PUBLIC CONTROL OF LAND USE IN THE UNITED STATES

GEORGE S. WEHRWEIN
University of Wisconsin

Social control over the use of land is not new nor untried in America. It lies in the sovereign power of the state itself. Take, for instance, a clause in the Wisconsin state constitution framed in 1848 by men grown up in the atmosphere of Jeffersonian democracy and the freedom of the frontier, "The people of the state in their right of sovereignty are declared to possess the ultimate property in and to all lands within the jurisdiction of the state." (Art. 9, Sect. 3.) Through eminent domain, the authority to tax and the police power the state exercises the rights of sovereignty. The right exists; the real question is whether the people are willing to make use of these powers and how far it is wise and reasonable to do so. Courts will generally test the constitutionality of such controls on the basis of reasonableness.

Public control over land use takes three forms: (1) direct administration of lands in public ownership, (2) regulations or control induced by or incident to subsidies paid to private owners, (3) public regulation of privately owned land through the police power.[1] This paper will exclude the first because it is always within the power of a public land owner to do with the land as it pleases, and also the second, because it is only right and proper that whenever the government assists an individual that it should lay down the rules under which the grant, subsidy or donation is made. The treatment will be confined to the regulation of non-urban land uses under the police power in the interests of public health, safety, morals and the general welfare. In this case no public compensation for the loss of income for damage or inconvenience is required, though not excluded as a part of the good will of the state toward its citizens.

It is proposed also to avoid legal questions such as the division of powers between federal and state governments, the problems of due process, of police power and public purpose, the delegation of power, or the constitutionality of the use of the police power as

[1] Glick, Philip, "The Soil and the Law," JOURNAL OF FARM ECONOMICS, XX (2), 430 (1938).

an instrument of rural land use control.[2] However, it is important to point out that since the police power rests in the state the federal government is impotent to use this power except in the few cases of delegated authority. Local units of government are likewise helpless to use it as a weapon of social control unless the state directly or indirectly delegates the power to municipalities, towns or counties or to extra-legal units of government such as the soil conservation districts. However, in so far as the power rests with the state or is delegated to local units of government, land use control is highly decentralized. Being decentralized it is democratic, which means that it is subject to the will of those enlightened enough to use it, as well as the will of those who are ignorant or prejudiced enough to defeat or nullify land use regulations. This is fortunate or unfortunate depending on the point of view. Moreover, it brings us back to the statement made in the foregoing that land use control is largely a question of how far people are willing to go and the reasonableness of the restrictions and controls as they see them.

The American attitude toward land is colored by our historical development. The Revolution swept aside not only political traditions but also the remnants of the feudal system. The frontier Jacksonian democracy emphasized the Jeffersonian concept of land tenure. The Ordinance of 1787 abolished primogeniture and entail. Soon thereafter property qualifications were dropped and free transfer of land, allodial tenure, and grants by the federal government without reservations or qualifications became a first part of American land institutions.[3]

In our anxiety to control erosion, prevent the destruction of forests or to curb speculation we seem to accept uncritically the policies of Europe without recognizing fundamental differences. It is one thing to formulate land use policies for a nation with abundant resources and approaching a stationary population and

---

[2] See Wertheimer, Ralph B., "Constitutionality of Rural Zoning," *California Law Review*, XXVI, 175–205 (Jan. 1938).

Walker Jr., Herman, "Some Considerations in Support of the Constitutionality of Rural Zoning as a Police Power Measure," *Land Use Planning Publication #11*, Dec. 1936, Resettlement Administration.

Glick, Philip, *op. cit.* and *Yearbook of the Department of Agriculture*, 1938, pp. 296–321.

