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CHAPTER 2

Governmental Influence on the Use of Real Property

An especially noteworthy area in which governmental intervention has steadily expanded is that concerned with the methods by which land is utilized and buildings are constructed, occupied, and maintained. There are several objectives in this form of intervention. Beginning with the provision of access and the prevention of hazards and nuisances,[1] the government's aim has been broadened in the course of years to provide a measure of protection to the landholder against his own acts and, beyond this, to include moral and economic, as well as physical, considerations within the scope of regulation. And now, as a means of counterbalancing the often wasteful effects of its expansionist land policy, government has asserted its powers to prevent land misuse. Although these objectives may not be immediately concerned with the financing of real estate, they are nonetheless vital to it. In many ways, the control that the law imposes upon physical realty determines the value of property, the yield that may be expected of it, and the security of investment in it. Physical control of land and of land uses sets the framework for financing operations no less than the legal strictures on the rights in real property.

The ability of government to control land use derives mainly from the police power, the power of eminent domain, and the rights of the state as a landowner. All of these powers are vested in the states and may be exercised directly by them or, through delegation, by their political subdivisions. The federal government may exercise police power only in situations affecting interstate commerce and on lands owned by it. In using the power of eminent domain, it has more limited authority than the states; and its

[1] For the development of the nuisance doctrine, see Shirley Adelson Siegel, "Real Property Law and Mass Housing Needs," *Law and Contemporary Problems*, Vol. 12, No. 1 (December 1947) pp. 30 ff.

privileges as a landowner were, during the period of their greatest extent, almost wholly unused as a means of controlling land use. The types of intervention discussed in this chapter are, therefore, mainly of state origin. Within the last few decades, however, the federal government, by a broad interpretation of the commerce clause, by use of the spending power, and by more direct and novel means, has increasingly sought on its own initiative to influence land use.

The Police Power

Under the police power, the state reserves the right to restrict personal liberties and to limit property rights in order to protect the safety, health, morals, and general welfare of the public. Although this power is not new, its scope is still being broadened as the term "general welfare" itself is being broadened to cover a widening range of social and economic considerations. Characteristic of the modern point of view is the decision of a Wisconsin court which held that "the same restrictions (i.e., those imposed in the interest of public health and safety) may be imposed upon the use of property in the promotion of the public welfare, convenience, and general prosperity." [2]

The exercise of the police power involves no responsibility for indemnification by the state. If a particular land use is noxious in the eyes of the law, it may be prohibited, irrespective of the loss to the property owner. Because of this extreme doctrine, the courts have frequently been reluctant to expand the definition of the police power. A further restraint exists in the "due process" clause of the federal constitution, under which the harmfulness of the use must be clearly demonstrated. Nevertheless, the tendency is toward a broader definition.

Building Regulations

The most familiar means of limiting private property rights through exercise of the police power are municipal ordinances regulating the construction and occupancy of buildings. Govern-

[2] Carter v. Harper, 182 Wis. 148 (1923). An example of the "convenience and general prosperity" concept will be found in rural zoning, Chapter 2, pp. 27-28. The police power has even been extended to matters of aesthetics: in Washington, D. C., for example, the appearance of buildings fronting on certain main boulevards and public places is subject to the approval of the Commission of Fine Arts (40 U.S.C. 121, c. 400; 53 Stat. 1144, 1939).

ment effort to protect the public from unsafe structures dates back to Babylonian tablets and the laws of ancient Rome.[3] After the fall of Rome there was little attempt to control building until towns were again important, and then regulation was mainly to prevent the spread of fire. Similarly in this country the first regulations related to methods of erecting chimneys.[4] Of all forms of realty control, building codes have the most consistent and uninterrupted development, broadening in scope with successive catastrophes and the increasing congestion of population. In large cities today, nearly all phases of construction, many features of planning (such as window and room sizes, ceiling heights, stair widths, depth of yards, etc.) and many aspects of building occupancy and operation are subject to regulation.

