

Sustainability and Property Rights

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THIS ISSUE OF *URBAN LAND* is about the sustainable use of land, so let me begin with two simple ideas: First, without sensible land use controls, there can be no sustainability; and second, sensible land use regulations almost always increase property values. However, whenever or wherever land use is discussed, so is the issue of property rights.

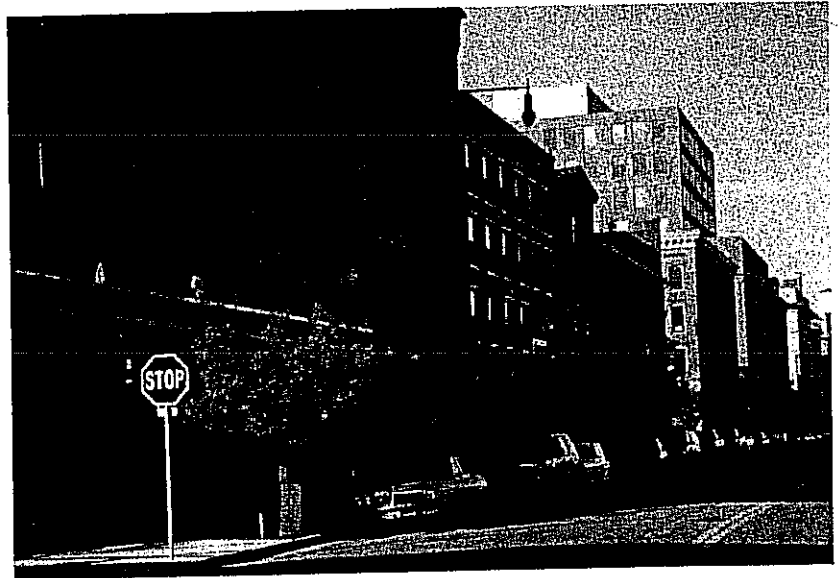
“Don’t take away my property rights” has become the standard refrain wherever local government proposes land use regulations of any kind. In November 2004, for example, Oregon voters passed Measure 37 requiring cities, counties, and the state of Oregon to waive land use restrictions and safeguards or to pay owners to obey the law. Emboldened by the Oregon initiative, property rights advocates in many other states are now proposing similar measures.

Collectively known as “takings” legislation, these measures would require government to pay landowners for any diminishment of value brought about by land use regulations. If government cannot afford to pay, it will have to waive or forgo the regulation.

Property rights advocacy is rooted in the Fifth Amendment to the U.S. Constitution, which states that private property shall not be taken for public use without just compensation. The language of the takings clause is pretty straightforward. In

general, the only instance in which government must pay a property owner is when private land is physically seized or “taken” for public purposes such as building new roads or other public facilities. In addition, there is an established body of law that protects landowners from overly burdensome

After it was designated a historic district, Denver’s Lower Downtown (LoDo) neighborhood experienced a renaissance.



regulation. Generally, the courts have limited compensation to those exceptional cases where a regulation has the effect of denying a landowner all or nearly all beneficial use of his or her property.

In recent years, however, some antigovernment activists have advocated for an extreme view of property rights that would require government to pay landowners anytime regulation limits the use of private property.

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per se, reduce property values. On the contrary, sensible land use regulations almost always *increase* property values.

Take zoning, for example. Zoning is the basic means of land use control employed by local governments in the United States. It has been around since 1916, the year when New York City enacted the nation’s first comprehensive zoning ordinance to protect the health, safety, and welfare of residents packed into crowded urban tenements. By some estimates, more than 9,000 cities, towns, and counties, both big and small, in every region of the country,



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and representing at least 90 percent of the nation's population, have some form of zoning in place.

Does this mean that every land use decision made by a local planning commission is a good one, or that zoning has produced nothing but the high-quality living and working environments we all care about? No, zoning has not always lived up to its promise and it is sometimes misused. For example, in some places, zoning is used to exclude low-income families or to keep out minorities. In other places, zoning is used to give landowners and builders exactly what they want, regardless of the cost to the community or the impact on adjacent landowners. Want to build a shopping center in a floodplain area or a racetrack next to a residential area? No problem, we'll just rezone the property.