[3] See the discussion of the ordinance in Shosuke Sato, "History of the Land Question in the United States" in Johns Hopkins University *Studies in Historical and Political Science*, Fourth Series, 1886, pp. 270–277: 338–378.

quite another for a nation with limited resources but which insists on stimulating population increase for reasons which cannot be separated from the social philosophy, ideology and nationalistic ambitions of that nation.[4] As an example, it is claimed that the only way to get better utilization of our farm land is through the inherited family farm, a system made *compulsory* by the German *Reichserbhofrecht* act of 1933 which goes so far as to permit the government to deprive the owner of the right to administer his land or may strip him of his possession completely.[5] It should be recognized, whether voluntary or compulsory, under a system of complete inheritance the land becomes monopolized in the ownership of families now on the farms and closed to all others even to members of the family other than the favored heir.

While more inherited farms are desirable in America this hope is a far cry from social control restoring the essence of entail and primogeniture. Personally I feel that there is something admirable about American land tenure, a free system which has permitted landless laborers and penniless immigrants to climb the agricultural ladder and at a comparatively early age to retire to the nearby town or to California to live off rents or interest. As they retired or rather "retreated" they made room for the next generation of farmers. If the figure of 20 years as the span of ownership is correct, five generations of farmers are permitted to climb the ladder every century.

In saying this I'm not unaware that freedom of tenure has not brought grave abuses—speculation, over-mortgaging—and in many cases the farmer has abused "the ladder by which he did ascend," leaving the land in a worse condition for the next generation. What is hoped for is that we may create a proper attitude toward land and establish such direct controls over land use as will still leave open access to land and the opportunity to rise to ownership and "landlordship."

Extensive investigation would be necessary to present all the

---

[4] Ashby, A. W., "The Relations of Land Tenure to the Economic and Social Development of Agriculture." *Proceedings* of the Fourth International Conference of Agricultural Economists, Oxford University Press, 1937, pp. 92–93.

[5] Baker, O. E., "The Outlook for Rural Youth." Cooperative Extension Work in Agriculture and Home Economics, *Extension Service Circular #223*, Sept. 1935, p. 34. "For the better utilization of our arable land I have full faith only in the family farm and in the family with continuity of life and occupancy on the land."

von Dietze, C., "Land Tenure and Social Control of the Use of Land," paper at the Fifth International Conference of Agricultural Economists (1938).

forms of land use control now in use in the United States. The purpose of this paper will be to give examples of the application of the police power and appraise their effectiveness and weaknesses. Some of these controls are exercised by the state directly. Weed laws are an illustration. While the act is a state law the enforcement is usually in the hands of local officials who have been given the power of trespass, the authority of destroying the weeds and forcing the land owner to pay for the expense of the work by placing the costs on his tax bill. As early as 1913 Kansas had a law with identical features for the purpose of controlling wind erosion with the duty of enforcement lodged in the board of county commissioners. Local enforcement did not prove effective; besides, the law was declared unconstitutional in 1936. A new act was passed in 1937 declaring it to be the duty of the land owner to prevent dust blowing. It repeats most of the provisions of the old act as far as the power of the board of commissioners is concerned. The cost for which the owner can be taxed however is limited to $1.00 per acre per year.[6]

Measures aimed at direct control over land use are zoning ordinances based upon powers delegated by the state to lower levels of government. Begun in cities more than 50 years ago, zoning was given the blessing of constitutionality by the Federal Supreme Court in 1926. Early in the 1920's the power was granted to counties in California and Georgia and somewhat later to townships. The first acts were specified grants to particular counties but in 1923 Wisconsin passed a general enabling act under which any county may regulate land uses. This was amended in 1929 to permit districting for agriculture, forestry, and recreation which has enabled this state to practice distinctly rural zoning. By 1937 Michigan, Indiana, California and Washington also had passed general enabling acts permitting rural zoning, while the Virginia, Tennessee and Illinois acts were confined to suburban zoning. Township zoning acts of the urban type had been passed in the New England and three Middle Atlantic states. Since 1937 Pennsylvania has passed a comprehensive act under which both rural and suburban zoning are possible. Tennessee, Georgia, Virginia, Florida and Michigan have corrected, broadened or added new statutes during

[6] Wehrwein, George S., "Wind Erosion Legislation in Texas and Kansas," *Jour. Land and Public Utility Econ.*, Aug. 1936, pp. 312–313; Teagarden, E. H., "Control of Wind Erosion," *Ibid.*, Nov. 1937, pp. 420–421; Hockley, H. A.,—Herman Walker, Jr., "1937 State Legislation for Control of Soil Erosion," *Ibid.*, May, 1938.

