Property Rights and Public Values
National Building Museum
June 13, 2001
Donovan D. Rypkema

This is a lecture series about Smart Growth, so I want to begin with a very basic premise: there can be no Smart Growth without sensible land use controls. But today whenever the issue of land use is raised, so is the issue of property rights. So my subject today is property rights in general and what I would suggest are the misunderstandings of the so called "property rights movement" in particular.

But let me tell you what this presentation will not do: I will not argue that every land use decision made by a local planning commission is a good one. I will not concede that every EPA designation of a wetland somewhere was appropriate. I will not take issue with any particular court case regarding land use – the Tigard case in California or the Dolan case in South Carolina or the recent California Superior Court decision on the Coastal Commission.

I won't argue that every land use decision made by a local planning commission is a good one because public bodies often make stupid decisions, and local planning commissions are no exception. I will not concede that every EPA designation of a wetland somewhere was appropriate because I am far from convinced that's the case. And I'm not going to quarrel with court decision for three reasons: 1) I'm not, thank god, a lawyer; 2) I strongly believe that it is in the courts where the decisions about the meaning of *property rights* belongs, not in so called takings legislation; and 3) In fact, there is a hundred and fifty year history of court decisions in this country that have recognized that sensible land use legislation enhances rather than diminishes property rights.

It would also be unfair if I didn't, from the start, identify both my professional perspective and my political persuasion on these issues. I am in the business of economic development, advising communities how to be competitive in the 21st century economy. And central to that competitiveness is sensible land use controls, central to that competitiveness is Smart Growth. My technical training is in real estate appraising and my background in real estate management and development.

On the political side I am a crass, unrepentant, real estate capitalist Republican type and unapologetic about it. So if you came here hoping to hear someone cast real estate developers, ranchers, or Republicans as evil demons you came to the wrong lecture. Likewise if you're hoping to hear a passionate description of environmentalists as divinely sanctified maybe you should skip out now.

What I would like to do is talk about property rights – specifically real estate property rights – in terms of American history, political philosophy, real estate economics, and fundamental fairness. And I'd like to do this through the examination of the arguments made by the property rights movement and then suggest to you why these arguments aren't very valid.

So let's begin with the most commonly heard argument: *It's my property and I have the right to do with it as I please.* Well is there a right to own property? Absolutely. Is there a right to use property? Absolutely. Is either the right to own or the right to use absolute? Absolutely not!

One could certainly make the case that of the rights specified in the Bill of Rights the right of free speech is first among equals. In fact, without the right of free speech the rest of the

rights become largely meaningless. But is the right of free speech unlimited? Certainly not. There are limits to free speech and those limits are established by the impact your speech has on others.

There is an amendment in the Constitution that gives the right to bear arms. But again that right is severely restricted, again based on how the use of those arms affects others.

In fact there is an old principle of law that says “My right to swing my fist ends where your nose begins.” But that principle applies to the right of real estate ownership and use as well.

Where did the concept of rights come from originally? Well, in America it came from a variety of sources – Greek and Roman law, English common law, and in some cases Spanish and French law. Every one of those philosophical and legal precedents recognized the peculiarity of the nature of real estate. Real estate is unlike any other asset on a number of grounds: every parcel is unique; it is fixed in place; it is finite in quantity; it will outlast any of its possessors; and it is necessary for virtually every human activity. Because of these characteristics real estate has always been treated differently than any other asset in law, lending, political perspective and taxation.

But there are two economic reasons why real estate has been treated differently as well: 1) the impact of land use on surrounding property values, and 2) the primary source of value in real estate being largely external to the property lines.

If that doesn’t immediately make sense, think about that old real estate cliché “The three most important things in real estate are location, location, location.” Notice it doesn’t say, “The three most important things are roof, walls, and floor.” It is a property’s location which provides most of its economic value – that is the context within which the property exists – and it is the protection of that context that virtually all land use ordinances are about whether they are zoning laws, historic districts, or ordinances to maintain viewsheds.

Real estate has economic value, but that value doesn’t magically emerge from within the four lot lines. It comes from elsewhere. In real estate economics are recognized four “Forces of Value”. These are the factors in the marketplace that move the value of a particular parcel both up and down. These forces are: social, political, economic, and physical. Let me give you a quick example of each.

