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A Conceptual Approach to Zoning: What's Wrong with Euclid

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ARTICLE

A CONCEPTUAL APPROACH TO ZONING: WHAT'S WRONG WITH *EUCLID*

RICHARD A. EPSTEIN*

I
THE CONCEPTUAL FRAMEWORK

Today my topic is the relationship between the government and the market with respect to property in general and land-use regulation in particular. One central worry of our time is which activities should be undertaken by government coercion, control, or influence of one form or another, and which activities ought to be left to decentralized private decisions of individuals, who, for the most part, act rationally and steadily in their own self-interest. This question has been a staple of political philosophy from the beginning of our constitutional history to the present. It is an issue that can be raised with respect to ordinary liberty and employment contracts, or, like today, with respect to property and its use. Since a comprehensive discussion of this grand conflict would be too abstract, I think it is instructive to cover one area, in this case land-use planning, to see how it ties in with the general controversy over public versus private regulation. By understanding this one case well, perhaps at some other time and on some other occasion you can then figure out exactly how the same considerations play out across the different subject-matter areas.

A. *The Owner of All You Survey*

There are two preliminary questions to ask in thinking about these abstract and broad relationships between government and the individual: first, where do you start; and second, what kind of hypothetical do you introduce in order to make your central

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point? The hypothetical that I like to use for land-use planning is a very simple one. Let us suppose, somewhat weirdly, that you own all of the land on the face of the earth. Any human interaction between you and others who presumably live on the same planet is, for the moment, very much set to one side. Obviously, this assumption is not realistic, but it is chosen to eliminate two problems simultaneously: first, it eliminates all those meddlesome problems of what happens to property at the boundary line between persons, because we have no boundaries; second, it eliminates the rather unpleasant question of what happens when two people disagree. Now, there are, of course, some difficulties with this example, but let us put those aside for now because we will bring them back in later.

Now that you are ruler of all you survey, what do you want to do with all the resources that are at your beck and call? The obvious answer is to do anything you want. But while you are never going to have to go to court to get your way, you are going to have to decide two questions that combative lawyers often forget have to be addressed first about any kind of purposeful activity: what do you want to do and why do you want to do it? You would say, in some sense, that you would like to maximize your personal welfare, utility, or happiness. You would not talk about wealth under these circumstances because wealth presupposes a medium of exchange, and the idea of exchange in a solipsistic universe would entail taking money from one of your pockets and putting it into the other. So you are going to arrange matters to maximize these objectives and thereby satisfy your appetites, which can be as base or as noble as you choose. Whatever you desire, you may do, subject to the material constraints that are out there, such as the shape of the earth and the ordinary rules of physics and chemistry.

When embarking on your course of conduct, you will discover that there are many things that you can do that will benefit you in some particular way. But you will also learn that you are not as free to act as you might suppose. You will quickly discover that the moment you start to alter the material universe in one respect, the consequences that flow from your actions are not necessarily limited to those you intended to bring about. You must take into account other types of consequences, some of which are known but unwelcome, and some of which are positively unanticipated. When you sit down to figure out whether

you have done the right or the wrong things—when you make a reckoning at the end of the day—you will be compelled to take into account the unanticipated, the unwanted, the untaught, and the unpleasant consequences of your actions, as well as the positive ones, even if no one else is around to remind you of your folly or praise you for your wisdom.

Faced with that insistent reality, your maximization process becomes rather more complicated than simply doing what you want. It also includes gathering and interpreting information as to all of the remote and indirect consequences, both positive and negative, of your actions, and then setting a course of action to maximize your anticipated advantage over all time and over all states. You can not spend money in this world, but you can spend—and waste—time and effort. So, even living in this solipsistic universe is more daunting than you might have initially supposed, simply because you would have to make certain calculations for survival: self-interest is a long way from self-indulgence. You cannot afford to say, "Gee, now that I'm master of the universe, I can do whatever I want in a promiscuous or indiscriminate fashion."

B. *A Shared World*

How can we start to enrich this bare bones model in order to come closer to the core issues of land-use planning? One way to complicate this model is to assume that instead of an actual person who owns the entire physical universe, it would be a legal entity or association with two or more partners that owns the universe. These partners have to decide what it is they want to do with what *they* own in a world into which some measure of personal conflict will necessarily intrude. But again, it is a world in which there are no boundary questions because our partners own everything in common.