1937–38. Florida has tried some direct state zoning by using a legislative decree to set up an exclusive residential area adjacent to the city of Tampa.[7]

Zoning is direct land use control because the ordinances prescribe the permitted and prohibited uses within districts designated on an official zoning map. County zoning ordinances have tried to cope with two types of situations, the fringe between agricultural and urban uses, and the border line between the farming area and the less extensive uses, forestry and recreation. County zoning started with the former and all enabling acts give the county boards the right to regulate building heights, the proportion of the lot to be covered with buildings, density and distribution of population, the uses of structures and land, all of them powers designed to deal primarily with suburban conditions. Some states have permitted township zoning to deal with these problems on a smaller area or given specified counties this authority exclusively.

While the results in general have been satisfactory for those counties and towns which have availed themselves of the zoning power, little has been accomplished by zoning or other land use control measures to regulate and restrict the subdivision of rural land for residential purposes. A recent publication of the New Jersey State Planning Board reports that the unoccupied platted lands of New Jersey cover almost 185,000 acres, enough to supply over one million 50×120 foot lots. An additional four million people could be accommodated on these vacant lots, equal to the present population of the state. Even if the 1910–1930 rate of population growth could continue, it will take 50 to 100 years to absorb the land now laid out in building sites. In spite of the superfluity subdividing is still going merrily on. New Jersey is not an isolated example; Chicago, Detroit, Florida and other places are in the same boat.[8]

The consequences of wildcat subdividing are surprisingly similar to circumstances on the agricultural-forest fringe. Land is taken out of agriculture and frozen in the form of residential plats, which in

[7] Walker, Herman, "Recent Progress in the Enactment of Rural Zoning Enabling Legislation," *Jour. Land and Public Utility Econ.*, Aug. 1938, pp. 333–339. For acts passed before 1937 see the same publication Aug. 1937 (Pennsylvania), (Nov. 1937), Tennessee.

[8] *Land Subdivision in New Jersey* by the New Jersey State Planning Board, Trenton (1938). For the most complete survey, see *Premature Subdivision and Its Consequences*, by Philip H. Cornick; Institute of Public Administration, Columbia University, 1938.

most cases cannot be restored to the former use. The boom subsides and thousands of lots remain unsold; ripening and waiting costs force the owners to let the land revert for taxes, forcing the remaining land to carry the burdens of government which have been boosted to excessive heights by the cost of new streets, sewers, schools and other public services demanded by the subdivider and his clients. "If the whole of the surplus platted acreage is fully improved as now laid out," says the New Jersey State Planning Board, "excessive costs of street improvements alone will amount to from 125 to 150 million dollars."[9] The tax reverted lands, "a new public domain," bring the same headaches to local units of government as to the counties in the cut-overs. The few owners who have built homes have their counterpart in the isolated nonconforming users in the zoned areas of the Lake States.

The agricultural economist cannot dismiss the situation by calling it a "city problem." Although it is a suburban problem the public costs fall upon distinctly rural forms of government, primarily the township and county. Moreover, it is not only platted or subdivided property that is involved. The "hit and miss settler" who buys land by metes and bounds on the outskirts of cities in the shoe string developments along the radiating highways is also setting a pattern of land use which becomes frozen before the city can reach him with some form of land use control. Township or county planning and zoning must become directional measures in this twilight zone.