In many communities there will be a belief that, for example, the Jefferson Elementary School is better than Lincoln Elementary. That belief may or may not be factual. But whether or not it is true buyers pay a premium for the identical house in the school district deemed to be the better. This is an example of the social force of value – economic value being affected by the attitudes of potential buyers and sellers.

Interest rates today for real estate mortgages are relatively low. But what would happen if tomorrow the Federal Reserve Bank would raise the Discount Rate? Banks would raise their interest rates, including home mortgage rates, and very simply the value of houses would go down. This is the economic force of value at work.

In 1979 the Russians sent troops into Afghanistan. Jimmy Carter, who was President at the time said, “We’ll show them. We’ll quit selling wheat to the Russians.” I have no idea if that was a good or bad response. But I was living in South Dakota at the time, making my living as a real estate appraiser, and I can tell you that virtually overnight the value of wheat land in western

South Dakota went down. The land didn't change, rainfall didn't change, the bushels per acre that could be produced didn't change. But the value of the land changed. Because of some stupid war 10,000 miles away and some goofy political decision 2000 miles away, the land in South Dakota declined in value. That's the political force of value.

So there are three examples of the social, the economic, and the political forces of value. Now could the residents of the Lincoln Elementary School District sue the School Board because their property values are less because the school is considered inferior? Of course not. Could all the people hoping to sell their homes collect from the Federal Reserve because their raising interest rates caused a decline in property value? Of course not. Did wheat farmers in South Dakota start a lawsuit against Jimmy Carter because the value of their wheat fields went down? Of course not. In each of those examples a public body makes decisions deemed to be in the public interest. In each of those cases there was an adverse affect on property values. In each of those cases not even the most litigious property owner would imagine he was entitled to some compensation because of those public actions.

Every day hundreds of decisions are made by public bodies at every level that impacts someone's property value. In virtually no instance is the property owner entitled to be compensated for that action.

I said there were four forces of value – the fourth being the physical force of value and it is the only one of the four created within the property lines at all. Suppose there were two houses, side-by-side, the same size, built by the same builder in the same year. One is in excellent physical condition, the other falling down. Which will sell for more in the marketplace? Obviously the one in better physical condition. And that's an example of the physical force of value. But even the physical force is not confined entirely within the lot lines. Views, infrastructure, transportation systems, access, are all components of the physical force of value but are again external to the property line and are neither created nor exclusively paid for by the individual property owner.

So this concept of "It's mine and I can do whatever I want" is both historically incorrect and economically unsupported. But let's move on to some of the other arguments.

The next argument often made by the property rights advocates is *"It's unconstitutional to regulate my land like that."* Well, I'm not a lawyer, but:

A) There is a 150-year constitutional precedence supporting the public regulation of private land.

B) If there is a constitutional issue there is an entire judicial system to which the issue can be appealed.

C) The sheer fact that the "property rights" advocates initiatives are primarily legislative and not judicial is recognition that current land use legislation <u>is</u> constitutional

This is the reason that I said earlier that I won't try to argue that this or that court decision was wrong. Courts for a century and a half have "gotten it" in terms of land use controls, of what is or is not a taking.

But if we really want to explore the constitutionality of land use legislation let's take a brief detour into the intellectual and political groundings upon which the American system is based. Probably no one influenced the drafters of the U.S. Constitution more than the English political philosopher John Locke – especially on property rights. If there is a single individual who has most affected American political traditions on property rights it is Locke. He was a vociferous property rights advocate. It is Locke that is usually cited in the more historical of the property rights arguments.

But four understandings of Locke and property rights are important:

1) When he spoke of "property" he was talking about one's own self as well as one's assets. So he was so adamant about rights because of his resistance to tyranny over human rights – one's self was one's "property" of which one could not be arbitrarily deprived.
2) When Locke wrote about property rights and was referring exclusively to assets, however, his ultimate test was the impact of the exercise of that property right on the community – the very basis of land use regulation.
3) One cannot hope to understand Locke by citing an out of context quotation. Fundamental to Lockean philosophy is the extraordinary sense of obligation, which was grounded in his religious perspective. 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.
4) Finally, for Locke the reason societies are created in the first place is for the protection of property. What is the reason land use controls are created in the first place? For the protection of property.

