

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

AFTER ACCEPTING THE RESPONSIBILITY TO APPEAR ON THIS FINE PANEL--WITH THE TOPIC ASSIGNED--I SPENT AN UNEASY SUMMER THINKING ABOUT WHAT TO SAY, AND HOW TO SAY IT.

BASICALLY I THOUGHT I WAS OPPOSED TO REGULATION OF ANY KIND. BUT AS A REALIST IN A CIVILIZED WORLD I HAVE LONG ACCEPTED MANY LIMITATIONS ON MY PERSONAL FREEDOM OF ACTION; I.E., LAISSEZ-FAIRE. I DO STOP AT RED LIGHTS, AND HOPE OTHERS COMPLY WHEN I HAVE THE GREEN SIGNAL AS I COMMUTE DAILY ABOUT 70 MILES TO AND FROM MY HEADQUARTERS AT USDA, L2TH AND INDEPENDANCE, WASHINGTON, D. C.

BASICALLY, I'M MORE INCLINED TOWARD USING PERSUASION TO SOLVE PROBLEMS. THAT'S THE WAY I GREW UP AND HAVE WORKED VIGOROUSLY TO DEFEND AND PROMOTE THAT METHOD OF HELP ON RESOURCE PROBLEMS.

HOWEVER, EVEN IN PERSUASION I'VE WOBBLLED A BIT IN THE PAST SEEKING A STICK ON AN ITEM OR TWO TO GO ALONG WITH THE CARROT.

FOR MANY YEARS I'VE TAUGHT A USDA GRADUATE SCHOOL COURSE IN MANAGEMENT AND SUPERVISION AND ONE TEXT 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 "COOKY CUTTER." ANSWERS TO ALL PROBLEMS.

THERE ARE STRENGTHS AND WEAKNESSES IN EITHER PERSUASION REGULATION. I THINK WE IN THE USA ARE BEYOND THE STAGE OF TRUE "LAISSEZ-FAIRE."

PROFESSOR JOHN E. CRIBBET SUMMARIZES THE CONSEQUENCES OF LAISSEZ FAIRE PHILOSOPHIES WITH RESPECT TO LAND RIGHTS AS FOLLOWS:

THE PRINCIPLE 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, FOREST 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 BORN THE SIGN 'PUBLIC--TP 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."

THERE ARE CERTAINLY NO PAT ANSWERS TO THIS COMPLICATED AND CONTROVERSIAL MATTER. EMPHASIS WILL NEED TO BE GIVEN TO THE NEED TO SELECT AND MODIFY PRINCIPLES TO FIT CIRCUMSTANCES. MANY USEFUL, DOWN-TO-EARTH GUIDELINES HAVE PROVEN WORKABLE. WHAT IS THE BEST OF THE BOTH WORLDS, OR IS IT THREE WITH LAISSEZ-FAIRE? IT ALL DEPENDS:

FIRST, WHAT DO WE MEAN BY LAND USE? IT MAY BE FAIRLY LATE IN THE MEETING FOR DEFINITION OF TERMS, BUT I'LL TAKE A CHANCE YOU HAVEN'T YET WORN THE TOPIC TOO THIN.

THE NAME OF THE GAME IN LAND USE ISN'T RELATED SO MUCH TO PRESENT USE AS TO THE POSSIBLE CHANGE IN USE--OR CONVERSION TO SOMEONE'S IDEA OF A "BETTER USE" OR EVEN "NON USE." IT'S OFTEN A QUESTION OF 1) GROWTH VS. NO GROWTH, OR 2) DEVELOPMENT VS. PRESERVATION.

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 AND WILL BE AFFECTED BY ITS USED. DEVELOPMENT PRESSURES, COUPLED WITH SOME DEFICIENCIES IN HOW LAND IS NOW CONVERTED FROM RURAL TO OTHER 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 TO HELP ACHIEVE A QUALITY ENVIRONMENT THROUGH THE MANAGING OF LAND USE DECISIONS.