The problem arises out of the fact that the suburban zoning has concerned itself primarily with restricting all uses but the residential. It was presumed that this use was welcome anywhere in the rural area and not detrimental nor out of harmony with agriculture, wood lands, estates or recreation. Furthermore, local officials were not adverse to new forms of taxable wealth. However, there are times and places where small lot subdivisions are as out of place and incompatible with the rural landscape as the needle trades would be on Fifth Avenue. It has been suggested that the chief reason for segregating land uses should not be the fact that land exists at different levels of uses but that these uses may be *incompatible*.[10] The isolated agricultural settler is out of place in a forest area and so is the bill-board on a memorial boulevard. Ap-

[9] *Land Subdivision in New Jersey, op. cit.*, p. 10–11.
[10] Cornick, *Premature Subdivision and Its Consequences, op. cit.*, pp. 324–325

plied to the suburban and rural areas the concept of incompatible land uses could be used to exclude small lot subdivisions entirely from farming and estate areas as well as the business uses. Zoning can become a directional measure in "steering" the residential districts where they should go by opening rural land only as a reasonable demand for new homes arises. Zoning, however, must be supplemented by more stringent platting laws and other forms of land use restrictions.[11]

Zoning on the agricultural frontier is now permitted in probably six states by appropriate enabling acts, but county ordinances under these acts are still confined to a few states. It is significant that the first ordinances won the approval of the local people, not as land classification measures, but as means for controlling public expenditures. The ordinances struck at indiscriminate settlement whether by farmers, storekeepers or filling stations because scattered residences meant excessive costs for schools, roads, and other public services. It is conceivable to zone a county having no land-use problems as ordinarily thought of. It might be an area having uniformly excellent soil with settlement starting from a given center. All but the area immediately adjacent to this center could be placed in a restricted district from which agriculture and year-long residence are excluded until such time when the demand for additional farms made it desirable to open new lands for settlement. The place, time, and manner of opening up the new area gives zoning its directional application. This is a familiar principle in urban zoning and is similar to the plan suggested for controlling the subdividing of land in suburban areas.

However, in so far as certain parts of the county are distinctly submarginal for farming, zoning can permanently close the land to agriculture. Furthermore, if erosion control, or watershed protection is best served by keeping a part of the county under forest cover, even though supermarginal for agriculture, the courts might support such use of the police power, provided sufficient public welfare can be proven.

Given an area of land which on the whole is best used for forestry or recreation the concept of incompatibility will rule out the intermingling of farms, commercial, industrial or other uses with the acceptable use of that district, even though spots here and there were suitable for farming or the other uses. Incompatibility is one of the strongest reasons for the abatement of non-conforming uses

[11] *Ibid.*, Chap. 7 to 9 inclusive.

and is urged in addition to the argument that isolated settlement should be prevented or corrected because of the high governmental costs or the personal costs and inconveniences to the settler.[12] It is even reasonable to legislate forestry out of an agricultural district if found to be incompatible with farming use and practices.

Recreational districts transcend both forest and agricultural zones in their requirements. The best use for fine riparian property may be for recreation no matter how fertile the soil or how valuable the timber. Clearing shore lands, even on a single farm, destroys recreational values of the entire frontage, besides inviting erosion and silting. Although forestry is permitted under Wisconsin ordinances it may be desirable to prohibit the cutting of timber entirely within recreational zones. Industry, bill-boards and commercial establishments are likewise incompatible with recreation and should be excluded from the recreational districts in the farm-forest fringe and might well be restricted in the forest zones. The shape and size of lots, roads, and regulation of pollution and sanitation are now regulated directly by the state in Wisconsin and New York by state agencies in cooperation with local officials, and in some cases by private deed restrictions. However, there is no reason why these land use controls should not be made a part of the zoning ordinances as is the case in some zoned areas of southern Wisconsin counties. Some of these items are being included in the Delta County, Michigan, ordinance.

Land use restrictions are also being tried in Jefferson County, Wisconsin, a county that is neither urbanized nor on the agricultural margin. It is a typical farming community with some fine lakes and streams in need of protection. In this county the unique feature is the "conservancy district," which consists of a strip of riparian land, rarely extending more than a mile from the stream or lake shores. In these districts agriculture, forestry and single family residences are the only permitted uses and all commercial uses, including bill-boards and even tourist camps, are excluded. Residential uses are subject to height and lot area regulations. A small forestry zone excludes agriculture and business uses primarily and a few uses are prohibited in the agricultural district.[13]

---

[12] Wehrwein, G. S., and J. A. Baker, "Relocation of Non-Conforming Land Users of the Zoned Counties in Wisconsin." *Jour. of Land and Public Utility Econ.*, August 1936.

