long tolerate purely private-enterprise decisions as to whether for instance productive farmlands or valuable wetlands are to be urbanized.

Permanent disruption of any natural resource, including land, should and will be more and more a matter of public concern. Various levels of government will have to take an interest and take acceptable action. And many will have to do it in this decade.

Regulatory actions on land use, enacted into state statutes or local ordinances--and presumed to be constitutional--are most likely to be dedicated mostly to helping prevent a public nuisance, threats to the public safety, or victimization and fraud. Questions of acceptability of properly drafted land use ordinances are also apt to be more political than judicial.

Many institutions--laws, practices, and contractual arrangements--and market forces interact to influence decision making about use, ownership, and management of natural resources. To achieve desired objectives, some of the ^{present} institutions may need to be changed and new arrangements made.

A broad base of citizen participation will be needed to help:

- 1) set the objectives in the first place, help ²⁾ change the institutions, and help ³⁾ make the decisions about land use. The demonstrated broad interest in environmental improvement directly touches on many land use decisions and gives hope that similar interest can be built around land use.

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Broad public participation will be required to coordinate land-use objectives with objectives for economic growth, environmental quality, transportation, soil and water conservation, and others.

An important aspect of the institutional structure for land use, as for all other resource decision-making, will be to continually renew support for the process, review and reshape or update objectives, and improve techniques used. Land use objectives cannot be static. All of these actions will require a great deal of persuasion.

I am inclined toward using persuasion ^{vs. regulation} to solve problems. That's the way I grew up; and I have worked vigorously to defend and promote that method of land and water management for private property. But I will admit that in going around dangling carrots to get action I sometimes have wished for a stick or two to wave at the same time on some tough problems.

For many years, I've taught a USDA Graduate School Course on management and supervision; and one text in particular attracts students. It's titled, "It All Depends." The author emphasizes the need to know:

"Which principle applies under what circumstances and to what extent it applies."

He makes a rather devastating critique of the "cookie cutter" answers to all problems. There certainly are no "cookie cutter" or standard answers to as complicated and controversial matter as land ^{and how} to use it wisely.

We will need to select and modify principles to fit circumstances. Many useful, down-to-earth guidelines will prove workable or adaptable.

What is the best of both worlds, persuasion or regulation-- or is it three worlds with do-nothing or leave-things-as-they-are? It all depends!

First, what do we really mean by land use? ~~It may be fairly late in this meeting for definitions, but it's never too late to try explaining land use policy in terms that are current.~~ "Land use" debate today isn't related so much to the present use of land as it is to possible change in use, either to someone's idea of a "better use" or "use according to its capability" or even to "non-use." It often is a question of (1) Growth vs. no or slow growth, or (2) development vs. preservation.

L Ford statement

As we view this at the Department of Agriculture, land use policy is a key facet of our general decision-making process on the use of natural resources. It is a tool to carry out governmental development policies evolving from decisions on related policies on economic, social, or environmental issues. Land-use policy and its consequences provide a focal point to identify and resolve conflicts growing out of competing land uses.

Land use policy, as phrased in a recent policy statement by USDA Secretary Earl Butz, is the expression of society's determination of how its resource, land, is used.

Land-use policy refers to the total of all those national, state, and local laws, ordinances, and attitudes affecting the short-term or long-term uses of land, private, or public, through such mechanisms as ownership, inheritance, taxation, condemnation, zoning, redevelopment, building regulation, master planning and legislative fiat.

We accept and endorse the fact that land, water, and air are basic assets to be used and managed wisely to protect, conserve, and enhance their productivity and quality for all Americans. Public interest in these basic assets calls for an effective planning and decision-making mechanism that complements local government's responsibilities for land-use limitations. The Nation is challenged to reconcile competing uses for land, and the impacts of such uses on water and air to assure the maximum possible advantage to the Nation.

There are strengths and weaknesses in either persuasion or regulation by itself. I do think that in the U.S.A. we are beyond the stage of just letting things happen--the "laissez faire" approach--to achieve solutions to the challenges in this field.

Professor John E. Cribbet summarized the consequences of laissez-faire philosophies with respect to land rights:

"The principal consequence of laissez-faire was to continue the tradition that had characterized Anglo-American law for a long time--the tradition of entrusting the protection of vital social interests to private contract or to essentially private litigation.

Minerals could be exploited, forests could be destroyed, streams could be polluted, water could be wasted, air could be contaminated and buildings could be constructed in growing cities without regard to elementary principles of health (to say nothing of esthetics), all in the sacred name of private property. If the prevailing concept of property could have been viewed as a bundle of sticks representing rights (the favorite visual aid of property professors), most of them would have been labeled 'private' although an occasional fragile straw would have borne the sign 'public--to be activated by private initiative.' These straws representing the doctrine of nuisance were real tokens in the wind. They demonstrated that even at their most extreme, development property rights could not be absolute."

