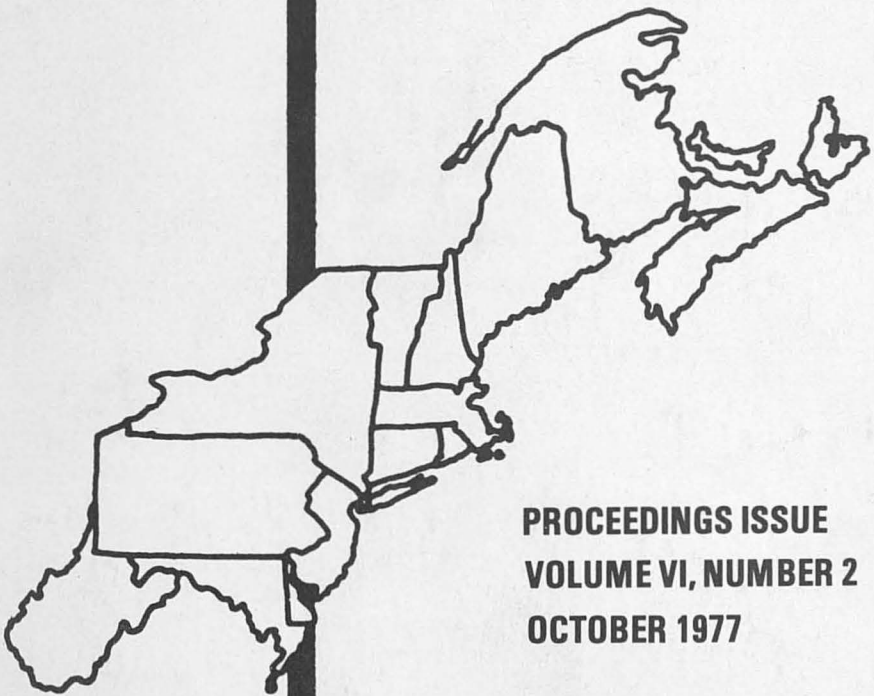
JOURNAL OF THE

Northeastern Agricultural Economics Council



PROCEEDINGS ISSUE
VOLUME VI, NUMBER 2
OCTOBER 1977

RECENT DEVELOPMENTS IN LAND USE LAWS

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When talking about the ownership of land, one deals with property law. Property law is concerned with questions such as how you describe a boundary, what's the scope of a particular easement, and does a mechanic's lien gain priority over an unrecorded mortgage? There are rules here which haven't changed much since Blackstone wrote them down. Thus law can be a set of rules that resemble the axioms of geometry and, often enough, the image of the lawyer as pettifogging nitpicker is an apt one.

When talking about land use controls, however, you meet the lawyer playing his role of social engineer. What he is trying to build is a sound society and the materials out of which he hopes to structure this vision are the legislature's authority to regulate the use of land under the police power and to condemn it through the exercise of eminent domain. Change rather than stability marks this part of the lawyer's work because society constantly evolves, as do notions as to what constitutes a sound society. It is my purpose to see whether we can discern any order in a realm which appears to sustain Heraclitus's view that everything is in a state of flux.

Let's posit this situation. Ours is a neighborhood zoned exclusively residential. All the lots but one have been sold and all of us have built our houses. It suddenly dawns on us that there is no place for our children to play. We lobby the village trustees and manage to have the zoning ordinance amended to designate the last remaining parcel an exclusive park district, defined as an area the only use of which is for public play and recreation. It should not surprise us if the owner should sue the village to have the amendment declared void. It should not surprise us if the owner wins. Typically the judge will, somewhere in his opinion, say that this ordinance deprives the landowner of any reasonable return on his property and is void because it constitutes a taking of property without the payment of just compensation.

If we think about it, this manner of speaking should cause us some perplexity. The village did not actually condemn the lot and never took possession of it. It did not exercise its power of eminent domain. It purported to exercise its police power to regulate land use. Why then, when striking down this cossack-like piece of regulation, do we refer to the taking power? Because we were brought up to believe that the law was stated correctly by Mr. Justice Holmes back

in 1922 in Pennsylvania Coal v. Mahon [260 U.S. 393]. What Holmes, J. did there is the subject today of serious debate so we had better look at this case.

In most places the person who owns mineral rights has to be careful to support the land above his mine. There is a miner and a landowner, each with an interest in the fee, and a duty of due care is owed by the miner to the landowner. Not so at one time in Pennsylvania. There the fee could be carved into three pieces: surface rights, mineral rights and support rights. If you bought only the surface rights from a coal company, you had not acquired any interest in the supporting estate - which really meant that the company could mine and let the subsidence of your house be damned.