Well, when the "it's unconstitutional" argument is weakened, the property rights advocates will default to "*It's un-American to tell someone what they can or cannot do with their own property."*

Well, I don't know what constitutes "un-American." But if limiting what you can do with your land is un-American then high on the list of un-Americans would be:

1) The Pilgrims
2) The Congress that passed the Homestead Act (I'll come back to that one shortly)
3) The Mormon Church
4) The New York City real estate community who got the first city zoning law passed (to protect their property values, by the way)
5) John Oglithorpe and the settlement of Savannah.

Let alone the Native American concept of land ownership. If the regulation of land use is un-American, it's time to reestablish the House Un-American Activities Committee because we have history books full of guilty parties.

But let's look to a more recent example. I live two blocks from here in downtown Washington. A couple of months ago there were *Washington Post* headlines about a proposal for a nude bar to move into a building on F Street, about a block from where I live.

Two things struck me about those articles. First, the argument against granting the licenses and use approvals wasn't about morality. No one was quoted saying that naked women were immoral. The entire case against the proposal was about the adverse impact clubs of that sort would have on nearby property values – the heart of what most land use regulation is about.

And secondly, nowhere in the article was a statement from the chairman of the Wise Use Movement, the Virginia Property Rights Committee, or the National Association of Home Builders about how un-American it would be to prevent nude bars from operating.

The "property rights" movement is the most selectively aggrieved political force in America. Those who loudly proclaim, "It's my land and you can't tell me what to do with it" are quick to appear before City Council when a homeless shelter is moving in next door or a sanitary land fill is proposed next to their cottage. And their argument won't be "I'm against the homeless" or "Waste shouldn't be disposed of" but rather, "That action will have an adverse affect on my property value, and you, City Council members, need to prevent that."

The next of the property rights arguments is: "*Land use regulations constitute a "taking" which entitles me to compensation for any loss in value."*

Let's sort this argument out. First, if one's property is taken by a unit of government for public use the person is entitled to compensation under an eminent domain procedure. It is also well established that when an owner loses all effective use of his property through regulation he/she must also be compensated.

But what about those instances where a land use regulation simply reduces the value of the land – is the owner entitled to compensation? And this is what is being proposed in most of the "property rights" and "takings" legislation.

Well, do land use provisions sometimes affect the value of individual properties? Absolutely! Not only land use legislation but public decisions of all kinds affect individual assets – in both directions!

We've already talked about the school that's deemed inferior – impacting your property value, and you aren't entitled to compensation.

Or a rise in interest rates lowering the value of your home and you aren't entitled to compensation.

Or Jimmy Carter's affect on western South Dakota wheat land, and not one of them got compensation.

You know about the current anti-trust suit against Microsoft. If the government wins Microsoft stockholders will see the value of their stock decline. If Microsoft wins Netscape stockholders will lose value. Will any of them be entitled to compensation? Absolutely not.

The common denominators among the school board, the Federal Reserve, Jimmy Carter and the Justice Department is in each instance a public body was acting in what it saw as the public good and in each instance somebody's property was adversely affected and yet uncompensated. Land use controls are exactly the same.

But let's turn it around for a minute. Adam Smith, the father of *laissez faire* economics wrote:

> Good roads, canals, and navigable rivers, by diminishing the expense of carriage, put the remote parts of the country more nearly upon a level with those in the neighborhood of the town. They are upon that account the greatest of all improvements.

Yet today, "roads, canals" and their contemporary infrastructure counterparts remain the "greatest of all improvements.

I said I live a couple of blocks from here. I happen to live at the Landsburgh – a wonderful building with great management – we love our apartment. The Landsburgh is undoubtedly worth millions and millions of dollars. But what would it be worth if there were no water – which the taxpayers paid for – or no sewage disposal – which the taxpayers paid for – or no cops – which the taxpayers pay for – or no Metro – that the taxpayers paid for. What would the Landsburgh be worth then? Approaching $0.