Although this regulatory power rests in the states, only a few, notably Indiana, Ohio, and Wisconsin, have attempted to cover the whole range of building in state codes.[5] Many states, however, maintain at least partial regulation of such structures as hospitals, schools, places of assembly and dwellings, safety measures in factory buildings, and provisions for the sanitation of dairy barns. For the most part, the power is delegated to municipalities with the result that there are some 1,500 to 1,800 building codes, and few of these are duplications.[6]

The codes differ in the subjects they treat and in their manner of treatment. Some relate to building planning and structural requirements only. Many also cover sanitary requirements, but in others the sanitary code is a separate document. Electrical work is often separately handled. Some cities regulate the occupancy of buildings after erection, particularly places of assembly, factories, and tenements. Some phases of building operation, such as seasonal requirements for heat and maintenance of boilers and elevators,

3 Frank Burton, *History of Building Codes* (Proceedings, Fifteenth Annual Meeting, Building Officials Conference of America, 1929) p. 41.

4 *Ibid.*, pp. 42-46. Also, Joseph D. McGoldrick, Seymour Graubard, and Raymond J. Horovitz, *Building Regulation in New York City* (The Commonwealth Fund, New York, 1944) p. 27. Other early regulations covered lot line restriction, the authorization of construction, and the materials for roofs.

5 Miles L. Colean, *American Housing* (The Twentieth Century Fund, New York, 1944) p. 125.

6 *Ibid.*, p. 125. George N. Thompson, *Preparation and Revision of Building Codes*, Building Materials and Structures Report BMS19, U.S. Department of Commerce (Washington, 1939).

are regulated in most large cities. Many cities have closing and demolition ordinances, effective where buildings, either beyond repair or in the hands of owners who refuse to repair them, are clearly a menace to health and safety.

The allowable safe strength of timber and steel beams and columns, the load that a brick wall is permitted to carry, the size of windows and rooms, the amount and kind of covering required to fireproof steel members, the width of stair required to discharge a given number of persons, the proper method of venting a plumbing system—all these details, and many more, vary from city to city. Furthermore, there are differences not only in the permitted stresses of materials but also in the allowances for floor loads, weight of snow, and wind pressure to which the stresses are applied.[7]

Since there is no central authority to which cities may look for the establishment of standards, diversity continues to be an outstanding code characteristic, intensifying the local nature of the construction industry, preventing the standardization of many types of product, and probably adding unnecessarily to the cost of construction.[8] The lack of widely accepted standards for the satisfactory performance of the various parts of a structure also slows up technological advance and makes easier the perversion of codes to serve special interests. Both these results tend to maintain, or actually create, artificially high levels of construction cost.

The federal government has tried several methods of bringing its influence to bear on the character of building regulations. Through the National Bureau of Standards of the Department of Commerce, it has carried on research in construction standards and has assisted in developing the model code of the American Standards Association. Through the Housing and Home Finance Agency, a model plumbing code has been prepared, performance requirements for residential construction have been issued, and considerable work done on the formulation of standards for a number of the elements of housing construction.[9] Through the con-

[7] M. L. Colean, *op. cit.*, p. 127.

[8] See Walter J. Mattison, "Building Codes Kill Low Cost Housing," *Municipalities and the Law in Action* (Washington, 1939).

[9] Authority to engage in this type of activity was specifically granted to the Housing and Home Finance Agency in the Housing Act of 1948 (62 Stat. 1276) and greatly expanded in the Housing Act of 1949 (Public Law 171, 81st Congress).

struction requirements and housing standards of the Federal Housing Administration, the government has imposed a sort of super-code in so far as the operations of that agency are concerned. In connection with its public buildings and public housing programs, the federal government has also imposed its own standards but, except during the war period, the practice has been mainly to follow local codes in such construction. On occasion the Department of Justice has offered to appear in the role of *amicus curiae* in cases involving allegedly unreasonable code restraints but it has never actually done so. Acting through special powers, federal authorities required modifications of code provisions during the war period as the price of permitting communities to have materials for housing construction.[10] Although similar coercive methods, through the withholding of Federal Housing Administration financing, public housing grants, and so forth, have been suggested for peacetime use, they have never been employed.