To make matters worse, the problems that we just discussed do not disappear just because new challenges have been introduced. It is still necessary to try to value various states of the world, and to figure out the indirect, unattended, unforeseen, or unwanted consequences of various forms of human action. But in addition, there is the obvious question of conflict and disagreement: what happens when it turns out that the two individuals have rather different evaluations of what they regard to be good or bad in their world? These disagreements could be directed

toward the desirability of certain ends, or to the likelihood that they can be achieved, or to both. But once they come out in the open, this happy partnership or association has to adopt some form of decision-making procedure. It could be dictatorship of the one over the many, or it could be some voting mechanism, or it could be a quasi-market mechanism—though the last is difficult to introduce in the world of common ownership, since by definition there are no property rights to facilitate exchange between people.

Technically speaking, as numbers increase, what is likely to happen under these circumstances is a rising impulse toward partition. That is, two individuals will have a dialogue that goes something as follows:

> A: You know, we can't figure out how the common management game is going to work. We just have fundamental disagreements; so you take the northern hemisphere, I'll take the southern hemisphere, and each of us will figure out what we're going to do in our own hemispheres.
>
> B: There are several conflicts that remain. First, each of us surrenders claims to half of the world in exchange for the right to develop the other half with perhaps a little bit more gusto than might have otherwise taken place. In addition, both of us recognize that there are going to be some messy interactions at the boundary lines where the activities on my side of the line are apt to have bad consequences for activities on your side. Finally, in our partition agreement, we are going to have to figure out exactly how to police these boundaries.

In our thought experiment, the moment two or more people own land, the single world owner model becomes untenable because the collective decision processes needed to satisfy shareholders, partners or whatever are all subject to a fundamental constraint in all social organizations: sometimes it is easier to have boundaries that have to be policed rather than to govern by collective rule. Stated another way, policing boundaries for separate assets and setting up government organizations for common assets both have their costs. One has to figure out ways to minimize the sum of these costs.

So let us examine the costs of policing boundaries. When the people focus on their partition arrangement, what sort of agreement are they going to make with respect to these noisy spillovers that are likely to take place at the boundary? One of

the tacks they could adopt is to ignore the boundary problem. Obviously, they cannot do this completely. The moment there are boundaries, the more important it is to have some rule of trespass to regulate entry onto the other person's land (the common-law term of *close* is suggestive here). So right from the start, there is a wall between the two pieces of land.

The trespass question may be the easiest question to solve, and perhaps even the most important. But even with that said, a good deal more work remains to be done—for not all spillovers, as the term suggests, rise to the level of an actual entry. There are many things that each person can do on his or her property that will have negative effects beyond the property line. The reverse will also be true. In the old world in which you owned everything, there was no such thing as an external consequence; there were only future consequences. Everything damaged was damaged for the one person who owned it. How should these bad consequences be treated in a world of two people, particularly where the negative spillovers exceed the positive gains? In principle, both people would be happy if they could devise a means to prevent them. In the easiest and most suggestive case, where each hurts the other, the possibilities of improvement are evident. By stopping a negative spillover effect of ten, each gets rid of negative ten by reciprocity; at the same time, each sacrifices five. In adding the numbers together, it turns out each is better off by five units (i.e., -10 to -5). Something similar to the law of nuisance will be born to police interactions at the boundary.

Next, suppose that we increase the number of people in the world by a fairly substantial factor. As the numbers increase, the obstacles to coordinated decision-making under common ownership become yet more intractable. To correct for obstacles, the people have to resort to more frequent divisions of property into smaller pieces. What typically happens, therefore—this is of course evident in or near major cities—is that the ratio of boundary lines to enclosed areas will increase. The more people that live in a given region, the more these areas will shrink in some way, shape, or form. The boundary questions that started out as essentially minor adjustments in a two-person universe turn out to raise an absolutely dominant problem in a universe with large numbers of people.