[13] Albers, J. M., "New Uses for County Zoning: The Jefferson County, Wisconsin Ordinance." *Jour. of Land and Public Utility Econ.*, Nov. 1938.

Two other features should be mentioned which are not confined to any particular district but are universal for the county in the towns which have approved the ordinances. Set-back lines have been established on all highways and no building adjacent to lakes and streams can be built or altered with the basement floor below the high water mark. The latter is an experiment in flood plain zoning and rests on the section of the enabling act granting authority to the county board to regulate trades and industries, the location of buildings within areas riparian to natural water courses, channels and streams. This section of the ordinance is an attempt to keep structures out of the path of waters. Since it is not retroactive except that buildings may not be structurally altered, it will not affect existing buildings. However, as old structures depreciate or become obsolete and new structures cannot be legally built in the flood zone eventually the entire area will become devoid of buildings. This offers suggestions for land use restrictions in watersheds in both rural and urban areas. The objective could be hastened by judicious purchase and relocation of non-conforming uses. With human beings, residences, domestic animals and the more expensive property entirely out of the way of floods the other uses within the flood plain can easily be readjusted to reduce damages to a minimum.

Another form of land use restriction receiving attention is the regulation of the margins of the highway. Roads and streets are created at public expense but the abutting property is immediately affected. The better the highway the more accessibility it gives to the land owner on adjacent land either by giving him a short cut to a market or by bringing thousands of customers past his door. This induces the building of business places, taverns, bill-boards, and junk yards on land otherwise rural. The result is that one of the purposes of the highway, namely for recreational travel, is seriously impaired. Besides, whenever the highway is lined with business places, forcing cars to park on the right-of-way, and causing cars to enter and leave the stream of traffic, health and safety are involved. Some authorities believe that since the state builds the highways it should take direct control over the margins or by purchase of easements obtain the right to do so. Others feel, and so far this has been the general practice, that this should be done by local zoning ordinances and set-back lines. Zoning can restrict business uses to given areas and the set-back lines can keep

parking off the right-of-way. This has been done successfully in several states, notably California.[14]

The above examples indicate the progress that has been made in our thinking and accepting the principle of land use control. A zoning enabling act shows that the people of a state are willing to permit localities to control the use of land within the provisions of a general act. An ordinance under the enabling statute is an indication that in a given locality the people are ready to live under restrictions which they have imposed upon themselves and their neighbors, but the test of any democratic form of land use control is the administration of that control.

One of the difficulties with rural zoning is the lack of administrative machinery. Counties with suburban zoning are usually wealthy counties and have building permits and codes and money enough to pay for inspectors. This, however, is no guarantee that the regulations are enforced adequately. It is interesting that Jefferson County is going to require building permits as a means of checking the enforcement of its ordinance in the entire county, including the purely agricultural areas, but inspection will be necessary to enforce building set-back restrictions and check up structures in flood plains and the location of tourist camps as well as the building permit ordinance.

In the second place, it is important to have boards of adjustment to take care of special exceptions to the terms of the ordinances but in harmony with their general purpose. On the whole the enabling acts have not made adequate provision for these boards nor have counties availed themselves of the opportunity. One reason is that the functions of the boards and their operations have not been understood and appreciated.

All of these administrative activities make some demand on the treasury and the counties on the agricultural-forest or grazing margins are least able to provide adequate machinery. Because building permits are not required, and undoubtedly are unworkable, a substitute in the form of a list of legal non-conforming users has been provided for. Machinery for detecting and handling discontinued uses has been set up, using already established offices. That this is not altogether satisfactory is to be expected. One reason is the short term of office of the county board of supervisors

[14] "Is Highway Zoning a Success?" *American Nature Association Quart. Bull.* July 1938. "Highway Zoning" in the *Roadside Bulletin*, June 1937.

and of the county officials charged with administration and enforcement of county ordinances in general.