Without regulation of the physical character of property, urban realty investment would be very hazardous. Building codes greatly moderate the risk of fire and maintain a minimum standard of construction. They eliminate a great deal of unscrupulous competition that would otherwise detract from the value of sound structures. On the other hand, many elements in present day codes no doubt raise the cost of construction and consequently limit the volume of activity.

In a special study of Chicago, for instance, evidence of an inverse correlation between code rigidity and building activity was discovered.[11] To this extent, investment opportunities will be restricted and hazard may be increased. For another thing, an artifi-

[10] Wartime construction was required by the federal government to conform to the following: "Critical Construction Materials Design Guide," June 26, 1943, War Production Board; "National Emergency Specifications for the Design, Fabrication and Erection of Structural Steel for Building," September 10, 1942, War Production Board; "National Emergency Specifications for the Design of Reinforced Concrete Buildings," November 10, 1942, including amendment dated March 30, 1944, War Production Board; "National Emergency Specifications for the Design, Fabrication and Erection of Street Grade Lumber and its Fastenings for Buildings," Directive No. 29, August 9, 1943, War Production Board; and "Emergency Plumbing Standards for Defense Housing," February 1942, Division of Defense Housing Coordination, Office for Emergency Management.

[11] Howard P. Vermilya, *Building Regulation in Chicago* (Chicago Association of Commerce, Chicago, 1945); also Miles L. Colean, *Your Building Code* (National Committee on Housing Inc., New York, 1946).

cial form of competition may be set up among the communities in a metropolitan district, since less onerous regulations and lower building costs in the outlying communities and unincorporated areas contribute to the dispersion of population and business from the central areas and to the consequent loss of their property values.

Regulation of Land Use

Although the bulk of our land-use regulation was enacted during the last few decades, the idea of legally determining the manner of occupying and utilizing land is far from new. The early New England towns had a considerable degree of regulated planning, and a number of our important cities, notably Philadelphia, Savannah, and Washington, have, with varying consistency and continuity,[12] evolved from official plans. Quite undesignedly, the survey system, created by the Land Ordinance of 1785, turned out to be the most significant single planning measure ever embodied in American law, for it determined the characteristically rectangular physical pattern not only of the major part of the rural area of the country but of numerous towns and cities as well.

Several planning or use-control features were embodied in the early public land acts. The requirement of a government survey and patent to establish title tended to reduce the scattered, hit-or-miss settlement so common in parts of the original colonial area, notably Virginia. The minimum, and sometimes the maximum, area that might be taken up was regulated. The initial sales price was regulated. Efforts were made (although without success) to prevent speculation and to provide for progressive expansion westward. Other measures specifically provided for the disposition of lands left behind in the first rush of settlement.[13]

As we have noted before, however, the early emphasis was on expansion, not purposeful control. And, though the Constitution specified the power to dispose of the public domain according to any method whatever, the inherent potentialities thus given for social and economic planning were not even considered, and even physical planning was only accidentally indulged in.

[12] National Resources Committee, *Urban Planning and Land Policies*, Volume 2 of the report of the Urbanism Committee (Washington, 1939) pp. 15-16.

[13] 9 Stat. 114 (1845-51) Act of August 3, 1846, c. 78, § 5; Revised Statutes, Title XXXII, § 2455.

The states likewise showed small concern with methods of land utilization during the first hundred years of the Republic. Their interest, like that of the federal government, was in getting people on the land and encouraging the growth of cities. To these ends, state laws encouraged unimpaired freedom of use; and land ownership lost nearly all its ancient responsibilities to the community. For the most part, land-use regulation was left to a later period when a reawakening community consciousness revived some of the old powers and devised several new means of influence or coercion.