As early as 1940, Ely and Wehrwein, in Land Economics, | stated in regard to policies of public control over land:

"Insofar as land and resources are affected by public interest, no landowner holds title to land to the exclusion of the rights of the public, including future as well as present generations. Our political philosophy must give meaning and content to the vague idea of 'public vs. private rights' to land. The right to control land uses exists and lies in the sovereign power of the state and may be exercised through the police power, eminent domain, and taxation. The real question is whether the people are willing to make use of these powers within the rule of reasonableness, as decided by the courts and American traditions."

This statement can hardly be improved upon today. If government spending is added to those powers enumerated by Ely and Wehrwein, we have a substantial listing of forces that can be used to implement land policy. What the statement does not specify, however, is that these powers or forces are variously distributed among different levels of government in our system. Until public attention began to focus recently on the issue of a national land use policy, little official effort was made to integrate the powers available at different levels of government to address land use problems.

In general, the powers of government may be characterized as follows: The Federal Government has immense power to tax and spend; the State governments have lesser powers to tax and spend, but they have broad regulatory powers; and the local governments have more limited power to tax and regulate, but they have a unique opportunity to hear or express the views of individual citizens.

There are many techniques for guiding land use decisions, ranging from full public ownership to voluntary agreements with individual owners. Within this broad range are many regulatory and incentive measures. Zoning and land use regulation, to restrict specific uses or designate areas for certain activities, are used by both local and State governments. Highways, water and sewer systems, and other public facilities are recognized as having major influences on area development.

Several states offer property tax relief as an incentive to retain land in agricultural, forestry, and other open-space uses. Tax incentives also have been used to encourage desired land and economic development.

← Peterson quote

The question is no longer whether U.S. landowners face more control and regulation--but in what form. The Nation is already far along this path. For example, all levels of government presently exercise some of the controls over land use:

First--public ownership: 42% of the Nation's land is now held by Federal, state, or local government for a large variety of uses--forests, parks, highways, airports, wildlife, landfills, wilderness, reservoirs, watersheds, flood plains, military reservations, public buildings, sports centers and recreation. This is the ultimate in regulation, in determining control over land.

By various acquisition and disposal actions, the Federal Government has at one time or another in our history been the owner of 1,442 million acres of land in the 48 contiguous States--or 77 percent of their total area. It has been the owner of 385 million acres or virtually all of Alaska. Today, Federal lands total 755 million acres, of which 699 million remain from the original public domain and 56 million acres have been purchased from private landowners.

The control of land by any level of government causes considerable concern in our Nation. The concept that property rights of the landowner are not to be trifled with is strong.

In 1862, after long delays and hot debate, President Abraham Lincoln signed the Homestead Act. This law presaged a major shift in national policy in favor of land conveyances to settlers. In return for a relatively small unit of free land, a man was expected to reside for a certain time, improve it (usually by cropping), construct a home and comply with simple administrative requirements.

Therefore, the history of land acquisition, disposal, and retention is the story of emerging needs and aspirations of people in a developing Nation.

The Nation is not now trending toward less public ownership--but slightly more. There are advantages and disadvantages--but one point is important. Public land does normally not yield tax revenue. Thus, added government land ownership as a method of regulation for certain defined uses would add to the present tax burden on private lands which now comprise 58 percent of the Nation. Tax policy and tax reform will be increasingly an important part of land use policy.

On the other hand, when land is owned by the public it can be used by the public (individuals and business firms) with reasonable regulation. A strong continuing issue in public land management is that of multiple vs. single use. The citizens' suit will challenge the land use manager to search for uses that are compatible and proper (in some cases an impossible task).

Second--eminent domain, another form of land acquisition (public ownership) in certain cases without the private owner's enthusiastic consent is used or available for many public projects including watershed and resource development measures.

Third--soil and water conservation districts have had nearly four decades of experience in developing concepts of a public interest in private land (and communicating a private interest in the use and care of public land). Many so-called incentives, including technical assistance to farmers, have been justified not only as providing aid to particular farmers but as expressing a public interest in maintaining the land resource. We are reminded that the Standard State Soil Conservation Districts Law sent by the President to the Governors in 1937 provided a procedure by which soil conservation districts could be organized as subdivisions of the state to exercise two types of powers:

--(1) The power to establish and administer erosion control demonstration projects and preventative measures, and

--(2) The power to prescribe land-use regulations in the interest of the prevention and control of erosion, such regulations to have the force of law within the district.