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. HOWEVER, THE FRONTIER (LAISSEZ FAIRE) DAYS OF LAND USE DECISION-MAKING ARE ABOUT GONE. THE PUBLIC WILL NOT LONG TOLERATE PURELY PRIVATE ENTERPRISE DECISIONS AS TO WHETHER PRODUCTIVE FARM LANDS OR CRITICAL WETLANDS ARE TO BE URBANIZED. IN THIS DECADE VARIOUS LEVELS OF GOVERNMENT MUST TAKE INTEREST AND ACCEPTABLE ACTION. IN SHORT, PERMANENT DISRUPTION OF ANY NATURAL RESOURCE, INCLUDING LAND, SHOULD AND WILL BE MORE AND MORE A MATTER OF PUBLIC CONCERN.

THE QUESTION IS NO LONGER WHETHER WE FACE MORE REGULATION--BUT IN WHAT FORM. THE NATION IS ALREADY FAR ALONG THIS PATH. FOR INSTANCE, ALL LEVELS OF GOVERNMENT PRESENTLY EXERCISE THE FOLLOWING TYPES OF CONTROLS OVER LAND USE:

--PUBLIC OWNERSHIP: 42% OF THE NATION'S LAND IS HELD AS FEDERAL, STATE, OR LOCAL GOVERNMENT LANDS FOR A LARGE VARIETY OF USES, I.E., FORESTS, PARKS, HIGHWAYS,, AIRPORTS, WILDLIFE, LANDFILLS, WILDERNESS RESERVOIRS, WATERSHEDS, FLOOD PLAINS, MILITARY RESERVATIONS, PUBLIC BUILDINGS, SPORTS CENTERS AND RECREATION. THIS IS THE ULTIMATE IN DETERMINING CONTROL OVER LAND. THE NATION IS NOT TRENDING TOWARD LESS PUBLIC OWNERSHIP--BUT MORE. THERE ARE ADVANTAGES AND DISADVANTAGES--BUT ONE POINT IS IMPORTANT. THIS LAND DOES NOT YIELD TAX REVENUE--ALTHOUGH IT MAY PRODUCE OTHER REVENUE WHEN OWNED BY YOU AND I.

THEREFORE, ADDED PUBLIC LAND OWNERSHIP AS A METHOD OF REGULATION AND FOR CERTAIN DEFINED USES ADDS TO THE PRESENT TAX BURDEN ON PRIVATE LANDS--58% OF THE NATION. THUS, TAX POLICY AND REFORM IS AN IMPORTANT INGREDIENT IN LAND USE POLICY.

- ZONING--LONG A PART OF THE URBAN SCENE--HAS YET BUT SPARINGLY BEEN USED FOR RURAL LANDS EXCEPT IN URBANIZING AREAS. IT, TOO, HAS ITS LIMITATIONS.
- EMINENT DOMAIN--ANOTHER FORM OF LAND ACQUISITION (PUBLIC OWNERSHIP) IN CERTAIN CASES WITHOUT THE PRIVATE OWNERS ENTHUSIASTIC CONSENT IS USED OR AVAILABLE FOR USE FOR MANY PUBLIC PROJECTS.
- HEALTH ORDINANCES HAVE INCREASINGLY BEEN CALLED UPON TO SLOW OR DIRECT COMMUNITY GROWTH.
- CLASS ACTION SUITS--THE MOST RECENT OF THE PRIVATE CITIZENS AVENUE TO INFLUENCING LAND USE DECISIONS HAS LED TO INCREASED REGULATORY ACTION.

THEREFORE, PAST EXPERIENCE SHOULD SERVE AS VALUABLE REFERENCE POINTS FOR FUTURE ACTION. IDEALLY, LAND USE POLICY SHOULD:

- 1) BUILD ON THE PAST TO UTILIZE FULLY THE BEST FEATURES
- 2) MEET NEEDS AND VALUES AS BEST THEY CAN BE ASCERTAINED THROUGH PUBLIC INVOLVEMENT; AND
- 3) PROVIDE FOR A DYNAMIC OPEN-ENDED APPROACH WITH OPTIONS AVAILABLE FOR A CHANGING FUTURE.

THE QUESTIONS THAT COME TO MY ATTENTION ARE:

- SHOULD LAND USE PLANNING AND IMPLEMENTATION OF THE PLAN BE MANDATORY OR OPTIONAL ?
- IS PLANNING AND LAND DEVELOPMENT CONTROL TO BE ENVIRONMENTAL OR ARE SOCIAL AND ECONOMIC CONSIDERATIONS TO BE MADE ALSO?
- HOW ARE THE INTERESTS OF THE PUBLIC (CONSUMER) TO BE IDENTIFIED, REPRESENTED, AND PROTECTED?
- ARE THEY TO 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, IMPLEMENTING OF PLANS?
- WHAT FEATURES OF PERSUASION AND EDUCATION CAN BE ACCELERATED AND HOW SHOULD THIS BE DONE?