C. *Action at the Boundary*

What then do you do at the boundary? I think the first order of business is to figure out what kinds of negative spillovers the people want to stop; and these turn out to be the kinds addressed by the much-maligned law of nuisance in its traditional common-law form. This body of law does not work on a moral or deductive principle. Rather, it works on a rough empirical generalization that will be false in some cases but true in most: we should permit only those activities in which the benefits to the land owner exceed the costs from dirt and filth to the neighbor.

One way in which we can think about this proposition is to assume a small world in which I happen to own both a productive resource and enough of the surrounding land, such that all the pollution caused by this resource is going to take place on my own property. We have to ask ourselves whether I, as a single owner, will ignore that large amount of pollution when I engage in my productive activity. Most of us will answer "no." It does me no good to increase the productivity of my barns or my pens if it turns out that I have fouled my field and destroyed my crops and animals worth twenty or thirty times as much. I am not going to end up making these self-destructive choices.

Once it is recognized how people act when the harmful consequences are visited on their own property, it becomes clear that the magnitude of the adverse consequences is not going to shift radically when the damaged property is moved back into the hands of another individual. The law of nuisance is basically born of the presumption that these non-trespassory spillovers are the kinds of things that normally both of us would be better off enjoining.

Our task is now to minimize the cost of two kinds of activity: first, the coordination problems that we are trying to avoid; second, the boundary problems that we necessarily have to face. Typically, under these circumstances, the negative class of spillovers with which one might be concerned is not necessarily limited to those things that pollute. There may be other kinds of negative interactions between neighbors, such as whether to construct a sheer wall on your side of the boundary line. It does not take a modern belief in the welfare state to disallow such actions. In fact, if you go back to any agricultural period in England, the basic rule has always been that every neighbor owns a reciprocal negative easement over the land of others; one person cannot

dig out his or her lands at the boundary so that a neighbor's land topples, and vice versa. The basic logic is the same as before: these mutual restrictions imposed at the boundary line will result in mutual gain for all neighbors.

One issue that any sensible legal system has to worry about is what happens if the idiosyncratic circumstances in a given case move it sufficiently far from our well-perceived empirical norms, such that some deviation from the well-established legal rule is appropriate. Is there any way we can correct the idiosyncracies that result from the application of the tort laws? At this particular point, it is critical to remember that the law of land use is not only a part of the law of torts, but is also part of the law of property. When two neighbors are stuck and the tort law does not give them a very good solution to their private desires, we typically introduce the body of law known as the law of real covenants, or covenants running with the land.

The full system of land-use planning starts with a nuisance law—which operates as a general, all purpose, off-the-rack term—and couples it with a series of contract or covenant rules to allow corrections and deviations from the basic norm. This allows a whole body of voluntary transactions to take place. For example, if somebody's land is already a sewer, it may well be that it is easier to let a neighbor pollute it further at a price that leaves both sides the better. The contract thus allows the two parties to operate as one, and to divide the gains from the operation in a fashion that leaves neither unhappy and that results in no additional burdens being cast on third parties.

The process, moreover, has no externally imposed stopping point. If the value of land continues to rise, its segregation into smaller and smaller parcels will continue apace. The need for covenants to handle these distinctive, asymmetrical situations will probably increase. As a rough generalization, the more intensive the use of land, the more complicated the covenant law to adjust the position of neighbors along the boundary lines.

So far, this more robust model involves nuisance and covenant law. Yet there is a third part of the model that may sometimes arise. By breaking up large problems, it is possible to get rid of the obstacles of collective action and governance. But by the same token, it is possible that you will be hoisted by your own petard; almost inevitably, having little parcels of land helps in making daily management decisions on each parcel of land,

such as who sits at the dining room table, or who plays in the fields. But this separation undermines coordination and management in that land owners have to respond to global problems that affect not only one or two parcels, but ten, fifty, a hundred, or perhaps an entire range of a city. The result is the standard market failure problem: large numbers of independent actors, all of whom would be better off if they coordinated their behavior toward a given solution, have an incentive to deviate unless the others can be brought into line. As the numbers increase, bargaining breakdowns become more frequent, costly, and difficult to overcome.