SUBDIVISION REGULATION

Among the first reassertions of the power to control land use in cities was the regulation of subdividing. The first of such regulations appears to have been enacted in 1882 when the village of Oak Park, Illinois, required plats to be filed in advance of sale and to conform to certain standards of layout. In 1888, the District of Columbia was authorized to regulate the platting of subdivisions. Since then, all but six states have authorized cities to regulate subdivision practices.[14]

As a minimum, subdivision control requires the filing of a plat showing lot sizes and layout and width of streets to conform with the city requirements. Many cities go further in supervising the planning of the area, specifying the type of improvement—streets, sidewalks, sewers, and water—to be installed, and requiring that these improvements be paid for by the subdivider.[15]

The control is thus qualitative rather than quantitative. No jurisdiction has claimed directly the right to govern the amount of land that may be subdivided; and constitutional considerations have so far prevented the assumption of this power. The requirement for the installation of improvements has, however, a tendency to restrict the development of urban lots to numbers that can be absorbed by the market within a fairly short time. Limited as these

[14] Harold William Lautner, *Subdivision Regulations; An Analysis of Land Subdivision Control Practices* (Public Administration Service, Chicago, 1941) pp. 217-342. National Housing Agency, Office of the General Counsel, *Comparative Analysis of the Principal Provisions of State Subdivision Control Laws Relating to Housing and Urban Development* (Washington, January 1, 1945).

[15] H. W. Lautner, *op. cit.*, p. 246. Usually subdivision control is limited to areas within municipal boundaries, although in some cases areas from three to five miles beyond the city limits (unless impinging on other municipalities) are brought under the regulation.

laws are, they still may stimulate real estate investment by contributing to the orderliness of urban development, assuring reasonable standards of land improvement and public facilities, and requiring that the costs of such improvements be included in the original development instead of overhanging the property as special assessments. On the other hand, these requirements may restrain investment by requiring excessive expenditures and thus have the retarding influence often attributed to building codes.

Subdivision regulation is by no means universal and there are only a few instances where it effectively assures a high standard of neighborhood layout. Therefore, the federal government, as a feature of its mortgage insurance system, has established "neighborhood standards" with which all users of the system must comply. This, like the use of FHA construction requirements, represents an intrusion of the federal government into matters normally under local jurisdiction only, and introduces another element into the already complex framework of control over realty investment.

Allied to these regulations is the use by developers of covenants running with the land, which may, among other requirements, restrict the size of lots and the minimum size or cost of dwellings, establish building lines, prevent inharmonious building, and exclude certain racial groups from tenancy or ownership.[16] Since the covenants depend for their enforcement upon the injunctive power, or the assessment of damages, they show how governmental power can be used to maintain private regulations. Designed to protect investment, they may, by freezing the character of development over a long period, ultimately have the opposite result.

ZONING

Aside from the yard and building line requirements and the fire districting common in building codes, the most widespread method of controlling land use is zoning. This form of regulation involves the division of cities or other political subdivisions into districts according to allowable land use—residential, commercial, indus-

[16] The U. S. Supreme Court, in 334 U. S. 24 and 334 U. S. 1, has denied access to the courts for the enforcement of covenants preventing sale or occupancy on the basis of race. Regulations announced late in 1949 by the Federal Housing Administration and the Veterans' Administration deny the availability of insured or guaranteed mortgage financing in any instance where a discriminatory covenant was of record.

trial, and many varieties of each of these. In some cases of county zoning, agricultural uses are stipulated as well.

Urban zoning regulates the area, height, and volume of buildings, although height restriction in some cities antedates zoning. The first zoning ordinance was that of New York City in 1916, following the 1914 enabling act of the New York legislature. Up to the present time, twenty-one states have made possible the enactment of zoning ordinances either in all counties or in specified areas.[17]

The impetus for zoning came from the great congestion of cities following the invention of the skyscraper. The steel frame building permitted an intensity of land use that robbed neighboring properties of light and air, converted streets into dim canyons, and endangered the health and safety of the public. Yet any attempt to interfere with such use of land involved both an intrusion on private rights that had been stoutly asserted and maintained for generations and a spectacular claim of superior community rights.