Finally, the essentially democratic safeguards of local approval and administration are not conducive to 100 per cent enforcement. However, if it is any consolation to rural planners they can find abundant solace in the violations and lack of enforcement found in the cities which should have adequate machinery to enforce their ordinances. The greatest achievement to date is still the fact that people who 20 years ago were in the midst of an agricultural land boom and antagonistic to forests should reverse themselves in a decade or so and be willing to vote land use controls which exclude agriculture from one-seventh of the state and dedicate this restricted area to forests and recreation.

Zoning, however, is inadequate to meet certain situations. In the first place it cannot be made retroactive; in fact, some of the enabling acts distinctly say so. The Georgia and Pennsylvania enabling acts, however, permit the ordinances to provide for the termination of a non-conforming use within a specified time or within a sufficient time to allow for the recovery or amortization of the investment of the "non-conformer." This is fairly simple where structures are involved but how far this can be applied to changing an agricultural practice in the interests of soil conservation or to a complete shift to forests remains to be seen.

In the second place, zoning can set up only broad classes of land uses within fairly large areas sufficiently uniform to meet the test of equal treatment of all land within a district. It has not been used in rural zoning to prescribe forestry regulations in a forest district nor to interfere with the practices within the line fence of a given farmer. This perhaps is one of the chief difficulties in applying zoning to the farm-grazing frontier where the line between the two uses cannot be drawn with the same sharpness as on the farm-forest fringe. This task the Soil Conservation District is prepared to do.

Soil Conservation Districts have provided a new power to an old form of land use control. The irrigation, levee, drainage and other districts had the authority to force a recalcitrant individual into an organization especially created for the reclamation of land and make him pay his share of the costs through the use of the taxing power. The Texas Wind Erosion Districts do not have the taxing power, however, but have the authority to construct improvements and maintain facilities which arrest or prevent erosion on private

land and do this at the expense of the land owner collectable in the form of taxes up to the benefits received. This is land use regulation after a fashion; the owner may prefer to prevent erosion rather than have the district control it for him. To do so he may have to change his farm practices and cropping system.

On the other hand, the Soil Conservation Districts based upon the model federal law do not have the taxing power.[15] However, the supervisors of the district may formulate regulations which actually prescribe the manner of land use within the farm. Upon approval of the designated number of land occupiers these regulations become binding on all land in the district. If farmers fail to carry out the rules the supervisors may enter upon the land of a non-cooperator and bring his operations in line with the regulations and charge the costs to him as taxes. It will be noted that the individual has ample power to express his wishes before the district exercises control over his land. While the district may perform educational functions or serve as the medium for state and federal subsidies for soil conservation its power to regulate and control the use of land remains inactive until the supervisors have formulated the regulations and the people affected have approved of them by referendum. The progress in this form of land use control is indicated by the fact that by November 15, 1938, twenty-six states had enacted enabling statutes, 102 districts organized in 23 states embracing 54 million acres, an area larger than the state of Idaho. This is a phenomenal record. District organization began only a little over a year ago. Land use regulations have not been enacted with the exception of one district in Colorado. This is to be expected and as it should be. Farmers must have time to gain experience with voluntary action before taking this step.[16]

DISCUSSION BY F. F. ELLIOTT

United States Department of Agriculture

In commenting upon Dr. Wehrwein's paper I shall have little to offer in the way of direct criticism of what he has said. My comments rather will be directed more toward phases of the problem not covered by him—and this primarily with the aim in view of presenting a somewhat more balanced discussion of control than it seems to me he has given.

Although, at the beginning of his paper, Dr. Wehrwein recognizes that

[15] In Colorado districts are authorized to levy special assessments against lands. D. H. Allred, "Districts for Soil Conservation," *Jour. of Land and Public Utility Econ.*, Feb. 1938.

[16] Private correspondence with D. H. Allred, Soil Conservation Service. December 14, 1938.