The classic argument in favor of land-use planning is based at root on some perception of market failure. The question is how these failures are best addressed. Dealing with that problem requires some guidance and constraint. Here the objective should be to replicate the win/win outcomes of voluntary exchanges. In responding to a coordination problem, a state-coerced solution should leave each party better off, and in the same proportion than before state coercion was imposed. Stated differently, the set of outcomes that result from coerced exchanges should imitate as much as possible those that derive from voluntary exchanges: namely, coerced exchanges should leave all participants, including involuntary participants, better off than they were before—after taking into account the full range of burdens and benefits created by that legal intervention.

II
THE CONSTITUTIONAL PAYOFF

By stating the point this way, you suddenly can see how a basic approach to social interactions—starting with one person owning everything and advancing to cases where many people own many little things—ties in with the just compensation model of the Constitution.[1] One has to recognize that when autonomous individuals surrender rights to the use of their land, something has been taken from them, for which compensation ought to be provided. One also has to recognize that the compensation requirement does not necessarily demand that each person receive cash for the deprivation. All that is necessary is to generate an outcome that provides benefits that all individuals can enjoy

[1] U.S. CONST. amend. V.

to some extent. It is best to approach the problem of market failure by conceiving of everybody as having something to sacrifice and receiving something in exchange. The social objective is to induce those kinds of social exchanges from which everybody will benefit.

I like to put the point in this particular fashion because it illustrates the intimate connection between the standard definitions of social welfare and the particular rules of land-use planning. The Epstein Constitution—which I think is basically the one that is already there, so there is no claim of originality, but only of devotion—holds that the law should allow the regulation or redefinition of the standard common-law property right only to the extent that, in the long run, it works to the average net advantage of all persons subject to regulation.

Given this view, what happens in those parts of the universe where some state initiative produces in aggregate a gain for the society at large, but leaves some individuals worse off than before? The answer is to equalize the benefits of the changed situation, not by stopping the transformation from going forward, but by making cash transfers from those who receive a disproportionate share of the gain to those individuals who are left worse off, thereby restoring the balance. The model—which, under some circumstances, allows you to find benefits from the implicit in-kind benefits of government action—also has this correlative proposition: when that condition of implicit in-kind compensation is not satisfied—and it may fail for many reasons, technical or political—then compensation from winners to losers could improve the overall situation by equalizing the gains across all persons. Such a world would have some coercive government action, but with a systematic application of the compensation requirement to approximate the preferred distributional consequences of voluntary exchanges.

The basic model of property rights articulated above tries to take into account, systematically and comprehensively, all benefits and costs to all individuals from government-initiated exchanges. How does this model compare with current law? What is it about the present land-use situation that deviates from the model?

A. Euclid's *Mistake*

The Just Compensation Clause[2] allows private property to be taken for public purposes of the sort that I have just discussed, but demands the payment of just compensation to various individuals. To the extent that the basic model I have developed seems to have all the elements that are found in the Just Compensation Clause, one would expect that the legal response would be the same as my theoretical model. Ironically, the result has been exactly the opposite. Let me explain how this departure occurred and then explore whether anything can be done to change the misguided results in the future.

In *Euclid v. Ambler Realty Co.*,[3] the seminal land-use planning decision, the Supreme Court adopted a posture of deference toward a comprehensive land-use ordinance enacted by well-meaning local officials who were grappling with the difficult matters of projected interdependence in future land uses.[4] After all, regulating land-use requires dealing with neighbors, and while neighbors may be able to move away from each other, land will have to remain behind. The Court said that almost anything the government wants to do in order to handle the externality questions is acceptable because the idea of nuisance is sufficiently pliable to allow virtually any form of government regulation to fall within its ambit. Moreover, this presumption of deference is bolstered by imprecise common law terms: there is no clear demarcation separating nuisances, for which regulation is appropriate, from ordinary activities, for which it is not.[5] As a result, the Court gave birth to a very powerful system of public planning without asking what risks, if any, might be prevented by the application of stricter scrutiny.

