
A generation ago—perhaps only yesterday—a book called "Law and Land" would have conjured up shades of feoffor-feoffee, the statute of Quia Emptores, or recording acts and the Torrens system. But today it will surprise no one to learn that this book deals with planning and zoning. The implications of this shift in attitude I leave for others to explore.

_Law and Land_ consists of papers by ten participants, five English and five American, in a Brookings Institution seminar on the legal control of land use: two essays on the relationship of land planning and individual ownership, two on the substance of the land plan—the English development plan and the American master plan—three on procedure and machinery of the planning process, and three on compulsory taking of property. Professor Charles M. Haar of the Harvard Law School has written a beginning and an end.

The first two essays and Professor Haar's Introduction provide an historical, political, social, and philosophical setting. W. O. Hart, Clerk of the London County Council, writes generally of land use control in England, and Professor Allison Dunham of the University of Chicago Law School discusses property, planning, and liberty. Planning in England, Mr. Hart shows, is much more comprehensive and pervading than in the United States (one cannot change a single land-use without planning permission) and understandably so, considering the urgent necessity for wholesale planning caused by war damage, the longer experience with governmental controls, the smaller size of the United Kingdom and its one central authority, the greater population pressure and land scarcity, and the lack of constitutional inhibitions. On the other hand, planning in England appears to be more flexible than here, for much of what the English do through planning we do through zoning, and the typical American zoning ordinance is a rigid document indeed. Throughout the book one has the feeling that the English participants did not grasp the full significance of zoning in the United States. Mr. Hart, for instance, says that under planning control the industrialist is told where he may manufacture, the citizen where he may live—or, at least, where they may not manufacture or live.¹ This is precisely what American zoning ordinances tell them.

Professor Dunham, proceeding in more philosophic vein, tells how lawyer and planner have always been like Guelph and Ghibelline:

¹ P. 21.
planners show little concern for individual liberty, lawyers give scant attention to the acute problems of urban society. Professor Dunham places more faith in the market as a regulator than planners do and, indeed, perhaps more than experience would warrant. His criticism of the ad hominem nature of most zoning and planning decisions is entirely justified but his message, couched as it is in an extremely complicated style, is sometimes elusive. What he calls for is a new philosophy uniting planning, liberty, and private property; in this essay, however, he does not purport to provide it.

Professor James B. Milner of the University of Toronto compares the English development plan with the master plan used in the United States. He points out the fundamental difference: the compulsory nature and centralized control of the development plan in contrast to the voluntary nature and localized control of the master plan. But again the difference may be more apparent than real. The American zoning ordinance imposes a degree of compulsion virtually as great as that of a development plan. Whether planning by zoning ordinance is good planning, is, of course, another question.

Desmond Heap, Comptroller and Solicitor to the Corporation of the City of London, next writes—and lucidly, too—about development plans promulgated under the Town and Country Planning Act of 1947 and its sequels of 1953, 1954, and 1959. To understand the English experience one may want to read this essay first. Among other things, Mr. Heap tells of the boom in English land prices and the movement of population from north to south, principally into greater London. Part of the thrust of English planning policy is to reverse this pressure, but people, being people, do not always fit into the scheme; there are always those who will sacrifice privacy and space, and put up with discomfort and inconvenience, just to be near London. And so also in the United States: "New Yorkers temperamentally do not crave comfort and convenience—if they did they would live elsewhere." It is Mr. Heap's conclusion, however, that the development plans have come through their first decade with considerable credit. An attempt to rebuild England on any other basis in the postwar years, he believes, would have been mired in chaos.

Coming to matters of procedure—the individual and the machinery of planning—we are in a realm familiar to zoning practitioners. Three papers make up this section: one by a barrister of the Inner Temple, F. H. B. Layfield; another by a member of the Massachusetts Bar, Lawrence A. Sullivan; and one by the Solicitor and Parliamentary Officer to the London County Council, J. G. Barr. This is the area Mr. Layfield

2 P. 43.

3 WHERE, HERE IS NEW YORK 50 (1949).
calls the "shop window of planning"; this is also the area that gives zoning and planning its color, incandescence, and, all too frequently, its bad name.

It is interesting to find a British barrister criticizing fundamental fairness in English planning practice. The hearing (called an inquiry) before an administrative inspector, though perhaps somewhat less of a hog-calling contest than the average American zoning hearing, has, according to Mr. Layfield, many of the same infirmities. With typical British understatement he describes the atmosphere as a "climate of opinion characterized by a distinctly casual attitude towards facts and a surprising indifference to the distinction between fact and opinion." To this American zoning lawyers will utter a soft "Amen."

At the next stage of planning procedure in England—the post-hearing appeal to the Ministry of Housing and Local Government—the phenomenon of invisible government makes its appearance. New evidence and opinions may often be placed before the Ministry and enter into the decisions. Again there are American analogues. Mr. Layfield's conclusions are sober ones:

[Appellants] continue to suspect that altogether too much is arranged behind the scenes and actual personal experience on both sides of the inquiry table very strongly suggests that this suspicion is well founded. . . . Apologists for the status quo sometimes say that these criticisms stem from a desire to see justice done, which, they add, is impossible because planning is founded on policy, not on considerations of justice. Leaving aside some of the surprising implications of this approach, it is a misconception. The affected public wants to be treated fairly and to understand fully what is decided. Most appellants are fair-minded people who, if the procedure is fair and the result is explained and can be understood, will accept the outcome with good grace.