These latter powers were covered in sections 9 to 12 of the model act and were quite substantial. The supervisors were authorized to formulate land-use regulations and conduct hearings thereon. They could not become law, however, until they had been submitted to a stringent referendum of the land occupiers in the districts.

Twenty-seven States and Puerto Rico have this feature in some form as part of their law. These provisions have, to date, been used very sparingly. Our records show that only two districts have had land use regulations in effect for some years. One in North Dakota regulated grazing of certain rangelands, the other in Oregon prescribed land use and treatment of certain dune areas.

However, in February 1974, a district in New Jersey enacted comprehensive regulations for control of soil erosion and sediment.

Legislation to strengthen programs for the control of sediment is getting attention in many states. Iowa action to require "soil loss limits" regulations is premised on a finding that erosion may be found to be a nuisance on any land in the State.

Fourth- zoning, long a part of the urban scene, has only sparingly been used for rural land except in urbanizing areas. It, too, has its limitations.

Fifth- health ordinances have increasingly been called upon to slow or direct community growth that uses land.

Sixth- class-action suits, the most recent of the private citizen's avenues to influencing land use decisions, have led to increased regulatory type action through decisions in the courts.

I think if we are to achieve the ~~best of both worlds~~ ^{middle ground}, we should use these past experiences as valuable reference points for any future action. Land use policy should:

--Make full use of the best features of past action.

--Meet needs and values as best they can be ascertained through public involvement, and

--Provide for a dynamic, open-ended approach with options available for a changing future.

It is equally important to have goals to not only promote the public welfare but also to protect private rights. In discussing land use regulation, the public will want to promote:

- Efficient use of community lands
- Environmental quality, and
- Concern for social and economic well being.

In land use control activities, the public will want to prevent:

- Fraud and victimization
- Public nuisances
- Threats to public safety.

In protecting private rights government should insure:

- Due process of law
- Participation by affected individuals, and
- Reasonable certainty in the use of lands.

The Nation will want to try to avoid:

- Discrimination
- Unreasonable regulation and
- Taking without compensation.

The questions that come to mind for ^{future} debate include:

--Should land use planning and implementation of plans be mandatory or optional?

--Should planning and land development control be environmental or should social and economic factors be considered too?

--How are the interests of the public (consumer) to be identified, represented, and protected?

--Will the public be meaningfully involved in the decisions? Who is to have the final word?

--What levels of government should exercise any increase in regulatory powers?

--How broad should these powers be?

--Who will do the planning, regulating and implementing of plans?

--What features of persuasion and education can be accelerated and how should this be done?

Finally, the proper relation between public authority and private rights in land is a recurring theme in Anglo-American history, a theme that has greatly influenced our legal traditions. Known to lawyers as the "Taking Clause," these few words from the fifth amendment to the U.S. Constitution protect one of the most fundamental of all individual rights: "Nor shall private property be taken for public use, without just compensation."

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It is worth remembering that when that doctrine was formulated during the past century, land was regarded as unlimited and its use not ordinarily of concern to society. Circumstances are different today.

As Marion Clawson of Resources for the Future says in his "Historical Overview of Land Use Planning in the U.S.":

"Two dominant themes emerge:

(1) Development of land has been an ideology of the American society and economy; and

(2) The balance of power has gradually shifted in favor of public interests in land (publicly and privately owned) rather than private interests."

The U.S. concept of land ownership has gradually changed since the colonial period. Private ownership of land has always rested upon public acceptance, as reflected in laws and customs, but the rights and privileges of that ownership have been changed over the decades-- and can be changed in the future.

As the U.S. developed from a sparsely settled agrarian economy into a populous and affluent Nation, changes were made and accepted. What was tolerated when a landowner's nearest neighbor was across the back forty often became intolerable when the neighbor was on the next lot a few feet away. Thus, the urban land use zoning action was taken early in this century. The U.S. is now again in the midst of a great sorting out of the rights of its land.

It is necessary to have goals for the use of land. In USDA agencies are to be guided by these purposes in implementing land use programs:

- (1) To conserve and improve land and related resources.
- (2) To seek fair returns for farms, forests, and ranches as economic units.
- (3) To promote economic development in the rural areas.
- (4) To enhance the amenities and social assets of rural America.
- (5) To assist all citizens and agencies to obtain technical data needed for planning.
- (6) To support research and education on land-use planning.
- (7) To conduct programs within state and Federal environmental standards.

In the management of all of America's natural resources, the best of the two worlds of persuasion and regulation will be achieved through responsibility, flexibility, respect for people and resources, and earnest efforts to communicate on a continuing basis with all the people and groups that have an interest in the use of land.

The time to develop or strengthen these qualities is short. Our success in building these qualities will determine in large part how close we can come to achieving the best of both worlds. Will we make it? It all depends!

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