Euclid itself is suggestive of some lurking difficulties with the Court's approach. The land in *Euclid* was a sixty-eight acre parallelogram between Euclid Avenue on the south and the Nickel Plate Railroad on the north.[6] The land owner had assembled vacant land and wanted to sell it for use as an industrial plant.[7] The Supreme Court upheld the Euclid zoning ordinance,[8]

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2 *Id.*
3 272 U.S. 365 (1926).
4 *Id.* at 388.
5 *Id.*
6 *Id.* at 379.
7 *Id.* at 384.
8 *Id.* at 395.

so that the land could not be used for the purpose for which it had been assembled because even though Euclid had designated the northern portion of the property for industrial use, Euclid had zoned the southern portion of the property for residential use.[9] As a result of this particular action, the land's market value diminished from approximately $700,000 as an integrated industrial park to approximately $200,000 as fractured by the heavy-handed regulation.[10]

Was this particular action justified in light of the problems that we were worried about in our hypothetical universe—coordination of multiple owners of a single plot of land and the externality problems in trying to maintain the boundary lines between neighbors? *Euclid* fails to address these two concerns. First, there should be no social concern with the ostensible externalities that might arise among subsequent owners of the sixty-eight acre plot when and if subdivided. On the particular facts, no subdivision was going to be created at all; the owner wanted to use it for an integrated purpose. Any gain from one portion of the land that is offset by a loss on some other portion of the land will be felt by the single land owner. The owner will pay the price if its assembly lines are going to suffer from an inefficient configuration. With such powerful private monitoring over these activities, government intervention is not needed to make sure that the land is rightly configured for its own industrial purposes. Ironically, by breaking up a large parcel of land into inconsistent zones slated for different uses, the regulation has created an externality problem along the boundary between the different zones, which is most acute when one zone is industrial and the other is residential. Zoning can thus create the very externalities that it is supposed to avoid.

Once you have these boundary conditions, you not only have to police the interactions between neighbors of the old plot, but you also have to worry about boundary problems between the residents of the original sixty-eight acre plot and their neighbors who live outside it. However, these two sets of people live in different jurisdictions subject to different local planning

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9 *Id.* at 380-83.

10 *Id.* at 384. Ironically, Euclid later rezoned all of the land owned by Ambler Realty Company for heavy industrial use. The site has been occupied by a General Motors Plant since World War II. ROBERT C. ELLICKSON & VICKI L. BEEN, LAND-USE CONTROLS: CASES AND MATERIALS (2d ed. forthcoming 1998).

boards. A truly comprehensive overview would take into consideration whether the plan for the original sixty-eight acre plot in town A is inconsistent with the plan for the land adjacent to it in town B. In short, local governments, like private actors, do not eliminate externalities. Rather, local governments create externalities as a consequence of operating in a hermetically sealed environment; a decision made in one township translates only with difficulty to what happens in the neighboring town. Transaction costs can bedevil governments just as they bedevil individuals, since the people who decide on land use in Euclid do not have to look beyond its borders to take their political cues. The upshot is that the problems of boundaries and externalities are not solved by zoning commissions. Indeed, zoning commissions create more friction because instead of only one land owner adjusting his or her arrangements with another, there are two layers of confusion: one between the two land owners and the other between the governing bodies of the two separate jurisdictions. Not only must neighbors come to their separate peace, but their governing bodies must come to peace as well.

The problems of coordination and externalities do not require a zoning solution. The relevant question in each case is whether government zoning aggravates or mitigates threatened harms. The first zoning case thwarted the single ownership solution to coordination problems and further aggravated externality problems that are a worry in any legal regime. Unfortunately, there is good reason to suspect that zoning, as it is currently practiced, more often than not aggravates rather than mitigates coordination and externality problems.

B. Euclid *Today*

The issue in *Euclid* carries over into the modern context. Most of the really pitched battles before zoning boards involve the future direction of undeveloped land. The endless veto powers given to immediate neighbors who suffer only minor financial loss could have powerfully negative consequences for the larger region of which that development is only a part. But political separations can prevent those costs from being registered. Developers have learned that buying land in small communities is a risky business, precisely because extensive negotiations are necessary to bring projects to fruition—projects that were stalled not because of external risks, but because neighbors thought they

could extract a pound of flesh from the developer. Just as zoning boards can aggravate externality problems, so too can they aggravate coordination problems as well.