Likewise the land in rural Montana with REA – taxpayer funded electricity, or Tennessee farms without the TVA, or ranches in Idaho without county roads.

Most of the value of an individual parcel of real estate comes from beyond the property lines from the investments others – usually taxpayers – have made. And land use controls are an appropriate recompense for having publicly created that value.

But we still hear, "If a government action causes the value of my property to go down, I'm entitled to be fully compensated."

Let me ask you, when was the last time you heard an owner say, "Because of rezoning my land went from being worth $10,000 to being worth $100,000. But since it was the action of the Planning Commission and not some investment I made that increased the value, I'm writing a check to the city for $90,000."? No "property rights" advocate ever said that, nor should they have. Public decisions affect the value of real estate in both directions – it is one of the risks and potential rewards of ownership.

But if we really want to compensate every landowner for public decisions that adversely affect their property value, I'm all for it – and I even know how to come up with the money. We'll have a 100% tax on all of the value enhancement of properties as a result of governmental actions. If the "property rights" movement will accept that equitable trade off, I'm all for it.

But back to history for a moment. "Property rights" advocates often hearken back to the days of the Western expansion and the homesteaders as the time when men and women were really free to do as they pleased with their land.

In fact certainly the most severe and limiting land use restrictions ever enacted by the Federal government were those placed on the homesteaders of the western frontier. To be able to lay claim to their 160 acres, the men and women of the western expansion had to clear, cultivate and live on their land for five years. Almost no current land use control is that demanding. It wasn't for money that the Homestead Act placed those restrictions. The Federal government paid less than 3¢ an acre for each of those 160 acre parcels – an amount most homesteaders could have afforded to pay. A homesteader was not allowed the option of paying $4.80 instead of abiding by the land use controls. The actions were required because of the recognition of the interrelationship and the interdependence of the properties and the desire to meet the social,

political, and economic needs of the sum of the landowners, and the nation as a whole, even if it meant restricting the "freedom" of the individual land owner.

Where did the ownership right to land come from originally, anyway? If you trace a deed back to the earliest entry it will be a conveyance from the government – as representative of the people – to the first private landowner. Where did the government get it? Through conquest, purchase, cession, or negotiation. The government – and that means all of us – is a prior owner to all subsequent deed holders. And that original conveyance reserved for the government four rights: the right of eminent domain, the right of taxation, escheat (the right to reclaim title if there are no heirs and no will) and the right of regulation (the police power). These four are prior rights held by the people through the government prior to any subsequent owner's individual rights.

Now you'll often hear from developers or their lawyers, *"I'm entitled to develop my property to its **highest and best use**."* Well, highest and best use is a real estate appraisal concept with a very specific meaning. "Highest and best use is that use which, at the time of the appraisal, is the most profitable likely use to which the property may be placed." But the key word is *likely* and the first constraint on likelihood is that use which is legally permitted. If a property is currently zoned General Agricultural, for example, someone who claims their highest and best use is as a resort hotel is either, a) woefully ignorant of the basic concept of what highest and best use is, or, more likely b) is trying to badger public decision makers into a change by distorting the meaning of highest and best use.

Highest and best use does **not** mean most profitable use imaginable. If it did we would have topless bars, hog rendering plants, and hazardous waste disposal plants in every residential neighborhood in America.

Another of the property rights arguments is, "*Land use controls are made up by faceless bureaucrats in Washington deciding how far from the curb my house can sit and what color I can paint my garage.*

This is an absolutely bogus argument. 99.99% of all land use controls in America are enacted at the local level by your neighbors – the ones who are most affected by land use decisions. Historically one of the fundamental premises of political conservatism and Republicanism in this country has been decision making at the lowest governmental level possible. That is where land use laws are presently enacted. But since the Contract with America in 1994 there has been a strategy of pushing for the U.S. Congress to limit the power of local government to enact such measures or to make it extraordinarily expensive and risky for them to do so. This a complete renunciation of what the party of Lincoln, Teddy Roosevelt, Eisenhower and Goldwater has always stood for.

There are only three types of Republicans who could vote for such a measure: those totally unaware of the philosophical grounding of their own party; those who believe that Washington knows better than the local community – in which case they're in the wrong party; or those who have sold out historic Republican principles to curry favor from the real estate and timber industries and right wing lunatics. As a lifelong Republican let me tell you it ticks me off.