For all practical purposes, the Minister's decision is final. It can be appealed to the courts only if it was ultra vires or if proper procedures had not been observed. But appeal is of little value. If the applicant appeals and prevails, his only remedy is to have the decision voided. He will then have to refile and go through the whole process again.

Mr. Sullivan's paper is a good around-the-wall discussion of American

4 P. 105.
5 Pp. 118-19.
6 Louis Hector has described this phenomenon in a different setting. See Hector, Government by Anonymity: Who Writes Our Regulatory Opinions, 45 A.B.A.J. 1260 (1959).
7 P. 125.
zoning administration, but Sullivan doesn’t write as well as Layfield. He makes a fundamental point that there is a gap between zoning theory—which the courts like to parrot—and the practices of zoning boards and plan commissions; courts are too often mesmerized by zoning slogans, and zoning boards too frequently fail to consider long-range social and economic objectives. Sullivan also points out the prevailing judicial ignorance of modern planning practices—e.g., mixing large and small residential units to achieve a desirable balance.

When experimental zoning changes are put to the constitutional test, the court should confer with the planner. It cannot perform its function without understanding what the planner has to say. For a lawyer, Mr. Sullivan shows a sympathy with the planner’s role not shared by most of his brethren.

The third paper in the group, by Mr. Barr, discusses in detail certain enforcement provisions under the English planning act, including—American zoning authorities please note—the meticulous controls over advertisements. In 1959 the act was amended to provide for an exclusive appeal to the Ministry, which decides matters of law as well as of fact. The advantage of eliminating duality of appeals, Mr. Barr suggests, outweighs the criticism voiced by lawyers that points of law will have to be argued before inspectors who are generally laymen. An exclusive mode of appeal like this, I suggest, would do much to improve the present unsatisfactory situation in many American jurisdictions, including Illinois.

In discussing proposed improvements in enforcement procedure, Mr. Barr has unwittingly advanced a criticism, and a fundamental one, of the typical modern comprehensive zoning ordinance.

To make such a system work, it would be necessary first to compile an all-embracing Domesday Book of existing uses and permitted uses [What else is a comprehensive zoning ordinance?]—not only an impossible task but effectively throwing away the flexible pattern of the 1947 act and substituting for it the rigidity of the detailed planning schemes of the prewar legislation, whose unworkability is already proved.

Mr. Barr writes of another section of the act that permits the planning authority to attach conditions to the planning permission it has granted

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8 Mr. Sullivan strays far from the world of Strunk and White and Quiller-Couch: "The need is to afford sufficient flexibility and responsiveness to community needs to deal constructively with vicissitudinous situations. . . . The rule of law . . . is an ellipsis intended to suggest the primary values to which policies promulgated and enforced in a democratic society should adhere . . . ." P. 129.

9 P. 148.

10 P. 170.
by means of covenants running with the land. American zoning authorities are not authorized to extract such conditions from an applicant, but in some cases covenants restricting land uses are voluntarily offered and, when recorded, become binding on successors in title.\(^1\)

The last portion of the book contains two papers on acquisition of land by the sovereign, preceded by an essay by David W. Craig, City Solicitor of Pittsburgh on regulation and purchase as two ways of attaining planned land use. It has long been gospel that police power is police power, and eminent domain is eminent domain, and never the twain shall meet. Mr. Craig shows how, over the years, the two concepts have overlapped and how their merger was nearly completed in \textit{Berman v. Parker}\(^2\) and in the current urban renewal programs.

The last two papers concern the law and practice of compulsory purchase in England and eminent domain in the United States. The British system is described by R. E. Megarry, Q.C., Reader in Equity in the Inns of Court; United States practice is discussed by David R. Levin, Deputy Director in the Office of Right-of-Way and Location of the Bureau of Public Roads of the Department of Commerce. The English practice has complications that have no American counterparts: the assumption must be made, for example, that planning permission will be granted for the use that the acquiring authority proposes. Otherwise the tribunal would have to engage in what Megarry calls “a process of statutory psychoanalysis.”\(^3\) Mr. Levin observes the trend of American courts to broaden the items that constitute compensable damage, and he points out that the element of “severance damages” is today the knottiest problem.

A book like this has obvious attractions: it puts in perspective our own struggles with those of our English cousins. Today, however, even this may not be enough; we must know more about land use controls from other than the Anglo-American world.\(^4\) The differences between the English and American systems are summarized by Professor Haar in his Appraisal.\(^5\) More important, perhaps, are the similarities. Whether it be a caravan park in England or a trailer camp in the United States, the blood pressure of the community rises about the same.

This is not a how-to-do-it book and it will not help a lawyer try a


\(^3\) P. 221.


\(^5\) Pp. 245-84.
zoning case. It nevertheless belongs in libraries of lawyers and planners, because Professor Haar's participants deal with fundamentals, and in the United States neither planner nor lawyer has yet come to grips with the fundamentals of land-use control. Finally, the book presents eloquently how, on both sides of the Atlantic, societies are grappling with the problem of how best to use a scarce natural resource in the public interest without trampling on the rights of their citizens.

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