It often happens, moreover, that developers who are burnt once can learn something from the experience. One famous illustration of the fickleness of boundaries is Disneyland. When Disney built Disneyland in Anaheim, it acquired just enough land for a theme park. The major winners of this investment were the neighbors across the street whose property multiplied in value by virtue of the improvements and advertisements by Disney, whose activities brought people from all over the country. The neighbors bore none of the costs, but reaped substantial benefits from this development. When Disney built Disney World in Orlando, on the other hand, it purchased a huge plot of land with hundreds of extra acres in order to limit the positive spillovers to strangers. It worked, sort of. Disney kept more of the gain, but the positive spillovers extended into a wider region and encouraged individuals to rent condominiums five miles from Disney World rather than across the street and drive to Disney World. Disney encountered the same problem in Orlando as in Anaheim, but in a somewhat less dramatic form.

There is a second odd feature of zoning that is worthy of mention. In many ways the entire zoning process fundamentally misunderstands the way in which individuals wish to integrate and coordinate their activities. The clue to the difficulty lies in the fact that the original meaning of the word "zone" implied that every use inside a single zone was uniform in content. That is why we have industrial zones, commercial zones, single family zones, and multiple-family zones. This vision of the world presupposes that identical uses within single zones are wonderful, that mixed uses are to be discouraged, and, as noted, that the problems with the zoned boundaries are to be ignored.

C. *Mixed Uses*

This is a monumentally rigid vision of how the world ought to be organized. Although there is perhaps some local disadvantage to having just one deviation from that particular pattern of uses, there is a huge overall advantage. Do you allow one convenience store, for example, to exist within walking distance of a large residential area? Yes. Do you want to have an uneven concentration of homes in a neighborhood so that some space can be

reserved for park land, and so forth? Yes. The same people who support zoning as a way to achieve convergent development have to worry about the question of mixed uses. Given the strong presumptions in favor of zones, the variance looks like an exceptional grant, sought by someone who wants to deviate from the normatively acceptable pattern of uses.

For all the superficial differences, the issue of mixed uses raises the same problem faced in *Euclid*. In *Euclid*, the land had to be sold to separate users. It was not kept for use as an industrial plant. Nevertheless, the single owner can sell off the land subject to covenants that can now be imposed at the front end as part and parcel of the condition of the sale. For example, if a seller wants to make a house far more attractive by laying out a golf course next door, he or she promises to dedicate the land to that use by covenant, and ensures that all buyers, present or future, can benefit from that decision. Since in cases of mixed uses, a seller can internalize gains and losses by covenant, why do we need zoning boards to review the architectural design plans whose impact, both visual and otherwise, is largely on the potential purchasers?

III
CONCLUSION: A RETURN TO LAISSEZ-FAIRE?

We must understand how the alternatives to zoning work before we can decide on its utility as a land-planning device. Typically, people describe it in the wrong way. To give just one example, perhaps the most gifted and influential writer on land use, Robert Ellickson, wrote the now-classic article on alternatives to zoning in 1973.[11] When Bob and I discussed the issue, he was puzzled as to what to call the common-law system. He decided to call it a system of laissez-faire. As an unabashed devotee of laissez-faire, I was concerned that his choice of title suggested that, without zoning, individuals could do whatever they wanted with their own land—which tends to underestimate the role of nuisance law in this area. But he continued to use this label nonetheless. That error, if it is an error, is harmless, so long as one recognizes that the full system of nuisance and covenants has enormous power. But it is also necessary to recognize that

[11] Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

many forms of land-use regulation could be justified on the ground that they improve overall welfare without leaving any individual or group worse off. This just compensation element cannot be ignored. The entire interplay of principles, therefore, leads to a sophisticated set of rules whose overall strength is easy to underestimate. The full legal system, as it is fully understood, takes into account initial property rights, multiple uses, externalities, internalities, coordination difficulties, covenants by way of correction, single owners, and forced exchanges. Can zoning provide an improvement to the common-law system in proportion to its increase in costs and delay? I suspect that the answer to this question is negative, and that we should here, as in other areas, seek to find ways to clip the wings of zoning authorities. *Euclid* set the inquiry off on the wrong track. It will now take a good deal of hard work—intellectual, political, and legal—to correct the errant course of the past 70 years.