For a number of years, the principle of zoning had a stormy court history. Nevertheless, the principle tended on the whole to be enlarged by successive court decisions. It is now established and is still being broadened as an instrument for controlling the economic and physical pattern of cities. Although a "nonconforming use" in existence at the time an ordinance was passed is often allowed to remain indefinitely in its privileged position, this is not universally so. Early in the development of zoning theory, the Supreme Court ruled that the banning of a pre-existing, nonconforming use did not take property without due process.[18] Authorities contend that the police power, as supported by this decision, is broad enough to permit retroactive restrictions, especially where a reasonable time is allowed to amortize existing investment.[19] A more drastic proposal (as yet nowhere enacted) would establish a

[17] For a thorough discussion of zoning principles and practices, see Edward Murray Bassett, *Zoning* (Russell Sage Foundation, New York, 1940).

[18] Hadacheck v. Los Angeles, 239 U. S. 394 (1915); 60 L. ed. 348.

[19] E. M. Bassett, *op. cit.*, pp. 112 ff.; Richard T. Ely and George S. Wehrwein, *Land Economics* (New York, 1940) pp. 108-9. In spite of this doctrine, the enabling legislation in many states prevents action against nonconforming uses, and in only a few cities have limits been set on the period during which the nonconforming use may be maintained.

life period for each building at the time of erection, so as to permit greater flexibility in future redistricting.

Although some county zoning in the twenties included districting for agricultural purposes, Wisconsin in 1929 definitely inaugurated rural zoning under which farming (not already established) was prohibited in certain submarginal areas in favor of forestry or recreation.[20] Here the economic, as contrasted with the physical, basis for zoning is undisguised.

OTHER WAYS OF REGULATING LAND USE

Aside from a few planning features in public land laws, the beginnings of subdivision regulation, and a few early instances of planned cities, land-use control during the nineteenth century consisted mainly of the widespread establishment of drainage districts, with powers to lay out drainage systems, to construct works, and to levy taxes or assessments. Irrigation districts, involving a similar legal framework, also became common,[21] but any true concern with land-use control was a later development.

Land-use planning in urban areas, in the sense of a legislatively supported official program for the coordinated development of highways, streets and other transportation facilities, schools and recreational areas, and other public improvements was largely a development of the period 1909 to 1920.[22] Interest was stimulated by the revival in 1901 of the long-neglected plan of the city of Washington, but the chaotic growth of cities following World War I created demands for more comprehensive control of urban expansion. Early city planners generally omitted the possibility of the planned use of privately-owned land from their considerations, except as it might be influenced indirectly by public improvements. Gradually, however, the planning concept has been expanded to include direct guidance of private land use until it has now become one of the important objectives of planning.

[20] R. T. Ely and G. S. Wehrwein, *op. cit.*, p. 187.

[21] *Ibid.*, pp. 168-71, 264.

[22] Such planning had tentative beginnings in the nineteenth and early twentieth centuries. The most noteworthy of the earlier plans, however, were often privately sponsored (as the Chicago plan of 1909) and were without any legal authority through which they could be carried into effect. For the development of official city planning, see Thomas Adams, *Outline of Town and City Planning* (Russell Sage Foundation, New York, 1935) Chapter 9.

Currently, public improvements are planned in relation to, and for their effect on, private land uses, with public works frequently used as a means to attain broad economic and social objectives. Zoning and subdivision regulations are considered elements of the planning function and, at least in their main outlines, are subject to the master plan of the community. The present New York City Charter, for example, represents a thorough-going effort to centralize all aspects of urban planning activity.[23]

Eminent Domain Applied to Planning

Growing concern with slums has created another field for official land-use planning. Although the police power, if effectively invoked, can require the vacation or demolition of unsafe and unsanitary structures, it cannot affect title to property, nor can it require the wholesale reorganization of an area. The redevelopment of outworn districts called for something more than the police power, namely, the authority to liquidate old ownerships, to wipe out old property lines, and to redistribute land in a manner conforming to new requirements. The power of eminent domain answered these requirements, but its application for such broad objectives demanded a much modified definition of "public purpose." Both federal and state courts have complied and the power of states, or their instrumentalities, to condemn land to provide sites for publicly-owned housing has been upheld in several decisions.[24]

[23] The New York City Charter was established by a referendum vote in 1936. For a description of its planning features, see Edward Murray Bassett, *The Master Plan* (Russell Sage Foundation, New York, 1938) Chapter 14.