I often have friends ask me, "Why are you still a Republican?" Well, first I'll point out that I've been a Republican longer than Phil Graham has. But I remain a Republican because I really do believe in three principles that historically have been the basis of Republican philosophy: 1) elected officials ought to be prudent with taxpayers dollars; 2) as many decisions

as possible ought to be made at the level closest to the people as possible; and 3) a sense of public and individual responsibility. The property rights movement is an abrogation of all three of those principles.

But I want to touch on this word responsibility for a moment. In the past few years I have heard the concept of "responsibility" touted at the Million Man March and at the Promise Keepers Rally; responsibility espoused by Newt Gingrich and Hillary Clinton; by Billy Graham, Louis Farrakhan, Jerry Falwell and the Pope. I've heard responsibility from inner city housing groups and conservative county commissioners. "The time is past" they all say, "when we can or should expect government at any level, or corporations or labor unions or white folks or "somebody else" to take care of us. We need to take responsibility on an individual and on a community level for our own actions." There is a broad movement away from what is one's "right" to combine the discussion of "rights" with the obligations of "responsibilities." Welfare reform is an excellent example. Congressional proponents of both parties said, "maybe a single mother has the "right" not to have her children starve, but she also has the responsibility to look for a job and get trained for the workforce." And public schools, "Yeah, maybe every kid has the right to an education but he also has the responsibility not to be disruptive in class or carry a gun to school."

So there is this widespread agreement about rights being balanced with responsibilities. I believe that is healthy; and it certainly points out the importance of taking the responsibility for our community's economic future ourselves; no one else is going to do it – not the government, not some giant corporation, not the Teamsters. We have the right to chart the direction of our community's economic future and the responsibility to make it happen.

There are two curious exceptions to this concept of balance between rights and responsibilities, however: pornographers and the so called "property rights" movement. Both screech about how their right of free speech or their property right is sacred, but neither wants to accept the responsibilities of free speech or property responsibilities.

As a crass unrepentant capitalist real estate Republican type I am certainly all for property rights. But who is talking about property responsibilities? This surreal concept that the right to own real estate somehow exempts one from having to balance rights with responsibilities, this Larry Flint attitude of "I can do what the hell I please and the rest of you be damned" is not only alien to 300 years of American political history, antithetical to how the west was developed, and the most blatant renunciation of fiscal responsibility today, but it is the ultimate gimmick to pass on bankrupt cities to our kids 20 years from now.

Those who are strong proponents of so called "property rights" movement tend to be politically those who also claim to be for fiscal responsibility. We have reached a point where those two concepts are mutually exclusive. Either we are going to be responsible with taxpayers' dollars and have reasonable land use controls or we are going to have a "do whatever you please" land use policy at the expense of fiscal responsibility. And it will be hellishly expensive for taxpayers.

The so-called "property rights" movement is the singularly most misguided, historically inaccurate, fiscally irresponsible political movement of the last half century.

It amazes me that elected officials who go home at night and tell their kids "just say no" to drugs can't muster the political responsibility to "just say no" to any developer who happens to come down the pike.

I began by telling you that I was in the business of economic development. The towns and cities that will be economically competitive in the 21st Century are those that pay attention to quality of life criteria and I would suggest to you that is what Smart Growth is really about. The sociologist

E.V. Walter wrote, “For the first time in human history, people are systematically building meaningless places.” The meaningless place will not be the economically competitive place. John Locke, although writing about a slightly different subject, had an even better phrase – “The undistinguishable inane.” Without sensible land use controls the only thing we will have is the undistinguishable inane.

Land use controls are, in fact, a capitalist plot to optimize the property values of the majority of owners, not some communist conspiracy to deprive individuals of some imaginary “property rights”.

Adam Smith perceptively observed that, “As soon as the land of any country has all become private property, the landlords, like all other men, love to reap where they never sowed.” That doesn’t mean we are depriving them of rights when we tell them no.

Thank you very much.

Place Economics
1785 Massachusetts Avenue, NW
Washington, DC 20036
Drypkema@aol.com
202-588-6258