Zoning is merely a tool. It can be used constructively as a positive force for community good or it can be misused. Zoning is whatever one makes of it. It works best when it is based on a vision and closely tied to a comprehensive plan. At its best, zoning can provide landowners and the marketplace with predictability and certainty. It can protect critical resources and increase property values.

So why do some people think zoning is a dirty word? Why do they get so upset whenever zoning is proposed in a previously unzoned municipality or whenever a community wants to strengthen its land use rules and regulations?

The two most common objections to land use regulation are, first, a perceived loss of control. Zoning opponents say, "If you own a piece of land, you should be able to do what you want with it." Second, there is a pervasive fear that regulation of any kind will reduce property values.

Land use regulation is as American as baseball or apple pie, but a county commissioner from a western North Carolina county once told me how he was called a communist

at a public hearing on a proposed zoning ordinance. He replied that while he was a Methodist, he certainly was no communist.

Land use disputes often inspire inflated rhetoric. Perhaps this is because land use regulations do mean that the interests of individual property owners must sometimes yield to the interests of the public. But isn't this just part of democracy? In fact, for more than 150 years, the courts have consistently held that the U.S. Constitution allows for the public regulation of private land.

To understand this, consider the old principle of law that says "your right to swing your fist ends where my nose begins." This principle applies to real estate as well. It means that with rights come responsibilities. Even political philosopher John Locke held as a basic assumption that "free men would never exercise their rights without recognizing the obligations that the exercise of those rights implied."

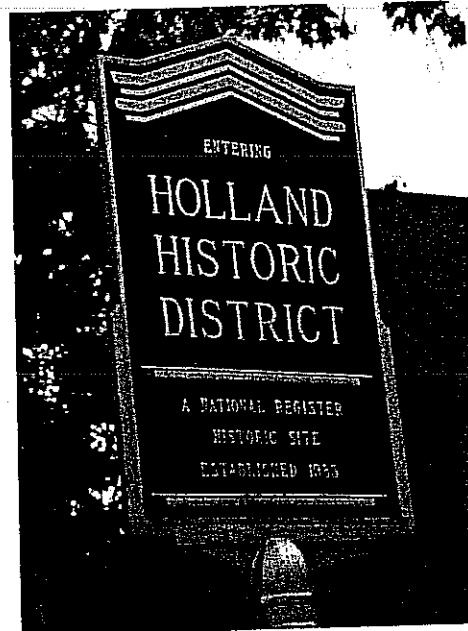
So what about fear of loss of control? It is true that some places grow much faster than others, but change is inevitable everywhere in America. Technology, immigration, new roads, the global economy, and many other factors are changing communities, particularly rural communities, whether they are prepared for it or not.

There really are only two kinds of change in the world today: managed change and unmanaged change. Land use planning is one way to mitigate and manage change. Communities that want to preserve what makes them special have no real choice except to plan for the future. This requires sensible rules that govern how a community will grow and change. The rural landowners who most abhor change are often the first to realize that without

sensible land use controls, everything they love about the place they live will ultimately disappear.

As for property values, hundreds of decisions are made every day by public bodies that affect someone's property values; however, these decisions are just as likely to increase the value of property as to diminish it.

As mentioned earlier, sensible land use controls almost always enhance rather than diminish property values. If you don't believe this, visit any historic district and compare property values in the district with property values outside of it. On the other hand, try selling a home next



Historic district zoning is often controversial but almost always has a beneficial effect on property values.

to an asphalt plant, a billboard, a landfill, or other noxious use. Real estate appraiser Don Rypkema says, "Sensible land use controls are central to economic competitiveness in the 21st century."

The story of Denver's Lower Downtown (LoDo) neighborhood is a classic example. In 1988, when the city council proposed designating the area as a historic district, the idea was met with a storm of

protest. Many of the area's property owners opposed historic district designation, fearing an erosion of property values, but before designation, the area saw blighted conditions, high vacancy rates, and low property values.

After historic district designation, however, LoDo experienced a renaissance. Today, it is home to more than 55 restaurants, 30 art galleries, and 1,000 new residential units. By 1995, property values had doubled and private investment, not including Coors Field—the new home of the Colorado Rockies baseball team—had exceeded \$100 million.