[24] The power of the federal government to take land for public housing purposes was denied by the Circuit Court of Appeals, Sixth Circuit, October 9, 1935. The United States v. Certain Lands in City of Louisville, 78 F (2d) 684; 296 U. S. 567; 297 U. S. 726. Later cases casting doubt on this decision are: (1) Oklahoma City v. Sanders, 94F (92d) 323 (January 8, 1938) and (2) the City of Cleveland v. the United States of America and Federal Public Housing Authority; and John J. Boyle, et al. v. the United States of America and Federal Public Housing Authority, 323 U. S. 329; 89 L. ed. 274 (January 2, 1945). The author is indebted to Mr. David Krooth, formerly General Counsel of the Federal Public Housing Authority for the following comment on these cases:

"In the Louisville case, the Court held that the National Industrial Recovery Act, so far as it attempted to authorize the Government to condemn private property for low-cost housing and slum clearance projects, and for the purpose of reducing unemployment, was unconstitutional, since such is not a public use and is not authorized by the General Welfare Clause of the Constitution.

"In the Oklahoma case, which was not a condemnation proceeding, the Court

Decisions in the courts of the District of Columbia, Illinois, and New York have approved the use of condemnation proceedings even where the purpose was not the redevelopment of the area by a public agency or for residential use, holding that slum removal in itself was a sufficient service to the public interest.[25] Since the reassembly of large urban tracts is rarely possible without a resort to condemnation, the new interpretation gives government a strong weapon to use in determining the conditions of investment in an ever-expanding proportion of the urban area. New York has gone even further in providing instruments for the control of future land use. The new state constitution of 1938 gave to municipalities the power to acquire "by purchase, gift, eminent domain, or otherwise" any land considered necessary for a housing program even though not necessary for current requirements.[26] This provision was reinforced by specific legislation.[27]

The establishment of the doctrine that private land might be taken for the purpose of clearing slums and placing the land in condition for re-use inaugurated a series of state "urban redevelopment" laws. These, along with the federal aid that was provided to

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of Appeals held that public housing and slum clearance was for a public and governmental purpose and therefore constitutional.

"In the Cleveland case, which involved the tax exemption of a PWA project acquired by the Government by eminent domain under the provisions of the National Industrial Recovery Act, the Supreme Court of the United States held that the United States Housing Act was constitutional and was enacted pursuant to the Welfare Clause of the Constitution, and that the project was exempt from taxes. This case reverses the principle of law upon which the Louisville case is based.

"It is now generally admitted by the Bar that public housing and slum clearance come within the delegated powers of the Federal Constitution.

"Despite these later decisions, the Federal Government, in the pursuit of its public housing program, has not directly taken land but has financed local authorities, which in turn have used the condemnation power. The exercise of eminent domain by such local agencies has not been effectively challenged, and the legality of the practice seems now firmly established."

[25] See U. S. Supreme Court, Minnie Keys v. U. S., 119 Fed. (2d) 444, October 13, 1941; Supreme Court of Illinois, John F. Zurn v. The City of Chicago, et al., 389 Ill. 114, 59 NE (2) 18 (1945), October 17, 1945; New York Court of Appeals, Mary V. Murray, et al., v. LaGuardia, et al., December 2, 1943; New York Supreme Court, Pratt v. LaGuardia, et al., March 17, 1944.

[26] New York Constitution, art. 18, § 9.

[27] New York Laws 1945, c. 887. For broad interpretations of the public purpose concept, see also S. A. Siegel, *op. cit.*, pp. 39-41, and Myres S. McDougal, "Municipal Land Policy and Control," *Annals of the American Academy of Political and Social Science,* Vol. 242 (November 1945) pp. 91-92.

spur the movement, are discussed in a later chapter, since they are so distinctly a part of the interventionary pattern of the years following World War II.