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 OF THE U.S. CONSTITUTION, "NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION" PROTECT ONE OF THE MOST FUNDAMENTAL OF INDIVIDUAL RIGHTS: THE RIGHT TO PRIVATE PROPERTY.

THERE ARE THOSE WHO NOW SAY IT IS WORTH REMEMBERING THAT WHEN THAT DOCTRINE WAS FORMULATED DURING THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES, LAND WAS REGARDED AS UNLIMITED AND ITS USE NOT ORDINARILY OF CONCERN TO SOCIETY. CIRCUMSTANCES ARE DIFFERENT TODAY.

AS MARION CLAWSON--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.

WE KNOW HOW THE U. S. CONCEPT OF LAND OWNERSHIP HAS 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 WAY 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 OF THIS CENTURY.

THE ULTIMATE IN REGULATION OF LAND IS PUBLIC OWNERSHIP. THE NATION HAS A MIXTURE OF PUBLIC AND PRIVATE OWNERSHIP. ABOUT ONE-THIRD IS FEDERAL--AS IT HAS BEEN FOR 175 YEARS. FEW AMONG US WOULD PREDICT A SIGNIFICANT CHANGE IN THIS TRADITION AS IT IS VERY MUCH A PART OF OUR SOCIAL AND POLITICAL HISTORY. IN FACT, PERMANENT PUBLIC LAND CONTROL BY OWNERSHIP IS STRONGLY SUPPORTED BY THE PUBLIC. EARLY EMPHASIS OF LAND HELD BY THE PUBLIC FOR EDUCATION, PARKS, WILDLIFE, TRANSPORTATION, GRAZING, AND FORESTS HAS RECENTLY BEEN BROADENED TO INCLUDE RECREATION, NATURAL BEAUTY AND ENVIRONMENTAL CONCERNS. A PRIME REASON FOR ACCEPTANCE IS THAT WHEN THE LAND IS OWNED BY THE PUBLIC IT CAN BE USED-- IN MOST CASES--BY THE PUBLIC (PRIVATE INDIVIDUALS AND BUSINESS FIRMS) WITH REASONABLE REGULATION. A STRONG CONTINUING ISSUE IN PUBLIC LAND MANAGEMENT IS THAT OF MULTIPLE VS. SINGLE USE. THE CITIZEN'S SUIT WILL CHALLENGE THE LAND USE MANAGER TO SEARCH FOR USES THAT ARE COMPATIBLE AND PROPER--IN SOME CASES AN IMPOSSIBLE TASK.

THE STRONG ELEMENT OF PERSUASION; NAMELY TO URGE, CONVINCING, MOVE, ENTICE OR IMPLY THAT IN RURAL AMERICA IT HAS BEEN REASONABLY SUCCESSFUL IN THE SOIL AND WATER CONSERVATION MOVEMENT OVER THE PAST FOUR DECADES. ELOQUENT TESTIMONY IS EXPRESSED BEST IN THE RECORD OF 3,000 CONSERVATION DISTRICTS AND OVER 2,000,000 OF THEIR COOPERATORS WHO HAVE CHANGED THE LANDSCAPE OF THE U.S.A. FOR THE BETTER.

YES, THERE ARE STRONG INCENTIVES TO HELP PERSUADE PRIVATE LAND OPERATORS TO PLAN AND MANAGE THEIR LANDS WISELY. THE ARRAY OF GOVERNMENTAL HELP IS IMPRESSIVE--RESEARCH, EDUCATION, TECHNICAL AND FINANCIAL ASSISTANCE. THE REWARDS TO THE LANDOWNER INCLUDED INCREASED YIELDS, INCREASED VALUE OF THE PROPERTY, ABILITY TO BETTER WITHSTAND THE HAZARDS OF WEATHER--DROUTH OR FLOOD.

LOCAL LEADERSHIP, USUALLY VOLUNTEER, CAN DO MUCH TO CONVINCING RECALCITRANT LAND ABUSERS TO "SHAPE UP" OR "SHIP OUT."