So how did historic district zoning contribute to LoDo's success? The answer is simple: scarcity and certainty create real estate value. Small businesses and investors were lured into the area by its charm and historic character—and by the knowledge that it would remain that way. In other words, historic district zoning gave investors assurance that their investment in the rehabilitation of turn-of-the-century buildings would not be undermined by billboards, parking lots, or other insensitive developments on nearby property. The same is true in master-planned communities, such as The Woodlands, Summerlin, or Seaside, all of which have seen huge property value appreciation because of their unique designs or environmental standards, which are guaranteed in perpetuity by strict development standards or covenants.

Historic district zoning may limit one's use of property (by regulating demolition and the character of new construction), but there is no evidence that it reduces property values. On the contrary, there are dozens of studies that demonstrate just the opposite.

The argument that any limitation on the use of land reduces property values simply doesn't hold water. Whether it is historic district zoning, height restrictions, corridor overlays,

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or setback requirements to protect rivers and streams, the evidence suggests otherwise.

The 2002 PricewaterhouseCoopers *Emerging Trends in Real Estate* report put it this way: "Properties in better-planned, growth-constrained markets hold value better in down markets and appreciate more in up-cycles. Areas with sensible zoning [integrating commercial, retail, and residential], and parks and street grids with sidewalks will age better than places oriented to cul-de-sac subdivisions and shopping centers navigable only by car." The real estate analysts at PricewaterhouseCoopers went on to say, "Markets where you can build too easily tend to produce lower returns."

Even downzoning may not cause a decrease in land value. For example, a 2002 study conducted by the University of Maryland's Center for Agro-Ecology found that "reducing the number of homes that can be built per acre on a section of land does not necessarily reduce the value of the land and may increase it."

In fact, the value of land on which very restrictive agricultural zoning had been imposed increased in value or experienced little or no change in four Maryland counties analyzed in the study. Likewise, a review of previous land use studies done in other states found that "downzoning done in conjunction with a comprehensive land use plan stabilized land values, and protected farm and forest land from sprawl for long periods of time."

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The truth is, the primary source of value in real estate is largely external to the lot lines. If you don't believe that, remember the traditional real estate mantra: location, location, location.

A 1994 study conducted by the National Association of Home Builders in Washington, D.C., found that "a mountain vista or proximity to a park, water, or green space affects the value of a home more than the size of the home, the number of rooms, the type of appliances, or the presence of a swimming pool." In other words, the surrounding environment (i.e., its context) is the single most important factor affecting the market value of a home. Virtually all land use ordinances are about protecting that context or surrounding environment, whether they are zoning ordinances, historic districts, or laws to safeguard streams or views.

Numerous social, political, economic, and physical factors affect the value of real estate, but the primary reason why land use controls were created in the first place was to protect property values, not undermine them. For example, suppose a landowner proposes building a strip club or a casino on his or her property. Nearby property owners often will object, arguing that these land uses will adversely affect their property values.

This year marks the 80th anniversary of the landmark U.S. Supreme Court case *Euclid v. Ambler Realty*, which upheld the basic constitutionality of local zoning. Zoning's original supporters included both Republicans and conservatives who shared a belief in the power of land use planning to protect property values and improve people's lives. In fact, it was former President Herbert Hoover, who as U.S. Secretary of Commerce chaired the commission that drafted the first model zoning enabling act. As Hoover noted in a foreword to the model act, "The discovery that it is practical by city zoning to carry out reasonably neighborly agreements as to the use of land has made an almost instant appeal to the American people."

Perhaps the most important reason why land use regulation has flourished, despite its imperfections,

is that it gives citizens a voice in local government. Without zoning or other land use controls, citizens would have no voice when out-of-town corporations run roughshod over local values and traditions. It also makes land use decisions public. This is important because the more a community understands how decisions are made, the better future decisions will be. Today, this principle is under assault by "undesirable users," such as industrial hog or poultry operations and billboard companies. Lobbyists for these industries work to get state legislators to pass laws that take away the ability of local authorities to regulate them, knowing that local officials are unlikely to approve of their use of the land.

Sustainability is really about balance. At their best, land use regulations can help strike the elusive balance between quality of life and economic vitality. Without sensible land use regulations, we would have chaos not only on the landscape but also in the marketplace. Efforts to gut land use controls through so-called takings legislation are unfair, unwise, and based on a fundamentally false premise. These efforts would, in the long run, be very harmful for both communities and the real estate industry. **U**