In effect, these and the public housing measures brought a restoration of the power of the state as landlord, making it potentially an important force in urban real estate investment. The same restoration was occurring in rural areas. In several of the states, the recovery of rural land, particularly through tax foreclosure, resulted in more positive use of ownership power; and the federal government also, on that part of the public domain that was left, as well as on lands reacquired by default or purchase, began a conscious direction of land use by means of irrigation projects, control of grazing, timbering control, and reforestation.

Governmental Influence on Rural Land Use

The broadening of the planning concept and the power to effectuate planning programs has not been solely an urban phenomenon. As the frontier narrowed, the attention of state governments, and, more particularly, of the federal government, turned to problems of the preservation of resources remaining in the public domain and of the more economic utilization of land that had passed into private hands.

Some of the first moves along these lines—the undertakings in drainage and irrigation mentioned above—were privately initiated within the framework of state law; but government soon adopted direct means of intervention. At first, the federal effort was only to stimulate state action; thus, vast areas of swamp or arid lands were transferred to states that would agree to undertake drainage or irrigation works.[28] But so many local drainage districts had fallen into financial difficulties by 1933 that the federal government came to their aid with Reconstruction Finance Corporation loans.[29] At an earlier date (1902), Congress began to provide funds for the installation of irrigation works on public lands in seventeen western states, with the idea that settlers would eventually reimburse the government through the payment of water charges—a prospect

[28] Thomas Corwin Donaldson, *The Public Domain, Its History With Statistics* (Washington, 1884) Chapters 12 and 30; Benjamin H. Hibbard, *A History of the Public Land Policies* (New York, 1924) Chapters 14 and 20.

[29] Reconstruction Finance Corporation Act, 47 Stat. 5 (1932); 15 U.S.C. 601 *et seq.*

only partly realized. As the program developed, reclamation projects were extended to provide electric power, to assist in flood control and navigation, and to supply water for domestic and industrial purposes as well as to serve irrigation requirements.[30]

Reclamation began to add thousands of acres to the supply of farm land shortly before it was realized that the supply was already too great for economic operation. As new acreage was created, the federal government undertook through other means, such as the "rural resettlement" program of the thirties, to acquire already settled land and withdraw it from cultivation.[31] This confusion in land policy is still far from being resolved.

The conservation and use programs of the Department of Agriculture represent another form of governmental land-use regulation. These programs began with the public recognition of the waste of resources resulting from the exploitative cultivation of private lands. Before the first World War, Kansas and Texas attempted to deal with erosion problems,[32] but it remained for the drought and the depression of the middle thirties to highlight the problem. In 1935, Congress passed the Soil Conservation Act,[33] authorizing the use of public funds in the rebuilding of land in local conservation districts set up under appropriate state laws. By 1947, almost three million farms and ranches, comprising 63 percent of the nation's cropland, were receiving federal assistance under this program; and allotments under the program for that year totaled $245 million.[34] This influence on farm values is not easy to measure, but it is unquestionably substantial.

From Flood Control to Regional Planning

The protection of private lands from flood damage shows an historical shift from private, through state, to federal jurisdiction, much the same as in the case of irrigation activities. Originally such protection was a private responsibility. In the original French

30 R. T. Ely and G. S. Wehrwein, *op. cit.*, pp. 265 ff.; *Federal Register,* Vol. 11, No. 177, pt. 2 (1946) p. 297.

31 This operation is now carried on by the Soil Conservation Service. See *Federal Register,* Vol. 11, No. 177, pt. 2 (1946) p. 297.

32 R. T. Ely and G. S. Wehrwein, *op. cit.*, p. 219.

33 49 Stat. 163 (1935); 16 U.S.C. 590 a-f.

34 From the records of the Production and Marketing Administration, U. S. Department of Agriculture.

grants in Louisiana, for instance, flood control was one of the conditions of landholding. During the middle nineteenth century, Mississippi Valley states began to establish levee districts and to provide continuity in levee construction, but the cost was still borne by landowners.[35]

After the Civil War, the federal government made grants-in-aid to levee districts, basing such action on its power under the commerce clause to protect navigation. In 1917, Congress made its first direct appropriations for flood control and after 1927 it assumed full responsibility for flood control in the Mississippi Valley. The purchase of forest lands for flood prevention also evolved from a broadened interpretation of the commerce clause.