Eventually an outraged legislature enacted a law which forbade coal companies mining under houses. This was justified as an exercise of the police power necessary to protect the public safety. Yesterday, because of peculiar local property law, the coal company owned this estate of support which entitled it to mine and let the devil take the hindmost. Today that estate was gone as a practical matter. Holmes rebelled. "The general rule, at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Holmes's reaction should have caused no surprise. In 1905, he had grumbled that, "The social reformers of today seem to me to have forgotten that we cannot get something for nothing by legislation." His admonition describes precisely what we were trying to do with reference to our neighbor, his empty lot, and our felt need for a park. We were trying to extract a free benefit for us at his expense by exploiting the power to regulate. The game just wouldn't be allowed. A certain gut reaction that there is something unfair about it dictates a negative reaction.

But turn the case around. Our affronted park owner starts to think. If I sue to have the new ordinance voided, I'll win because the judge will say its a taking. Instead, I shall accept that they have taken my land and, since they have not yet paid me, I shall sue the village in an action of debt to collect the value of the lot. This ploy has been tried recently in California and New York. Now what do we hear from the judges? "The metaphor should not be confused with reality. Close examination of the cases reveals that in none of them, anymore than in the Pennsylvania Coal case, was there an actual 'taking' under the eminent domain power." The only remedy is to sue to have the ordinance declared void. [39 N.Y.2d 587 (1976)]

Now we are getting close to the nub of the matter. We are really concerned with allocating the cost of progress. Our street might be a far better street with a park, in which case maybe the village ought to have condemned the parcel and imposed an assessment district on us and

make us pay for it. But we can't get it for free by all but taking it through the guise of regulation.

This is not to say that landowners have not been pretty badly mauled in the march of progress. Lets cut back to the law of nuisance. The memory of man runneth not to the time when you could ever manufacture explosives in center city or raise hogs in a posh residential enclave. The common law of nuisance has always existed and outraged neighbors have not been wont to sue. Thus Los Angeles had an ordinance which forbade the manufacture of bricks within its city limits. A landowner had for years maintained a brickyard on the site of a valuable clay deposit outside of the city. The city annexed the area and ordered the kilns shut down. The city did not condemn the site. The owner was free to continue to mine clay, take it further outside the city to make it into bricks and cart his product back into town again. Competition made this an impractical expedient. Thus it was that the value of his parcel dropped from $800,000 down to $60,000.

Was this due process? It certainly was, because stinking brick ovens were a nuisance, something which cities had a right to banish. But didn't the owner acquire some vested right having been there before the city? Bosh. "There must be progress, and if in its march private interests are in the way they must yield to the good of the community." Thus spoke not a member of the Warren Court but sound old Justice McKenna back in 1915. [239 U.S. 394] Peculiarly enough it was later said that Justice McKenna tended to be "a sporadic spokesman against vested property interests under Holmes's tutelage."

Let's go back to our neighborhood park. We saw that our friend couldn't be coerced by the zoning law to provide us with the free benefit of a park. What if he found the lot was superb clay: could he open a brick yard? No: the police power can prevent him from inflicting harm on us. We are onto something here. Government has two distinct powers - it can regulate or it can condemn. Why get the two mixed up? Let us stick with regulation and forget these vexing taking metaphors. I've got a new rule: "A regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." How do you tell? It's a valid public purpose to prevent the infliction of harm on the community. It's not a valid public purpose to extort a free benefit.

Can this principle be illustrated? Let us suppose some years ago and for a song someone bought some saltwater marshland. His dream was to occupy his retirement by filling the marsh and building a waterfront home on it. It has recently dawned upon us, however, that salt water marshes are a vital part of the larger marine ecosystem because of the nutrients they provide. As a result, we get enacted an ordinance which forbids filling in any more marshes. Our landowner friend, of course, says that this ordinance is invalid. Our answer is simple per our test: there is no extraction of any free benefit here but merely

the prevention of harm to the public interest in the marine ecosystem.

The owner may object that we are being unfair. True enough, we do prevent harm to the ecosystem, but from that we all reap a benefit. His cost in creating this benefit may be rather more than ours. Maybe our harm/benefit analysis hides what we have really done, which is to say that there was no disguised taking here. The marsh as a marsh is worth as much today as it was yesterday. In otherwords, we refuse to let our friend include its speculative value in the equation, because we have decided there no longer exists the right to reap speculative gains out of critical land areas. [115 N.H. 124 (1975)]

Well, we all love the environment and detest speculators. Would we be quite so cavalier with our neighborhood park case today? We have just had a park case. Near the United Nations complex a developer put in several highrise luxury apartment towers in a self-contained enclave that included a mini-park. The developer went bust and when a new one took over he obviously began to look for ways to create some additional income. The area was zoned for commercial-apartment towers; there still sat the park. He applied for a permit to build another tower, this on the site of the park. In a flash the project inhabitants were clamoring for the zoning ordinance to be amended.