The climax in this development was the Tennessee Valley Act of 1934. This measure provided, along with navigation and flood control operations, a bundle of ancillary activities, such as the creation and distribution of electric power and the manufacture of fertilizer.[36] The Tennessee Valley operation has modified the structure of realty values, both rural and urban, throughout a whole region. The Tennessee Valley Act is not only a climax in constitutional interpretation, but also the highest development to date of the planning principle for the clear purpose of reorganizing land use and increasing economic opportunity. It creates a wholly new concept of governmental-private relationships, in which initiative is primarily governmental and the participation of the electorate in official decisions is extremely remote and indirect.[37] Although compliance with the Tennessee Valley Authority's programs is voluntary, the character of private activity—industrial, commercial, and personal—is inevitably shaped by the direct operations of the Authority.

[35] R. T. Ely and G. S. Wehrwein, *op. cit.*, pp. 353-59. It may be noted that along with the assumption by government (whether state or federal) of the responsibility for irrigation and flood control has come a very substantial modification of the doctrine of riparian rights. *Ibid.*, pp. 367-80.

[36] For the opinion on the constitutionality of the Act, see Ashwander et al., v. TVA, 297 U.S. 288 (1935), also United States v. Appalachian Electric Power Company, 311 U.S. 377 (1940); 48 Stat. 59 (1933) c. 32, § 2; 16 U.S.C. *et seq.*

[37] Consulting with, and even acting on the advice of, persons and local governing bodies affected by TVA decisions (see David Eli Lilienthal, *TVA: Democracy on the March*, New York, 1944) does not constitute the democratic process as ordinarily interpreted. Final decisions are the Authority's and action by it can be taken without popular approval.

The Lengthening Arm of Control

As the above review indicates, government, on one claim to authority or another, will restrict the exercise of private rights in real property whenever it considers it necessary either to prevent the landowner from impinging on the rights of others, or to obtain for all, or a specially favored group of landholders, benefits presumably unattainable through private action. All forms of governmental control and assistance so far reviewed fall into one or another of these categories.

The influence of government on the use of realty has expanded from regulations to prevent fire and the collapse of buildings to far-reaching measures affecting the future of realty investment, both urban and rural. Building regulation now influences the whole technology of the construction industry; urban zoning has predetermined to a great extent the potentialities of urban realty investment; and rural zoning promises to do the same in the agricultural area. Planning programs, carrying the sanction of government, go beyond the original concepts of zoning in limiting the scope and possibilities of private investment in land. Conservation programs put government in a very influential relationship with the landowner. There are also less direct ways, to be considered later, for increasing governmental influence in a field hitherto left largely to private decision.

Because of its nature, and the degree to which its development and use is affected by public interest, a wide measure of governmental control over the uses of land is unavoidable. Certainly, without some measure of control the hazard of investment would undoubtedly be intolerable. Yet faulty or misconceived control may impede the flow of investment which is essential to economic land utilization as certainly as would the chaos of no control.[38] However, when such an impediment to the desired flow of investment does appear, government is less likely to remove the obstacle

[38] Not the least of the difficulties imposed upon investment is the diversity of regulation and the multiplicity of jurisdiction, particularly as regards urban property. Not only is there little uniformity in the building, zoning, and planning requirements of different, even neighboring, communities, but within a single community the developer of property must satisfy the requirements of and pay fees to as many as a dozen or more uncoordinated municipal agencies as well as often having to satisfy a federal finance-planning agency.

than it is to introduce new devices of regulation or stimulation, and in this way to broaden the area of intervention. Thus, the increase of governmental control introduces a new element of uncertainty in the market—uncertainty as to what government policy will be. As a result, private decisions come more and more to wait upon the judgment of public officials, and there follows a tendency for initiative to shift from the private to the public source.