The developer owned the project area, including the park and he was not getting a return on it that made the books balance. Zoning the empty lot a park invited the courts to invoke the taking litany. The city had no money with which to condemn the parksite. What was to be done? Why, simply amend the zoning ordinance to designate the lot exclusively a park district. But then label the park a granting district, and draw a still larger square several blocks around it and label this a receiving district. Then decree that anyone in the receiving district can exceed by ten percent allowable floor space in his new building by buying from the parkowner pieces of the floorspace that might otherwise have been built on the parksite.

Wait a minute, said the court, what's going on here? As we now understand it, this metaphorical talk about taking really means to say that it is unreasonable to make a landowner assume the cost of providing the public with a benefit. Maybe development right transfers are the answer to this problem. Here, however, how do you know anyone actually intends to build a tower in the area? The park had cash value; the owner now has some script which he may or may not some day be able to convert to cash. The ploy here is unconstitutional. [39 N.Y. 587 (1976)]

There is a very interesting idea in this Tudor Towers case. That is, Chief Judge Breitel suggests that the real evil of overusing the power to regulate is that it is undemocratic. A change in the zoning law as to a particular parcel may zap an owner and hit him with the cost, all pretty much unnoticed by the public at large. The real

question is whether the public want a park or a tax-generating tower. Requiring compensation puts the question into a more visible perspective because we all tend to watch more carefully the spending choices of our rulers. Indeed, pushed a bit this line of reasoning would support the idea that the brickyard case and the marsh case were wrong - the public should have been asked to pay compensation.

But what happened on June 23, 1977? This whole TDR idea really has been a response to the problem of Grand Central Terminal. The city has designated the terminal a landmark - yet with all the airspace above it money can be had by erecting a tower over it. The city has forbidden the use of this airspace, but has added an equal amount on top of other parcels already owned by Penn Central around the terminal. Unlike Tudor Towers, this isn't a case of hoping someone else will buy these rights; they are already on Penn Central's land. True, the buildings on these other parcels are perfectly good ones so that it is not likely that these transferred rights make much sense to use at once. The new space is not then precisely equal to the old space - but it's reasonable compensation. "The compensation need not be 'just' compensation" because this isn't an eminent domain case.

Come to think of it, why can't Penn Central make a reasonable return on the terminal? Let it put a value of x million on the site and its accountants can demonstrate the lack of a reasonable return. If we halved that value, the return might look reasonable. Five cents on the dollar is five percent; but five cents on the half dollar is ten percent. Why should Penn Central be entitled to claim the full current value on the site? Without its monopoly franchise, its subsidies and the growth of the city around the terminal, the site would have no value. True, without the terminal the area around it might not have prospered. Ah - this is the point: it was the interaction between the railroad and the public which created the site's value. But without the public the terminal wouldn't be worth a fraction of its current economic value. "Plaintiffs may not now frustrate important social objectives by complaining that public regulation deprives them of a return on an investment made not as much by themselves as by the people." Thus, until Penn Central can prove the purely private value of the terminal they have no cause to complain. [Penn Central v. City of New York, Slip Opinion, 6/23/77]

What is one to make of all this? First, I'd now take with several blocks of salt the lawyers' claim to be social engineers because no rational paradigm will explain the eccentricities we have rehearsed tonight. Second, let me suggest that the reason we can't precisely articulate any norms here is because we are really struggling with a problem of ethics. We are trapped in a world of the parable, the story, the example. A clay pit - a water marsh - a terminal building - the owners of these may have contributed more than their fair share to the commonweal. Coal was protected. Artifacts which trigger ecological or aesthetic responses from the multitudes do not get the

same respect as raw, dirty coal mines, perhaps? In a way.

When we deal with mainstream society, we seem to make a pretty good accommodation about sharing the cost of progress. Get caught on the periphery, however, and you may lose your shirt. Situate in a farm county far removed from the city, planning may mirror agreed upon mutual advantage. For a farmer situated on the fringe of urban sprawl, living in an era when the buzzing multitudes are enamored of preserving open space amenities, he might be well advised to cock an eyebrow when the social engineers arrive with their "regulations" and TDR schemes to structure the place for the common good. Let me end this with something Holmes' once said: "Personally I like to know what the bill is going to be before I order a luxury."